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Lieutenant Governor Ron Ramsey
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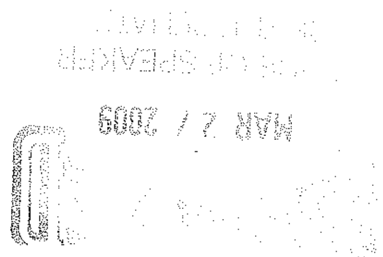


Dear Governor Ramsey:

The Tennessee Business Roundtable's schedule did not provide us with much of an opportunity to talk following our presentations on Wednesday. I wanted to thank you for your candid and thoughtful remarks – especially for characterizing judicial selection as one of the most important issues facing the General Assembly this year. You have many challenging issues on your plate, and many of us appreciate the time and thought you are devoting to this issue.

I owe you an apology for not being clearer and more precise in our earlier conversations about whether the Constitution of Tennessee currently permits the General Assembly to mandate a merit selection and retention process for Tennessee's appellate judges. The fault is mine for not addressing your questions regarding the interpretation of the Constitution in a more effective way.

Under normal circumstances, it would be ethically inappropriate for me to discuss constitutional questions that could end up in the state courts. However, because I plan to recuse myself from the consideration of any case involving the facial constitutionality of the process by which I am elected, I hope you will permit me to use this letter to provide a few thoughts for your consideration. It may be that my study of the Constitution of Tennessee for the past thirty-five years, my presence at the 1977 Limited Constitutional Convention, and my teaching constitutional law for the past twelve years enable me to provide some insights that will be helpful to you.

There are many different theories of constitutional interpretation being used today. One of these theories is referred to as "originalism." Its guiding principle is that persons interpreting a constitution should construe the constitutional text based

only on what the drafters of the text intended. While this theory has not been widely adopted by the federal and state judiciary, its most famous practitioner is United States Supreme Court Justice Antonin Scalia. Because Professor Fitzpatrick clerked for Justice Scalia, it is not surprising that his approach is similar to Justice Scalia's.

The "originalism" approach has some strong points. It prompts courts to pay more attention to the text of the constitution, and it challenges courts to focus on what the drafters of the constitution had in mind when they drafted the text. However, the "originalism" approach has some significant shortcomings that have deterred other judges like Chief Justice John Roberts, Justice Samuel Alito, and Justice Sandra Day O'Connor from employing it as their exclusive method of constitutional interpretation. Permit me to summarize three of the most significant shortcomings of the "originalism" approach.

(1) *The most significant shortcoming of the "originalism" approach is that in many instances nobody can reliably determine what the drafters of a constitutional provision had in mind.* In many instances, there are no definitive historical materials that enable us to determine precisely what the drafters of many of our constitutional provisions intended. The conventions that adopted our older constitutional provisions did not keep detailed records of their proceedings like the records currently kept of the General Assembly's proceedings. There are no transcripts or recordings of the debates. In the absence of these sorts of materials, we are left to reading contemporary newspaper accounts and other secondary sources to try to find a clue to what the drafters had in mind. As a general matter, these sources rarely provide much reliable assistance.

(2) *The second shortcoming to the "originalism" approach is that it limits the application of the constitution to only those matters that were in the minds of the drafters.* Many aspects of modern society could not even have been dreamed of by the persons who drafted our constitutional text in 1796, 1834, 1853, or 1870. To limit the application of the Constitution only to the things the drafters knew about would render our Constitution essentially irrelevant to matters that are commonplace today like the Internet, modern public education, current scientific law enforcement techniques, or digital entertainment. Most of the other approaches to interpreting the Constitution recognize that it is important and necessary to keep the Constitution relevant to the world we are living in today.

(3) *The third shortcoming of the "originalism" approach is that it fails to take into account the erroneous beliefs that the drafters may have had.* Strictly adhering to the "originalism" approach would require us to perpetuate our ancestors' mistakes. One example of this problem is the use of the words "people" and "person" in the United

States Constitution. When the founders drafted the United States Constitution in 1787, they intended for the terms "people" and "person" to refer only to white males. They did not believe that African-Americans were persons. In fact, the prevailing view in 1787 was that African-Americans were property. Similarly, women did not have the same status in society as men. Despite the founders' limited view, no one would seriously argue today that African-Americans and women should not enjoy the same constitutional rights and protections that are enjoyed by white males.

You might ask "how is all this theory relevant to my concerns about the constitutionality of merit selection and retention of judges?" Here's how it's relevant. Despite diligent efforts, no one has discovered historical records that tell us reliably what the drafters intended when they drafted Article VI, Section 3 of the Constitution of Tennessee. Thus, we do not have a definitive answer regarding the election process or processes that the drafters might have had in mind. If anyone tells you unequivocally that they know what the drafters intended, ask them to provide you with the proof. They will not be able to produce it.

What should we do if we cannot determine precisely what the drafters had in mind when they used the term "election"? This is where the art of constitutional interpretation is brought to bear. Rigorous interpretation usually begins with the text of the constitution but also takes into consideration the circumstances that existed when the constitutional provision was drafted, court decisions construing the constitutional provision, and traditional principles of constitutional construction. Instead of burdening you with a lengthy legal analysis using this approach, permit me to provide you the highlights.

Step One: The word "elect" or derivations of the word appear in 117 places in 38 different parts of the Constitution of Tennessee. Thus, the first question is whether the drafters used these words so consistently that they can only refer to contested elections. When each of these words is reviewed in their own context, the answer is "no." The drafters of the Constitution did not use the words so consistently that they can only refer to contested elections. The clearest example of this is in Article II, Section 29 which plainly envisions a "yes/no" election by the qualified voters before a local government can extend its credit to a private party.

Step Two: The conclusion in Step One is confirmed by the fact that in our earlier Constitutions, the drafters used the term "election" in the context of selecting judges to describe a process in which the judges were "elected" by the General Assembly, not the people.

Thus, between 1796 and 1853, judicial "elections" referred to elections by the General Assembly. These elections were not contested. They were up or down votes on particular nominees.

Step Three: The next step is to ask if the word "elect" or a derivation of the word can only mean a contested election. Most dictionaries say "no." The verb "elect" is a broad term that includes any process of selection by vote for an office. When a constitution uses a broad term like "elect," the General Assembly has broad constitutional authority to fill in the details.

Here is a hypothetical example that makes this point. Assume that the Constitution said that the General Assembly was "required to travel to Jonesboro once every five years to conduct legislative business on the first day of April." This provision would require the General Assembly to meet in Jonesborough on April 1st every five years. However, if the Constitution simply required the General Assembly to travel to Jonesborough once every five years to conduct legislative business, it would be up to the General Assembly to decide when to go to Jonesboro. In addition, since the Constitution did not dictate where the General Assembly would meet in Jonesborough or how to get to Jonesborough for the meeting, the General Assembly would be free to decide on the location of its meeting in Jonesborough, whether the legislators would travel to Jonesborough by automobile, plane, or bus, and the route that the legislators would take. The constitutional mandate is satisfied as long as the General Assembly meets in Jonesborough every five years. The Constitution leaves the details to the General Assembly.

Step Four: If, taken in the context of the constitutional text, the word "elect" or a derivation of the word does not just refer to a contested election, just what does it mean? If we look at the way that the word is used in the constitution, the common thread is that the drafters intended that an "election" would be a process in which the qualified voters would be given an opportunity to cast a ballot (vote one way or the other) on a particular issue.

Step Five: If the term "elect" or "election" refers broadly to a process by which the qualified voters are given a chance to cast their ballots on a particular issue, who decides what the election process should be? The answer to that question is easy. Under the Constitution of Tennessee, the General Assembly has broad, law-

making power to decide on the details regarding the process of electing judges, subject to the other limitations and restrictions in the Constitution.

There was an effort in 1977 to limit the General Assembly's power to decide how judges should be selected and retained when the Limited Constitutional Convention decided that merit selection should be mandated by the Constitution. Had that provision been ratified, the General Assembly's power would have been diminished. That effort, however, did not succeed. Thus, to this day, the General Assembly retains broad constitutional authority to decide how judges will be elected.

Step Six: Does the Constitution contain any specific restrictions on the General Assembly's power to establish the details for judicial elections? The answer is "yes," but not very many. With regard to the Supreme Court, Article VI, Section 3 requires that the judges be elected by the "qualified voters of the State." This means that Supreme Court judges must be elected state-wide, and not by geographic district. With regard to the other judges, Article VI, Section 4 requires that they be elected by the "qualified voters of the district or circuit to which they are to be assigned." This means that, unlike the Supreme Court, the General Assembly may create districts or circuits for other state courts and may limit the elections for the judges of these courts to these circuits or districts.

Step Seven: In 1971, 1974, and 1994, the General Assembly exercised its constitutional power to decide how judges should be appointed and elected. These votes reflect the belief of a majority of the members of the 87th, 88th, and 98th General Assemblies that they had the power under the current Constitution to establish the details of judicial elections.

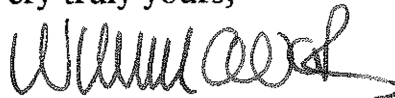
Step Eight: In addition to prior General Assemblies believing that they had the constitutional power to establish a merit selection and retention plan for Tennessee's appellate judges, other Tennessee Supreme Courts have carefully analyzed that constitutional issue and have determined that the current Constitution permits the General Assembly to adopt a merit selection and retention system. The question has been addressed twice, and nine of the

ten special judges who have independently studied the question have concluded that the merit selection and retention is constitutional. Since these were judges specially appointed to hear these cases, none of them were influenced by a desire to save their jobs.

So what does all this tell us? First, no one can state authoritatively that the drafters intended for judges to be elected in contested elections because the evidence of the drafters' intent is either non-existent or equivocal. Second, the Constitution of Tennessee uses broad terms to describe how judges should be elected, and these broad terms give the General Assembly a great deal of power and discretion to decide on the mode of judicial elections. Third, the General Assembly has exercised its broad power three times since 1971 to establish a merit selection and retention plan for Tennessee's appellate judges, and these actions reflect the legislators' belief that their actions were constitutional. Fourth, the courts have decided twice that the General Assembly was acting within its constitutional authority when it established a merit selection and retention plan for Tennessee's appellate judges. Taken together, all these points provide a firm foundation and legal support for the conclusion that the current Constitution permits the General Assembly to establish a merit selection and retention process for Tennessee's appellate judges, if a majority of the legislators decide that such a system is in Tennessee's best interests.

I hope that this letter has been of some assistance as you work through these legal and constitutional issues. As always, I will be delighted to discuss any of the points I have made in this letter or any other matter pertaining to judicial selection with you should you decide that further conversations will be helpful. All of us are grateful for the attention that you are giving this issue.

Very truly yours,



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