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

February 27, 2007

Opinion No. 07-22

Filling of Vacancies in County Offices

QUESTIONS

1. May the General Assembly pass a general law applicable to all counties of Tennessee, or just to counties that have adopted a charter form of government, that defines the phrase "next election" in Article VII, Section 2 of the State of Tennessee Constitution to mean "the earlier of (i) the next general election or (ii) the date of special election set by the county commission responsible for filling the vacancy"? Such legislation would also authorize the county to conduct a county wide election in such event if the date of the election set by the county commission is earlier than the next general election.

2. Would the answer to No.1 differ if the subject legislation defined the phrase "next election" in Article VII, Section 2 of the State of Tennessee Constitution to mean "the earlier of (i) the next general election or (ii) the date of the next municipal election for the largest municipality in the county"?

3. If constitutional, could such a law be limited by its terms to special situations where multiple vacancies occur simultaneously in the county commission and other county offices as a result of an extraordinary event (*e.g.*, a natural disaster or judicial ruling that results in the simultaneous vacancy of multiple county offices, *etc*.), thereby providing remedial relief to the people of the county that would allow them to elect successors for the vacated seats more quickly than current law allows?

4. If constitutional could such a law be applied to existing successor appointees of multiple vacated county offices who were otherwise duly appointed by the County Commission as a result of such an extraordinary occurrence, such that its passage and application to the appointed successors would have the effect of shortening their terms?

5. Does the prohibition of Article II, Section 9 of the Tennessee Constitution prohibiting the legislature from passing a "special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term . . . prior to the end of the term for which such public office was selected" apply to a general act of the legislature applicable to all counties or just charter counties for an extraordinary occurrence resulting in the vacancy of multiple county commission offices and other county elected officials?

6. Can the General Assembly constitutionally enact a special, local or private act for a charter county that required a special county election to elect successors for multiple county offices that had been filled by appointment of the county commission if the effect of the legislation is to shorten the terms of the appointed successors, provided that such legislation by its terms required it to either be approved by a two-thirds vote of the county commission or a majority vote of the citizens of the affected county to be effective?

7. If the answer to No. 6 is yes, could the citizens of the county approve such legislation as a ballot question at the same time the election to fill such offices is held, such that if the citizens of the county failed to approve the legislation, the election results for the affected offices would have no effect?

OPINIONS

1. In light of the Tennessee Supreme Court's holding in *Marion County Board of Commissioners v. Marion County Election Commission*, we think that the Legislature could enact a general law applicable to all counties in Tennessee that defines "next election" as an election occurring at a time other than the August general election.

2. To the extent that the equal protection provisions of the state and federal constitution would be implicated by any such proposed legislation, we believe that there is a conceivable rational basis for a law allowing only counties that have adopted a charter form of government to fill vacancies in county offices at a time other than the August general election.

3. It is our opinion that such a classification would be constitutional.

4. It is our opinion that application of the proposed legislation to existing successor appointees who were otherwise duly appointed by the County Commission, so as to shorten their terms would be unconstitutional.

5. By its own terms, the prohibition in Art. XI, § 9 would not apply to a general act of the legislature. However, as previously discussed, to the extent that application of a such general law would result in abridgement of the terms of duly appointed and qualified successor appointees, it would be unconstitutional.

6. It is our opinion that the General Assembly could not enact a special, local or private act as described herein if the resulting effect is to shorten or abridge the terms of the duly appointed and qualified appointed successors.

7. This question is pretermitted by the answer to question six.

ANALYSIS

1. & 2. You have asked a number of questions relative to the timing of elections provided for in Art. VII, § 2 of the Tennessee Constitution with respect to filling a vacancy in a county office. Article VII, § 2, of the Tennessee Constitution provides that:

> Vacancies in county offices shall be filled by the county legislative body, and any person so appointed shall serve until a successor is elected at the next election occurring after the vacancy and is qualified.

Your first question asks whether the General Assembly may pass a general law applicable to all counties in Tennessee, or alternatively, to counties that have adopted a charter form of government, that would define the phrase "next election" to mean "the earlier of (i) the next general election or (ii) the date of a special election set by the county commission responsible for filling the vacancy," or alternatively, to mean "the earlier of (i) the next general election or (ii) the date of the next municipal election for the largest municipality in the county." In *McPherson v. Everett*, the Tennessee Supreme Court held that Art. VII, § 2 "is somewhat ambiguous and is not self-executing" and, therefore, "until such time as the Legislature speaks affirmatively and with specificity upon the subject, the phrase 'next election,' . . . must be held to mean the regular August general election." 594 S.W.2d 677, 680-81 (Tenn. 1980).

Thus, the Tennessee Supreme Court has indicated that the legislature has the authority to pass a general law defining the phrase "next election" for purposes of filling vacancies in county offices. Indeed, the legislature has already enacted several statutes for that very purpose. Specifically, Tenn. Code Ann. § 5-1-104(b), which governs the filling of vacancies in county offices required by the Tennessee constitution, provides:

> Vacancies in county offices required by the Constitution of Tennessee or by any statutory provision to be filled by the people shall be filled by the county legislative body, and any person so appointed shall serve ***until a successor is elected at the next general election, as defined in § 2-1-104***, in the county and is qualified; provided, that all the candidates have sufficient time to qualify for the office, as provided for in § 2-14-106. (Emphasis added).[1]

Tenn. Code Ann. § 5-5-102(i), which governs the filling of vacancies in the county legislative body, provides:

> If a vacancy shall occur in the office of a member of the county legislative body, the vacancy shall be filled as provided for in § 5-1-104(b).

This opinion first addresses the issue of whether the legislature could pass a general law that defines "next election" at a time other than the August general election, *i.e.*, the earlier of the next

[1]Tenn. Code Ann. § 2-1-104 defines "election" as a "general election for which membership in a political party in order to participate therein is not required."

general election or the date of a special election set by the county commission responsible for filling the vacancy. The Tennessee Supreme Court in *McPherson* held that, pursuant to Art. IV and Art. VII, § 5 of the Tennessee Constitution, the legislature has the authority to provide for special elections to fill vacancies in county offices, but that the provisions were not self-executing and required affirmative legislative action. *McPherson*, 594 S.W.2d at 680.

In a companion case, the Court addressed the constitutionality of a state statute which provided for filling vacancies in a county office at a time other than the August general election. *See Marion County Board of Commissioners v. Marion County Election Commission*, 594 S.W.2d 681 (Tenn. 1980). The statute in question provided as follows:

> (b) Whenever a vacancy occurs in the office of a member of the county legislative body, the remaining members of the county legislative body shall fill the vacancy by the election of a qualified person to serve until the office is ***filled at the next general election, primary election or referendum in the county or general election, primary, or referendum in a municipality in the county if such municipality includes all or part of the district seat to be filled by election in the county occurring seventy-five (75) or more days after the vacancy occurs.*** If the vacancy occurs within seventy-five (75) days before a general election in the county, the person elected by the county legislative body shall serve until the vacancy is filled at the next succeeding general election. . . .

Id. at 684, fn. 3 (quoting T.C.A. § 5-502(b)) (emphasis added).

The Court found that this statute did not violate Art. VII, § 2 because it allowed a vacancy to be filled at the next primary, general or referendum county election or next municipal primary, general or referendum election, stating as follows :

> We believe the overriding legislative purpose was to provide a mechanism for the selection of successor county commissioners designed, on the one hand, to ensure that the people had continuing representation, and on the other, to give maximum opportunity for the public to exercise its choice.

Id. at 685.

In light of this holding, we think that the legislature could enact a general law applicable to all counties in Tennessee that defines "next election" as an election occurring at a time other than the August general election. We would note, however, that the calling and setting of *special* elections is currently governed by the provisions of Tenn. Code Ann. §§ 2-14-101, *et seq*. Pursuant to Tenn. Code Ann. § 2-14-103, it is the county election commission, and not the county legislative body, that is authorized to order special elections for all county and municipal offices. Furthermore,

Tenn. Code Ann. § 2-14-102, which governs the time for holding special elections, appears to address the situation where the date for a special election falls in close proximity to the next general election. Specifically, it provides in pertinent part as follows:

> (a) Special elections shall be held not less than seventy-five (75) days nor more than eighty (80) days after the officer or body charged with calling the election received notice of the facts requiring the call. An election for an office shall be held on the same day in every county in which it is held.
> (b)(1) If it is necessary to hold a special election to fill a vacant seat in the United States house of representatives, a vacancy in a county office, or a vacancy in any municipal office, and the date for such election, as established under subsection (a), falls within thirty (30) days of an upcoming regular primary or general election being held in that district, the governor, or the county election commission, as specified in § 2-14-103, may issue the writ of election for the special election for the date which will coincide with the regular primary or general election.

You have also asked whether the legislature could pass a general law that defines "next election" as an election occurring at a time other than the August general election that is applicable only to those counties that have adopted a charter form of government. Limiting its application only to those counties that have adopted a charter form of government raises the issue of whether such a law implicates the provisions of Art. XI, § 8 of the Tennessee Constitution. Under that provision:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same laws extended to any member of the community, who may be able to bring himself within the provisions of such law.

The equal protection provisions of the Tennessee Constitution provide the same protection as the Equal Protection Clause of the United States Constitution; therefore, the rational basis review is the same. *State v. Price*, 124 S.W.3d 135, 137-38 (Tenn.Crim.App. 2003) *p.t.a. denied* (2003). All classifications that do not affect a fundamental right or discriminate as to a suspect class are generally subject to the rational basis test. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). Under this test, the classification will be upheld "if any state of facts may *reasonably be conceived* to justify it." *Tester*, 879 S.W.2d at 828 (emphasis added) (citing *Tennessee Small Schools System v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993)); *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978). The question is "whether the classifications have a reasonable relationship to a legitimate state interest." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988) (citing *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), *rehearing denied* (1982)). In such an

instance, there is a presumption of validity. The legislative body may make distinctions and treat various groups differently so long as the classification is not arbitrary. *Harrison*, 569 S.W.2d at 825. A classification having some reasonable basis does not offend equal protection merely because the classification is not made with mathematical nicety, or because in practice it results in some inequality. *Wyatt v. A-Best Products Company, Inc.*, 924 S.W.2d 98, 105 (Tenn.Ct.App. 1995), *as modified on rehearing, p.t.a. denied* (Tenn. 1996).

To the extent that the equal protection provisions of the state and federal constitution would even be implicated by any such proposed legislation, we believe that there is a conceivable rational basis for a law allowing only counties that have adopted a charter form of government to fill vacancies in county offices at a time other than the August general election. Art. VII, § 1 authorizes the General Assembly to provide alternate forms of county government. Pursuant to this provision, the legislature has adopted Tenn. Code Ann. §§ 5-1-201, *et seq*., which authorizes a charter form of government. Any county may adopt a charter form of government by complying with the provisions of these statutes. Because the charter form of government is an alternate form of government, it is certainly rational to allow those counties that have adopted a charter form of government to provide for the filling of vacancies in their county offices at an election earlier than the next August general election.

3. You next ask whether a law authorizing vacancies in county offices to be filled at an election other than the next August general election could be limited by its terms to special situations where multiple vacancies occur simultaneously in the county commission and other county offices as a result of an extraordinary event, *e.g.*, a natural disaster or judicial ruling that results in the simultaneous vacancy of multiple county offices. Again, such a limitation raises the issue of whether such a law would implicate the provisions of Art. XI, § 8 of the Tennessee Constitution. However, we believe that there is a rational basis for only allowing those counties with multiple vacancies in county offices resulting from a single extraordinary event to fill those vacancies at an election other than the next August general election. Clearly, the state has a legitimate interest in assuring that all the citizens of those counties have continuous representation in local governmental affairs, as well as the preservation and continuation, without interruption, of essential governmental services. *See Diane Jordan, et al. v. Knox County, Tennessee*, __ S.W.3d __, No. E2006-01377-SC-RDM-CV, slip op. at 34 (Tenn. January 12, 2007). Allowing counties in these limited special circumstances to fill vacancies at an earlier election than the next August general election will help further that interest. Additionally, it will give maximum opportunity for the public to exercise its choice. *See Marion County*, 594 S.W.2d at 685. For these reasons, it is our opinion that such a classification is constitutional.

4. Your next question asks whether such a law, if passed, could be applied to existing successor appointees who were otherwise duly appointed by the County Commission, thereby in effect shortening their terms. While a public official has no vested right in his office, "it is well-settled that an office is a species of property in which he has property rights." *State v. Blazer*, 619 S.W.2d 370, 374 (Tenn. 1981). Those rights, however, are defined by state law. "[A]n official takes his office subject to the conditions imposed by the terms and nature of the political system in which he operates." *Gordon v. Leatherman*, 450 F.2d 562, 565 (5th Cir. 1971); *Eaves v. Harris*, 364

S.E.2d 854 (Ga. 1988).

In this instance, the existing successor appointees were presumably appointed by the County Commission pursuant to Tenn. Code Ann. § 5-1-104(b) and/or § 5-5-102(i), which provides that "any person so appointed shall serve ***until a successor is elected at the next general election, as defined in § 2-1-104***, in the county and is qualified; . . ." Under this statute, the appointees have a property right in holding the office to which they were appointed until their successor is elected at the next general election and qualified. The proposed legislation would, however, impair that right by shortening the appointees' term, thus raising the issue of whether the proposed legislation would violate Art. I, § 10, cl. 1 of the United States Constitution and Art. I, § 20 of the Tennessee Constitution, which provide as follows:

> § 10. Powers denied the states. - [1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.
>
> Sec. 20. No retrospective laws. - That no retrospective law, or law impairing the obligations of contracts shall be made.

These two constitutional provisions are construed and applied in the same way to provide the same protection. *Fidelity Union Trust Co. v. New Jersey Highway Auth.*, 85 N.J. 277, 299-300, 426 A.2d 488 (1981), *appeal dismissed*, 454 U.S. 804, 102 S.Ct. 76, 70 L.Ed.2d 73 (1981). Thus, if the proposed legislation is valid under the federal contract clause, it is necessarily valid under the parallel State provision.

These constitutional provisions do not proscribe all retrospective laws, but rather proscribe only those laws that divest or impair vested substantive or contractual rights. *Hanover v. Ruch*, 809 S.W.2d 893, 896 (Tenn. 1991); *Miller v. Sohns*, 225 Tenn. 158, 162, 464 S.W.2d 824, 826 (Tenn. 1972); *Dark Tobacco Growers' Co-op Ass'n v. Dunn*, 150 Tenn. 614, 632, 266 S.W. 308, 312 (1924). "Vested rights" are defined by the Tennessee Supreme Court as including those "which it is proper for the State to recognize and protect and of which the individual should not be deprived arbitrarily without injustice." *Morris v. Gross*, 572 S.W.2d 902, 905 (Tenn. 1978). The Tennessee Supreme Court has further held that in order to be protected by Art. I, § 20, a "contract right" must be legally enforceable and must not conflict with the constitution, the statutes, or the common law. *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991). *See also Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 648, 383 S.W.2d 1, 5 (1964) (recognizing that contracts that conflict with constitutions, statutes, or the common law violate public policy and are unenforceable). Thus retrospective laws are those "which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." *Morris v. Gross*, 572 S.W.2d at 907.

The Tennessee Supreme Court has long recognized that although the legislature is given the power to abolish offices, until it does so it cannot abolish the tenure of any rightful incumbent of the office. *See Malone v. Williams*, 118 Tenn. 390, 103 S.W. 798, 821 (1907). Furthermore, while it is a well-settled principle that the right of removal is an incident of the right of appointment, it is an equally well-settled principle that the right of removal does not exist in the appointing power, in the absence of some constitutional or statutory provision, where the term of the official is fixed by law for a definite period. *See Brock v. Foree*, 168 Tenn. 129, 76 S.W.2d 314, 315 (1934). Here, the term of office of the successor appointees is clearly fixed for a definite period by Tenn. Code Ann. § 5-1-104(b). Moreover, the proposed legislation does not abolish any of the offices in question, but rather simply acts to abridge the term of the appointees. Accordingly, it is our opinion that application of the proposed legislation to existing successor appointees who were otherwise duly appointed by the County Commission, which would shorten their terms, would be unconstitutional.

5. & 6. Your next two questions concern the prohibition contained in Art. XI, § 9 of the Tennessee Constitution, which provides in pertinent part:

> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected. . . .

You first ask whether this prohibition would apply to a general act of the legislature applicable to all counties that would allow vacancies in county offices to be filled at an election other than the next August general election. This provision specifically states that the General Assembly shall have no power to pass a ***special, local or private act*** having the effect of removing the incumbent from a county office or abridging the term. Thus, by its own terms, the prohibition in Art. XI, § 9 would not apply to a general act of the legislature. However, as discussed in the previous section, to the extent that application of such general law would result in abridgement of the terms of duly appointed and qualified appointees, it would be unconstitutional.

You also ask whether the General Assembly could enact a special, local or private act for a charter county requiring a special county election to elect successors for multiple county offices that had been filled by appointment of the county commission the effect of which is to shorten the terms of the appointed successors, provided that such legislation by its terms required it to either be approved by a two-thirds vote of the county commission or a majority vote of the citizens of the affected county to be effective. Again, the language of Art. XI, § 9 contains an express prohibition against *any special, local or private act* abridging the term of any county office, regardless of

whether such private act is subsequently ratified by either the county legislative body or the citizens of the county. Accordingly, it is our opinion that the General Assembly could not enact a special, local or private act as described herein if the resulting effect is to shorten or abridge the terms of the duly appointed and qualified appointed successors. *See also* Tenn. Atty. Gen. Op. 05-013 (January 26, 2005) (copy attached).

7. This question is pretermitted by the answer to question six.

ROBERT E. COOPER, JR.
Attorney General

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Senior Counsel

Requested by:

Honorable Tim Burchett
State Senator
Suite 310A, War Memorial Building
Nashville, TN 37243-0207