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

March 26, 2009

Opinion No. 09-43

Effect of Expiration of Judicial Selection Commission and Judicial Evaluation Commission

QUESTIONS

Under the Tennessee Governmental Entity Review Law, Tenn. Code Ann. § § 4-29-101 to 4-29-236 (2005 & Supp. 2008), both the Judicial Evaluation Commission and the Judicial Selection Commission terminated on June 30, 2008. *Id*. § 4-29-229(46), (47) (Supp. 2008). On that date, both commissions entered a one-year wind-up period. *See* Tenn. Code Ann. § 4-29-112. At the end of that period, on June 30, 2009, both commissions will automatically expire and must "cease all activities" unless legislation providing for the commissions' continued existence is enacted before that date. In the event that the General Assembly does not act and both commissions automatically expire on June 30, 2009:

1. How will incumbent trial and appellate court judges stand for election who (a) were appointed on or after September 1, 2008, and choose to seek election on August 5, 2010, to the unexpired portion of the eight-year term or (b) are currently serving the remainder of an eight-year term and who seek reelection on August 7, 2014, to a full eight-year term?

2. How will vacancies occurring in the trial or appellate courts on or after July 1, 2009, be filled?

3. If an incumbent judge decides not to seek reelection at the August 7, 2014, election, how will that vacancy occurring on September 1, 2014, be filled?

OPINIONS

1. Because there would be no statutory mechanism in place for the election of appellate judges upon the expiration of the two commissions, there could not be an election for appellate court judges in either 2010 or 2014. By virtue of Article VII, §5, of the Tennessee Constitution, incumbent appellate court judges would hold over pending further action of the General Assembly to determine the manner of the election of such judges. On the other hand, expiration of the two commissions would not change the current system for electing trial court judges. Incumbent trial court judges either seeking election in 2010 to the unexpired portion of an eight-year term or reelection in 2014 to a full eight-year term could stand for election by the qualified voters of their districts in August of 2010 and 2014, respectively.

2. Vacancies occurring in the appellate courts on or after July 1, 2009, could not be filled because there would be no operative statutory procedure for the filling of vacancies after June 30, 2009. Furthermore, any vacancy occurring before July 1, 2009, on which the Judicial

Selection Commission had not completed its work by June 30 could not be filled. Vacancies occurring in the trial courts could only be filled at the next regular August election occurring more than 30 days after the vacancy arose. The provisions of current law directing the governor to appoint persons to fill trial court vacancies on an interim basis before the next regular August election would be inoperative, and, thus, no such appointments could occur.

3. If an incumbent appellate court judge decided not to seek reelection in 2014, there would be no operative statutory procedure to appoint a new judge. Accordingly, the incumbent appellate court judge would hold over in the office by virtue of Article VII, §5, of the Tennessee Constitution. If the incumbent appellate court judge did not desire to hold over, he could choose to resign his office. That action would create a vacancy. However, because there would be no operative statutory procedure for filling a judicial vacancy on the appellate courts, the vacancy could not be filled. By contrast, if an incumbent trial court judge decided not to seek reelection in 2014 and failed to take the steps necessary to qualify as a candidate for reelection, his successor would be elected at the August election to the eight-year term commencing September 1, 2014, by the qualified voters of the district.

ANALYSIS

1. The Tennessee Plan, codified at Tenn. Code Ann. §§ 17-4-101 to 17-4-201 (1994 & Supp. 2008), provides for the election and evaluation of appellate court judges and for the selection of persons to fill vacancies on the trial and appellate courts. The Plan establishes a seventeen-member Judicial Selection Commission as part of the judicial branch and charges it with the duty to select "three (3) persons whom the commission deems best qualified and available to fill the vacancy." Tenn. Code Ann. § 17-4-109. The governor is then given the authority to fill the vacancy by appointing one of the three persons nominated. With respect to an appellate court vacancy, but not a trial court vacancy, *see* Tenn. Code Ann. § 17-4-118, the governor can reject all three nominees. In that instance, the Commission is then required to submit three new nominees, and the governor must select one of these three new nominees to fill the appellate vacancy. Tenn. Code Ann. § 17-4-112(a).

The term of a judge thus appointed by the governor expires on August 31 after the next regular August election occurring more than thirty days after the vacancy occurs. Tenn. Code Ann. §§ 17-4-112(b), 17-4-118(b). In the case of a trial court judge so appointed, the voters of the judicial district at the next regular August election occurring more than thirty days after the vacancy occurs are to elect a candidate to fill the remainder of the unexpired term or a complete term. Tenn. Code Ann. § 17-4-118(e). Any incumbent appellate court judge who seeks election to fill the unexpired term of the office to which he or she was appointed is required to qualify by filing a written declaration of candidacy to fill the unexpired term with the state election commission by the appropriate qualifying deadline. Any incumbent appellate court judge who seeks election or reelection to a full term similarly must file a written declaration of candidacy. Tenn. Code Ann. §§ 17-4-114(a), 17-4-115(a).

Section 17-4-201 establishes a judicial evaluation program for appellate court judges, the purpose of which is "to assist the public in evaluating the performance of incumbent appellate

court judges." A twelve-member Judicial Evaluation Commission is established to perform the required evaluations and to make a recommendation either "for retention" or "against retention." Unless the Judicial Evaluation Commission makes a recommendation "against retention" of an incumbent appellate court judge, then the Plan provides that the judge shall be subject to a retention election only, assuming the judge has filed a timely declaration of candidacy. *See* Tenn. Code Ann. §§ 17-4-114(b) (Supp. 2008) and 17-4-115(b) (Supp. 2008). If, however, the Judicial Evaluation Commission makes a recommendation "against retention" of an incumbent appellate court judge who nevertheless has timely filed a declaration of candidacy, such office is to be filled by a contested election. *See* Tenn. Code Ann. §§ 17-4-114(c) (Supp. 2008) and 17-4-115(c) (Supp. 2008).

If the General Assembly takes no action to continue, restructure, or reestablish the Judicial Evaluation Commission and the Judicial Selection Commission prior to June 30, 2009, both commissions will statutorily expire under the provisions of the Governmental Entity Review Law. Because the commissions are key components of the Tennessee Plan, the expiration of the commissions would raise the question of the continued viability of the entire Plan.

The first question to be addressed is whether the "sunsetting" and subsequent "wind-up" of the two commissions would act to repeal the Tennessee Plan. In interpreting any statute, the most basic rule is to ascertain and give effect to the intention of the legislature as expressed in the statute. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808 (Tenn. 2007).

The General Assembly can repeal a statute in either of two ways: it can expressly repeal it by enacting repealing legislation, or it can enact new legislation so inconsistent with the statute that it is repealed by implication. Clearly, merely allowing the Judicial Evaluation Commission and the Judicial Selection Commission to expire does not expressly repeal the Plan.

Furthermore, the General Assembly's termination of the two commissions cannot be said to have effected an implied repeal of the Plan. In the first place, implied repeals are disfavored, *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995), and there is a presumption that statutes are not repealed by implication. *Still v. First Tennessee Bank, N.A.*, 900 S.W.2d 282, 284 (Tenn. 1995). Second, it is only where the terms of an earlier statute are completely irreconcilable with the provisions of a later enactment that the earlier statute can be said to have been repealed by implication. *Nichols v. Benco Plastics, Inc.*, 225 Tenn. 334, 469 S.W.2d 135, 137 (1971). "'One statute is not repugnant to another,' that is, in irreconcilable conflict therewith, 'unless they relate to the same subject *and are enacted for the same purpose*.'" *Chadrick v. State*, 175 Tenn. (11 Beeler) 680, 137 S.W.2d 284, 285 (1940) (quoting *State v. Collier*, 160 Tenn. (7 Smith) 403, 23 S.W.2d 897, 911 (1930) and adding emphasis). If the two commissions established by the Plan are allowed to expire on June 30, 2009, merely as a result of legislative inaction, without the enactment of new legislation affirmatively replacing or modifying the Plan, then there can be no implied repeal of the Plan in our view, because there has been no later enactment that is in irreconcilable conflict with the Plan.

Moreover, even if the expiration of the two commissions by operation of the "sunset" statute were somehow interpreted as amounting to the passage of a "new" law, there would be no implied repeal of the Plan. Although the old and "new" laws under that scenario might be said to relate to the same general subject—the filling of judicial vacancies and the election of judges—it could hardly be said that the enactments were for the same purpose. The purpose of the Tennessee Plan is recited in § 17-4-101 and quoted above. The purpose of the Tennessee Governmental Entity Review Law, §§ 4-29-101 to 4-29-236, on the other hand, is stated in § 4-29-102(b):

> It is the intent of the general assembly by this chapter to provide a responsible method to review state governmental entities to ensure that state governmental regulation is beneficial rather than detrimental to the public interest of the citizens of Tennessee.

In other words, the purpose of "sunsetting" the Judicial Selection Commission and the Judicial Evaluation Commission was to promote efficiency in state government, not to provide a method for the filling of judicial vacancies and the election of judges. Because the termination of two components of the Tennessee Plan under the "sunset" statute and the adoption of the Plan itself were not necessarily accomplished for the same purpose,[1] the presumption against an implied repeal would apply.

There being no repeal of the Tennessee Plan, express or implied, the issue that must then be addressed is whether the General Assembly could nevertheless have intended for the Plan to operate without the Judicial Selection Commission or the Judicial Evaluation Commission. Two factors lead us to the conclusion that it would not have intended that result.

In the first place, even a cursory examination of §§ 17-4-101 to 17-4-201 reveals that both the Judicial Selection Commission and the Judicial Evaluation Commission are inextricably woven into the statutory fabric. The very first statute in the scheme, § 17-4-101, setting forth the purpose of the entire act, appears to contemplate the Judicial Selection Commission as the linchpin. Subsection (a) declares that the purpose and intent is

> to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee, and to assist the electorate of Tennessee to elect the best qualified persons to the courts; to insulate the judges of the courts from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the courts by eliminating the necessity of political activities by appellate justices and judges; and to make the courts "nonpolitical."

Subsection (b) then states that

[1] Indeed, the events of the 2008 legislative session demonstrate the hazard of attempting to ascribe any unitary "legislative purpose" to the *absence* of action providing for the two commissions' continued existence. During the 2008 session, a bill was introduced that would have extended both commissions to June 30, 2012. House Bill 2769/Senate Bill 3098. While the House passed the bill, the Senate took no action on it.

> [t]he organizations authorized in this chapter to make nominations for members of the judicial selection commission are associations composed of lawyers who regularly practice in the trial and appellate courts and who, respectively, represent the prosecution and defense functions in criminal proceedings and the plaintiff and defense functions in civil proceedings, and who, therefore, from experience and observation are familiar with the best qualifications and characteristics of judges.

Clearly, this statute strongly indicates that it is through the Judicial Selection Commission and the Judicial Evaluation Commission that the purpose and intent of the act primarily are to be accomplished. Of the eighteen statutes currently in the scheme, seven relate exclusively to the membership of the Judicial Selection Commission (§§ 17-4-102 to 17-4-108, 17-4-111); one relates exclusively to reimbursement of expenses for the Judicial Selection Commission and the Judicial Evaluation Commission (§ 17-4-108); and one relates exclusively to the membership of the Judicial Evaluation Commission. (§ 17-4-201). Except for the two statutes that set forth the qualification of judicial nominees (§ 17-4-110) and provide for the administration of the statutory framework by the Administrative Office of the Courts (§ 17-4-117), the remaining statutes clearly contemplate action by either the Judicial Selection Commission or the Judicial Evaluation Commission or both (§ 17-4-109 (establishing procedure before the Judicial Selection Commission), § 17-4-112 (providing for filling of appellate judicial vacancy by Judicial Selection Commission), § 17-4-114 (providing, *inter alia*, for evaluation by Judicial Evaluation Commission of incumbent judge seeking to fill unexpired term and, following negative retention vote, filling of vacancy from persons nominated by Judicial Selection Commission), § 17-4-115 (providing, *inter alia*, for evaluation by Judicial Evaluation Commission of incumbent judge seeking election to full term and, following negative retention vote, filling of vacancy from persons nominated by Judicial Selection Commission), § 17-4-116 (providing for selection from persons nominated by Judicial Selection Commission to fill vacancy created by incumbent judge failing to seek reelection), § 17-4-118 (providing for filling of trial court vacancy from persons nominated by Judicial Selection Commission)). Thus, the statutory provisions demonstrate that the Judicial Selection Commission and the Judicial Evaluation Commission are critical to the operation of the statutory framework.

Although the Tennessee Plan contains a severability clause,[2] that clause does not demonstrate that the General Assembly intended for the Plan to operate without the two commissions. The severability clause states:

> If any provision of this act or of Chapter 942 of the Public Acts of 1994, as codified and amended, or the application thereof to any person or circumstance is

[2] The Tennessee Plan initially contained a "reverse" severability clause, which provided:

> If any provision of this act and Title 17, Chapter 4 or the application thereof to any person or circumstance is held invalid, then all provisions and applications of this act and Title 17, Chapter 4, are declared to be invalid and void.

1994 Tenn. Pub. Acts, ch. 942, § 23. This provision was repealed by 1999 Tenn. Pub. Acts, ch. 315, § 15.

> held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

1999 Tenn. Pub. Acts, ch. 315, § 16. Clearly, this provision is triggered only by a court's holding some provision of the Plan "invalid." A legislative decision to terminate critical components of the Plan is not the same thing. Moreover, even if it were the same thing, the clause plainly conditions severability on "other provisions or applications of the act which can be given effect without the invalid provision or application." But, as discussed above, the statutory provisions themselves demonstrate that the Judicial Selection Commission and the Judicial Evaluation Commission are critical to the operation of the entire Plan. The inescapable conclusion from this evidence is that the legislature did not intend for the Plan to operate without the Judicial Selection Commission and the Judicial Evaluation Commission.

In similar situations in which a "sunset" provision has terminated an agency or commission, but the legislation did not expressly repeal or effect an implied repeal of the existing statutory scheme, this Office has opined that the statutory scheme is temporarily suspended. In Op. Tenn. Att'y Gen. 82-1 (Jan. 5, 1982), this Office addressed the effect of the termination of the Public Service Commission under the Tennessee Governmental Entity Review Law and concluded that, in the event the Commission was terminated without any legislation transferring the jurisdiction of the Commission to another entity, "those industries which are presently regulated by the Public Service Commission would no longer be regulated with regard to purely intrastate commence." *Id*. at 2.

In Op. Tenn. Att'y Gen. 91-38 (Apr. 26, 1991), this Office addressed the effect of the termination of the Health Facilities Commission under the "sunset" law and concluded:

> It would be unrealistic and incorrect to conclude that in terminating the Health Facilities Commission, the legislature did not intend to also terminate or suspend the regulatory process provided in the Tennessee Health Planning and Resource Development Act, i.e., the certificate of need program. . . . Legislation concerning the termination of the Commission has been carefully and fully considered by the legislature. The Commission was created for the express purpose of administering the certificate of need program. The Commission and the certificate of need program are legally and factually inseparable, and it seems unlikely that by terminating the Commission, the legislature did not also intend to terminate, at least temporarily, the certificate of need program. In fact, the Governmental Entity Review law expressly requires the evaluation committee, in considering whether to terminate an entity, to consider the impact the termination would have on the regulatory functions of the particular entity. In conducting its review and in submitting its report recommending to extend the Commission for one year, the evaluation committee was apparently of the opinion that continued regulation was needed. Upon consideration by the full House Government Operations Committee, however, it was apparently determined that such continued regulation was not needed, as evidenced by the deferral, and ipso facto

> defeat, of the proposed legislation. We believe the legislative intent to deregulate must be given effect.
>
> We are aware of the well established rule that repeals and/or amendments of existing legislation by implication are disfavored by the law. We do not opine that the regulatory process and requirements of the Tennessee Health Planning and Resource Development Act have been impliedly repealed by the "sunset" termination of the Commission. We are of the opinion, however, that such regulatory provisions must necessarily be suspended and not enforced until such time as legislation is enacted either abolishing or transferring such regulatory functions.

Id. at 4-6 (internal citations and footnote omitted).

In Op. Tenn. Att'y Gen. 95-045 (May 1, 1995), the Office revisited its opinion in Op. Tenn. Att'y Gen. 82-1 concerning the effect of the "sunsetting" of the Public Service Commission. Although the earlier opinion was modified with respect to certain procedural aspects of the Tennessee Governmental Entity Review Law, the 1995 opinion adhered to the 1982 opinion's conclusion regarding the termination's effect upon utility regulation:

> This Office previously opined that if the PSC were terminated without any legislation transferring its functions and jurisdiction to another entity, then those utilities currently regulated by the PSC would not be subject to any regulation by the State. We concur with this aspect of opinion 82-001. Because only the PSC is vested with jurisdiction over utilities under T.C.A. §§ 65-1-116 and 65-4-117, its termination would leave those utilities unregulated by the State.

Id. at 5 (citation omitted).

Finally, in Op. Tenn. Att'y Gen. 98-045, this Office opined on the effect of the "sunsetting" of the Tennessee State Racing Commission. Relying on Op. Tenn. Att'y Gen. 91-38 and 95-045, the Office concluded:

> With respect to the Racing Commission, we also conclude that its regulatory functions will be suspended and unenforceable if it goes out of existence under the Sunset Law on June 30, 1998, without further legislation. . . . If the Racing Commission simply goes out of existence under the Sunset Law because the General Assembly takes no further legislative action, an outright repeal of the Racing Control Act will not be effected. Nevertheless, the Racing Commission and its intended regulation of pari-mutuel wagering on horse racing are legally and factually inseparable. If the General Assembly does not enact legislation to continue the Racing Commission beyond June 30, 1998, or to transfer its regulatory functions, then it is our opinion that the Legislature also intends to terminate its legalization of pari-mutuel betting under the Racing Control Act.

Id. at 5,7.

Likewise, with respect to the termination of the Judicial Selection Commission and the Judicial Evaluation Commission, the Tennessee Plan would not be repealed. However, because those entities and the scheme embodied by the Tennessee Plan are legally and factually inseparable, the Tennessee Plan simply would be suspended and unenforceable without further legislation.

The suspension of the Tennessee Plan would significantly impact the election of judges and the filling of judicial vacancies after June 30, 2009. Because the Plan would be suspended, not repealed, prior law repealed by the enactment of the Tennessee Plan would remain repealed. The Tennessee Plan specifically abolished the Appellate Court Nominating Commission, which under the preceding Modified Missouri Plan essentially had performed the functions assigned to the newly created Judicial Selection Commission; the Plan transferred all of the former commission's records to the new commission; and it expressly repealed Tenn. Code Ann. § 2-8-117, which provided for the results of the popular election of Supreme Court judges. *See* 1994 Tenn. Pub. Acts, ch. 942, §§ 21, 22. The enactment of the Tennessee Plan also repealed by implication the Modified Missouri Plan and any prior laws inconsistent with it. *See Delaney v. Thompson*, No. 01A01-9806-CH-00304, 1998 WL 398363, at *2 (Tenn. Ct. App. July 16, 1998) ("The passage of the . . . Tennessee Plan in 1994 carried with it the repeal of the pre-existing Modified Missouri Plan"), *reversed on other grounds*, 982 S.W.2d 857 (Tenn. 1998). *See generally State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995) (statute is repealed by implication if subsequent statute is in irreconcilable conflict).

With the Tennessee Plan suspended and the Plan having repealed explicitly and by implication all prior laws in conflict with it, there would be no statutory scheme in place for the election of appellate judges after June 30, 2009. Because the Plan would be suspended after June 30, 2009, none of its provisions would be operative after that date. Thus, for instance, after June 30, 2009, there would be no functioning Judicial Evaluation Commission that could make a recommendation "for retention" or "against retention" of an appellate court judge as required by Tenn. Code Ann. § 17-4-201(a). The failure of the Judicial Evaluation Commission to make a recommendation "against retention" because the Commission is defunct would not, however, trigger by default a retention election for that judge under either Tenn. Code Ann. §§ 17-4-114(c) or 17-4-115(c), because the Plan that provides for the retention election itself would be suspended. There is certainly nothing in the language or logic of the Plan to suggest that the General Assembly intended to permit retention elections for judicial officers without affording voters the benefit of prior evaluation of the candidates by the Judicial Evaluation Commission.[3]

Although the Tennessee Constitution clearly provides for the election of judges in Article VI, § 3 ("The Judges of the Supreme Court shall be elected by the qualified voters of the State.") and § 4 ("The 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."), these

[3] These evaluations are an important element of the General Assembly's purpose and intent in passing the Plan "to assist the electorate of Tennessee to elect the best qualified persons to the courts." Tenn. Code Ann. § 17-4-101(a). To that end, the Plan requires that judicial evaluations are available for public inspection and published in daily newspapers in six metropolitan areas across the state. Tenn. Code Ann. § 17-4-201(c).

provisions do not establish a procedure to conduct the elections thereby contemplated. As the Supreme Court concluded in *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973),

> [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, certification of results and the like. Such executory details can be provided either in the Constitution itself or left to the Legislature. They are entirely absent from Article 6, Section 3.

Id. at 487 (citation omitted). Such executory details are also absent from Article VI, §4. Thus, without action by the General Assembly, there would be no statutory procedure for the election of appellate judges after June 30, 2009.[4]

Thus, after June 30, 2009, there would be no statutory procedure in place for an election (and therefore, no election) either on August 5, 2010, for incumbent appellate court judges who were appointed after September 1, 2008, and who desire to seek election to the unexpired portion of the eight-year term, or on August 7, 2014, for incumbent appellate court judges who are currently serving the remainder of an eight-year term and who desire to seek reelection to a full eight-year term. Because Article VII, § 5, of the Constitution of Tennessee requires that "[e]very officer shall hold his office until his successor is elected or appointed, and qualified," incumbent appellate court judges would hold over pending further action of the General Assembly to determine the manner of the election of judges, or until such judge chose to resign from office.

A different result obtains with respect to incumbent trial court judges. Section 17-1-103, Tennessee Code Annotated, provides that "[t]he judges of the supreme court, court of appeals and court of criminal appeals are elected by the qualified voters of the state at large; the chancellors, circuit judges, and judges of special courts by the qualified voters of the respective judicial districts, and special judicial districts." This code section was impliedly repealed by the Tennessee Plan only to the extent that it was inconsistent with the Plan. Because the Tennessee Plan did not change the traditional method of election of "chancellors, circuit judges, and judges of special courts," § 17-1-103 would remain operative with respect to the election of those judges, despite the suspension of the Plan. Thus, if the General Assembly were to fail to act and the Tennessee Plan is suspended, those persons seeking election as trial court judges on August 5, 2010, for the unexpired portion of the eight-year term or reelection on August 7, 2014, for the full eight-year term commencing September 1, 2014, would be elected by the qualified voters of

[4]While it has been held that under certain circumstances the Tennessee Plan creates a property interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, *see Lillard v. Burson*, 933 F.Supp. 698, 703 (W.D. Tenn. 1996), any such property interest would not survive the suspension of the Plan. Protected property interests are normally not created by the Constitution itself, but instead by an independent source such as a state statute. *Id.* at 702 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and *Bush v. Johnson*, 607 F. Supp. 96 (E.D. Tenn. 1985)). Thus, to the extent that the Tennessee Plan creates a property interest, the suspension of the statutory scheme would extinguish that interest.

their respective districts in accordance with Article VI, § 4, Tenn. Code Ann. § 17-1-103, and the general election laws contained in Title 2, Tennessee Code Annotated.

2. The ability to fill judicial vacancies after June 30, 2009, would also be significantly affected by the suspension of the Plan. The procedure for the filling of a judicial vacancy[5] is provided for in Tenn. Code Ann. §§ 17-1-301 (Supp. 2008) and 17-4-118. Section 17-1-301 provides:

> (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 office 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 office of a judge of the supreme court, then the vacancy must be filled in accordance with chapter 4 of this title

[5]Section 8-48-101, Tennessee Code Annotated (2002), which sets forth the recognized causes of vacancies, provides:

> Any office in this state is vacated by:
> (1) The death of the incumbent;
> (2) The incumbent's resignation, when permitted by law;
> (3) Ceasing to be a resident of the state, or of the district, circuit, or county for which the incumbent was elected or appointed;
> (4) The decision of a competent tribunal, declaring the election or appointment void or the office vacant;
> (5) An act of the general assembly abridging the term of office, where it is not fixed by the constitution;
> (6) The sentence of the incumbent, by any competent tribunal in this or any other state, to the penitentiary, subject to restoration if the judgment is reversed, but not if the incumbent is pardoned; or
> (7) Due adjudication of the incumbent's insanity.

A vacancy also occurs under the Tennessee Plan when an incumbent appellate judge fails to file a declaration of candidacy or withdraws as a candidate. Tenn. Code Ann. § 17-4-116(a). This language would not be operative if the Plan has been suspended. The effect of an incumbent appellate judge not seeking reelection is discussed in our analysis of question three.

> and the requirements of article VI, section 2 of the constitution of the state of Tennessee.

Section 17-4-118 provides:

> (a) After September 1, 1994, when a vacancy occurs in the office of a state trial court judge by death, resignation or otherwise, the Governor shall fill the vacancy by appointing the [sic] one (1) of the three (3) persons nominated by the judicial selection commission.
>
> (b) The term of a judge appointed under this section shall expire on August 31 after the next regular August election recurring more than thirty (30) days after the vacancy occurs.
>
> (c) The judicial selection commission shall follow the process established in § 17-4-109 except that the commission shall hold a public meeting in the judicial district from which such vacancy is to be filled.
>
> (d) If the judicial district is one (1) of the five (5) smallest judicial districts according to the 1990 federal census or any subsequent federal census, the judicial selection commission may submit two (2) names to the governor.
>
> (e) At the next regular August election recurring more than thirty (30) days after the vacancy occurs, the electorate shall elect a candidate to fill the remainder of the unexpired term or a complete term, as provided in the general election law in title 2.

Together, these statutes provide that vacancies are to be filled by the governor's selection of persons nominated by the Judicial Selection Commission. Thus, as in the case of the election of appellate court judges, with the Tennessee Plan suspended and the Plan having repealed all prior laws in conflict with it, there will be no statutory procedure in place for filling appellate judicial vacancies after June 30, 2009. Although the Constitution provides for the filling of vacancies in general and judicial vacancies in particular, these provisions do not contain any executory details. Article VII, § 4, merely provides 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." With respect to judicial vacancies, Article VII, § 5, simply provides:

> No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed, and qualified. No 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.

Thus, absent action by the General Assembly, there will be no statutory procedure for filling appellate court vacancies after June 30, 2009.

With respect to trial court vacancies, § 17-1-301(a) plainly provides that, "[i]f 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." This provision is not inconsistent with the Tennessee Plan. Indeed, § 17-4-118(e), one of the provisions of the Plan, provides that, "[a]t the next regular August election recurring more than thirty (30) days after the vacancy occurs, the electorate shall elect a candidate to fill the remainder of the unexpired term or a complete term, as provided in the general election law of title 2." Thus, in accordance with these statutes, absent further action by the General Assembly, a trial court vacancy occurring after June 30, 2009, must be filled by the qualified voters at the next August election occurring more than 30 days after the vacancy arises. However, it must be noted that the portion of § 17-1-301(a) that authorizes the governor to appoint a person to fill a trial court vacancy until August 31 following the election would be inoperative after June 30, 2009. Section 17-1-301(a) provides that such an appointment be "[i]n accordance with § 17-4-118." But § 17-4-118(a) provides that "the Governor shall fill the vacancy by appointing the [sic] one (1) of the three (3) persons nominated by the judicial selection commission." Because after June 30, 2009, the Judicial Selection Commission will be suspended, the gubernatorial appointment procedure contemplated by § 17-1-301(a) and § 17-4-118 will be inoperative.

There are several statutory provisions providing for the appointment of special judges.[6] These are Tenn. Code Ann. § 17-2-102 (allowing the governor to appoint lawyers to replace disqualified supreme court judges); Tenn. Code Ann. § 17-2-104 (allowing the governor to commission persons learned in law during the illness of a supreme court judge); Tenn. Code Ann. § 17-2-105 (allowing the governor to appoint replacement judges on intermediate appellate courts in case of incompetence, sickness or other disability); Tenn. Code Ann. § 17-2-107 (allowing the governor to appoint replacement for disabled general sessions court judges and to permit sitting by interchange); Tenn. Code Ann. § 17-2-109 (allowing the chief justice of the supreme court to assign retired judges to service); Tenn. Code Ann. § 17-2-110 (allowing the chief justice to assign judges and chancellors outside their district); Tenn. Code Ann. § 17-2-115 (allowing the governor to appoint a qualified person to serve as judge or chancellor in cases of incompetency of incumbent); Tenn. Code Ann. § 17-2-116 (allowing the governor to appoint a special judge to replace a disabled judge or chancellor); Tenn. Code Ann. § 17-2-118 (allowing a state or county trial court judge of record to appoint a substitute judge when the regular judge is unable to hold court by reason of illness, physical incapacitation, vacation, or absence from the city or judicial district on a matter related to the judge's judicial office); Tenn. Code Ann. § 17-2-119 (allowing the governor to appoint a temporary judge, chancellor, or district attorney in an election contest involving any of those officers); Tenn. Code Ann. § 17-2-121 (allowing litigants

[6] None of these statutes would be affected by allowing the Judicial Selection Commission or the Judicial Evaluation Commission to sunset.

to select a retired judge in certain complex civil cases); and Tenn. Code Ann. § 8-48-205 (allowing the governor to appoint a temporary replacement for a judge inducted into the military service). However, none of these provisions could serve as a vehicle for filling a vacancy as defined in Tenn. Code Ann. § 8-48-101, as these provisions do not contemplate a vacancy under that statute, but only a temporary disability, disqualification, or circumstance affecting the performance of the incumbent judge.

Article III, § 14, of the Constitution of Tennessee authorizes the governor to make certain temporary appointments:

> When any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during the recess, die, or the office, by the expiration of the term, or by other means, become vacant, the Governor shall have the power to fill such vacancy by granting a temporary commission, which shall expire at the end of the next session of the Legislature.

However, this provision does not provide a vehicle for filling judicial vacancies because a judge is not an officer, "the right of whose appointment is by this Constitution vested in the General Assembly." The only officers whose appointment is vested in the General Assembly by the Constitution are the secretary of state, the comptroller, and the treasurer. *See* Art. III, § 17; Art. VII, § 3.

3. Because the Tennessee Plan would be suspended after June 30, 2009, none of its provisions would be operative after that date. This would include § 17-4-116(a), which provides that "[i]f an incumbent appellate court judge, whether appointed or elected, fails to file a declaration of candidacy for election to an unexpired term or to a full eight (8) year term within the prescribed time, or if such judge withdraws as a candidate after receiving a recommendation 'for retention' from the judicial evaluation commission and filing the required declaration of candidacy, then a vacancy is created in the office at the expiration of the incumbent's term effective September 1." If an incumbent appellate court judge decided not to seek reelection at the August 7, 2014, election, that judge would hold over past the expiration of the eight-year term on August 31, 2014, by virtue of Article VII, § 5, of the Tennessee Constitution, which provides that "[e]very officer shall hold his office until his successor is elected or appointed, and qualified." If the incumbent appellate court judge did not desire to hold over, he could choose to resign his office, and that action would create a vacancy. *See* Tenn. Code Ann. § 8-48-101(2). However, for the reasons discussed above in Section 2, that vacancy could not be filled.

With respect to an incumbent trial court judge who decides not to seek reelection at the August 7, 2014, election, a different result obtains. Because, as discussed in Section 1, above, the Tennessee Plan did not change the traditional method of election of "chancellors, circuit judges, and judges of special courts," Tenn. Code Ann. § 17-1-103 would remain operative with respect to the election of those judges. If the incumbent trial court judge failed to take the steps necessary to qualify as a candidate for reelection, his successor would be elected in August to the

eight-year term commencing September 1, 2014, by the qualified voters of the district in accordance with Article VI, § 4, Tenn. Code Ann. § 17-1-103, and the general election laws contained in Title 2, Tennessee Code Annotated.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

GORDON W. SMITH
Associate Solicitor General

Requested by:

The Honorable Doug Overbey
State Senator
4 Legislative Plaza
Nashville, Tennessee 37243-0208

The Honorable Dewayne Bunch
State Senator
9 Legislative Plaza
Nashville, Tennessee 37243-0208

The Honorable Frank Niceley
State Representative
113 War Memorial Building
Nashville, Tennessee 37243-0117

The Honorable Beth Harwell
State Representative
107 War Memorial Building
Nashville, Tennessee 37243-0156