

With Judicial Selection Finalists Up for Renewal, Debate Proceeds in Earnest

BILL DRIES | The Daily News

The state Judicial Selection Commission that has been the subject of Governor Phil Bredesen's ire in the last two years is at a crossroads.

The legislative act that created the commission to send the names of finalists for state appellate court vacancies to the governor for his selection is up for renewal by legislators next month.

It is part of the state's hybrid system of appointing state Supreme Court justices and appellate court judges before retention (yes/no) elections, filling vacancies on lower courts by appointment and electing local trial court judges.



ERUDITE CHATTER: Vanderbilt University School of Law Professor Brian T. Fitzpatrick, left, and Tennessee Judicial Selection Commission member C. Barry Ward shoot the breeze after a lively forum on judicial selection for the local chapter of The Federalist Society. -- Photo By Bill Dries

Open questions

The 17-member commission screens applicants for the appellate courts and sends a list of three finalists to the governor. The governor must appoint one of the three or reject all three for specific reasons and then select from another list of three finalists. For trial court vacancies, the governor must pick one of the three finalists.

At a forum this month sponsored by the Memphis Lawyers' Chapter of The Federalist Society, Vanderbilt Law School professor Brian T. Fitzpatrick was among those arguing the commission is unconstitutional - as is anything short of a popular vote. Fitzpatrick pointed to the 1977 Constitutional Convention that put 13 proposed amendments to voters across the state.

"The one amendment they rejected would have repealed the constitutional language requiring election of judges and replaced it with the Tennessee plan. ... The question has never been addressed by the Tennessee Supreme Court," Fitzpatrick said. "So, I think we have a few open questions."

Barry Ward of Glankler Brown PLLC is a member of the commission, appointed in 2002 by House Speaker Jimmy Naifeh. He told the society's gathering at Felicia Suzanne's the commission works hard and its members are conscientious.

"When we get in the discussions, it's not about partisanship," Ward said. "When we get behind closed doors, we have big and long and basic disagreements about who is best qualified to serve. It's always about who has the best judicial temperament - who is going to be best served to be a judge."

Buddy system?

Drew Johnson, president of the Tennessee Center for Policy Research, a Nashville think tank, said the political connections with a commission are more direct than those involved in popular elections.

"I feel, frankly, a lot more comfortable with the 4.5 million to 4 million voters in the state of Tennessee electing who they feel are competent to serve as judges rather than having - talking about special interests - you have the buddy of (House Speaker Jimmy) Naifeh or (Senate Speaker Ron) Ramsey ... on the Commission," Johnson said.

Ward, who lives in Tipton County, where the Naifeh family is the dominant political power, admits he is a political ally of Naifeh's. But he insists the commission is better than elections.

"We have varied interest groups (in elections). We have a demand for money. The last thing I want is a judge with his hand out looking for a special interest group asking for money," he said.

Fitzpatrick made a case for legal realism.

"What are we trying to accomplish - if you honestly believe that judges are never political, then maybe the Tennessee plan makes sense," he said.

"Reasonable people can disagree about what the law should say. And when the text and the doctrine and the precedent do not control the question, the judges have to pull something out and the question is what do they consult? They consult what makes sense to them - their own world view."

Equal opportunity employment

Among those in the audience of 50 at the restaurant was attorney Buck Lewis. Lewis and Covington attorney Houston Gordon were on the list of three finalists that Bredesen rejected earlier this year for a vacancy on the state Supreme Court.

Bredesen said he wanted to appoint a black jurist to the high court. Bredesen later filed suit when Lewis and Gordon applied unsuccessfully for a second list of finalists sent to Bredesen by the commission. The second list also included Circuit Court Judge D'Army Bailey of Memphis, who is black. Bredesen eventually selected Nashville appeals court judge William Koch, who is white.

Ward said the commission hoped for a court ruling that would resolve whether Bredesen's reason was legitimate.

"We were all waiting for the decision to say whether it is permissible to have per se exclusions within the government. And our Supreme Court punted," Ward said. "They didn't answer the question. They said it's a political issue among different departments of government and we're not going to answer it."

Bredesen had also complained of the commission process of selection being too political.

Ward downplayed the difference despite Bredesen's plan to pursue long-term changes in the process during the remaining three years in his second term of office.

Lewis told the group that despite the political intrigue and litigation, he supports the selection process, if not the outcome.

"The issue is not is the commission political. Certainly it has aspects of politics. The real issue is, is it better than the alternative?" Lewis asked.

Johnson's response was immediate.

"It really doesn't matter if it's better. This is what should matter: If you're a person with integrity who can read the Constitution, what should matter is upholding the Constitution," he said. "There's a very good chance that some version of the way we're doing it now would be the best way to do it. But we need to change that constitutionally."

Fitzpatrick also talked of a third course that would keep the hybrid in Tennessee's selection system.

"I'm not advocating putting Barry out of business. I think, no matter what we do, there should be a role for a commission like the one Barry sits on," he said. "The question is simply whether they have full control or we maybe make it an advisory committee where they can offer recommendations to the public."