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Opinion No. 07-14

Constitutionality of Tennessee Plan

QUESTIONS

1. Whether the Tennessee Plan for the selection and evaluation of appellate court judges, codified at Tenn. Code Ann. §§ 17-4-101, *et seq*., is constitutional?

2. Whether the Tennessee Plan is "invalid" and "void" pursuant to its own terms as a result of the ruling in *Lillard v. Burson*, 935 F.Supp. 689 (1996)?

OPINIONS

1. Yes.

2. No.

ANALYSIS

You have asked whether the Tennessee Plan, codified at Tenn. Code Ann. §§ 17-4-101, *et seq*., is constitutional. In 1994, the Tennessee Legislature adopted Public Chapter 942 establishing the Tennessee Plan, the purpose of which is

> to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee, and to assist the electorate of Tennessee to elect the best qualified persons to the courts; to insulate the judges of the courts from political influence and pressure; to improve the administration of justice; to enhance the prestige and respect for the courts by eliminating the necessity of political activities by appellate justices and judges; and to make the courts "nonpolitical."

Tenn. Code Ann. § 17-4-101(a). The plan provides for selection to fill vacancies on the appellate courts, as well as for the evaluation and election of the appellate court judges. With respect to the filling of vacancies on the appellate courts, the Plan establishes a seventeen-member Judicial

Selection Commission as part of the judicial branch and charges it with the duty to select "three (3) persons whom the commission deems best qualified and available to fill the vacancy." Tenn. Code Ann. § 17-4-109. The Governor is then given the authority to fill the vacancy by appointing one of the three persons nominated, or he can reject all three nominees. In that instance, the Commission is then required to submit three new nominees and the Governor must select one of these three new nominees to fill the vacancy. Tenn. Code Ann. § 17-4-112(a).

The term of a judge thus appointed by the Governor expires on August 31 after the next regular August election occurring more than thirty days after the vacancy occurs. Tenn. Code Ann. § 17-4-112(b). Any incumbent appellate judge who seeks election to fill the unexpired term of the office to which he or she was appointed is required under the Plan to qualify by filing a written declaration of candidacy to fill the unexpired term with the state election commission by the appropriate qualifying deadline. Any incumbent appellate judge who seeks election or re-election to a full term must similarly file a written declaration of candidacy. Tenn. Code Ann. §§ 17-4-114(a) and 17-4-115(a).

Tenn. Code Ann. § 17-4-201 establishes a judicial evaluation program for appellate court judges, the purpose of which is "to assist the public in evaluating the performance of incumbent appellate court judges." A twelve-member Judicial Evaluation Commission is established to perform the required evaluations and to make a recommendation either "for retention" or "against retention." If the declaration of candidacy is timely filed and the Judicial Evaluation Commission has conducted an evaluation and recommended retention pursuant to Tenn. Code Ann. §17-4-201, then the Tennessee Plan provides that the judge shall be subject to a retention election only. *See* Tenn. Code Ann. §§ 17-4-114(b) and 17-4-115(b). If, however, the Judicial Evaluation Commission makes a recommendation "against retention" of an incumbent appellate judge who nevertheless files or has timely filed a declaration of candidacy, such office is to be filled by a contested election. *See* Tenn. Code Ann. §§ 17-4-114(c) and 17-4-115(c).

You have asked whether the Tennessee Plan, which authorizes retention elections for incumbent appellate judges whom the Judicial Evaluation Commission has recommended for retention, is constitutional particularly in light of the provisions of Art. VI, § 3 of the Tennessee Constitution. That section provides as follows:

> The Judges of the Supreme Court shall be elected by the qualified voters of the State. The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. Every Judge of the Supreme Court shall be thirty-five years of age, and shall before his election have been a resident of the State for five years. His term of service shall be eight years.

The Tennessee Supreme Court in *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (1973), specifically addressed the issue of whether retention elections for incumbent appellate judges as provided by statute were constitutional. That Court first noted that the

> constitutional requirement that members of the Supreme Court shall be elected by the qualified voters of the State is not self-executing. The holding of an election envisions much more than fixing a date when it is to be held and providing that only qualified voters shall participate. Provisions must be made by law for nominating and qualifying of candidates. Such executory details can be provided either in the Constitution itself or left to the Legislature.

Id. at 487 (internal citations omitted). Because Art. VI, § 3 of the Tennessee Constitution was otherwise silent, the Court found that all the provisions of the Act derived from the general powers of the Legislature.[1] The Court further found that, because the Constitution did not define the words, "elect," "election," or "elected," and because the Constitution elsewhere denominated similar methods of ratification, *i.e.*, referenda, as elections, retention elections for incumbent appellate court judges were not unconstitutional simply because such elections are limited to approval or disapproval. *Id*. at 489. This decision of the Supreme Court finding retention elections to be constitutional was later affirmed by the Special Supreme Court in *State ex rel. Hooker v. Thompson*, 1996 WL 570090 (Tenn. 1996) (copy attached). Accordingly, it is our opinion that the Tennessee Plan, which provides for retention elections of incumbent appellate judges, is constitutional.

You have also asked whether the Tennessee Plan is invalid and void under its own terms, in light of the federal court's ruling in *Lillard v. Burson*, 935 F.Supp. 689 (1996). Section 23 of the Chapter 942 provides as follows:

> If any provision of this Act (Title 17, Chapter 4) or the application thereof to any person or circumstance be held invalid, then all provisions and applications of this Act and Title 17, Chapter 4, are declared to be invalid and void.

However, that case did not involve a determination that an application of any provision of the Act was invalid. Rather, the court found that a particular provision of the Act, namely, Tenn. Code Ann. § 17-4-115, simply was not applicable under the circumstances.

In that case, plaintiffs were several appellate court judges who had been appointed by the Governor pursuant to the Tennessee Plan to fill vacancies on the appellate courts. Their terms all expired on August 31, 1996 . Each had timely filed declarations of candidacy to fill the unexpired terms; however, none of them had been evaluated by the Judicial Evaluation Commission, nor recommended for retention pursuant to Tenn. Code Ann. § 17-4-201. At the time of the filing of their declarations in May 1996, though, these judges were assured by the State Coordinator of Elections that their names would be placed on the ballot with a "yes" or "no" retention designation. *Id*. at 701. Then on July 5, 1996, the Special Supreme Court held that the Tennessee Plan was not applicable to then Justice White because she had not been evaluated and recommended for retention

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[1]The Act in question was Chapter 198 of the Public Acts of 1971, codified at Tenn. Code Ann. §§ 17-701 - 17-716, and is the predecessor to the Tennessee Plan.

by the Judicial Evaluation Commission and, therefore, that she must stand for a contested, rather than a retention election.

The state defendants subsequently sought to apply this ruling to the plaintiff judges, as they also had not been evaluated by the Judicial Evaluation Commission. The judges filed suit in federal court seeking a temporary restraining order to enjoin the state defendants from placing their names on the ballot in any manner other than a "yes" or "no" retention ballot, on the grounds that to do so would violate their due process rights. The federal court found that the plaintiff judges had a legitimate expectation to run on a "yes or no" ballot that was cognizable under Tennessee law and, therefore, entitled to constitutional protection. The court granted the request for the restraining order, finding that

> the plain language of the statute [Tenn. Code Ann. § 17-4-201(e)] exempts judges seeking interim term re-election from the strictures of Tenn. Code Ann. 17-4-114, since the entity established to perform the evaluations is not asked to commence its work until such time as appellate court judges seek a full term. Tenn. Code Ann. 17-4-201. Since plaintiffs are not seeking to serve complete eight-year terms, the requirement of judicial evaluation for purposes of running "yes or no" for retention are inapplicable. Because the actions of defendants in seeking to apply the provisions of 17-4-115 to plaintiffs in derogation of their right to stand for retention election on a "yes or no" vote deprived them of the fundamental due process right of notice and a hearing, the court finds that there is a strong likelihood that plaintiffs will succeed on the merits.

Id.

Accordingly, it is our opinion that this ruling did not invalidate or void the Tennessee Plan pursuant to the terms of Section 23 of Public Chapter 942.[2]

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[2]Tenn. Code Ann. § 17-4-201 was subsequently amended to provide specifically for the evaluation of any incumbent appellate court judge seeking re-election to an unexpired term and to authorize the Judicial Evaluation Commission to publish supplemental final reports as may be necessitated by the filing of declarations of candidacy, required by § 17-4-114(a)(2) or § 17-4-115(a)(2). *See* Tenn. Code Ann. § 17-4-201(a)(2) and (c)(2).

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