

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
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July 28, 2009

Opinion No. 09-133

Appointment of Judges

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**QUESTIONS**

1. Under current law, does the chief justice of the supreme court have the right to appoint special judges to fill a judicial vacancy and to serve until the next biennial election?
2. Is the legislature's power to provide for the appointment of judges limited to the power to appoint special judges?

**OPINIONS**

1. No, the chief justice only has the authority to appoint a retired or regular chancellor or judge to assist in the removal of congestion or delay in the disposition of litigation in any chancery, circuit, criminal, general sessions, juvenile, probate or appellate court of this state or to hear the case(s) of a chancellor or circuit, criminal or appellate judge, where that judge has certified that he is unable to hear and decide the case(s).

2. Pursuant to Art. VII, § 4, of the Tennessee Constitution, the legislature has the authority to provide for the appointment of judges to fill judicial vacancies. Art. VI, § 11, of the Tennessee Constitution also authorizes the General Assembly to provide by general laws for the appointment of special judges of the inferior courts in the case of the absence or disqualification of the regular judge.

**ANALYSIS**

1. You have asked whether the chief justice of the supreme court has the right to appoint special judges to fill a judicial vacancy and to serve until the next biennial election. The filling of judicial vacancies is governed by Art. VII, § 4, of the Tennessee Constitution, which

provides, in pertinent part, that “the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct.” Pursuant to this constitutional grant of authority, the legislature has enacted Tenn. Code Ann. § 17-1-301, which provides as follows:

- (a) If a vacancy occurs during the term of office of a judge of a circuit, chancery or criminal court, or any other state trial court of record, then the vacancy must be filled by the qualified voters of the judicial district at the next regular August election occurring more than thirty (30) days after the vacancy arises. For the purposes of this subsection (a), a vacancy shall be deemed to exist if, prior to September 1, the duly elected successor to any judicial office becomes ineligible as a result of death or other disqualifying event. In accordance with § 17-4-118, the governor shall appoint a person to discharge the duties of such office until August 31 following the election.
- (b) If a vacancy occurs during the term of a judge of the court of appeals or court of criminal appeals, then the vacancy must be filled in accordance with chapter 4 of this title, from the grand division in which the vacancy occurs.
- (c) If a vacancy occurs during the term of a judge of the supreme court, then the vacancy must be filled in accordance with chapter 4 of this title and requirements of article VI, section 2 of the constitution of the state of Tennessee.

Tenn. Code Ann. § 17-4-112(a) provides that the governor shall fill any vacancy in the appellate courts by appointing one of the three persons nominated by the judicial selection commission, or the governor may require the commission to submit one other panel of three nominees. If the governor rejects the first panel of nominees, the governor shall select one of the nominees in the second panel. The term of a judge appointed under this section shall expire on August 31 after the next regular August election occurring more than thirty (30) days after the vacancy occurs. Tenn. Code Ann. § 17-4-112(b).

The legislature has also enacted Tenn. Code Ann. § 16-15-210 which provides that vacancies in the office of judge of general sessions court shall be filled by the appropriate county legislative body in accordance with the provisions of Tenn. Code Ann. § 5-1-104. Thus, under Tennessee law, the authority to fill judicial vacancies is given either to the governor or the appropriate county legislative body. It is not, however, given to the chief justice or any other member of the judicial branch.

Art. VI, § 11, of the Tennessee Constitution authorizes the General Assembly to provide by general laws for the appointment of special judges of the inferior courts; however, the Tennessee Supreme Court has recognized that this provision is not to enable the General Assembly to provide for filling a vacancy in an office, but only for supplying a temporary judge in the case of the absence or disqualification of the regular judge. *See Hundhausen v. U.S.*

*Marine Fire Ins. Co.*, 52 Tenn. 702 (1871). Pursuant to this authority, however, the Legislature has enacted a number of statutory provisions providing for the appointment of special judges in the instance of a temporary disability, disqualification, or circumstance affecting the performance of an incumbent judge. See Op. Tenn. Att’y Gen. 09-43 (March 26, 2009) and Op. Tenn. Att’y Gen. 09-90 (May 18, 2009) (copies attached). Only two of these statutes, however, authorize the chief justice to appoint special judges. Tenn. Code Ann. § 17-2-109 authorizes the chief justice to appoint a retired or regular chancellor or judge to assist in the removal of congestion or delay in the disposition of litigation in any chancery, circuit, criminal, sessions, juvenile, probate or appellate court in this state. Tenn. Code Ann. § 17-2-110 authorizes the chief justice to appoint a special judge to hear the case(s) of a chancellor or circuit, criminal or appellate judge who has certified, for any reason, that he is unable to hear and decide the case(s). In both instances, the special judge is not being appointed to fill a vacancy but is being appointed for a limited time and limited purpose of either assisting in the removal of congestion or delay in the disposition of litigation in a particular court or hearing and deciding a case or cases of an incumbent judge who has certified that he cannot otherwise hear the case(s).

You have also asked whether the legislature’s power to provide for appointment of judges is limited to the appointment of special judges. As discussed above, Art. VII, § 4, of the Tennessee Constitution provides, in pertinent part, that “the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct.” Pursuant to this constitutional provision, the legislature has the authority to provide for the appointment of judges to fill judicial vacancies and has, in fact, enacted legislation authorizing county legislative bodies to make appointments to fill vacancies in general sessions courts and authorizing the governor to make appointments to fill vacancies in all other trial and appellate courts. The legislature also has the authority under Art. VI, § 11, to provide for the appointment of a temporary special judge in the case of the absence or disqualification of the regular judge.

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