



Grisham: New way needed to elect judges

Greg Grisham
Sunday, April 27, 2008

Last year, the Tennessee Supreme Court issued its decision in *Bredesen v. Tennessee Judicial Selection Commission*, upholding the governor's rejection of the first panel of three candidates submitted by the Judicial Selection Commission for the vacant Supreme Court position and his right to request a second panel with three different candidates under the current statute. The lawsuit sparked a political debate that continues today.

Many Tennesseans, including Gov. Phil Bredesen, have stated that our state's method for selecting judges should be reexamined and the process improved. Missouri, whose Missouri Plan provided the judicial selection model for Tennessee, is also having a public debate over whether its long-standing plan of judicial selection should be reformed.

The Tennessee Plan for selecting judges is a hybrid model combining a merit-based approach of initial appointments to judicial vacancies with popular elections for trial judges and retention elections for appellate judges. The Tennessee Plan has been challenged several times over the years as being unconstitutional, and some critics have accused the Judicial Selection Commission of being dominated by attorneys representing a handful of special-interest legal groups.

Today, some legal scholars argue that our state Constitution requires that Supreme Court justices be selected in direct elections by the qualified voters of Tennessee and that the current plan is unfair and has not fulfilled its stated purpose of creating a more diverse judiciary. Others believe that the current method of judicial selection should be maintained as is or with only a few modifications, such as having all Judicial Selection Commission meetings open to the public.

This summer the Judicial Selection Commission will sunset unless it is reauthorized by the General Assembly. Therefore, the time is right for the General Assembly and the governor to look for ways to improve the Tennessee Plan, and some legislators are interested in doing so. One bill - HB3990 filed by Rep. Tom Dubois and its Senate companion SB4107 filed by Sen. Mark Norris - would change the composition of the Judicial Selection Commission and create a federal-styled model of judicial selection. If passed into law, HB3990 would represent an improvement in the current process by adding greater diversity in access and participation in the selection of judges and add a new check and balance on the governor's right to select a candidate for each vacancy through confirmation by the Tennessee Senate.

The Judicial Selection Commission plays a critical role under the current system by evaluating applicants for vacant judicial positions and by recommending a panel of three candidates to the governor. Under HB3990, the commission would still have the responsibility to review all applicants for vacant judicial positions. However, instead of acting as a gatekeeper by limiting the number of candidates that the governor can consider, the commission, following a review of each candidate's credentials, would make a recommendation of "qualified" or "not qualified" to the governor. The governor would then be able to nominate any of the candidates who applied for the vacancy and then

submit his nominee to the Senate for approval.

In essence, the commission would operate like the American Bar Association has for many years in the selection process for federal judges, by providing an independent evaluation of the qualifications of candidates for judicial vacancies. This change would ensure that all candidates are open to consideration by the governor which addresses in a practical way some of the arguments made in the Bredesen case.

The current commission is composed of 14 lawyers and three nonlawyers. Twelve of the lawyers on the commission are appointed from lists of nominees submitted by five lawyers' associations, including the Tennessee Bar Association. Under HB3990, the speaker of the House and lieutenant governor would have greater freedom to appoint members to the Judicial Selection Commission and would be able to appoint any Tennessee attorney in good standing to the commission.

In addition, the number of commission members would increase to 19, and the composition of the commission would reflect greater geographic diversity by requiring that six members of the Judicial Selection Commission be from each grand division (four attorneys, one retired judge and one nonlawyer). The bill would also add to the commission a dean from one of the four Tennessee law schools.

The candidate nominated by the governor for any judicial vacancy would then be subject to an "up or down" vote in the Tennessee Senate, which would operate in a manner similar to the United States Senate's advise and consent role. Adding Senate approval provides an important check and balance to the current process where the governor retains the final say on filling judicial vacancies. Several states, including Maine, New Jersey, Massachusetts and New Hampshire, have judicial selection processes that involve gubernatorial appointment with confirmation by the senate or the governor's council.

Since Tennessee's governor and the Senate are popularly elected, they are accountable to the voters for the choices they make in the judicial selection process. The modifications to the Tennessee Plan as set forth in HB3990 would preserve the merit selection/election balance and open the selection process up to greater participation and political accountability. Simply put, HB3990 represents a better plan for Tennessee.

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