S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

January 26, 2001

Opinion No. 01-011

Legislator on Judicial Selection Commission and Judicial Evaluation Commission

QUESTIONS

1. Assuming legislation was drafted amending Tenn. Code Ann. §§ 17-4-101, *et seq.*, to allow a member of the General Assembly to serve as an *ex officio* member of the Judicial Selection Commission, is such legislation constitutional pursuant to Article II, Section 10 of the Tennessee Constitution or any other applicable provision?

2. Assuming legislation was drafted amending Tenn. Code Ann. §§ 17-4-201, *et seq.*, to allow a member of the General Assembly to serve as an *ex officio* member of the Judicial Evaluation Commission, is such legislation constitutional pursuant to Article II, Section 10 of the Tennessee Constitution or any other applicable provision?

3. If the answer to Question 1 or 2 is yes, what duties could an *ex officio* legislative member on either of these commissions perform?

OPINIONS

1. A statute appointing or providing for appointment of a state legislator to membership on the Judicial Selection Commission either by the General Assembly or any member or members of the General Assembly or by the Governor or any state commissioner would violate Article II, Section 10 of the Tennessee Constitution. A statute providing for appointment by some other officer or authority would not violate Article II, Section 10. Further, a legislator would violate Article II, Section 26 of the Tennessee Constitution by serving as a member of the Judicial Selection Commission if the statute authorized any compensation for that office beyond reimbursement for expenses. No other constitutional provision appears to prevent a state legislator from serving on the Judicial Selection Commission.

2. A statute appointing or providing for appointment of a state legislator to membership on the Judicial Evaluation Commission either by the General Assembly or any member or members of the General Assembly or by the Governor or any state commissioner would violate Article II, Section 10 of the Tennessee Constitution. A statute providing for appointment by some other officer or authority would not violate Article II, Section 10. Further, a legislator would violate Article II, Section 26 of the Tennessee

Constitution by serving as a member of the Judicial Evaluation Commission if the statute authorized any compensation for that office beyond reimbursement for expenses. No other constitutional provision appears to prevent a state legislator from serving on the Judicial Selection Commission.

3. No constitutional provision would bar a member of the General Assembly from performing all the statutory duties of a member of the Judicial Selection Commission or the Judicial Evaluation Commission.

ANALYSIS

1. Legislator on Judicial Selection Commission

The first question is whether the General Assembly could constitutionally amend Tenn. Code Ann. §§ 17-4-101, *et seq.,* to allow a member of the General Assembly to serve as an *ex officio* member of the Judicial Selection Commission. Of course, any definitive analysis of this issue would require a review of the actual legislation. Under Tenn. Code Ann. § 17-4-102, the Speakers of the House and Senate appoint the members of the Judicial Selection Commission from lists of nominees submitted by different groups. Under the current statute, no member of the commission may be a salaried office holder of the State of Tennessee or the United States. Tenn. Code Ann. § 17-4-104. Since members of the General Assembly receive a salary, this provision currently prohibits state legislators from serving on the commission. Op. Tenn. Atty. Gen. 81-481 (August 27, 1981). Furthermore, under present law, members of the Judicial Selection Commission receive no compensation for their services but are reimbursed for their official travel expenses pursuant to policies and guidelines promulgated by the Supreme Court. Tenn. Code Ann. § 17-4-108(a). The Judicial Selection Commission is responsible for submitting a list of nominees to the Governor to fill judicial vacancies. Tenn. Code Ann. § 17-4-109; Tenn. Code Ann. § 17-4-112.

The Tennessee Constitution prohibits a legislator from serving in any "office or place of trust, the appointment to which is vested in the Executive or the General Assembly, except to the office of trustee of a literary institution" during the time for which he or she was elected. Tenn. Const. Art. II, § 10. The Tennessee Supreme Court has stated that this provision should be narrowly construed so as to uphold the eligibility of the appointee wherever possible. *Wallace v. Grubb,* 154 Tenn. 655, 289 S.W. 530, 531 (1926). An "office" within the meaning of this section is a public charge or employment, the duties of which are prescribed by law rather than by contract. *State ex rel. Carey v. Bratton,* 148 Tenn. 174, 253 S.W. 705, 706 (1923) (membership on the State Election Commission is an "office" within the meaning of this provision). The Tennessee Supreme Court has concluded that a statute, since repealed, providing for three members of the Appellate Court Nominating Commission (the predecessor agency to the Judicial Selection Commission) to be elected from the General Assembly in joint session violated Article II, Section 10 of the Tennessee Constitution. *State ex rel. Higgins v. Dunn,* 496 S.W.2d 480 (Tenn. 1973), *two petitions to rehear denied and mod. on third petition to rehear*, 496 S.W.2d 495 (Tenn. 1973). The Court reasoned that such membership is an "office of place or trust" within the meaning of this provision. We think that membership on the Judicial Selection Commission, similarly, is an "office of place or trust" within

the meaning of Article II, Section 10 of the Tennessee Constitution. Therefore, a statute providing for appointment of a state legislator to such position either by the General Assembly or any member or members of the General Assembly or by the Governor or any other executive officer would violate this provision of the Tennessee Constitution.

Article II, Section 10 would not prohibit a statute providing for the appointment of a state legislator to a position on the Judicial Selection Commission if the power of appointment is vested in some authority besides the General Assembly or any members of the General Assembly, the Governor, or the members of the cabinet. Op. Tenn. Atty. Gen. (June 1, 1983) (a legislator may constitutionally accept the position of executive director of the Tennessee Public Service Commission; the failure of the framers of the Constitution to use the terms "Executive *Department*" and "Legislative *Department*" indicates an intent to limit the application of this provision to appointments by the Governor or his cabinet and the General Assembly); and Op. Tenn. Atty. Gen. 80-458 (September 19, 1980) (Article II, Section 10 would not prevent a state legislator from being appointed Attorney General because the power of appointment is vested in the Tennessee Supreme Court). In order to comply with Article II, Section 10, therefore, the statute would have to provide for appointment by some authority besides the Governor, a commissioner, or a member or members of the General Assembly.

There are two other constitutional provisions that merit consideration as to the proposed legislation. Under Article II, Section 26 of the Tennessee Constitution, no person in the State may hold more than one "lucrative office" at the same time. The concept of office "'embraces the idea of tenure, duration, and continuity, and the duties connected therewith are generally continuing and permanent.'" *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978), quoting 63 Am.Jur. 2d *Public Officers and Employees* § 10. Further, an individual who holds an office takes an oath. Tenn. Const. Art. X, § 1; Op. Tenn. Atty. Gen. U92-44 (April 10, 1992). Membership on the Judicial Selection Commission is an "office" within the meaning of Article II, Section 26. But the provision does not prohibit a state legislator from serving as a member of the commission unless the office is "lucrative." It is the right to extra compensation that renders an office lucrative. *Boone v. Torrence*, 63 Tenn. App. 224, 470 S.W.2d 356 (1971); Op. Tenn. Atty. Gen. 84-7 (January 5, 1984). This Office has concluded that mere payment of expenses does not amount to unconstitutional compensation. Op. Tenn. Atty. Gen. 84-7, *supra*. The statute provides that members of the commission serve without compensation except for reimbursement of expenses. Since the statute provides for no other compensation, membership in the commission is not a "lucrative office" within the prohibition of Article II, Section 26.

A question also arises as to whether allowing a legislator to serve as a member of the Judicial Selection Commission would violate the Separation of Powers Clause in 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.

Tenn. Const. Art. II, § 1. 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.

Tenn. Const. Art. II, § 2.

As a general matter, the legislative power is to make, order, and repeal laws, the executive power is to administer and enforce laws, and the judicial power is to interpret and apply laws. *Richardson v. Young*, 122 Tenn. 471, 493, 125 S.W. 664 (1909). This Office has recognized that there may be some overlap among the functions that may be constitutionally exercised by the different branches of government. *See* Op. Tenn. Atty. Gen. 82-115 (March 11, 1982). The major duty of the Judicial Selection Commission is to forward a list of nominees to fill a vacant judicial office to the Governor. Tenn. Code Ann. § 17-4-109; Tenn. Code Ann. § 17-4-112. The commission therefore plays a role in filling judicial vacancies. 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); *State ex rel. Witcher v. Bilbrey*, 878 S.W.2d 567 (Tenn. Ct. App. 1994). Further, the General Assembly is generally authorized to provide for the manner in which vacancies are to be filled unless the Constitution expressly provides for the manner in which a vacancy in a particular office is to be filled. Tenn. Const. Art. VII, § 4. No provision in the Tennessee Constitution expressly provides for the manner in which a vacancy in the office of judge of a state court is to be filled. Allowing legislative participation in the process of filling vacancies in state judicial offices by having members of the General Assembly serve on the Judicial Selection Commission does not violate the Separation of Powers Clause.

2. Legislator on Judicial Evaluation Commission

The next question is whether legislation allowing a member of the General Assembly to serve as a member of the Judicial Evaluation Commission would violate Article II, Section 10 or any other applicable provision. Again, any definitive analysis of this issue would require a review of the actual legislation implementing this change. The Judicial Evaluation Commission is created under Tenn. Code Ann. § 17-4-201. Its function is to evaluate appellate court judges. Under the current statute, six members are appointed by the Judicial Council; three members are appointed by the Speaker of the Senate; and three members are appointed by the Speaker of the House. For the reasons discussed in Question 1, a statute appointing or providing for appointment of a state legislator to the Judicial Evaluation Commission either by the General Assembly or any member or members of the General Assembly or by the Governor or any state commissioner would violate Article II, Section 10 of the Tennessee Constitution. But, for the reasons discussed above, Article II, Section 10 would not prohibit a statute providing for the appointment of a state legislator to a position on the Judicial Evaluation Commission if the power of appointment is vested in some authority besides the General Assembly or any members of the General Assembly, the

Governor, or the members of the cabinet. For example, the Judicial Council, established under Tenn. Code Ann. §§ 16-21-101, *et seq.*, has sixteen members, eight of whom, including the Attorney General, are selected by judges and four of whom are gubernatorial appointees. A statute authorizing appointment of a legislator to the Judicial Evaluation Commission by the Judicial Council would not violate Article II, Section 10 because that body is not "the Executive" or "the General Assembly" within the meaning of that provision. Since the statute provides for no compensation for members of the Judicial Evaluation Commission, the office is not a "lucrative office" within the prohibition of Article II, Section 26.

We think that authorizing a member or members of the General Assembly to play a role in evaluating appellate court judges by serving on the Judicial Evaluation Commission presents no problems under the Separation of Powers Clause. The Judicial Evaluation Commission is empowered to perform evaluations for appellate court judges, and make a recommendation "for retention" or "against retention" for each appellate court judge. Tenn. Code Ann. § 17-4-201(a)(1). An incumbent appellate judge who receives a recommendation "against retention" who wishes to serve the remainder of the unexpired term to which he or she was appointed must run in a contested election. Tenn. Code Ann. § 17-4-114(c). The Judicial Evaluation Commission therefore plays a role in the process by which appellate judges are elected. The Tennessee Constitution vests the legislative branch with authority over the manner in which the election of all officers--including judges--shall be made. Tenn.Const. Art. VII, Section 4; *State ex rel. Higgins v. Dunn, supra*, 496 S.W.2d at 487-88 (Article VII, Section 4 authorized the General Assembly to pass legislation supplementing Article VI, Sections 3 and 4 regarding the election of judges). For this reason, we think a member or members of the General Assembly could constitutionally play a role in evaluating appellate court judges by serving on the Judicial Evaluation Commission.

3. Legislator Performing Duties as a Member of the Judicial Selection Commission or the Judicial Evaluation Commission

Finally, assuming a legislator may constitutionally serve on either the Judicial Selection Commission or the Judicial Evaluation Commission, the request asks what duties he or she may perform on either commission. As discussed in Questions 1 and 2, no constitutional provision appears to bar a legislator from performing any of the duties accorded to members of either commission under the statutes creating them.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable David Fowler
State Senator
304 War Memorial Building
Nashville, TN 37243-0211