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Opinion No. 09-74

Constitutionality of Retention Election for Governor and State Legislators

QUESTIONS

1. Would a "yes-no" retention election for governor be constitutional?

2. Would a "yes-no" retention election for state senators and representatives be constitutional?

OPINIONS

1. Based on the provisions of Article III of the Tennessee Constitution governing gubernatorial elections, a "yes-no" retention election for governor would not be constitutional.

2. Although the issue is not without doubt, a court could construe the provisions of Article II of the Tennessee Constitution to distinguish legislative elections from judicial elections so that a "yes-no" retention election for legislators would be unconstitutional.

ANALYSIS

In *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (1975), the Tennessee Supreme Court addressed the issue of whether "yes-no" retention elections for incumbent appellate court judges as provided by statute were constitutional. At issue were the provisions of the Tennessee Constitution in Article VI, §§ 3 and 4, which require that the judges of the Supreme Court and of the inferior courts "shall be elected by the qualified voters," and Article VII, §5, which specifies when "[e]lections" for judicial and other civil officers shall be held, the terms of each officer so "elected," the term of office of the governor after "election," a limitation of the availability of appointment or "election" to fill a vacancy, the holding of an office until a successor is "elected" and qualified, a prohibition of a special "election" to fill a vacancy in the office of judge or district attorney, and the filling of such a vacancy at the next biennial "election."

The Court concluded that, because the Constitution did not define the words, "elect," "election," or "elected," and because the Constitution elsewhere denominated similar methods of ratification, *i.e.*, referenda, as elections, retention elections for incumbent appellate court judges were not unconstitutional. The Court stated that this result was "particularly the case" because Article VII, §4, of the Tennessee Constitution—which provides that "[t]he election of all officers, and the filling of all vacancies not otherwise directed or provided by this Constitution,

shall be made in such manner as the Legislature shall direct"—"reposes wide discretion in the Legislature with respect to elections and the filling of vacancies." 496 S.W.2d at 489. This decision holding judicial retention elections to be constitutional was affirmed in *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331 (Tenn. 1996).

Under the rule of stare decisis, when a principle of law has been established by a court of competent jurisdiction, it becomes settled and binding upon the courts and should be followed in similar cases. *Staten v. State*, 191 Tenn. (27 Beeler) 157, 159, 232 S.W.2d 18, 19 (1950); *see also McCulley v. State*, 102 Tenn. (18 Pickle) 509, 532, 53 S.W. 134, 139 (1899) (rule of stare decisis is peculiarly applicable in the construction of constitutions). To resolve these questions, we must consider whether the election of governors, state senators, and state representatives are sufficiently similar to judicial elections to invoke the doctrine of stare decisis and whether other constitutional provisions command a different result.

1. With respect to gubernatorial elections, Article III, § 4, provides that "[t]he governor shall be elected for four years and until a successor is elected and qualified." Article III, §2, specifies how gubernatorial election returns are reported and a winner determined:

> The Governor shall be chosen by the electors of the members of the General Assembly, at the time and places where they shall respectively vote for the members thereof. The returns of every election for Governor shall be sealed up, and transmitted to the seat of Government, by the returning officers, directed to the Speaker of the Senate, who shall open and publish them in the presence of a majority of the members of each House of the General Assembly. *The person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, one of them shall be chosen Governor by joint vote of both Houses of the General Assembly. Contested elections for governor shall be determined by both Houses of the General Assembly, in such manner as shall be prescribed by law.*

(emphasis added). Although these provisions do not define the words "elected," "election," or "elections," the italicized language quoted clearly contemplates a popular election involving two or more persons. A "yes-no" retention election limited to approval or disapproval of the incumbent would be incompatible with this provision. Accordingly, it is the opinion of this office that a "yes-no" retention election for governor would be unconstitutional.

2. Constitutional provisions pertinent to the election of legislators are contained in Article II, §§ 3, 7, and 15. Section 3 provides (emphasis added):

> The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, *both dependent on the people*. Representatives shall hold office for two years and Senators for four years from the day of the general election, except that the Speaker of the Senate and the speaker of the House of Representatives, each shall hold his office as

> speaker for two years or until his successor is elected and qualified, provided however, that in the first general election after adoption of this amendment Senators elected in districts designated by even numbers shall be elected for four years and those elected in districts designated by odd numbers shall be elected for two years. In a county having more than one senatorial district, the districts shall be numbered consecutively.

Section 7 provides:

> The first election for Senators and Representatives shall be held on the second Tuesday in November, one thousand eight hundred and seventy; and forever thereafter, elections for members of the General Assembly shall be held once in two years, on the first Tuesday after the first Monday in November. Said elections shall terminate the same day.

Section 15, which prescribes the procedure for filling legislative vacancies, provides:

> When the seat of any member of either House becomes vacant, the vacancy shall be filled as follows:
>
> > (a) When twelve months or more remain prior to the next general election for legislators, a successor shall be elected by the qualified voters of the district represented, and such successor shall serve the remainder of the original term. The election shall be held within such time as provided by law. The legislative body of the replaced legislator's county of residence at the time of his or her election may elect an interim successor to serve until the election.
> >
> > (b) When less than twelve months remain prior to the next general election for legislators, a successor shall be elected by the legislative body of the replaced legislator's county of residence at the time of his or her election. The term of any Senator so elected shall expire at the next general election for legislators, at which election a successor shall be elected.
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> > (c) Only a qualified voter of the district represented shall be eligible to succeed to the vacant seat.

None of these provisions or any other provision of the Constitution further defines "general election," "elected," "election," "elections," or "elect."

However, a court could distinguish the concept of "election" of legislators under Article II from the interpretation of "election" of judges adopted by the Tennessee Supreme Court in *Higgins*. As the Court notes in *Higgins*, Article VII, § 4, provides that elections of all officers and filling of all vacancies not otherwise provided by the constitution "shall be made in such

manner as the Legislature shall direct" and thereby "reposes wide discretion in the Legislature with respect to elections and the filling of vacancies." 496 S.W.2d at 489. Article II could be read to narrow this "wide discretion" with respect to elections to the General Assembly.[1] Article II, § 3, states that the Senate and House of Representatives are "both dependent on the people"; no similar language is used in Article VII to describe the judicial branch. Accordingly, one commentator has suggested that the wording of Article II, § 3, arguably "implies a different, more democratic form of election" than the wording of Article VII, § 4.[2] One of the stated purposes of adopting retention elections for the judiciary was "to insulate the justices and judges of said courts from political influence and pressure," *Higgins*, 496 S.W.2d at 488 (quoting 1971 Public Acts Chapter 198). A court could determine that insulation of members of the General Assembly "from political influence and pressure" by the use of retention elections would be inconsistent with that body's being "dependent on the people" and therefore unconstitutional.

Furthermore, for institutional reasons, a court might be inclined to interpret the constitution as granting less discretion to the legislature in setting the rules governing the election of its own members than in setting the rules for the election of the judicial branch. *Cf. Miller v. Cunningham*, 512 F.3d 98, 103 (4th Cir. 2007) (denial of petition for reh'g en banc) (Wilkinson, C.J., dissenting) (arguing that election statutes that facially discriminate in favor of existing officeholders should be unconstitutional, "at least when state legislators are passing laws dealing with their own re-election prospects").

While none of these arguments compels the conclusion that retention elections could not be used to reelect legislators, they do form a solid basis on which a court could distinguish the result reached by the Supreme Court in *Higgins* and find retention elections to be unconstitutional as applied to membership in the General Assembly.

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[1] Article II clearly narrows the "wide discretion" given to the General Assembly by Article VII with respect to filling vacancies, as Article II, § 15, sets out a detailed process for filling legislative vacancies.

[2] Brian T. Fitzpatrick, *Elections as Appointment: The Tennessee Plan Reconsidered*, 75 Tenn. L. Rev. 473, 493 (2008). *But see* Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 Tenn. L. Rev. 501, 529 (2008) (asserting as a general proposition that holding retention elections for governor or any other elected office in Tennessee would not be unconstitutional).

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