

IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE

JOHN JAY HOOKER,)
)
 Plaintiff,)
)
 vs.)
)
 PHIL BREDESEN in his official capacity)
 as Governor of the State of Tennessee, and)
 BROOK THOMPSON in his official)
 capacity as Coordinator of Elections, and)
 JUSTICE A. A. BIRCH in his official)
 capacity as a potential candidate for)
 reelection from the Middle District of)
 Tennessee in 2006,)
)
 Defendants.)

NO. _____

(August 5, 2005)

For notification purposes:
ATTORNEY GENERAL PAUL SUMMERS
in re: The Constitutionality of the “Tennessee Plan”

COMPLAINT

1. The Plaintiff, John Jay Hooker, herein as a voter, challenges the constitutionality of the “Tennessee Plan,” T.C.A. 17-4-101, et seq., and T.C.A. 17-4-201, et seq., and any appointment under the “Tennessee Plan” of appellate judges by Gov. Phil Bredesen. Gov. Bredesen has a duty under the Tennessee Constitution, Article III, Section 10, to, “...take care that the laws be faithfully executed.” Therefore, Gov. Bredesen likewise has a duty to challenge the constitutionality of the aforesaid so-called “Tennessee Plan” as the “Tennessee Plan” in its entirety violates Article I, Sections 4 & 5, Article VI, Sections 3 & 4,

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and Article VII, Sections 4 & 5, of the Tennessee Constitution, as well as the Fourteenth Amendment. Consequently, the Plaintiff seeks a declaratory judgment under T.C.A. 29-14-101 and T.R.C.P. Rule 57. Moreover, Gov. Bredesen, according to the press, will appoint a judge to fill the seat of Justice Frank Drowota subject to Judge Drowota's retirement on September 2, 2005. The newly appointed justice will be appointed under that statute and "the people" of Tennessee shall, as a consequence of Gov. Bredesen's appointment, be deprived of their right to elect the judges of the appellate courts for a full term under Article VI, Sections 3 and 4. Therefore, Gov. Bredesen should be enjoined from making an appointment to the Supreme Court under the aforesaid statutes as any appointment is unconstitutional because the appointment is not limited to an unexpired term as required by Article VII, Sections 4 and 5, due to the fact that the appointment for the unexpired term creates a "property right" to run in a yes/no election for a full term under the authority of *Lillard v Burson*, 933 Fed.Sup. 698 (1996), and, consequently, the Plaintiff seeks an injunction to prohibit Gov. Bredesen from making an appointment under the authority of the "Tennessee Plan." Furthermore, the "Tennessee Plan" is unconstitutional as it violates the three separate and equal branches of government required under Article II, Section 1. The Legislature, by passing the "Tennessee Plan," has usurped the power of the judiciary to an election by the people under Article VI, Sections 3 & 4. The Legislature, by setting the amount of votes needed to prevail in a "yes/no" vote, has likewise assumed power that the Legislature does not have. The Judicial Department, as a separate and equal branch of government, cannot be subject to the whim of the Legislature in establishing an election process contrary to the various mandates of the Constitution which prohibit the Legislature from adding qualifications for the candidates or depriving the people of a choice in a "free and equal" election. Mr. Justice Allison Humphries in his dissent in *Higgins v Dunn*, 496 SW2d 480 (Tenn.

1973), opined that the Supreme Court Justices approving the constitutionality of the “Tennessee Plan” had, “...like Esau, sold their soul for a mess of pottage,” and made the judicial branch subordinate to the legislative branch in direct violation of the separation of powers required by the Constitution.

2. Moreover, the Plaintiff, John Jay Hooker, is a potential qualified candidate and a qualified voter for the Supreme Court election against Mr. Justice A. A. Birch from the Middle District of Tennessee in the election to take place on the first Thursday in August, 2006. Plaintiff Hooker is constitutionally qualified to be a candidate against Justice Birch, but is prohibited from doing under the “Tennessee Plan,” T.C.A. 17-4-101, et seq., and 17-4-201, et seq., and, consequently, files this lawsuit seeking a declaratory judgment under T.C.A. 29-14-101 and T.R.C.P. Rule 57 against Brook Thompson, Coordinator of Elections, because he claims that he cannot issue a Qualifying Petition to run for the Supreme Court to any person other than a sitting judge under the aforesaid statutes.

3. As aforesaid, this lawsuit is a constitutional challenge seeking a declaratory judgment by a potential candidate and voter who has the legal standing to do so because he is personally harmed by the “Tennessee Plan,” T.C.A. 17-4-101, et seq., and 17-4-201, et seq., which provisions provide for the reelection of sitting appellate judges wherein the electorate is deprived of the choice of candidates and is limited to voting yes or no for sitting judges, which is a personal harm to this qualified voter and is unconstitutional under Article VI, Section 3, requiring an election by the people which, by definition, requires a choice of candidates.

4. The “Tennessee Plan” is unconstitutional in that it adds an additional qualification so that no person can be a candidate for an appellate judgeship who is not an appellate judge, which circumstance adds an additional qualification so that lawyers who are otherwise constitutionally qualified cannot seek election as they are not sitting appellate judges. This fact violates Article I, Section I, Section 4, which provides:

“That no political or religious test, other than an oath to support the Constitution of the United States and of this state, shall ever be required as a qualification to any office or public trust under this state.”

5. Moreover, retention elections under the “Tennessee Plan” violate Article I, Section 5, which provides:

“The election shall be free and equal and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto...”

An election cannot be “free and equal” where the voter is deprived of a choice or where a candidate has no opposition.

6. In summary, it has been averred that the so-called “Tennessee Plan” is unconstitutional under the Tennessee Constitution Article I, Sections 4 & 5, Article VI, Sections 3 & 4, and Article VII, Sections 4 & 5, as well as the Fourteenth Amendment of the Constitution of the United States, and this lawsuit seeks a Declaratory Judgment to that effect under the Declaratory Judgment Statute, T.C.A. 29-14-101 and T.R.C.P. Rule 57.

7. The constitutionality of the “Tennessee Plan” is an open question as the decision in *Higgins v Dunn*, holding the Statute to be constitutional, is void

because it was decided by a court that was incompetent under Article VI, Section 11, of the Tennessee Constitution, and the decision by the court so shows on its face in that there were not three competent judges as required to render a decision because the court was interested in the subject matter of the case. Consequently, Judge Birch and all other appellate judges elected under the unconstitutional “Tennessee Plan” in 1998 are *de facto* not *de jure* judges. Likewise, the Court in *Delaney v Thompson*, 982 SW2d 857, 858 (Tenn. 1998), which also challenged the “Tennessee Plan,” declined to rule on the constitutionality of the statute and, consequently, the constitutionality of the “Tennessee Plan” is an open question and should, therefore, be decided in this case.

PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That the Court have a hearing on August 19, 2005, under T.R.C.P. Rule 65.01, and grant a restraining order prohibiting Gov. Bredesen from appointing a successor for Justice Drowota under the “Tennessee Plan,” T.C.A. 17-4-101, et seq., and T.C.A. 17-4-201, et seq..

2. That the Court declare the “Tennessee Plan” T.C.A. 17-4-101, et seq., and T.C.A. 17-4-201, et seq., is unconstitutional.

3. That the Court issue a declaratory judgment and a permanent injunction enjoining Gov. Bredesen from making an appointment to the Supreme Court to fill the vacancy of Justice Drowota under the “Tennessee Plan.”

4. That the Court order an election under Article VI, Sections 3 & 4, for all appellate judges in the election to be held on the first Thursday in August, 2006.

5. For such other further and general relief that the Plaintiff may be entitled.

Respectfully submitted,

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cc: Attorney General Paul Summers