

THE TENNESSEAN

March 14, 2008

Tennessee's plan to appoint judges takes power away from the public

By *BRIAN T. FITZPATRICK*

Tennessee Voices

For most of Tennessee's history, state judges were selected just like other state officials, in elections.

In 1971, however, the legislature decided to adopt a controversial method of selection called the "Tennessee Plan." The plan expires this summer, and the legislature has a great deal to think about before deciding whether to reauthorize it.

Under the Tennessee Plan, the governor appoints all state appellate judges, including Supreme Court justices, from a list of candidates submitted by a commission made up primarily of members of lawyers' organizations. Only after the judges have served for a period of time do they come before the public, and then only in uncontested retention referendums.

In these referendums, voters are asked only "yes" or "no" as to whether judges should stay on the bench; voters are not informed of who might replace them if they vote "no." Under these circumstances, the public has, unsurprisingly, voted to retain incumbent judges 99.3 percent of the time.

The plan is one of several "merit systems" used in the U.S. The primary goal of these systems is to take politics out of judicial selection, but the way they do so is simply by taking the power away from the public and giving it instead to special lawyers' organizations.

But the most controversial aspect of the Tennessee Plan has been whether it is even legal. Since 1853, the Tennessee Constitution has required all judges "be elected by the qualified voters of the state," and several lawsuits have been filed over the years arguing appellate judges selected under the plan are not "elected."

Although lawsuits have twice gone to the Tennessee Supreme Court, the court's decisions have left many questions unanswered. For example, how can it be that all appellate judges are "elected by the qualified voters of the state" if they are all appointed by the governor and the lawyers' commission?

In light of these questions, Tennessee voters were asked in 1977 to amend the constitution to replace the provision calling for elected judges with the Tennessee Plan. The public rejected this amendment. Yet, the plan has remained on the books.

With so many unanswered questions, many people believe the legislature should vote against plan reauthorization until the people of Tennessee have had another chance to amend the constitution. This will give the lawyers of Tennessee one more opportunity to persuade the rest of the citizenry that the best way to choose judges is by placing the power to do so in the hands of lawyers.

If the events of 1977 and recent public opinion polls are any indications, however, this could be a very hard sell.