**S T A T E O F T E N N E S S E E**
OFFICE OF THE
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Opinion No. 02-076

Constitutionality of Amendment No. 2 to Senate Bill 1201/House Bill 1767

## QUESTIONS

1. May Amendment No. 2 to House Bill 1767, Section 3, constitutionally change the five percent (5%) figure from the votes cast in the primary to the registered voters in the district after the election process has begun?

2. May Section 4 of Amendment No. 2 legally make the thirty (30) day provision retroactive after the election process has commenced?

3. Is it constitutional and permissive under this bill to change the rules of qualification after the election process has commenced?

4. Is Senate Bill 1201/House Bill 1767 constitutionally suspect?

## OPINIONS

1. It is our opinion that it would be constitutionally permissible to change the requirements for a write-in candidate to receive a party nomination by write-in ballots from five percent (5%) of the votes cast to five percent (5%) of the registered voters in the district, particularly since the election process has not yet commenced for write-in candidates.

2. Nothing in the language of Senate Bill 1201/House Bill 1767 expressly declares or necessarily implies that it be given retroactive effect. Accordingly, if the legislation becomes law after July 2, 2002, it would operate prospectively only and, therefore, would not apply to potential write-in candidates in the upcoming August 1 state primary election. If, however, the legislation becomes law prior to July 2, 2002, while constitutionally defensible on its face, we think that a court of competent jurisdiction would extend the deadline for filing the notice, as applied to the upcoming primary election.

3. & 4. We have already addressed these issues with respect to Section 3 in response to your first question. As for the constitutionality of Section 4, it is constitutionally defensible on its face.

## ANALYSIS

1. You have asked several questions concerning the constitutionality of certain provisions of Amendment No. 2 to Senate Bill 1201/House Bill 1767 ("HB 1767"). HB 1767 would amend Tenn. Code Ann. § 2-8-113, which contains the provisions for determining the results of primary elections. Section (a) currently provides as follows:

> On the third Thursday after a primary election the state coordinator of elections shall publicly calculate and compare the votes received by each person and declare who has been nominated for office in the primary or elected to the state executive committee. The candidates who receive the highest number of votes shall be declared elected or nominated; provided, that in order for any person to receive a party nomination by write-in ballots, such person must receive a number of write-in votes equal to or greater than five percent (5%) of the total number of votes cast in the primary on the day of the election. However, this section shall not apply where there are candidates for the office involved listed on the official ballot.

Section 3 of Amendment No. 2 to HB 1767 would change the requirements for a write-in candidate to receive a party nomination by write-in ballots from five percent (5%) of the votes cast to five percent (5%) of the registered voters in the district. You have asked whether this change is constitutionally permissible after the election process has commenced.

This question first assumes that the election process has commenced with respect to write-in candidates. But that is not the case in light of the very nature of write-in candidates. This Office has previously opined that the Legislature has recognized and established an alternative procedure for an individual to obtain a party nomination in a primary election outside of the procedure established in Tenn. Code Ann. § 2-5-101 (the filing of nominating petitions by the respective qualifying deadline). *See* Op. Tenn. Atty. Gen. 02-058. Thus, while the election process may have already begun for candidates qualified through the procedures established in Tenn. Code Ann. § 2-5-101, the election process has not — and cannot — commence for the write-in candidate until the primary election itself commences. Pursuant to Tenn. Code Ann. § 2-6-102(a)(1), early voting may begin not more than twenty (20) days before the day of an election. For purposes of the upcoming August 1 state primary election, early voting begins on July 12, 2002. Thus, July 12th is the earliest that the election process may commence for any potential write-in candidate in the August 1 state primary election.

Second, and more importantly, Section 3 of the proposed amendment to the statute in question does not change the ability of an individual to run as a write-in candidate, nor the ability of the voter to vote for the candidate of his or her choice. It simply changes the percentage of votes that a write-in candidate

must receive in order to successfully obtain a party nomination. Thus, Section 3 of Amendment No. 2 neither denies access to the ballot as a write-in candidate, nor does it impermissibly burden the right to vote. Accordingly, it is our opinion that it would be constitutionally permissible to change the requirements for a write-in candidate to receive a party nomination by write-in ballots from five percent (5%) of the votes cast to five percent (5%) of the registered voters in the district, particularly since the election process has not yet commenced for write-in candidates.

2. Your next question concerns Section 4 of Amendment No. 2. That section would add a new provision to Tenn. Code Ann. § 2-8-113, which would provide as follows:

> Any person trying to receive a party nomination by write-in ballots shall complete a notice requesting such person's ballots be counted in each county of the district no later than thirty (30) days before the primary election. Such person shall only have votes counted in counties where such notice was completed. The notice shall be on a form prescribed by the coordinator of elections and shall not require signatures of any person other than the person requesting ballots be counted. The coordinator of elections shall distribute such form to the county election commissions.

For purposes of the upcoming August 1 state primary election, a potential write-in candidate would have to complete and file such notice no later than July 2, 2002 under this proposed amendment.[1] You have asked whether the Legislature may make this provision retroactive after the election process has commenced.

In general, statutes are presumed to operate prospectively unless retroactive application is expressly stated or is necessarily implied. *Henderson v. Ford*, 488 S.W.2d 720, 721 (Tenn. 1972). The intention of the Legislature that a statute be retroactively applied must be clear and unequivocal. *Id.* Nothing in the language of SB 1201/HB 1767 expressly declares or necessarily implies that it be given retroactive effect. Accordingly, if SB 1201/HB 1767 becomes law after July 2, 2002, it would operate prospectively only and, therefore, would not apply to potential write-in candidates in the upcoming August 1 state primary election.

If, however, SB 1201/HB 1767 becomes law prior to July 2, 2002, while constitutionally defensible on its face, we think that a court of competent jurisdiction would extend the deadline for filing the notice, as applied to the upcoming primary election. The Tennessee Supreme Court has recognized that it has broad equitable powers and that there is ample precedent for extending qualifying deadlines. *See Koella v. State ex rel. Moffett*, 218 Tenn. 629, 405 S.W.2d 184 (1966); *Crowe v. Ferguson*, 814 S.W.2d 721 (Tenn. 1991); *State ex rel. Hooker v. Thompson*, 1996 WL 570090 (Tenn. 1996).

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[1] It should be noted that there is some ambiguity in this section as to where a write-in candidate should file the notice, *i.e.*, with the coordinator of elections or with the county election commission for each county of the district.

> [I]f a candidate misses a qualifying deadline due to her reasonable and justifiable reliance upon an official opinion, relief from the mandatory deadline is appropriate, providing filing takes place with all reasonable dispatch after it is discovered that the opinion is incorrect.

*Crowe v. Ferguson*, 814 S.W.2d at 725.

Section 4 of Amendment No. 2 is not a qualifying deadline, *per se*, in that it does not prevent or alter the ability of an individual to run as a write-in candidate. In its application to the upcoming August 1 election, however, it has the practical effect of acting as a qualifying deadline in that it provides that no write-in ballots for a candidate may be counted unless that candidate has timely filed the required notice. Additionally, while potential write-in candidates have not relied upon any official opinion, they arguably have relied upon current law, which does not contain any requirement for the filing of such a notice.

If SB 1201/HB 1767 becomes law prior to July 2nd, it would be virtually impossible for any potential write-in candidate to comply with this filing deadline for a number of reasons, not the least of which is the requirement that the notice "shall be on a form prescribed by the coordinator of elections," who "shall distribute such form to the county election commissions." It is our understanding that the Coordinator of Elections has not created or prescribed any such form, nor has he transmitted any such forms to the county election commissions. In light of these facts and circumstances, it is our opinion that a court, exercising its broad equity powers, would extend the deadline for filing the notice required by Section 4 of Amendment No. 2, if SB 1201/HB 1767 became effective prior to July 2, 2002.

3. & 4. Your third and fourth questions both essentially ask whether SB 1201/HB 1767 is constitutionally suspect. We assume that you are limiting your inquiry to Sections 3 and 4 of Amendment No. 2 to HB 1767. We have already addressed this issue with respect to Section 3 in response to your first question. As for the constitutionality of Section 4, we believe that on its face it is constitutionally defensible. The United States Supreme Court has held that a state may constitutionally ban write-in voting provided that its electoral scheme provides sufficient ballot access.

> [T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system. We think that Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters.

*Burdick v. Takushi*, 504 U.S. 428, 441-42, 112 S.Ct. 2059, 2067, 119 L.Ed.2d 245 (1992) (citations omitted).

In light of the Supreme Court's analysis in *Burdick* upholding Hawaii's complete ban on write-in voting, it is our opinion that Section 4 to Amendment No. 2 is presumptively valid. Tennessee provides ample opportunity for candidates to get on the ballot by other means, and Section 4 places only reasonable restrictions on write-in candidates, in contrast to a complete ban.[2]

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[2] Additionally, it should be noted that Sections 3 and 4 to Amendment No. 2 only apply to persons trying to receive a party's nomination by write-in ballots in a primary election. There is nothing in either of these provisions that would prohibit that same person from conducting a write-in campaign in the November general election.