STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 23, 2018

Opinion No. 18-14

Constitutionality of Legislation Providing for the Appointment of Senior Business Judges

Question 1

Would proposed legislation that gives the Tennessee Supreme Court the authority to appoint any former judge or justice who has at least one year of judicial service to serve as "a senior judge to hear complex commercial disputes" raise constitutional concerns?

Opinion 1

Yes.

Question 2

Would the proposed legislation raise constitutional concerns by allowing the Supreme Court to transfer a case to a senior judge appointed to hear complex commercial cases without requiring the consent of the regularly assigned judge or the parties?

Opinion 2

No.

ANALYSIS

Senate Bill 2493/House Bill 2184, 110th Tenn. Gen. Assem. (2018), would grant the Tennessee Supreme Court the authority to appoint a new type of senior judge—a senior business judge—to hear complex commercial cases. The proposed legislation would amend Tenn. Code Ann. § 17-2-302 to allow the Supreme Court to appoint "as a senior judge to hear complex commercial cases," a former judge "who has at least one (1) year of creditable judicial services," notwithstanding the general requirement that senior judges must have eight years of previous experience. See Tenn. Code Ann. § 17-2-302(a). The proposed legislation would also amend Tenn. Code Ann. § 17-2-303 to permit a former judge to be appointed as a senior business judge even if the judge had sought reelection or retention but had been defeated. Currently, a former judge who "sought reelection or retention but was defeated in the reelection or retention bid" during the judge's most recent term of judicial service may not be appointed as senior judge, unless the judge had previously "been elected at least twice and served at least two (2) full eight-year terms." Id. § 17-2-303(b)(2),(3). Under the proposed legislation senior business judges would not be subject to this restriction. The Supreme Court would be empowered under the proposed legislation to "promulgate rules to effectuate" the appointment of senior business judges. Finally, an amendment to the proposed legislation would allow a senior business judge to be assigned a

complex commercial case by the Supreme Court after the Court had "consult[ed] with the originally assigned trial judge."

1. The Tennessee Constitution provides that "the Judges of the Circuit and Chancery Courts, and of the other inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned." Tenn. Const. art. VI, § 4. This provision was part of the Tennessee Constitution adopted in 1870, *see Hooker v. Haslam*, 437 S.W.3d 409, 429 (Tenn. 2014); Tenn. Att'y Gen. Op. 83-401 (Dec. 1, 1983), and preserves "an independent judiciary free of the political caprice and whims of other government branches," *State ex rel. Town of Carthage v. Barrett*, 840 S.W.2d 895, 899 (Tenn. 1992); *see also State ex rel. Newsom v. Biggers*, 911 S.W.2d 715, 717 (Tenn. 1995) (noting the "acute concern for an independent judiciary" that motivated the constitutional requirement that they be elected).

Despite this general rule, in limited circumstances specified in the Constitution, individuals who have not been elected to serve as a judge may exercise limited or temporary judicial authority. For example, article VI, section 11 of the Tennessee Constitution grants the General Assembly the authority to "make provisions 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." Article VI, section 11 does not "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." Tenn. Att'y Gen. Op. 09-133 (July 28, 2009). Pursuant to this authority, "the General Assembly has enacted several statutes relating to the appointment of special/substitute judges[.]" *Ferrell v. Cigna Prop. & Cas. Ins. Co.*, 33 S.W.3d 731, 736 (Tenn. 2000); *see, e.g.*, Tenn. Code Ann. §§ 17-2-109, 17-2-116; 17-2-118, 17-2-121, 17-2-122. And the Tennessee Supreme Court has recognized that there is no conflict between the general requirement that judges be elected and the specific grant of authority to the General Assembly to provide for the appointment of special judges. *See In re Valentine*, 79 S.W.3d 539, 545 (Tenn. 2002); *State ex rel. Witcher v. Bilbrey*, 878 S.W.2d 567, 575 (Tenn. Ct. App. 1994).

Additionally, the Governor has the authority to appoint chancery and circuit court judges to serve out the remaining term of a judicial vacancy. *See* Tenn. Const. art. VII, § 4 (granting the legislature authority to provide for the "filling of vacancies not otherwise directed or provided" by the Constitution); Tenn. Code Ann. § 17-1-301 (granting the Governor authority to appoint a "qualified person to fill" a judicial vacancy); *see also Gold v. Fite*, 61 Tenn. 237, 245 (1872); Tenn. Att'y Gen. Op. 13-76 (Oct. 9, 2013). And the Supreme Court may appoint former judges to serve as senior judges when it determines that "the effective administration of justice" in a particular district "requires additional judicial resources." Tenn. Code Ann. § 17-2-303(a). Senior judges are required to have at least eight years of previous judicial service. Tenn. Code Ann. § 17-2-302(a). That requirement, which represents a full judicial term, virtually ensures that any former judge appointed as a senior judge will have previously been elected to serve as a judge. *See* Tenn. Const. art. VII, § 5 (providing that a judicial vacancy "shall be filled at the next Biennial election recurring more than thirty days after the vacancy occurs"); Tenn. Code Ann. §§ 17-4-105, 17-4-308 (requiring judges and justices appointed to fill judicial vacancies to stand for election at the next opportunity in accordance with the constitutional requirement).

The proposed legislation would create a new type of senior judge—a senior business judge to hear complex commercial cases—and would allow the Supreme Court to appoint as a judge to

hear these complex commercial cases a person who has never been elected to serve as a judge. Former judges with only a single year of judicial experience would be eligible to be appointed as a senior business judge. As a result, former judges would be eligible to be appointed as senior business judges despite having never won a judicial election. Additionally, although former judges who lost their most recent election are generally not eligible to serve as a senior judge unless they have previously been elected *twice* and served two full eight-year judicial terms, *see* Tenn. Code Ann. § 17-2-303(b)(2),(3), former judges would be eligible to serve as senior business judges even if they had *never* won a judicial election and even if they had lost in their most recent election bid. Under the proposed legislation, a judge appointed to serve out the final year of a judicial vacancy who then lost the subsequent election for that vacancy could be appointed by the Supreme Court to serve a four-year term as a senior business judge, presiding over complex, and potentially consequential, commercial cases, and then reappointed to that position without limitation.

Accordingly, the legislation would raise significant constitutional concerns. Unlike existing law, the proposed legislation would permit a former judge who has minimal judicial experience and who has never won a judicial election to serve in a judicial capacity. And the appointment would not be temporary but would be for a four-year term, renewable without limitation at the discretion of the Supreme Court. The election requirement of article VI, section 4 is not absolute, as demonstrated by the several provisions that allow unelected individuals to exercise judicial authority for a limited time or limited purpose. But the proposed legislation would undermine the election requirement to an extent not provided in existing law.

2. The Tennessee Supreme Court is the "supreme judicial tribunal of the state" and "has broad inherent authority over the Tennessee judicial system." *In re Bell*, 344 S.W.3d 304, 313 (Tenn. 2011) (internal quotation marks omitted). Accordingly, the General Assembly has recognized that "to ensure the harmonious, efficient, and uniform operation of the judicial system of the state, the supreme court is granted and clothed with general supervisory control over all the inferior courts of the state." Tenn. Code Ann. § 16-3-501; *see also* Tenn. Att'y Gen. Op. 87-02 (Jan. 7, 1987) (recognizing that the "supervisory authority over the Tennessee judicial system is a part of the inherent power of the Tennessee Supreme Court").

Existing law grants numerous specific supervisory powers to the Supreme Court, including the authority to (1) "[d]esignate and assign temporarily any judge or chancellor to hold or sit as a member of any court, of comparable dignity or equal or higher level, for any good and sufficient reason"; (2) to "[t]ake affirmative and appropriate action to correct and alleviate any imbalance in caseloads among the various judicial districts of the state"; and (3) to "[t]ake affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state." Tenn. Code Ann. § 16-3-502(3)(A),(D),(E). These and other supervisory powers granted to the Supreme Court "constitute a broad conference of full, plenary and discretionary power." *Id.* § 16-3-504.

The authority to transfer a case from a regularly assigned judge to another judge fits within the Supreme Court's supervisory authority. The General Assembly has already granted the Supreme Court the general authority to assign judges to various courts and to take any action that is appropriate to alleviate caseloads or other conditions adversely affecting the administration of justice. *Id.* § 16-3-502(3)(A),(D),(E). Those broad grants of authority encompass the ability to assign particular cases to particular judges or courts in furtherance of the efficient administration

of the judicial system. *See, e.g.*, *State v. Brown*, 644 S.W.2d 418, 420-21 (Tenn. Ct. Crim. App. 1982). And other statutes confirm that the Supreme Court's broad supervisory authority includes authority over the assignment of judges. *See, e.g.*, Tenn. Code Ann. § 17-2-202(a)(4) (imposing an "affirmative duty to interchange" on a state trial court judge if the "chief justice of the supreme court has assigned by order a judge to another court" pursuant to the supreme court's supervisory authority); Tenn. Att'y Gen. Op. 09-90 (May 18, 1990) (concluding the Supreme Court has the authority pursuant to Tenn. Code Ann. § 17-2-109 to assign a retired or regular chancellor or judge to cases to alleviate congestion or delay).

The amendment to the proposed legislation that would allow the Supreme Court to transfer complex commercial cases from the assigned trial court judge to a senior business judge thus does itself not raise constitutional concerns.[1] It constitutes a specific grant of authority to transfer cases in furtherance of the Court's existing supervisory authority.

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[1] Although the *transfer* authority itself would not raise constitutional concerns, the assignment of the case to an unelected senior business judge appointed pursuant to the proposed legislation would raise the same significant constitutional concerns discussed previously. Moreover, the method by which complex commercial cases are assigned to senior judges and the administration of the system of senior business judges could raise additional constitutional concerns that are outside the scope of the questions addressed in this opinion.