



Tuesday, February 26, 2008

Guest Commentary: Tennessee plan for selecting judges is unconstitutional

By David Danner

The Tennessee Plan must not be reauthorized by the General Assembly upon the imminent expiration of its key provisions in June 2008.

The Tennessee Constitution requires that state judges be elected by the qualified voters of the state.

This is a simple democratic proposition that has been turned upside down by a complicated Tennessee Plan which permits the Governor to appoint state appellate judges from slates of pre-selected judicial candidates submitted to the Governor by an elite, insular committee process wherein voters are not permitted to participate until well after the eventual appointee dons a black robe deciding court cases. Voters do not initially select the jurist but simply approve/retain or reject/recall the judge within a retention “election” long after the gubernatorial appointee has already served as a judge which process all but guarantees that a non-elected government official gets to keep a job acquired inconsistent with the state constitution. But the Tennessee Supreme Court has wrongly ruled that the Tennessee Plan is constitutional essentially because the misnomer “election” is used by the Plan to describe this esoteric, convoluted, non-democratic process wherein voters are mistreated as unwanted guests to an aristocratic party.

The state constitution refers to an election, which Tennessee counties have gotten right in the form of general contested elections for local trial judges. If county judicial elections can adhere to the state constitution, then statewide judicial elections can also adhere to the state constitution.

Supporters of the Tennessee Plan argue that the election required by the state constitution would improperly inject campaign politics into the court system. But this “politics” argument is a seductive, specious excuse to violate the state constitution. If campaign politics is an actual problem in the courts, a better method to choose competent judges based on non-political merit while adhering to the state constitution is for the state to implement the county practice of general elections for judges which are regulated by the Code of Judicial Conduct wherein judicial candidates are personally prohibited from collecting direct campaign donations. Or, public financing of judicial elections could be instituted wherein candidates are prohibited from collecting any campaign donations.

Unless the state constitution is amended to authorize both the gubernatorial appointment and the retention/recall referendum of judges, the Tennessee Plan serves as an infamous model for politicians - with the affirmative assistance of a lax judiciary - to contravene the state constitution by misusing a simple term such as “election” by applying it to a non-election in a manner that serves to deny the intent of the drafters of the Tennessee Constitution that state judges be genuinely elected by the qualified voters of the state.

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