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Opinion No. 10-67

Submission by Private Entities of Lists for Appointments to State Boards and Agencies

QUESTION

Is it constitutionally suspect for the General Assembly to delegate the Governor's appointing authority to a private entity for the purpose of submitting lists from which the Governor would appoint members of a state licensing board or agency?

OPINION

As this Office has previously opined, requiring the Governor to make appointments to a state board or agency from a list of names submitted by a private entity does not violate the doctrine of separation of powers or otherwise violate the Tennessee Constitution.

ANALYSIS

Various Tennessee statutes require the Governor to appoint the members of certain state boards and agencies from lists of names submitted by one or more private entities. For example, Tenn. Code Ann. § 68-29-109 provides that the Governor "shall appoint" the members of the Tennessee Medical Laboratory Board from lists submitted by various organizations listed at subsection (d), including the Tennessee Medical Association and the Tennessee Hospital Association. Likewise, Tenn. Code Ann. § 63-16-102 provides that the members of the Board of Examiners for nursing home administrators "shall be appointed" by the Governor from lists submitted by the Tennessee Hospital Association, the Tennessee Health Care Association, and other organizations.

The instant question is whether this amounts to an unconstitutional delegation of the Governor's appointing authority. But, in fact, it is not a delegation of that authority, since the Governor retains the power to appoint board members. Thus, the thrust of the inquiry is whether the Governor's authority may be so restricted. The Tennessee Constitution, however, does not address such appointing authority. As a result, the General Assembly may vest that authority as it chooses. Whether such appointing authority could be vested exclusively in a private entity or organization is not before us, since the Governor retains the ultimate appointing authority under all of the statutory schemes at issue. This analysis is consistent with the thorough and enduring

interpretation in *Richardson v. Young*, 122 Tenn. 471, 125 S.W. 664 (1909), of the manner in which the Tennessee Constitution distributes the appointment authority between the General Assembly and the Governor.

In Opinion No. 83-458, this Office opined that a similar system established by Tenn. Code Ann. § 63-7-202 does not violate the doctrine of separation of powers or otherwise violate the Tennessee Constitution. This section requires the Governor to appoint members of the Tennessee Board of Nursing from a list of names submitted by the Tennessee State Nurses' Association, provided that the names are submitted at least forty-five days prior to the expiration of the departing member's term of office. The opinion states:

> This office has previously opined[1] that statutory provisions which require the Governor to appoint members to administrative state agencies from lists submitted by private professional or trade associations are not unconstitutional. . . . Although the Tennessee appellate courts have not ruled on the validity of such provisions, courts in other jurisdictions have upheld such provisions.
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> The majority of cases in other jurisdictions have held that statutes similar to T.C.A. § 63-7-202 do not confer a special "privilege" or right upon an association but rather confer a duty from which the general public benefits. Thus, such provisions would not violate Article XI, § 8 of the Tennessee Constitution.
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> The majority of cases have also held that these statutes are not a violation of the separation of powers doctrine. Unless the state constitution specifically vests the governor with authority to appoint executive officers, the cases have held that the legislature may establish the method to make official appointments. The Tennessee Supreme Court has held that the governor is not vested with an inherent power to appoint state officials in the executive branch. *Richardson v. Young*, 122 Tenn. 471, 125 S.W. 664 (1909). Therefore, it is the opinion of this office that T.C.A. § 63-7-202 is not a violation of the separation of powers.

Op. Tenn. Att'y Gen. 83-458 (Oct. 26, 1983). The Tennessee Supreme Court has twice upheld a similar system used to appoint members of the Tennessee Motor Vehicle Commission, all of whom are "to be selected and appointed by the governor from a list of qualified persons furnished by the Tennessee Automotive Association." Tenn. Code Ann. § 55-17-103(a). In *Ford Motor Co. v. Pace*, 335 S.W.2d 360 (Tenn. 1960), the Court held that this system did not violate Article 1, Section 8; Article 1, Section 17; or Article 6, Section 11 of the Tennessee Constitution. *Id.* at 367 (citing *Prosterman v. Tennessee State Bd. of Dental Examiners*, 73 S.W.2d 687 (Tenn. 1934) (upholding similar provision for Tennessee State Board of Dental Examiners)). Although some decisions from other States have held this type of system to be unconstitutional, the predominant view seems to be that such arrangements do not unconstitutionally delegate or restrict the appointment authority. The decisions from those state courts which interpret the doctrine of separation of powers similarly to *Richardson v. Young* are particularly inclined to

[1] This Office has been unable to identify or locate the earlier opinion referred to here.

uphold these sorts of provisions. *See* Annot., *Validity of Delegation to Private Persons or Organizations of Power to Appoint or Nominate to Public Office*, 97 A.L.R.2d 361 (1964).

In *General Motors Corp. v. Capital Chevrolet Co*., 645 S.W.2d 230 (Tenn. 1983), the Court quoted without criticism the discussion in *Ford Motor Co*. The Court noted that "[t]here is no requirement that the Governor accept any particular nominee, or that he accept an original list submitted." *Id.* at 236. Accordingly, it appears that although a requirement that the Governor "shall" appoint the members of a board or agency from a list submitted by a private organization would be permissible, a provision allowing additional discretion on the Governor's part, such as changing "shall" to "may," would further shield the system of appointments from constitutional challenge.

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