S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

January 23, 2008

Opinion No. 08-10

Appointing Substitute Senator

QUESTIONS

1. May the General Assembly constitutionally adopt a statute or rule under which an alternate member may be appointed or elected to perform temporarily the official duties of a duly elected Senator during a period in which the Senator may be temporarily incapacitated due to illness?

2. If the answer to Question 1 is yes:

   a. What provisions authorize such rule?

   b. What persuasive authority exists to support such position?

   c. Could a temporarily incapacitated Senator continue to collect his or her salary and benefits during the period in which another person is actually performing the duties of the office? Would this arrangement violate Article II, Section 6, of the Tennessee Constitution, which limits the number of Senators to thirty-three?

   d. Is Senate Bill 2586 constitutional?

OPINIONS

1. No.

2. Because of the answer to Question 1, Questions 2.a., b., and c. are moot. For the reasons discussed in the answer to Question 1, Senate Bill 2586 is unconstitutional.

ANALYSIS

1. Appointment of Substitute State Senator During Senator's Incapacity

This opinion concerns whether the General Assembly may, by statute or rule, authorize the selection of an alternate member to perform temporarily the official duties of a duly elected Senator during a period in which the Senator may be temporarily incapacitated due to illness. Such a

provision would be unconstitutional. The Tennessee Constitution provides for the qualifications and election of members of the Tennessee Senate. It does not authorize an individual who has not met those qualifications to act on behalf of an elected member.

The General Assembly is the creature of the Constitution and may not rise above it or go beyond it. The Constitution is the chart and guide by which the General Assembly must be governed and controlled. *Lynn v. Polk*, 76 Tenn. 121 (1881). The legislature has unlimited power to enact laws except as expressly or impliedly restricted by the United States Constitution or Tennessee Constitution. *Perry v. Lawrence County Election Commission*, 219 Tenn. 548, 551, 411 S.W.2d 538 (1966), *cert. denied*, *Kimbrell v. Perry*, 88 S.Ct. 44, 389 U.S. 821, L.Ed.2d 73 (1967); *Mayhew v. Wilder*, 46 S.W.3d 760, 784 (Tenn. Ct. App. 2001), *p.t.a. denied* (2001) (citing *Prescott v. Duncan*, 126 Tenn. 106, 148 S.W. 229 (Tenn. 1912)).

The first guide, therefore, is the text of the Tennessee Constitution. Article II, Section 3, of the Tennessee Constitution provides in relevant part:

> The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people. Representatives shall hold office for two years and Senators for four years *from the day of the general election*[.]

(Emphasis added).

Under Article II, Section 5, the number of Representatives is ninety-nine. Under Article II, Section 6, the number of Senators may not exceed one-third the number of Representatives, or thirty-three. Senators and Representatives are elected at a general election on the first Tuesday after the first Monday in November. Tenn. Const. Art. II, § 7.

Article II, Section 10, provides:

> No person shall be a Senator unless he shall be a citizen of the United States, of the age of thirty years, and shall have resided three years in this State, and one year in the county or district, immediately preceding *the election.* No Senator or Representative shall, *during the time for which he was elected*, be eligible to 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.

Tenn. Const. Art. II, § 10 (emphasis added).

Article II, Section 11, provides in relevant part:

> The senate and house of representatives, *when assembled*, shall each choose a speaker and its other officers; *be judges of the qualifications and election of its members*, and sit upon its own adjournments from day to day. Not less than two-

> thirds of all the members to which each house shall be entitled shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized, by law, *to compel the attendance of absent members.*

Tenn. Const. Art. II, § 11 (emphasis added). Article II, Section 12, provides:

> Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same offence; and shall have all other powers necessary for a branch of the Legislature of a free State.

Tenn. Const. Art. II, § 12. Under Article II, Section 15, when the seat of any member of either House becomes vacant, where more than twelve months remain before the next general legislative election, the county commission of the legislator's county of residence fills the vacancy until an election by the qualified voters of the district fills the vacancy. If less than twelve months remain before the next general legislative election, the successor elected by the county commission of the legislator's county of residence serves until the next general election for legislators. Under Article II, Section 18:

> A bill shall become law when it has been considered and passed on three different days in each House and on third and final consideration has received the assent of a majority of all the *members to which each house is entitled under this Constitution*, when the respective speakers have signed the bill with the date of such signing appearing in the journal, and when the bill has been approved by the Governor or otherwise passed under the provisions of this Constitution.

Tenn. Const. Art. II, § 18 (emphasis added). The Tennessee Constitution, therefore, requires a Senator to be elected by the qualified voters of his or her district. Article II, Section 15, specifies the process by which a vacant seat in the Tennessee Senate may be filled. Under Article II, Section 11, each House judges the election and qualification of its members. This Office has concluded that the General Assembly may, constitutionally, add to the minimum qualifications for legislative membership set forth in the Constitution. Op. Tenn. Att'y Gen. 96-149 (December 31, 1996) (compliance with campaign finance requirements); Op. Tenn. Att'y Gen. 91-26 (March 25, 1991) (term limits). But it may not ignore these qualifications.

Further, the provisions of the Constitution are to be given effect according to the drafters' intention in light of the entire document. *State v. Martin*, 940 S.W.2d 567, 570 (Tenn. 1997). Article II, Section 11, also states that where a quorum is absent, a smaller number of members "may be authorized, by law, to *compel the attendance of absent members.*" (Emphasis added). Nothing here or elsewhere in the Constitution suggests that substitute members may be selected to fill a quorum. By contrast, under Article VI, Section 11, "[t]he Legislature may by general laws make provision that special Judges may be appointed, to hold any Courts the Judge of which shall be unable or fail to attend or sit; or to hear any cause in which the Judge may be incompetent." Thus, the Constitution expressly authorizes the legislature to provide for a special judge to act on behalf

of a judge who cannot attend court. But the Constitution does not authorize the General Assembly to recognize an individual lacking the constitutional qualifications to act on an absent or incapacitated Senator's behalf. Such a measure would, in effect, allow the Senate to ignore those explicit qualifications. For the same reason, such a measure is outside the authority of each House to determine its rules of proceedings.

Material included with the request cites an Idaho and a Washington statute authorizing the appointment of temporary state officers. Idaho Code § 59-915; Wash. Rev. Code. § 73.16.041. Idaho statutes expressly authorize the appointment of substitute legislators in the event of a catastrophic attack. Idaho Code §§ 67-413 — 67-426. The interpretation and constitutionality of any of these statutes depends on the law of those states. Under the Tennessee Constitution, the Senate may not recognize as a member an individual acting on behalf of a member who is unable to attend.

2. Related Questions

The request also poses four questions that arise if we conclude that the General Assembly may constitutionally adopt a statute or rule under which an alternate member may be appointed or elected to perform temporarily the official duties of a duly elected Senator while he or she is temporarily incapacitated due to illness. Since Question 1 concludes that the General Assembly does not have this power, Questions 2.a., b., and c. are moot.

Question 2.d. asks whether Senate Bill 2586 is constitutional. Under this bill, a member of either House who is temporarily unable to perform his or her duties may file a request with the Chief Clerk of the appropriate House that a temporary replacement be appointed. Alternatively, a member of the House to which that member has been elected may bring a resolution requesting that a temporary replacement be appointed until the incumbent member is able to perform the duties of the office, or a vacancy occurs in such office, or until the next election. Where the member makes the request, he or she appoints the temporary replacement. Where a temporary replacement is appointed by a resolution of the appropriate House, the Governor appoints the temporary replacement. The bill also provides for a process by which the incapacitated member may return to his or her duties. As discussed in the answer to Question 1, the General Assembly may not constitutionally authorize the selection of a temporary member to carry out the duties of a member who is temporarily incapacitated. For this reason, Senate Bill 2586 is unconstitutional.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Randy McNally
State Senator
307 War Memorial Building
Nashville, TN 37243-0205