STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 09-174

Legislative Authority Concerning Judicial Elections and Appointments

QUESTIONS

1. What provision of the Tennessee Constitution grants to the Legislature the power to define the word 'election" as meaning one thing for trial Judges and another for appellate court Judges?

2. What provision of the Tennessee Constitution grants to the Legislature the power to fill a vacancy in a judicial office by appointment rather than by an election?

3. What provision of the Tennessee Constitutions grants to the Legislature the power to appoint an individual to fill a judicial vacancy for the full term beyond the unexpired term of the office?

OPINIONS

1. The Tennessee Supreme Court in State ex rel. Higgins v. Dunn, 496 S.W.2d 480 (Tenn. 1973), held that the Legislature's authority to define "elections" for purposes of appellate and trial court judges is derived from Art. VII, § 4, of the Constitution.

2. The Court in State ex rel. Higgins v. Dunn also held that Art. VII, § 4 authorizes the Legislature to enact legislation providing for the filling of judicial vacancies by appointment.

3. We are not aware of any provision either in the Constitution or in the statutes governing appointments to fill judicial vacancies, i.e., the "Tennessee Plan", that would allow the Legislature to appoint an individual to fill a judicial vacancy for the full term beyond the unexpired term of the office.

ANALYSIS

You have asked several questions concerning the authority given to the Legislature in the Tennessee Constitution with respect to the election of judges and the filling of judicial vacancies. Article VI, § 3, of the Tennessee Constitution states that "[t]he Judges of the Supreme Court shall be elected by the qualified voters of the State." Similarly, Article VI, § 4, states that "[t]he 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." Your first question asks what provision of the Tennessee Constitution authorizes the Legislature to define the word "election" one way for trial court judges and in a different way for appellate court judges. This issue was addressed by the Tennessee Supreme Court in *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973). In that case, the Tennessee Supreme Court specifically addressed the issue of whether the statutes providing for the nonpartisan election of appellate court judges were in conflict with Art. VI, § 3, of the Tennessee Constitution. [1]

In doing so, the Court first noted that

> [h]istorically, constitutions have been regarded as providing a permanent framework of government. Customarily, they do not provide the details for exercising governmental power. For obvious reasons they are not intended to establish all the law which, from time to time, may be necessary to meet changing conditions, but only to mark the broad outlines of power.

Id. at 487. The Court further 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 authority of the legislature to establish the details of such elections derived from the powers given the Legislature in Art. VII, § 4, of the Constitution. That section provides that "[t]he election of all officers and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct." The Court further found that, because the Constitution did not define the words, "elect," "election," or

[1]The Act in question was Chapter 198 of the Public Acts of 1971 and was the predecessor to the Tennessee Plan.

"elected," and, because the Constitution elsewhere denominated similar methods of ratification, *i.e.*, referenda, as elections, retention elections for incumbent appellate court judges did not conflict with Art. VI, § 3, simply because such elections are limited to approval or disapproval. *Id*. at 489. Accordingly, the Legislature's authority to define "elections" for purposes of the selection of appellate and trial court judges is derived from Art. VII, § 4, of the Constitution.

You have also asked what provision of the Constitution grants to the Legislature the power to fill a vacancy in a judicial office by appointment rather than by an election. This issue was also addressed by the Supreme Court in *State ex rel. Higgins v. Dunn.* Art. VII, § 4, provides that "[t]he election of all officers, and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct." While Art. VI, §§ 3 and 4, provide that appellate and trial court judges are to be elected by qualified voters, these section are silent as to how vacancies in such judicial offices are to be filled. Furthermore, Art. VII, § 7, provides that "[n]o special election shall be held to fill a vacancy in the office of Judge or District Attorney, but at the time herein fixed for the biennial election of civil officers; and such vacancy shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs." Reading these constitutional provisions together, the Supreme Court held that Art. VII, § 4, authorized the Legislature to enact legislation providing for the filling of judicial vacancies by appointment. 496 S.W.2d at 487.

Your final question asks what provision of the Tennessee Constitution grants to the Legislature the power to appoint an individual to fill a judicial vacancy for the full term beyond the unexpired term of the office. We are not aware of any provision either in the Constitution or in the statutes governing appointments to fill judicial vacancies, *i.e*., the "Tennessee Plan", that would allow the Legislature to appoint an individual to fill a judicial vacancy for the full term beyond the unexpired term of the office. As previously noted, Art. VII, § 7, specifically provides that any vacancy in the office of Judge is to be filled at the next biennial election occurring more than thirty days after the vacancy occurs. Additionally, Tenn. Code Ann. § 17-4-112(b) specifically provides that the term of any judge appointed "shall expire on August 31 after the next regular August election occurring more than thirty (30) days after the vacancy occurs."

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Deputy Attorney General

Requested by:

The Honorable Stacey Campfield
State Representative
113 War Memorial Building
Nashville, TN 37243-0117