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

May 29, 2009

Opinion No. 09-103

Constitutionality of legislation prohibiting campaign contributions by constitutional officers

QUESTIONS

Whether the language contained in Section 5, subsection (a), of the House State and Local Government Committee amendment number one to HB 198 is constitutional.

OPINION

We believe that a court would uphold this restriction on the political activities of the constitutional officers; however, we think that the amendment should contain an explicit statement making it clear that these officials are not prohibited from exercising their right to vote or from expressing their views as private citizens.

ANALYSIS

You have asked whether the language contained in Section 5, subsection (a), of the House State and Local Government Committee amendment number one to HB 198 is constitutional (hereinafter referred to as "Section 5(a)"). Section 5(a) would amend Chapter 10 of Title 2 by adding the following new section:

> (a) The secretary of state, comptroller of the treasury and the state treasurer shall not make campaign contributions to any candidate for general assembly or governor.
>
> (b) The secretary of state, comptroller of the treasury and the state treasurer shall not conduct a fundraiser for the benefit of any candidate for general assembly or governor.

This Office has previously opined that proposed legislation prohibiting the three constitutional officers (secretary of state, comptroller and treasurer) from serving as an officer of a committee which must file a report under the Campaign Financial Disclosure Act and from soliciting funds on behalf of any member of the General Assembly would be constitutional. *See* Op. Tenn. Att'y Gen. 90-41 (March 27, 1990) (copy attached). This Office has further opined that proposed legislation prohibiting the three constitutional officers from making "campaign contributions in support of or in opposition to any candidate for general assembly or participat[ing] in any way in any election campaign for any candidate for general assembly" was constitutionally defensible; however, we noted that such legislation would be more defensible if it contained an explicit statement making it clear that these officials are not prohibited from "full participation in political decisions at the ballot box." *See* Op. Tenn. Att'y Gen. 07-58 (April 25, 2007) (copy attached).

Our previous opinions relied upon a line of cases in which the United States Supreme Court had held that governments may impose significant restrictions upon the political activities of their officers and employees that could not be placed upon the citizenry at large, provided that such restrictions are, of course, tailored to serve a compelling interest of the government. *See United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 830 (1973). We further noted that, since these decisions in *Mitchell*, *National Association* and *Broadrick*, both state and federal courts have upheld a number of statutes, ordinances and regulations regulating the political activity of state, county and city government employees. *See International Brotherhood of Electrical Workers v. St. Louis County*, 117 F.Supp.2d 922 (E.D. Mo. 2000) and cases cited therein. We specifically noted that the Sixth Circuit Court of Appeals had upheld the constitutionality of a city ordinance that prohibited city employees from soliciting political campaign contributions or from engaging in or actively participating in any city council election or city political campaign. *See Randall v. City of Cookeville*, 991 F.2d 796 (6th Cir. 1993).

In our previous opinions, the Office determined that, due to the nature of the responsibilities of the three constitutional officers and the fact that they are elected by the General Assembly, the involvement of these officials in the campaigns of a member of the General Assembly could be asserted as giving rise to a public perception of impropriety. The Office further concluded that the need to avoid such a perception constituted a sufficiently compelling interest to support the narrow limitations on political activity proposed by the bill in question. As discussed above, research on developments since the release of our earlier opinions has not disclosed any reason to change this conclusion. Thus, consistent with our previous opinions, the proposed language of Section 5(a) prohibiting the three constitutional officers from making campaign contributions to or conducting fundraisers on behalf of candidates for the General Assembly is constitutionally defensible.

The language of Section 5(a) also extends the prohibition on campaign contributions and fundraisers by the constitutional officers to candidates for governor. Thus, there is an issue of whether there is a compelling state interest with respect to the involvement of these state officials in the campaigns of gubernatorial candidates. These officials all have statutory duties

that can have a significant impact upon the governor and candidates for governor. For example, as we noted in Op. 07-58, the secretary of state is required by statute to appoint the coordinator of elections, who shall serve at the pleasure of the secretary of state and for such compensation as the secretary of state determines. *See* Tenn. Code Ann. § 2-11-201(a). The state coordinator of election is then charged with, among other things, the duty of generally supervising all elections, advising election commissions, primary boards and administrators of election as to the proper methods of performing their duties and authoritatively interpreting the election laws for all persons administering them. *See* Tenn. Code Ann. § 2-11-202(a). Tenn. Code Ann. § 8-4-110(b) provides that, if during the course of an audit, the comptroller finds evidence of improper transactions or of incompetence in keeping accounts or in handling funds or of any improper practice of financial administration, the comptroller shall report the same to the governor immediately. Pursuant to Tenn. Code Ann. § 8-5-111, the state treasurer is required to provide to the governor, at least ten (10) days before the meeting of the general assembly, an exact statement of the balance in the state treasury to the credit of the state, with a summary of the receipts and payments of the state treasury during the two (2) preceding years. Finally, under the provisions of Tenn. Code Ann. § 8-1-107, the secretary of state and comptroller are, respectively, in the line of succession for the office of governor.

In light of these and other duties of these public officials, we think that their involvement in the campaigns of gubernatorial candidates could also be asserted to give rise to a public perception of impropriety. Accordingly, the need to avoid such a public perception would similarly constitute a sufficiently compelling state interest to otherwise support the prohibition on the political activities of the three constitutional officers set forth in Section 5(a) with respect to candidates for the General Assembly and for governor. However, as we stated in Op. 07-58, we think the prohibitions contained in Section 5(a) would be more constitutionally defensible if that section contained an explicit statement making it clear that these officials are not prohibited from exercising their right to vote or from expressing their views as private citizens.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Senior Counsel

Requested by:

The Honorable Brian Kelsey
State Representative
110 War Memorial Building
Nashville, TN 37243-0183