STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 27, 2015

Opinion No. 15-28

Appointment of Appellate Court Judges Pursuant to "Amendment 2" to Article VI, Section 3, of the Tennessee Constitution

Question

Article VI, Section 3, of the Tennessee Constitution, as recently amended, authorizes the Tennessee Legislature "to prescribe such provisions as may be necessary to carry out" Section 3. If the General Assembly does not prescribe any such provisions, would the Governor nevertheless be able to appoint appellate court judges pursuant to Article VI, Section 3?

Opinion

Yes.

ANALYSIS

In the November 4, 2014, general election the voters of Tennessee ratified "Amendment 2," which changes Article VI, Section 3, of the Tennessee Constitution by deleting the first two sentences of Section 3 and replacing them with the following three sentences:[1]

> [1] Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state.
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> [2] Confirmation by default occurs if the Legislature fails to reject an appointee within sixty calendar days of either the date of appointment, if made during the annual legislative session, or the convening date of the next annual legislative session, if made out of session.

[1] The last two sentences of Article VI, Section 3, were unchanged by Amendment 2. Before the ratification of Amendment 2, Article VI, Section 3, provided as follows:

> The Judges of the Supreme Court shall be elected by the qualified voters of the State. The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. Every Judge of the Supreme Court shall be thirty-five years of age, and shall before his election have been a resident of the State for five years. His term of service shall be eight years.

> [3] The Legislature is authorized to prescribe such provisions as may be necessary to carry out Sections two and three of this article.

As amended, Article VI, Section 3, (referred to here as "Amendment 2") provides for three separate processes related to the selection of appellate judges. The first is the appointment process for filling appellate judicial vacancies. Control of that process is vested in the Governor. The second is the confirmation process for appellate judges appointed by the Governor. Management of that process lies with the Legislature. The third is the election process for incumbent appellate judges. Amendment 2 gives the qualified voters of Tennessee the right to elect those judges in a retention election.

Whether Amendment 2 requires the Legislature to enact or adopt any particular provision as a prerequisite to the Governor's appointment of appellate judges is a question of interpretation of the language of Amendment 2. Interpretation of the language of Tennessee Constitution is governed by certain long-standing principles. Words in the Constitution are given their plain, ordinary, and inherent meaning. Courts construe constitutional provisions as written without reading any ambiguities into them. When a provision clearly means one thing, courts will not give it another meaning. Courts must presume that the language in the Constitution has been used with sufficient precision to convey the intent of those who framed and adopted the language. *State ex rel. Sonnenburg v. Gaia*, 717 S.W.2d 883, 885 (Tenn. 1986). Since constitutional provisions must be taken literally unless the language is ambiguous, there is no need to resort to other means or rules of interpretation when the words are free from doubt and express plainly and clearly the sense of the framers. *Shelby County v. Hale*, 200 Tenn. 503, 292 S.W.2d 745, 748 (1956). Constitutional provisions will not be read to conflict with one another; rather, they must be harmonized and construed to make every word operative and effective and to render no word idle or meaningless. *Id.* at 748-49.

The Amendment 2 language pertinent to the question that has been asked is not ambiguous. The first sentence of Amendment 2 provides that Tennessee's appellate judges "shall be appointed by the governor," either for a full term or to fill a vacancy.[2] Appointment, moreover, is "at the discretion of the governor," which perforce includes discretion in both the appointment process and the choice of appointee.[3] Once appointed, an appellate judge who wishes to serve an additional term must stand for election in a state-wide retention election.

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[2] This clause is to be read in conjunction with Article VII, Section 5, of the Tennessee Constitution, which provides that "[n]o appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term." In the context of Article VII, Section 5, there is a "vacancy" in any judicial office without an incumbent, so that an appointment may be made to fill an office for the first time or to fill a preexisting office in which there is no incumbent. *Conger v. Roy*, 267 S.W. 122, 125 (Tenn. 1924).

[3] After ratification of Amendment 2, Governor Haslam exercised that discretion to establish the appointment process he presently intends to follow. Executive Order No. 41 (issued on Nov. 6, 2014) creates the Governor's Council for Judicial Appointments and sets out an appointment process which, in essence, calls for the Council to furnish the Governor with a slate of nominees for any given vacancy or impending vacancy on an appellate court and then calls for the Governor to fill that appellate court vacancy by appointing one of those nominees to the vacant position. The Executive Order includes deadlines for various steps in the appointment process. If the Council does not furnish the required panel or panels of nominees within the specified time limits, the Governor may fill the vacancy by appointing any qualified person to the position.

According to the plain, ordinary, inherent meaning of this first sentence of Amendment 2, the Governor is required to ("shall") make judicial appointments and is alone vested with discretion as to the process for making those appointments. *Ipso facto*, the Legislature may not prescribe any provision that would prohibit the Governor from fulfilling his constitutionally mandated duty to make an appointment and the Legislature can have no say in an appointment process that lies within the discretion of the Governor.

The Governor's constitutionally mandated responsibility to appoint appellate judges and his constitutionally vested control over the appointment process are stand-alone and self-executing. No "enabling" legislation is required—or permitted. The Legislature may neither prohibit the Governor from making judicial appointments, nor may it control how or when the Governor makes judicial appointments. The corollary is that what the Legislature may not do by affirmative action, it may not do by inaction. Therefore, the Legislature's failure to enact provisions for "carrying out" Section 3 cannot and does not have any negative impact on the Governor's appointment power and prerogative. Whether the Legislature does or does not enact such provisions is simply irrelevant to the appointment process.

To be sure, the Governor's judicial appointees are subject to confirmation by the Legislature. As specified in the first sentence of Amendment 2, an appellate judge must be appointed by the Governor and must be confirmed in that appointment by the Legislature.

Separate and distinct from the appointment process, the legislative confirmation process is addressed in the second sentence of Amendment 2. According to the plain, ordinary, inherent meaning of that sentence, the Legislature may reject an appointee only by taking affirmative action to do so within the specified time limit. Confirmation, on the other hand, may be by affirmative action or by inaction. The Legislature may act affirmatively to confirm, but if it does not act within the specified time limits either to confirm or reject, the appointee is confirmed by default. Thus, to the extent that legislation is necessary to carry out this part of Section 3, the result of any failure by the Legislature to prescribe the necessary measures will be confirmation by default.

The third sentence of Amendment 2 "authorize[s]" the Legislature to "prescribe" any provisions that may be "necessary" to carry out Section 3.[4] The common, ordinary meaning of "authorized" is to "empower" or "to give power or permission to" someone, or to "give legal or official approval for something." *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com (last visited Mar. 23, 2015). "Prescribe" is commonly understood to mean "to make an official rule," or "to specify as a guide, direction, or rule of action." *Id.* Thus, according to the

[4] Amendment 2 also authorizes the Legislature to prescribe provisions for carrying out Article VI, Section 2, but that is not relevant here, since Article VI, Section 2, deals with the composition and jurisdiction of the Tennessee Supreme Court.

The third sentence of Amendment 2 replaces similar pre-amendment language that gave the Legislature the "power to prescribe such rules as may be necessary to carry out the provisions of" Article VI, Section 2. Amendment 2 augmented this previous language by giving the Legislature the authority to prescribe provisions for carrying out Section 3 as well as Section 2, whereas before Amendment 2 the Legislature was empowered only to prescribe rules for carrying out Section 2.

plain, ordinary, inherent meaning of the third sentence of Amendment 2, the Legislature is permitted—but is not required—to specify rules, if any, necessary to carry out Amendment 2.

When Amendment 2 empowers the Legislature to make any necessary provisions, it has inherently designated the Legislature as the arbiter, in the first instance, of what is necessary. Determining what is "necessary" involves making a judgment about what is "required," "absolutely needed," or "compulsory." *See id.* Therefore, if the Legislature opts not to prescribe provisions for carrying out Section 3, then the Legislature must have determined that no such provisions are needed for it to conduct its confirmation process.

One cannot logically read the third sentence of Amendment 2 to mean that, if the Legislature does not prescribe any provisions for carrying out Section 3, then the Governor is precluded from fulfilling his constitutional obligation to appoint judges to vacant appellate positions. Such a reading would give the Legislature the power—by mere inaction—to strip the Governor of his constitutionally mandated duty to make judicial appointments, and would be tantamount to reading that duty out of the Constitution. Such a reading would also allow the Legislature to divest the Governor of his constitutionally vested discretion to make the appointments by whatever process he deems appropriate. Such a reading is, therefore, insupportable, because it would be contrary to the plain import of the first sentence of Amendment 2, and, indeed, would render meaningless the entire first sentence of Amendment 2.

The reading that properly harmonizes the provisions of Section 3 and makes every word effective is that the Legislature may enact rules to determine and govern the legislative process, consistent with the framework contained in Amendment 2, related to legislative confirmation of the Governor's appointees. If the Legislature does not enact any such rules, then, presumably it has not deemed any such rules to be necessary. But that would in no way affect or impede the ability of the Governor to make judicial appointments.

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