Municipal Technical Advisory Service
INSTITUTE FOR PUBLIC SERVICE

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Elections

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Reference Number: MTAS-182

Elections - State Provisions

In 1972, the General Assembly enacted a comprehensive law to regulate all elections T.C.A. Title 2. Its apparent intent was to override provisions in private act charters and other conflicting general laws relating to the conduct of municipal elections, including certain provisions in T.C.A. Title 6, Chapter 53, that pertain to municipal elections. Title 6, Chapter 53, has been amended several times since 1972, however, and some of those amendments apply to current municipal elections and appear to be legally sound. For that reason, both T.C.A. Title 2 and Title 6, Chapter 53, should be consulted and reconciled with respect to questions regarding municipal elections.

The introductory provisions of T.C.A. Title 2 include the following:

- "The purpose of this title is to regulate the conduct of all elections by the people so that ...internal improvement is promoted by providing a comprehensive and uniform procedure for elections ..." (T.C.A. § 2-1-102(3)); and
- "All elections for public office, for candidacy for public office, and on questions submitted to the people shall be conducted under this title" (T.C.A. § 2-1-103).

The statutes outline the procedures and conduct of all city elections, and municipal officials should seek guidance from these laws and from those governing county election commissions.

Conducting Municipal Elections

Reference Number: MTAS-184

Dates and Changes

In election law, there is no uniform date for municipal elections as there is for county elections. Private act charters prescribe election dates, and a private act municipality may change its election date by changing its charter. In addition to any existing charter provisions, a private act municipality may change its election via ordinance to coincide with the August or November general election. The ordinance changing an election date may extend terms for no more than two years as necessary to meet the general election date. T.C.A. § 6-54-138.

The general law mayor-aldermanic charter provides that the first election after the incorporation of the municipality shall be held no later than 62 days following the incorporation election; and it authorizes the board of mayor and aldermen to change its election date by ordinance to coincide with the August or November general election. The ordinance changing an election date may extend terms for no more than two years as necessary to meet the general election date. T.C.A. § 6-1-207, T.C.A. § 6-3-104.

The general law city manager-commission charter provides that the first election of commissioners shall be the fourth Tuesday following the incorporation election, and it authorizes the board of commissioners to change the election date by ordinance to coincide with the August or November general state election. The ordinance changing an election date may extend terms for no more than two years as necessary to meet the general election date. T.C.A. § 6-20-102.

The general law modified city manager-council charter provides that the first election of council members after the incorporation of the municipality shall be the fourth Tuesday following the incorporation election, and it authorizes the city council to change the election date by ordinance. The ordinance changing an election date may extend terms for no more than two years as necessary to meet the general election date. T.C.A. § 6-31-102.

Qualifying Deadline for Municipal Election

Reference Number: MTAS-284

T.C.A. § 2-5-101(a)(3) requires candidates in municipal elections held with the August general election to file their nominating petitions by noon on the first Thursday in April, and candidates in other municipal elections to file their nominating petitions no later than noon on the third Thursday in the third calendar month before the election.

T.C.A. § 6-53-101 states, "The county election commission of each county shall hold, upon no less than one hundred twenty (120) days' notice, an election for mayor ... and other officers...." T.C.A. § 6-53-101(a)(2) requires municipalities that have changed the term of office of an elected official to file a certified copy of the ordinance changing the term with the county election commission at least seven days before the deadline for filing the notice of election under T.C.A. § 2-12-111.

Early Voting

Reference Number: MTAS-289

Early voting applies to all elections, including municipal elections. T.C.A. §§ 2-6-101, *et seq.* The time and the place for early voting is not more than 20 days nor fewer than five days before the date of the election, at the office of the county election commission. However, in the case of a municipal election in which there is no opposition for any of the offices involved, the period is not more than 10 or fewer than five days before the election. Furthermore, with the exception of Nashville and Memphis, early voting is abolished in a municipal election not held in conjunction with a primary election, the regular August or November election or any special primary or general election for state or federal office if there is no opposition for any of the offices at issue.

The time during which the county election commission offices must be open for early voting is set in T.C.A. § 2-6-103 and includes certain Saturdays. However, municipalities of less than 5,000 in population may set the Saturday schedule. Certain rules govern the hours that election commission

offices are open for early voting in municipal elections in the principal city in counties with a population of more than 150,000.

T.C.A. § 2-6-112 also provides that, at the request of the municipality, the county election commission must establish a satellite voting location for municipal elections, where the election is held at times other than the regular state general elections in August and November. The municipality is responsible for the cost of the satellite location.

The county election commission may choose not to have early voting at the election commission office when a municipality with a satellite voting location requests this. T.C.A. § 2-6-112.

Determination of Residency

Reference Number: MTAS-287

Determination of Residence for Voter Registration Purposes

Any United States citizen who is or will be 18 years old before the next election date and is a Tennessee resident may register to vote unless he or she has been legally disqualified. T.C.A. § 2-2-102, T.C.A. § 2-2-104, T.C.A. § 2-22-122. The registrar follows T.C.A. § 2-2-122 to determine if a person is a Tennessee resident.

Residency Requirements Applicable to Persons Living in a Newly Annexed Area

People living in newly annexed territory have the same rights as any other people living in the city, as if the annexed area "had always been part of the annexing municipality". T.C.A. § 6-51-108(a). Therefore, any residency period in the annexed area would apply toward residency requirements for voting and running for municipal office.

Municipalities should consider election deadline dates when they annex territory. Municipalities that annex territory must provide the appropriate county election commission with:

- Maps depicting the area;
- A copy of the annexation ordinance denoting wards or districts, if applicable; and
- A copy of the census taken for the annexation, if available. T.C.A. § 2-2-107 (c).

Notice to County Election Commission of Certain Changes

The legislative body of each municipality must provide the county election commission an updated list of any changes to house, road, or street names and numbers every six months. T.C.A. § 7-86-127.

Non-resident Property Owners' Voting Rights

Tennessee statutes recognize non-resident property owners' voting rights in municipal elections if such rights are provided by municipal charter or general law. Separate voter registration for non-resident property owners is required. Therefore, non-resident property owners who also are registered to vote anywhere in Tennessee must register as property rights voters before registration closes for an upcoming municipal election, just as other voters must register. T.C.A. § 2-2-107, T.C.A. § 6-53-102. A municipality where non-resident property owners have voting rights may, via ordinance, require non-resident voters to vote absentee ballot via certified mail. Such an ordinance must be passed and filed with the county election no less than 60 days prior to an election where utilized T.C.A. § 2-6-205.

Presumably, only those people whose names appear on deeds or tax rolls would be eligible to register as non-resident property owners. T.C.A. § 2-2-107(a)(3) provides that no more than two persons are entitled to vote based upon ownership of an individual tract regardless of the number of property owners. If a partnership owns property, only partners named on the deed have non-resident voting rights. Corporate owners have no vote because the Tennessee Constitution and election laws authorize voter registration of only natural people. Article IV, Section 1, and T.C.A. § 2-2-102.

The general law city manager-commission charter provides that a person eligible to vote in municipal elections solely because of non-resident ownership of real property is not eligible for election as a commissioner T.C.A. § 6-20-103.

Nominating Petitions

Reference Number:

MTAS-288

Nominating petitions must be signed by the candidate and 25 or more registered voters eligible to vote for the office the candidate is seeking. T.C.A. § 2-5-101(b)(1). Such petitions may not be issued more than 90 days before the qualifying deadline. T.C.A. § 2-5-102 (b)(5).

The county election commission office is required to furnish nominating petition forms for municipal elections. T.C.A. § 2-5-102(b)(1). Candidates in a city that lies in two or more counties must file their original nominating petitions with the chairperson or administrator of elections in the county where the city hall is located. They also must file certified duplicates of the petition with the commissions of all the counties in which the city lies. T.C.A. § 2-5-104.

If candidates miss a filing deadline or if their petitions do not contain the signatures and home addresses of at least 25 registered voters eligible to vote for the offices the candidates are seeking, their names may not be printed on the ballot. T.C.A. § 2-5-101(c).

T.C.A. § 2-5-101 and T.C.A. § 2-2-204 provide procedures for qualifying additional candidates if another candidate is nominated but dies or withdraws before the election.

Candidate Qualifications

Reference Number: MTAS-185

Tennessee's "Little Hatch Act" limits the political activity of certain government employees but does not apply to municipal employees. T.C.A. §§ 2-19-201, *et seq.* Some municipal charters and ordinances contain restrictions on the political activities of municipal employees; however, they have been superseded by T.C.A. § 7-51-1501. That statute expressly gives local government employees the same rights as other Tennessee citizens to engage in political activities and to run for state and most local government offices.The law contains one significant exception: Local government employees may not run for the local governing body unless authorized by law or local ordinance.

Only the names of "qualified" candidates may be on the ballot. T.C.A. § 2-5-204(a). In general, charter provisions requiring up to one year of residency in the city to qualify for office are valid. A person may not use a business or commercial address as a residence for purposes of the election code unless the person provides evidence of the residential use of the property. T.C.A. § 2-2-122.

No minimum age qualification for membership on the municipal governing body may be greater than 21 years at the time the member takes office. A minimum age of 18 is fixed to be a candidate for such an office. However, a minimum age between 18 and 21 for assuming office may be fixed by private act, charter provision, or ordinance, if authorized by charter. This law does not apply in a county with a metropolitan form of government. T.C.A. § 6-53-109.

Political Ads and Signs

Reference Number: MTAS-187

A political advertisement must state the name of the person or group funding it and whether the candidate authorized the ad. T.C.A. § 2-19-120.

Within certain counties, it is illegal for anyone to attach posters, show cards, advertisements, or devices (including election campaign literature) on poles, towers, or public utility company fixtures – whether publicly or privately owned – unless legally authorized. T.C.A. § 2-19-144. Candidates are required to remove all election signs on highway rights of way and on other publicly owned property within three weeks after an election, but there is no penalty for failing to do so. T.C.A. § 2-1-116. In addition to these provisions, many cities have local ordinances regulating posters, advertisements, and devices on public property.

Referenda Elections

Reference Number:

MTAS-188

The Tennessee Supreme Court has held that "the right to hold an election does not exist absent an express grant of power by the legislature." (See Brewer v. Davis, 28 Tenn. 208 (1848); McPherson v. Everett, 594 S.W.2d 677, 680 (Tenn. 1980).) The Tennessee Attorney General's office has consistently concluded under those cases that referenda are elections for which there must be statutory authorization. Op. Tenn. Atty. Gen. No. 86-146; 95-013.

Local Referenda Permitted

The following referenda are authorized under Tennessee law:

- General obligation bonds (T.C.A. §§ 9-21-201, *et seq.*);
- Liquor retail sales (package stores) or selling alcoholic beverages for consumption on the premises (T.C.A. §§ 57-3-101, *et seq.*, T.C.A. §§ 57-4-101, *et seq.*);
- Annexation (T.C.A. §§ 6-51-104, *et seq.*);
- Local sales tax (T.C.A. §§ 67-6-701, *et seq.*);
- Adopting or surrendering the general law mayor-aldermanic charter (T.C.A. § 6-1-201), the city manager-commission charter (T.C.A. § 6-18-104), and the modified city manager-council charter (T.C.A. § 6-30-106);
- A private act passed by the General Assembly (Article XI, Section 9, of the Tennessee Constitution);
- Creating an emergency communications (911) district (T.C.A. §§ 7-86-101, *et seq.*);
- Recalling a city official if the charter permits (T.C.A. § 2-5-151);
- Adopting or amending home rule charters (Article XI, Section 9, of the Tennessee Constitution);
- Popular election of the mayor in cities incorporated under the uniform city manager-commission charter (T.C.A. § 6-20-201(b));
- Consolidating city and county government (T.C.A. §§ 7-1-101, 7-3-312, and 7-21-101, *et seq.*);
- Increasing the number of commissioners from five to seven for cities with a population greater than 20,000 incorporated under the uniform city manager-commission charter (T.C.A. § 6-20-101); and
- Approval of the issuance of retail liquor licenses to alcoholic beverage manufacturers (T.C.A.§ 57-3-204).

Referendum Election Procedures

The procedures for holding any type of referendum election generally are in the law that authorizes the election. If the legislation does not address a particular type of referendum, the provisions of the Election Code apply. Additionally, T.C.A. § 2-3-204 frequently applies, and T.C.A. § 2-12-111 and T.C.A. §§ 2-6-101, *et seq.*, always apply. Elections regarding local option sales tax pursuant to T.C.A. § 67-7-706(a) shall be conducted according to T.C.A. § 2-3-204.

Resolutions, ordinances, or petitions requiring elections on questions to be held during the general election or the presidential primary must be filed with the county election commission at least 75 days before the election T.C.A. § 2-3-204(b).

The city attorney is required to summarize in 200 or fewer words any question exceeding 300 words that is to be submitted to the voters T.C.A. § 2-5-208(f).

T.C.A. § 2-5-208 requires any question submitted to the people in a local referendum to be followed by the words yes and no so the voter can mark an X opposite the proper word. Any question must be worded so that yes indicates support for and no indicates opposition to the measure.

Financial Disclosure/Conflict of Interest

Reference Number: MTAS-189

All candidates for the chief administrative office (mayor), any candidates who spend more than $500, and candidates for other offices who pay at least $100 a month are required to file campaign financial disclosure reports. Members of a municipal or regional planning commission must also file a campaign disclosure report. Civil penalties of $25 per day are authorized for late filings. Penalties up to the greater of $10,000 or 15 percent of the amount in controversy may be levied for filings more than 35 days late. It is a Class E felony for a multi-candidate political campaign committee with a prior assessment record to intentionally fail to file a required campaign financial report. Further, the treasurer of such a committee may be personally liable for any penalty levied by the Registry of Election Finance. T.C.A. §§ 2-10-101–118.

Contributions to political campaigns for municipal candidates are limited to:

- $1,000 from any person (including corporations and other organizations);
- $5,000 from a multi-candidate political campaign committee;
- $20,000 from the candidate;
- $20,000 from a political party; and
- $75,000 from multi-candidate political campaign committees.

The Registry of Election Finance may impose a maximum penalty of $10,000 or 115 percent of the amount of all contributions made or accepted in excess of these limits, whichever is greater. T.C.A. §§ 2-10-301–310.

Each candidate for local public office must prepare a report of contributions that includes the receipt date of each contribution and a political campaign committee's statement indicating the date of each expenditure. T.C.A. §§ 2-10-105, 107.

Candidates are prohibited from converting leftover campaign funds to personal use. The funds must be returned to contributors, put in the volunteer public education trust fund, or transferred to another political campaign fund, a political party, a charitable or civic organization, educational institution, or an organization described in 26 U.S.C. 170(c). T.C.A. § 2-10-114.

Conflict of interest disclosure reports by any candidate or appointee to a local public office are required under T.C.A. §§ 8-50-501, *et seq.* Detailed financial information is required, including the names of corporations or organizations in which the official or one immediate family member has an investment of more than $10,000 or 5 percent of the total capital. This must be filed no later than 30 days after the last day legally allowed for qualifying as a candidate. As long as an elected official holds office, he or she must file an amended statement with the Tennessee Ethics Commission or inform that office in writing that an amended statement is not necessary because nothing has changed. The amended statement must be filed no later than January 31 of each year. T.C.A. § 8-50-504.

Recall Elections

Reference Number: MTAS-190

Recall elections are available only if the municipality's charter authorizes them. Procedures for recall elections are found in T.C.A. § 2-5-151, but these provisions do not apply in Nashville-Davidson County. Recall petitions must contain one or more specific grounds for removal. T.C.A. § 6-53-108.

Petitions for Recall, Referendum, or Initiative

T.C.A. § 2-5-151 outlines procedures for cities having charter provisions for recall, referendum, or initiative. The statute contains extensive rules, including:

- A registered voter must submit the prepared petition and question to the county election commission, which must certify within 30 days whether it is proper;
- The individual who files has 15 days to fix any problems;
- The petition must include the question, the printed name of each signer, the date of the signature, and the signatures of at least 15 percent of the city's registered voters;

- The completed petition must be filed within 75 days after certification by the election commission and at least 60 days before the election; and
- Individuals have eight days after filing to remove their names from the petition.

Since July 1, 1997, a municipality has been allowed to enact or re-enact controlling charter requirements relative to the number of signatures required and the 75-day deadline after election commission certification of the petition. T.C.A. § 2-5-151.

At-Large Electoral Systems

Reference Number: MTAS-1092

So you want to adopt or continue an at-large election system where all the members of the governing body are elected from the municipality as a whole. Or, you want to adopt a combination district / at-large election system in which the majority of members of the governing body would be elected from districts and one or two would be elected at-large. Will either system survive a challenge on the ground that it discriminates against minority voters?

Well, yes and no. Local governments have successfully defended a tiny number of totally at-large systems and at least one combination district / at-large system (by agreement of the parties).

However, if the local government has a significant minority population and a less-than-pristine record of race relations, any at-large component of its electoral system is skating on thin ice. Besides, win or lose, the defense of such suits is horrendously expensive (if the city loses, it also pays the plaintiff's attorney's fees).

If that answer is not particularly helpful in individual municipalities, there is a good reason for it. The reason lies in the nebulous legal tests against which at-large and combination at-large / district electoral systems are measured that have grown out of the history of the statutes and cases in this area.

The Civil Rights Act of 1965 (act) banned a large number of election practices considered by the Congress to discriminate against minorities in violation of the Fifteenth Amendment to the United States Constitution. These practices include literacy tests, educational or knowledge tests, moral character tests, and proof of qualifications through registered voters or other classes. A major amendment to the act, passed in 1975, required many states and local governments to provide bilingual election forms, including ballots.

Section 2 of the act, which basically tracked the language of the Fifteenth Amendment, provided that:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4 (f)(2).

In applying Section 2, the federal courts disagreed on whether a Section 2 violation was triggered by election practices that were adopted with the intention to discriminate against minority groups or simply the effect of the practice.

The United States Supreme Court settled the disagreement in *Mobile v. Bolden*, 446 U.S. 55 (1980). That case involved a challenge under the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and Section 2, of the at-large election system of the City of Mobile, Alabama. The city was governed by a commission consisting of three commissioners elected at-large. The commission was established in 1911, but no black had ever been elected under that system.

In fact, until 1973 none had ever sought office. However, the Supreme Court turned aside the challenge on the grounds that the Plaintiffs had not proved the election system was a "purposeful device to further racial discrimination." Curiously enough, the Court reasoned that purposeful discrimination in establishing the system could not be proven because in 1911 blacks in Alabama were, for all practical purposes, disenfranchised; therefore there was no need on the part of the City of Mobile to adopt an at-large system to discriminate against them.

In response to Bolden's requirement that proof of intentional discrimination was essential to an election practice claim under both the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and Section 2, the Congress in 1982 amended Section 2 by writing into it an "effects test." The intent and effect of that amendment was to overturn the "intentional test" of Bolden under Section 2. In fact, the

Senate Judiciary Report on the bill whether " a challenged practice or structure, prevents plaintiffs from having an equal opportunity to participate in the political process and to elect candidates of their choice" (emphasis in mine).

As amended in 1982, Section 2 presently reads as follows:

a. No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
b. A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that it members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered; Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population (emphasis is mine).

At-large election systems, then, are not per se unconstitutional or a violation of Section 2. They, like other election practices, stand or fall on a "totality of circumstances" test under Section 2.

However, because intentional discrimination is still essential to the proof of a voting rights discrimination case under the Fourteenth and Fifteenth Amendments to the United States Constitution, and Section 2 requires only that the effect of the election practice in question be discriminatory, the latter has become the primary vehicle for at-large elections system challenges.

The only U.S. Supreme Court case that interprets the present Section 2 is the landmark case of *Thornburg v. Gingles*, 106S.Ct. 2752 (1986). In striking down most of the redistricting plan of the North Carolina General Assembly on the grounds that it diluted the vote of black citizens in certain districts, the Court announced a three-pronged test for proving a minority voter dilution claim under Section 2. A plaintiff must show that:

- The minority is sufficiently large and geographically compact enough to constitute a majority in a single-member district.
- The minority is politically cohesive.
- The majority votes sufficiently as a block to enable it — in the absence of special circumstances, such as an unopposed minority candidate — usually to defeat the minority's preferred candidate.

The Court went on to say that, "Stated succinctly, and bloc voting majority must usually be able to defeat candidates supported by a politically cohesive geographically insular minority group" (emphasis is mine).

If a local government possessed no other information than the history of Section 2, it should be on notice that if it has a significant minority population in identifiable pockets, an at-large election system or a combination district / at-large is automatically suspect.

The Voting Rights Act of 1965, as amended, generally, and Section 1 of that act, as amended after Bolden, in particular, express a clear intention on the part of Congress to snuff out any kind of election practice that operates to the detriment of minority groups. At-large provisions created or preserved in such cities after 1982 are invitations to legal trouble even if they were, or are, established with no discriminatory intent in mind.

The reason it is difficult to answer the question of whether a proposed district / at-large combination in a particular municipality would withstand challenge is that there are no simple rules or standards against which to measure any particular at-large or combination district / at-large election system, either before its adoption or after is challenged.

Even the U.S. Supreme Court in Gingles could not agree on what kind of evidence will satisfy the proof of a violation of each prong of the three-pronged test. Under the "totality of circumstances" test, the determination of whether a system complies with Section 2, can require some incredibly complicated and expensive analysis. In theory, that should be the plaintiff's problem; in reality, it is usually municipalities that end up on the complicated, expensive defensive in most at-large cases.

However, one ironclad rule can be observed in the at-large electoral system cases: if under the old election system no blacks, or few were ever elected to office, that system will not stand constitutional muster . The corollary is that if under a proposed election system it is likely that no blacks, or few blacks will be elected to office, the system will not stand constitutional muster.

Beyond that simple rule, a municipality's defensive problems are compounded by the Senate Judiciary Report's list of nine "objective" factors the Courts are to use in analyzing a Section 2 claim

- The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process.
- The extent to which voting in the elections of the state or political subdivision is racially polarized.
- The extent to which the state or political subdivision has used unusually large election districts, majority voter requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.
- If there is a candidate slating process, whether the members of the minority group has been denied access to that process.
- The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.
- Whether political campaigns have been characterized by overt or subtle racial appeals.
- The extent to which members of a minority group have been elected to public office in the jurisdiction.
- Whether there is a significant lack of responsiveness on part of elected officials to the particularized needs of the members of the minority group.
- Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisites to voting. or standard, practice or procedure is tenuous.

But that list of rules is not a comprehensive and exclusive one, and there is no requirement that any particular factors proven, the Senate Judiciary Report continued. In other words, the "totality of circumstances" test permits the plaintiff to use the shotgun approach in his presentation of evidence of discriminatory effect. Any evidence or perceived evidence of discrimination in, as well as by, the city is allowed to be shot forth as evidence of election practices discrimination.

That list of rules has been used in one form or another by the courts in virtually all of the cases challenging at-large systems since Gingles. Many courts have gotten even into white-minority income comparisons as evidence of a lesser ability on the part of the latter to participate in the electoral process!

For an outstanding and devastating example of the Senate Judiciary Committee rules applied in a Tennessee Case, see *Buchanan v. City of Jackson*, 683 F.Supp. 1515 (1988) in which court developed a 170 year of discrimination against blacks in and by the City of Jackson.

What the Gingles three-pronged test and the "factors" that go into an analysis of a Section 2 case mean is that how a case is actually analyzed is "judge's choice." As one prominent writer on the subject pointed out:

Because the nine factors of the Senate Report remain relevant, and because of the presence of constitutional claims, proof in at-large election cases extends backward to formation of a local government in the Nineteenth Century, and extends forward to cover the fairness to minorities of every aspect of current government operations: hiring, housing, urban renewal and relocations, street improvements, school operations and curricula, and the provision of all government services…(emphasis is mine). (Rhyne, William S., Preparing and Trying the At-Large Election Voting Rights Case).

In other words, the at-large system analysis can become an as complicated and comprehensive look into the history of the municipality as the judge wants to make it, and the outcome can be totally unpredictable, depending upon which proof the judge wants to accept or ignore.

Although at-large election systems are not per se unconstitutional or a violation of Section 2, there is a judicial bias against them. While some have been upheld, they have generally received rough treatment in the courts, including in Jackson and Chattanooga.

No matter what good arguments justify at-large systems, where there is a significant minority population in identifiable pockets, they are viewed as an instrument which either dilutes, or have the high potential to dilute, the voting strength of minority groups.

While Section 2 specifically says that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population,” arguably, cases brought under that section lead to roughly that result.

The lengths to which the courts have gone to overturn local election practices clearly not designed with discriminatory intent in mind and defensible on common sense grounds is seen in *NAACP v. City of Statesville*, 606 F.Supp. 569 (1985). In that case the parties agreed to a combination district / at large system in which some of the district seats contained a majority black voting age population.

However, the city supported staggered two year terms, the plaintiffs non-staggered four year terms, for the at-large offices. The Court was asked to resolve that difference in a way that would lead to the least diminution of minority voting power. The Court decided that the at-large seats would be filled in non-staggered elections because that method permitted single-shot voting and candidate support trade off agreements between white and black candidates. The terms of office would be for four years because the blacks were less economically able than whites to sustain the cost of more frequent elections.

In theory, a redistricting scheme which incorporates one or two at-large seats would insure the election of members of the minority to office, thereby satisfying Section 2 and Gingles. But a careful reading of Section 2 and the Senate Judiciary Committee Report’s nine rules lead the court’s to ask In theory, a redistricting scheme which incorporates one or two at-large seats would insure the election of members of the minority to office, thereby satisfying Section 2 and Gingles. But a careful reading of Section 2 and the Senate Judiciary Committee Report’s nine rules lead the court’s to ask two questions about minority representation under such a system: (1) Does it permit the minority group to elect minority officeholders? And (2) Does it provide the minority group political power? Minorities may be elected by office in “proper” number in satisfaction of Section 2 and Gingles under a combination district / at-large election system, but conceivably find their political power diluted by the at-large office holders. The court will assure itself that both question are answered in favor of the minority.

Although Section 2 and Gingles may have had in mind voting power as opposed to political power, the latter has become a major component of the “totality of circumstances” test.

In fact, evidence of that can be seen in *Buchanan v. City of Jackson*, 683 F.Supp. 1537 (1988) in which the Court fashioned a remedy to the at-large election system it had found in violation of Section 2 in *Buchanan v. City of Jackson*, 683 F.Supp. 1515 (1988). A proposal by the City of Jackson called for the board of nine commissioners, six district commissioners to be elected from single member districts, and three administrative commissioners to elected at-large.

The three administrative commissioners were to be responsible for the administration of the City of Jackson in virtually the same manner as was the old board of three commissioner struck down by the Court. The Court rejected that plan on the premises that the election of all the administrative commissioners at-large would not remedy effects of past discrimination, which included, among other things, under employment of blacks as City employees, poorly maintained streets in black communities, and the total absence of blacks elected to City administrative ositions or appointed to head any department.

If there has been past discrimination on the part of the city, it is very easy for a court to find that any proposed system in which the majority voters can elect the controlling faction n the governing body perpetuates the effects of past discrimination.

Assume that there are five members of the governing body, two elected from majority districts, two from minority districts, and one elected at-large. If the total number of the majority oting age population in the municipality exceeds the total number of the minority voting age population, the at-large member of the governing body would, given polarized voting, lways be elected by the majority. In addition, he or she would hold the swing vote on the governing body. On the whole, it is not worthwhile to defend an at-large or even a district / at-large election system any place in Tennessee where there are significant identifiable pockets of blacks, unless the city in question has an immaculate history on discrimination. It

is essential to remember that the issue here is not whether the municipality intended to discriminate, but whether there was and is discrimination.

Several good Tennessee Attorney General's opinions and publications from various sources have been written on this subject.
