IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

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| ROBERT L. DeLANEY, | ) | |
| | ) | |
| Plaintiff/Appellee, | ) | Davidson Chancery |
| | ) | No. 98-1048-I(II)(III) |
| VS. | ) | |
| | ) | Appeal No. |
| BROOK K. THOMPSON, et al., | ) | 01A01-9806-CH-00304 |
| | ) | |
| Defendants/Appellants. | ) | |



APPEAL FROM THE CHANCERY COURT
FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE ELLEN HOBBS LYLE, CHANCELLOR

For Plaintiff/Appellee:

Robert L. DeLaney
Nashville, Tennessee

For Defendants/Appellants:

John Knox Walkup
Attorney General and Reporter

Michael E. Moore
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For Amicus Curiae
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Harris A. Gilbert
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Nashville, Tennessee

AFFIRMED IN PART,
REVERSED IN PART,
DISMISSED, AND REMANDED

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

JOE D. DUNCAN, SPECIAL JUDGE
SAMUEL L. LEWIS, SPECIAL JUDGE

## OPINION

This is an expedited appeal before a special panel of the Middle Section of the Tennessee Court of Appeals sitting in Nashville. The subject matter is the constitutional validity of the Tennessee Plan for the selection and retention of state judges as established by the General Assembly and documented in T.C.A. Secs. 17-4-101, et seq.

The appellee, Hon. Robert L. DeLaney, a member of the bar and eligible by age and legal training to seek a seat upon this court, filed suit to enjoin the conduction of the August 1998 election for seats upon this court under the procedures established for such elections under the Tennessee Plan. He cited six grounds for his thesis that the General Assembly had established an unconstitutional election procedure to be followed in the election of judges to this court.

The learned chancellor ruled that the comprehensive scheme of the Tennessee Plan is unconstitutional because "it drastically limits the group of persons who can become appellate judges and virtually insures the name of the incumbent on the ballot thereby eliminating the right contained in Article VII, section 4 for appellate judges to be "elected by the qualified voters." The State Coordinator of elections, Brook Thompson, was permanently enjoined from following the Tennessee Plan procedures in the conduct of the August 1998 election for seats upon this court. The trial court held the other five allegations of constitutional defects in the subject statutory scheme to be without merit. Both sides have appealed.

## The Tennessee Plan

T.C.A. Sec. 17-4-101 provides that the declared purpose and intent of the general assembly by the passage of this chapter [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".

T.C.A. Sec. 17-4-102 establishes a fifteen member judicial selection commission. Twelve members shall be attorneys who, from experience and observation are familiar with the best qualifications and characteristics of judges. They are to be nominated by various professional groups. Three members are non-lawyers. The speakers of the senate and house make the final appointments. They must consciously select a diverse mixture with respect to race and gender, and the appointees are selected statewide.

T.C.A. Sec. 17-4-109 provides for meetings of the commission at which interested candidates and their supporters may appear in support of their application for nomination to the governor. The public may also participate for or against any candidate. The commission selects three persons "whom the commission deems best qualified and available to fill the vacancy" and certify those names to the governor.

T.C.A Sec. 17-4-112 provides that the governor makes the appointment from the three nominees; or the governor may reject the three and request another panel, from which a selection must be made. Under T.C.A. Sec. 17-4-113 the governor may appoint any qualified licensed attorney if the nominating commission fails to submit nominees within 60 days.



T.C.A Sec. 17-4-116 provides the procedure for a person such as the appellee to become a candidate. It provides that where 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 after the qualifying date withdraws as a candidate, a vacancy is created in the office at the expiration of the incumbent's term effective September 1. In this event the judicial selection commission shall furnish a list of nominees for the office to the governor as provided by T.C.A. Sec. 17-4-109. From such list, the governor shall appoint a successor to fill the vacancy effective September 1. The appointment is subject to the action of the electorate in the next regular August election. The appointee shall file a declaration of candidacy and be voted on as provided in T.C.A. Secs. 17-4-114 and 17-4-115. This record reflects that Judge Henry Todd of this court will retire at the end of August 1998, creating such a vacancy as is addressed in this section.

T.C.A. Sec. 17-4-201 establishes a judicial evaluation commission of twelve members, selected by various professional groups, and appointed by the Judicial Council and the speakers of

both houses of the General Assembly. Race and gender balance are explicitly mandated. Each sitting appellate court judge is evaluated and the evaluations published.

This statute also creates a judicial evaluation guidelines commission; whose nine members are appointed by the court of the judiciary, the board of professional responsibility, the judicial council, the speaker of the house, the speaker of the senate, and the deans or their designee from each of the four law schools in Tennessee. The function of this group is to adopt a program for appellate court judges to aid the public in evaluating the performances of incumbent judges.



**The Modified Missouri Plan**

The passage of the foregoing Tennessee Plan in 1994 carried with it the repeal of the pre-existing Modified Missouri Plan. Under this system of electing all appellate court judges in Tennessee, incumbent judges would no longer run on a contested basis, but instead would run on a retention or yes/no basis. The establishing act, Chapter 198 of the Public Acts of 1971, established an Appellate Court Nominating Commission to be composed of nine members. When vacancies occurred on any of the appellate courts after July 1, 1971, the Appellate Court Nominating Commission would accept applications from attorneys and then conduct a public hearing and such additional private or public meetings as it deemed necessary. It was required to submit the names of three applicants to the Governor for consideration to fill the vacancy. The Governor's choice would fill the vacancy and would stand for election at the next August biennial election, the ballot question being: "Shall _____(name)_____ be

elected and retained in office as _____(office)_____ Vote yes or no." As the terms of all incumbent appellate court judges expired they would each stand for retention election for a full eight year term in the same manner, with no other candidates appearing on the ballot.

On May 1, 1973, the General Assembly passed 1973 Tenn. Pub. Acts Ch. 443, removing the Justices of the Supreme Court from the Modified Missouri Plan. Governor Winfield Dunn vetoed this act, but the General Assembly overrode the veto on February 14, 1974, and it became law. The Tennessee Supreme Court was not again under a retention election plan until the passage of the Tennessee Plan in 1994.

The preamble to the Modified Missouri Plan expressed its purposes in these words:

> It is the declared purpose and intent of the General Assembly of Tennessee by the passage



> of this Act 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 said courts; to insulate the justices and judges of said courts from political influence and pressure; to improve the administration of justice; and to enhance the prestige of and respect for the appellate courts by eliminating the necessity of political activities by appellate justices and judges; and to make the appellate courts of Tennessee "non-political".

## Relevant Constitution Provisions

**United States Constitution, Amendment 5:**

[No person shall] be deprived of life, liberty, or property, without due process of law; * * *

**United States Constitution, Amendment 14:**

* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Constitution of Tennessee, Article VI, Sections 3 and 4.**

Sec. 3. Supreme court judges. -- 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.

Sec. 4. Judges of inferior courts. -- The Judges of the Circuit and Chancery Courts, and of other inferior Courts, shall be elected by qualified voters of the district or circuit to which they are assigned. Every Judge of such Courts shall be thirty years of age, and shall before his election, have been a resident of the State for five years and of the circuit or district one year. The term of service shall be eight years.



Sec. 8. General law only to be passed. -- The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general law of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provision of such law. * * * * *

> Sec. 11. Incompetency of judges. Special judges. -- * * * * The Legislature may by general law make provision that special judges may be appointed, to hold any Courts the Judge of which shall be unable or fail to attend or sit; or to hear any cause in which the Judge may be incompetent. [Pursuant to this provision the General Assembly has passed several statutes, including T.C.A. Sec. 17-2-102 (allowing the governor to appoint lawyers to replace disqualified Supreme court justices); T.C.A. Sec. 17-2-105 (allowing the governor to appoint replacement judges on intermediate appellate courts); T.C.A. Sec. 17-2-107 (allowing the governor to appoint replacement General Sessions Court Judges and to permit sitting by interchange); T.C. A. Sec. 17-2-108, (allowing parties to litigation in circuit and chancery and sessions courts to select by consent a member of the bar to serve as judge or chancellor in all civil cases); T.C.A. Sec. 17-2-109 (allowing the chief justices of the supreme court to assign retired judges to service); T.C.A. Sec. 17-2-110 (allowing the chief justice to assign judges and chancellors outside their district); T.C.A. Sec. 17-2-115 (allowing the governor to appoint a qualified person to serve as judge or chancellor); T.C.A. Sec. 17-2-116 (allowing the governor to appoint a special judge to replace a disabled judge or chancellor); T.C.A. Sec. 17-2-118 (allowing the members of the bar and the clerk to elect a judge or chancellor pro tempore when the regular judge is absent or is unable to hold the court); and T.C.A. Sec. 8-48-205 (allowing the governor to appoint a temporary replacement for a judge inducted into the military service).]

**Standards for Reviewing the Constitutionality of Statutes**

Every presumption should be made in favor of the constitutional validity of statutes. Bank of State v. Cooper, 10 Tenn. 599 (1831). Every intendment and presumption must be made in favor of a statute whose constitutionality is questioned, and every doubt must be resolved to sustain it; and where it is



subject to two constructions, that which will sustain its constitutionality must be adopted. Cole Mfg. Co. v. Falls, 90

Tenn. 466, 16 S.W. 1045 (1891); Kirk v. State, 126 Tenn. 7, 150 S.W. 83 (1911).

A statute must plainly violate the constitution before the courts will pronounce it void. Smith v. Norman, 13 Tenn. 270 (1833). The courts will never construe a statute to be unconstitutional if it will admit of any reasonable construction consistent with the constitution. Arrington v. Cotton, 60 Tenn. 316 (1873). The court in Cotton held that in construing statutes, the courts will look at the objects aimed at by the legislature, and not the particular verbiage, in which a statute, in some of its parts, may be expressed. If the real object aimed at is within the legislative competency, and can be clearly seen from the whole statute taken together, and the history of the prior legislation upon the same subject, the courts will not be turned aside by particular expressions which, taken by themselves, might seem to indicate that the legislature was assuming to transcend its constitutional power, but will give effect to the will of the legislature thus discovered.

It is a primary rule that a statute must be construed, if possible, to save its constitutionally. Turner v. Eslick, 146 Tenn. 236, 240 S.W. 786 (1921); Consolidated Enters, Inc. v. State, 150 Tenn. 148, 263 S.W. 74 (1924). It was held in Knoxville Power & Light Co. v. Thompson, 152 Tenn. 223, 276 S.W. 1050 (1925) that a legislative act will never be declared to be unconstitutional if it is possible to avoid so doing.

Laws enacted by the legislature are entitled to a presumption of constitutionality. State ex rel. Maner v. Leech, 588 S.W. 2d 534, 540 (Tenn. 1979). Where there is doubt as to the meaning of

the constitution, or a seeming conflict, it is a court's duty "to



harmonize such portions and favor the construction which will render every work operative." Shelby County v. Hale, 200 Tenn. 503, 292 S.W. 2d 745 (1956); State ex rel. Hooker v. Thompson, No. 01S01-9605-CH-00106, slip op. (Tenn. 1996).

The rule of stare decisis is peculiarly applicable in the construction of written constitutions. A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may have so changed as, perhaps, to make a different rule in the case seem desirable. The principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances, or be modified by public opinion. McCully v. State, 102 Tenn 509, 53 S.W. 134 (1899); State ex rel. Pitts v. Nashville Baseball Club, 127 Tenn. 292, 154 S.W. 1151 (1913).

**Analysis**

The Modified Missouri Plan was challenged as being unconstitutional, primarily upon the contention that it did not provide for an election in the traditional sense. The Supreme Court addressed this issue and held that plan's retention election to be constitutional. State er rel. Higgins v. Dunn, 496 S.W. 2d 480 (Tenn. 1973). The reasoning of the court was that the constitutional provision calling for elections by the qualified

voters was not self-executing, and that the General Assembly had the power and duty to structure the procedures.

We have heretofore pointed out multiple instances in which judges may take office by appointment without an election of any type. Obviously, this was done by the General Assembly in the



exercise of its general powers. It is interesting to note that a traditional election by the qualified voters in 1870, when this constitution was adopted, would have been limited to males over age 21 who had paid a poll tax. It cannot be doubted that the General Assembly had the power to update the definition of qualified voters to include women and 18-year-olds and to eliminate the poll tax. Our Supreme Court has held that an election could be restructured to hopefully constitute a better way for providing judges. We adopt the following language from Dunn:

> Article 7, Section 4 is in the following words:
>
> > "The 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."
>
> Article 7, Section 7 provides for the general elections to be held on the first Thursday in August preceding the expiration of the terms of judges and other civil officers. It provides also that "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."
>
> This 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. State ex rel. Ferguson v. Superior Ct. of King County, (Washington Sup. Ct.) 148 Wash. 636, 250 P. 66. 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.

. . . .

. . . Stated differently, the rule is that a self-executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution and further the exercise of constitutional right and make it more available. 16 Am. Jur. 2d, Sec. 95, p. 280.

. . . .

. . . The 1971 Act [the Modified Missouri Plan], of course, makes other provisions controlling the election of members of the appellate courts, the most notable and far-reaching of which are the incumbent shall be required to run on his record and not against an opponent and that the Governor shall appoint from a list of three chosen by the Commission created by the Act.

The purpose of the statute as expressed in its preamble is "to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee and to elect the best qualified persons to said courts; to insulate the justices and judges of said courts free from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the appellate courts by eliminating the necessity of political activities by appellate justices and judges; and to make the appellate courts of Tennessee 'nonpolitical.'"

All of these provisions of the Act, it now seems to us, derive from the general powers of the Legislature and, with particular reference to the power to fill vacancies in public office, from the express provisions of Article 7, Section 4 and, since none of them is either directly or by necessary implication contrary to the Constitution, the Act is constitutional and valid.

. . . .

The attack on the statute . . . is based entirely on the insistence that the voting provided for . . . is not an election within the requirements of Article 6, Section 3, and Article 7, Section 5 of our Constitution.

The Constitution of Tennessee does not define the words, "elect", "elective", or "elected" and we have not found nor have we been referred to any provision of the Constitution or of a statute or to any decision of one of our appellate courts defining these words.

There are three instances which the constitution provides for referenda and refers to them as elections:

. . . .

It seems to us that if the Constitution itself denominates these methods of ratification as elections, it cannot be that Chapter 198 [the Modified Missouri Plan] is unconstitutional because the elections therein provided for are limited to approval or disapproval. So

> are the elections provided in Sections of the Constitution referred to above. This is particularly the case, since Article 7, Section 4 reposes wide discretion in the Legislature with respect to elections and the filling of vacancies.

496 S.W.2d at 487-89.

A special supreme court, dealing directly with the constitutionality of the Tennessee Plan, upheld it in these words:

> Thus, it being the duty of this court, if there is a doubt as to the meaning of the Constitution or a seeming conflict, ". . . to harmonize such portions and favor the construction which will render every word operative . . .," Shelby County v. Hale, 200 Tenn. 503, 292 S.W.2d 745 (1956), this Court holds that the yes/no retention vote provided for in the Tennessee Plan is in compliance with Article VI, Section 3 mandate of the Tennessee Constitution that Judges of the Supreme Court be "elected by the qualified voters." No authority was cited by any party to these proceedings, nor has any been found by this Court, that would dictate a different result under the United States Constitution . . ..

Hooker v. Thompson, supra, slip op. at 4,5.

In fairness to the trial judge, she recognized the application of these Supreme Court decisions to the case at bar, but she based her finding of unconstitutionality upon the perception that "it drastically limits the group of persons who can become appellate judges and virtually insures the name of the incumbent on the ballot thereby eliminating the right contained in Article VI, section 4 for appellate judges to be ‘elected by the qualified voters’."

We do not find that the Tennessee Plan drastically limits the group of persons who can become appellate judges. There are the same number of seats. Whether the ultimate holders go through a screening as previously necessary by the executive committee of a political party, or participate in a party primary, or run for office as an independent candidate, only one person can hold each office. The Tennessee Plan does not reduce the number of persons who can become appellate judges. It simply structures an application procedure designed to insure the quality of the judges while minimizing the politics of the process.

The Modified Missouri Plan did, in fact, insure that the incumbent was on the ballot. That plan was held to be constitutional. The Tennessee Plan contains requirements that the

incumbent must have served satisfactorily in order to be on the ballot. This eliminates the automatic right to be on the ballot, and impacts against the complaint of exclusivity expressed.

We also reject the trial court's suggestion that the Supreme Court in Higgins and Hooker was limiting its approval of judicial retention elections under Article VI to elections "filling a vacancy". The language of the opinion is quite clear that the intent was to approve the entire process envisioned by the Tennessee Plan.

We affirm the judgment of the trial court that the Tennessee Plan does not violate Article XI, Section 8 of the Tennessee Constitution or the Fourteenth Amendment to the United State Constitution.

The contention that the plaintiff's rights under the Fourteenth Amendment were violated by the passage of the Tennessee Plan was correctly addressed by the trial judge, who found that the subject legislation is not class legislation qualifying for equal protection.

Even if it were found that the Tennessee Plan constitutes class legislation for purposes of either Article XI, section 8, or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, there is still no violation. The law is that unless a classification involves a suspect class or a fundamental right, then all that is necessary to satisfy the requirements of equal protection is that there be a rational basis for the classification. McGowan v. Maryland, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393, 399 (1961). There is

undoubtedly a rational basis for treating appellate court judges differently than other public officials for purposes of the manner in which they are elected.



The appellee is not a member of a suspect class. It has been held by the United States Supreme Court that there is no fundamental right to hold or run for public office. Bullock v. Carter, 405 U.S. 134, 142-43, 92 S. Ct. 849, 855, 31 L. Ed. 2d 92 (1972). To the same end are the holdings in City of Akron v. Bell, 660 F. 2d 166 (6th Cir. 1981) and Civil Service Merit Board v. Burson, 816 S.W. 2d 725, 733 (Tenn. 1991).

The trial judge correctly ruled that the election of judges to the Court of Appeals by the voters of the state at large is constitutional. The court involved statewide jurisdiction. There is only one court of Appeals in Tennessee. The requirement of Article VI, section 4, that the judges be elected from their "district" or "circuit", in this instance means the entire state. See T.C.A. Sec. 16-4-113, 114.

The appellee's contention that the Tennessee Plan is illegal for the alleged voiding of a general law was correctly overruled by the trial court, since the general law claimed to have been voided is the Tennessee Constitution. As the trial court held, only a statute and not a constitutional provision is a "general law" in the technical sense. Civil Service Merit Board v. Burson, 816 S.W. 2d 725 (Tenn. 1991).

The appellee contends that the general law for the election of Tennessee Court of Appeals judges is contained in Art. VI,

section 4, of the state constitution; and that the Tennessee Plan suspends the general law. This claim is premised upon the contention that said section does not permit retention elections. This position has been squarely met and overruled in Higgins and Hooker.

The final contention of Mr. DeLaney is that the reversed severability clause contained in chapter 942, section 23, of the



subject Act has been triggered and that the entire Act thereby voided.

The trial court succinctly and correctly held that the voiding clause had not been triggered, "because no court has held the Plan itself to be invalid or held its application to be invalid."

## CONCLUSION

It is central to note that it is the General Assembly that controls the details of how qualified persons become judges. The Legislature, in its wisdom, has enacted the Tennessee Plan. It can change it. It is not for this court to judge its merits, but only its constitutionality.

There are no perfect judges, nor any perfect way for their selection.

The veteran judges making up this special court have served as judges at various times and places by every procedure known to

the law: appointment, election, interchange, retention, litigant selection, bar election and special designation.

Our only bias is to follow our oath to administer justice without respect to persons, and do equal rights to the poor and the rich, and faithfully and impartially discharge all the duties incumbent upon us as judges, to the best of our abilities. T.C.A. Sec. 17-2-120.

It is our judgment that the Tennessee Plan is constitutional. The judgment of the trial court, to the extent that it holds otherwise, is reversed. The suit is dismissed. Costs on appeal are assessed to the appellee.



WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

JOE D. DUNCAN, SPECIAL JUDGE

SAMUEL L. LEWIS, SPECIAL JUDGE