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Opinion No. 06-097

Constitutionality of an elected Solicitor General

QUESTION

Whether House Bill 3304/SB3242, which creates an elected Solicitor General and gives that office the non-reporter duties of the Attorney General and Reporter, is constitutional?

OPINION

No, House Bill 3304/SB3242 violates the Separation of Powers provisions of the Tennessee Constitution and unconstitutionally removes the constitutional authority of the Attorney General and Reporter.

ANALYSIS

The answer to this question must begin with an examination of the evolution of the office of Attorney General. The office originated in the mid-thirteenth century in England as the "King's Attorney," representing the King in a various matters. *State Attorneys General Powers and Duties*, 4 (B.N.A. 1990). The title "Attorney General of England," was established in 1461. *Id*. at 5. As parliament gained more power relative to the King, the Attorney General evolved into the legislature's legal advisor as well. By the time of the American Revolution, the English Attorney General had evolved into not only the legal advisor to the Crown and the legal representative of the Crown in the courts, but also the legal advisor and legal representative of all departments of the state. *Id*., at 5-6.

The 1796 Tennessee Constitution did not create the position of attorney general. Article V, Section 2 provided for the appointment of "an attorney or attorneys for the state." Over the next four decades, the state passed a number of statutes about how state legal services, including prosecutions, would be delivered. The 1835 Tennessee Constitution in Article VI, Section 5 still provided for the election of "the attorneys for the state" by the legislature. New statutes enacted in 1836, however, altered the provision of state legal services. Chapter 51 created the position of attorney general and gave the position the legal duties it still holds today --- providing legal advice to state officials, representing the state in the Supreme Court, handling state civil cases in the trial courts, and reporting the decisions of the Supreme Court. Attorneys for the districts were previously established by Chapter 28 to handle trial court criminal prosecutions. In 1853 Article VI, Section 5 was amended to provide for the election of the attorney general and the attorneys for the districts. This

amendment marks the first appearance of the title "attorney general" in the Tennessee Constitution. The amended provision did not address the duties. The duties provided in the statutes remained unchanged. The 1870 Tennessee Constitution changed the title of the office to "attorney general and reporter" and altered the method of selecting the attorney general. While new statutes were enacted concerning the duties, they were essentially the same as those enacted in 1836. Acts 1870-71, Ch. 3. The fundamental duties of the attorney general and reporter today are derived from the 1836 act.

When the constitutional office of attorney general was created in 1853, the state had settled on a system for the delivery of legal services. Significantly, no provision was made in the amendment concerning the duties of the office. This is not surprising since the title "attorney general" had been used in England and the colonies and had a well understood set of duties attached to it. Also, the pre-existing statutes already laid out the basic duties that the office was to perform. In essence, what happened via the 1853 amendment was a "constitutionalization" of not only the office and its duties, but the system of state legal services as well.

The 1870 Constitution not only changed the method of selection but also changed the title of the office to "attorney general and reporter." This significant addition to the title must have been intended to "constitutionalize" the only duty of the office that was not already a traditional, constitutional function of an attorney general. Otherwise, why do this when the statutes already provided for this officer to perform this duty? The only logical and rational reason is to make the reporter function a constitutional duty just like the other duties of the office.

House Bill 3304/SB3242 creates an elected Solicitor General to handle all of the Attorney General and Reporter's duties except the reporter function. It violates the separation of powers by denying the Supreme Court the ability to appoint the State's Chief Legal Officer. No person or persons belonging to one of the three departments of the government may exercise any of the powers properly belonging to either of the others. Tenn. Const., Art. II, Sec. 2. Article VI, Section 5 provides: "An Attorney General and Reporter for the State, shall be appointed by the Judges of the Supreme Court and shall hold his office for a term of eight years." This provision has been in place since the adoption of the Tennessee Constitution of 1870. The clear intent of the provision is to vest the Supreme Court with the duty to select the person who represents the State[1] and who also reports its decisions. House Bill 3304/SB3242, which vests in the elected Solicitor General all of the duties of the Attorney General and Reporter except for the reporting of court opinions, by divesting the office of almost all of its powers, negates the Supreme Court's constitutional duty to choose the State's Chief Legal Officer.

House Bill 3304/SB3242 also violates the Tennessee Constitution by materially altering the duties of the Attorney General and Reporter. Article VI, Section 5 of the Tennessee Constitution creates the office of Attorney General and Reporter without providing that the legislature may

[1]The title "Attorney General" had a specific meaning at common law. "It is the settled rule in this state that where a word used in our constitution had a technical judicial meaning established by the common law when it was so used, it must be taken by this Court to have been used in the constitution in that established sense." *Dennis v. Sears, Roebuck & Co.*, 223 Tenn. 415, 446 S.W.2d 260 (1969).

prescribe the duties.[2] As noted earlier, this is a clear indication that the duties of this officer were well known and understood. Those duties would certainly be those that existed at common law and those that existed in statute at the time the 1853 amendment and the 1870 Constitution were adopted. In 1897 the Tennessee Supreme Court raised the issue of how far the legislature can go in stripping the Attorney General and Reporter of the functions attached to the office at the time the Constitution of 1870 was adopted. *State v. Spurgeon*, 99 Tenn. 659, 47 S.W. 235 (1897). The Court decided, however, that it did not have to address the issue.

A similar issue, however, was addressed by the Supreme Court in the very same term. In *State ex rel. v. Cummins*, 99 Tenn. 667, 42 S.W. 880 (1897), the Court reviewed the provisions of an act that took the jail and prisoners out of the custody of the sheriff under certain circumstances. These provisions were found unconstitutional because they were "plainly destructive of the functions, duties, and prerogatives incident to the constitutional office of Sheriff...." *Id.*, 99 Tenn. at 682. As explained in a later case,

> when the constitution of 1870 provided for the election of a sheriff without defining his duties, it was held that the term "sheriff" must be understood in its constitutional sense as including all the duties and powers, and having all the privileges and emoluments, which belonged to that office at common law. "The office of sheriff at common law included the custody of the jail of right, and this custody was annexed as an incident to the office of sheriff." *Felts v. Mayor of Memphis*, 2 Head (39 Tenn.) 651 (1859).

Prescott v. Duncan, 126 Tenn. 106, 141-42, 148 S.W. 229 (1912).[3] Thus, it would appear that the Supreme Court in *State v. Spurgeon*, supra, would at least have held that the Attorney General and Reporter possessed "constitutionalized" powers that could not be legislatively diminished.

In 1969 in *Banks v. Jenkins*, 224 Tenn. 23, 449 S.W.2d 712 (1969), the Tennessee Supreme Court held that while the office of constable could not be abolished, the statutory duties could be changed. That case turned on the fact that when the office of constable was created in the 1796 Constitution, another portion, Article X, Sec. 2, said, "All laws and ordinances now in force and use in the territory not inconsistent with this Constitution, shall be in force and in use in this state, until they shall expire, be altered or repealed by the Legislature." No such language was a part of the 1853 amendment creating the attorney general. The preexisting, similar language of the 1835 Constitution would not apply to statutes passed after the adoption of the 1835 Constitution and the

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[2]Several other provisions of the Tennessee Constitution create offices and state that the legislature may prescribe the duties. *See* Article III, Section 17 (Secretary of State "shall perform such other duties as shall be enjoined by law."); Article VII, Section 1 (creating county legislative body, county executive, sheriff, trustee, register, county clerk and assessor of property and stating "Their qualifications and duties shall be prescribed by the General Assembly.")

[3]Constitutional changes limit the impact of *Cummins* today as to sheriffs and local officials. The provisions added in 1953 to Article XI, Sec. 9 permit the alterations of some functions of constitutional officers in consolidated metropolitan governments. *See Metropolitan Government of Nashville v. Poe*, 215 Tenn. 53, 383 S.W.2d 265 (1964)(sheriff can be deprived of law enforcement powers). In 1978 the Constitution was amended to provide that the duties of sheriffs are prescribed by the General Assembly. Tenn. Const., Art. VII, Sec. 1.

similar language of the 1870 Constitution would not affect "constitutionalized" powers established by the unique circumstances surrounding the creation of the office of attorney general.

Therefore, it is the opinion of this Office that House Bill 3304/SB3242, which removes all but the reporter duties from the attorney general and reporter, violates the Separation of Powers provisions of the Tennessee Constitution and also violates the Tennessee Constitution by removing the constitutional powers of the Attorney General and Reporter.

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