

Verdict on Tennessee Plan may require a jury

For now, appellate judges are appointed. Perhaps it's time that judicial selection involved not just lawyers, but all of us.

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In June of this year, Tennessee's system for selecting appellate judges -- called the "Tennessee Plan" -- will expire unless it is reauthorized by the legislature. This is, therefore, an opportune time to consider whether the Tennessee Plan has served the people of the state well.

For most of Tennessee's history, appellate judges, like other public officials, were selected in elections. But in 1971 the General Assembly decided to change things by adopting the Tennessee Plan.

The plan charges the governor with appointing all appellate judges in the state -- including Supreme Court justices -- from a list of candidates submitted by a nominating commission. Only after the judges have served for a period of time do they come before the public for approval, and, even then, only in uncontested referendums on retention. Voters are asked to respond simply with "yes" or "no" to the question of whether the appointed judges should stay on the bench; voters are not informed about who might replace the judges if they vote "no."

Under these circumstances, the public has, unsurprisingly, voted in favor of retaining incumbent judges 99.3 percent of the time.

The Tennessee Plan has been controversial ever since it was adopted. Most of the controversy has revolved around whether the plan is consistent with the Tennessee Constitution. The Constitution has required since 1853 that all judges be "elected by the qualified voters of the state." Many people believe that judges appointed by the governor and retained in uncontested referendums are not "elected" in any fair sense of that word.

But the controversy over the plan runs deeper than whether it is constitutional. Many people have also questioned whether it is fair.

Under the plan, no one can become an appellate judge in Tennessee unless he or she wins the blessing of a 17-member nominating commission. Fourteen of the

commission members are required to be lawyers, and 12 of those lawyers are required to come from one of five lawyers' organizations, such as the Tennessee Trial Lawyers Association. The Tennessee Plan, in other words, has basically taken the power to choose judges away from the public and placed it in the hands of lawyers.

Lawyers are fine people (I myself am one of them), but many have wondered whether it is fair to the rest of the people of Tennessee that lawyers are basically the only ones who have a say in selecting our judges. Judges are powerful public officials who are called on to decide many of the most contentious questions of public policy in our society. Their decisions affect not only lawyers, but businesses, doctors, teachers and many others. Yet under the Tennessee Plan, all but three of the seats on the nominating commission are reserved only for lawyers.

It might make sense to leave judicial selection to lawyers if they were somehow uniquely qualified for that task, but we know they are not. It is widely believed that the best judicial system in America is the federal system, yet the selection of judges in the federal system has not been left exclusively to lawyers. Four of our last five presidents have not been lawyers, yet they appointed thousands of excellent judges. All of those judges were confirmed by U.S. senators, a large number of whom were not lawyers. Non-lawyers are just as capable of selecting good judges as lawyers are.

In fact, in one very important respect, non-lawyers may be even better at selecting judges than lawyers are. If there is one thing that virtually all lawyers agree on -- whether they represent plaintiffs, businesses or anyone else -- it is that life is better for lawyers if there is more litigation. The more litigation there is, the more fees lawyers can collect.

This means that a method of selection like the Tennessee Plan, which reserves nearly all its seats of influence for those who benefit from lawsuits, will be heavily biased toward judges who favor more lawsuits. This is, of course, cold comfort to those among us who get sued, including the businesses, doctors, teachers and others who are reserved no spots at all on the nominating commission.

Judicial decisions do not affect just lawyers; they affect all of us. Perhaps it is time that judicial selection involved not just lawyers, but all of us as well. That is the question the legislature will be forced to answer this summer when it considers whether to reauthorize the Tennessee Plan.

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