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August 13, 2007

Opinion No. 07-120

Constitutionality of Senate Bill 338

QUESTIONS

1. Senate Bill 338 provides that the intermediate appellate court judges would only be subject to a retention vote in the grand division from which they are appointed. Is there a constitutional problem with not having these judges elected statewide?
2. Is there any other provision of Senate Bill 338, as amended, that might make it constitutionally suspect?

OPINIONS

1. Sections 8 and 10 of Senate Bill 338, which provide that intermediate appellate court judges would be elected by the qualified voters of the grand division from which they are appointed, do not violate either the United States or the Tennessee Constitution.
2. No.

ANALYSIS

1. Tenn. Code Ann. § 16-4-102 currently provides as follows with respect to the election of the judges of the court of appeals:

At the regular judicial election held every eight (8) years, there shall be elected twelve (12) judges of the court of appeals, of whom not more than four (4) shall reside in one (1) grand division of the state, and each of whom shall be not less than thirty (30) years of age, and shall have been a resident of the state five (5) years before qualification; and be learned in the law.

Similarly, with respect to the court of criminal appeals, Tenn. Code Ann. § 16-5-103(a) provides that “[t]he judges of the court of criminal appeals shall be elected by the qualified voters for a full term of eight (8) years at the same time the regular judicial election is held in the state of Tennessee

for the judges of the other courts of record.” Tenn. Code Ann. § 16-5-102 further provides that the court shall be composed of twelve (12) judges, of whom not more than four (4) shall reside in any grand division of the state.

Section 8 of Senate Bill 338 would amend Tenn. Code Ann. § 16-4-102 by deleting that section in its entirety and substituting the following:

At the regular judicial election held every eight (8) years, there shall be elected twelve (12) judges of the court of appeals as follows:

(1) Four (4) judges shall be elected by the qualified voters of the state’s eastern grand division, as described in § 4-1-202;

(2) Four (4) judges shall be elected by the qualified voters of the state’s middle grand division, as described in § 4-1-203; and

(3) Four (4) judges shall be elected by the qualified voters of the state’s western grand division, as described in § 4-1-204.

Each judge shall be at least thirty (30) years of age, shall be duly licensed to practice law in the state of Tennessee, shall reside within the grand division from which he or she was appointed or elected, and shall have been a resident of the state for a period of at least five (5) years immediately preceding appointment or election to the court. The oath of office of each judge shall be filed and entered on the minutes of the court in the particular grand division from which he or she has been appointed or elected; and the oath shall likewise be filed and entered on the records in the office of the secretary of state at Nashville.

Section 10 of the bill would delete Tenn. Code Ann. § 16-5-102 as it is currently written and substitute the following with respect to the election of judges for the court of criminal appeals:

At the regular judicial election held every eight (8) years, there shall be elected twelve (12) judges of the court of criminal appeals as follows:

(1) Four (4) judges shall be elected by the qualified voters of the state’s eastern grand division, as described in § 4-1-202;

(2) Four (4) judges shall be elected by the qualified voters of the state’s middle grand division, as described in § 4-1-203; and

(3) Four (4) judges shall be elected by the qualified voters of the state's western grand division, as described in § 4-1-204.

Each judge shall be at least thirty (30) years of age, shall be duly licensed to practice law in the state of Tennessee, shall reside within the grand division from which he or she was appointed or elected, and shall have been a resident of the state for a period of at least five (5) years immediately preceding appointment or election to the court.

Additionally, Section 11 of the bill would delete Tenn. Code Ann. § 16-5-103(a) in its entirety.

You have asked whether these provisions of Senate Bill 338, which provide that the intermediate appellate court judges would be elected by the qualified voters of the grand division from which they are appointed, are constitutional.

Article VI, § 1, of the Tennessee Constitution provides that

[t]he judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in the Justices of the Peace. The Legislature may also vest such jurisdiction in the Corporation Courts as may be deemed necessary. Court to be holden by Justices of the Peace may also be established.

This provision confers exclusive authority on the Legislature to create and establish inferior courts in Tennessee such as the court of appeals and court of criminal appeals. *See State ex rel. Ward v. Murrell*, 169 Tenn. 688, 90 S.W.2d 945 (1936); *McCulley v. State*, 102 Tenn. 509, 53 S.W. 134 (1899).

Article VI, § 4, of the Tennessee Constitution provides:

The Judges of the Circuit and Chancery Courts, and of other inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every Judge of such Courts shall be thirty years of age, and shall before his election, have been a resident of the State for five years and of the circuit or district one year. His term of service shall be eight years.

The judges of the intermediate appellate courts are judges of "other inferior courts" within the meaning of this constitutional provision and, therefore, are to be elected "by the qualified voters of the district or circuit to which they are to be assigned." Under the current law, the intermediate appellate court judges are not assigned to a particular district or circuit but instead are subject to

statewide retention elections.¹ However, pursuant to Art. VI, § 4, the Legislature has the authority to define what constitutes a “district” and “circuit” to which judges of the inferior courts are to be assigned. With respect to the judges of the intermediate appellate courts, there is nothing in Art. VI, § 4, or in any other provision of the Tennessee Constitution that would prevent the Legislature from defining a “district” to be one of the three grand divisions as described in Tenn. Code Ann. §§ 4-1-201 - 4-1-204.

Moreover, the unequal population of the three grand divisions does not implicate the principle of “one person, one vote” under the state and federal constitutions. The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment to the federal constitution requires that the principle of “one person, one vote” govern legislative districting and apportionment. *See Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S.Ct. 1362, 12 L.Ed.2d 506, 529 (1964). However, federal courts have drawn a distinction between the requirement of “one person, one vote” in elections for representative positions and those for judicial positions.

[E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

Holshouser v. Scott, 335 F.Supp. 928, 931 (M.D.N.C. 1971) (quoting *Stokes v. Fortson*, 234 F.Supp. 575 (N.D.Ga. 1964)), *aff’d mem.*, 409 U.S. 807, 93 S.Ct. 43, 34 L.Ed.2d 68 (1972). Additionally, in *Wells v. Edwards*, the United States Supreme Court affirmed a district court’s rejection of a claim based on the “one person, one vote” principle applied to the election of Louisiana Supreme Court justices under the Louisiana constitution. *See* 347 F.Supp. 453 (M.D.La. 1972), *aff’d mem.*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). *Cf. Buchanan v. Gilligan*, 349 F.Supp. 569, 571 (N.D. Ohio 1972); *N.Y. State Ass’n of Trial Lawyers v. Rockefeller*, 267 F.Supp. 148, 153 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F.Supp. 860 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.3 (1966); *Blankenship v. Bartlett*, ___ S.E.2d ___, 2007 WL 1890628 (N.C.Ct. of Appeals, July 3, 2007) (all rejecting equal protection challenges to unequal distribution of local district judgeships).

¹Current law does provide that no more than four judges on each court may reside in any one of the grand divisions of the state. *See* Tenn. Code Ann. § 16-4-102 and § 16-5-102.

Accordingly, it is our opinion that sections 8 and 10 of Senate Bill 338, which provide that the intermediate appellate court judges would be elected by the qualified voters of the grand division from which they are appointed, do not violate either the United States or Tennessee Constitutions. However, in order to avoid any ambiguity in the law, we would suggest that Senate Bill 338 specifically provide that, with respect to the election of the judges of the intermediate appellate courts, each of the grand divisions shall constitute a district for purposes of Art. VI, § 4, of the Tennessee Constitution.

You have also asked if there is any other provision of Senate Bill 338 that might make it constitutionally suspect. Sections 3 - 6 of the bill would amend Tenn. Code Ann. § 17-4-109 to require the Judicial Selection Commission to conduct its business in open meetings and to require prospective nominees to provide a complete work and credit history and to submit to a criminal records background check. Section 7 of the bill would prohibit the Executive Director of the Administrative Office of the Courts, the Attorney General and Reporter, and the chair of the Judicial Council from being eligible for nomination by the Judicial Selection Commission while in office and for a two-year period immediately following such person's departure from office. Section 12 would amend Tenn. Code Ann. § 17-1-103 to provide that the judges of the court of appeals and court of criminal appeals would be elected by the qualified voters of the respective grand divisions of the state. Sections 13 and 14 would amend Tenn. Code Ann. § 17-4-114(b)(1) and § 17-4-115(b)(1) to provide that, if a candidate seeks retention as a judge of the court of appeals or court of criminal appeals, then only the county election commissions within the appropriate grand division of the state shall cause the retention question relating to that judge to be placed on the ballot. In our opinion, none of these provisions raises a constitutional issue.

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