S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 00-019

Separation of Powers: Board Appointments by Speakers

QUESTION

Proposed legislation would authorize the Speakers of the House and Senate, acting jointly, to appoint a member to fill a vacancy in a wide range of regulatory agencies and boards if the Governor fails to fill the vacancy within ninety days of its occurrence. Would giving this authority to the two Speakers violate the Separation of Powers Clause of the Tennessee Constitution?

OPINION

The General Assembly may provide for filling vacancies of members whose office is created by statute in this manner. But to the extent that the legislation would also apply to vacancies of *ex officio* members whose appointments are governed by the Constitution this provision would be unconstitutional.

ANALYSIS

Proposed legislation would amend various statutes governing a broad range of regulatory boards and agencies. Research indicates that membership in these boards and agencies generally consists of *ex officio* members and members appointed by the Governor. Under the proposed legislation, the Governor would be required to fill any vacancy within ninety days of its occurrence. A vacancy not filled within this period would be filled by joint action of the Speaker of the Senate and the Speaker of the House. Some of the sections of the proposed law expressly exclude *ex officio* offices from this provision, while others do not. In at least one case where *ex officio* positions have not been exempted — the Pest Control Board, Tenn. Code Ann. § 62-21-104 — the Commissioner of Agriculture serves as a member. The question is whether giving this authority to the two Speakers would violate the Separation of Powers Clause of the Tennessee Constitution.

Article II, Section 1 of the Tennessee Constitution provides:

> The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.

Article II, Section 2 of the Tennessee Constitution provides:

> No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed or permitted.

The Tennessee Supreme Court has long recognized that the power of appointment to public office in Tennessee is not inherently legislative, executive or judicial. The power of appointment may be vested with equal propriety in any branch of state government. *Richardson v. Young*, 122 Tenn. 471, 497, 125 S.W. 664, 669 (1910). Moreover, Article VII, Section 4 of the Tennessee Constitution provides:

> The election of all officers, and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct.

Based on this authority, this Office has generally concluded that the General Assembly may, by statute, delegate the power to appoint or confirm an officer whose office is created by statute to the Speakers of the House and Senate. Op.Tenn.Atty.Gen. 84-109 (April 2, 1984)(legislative confirmation of executive appointments is constitutionally permissible); Op. Tenn. Atty. Gen. 80-78 (February 7, 1980) (the appointment of Director of the Tennessee Bureau of Investigation may be conditioned on legislative confirmation); Op. Tenn. Atty. Gen. 79-299 (June 26, 1979) (the Speakers of the House and Senate, acting jointly, may appoint a member of the Tennessee Board of Paroles). The General Assembly may therefore provide for filling vacancies of members whose office is created by statute. But to the extent the legislation might authorize the Governor or the Speakers of the House and Senate to appoint an *ex officio* member of a board whose appointment is governed by the Tennessee Constitution, the legislation would also be unconstitutional.

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