

JEFF YARBRO
SENATOR
21ST DISTRICT

CORDELL HULL BUILDING, SUITE 768
425 REP. JOHN LEWIS WAY NORTH
NASHVILLE, TENNESSEE 37243
(615) 741-3291

Tennessee State Senate

NASHVILLE

MEMBER OF COMMITTEES:

FINANCE, WAYS AND MEANS
STATE & LOCAL GOVERNMENT
HEALTH AND WELFARE
RULES

September 29, 2025

The Honorable Jonathan Skrmetti
Attorney General and Reporter
State of Tennessee
P.O. Box 20207
Nashville, TN 37202

Re: Improper Revision and Withdrawal of Attorney General Opinions relative to
National Guard Deployments

Dear Attorney General Skrmetti:

The Office of the Attorney General recently revised and withdrew its previously issued legal guidance on Tennessee National Guard deployments, and this alteration of formally published opinions appears to neither comport with Tennessee law nor meet the Office's transparency obligations to Tennessee's citizens.

Earlier this month, Governor Lee appeared with President Donald Trump in the White House to announce the deployment of Tennessee National Guard troops in support of a domestic law enforcement and crime reduction mission in Memphis. Formal Attorney General opinions issued in 2021 and 2024 indicated that an order by Governor Lee deploying the National Guard for the mission set out by the President would exceed the limitations imposed by the Tennessee Constitution. I recently discovered the Office of the Attorney General reversed, withdrew, or otherwise modified its official legal position on National Guard deployments. These changes were not publicly announced but largely surreptitious to the public. Because these actions appear inconsistent with both the letter and spirit of the law governing the Office of the Attorney General, I request you provide additional information regarding these changes and take appropriate remedial action.

First, Attorney General Opinion 21-05, issued by your predecessor Herbert Slatery in May 2021, casts serious doubt on the legality of any order by the Governor to deploy the National Guard to support a law enforcement mission as contemplated by President Trump's Executive Order. Before its improper withdrawal, the Opinion stated clearly that

“both the Tennessee National Guard and State Guard fall within the definition of militia under both the Tennessee and federal constitutions.” The Opinion further noted significant constitutional limitations on the deployment of guardsmen, referencing both state and federal judicial decisions supporting that conclusion.¹ While this Opinion is plainly relevant to the Governor’s deployment of the National Guard to Memphis, the Office of the Attorney General quietly withdrew the published opinion in its entirety. If one seeks to access the opinion on your website, it returns only a blank page indicating the opinion has been withdrawn. There is no rationale provided for this change in the State’s legal position or even a date indicating when it was withdrawn.

Second, Attorney General Opinion 24-01, which you issued in January 2024, has now been rewritten to reach nearly the opposite conclusion on the fundamental legal question of whether the Tennessee State Guard is bound by limitations imposed by the Tennessee Constitution. Again, no reason was given for this substantive modification. There was no public announcement of a change, and the new version still bears the date stamp of the original opinion. Aside from the parenthetical notation that the opinion is “Revised” on the Attorney General’s website, there is no public trace of the Office’s original, official opinion. While the original Opinion reiterated that state guardsmen were members of the “organized militia,” the revision presents a substantively different and more limited opinion, stating only that guardsmen are militia “for federal-law purposes.” Further examples of the change are below with added emphasis.

Original Text: The Tennessee State Guard is a separate and independent entity **that also constitutes a ‘militia’ for constitutional purposes**, albeit one subject to a different command structure and legal regime. Tenn. Op. Atty. Gen. No. 21-05 at 6 (May 6, 2021), 2021 WL 1930606 (citing Tenn. Code Ann. 58-1-402); *see also Perpich*, 496 U.S. at 352, *Yount v. Tennessee*, 774 S.W.2d 919, 920 n.2 (Tenn. 1989).

Revised Text: The Supreme Court’s decision in *Maryland ex rel. Levin v. United States* confirms that the National Guard qualifies as the **militia for purposes of federal law** under the Militia Clauses in the U.S. Constitution. **Neither *Maryland* nor this opinion expresses a view on whether the National Guard serves as ‘the Militia’ under Article III, § 5 of the Tennessee Constitution.**

Characterizing this new opinion as merely “Revised” is a dramatic understatement of the Office’s change in position on a fundamental question of constitutional law. Just last

¹ The Opinion notes for instance an 1885 Tennessee Supreme Court decision, which “perfunctorily” rejected as unconstitutional a statute that would have authorized deploying active militia for missions such as maintaining public order. *See Green v. State*, 83 Tenn. 708, 710–11 (1885). Even more pointedly, the Opinion points to a federal court injunction against Governor Browning’s politically and racially charged deployment of the National Guard to Memphis in 1939 under a statute permitting deployment supporting the execution of state law. *See Joyner v. Browning*, 30 F. Supp. 512, 515, 517 (W.D. Tenn. 1939).

year, you opined that the State Guard, like the National Guard, “also constitutes a militia for constitutional purposes.” In support of this point, you relied upon the now-withdrawn 2021 Opinion, which stated that “Tennessee constitutional provisions addressing militias apply to the Tennessee State Guard, as well as the Tennessee National Guard, because both entities meet the description of militia as that term was used in founding-era sources.”² The new opinion suggests only that the National Guard is a militia “for purposes of federal law” and expresses no view on “whether the National Guard qualifies as ‘the Militia’ under Article III, § 5 of the Tennessee Constitution.” That is more akin to a reversal than a mere revision.

Your “revised” Opinion implicitly suggests there is some uncertainty as to whether the National Guard is subject to the limitations set out in the Tennessee Constitution but avoids stating so directly. Technically, the Opinion only states that the *Opinion itself* expresses no view on this question of law. There is no claim in your revised opinion that Tennessee or federal law is silent on the question. Nor could there be given the numerous legal authorities cited in the two opinions you withdrew. The “revised” opinion provides no indication of what changes were made, the rationale for the modifications, or even when the change was made. It includes only the original Opinion’s date, January 19, 2024, inaccurately suggesting it was revised that same day.

Tennessee law does not authorize backdated revisions or undated withdrawals of formal opinions issued by Tennessee Attorneys General. Instead, the Attorney General is authorized to “omit” an opinion from publications when it has been superseded by a change in the law. Even then, such omissions are only permissible in two narrow circumstances that do not appear applicable here. See Tenn. Code Ann. § 8-6-205(b) (authorizing the Attorney General “to examine all such past opinions and omit from the publication any opinion which has, as a result of a holding by a court of competent jurisdiction, or by a change in the law by the general assembly, become obsolete or no longer of authoritative value.”).

Reversing the State’s legal position on such a fundamental question of law should not be done in silence or without a stated rationale under Tennessee law. Tennessee law expressly mandates that written opinions issued by the Office of the Attorney General “shall be made available for public inspection.” Tenn. Code Ann. § 8-6-109(b)(6).

² Tenn. Op. Atty. Gen 24-01, at 2 & n.3 (2024); Tenn. Op. Atty. Gen. 21-05, at 6 (2021). The legal authorities relied upon in the 2024 Opinion, as well as Tennessee and federal case law, further support that analysis. *E.g.*, *Yount v. State*, 774 S.W.2d 919, 920–21 & n.2 (Tenn. 1989) (recognizing dual status of Tennessee National Guard); *see also United States v. Miller*, 307 U.S. 174, 178–79 (1939) (“The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress.”); *Joyner v. Browning*, 30 F. Supp. 512, 517 (W.D. Tenn. 1939) (holding statute governing deployment of National Guard was subject to and “obviously violative of several provisions of the Constitution of Tennessee” including Tenn. Const. art. i, §§ 24, 25, art. iii § 5; art. xi § 16).

Tennessee law does not and should not bind the Attorney General to adhere to every prior opinion, but it does require transparency when the State adopts new legal positions. If there is a legitimate basis for your Office to conclude that the Tennessee National Guard is not bound by the constitutional constraints previously acknowledged and endorsed by the 2021 and 2024 Opinions, you should issue an opinion that says so.

The transparency mandates ensure the Office of the Attorney General fully considers its prior positions and makes reasoned and reasonable determinations before adopting new positions. Otherwise, any Attorney General would have free reign to discard prior opinions for mere convenience or, more significantly, to avoid constitutional and legal constraints acknowledged in prior opinions, which would be a serious departure from both statutory requirements and institutional integrity.

I request your Office respond to this letter by providing the following information:

1. The original opinion and each publicly issued revision of Attorney General Opinions 21-05 and 24-01, along with documentation of the dates and circumstances necessitating each change.
2. Documentation of court rulings or legislative changes that rendered either opinion obsolete or no longer of authoritative value under Tenn. Code Ann. § 8-6-205(b).
3. Statutory authority relied upon to withdraw or modify the previously issued Attorney General Opinions.
4. A list of other Attorney General Opinions that have been withdrawn or modified during your tenure as Attorney General and Reporter.

Finally, I request that you restore public access to the original versions of Attorney General Opinions 21-05 and 24-01. To the extent your Office determined that these prior versions are ill-considered or erroneous, that should be remedied through new lawfully authorized opinions that meet the transparency obligations imposed on your Office by Tennessee law.

The stakes here are far larger than whether the Office of the Attorney General adhered to the proper timelines and procedures concerning the issuance of official opinions. Governor Lee recently met with the President in the White House's Oval Office for the unveiling of an executive order entitled "Restoring Law and Order in Memphis." As it pertains to the National Guard, however, there is no order but rather a request for Governor Lee to order the deployment of the Tennessee National Guard to assist with an effort focused on "reduc[ing] crime."³ For the Governor to accede and deploy the National Guard

³ The presidential memorandum included just one paragraph related to the deployment of the Tennessee National Guard and requests Gov. Lee to "make available National Guard units of Tennessee to support public safety and law enforcement operations in Memphis, in such numbers and *for such duration as the Governor may deem necessary and appropriate* to assist with the

on such a mission not only places the State at significant risk for potential liabilities but also raises obvious and significant constitutional questions. Constitutional prohibitions against using the military to police Tennesseans have been present in all three of Tennessee's constitutions dating back to 1796, and those prohibitions exist to safeguard the liberty of Tennessee citizens, who are the Attorney General's most important client.

The eyes of the nation and the world are focused on the use of military forces in American cities for law enforcement purposes, and Tennessee is the first state to consider the unprecedented request to deploy their own National Guard to assist the policing of its own citizens. This is no time to expand uncertainty by withdrawing or revising prior opinions—or to avoid providing essential legal guidance for the Governor, the Legislature, the National Guard, or the public.

Respectfully yours,



Jeff Yarbrow

ATTACHMENTS

1. Attorney General Opinion No. 21-05 (May 6, 2021), as currently posted at <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2021/op21-05.pdf>
2. Attorney General Opinion No. 21-05 (May 6, 2021), as issued on May 6, 2021, 2021 WL 1930605
3. Attorney General Opinion No. 24-01 (Jan. 19, 2024), as currently posted at <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2024/op24-001.pdf>
4. Attorney General Opinion No. 24-01 (Jan. 19, 2024), as issued on January 19, 2024, publicly discoverable at <https://tennesseelookout.com/2024/02/14/tennessee-ag-doubts-legality-of-bill-limiting-presidents-ability-to-federalize-national-guard/>
5. Tenn. Code Ann. § 8-6-205
6. Tenn. Code Ann. § 8-6-109
7. Tennessee Constitutional Provisions

activities of the Task Force.” See Pres. Memo. § 3 (emphasis added). This is not a presidential order but rather a request for the Governor to order the deployment of the National Guard under State authority. Indeed, 32 U.S.C. § 502, which the Executive Order cites as the basis for the request, pertains almost exclusively to drills, instruction, and field training exercises rather than operational deployments such as that contemplated here. The Executive Order further clarifies that the Governor has discretion to determine the duration of any deployment.