

John Jay Hooker

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April 3, 2011

Dear Governor Haslam:

Belatedly, let me offer my congratulations on your being elected Governor!

I thought you and our mutual friend, Tom Ingram, conceptualized a magnificent campaign and that you were a great candidate. Your campaign was comparable to the spectacular campaign made by another mutual friend, Governor Winfield Dunn, when he came out of nowhere against all odds and beat me, the Democratic nominee, in the election for Governor in 1970.

Governor Dunn's victory gave birth to the Republican Party as we know it in Tennessee. Jokingly, I have sometimes claimed that I am the "co-founder" along with him of your Party. Governor Dunn and I have become good friends and we should go to Washington and teach the Congress how to work together on a bi-partisan basis.

I am writing you because I am a "Friend of the Constitution" about the "Constitutional Crisis and the Retention- Elections," (see attached memo), which provide for a gubernatorial appointment of judges when the Constitution mandates that all judges, both for the eight year term and including those who fill the vacancies of the unexpired term must be "elected by the qualified voters of the State." Article VI §3,4;Article VII §4,5.

I believe you want to be and can be a great Governor. As you know being a great Governor above all else requires that you, "take care that the laws shall be faithfully executed", (Article III §10) which means of course that the Constitution, which is the fundamental law must be honored above all else.

In that regard I submit the attached memo to you and Governor Winfield Dunn, who signed the 1971 Retention-Election Statute which became the subject matter of the landmark Higgins vs. Dunn case (1973) and the Hooker vs. Thompson case (1996). The Higgins case held the statute Constitutional and that precedent was followed in the Hooker case which likewise held the Retention-Election Statute is constitutional. However, the fact is Judge McCanless who wrote the majority opinion in the Higgins case was "incompetent" to hear the case as he had a duty to "disqualify" himself under Article VI §11. The fact was he had an "interest" in the subject matter of the case because the decision permitted him to run for re-election under the Retention-Election Statute. Those who rely on that case as authority to claim that the Retention-Election Statute is Constitutional ignore the fact that Judge McCanless was "disqualified" and accordingly had

no authority to decide the case. Therefore, the holding in the Higgins case is void and was not a valid precedent to be relied on in the Hooker case. Consequently, there is no valid judicial authority holding that the Retention-Election Statute is Constitutional.

Furthermore, Judge Humphries who wrote a brilliant dissenting opinion in the Higgins case, set out the historical background that conclusively shows that the Retention-Election Statute is unconstitutional because the holding violates Article VI §3, requiring an election by "the qualified voters of the State." Judge Humphries wrote: "Judge Taylor has, however placed before the Court portions of the Constitutional Convention of 1870, which makes it perfectly clear that before the resolution of the question, whether the Supreme Court should be elected by the qualified voters of the State or be appointed as a Federal Judges, there was much debate, and it was finally decided that Supreme Court Judges should be elected by the qualified voters. All of this discussion was summarized in Article VI §3 of the Constitution where it declares "the Judges of the Supreme Court shall be elected by the qualified voters of the State.'" The Higgins case 496 S.W.2nd Pg 480, 497 (1973)

Independently of me, after his own careful study, Governor Dunn now agrees that the Retention-Election Statute which provides for a gubernatorial appointment to fill a vacancy, as opposed to a popular election by the qualified voters, is unconstitutional. Article VII §5

Furthermore, Governor Ned McWherter, told me with great sincerity that the worst mistake he ever made as Governor was letting Speaker Wilder convince him to sign the Retention-Election Statute of 1994, which bill placed the Supreme Court back under the Act.

I write you as a lawyer who has spent years studying the Constitution who became an officer of the Supreme Court in 1958. I thereafter was employed by Governor Clement to investigate a judge and was subsequently employed by the House of Representatives to prosecute the judge on impeachment charges in a trial before the Senate. That experience gives me a deep insight into judicial misconduct and the oversight role of the Legislature. Accordingly, I write this letter with the attachment, which is self explanatory, to request a meeting with you to discuss the Constitutional crisis that exists in Tennessee as a consequence of the fact that the Legislature passed the Retention-Election Statute and all members of the appellate courts of Tennessee are "obviously unconstitutionally seated". Since these Judges can read, all these Judges know they are unconstitutionally seated and therefore under their oath as lawyers to support the Constitution are required to either "resign" or be "removed" under Article VI §6. The claims by the appellate judges that the Retention-Election Statute is constitutional is a "cover up" to keep them from being put out of office.

Any lawyer or non-lawyer alike, who takes the time to study the aforesaid Constitutional provisions should conclude that these judges are unconstitutionally seated and consequently sir, you should rely on your own understanding and not that of judges and lawyers who have a vested interest in supporting the present system of "appointing judges". Make no mistake, Governor Haslam, non-lawyers who study the Constitution can read the Constitution as well as lawyers because the Constitution was written in plain language to be understood by those citizens who ratified it and their successors.

Notwithstanding the fact that the appellate judges claim the Retention-Election Statute is constitutional, and have lobbied with the Legislature for their own "benefit" so that they can enjoy their salaries, their insurance and their retirement benefits in violation of their oath of office and their attorney's oath, the statute remains unconstitutional. Their conduct reminds me of the observation made by Sir Walter Scott in 1810, when he wrote; "Oh what a tangled web we weave when first we practice to deceive," as their conduct has created a constitutional crisis that inevitably is going to embarrass them.

I believe that the historic moment at long last has come, based upon my conversations with Lt. Governor Ramsey and the fact that Speaker Harwell voted to repeal the Retention-Election Statute in 2009, to address the retention-election issue because both of them, independently of me, believe that the Retention-Election Statute is unconstitutional as do many other Legislators. There are bills pending before the Legislature sponsored by Senators Campfield and Bell in the Senate and Representatives Casada and Dunn in the House to repeal the Retention-Election Statute. In my view, one of these bills will pass which will set the stage to address and resolve the Constitutional crisis that confronts our government and shames our proud State.

I think Lt. Governor Ramsey said it well when he wrote a memo that says: "Stand with me and demand that the Constitution of the State of Tennessee either be followed or changed-but not ignored." But I would add that the Retention-Election Statute "ignores" the Constitution and that fact as aforesaid has created a constitutional crisis that must be addressed by both the Executive and Legislative branches of government.

Moreover, I do not disagree with Lt. Gov. Ramsey, that when the Retention-Election Statute is repealed, and that there should then be an effort made to amend the Constitution on behalf of all those who believe that the retention-election of appellate Judges is a better method than popular elections.

On the other hand, in accordance with our "Republican Form of Government" in intellectual honesty as a lawyer and more importantly as a voter, I believe such an amendment will fail as it did in 1977 because the genius of "self government" ("government of the people, by the people and for the people"), is that the voters should

hold public officials "accountable" for their actions after a debate between candidates in a popular election.

In conclusion, as a "Friend of the Constitution" while I want to be respectful of you and your high office in every sense of the word, let me be clear, I am asking you to use your own judgment after you have studied the aforesaid provisions to determine whether or not you think the Retention-Election Statute is unconstitutional. If in fact you think it is unconstitutional, I think, you under your oath to see "that the laws are faithfully executed" will have a duty to use your "best efforts" to see that the Legislature forthwith repeals the Retention-Election Statute. If the Legislature does, then you as Governor to resolve the constitutional crisis in my judgment, shall have a duty to see that all Appellate Judges "resign" or are "removed" by the Legislature in accordance with Article VI §6. This is obviously a heavy burden, but the integrity of our Constitution requires no less of the Governor of the State and the members of the Legislature, who likewise have a sworn duty to support the Constitution.

Again, congratulations Governor upon your election, your campaign and your performance up until now has earned my respect. I hope you will turn out to be a great Governor which will require you "to meet and resolve," as aforesaid, the Constitutional crisis which you inherited as a consequence of the fact that Governor Bredesen and others, contrary to my continuous urging over a long number of years including when I was the Democratic nominee running against Governor Sundquist in 1998, made "judicial appointments" to "fill vacancies" in obvious disregard of the provisions set out above.

Please let me hear from you at your convenience as I will make myself available to you at any time. Good luck!

God Bless;

John Jay Hooker

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April 3, 2011

Memo from John Jay Hooker, a Friend of the Constitution

To:

Governor Haslam, Lt Governor Ramsey, Speaker Harwell, Chief Justice Clark and Associates , Attorney General Cooper, Chief Judge Ash and Chief Disciplinary Counsel Discenza for the Court of the Judiciary and others

The Constitutional Crisis and Retention-Elections

The Retention-Election Statute TCA 17-4-101 et seq. is obviously unconstitutional and the members of the Supreme Court and all Appellate Judges know it. They have intentionally violated the Constitution by accepting "appointments" to the Courts to "fill a vacancy" and each Judge thereby violated their oath of office and the "Due Process" rights of all the litigants who have come before the Courts over the years.

The facts are the Retention-Election Statute TCA 17-4-112, 115 provides that the Governor shall make "appointments" to fill a "any vacancy" in lieu of an "election by the qualified voters" for both the eight year term and any "unexpired term" occasioned by death or otherwise. "These appointments" are in plain violation of the Constitutional provisions which "direct and provide" that "all vacancies" for the "eight year term" and the "unexpired term" be filled by an election "by the qualified voters of the State" (see Article VI §§ 3, 4 and Article VII §§ 4, 5 attached hereto).

This circumstance is not to be confused with the fact that the Legislature may "make provision" to "appoint" a "Special Judge" to sit temporarily until the "vacancy" occasioned by the death or resignation of the "elected" judge can be filled by a "special election" in accordance with the Constitution. (see Article VI §11; Article VII §5)

In other words the Legislature has "no power" to "give the Governor the power" to "appoint judges" to fill any "vacancies" that must be filled by a "special election" under Article VII §5 because the Constitution "directs and provides" that "all vacancies" shall be filled by "an election" under the aforesaid provisions. Therefore, the Retention-Election Statute passed in 2009, must forthwith be repealed as it violates the Constitution and consequently none of these Judges can be allowed to decide any additional cases pending or hereinafter brought before the Court without violating "Due Process" rights of the litigants including those on Death Row. For that reason it is obvious that our State Government is confronted by a "constitutional crisis" involving our Appellate Court system that you as Governor under your oath should forthwith address.

The Supreme Court did not rule on the aforesaid legal proposition in either the Higgins vs. Dunn case in 1973 or the Hooker vs. Thompson case (Justice Penny White) in 1996. The courts in those cases held that the Retention-Election Statute is Constitutional. However, neither opinion addressed the aforesaid circumstance differentiating between an "appointment" for a "Special Judge" to sit temporarily under Article VI §11 and the requirement that there be a "special election" to fill the "vacancy" on the Court under Article VII §5 as a result the Court did not reach the Constitutional issue which produces as aforesaid the constitutional crisis.

It should be noted, that the decision in the Higgins which was followed in the Hooker case is void and is not valid legal authority because the Judge in that case, Judge McCanless who wrote the majority opinion in the Higgins case was "incompetent" to hear the case as he had a duty to "disqualify" himself under Article VI §11. The fact was he had an "interest" in the subject matter of the case because the decision permitted him to run for re-election under the Retention-Election Statute. Those who rely on that case as authority to claim that the Retention-Election Statute is Constitutional ignore the fact that Judge McCanless was "disqualified" and accordingly had no authority to decide the case. Therefore, the holding in the Higgins case is void and was not a valid precedent to be relied on in the Hooker case. Consequently, there is no valid judicial authority holding that the Retention-Election Statute is Constitutional.

Furthermore, those who claim that the Retention-Election Statute is constitutional are unwilling to acknowledge that the Retention-Election Statute was passed in direct conflict with the historical fact which is that the convention that wrote 1870 Constitution that clearly considered the option regarding, whether or not judges should be "appointed" or "elected" and concluded that judges should be, "elected by the qualified voters of the State."

Consequently, there is no "controlling legal authority" challenging the aforesaid proposition of law, which the Court had a duty to address in those cases but avoided, because there is no legitimate argument to "substitute an appointment" by the Governor for an "election" by the "qualified voters of the State", Article VI §3; Article VII §5. Repeating what was said in the letter to Governor Haslam, Sir Walter Scott wrote; which applies to the decisions in both the Higgins (1971) and Hooker (1996) cases; "Oh, what a tangled web we weave if first we practice to deceive." To substantiate this claim all one has to do is read Judge Humphries' dissenting opinion in the Higgins vs. Dunn case, which sets out the historical fact that Judge Humphries relied on in his opinion wherein he said, "Judge Taylor has, however placed before the Court portions of the Constitutional Convention of 1870, which makes it perfectly clear that before the resolution of the question, whether the Supreme Court should be elected by the qualified voters of the State or be appointed as are Federal Judges, there was much debate, and it was finally decided that Supreme Court Judges should be elected by the qualified voters. All of this discussion was summarized in Article VI §3 of the Constitution where it declares "the Judges of the Supreme Court shall be elected by the qualified voters of the State.'" The Higgins case 496 S.W.2nd Pg 480, 497 (1973)

Therefore each member of the appellate courts who was appointed by the Governor to "fill a vacancy" who was not duly "elected" are consequently unconstitutionally seated. Moreover, each Judge of the Appellate Courts sit in violation of their oath of office, their attorney's oath and the Code of Judicial Conduct. Unfortunately, as a result, each of these Judges must "resign" their judgeships under the requirements of the Canons of Judicial Ethics and in accordance with "Due Process" clauses of both the State and Federal Constitutions which require "fair and impartial judges" who are "competent to sit". In Tennessee to be "competent to sit" all judges must be "elected" under the Constitution, Article VI §3 Article VII §5.

In the alternative if the Judges do not resign their judgeships the members of the Court of the Judiciary, under their oath to support the Constitution and the Code of Judicial Conduct, must act and report the facts regarding the violation of the Judicial Code of Conduct to the members of the Supreme Court itself. Notwithstanding, the members of the Supreme Court are "incompetent" under Article VI §11 to hear the matter and therefore the Court of the Judiciary under TCA 17-5-311 must report that circumstance to the Legislature for appropriate action. Accordingly, if the members of the Court do not "resign" their judgeships then the Legislature, under their oath of office to support the Constitution, are required thereafter to "remove" each of these Judges under Article VI § 6.

The Legislature then has "the power" to "make provision" under Article VI §11 "to appoint" Special Judges "to sit" until the biennial election in 2012 at which time "the qualified voters of the state" will fill "all vacancies" on the appellate courts in accordance with the aforesaid Constitutional provisions of 1870. That is precisely what happened for 100 years from the time the Constitution of 1870 was passed until 1971 when Lt. Governor John Wilder, as a pure "political gimmick" under the guise of a claim that the statute was being passed to install the merit selection of judges, authored the Retention-Election Statute to protect Democratic judges from the Republican political onslaught that occasioned the defeat of Governor Frank Clement by Howard Baker in the 1966 election for the United States Senate, the defeat of Albert Gore Sr. for the United States Senate in 1970 and my defeat for Governor by Winfield Dunn in the same historic year That was the first time a Republican Governor had been elected for half of a century. The fact is the retention-elections became the law under a Democratic controlled Legislature to protect Democratic judges in direct violation of the Constitution and the time has come when this circumstance must be addressed because it has led to a constitutional crisis.

If Governor Haslam, Lt. Governor Ramsey and Speaker Harwell will address the constitutional crisis, which they have inherited, they have the capacity to resolve it by first repealing the Retention-Election Statute and then advising the appellate judges of Tennessee that they should "resign" because being unconstitutionally elected the cannot "preside" and accord litigants the "Due Process of Law" guaranteed by both the State and Federal Constitutions. Consequently, if any and all of the sitting judges fail to resign they must be "removed" under Article VI §6 of the Constitution.

In the event, that the Supreme Court Judges “resign” or are “removed” from office because they are unconstitutionally seated, then the Attorney General Robert Cooper, Chief Judge Ash and the other members of the Court of the Judiciary “appointed” by the Supreme Court, the Chief Disciplinary Counsel other members of the Board of Professional Responsibility who are appointed by the members of the Supreme Court, who were unconstitutionally seated, must likewise “resign” as the Court had no authority to appoint them.

In other words, those of us who are ordinary citizens as well as those who are in office and who are likewise “Friends of the Constitution” in order to avoid further “shame” have a duty in this time of constitutional crisis to stand tall together and “honor” the Constitution.

Tennessee Constitution

Article VI

Section 3. 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. [emphasis added]

Section 4. The Judges of the Circuit and Chancery Courts, and of other Inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be 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. His term of service shall be eight years. [emphasis added]

Section 6. Judges and attorneys for the state may be removed from office by a concurrent vote of both Houses of the General Assembly, each House voting separately; but two-thirds of the members to which each House may be entitled must concur in such vote. The vote shall be determined by ayes and noes, and the names of the members voting for or against the judge or attorney for the state together with the cause or causes of removal, shall be entered on the journals of each House respectively. The judge or attorney for the state, against whom the Legislature may be about to proceed, shall receive notice thereof accompanied with a copy of the causes alleged for his removal, at least ten days before the day on which either House of the General Assembly shall act thereupon.

Section 11. No judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity of consanguinity, within such degrees as may be prescribed by law, or in which he may have been of counsel, or in which he may have presided in any Inferior Court, except by consent of all the parties. In case all or any of the judges of the Supreme Court shall thus be disqualified from presiding on the trial of any cause or causes, the court or the judges thereof, shall certify the same to the governor of the state, and he shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination thereof. The Legislature may by general laws 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. [emphasis added]

Article VII

Section 4. The election of 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. [emphasis added]

Section 5. Elections for judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of each officer so elected shall be computed from the first day of September next succeeding his election. The term of office of the governor and other executive officers shall be computed from the fifteenth of January next after the election of the governor. No appointment or election to fill a vacancy shall be made for a period extending beyond the unexpired term. Every officer shall hold his office until his successor is elected or appointed, and qualified. 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. [emphasis added]

Statutory Provisions

TCA 17-4-112. Judicial appointments from nominees from commission – Expiration of terms.

(a) (1) When a vacancy occurs in the office of an appellate court after July 1, 2009, by death, resignation or otherwise, the governor shall fill the vacancy by appointing one (1) of the three (3) persons nominated by the judicial nominating commission, or the governor may require the commission to submit one (1) other panel of three (3) additional nominees. Within sixty (60) days following receipt of the additional panel of nominees, the governor shall fill the vacancy by appointing any one (1) of the six (6) nominees certified by the commission. [emphasis added]

17-4-115. Declaration of candidacy for reelection for full term – Time of filing – Exception – Form of ballot – Rejection of candidate – Appointment.

(a) (2) An incumbent appellate judge who seeks election for a full eight-year term but who was appointed to the office after the first Thursday in February before the next regular August election occurring more than thirty (30) days after occurrence of the vacancy that was filled by the incumbent appellate judge must qualify by filing with the state election commission a written declaration of candidacy. The declaration must be filed not later than the first Thursday occurring at least one (1) full week after the appointment. After timely filing the declaration, any request by the candidate to withdraw must be filed with the state election commission not later than twelve o'clock (12:00) noon prevailing time on the seventh day after the deadline for filing the declaration of candidacy. [emphasis added]

17-5-311. Review by the general assembly.

(a) In the event the supreme court affirms the action of the court of the judiciary as provided in § 17-5-309, the judgment of the supreme court shall be final. In the event the supreme court affirms the action of the court of the judiciary in recommending removal of the judge in accordance with § 17-5-303 or § 17-5-309(a) and § 17-5-301(f)(6), the question of removal shall be transmitted to the general assembly for final determination. However, if the supreme court affirms the court of the judiciary's action recommending the removal of a judge and its determination that the recommendation is moot as provided in § 17-5-309(c), the matter shall not be transmitted to the general assembly for final determination but shall become final upon the supreme court's action.

Code of Judicial Conduct

Canon One

"A Judge shall uphold the integrity and independence of the Judiciary."

Canon Two

"A Judge shall avoid impropriety and the appearance of impropriety in all of the Judges activities."

...End of John Jay Hooker, Memorandum