

# THE GREENEVILLE SUN

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## GUEST COLUMNS

### Judges:

#### Should 'Tennessee Plan' Be Replaced?

'No: Plan Provides Balanced Approach To Selecting Judges'

By **MARCIA M. EASON**

The "Tennessee Plan" is the non-partisan system for merit selection, evaluation and retention elections for Tennessee judges. This plan has been challenged in court and held constitutional on three separate occasions dating back to 1973.

##### **Merit Selection:**

Merit selection has been a feature of the Tennessee judiciary since 1971. Through public hearings the Tennessee Judicial Selection Commission now screens appointments to the Tennessee Supreme Court and to all state courts (which includes Circuit, Chancery and Criminal courts), and submits three names to the Governor to fill vacancies on the courts.

Members of the Commission are appointed by the two legislative speakers, from the public and from nominees offered by various bar groups. The nomination and appointment process for the commission is required to balance geography, race, and gender. More than 76 judges have been appointed under this plan, under both Republican and Democrat governors.

##### **Judicial Performance Evaluation:**

The Tennessee Plan is unique: It requires evaluation and published performance for each of the appellate judges subject to a retention election (judges from the Tennessee Supreme Court, Court of Criminal Appeals and Court of Appeals). The judges are reviewed by a panel, which recommends whether those judges should be retained in office or not. Members of the Tennessee Judicial Evaluation Commission include judges selected by the Judicial Council and lawyers

##### **Merit Retention:**

Intermediate appellate judges have been subject to merit retention since 1971. In 1994, merit retention elections were extended to the Tennessee Supreme Court system. These judges are not local judges, but review cases that are appealed from local courts to appellate courts in each of three grand divisions.

Unlike many other publicly-held offices (such as governor), it is difficult for the public to get to know each of the 29 appellate judges across the state and to measure his or her performance. Merit retention elections have also proven to provide an opportunity for women and ethnic and minority judges to prove their qualifications before being subject to election.

One of the driving forces behind enactment of this program is experience with contested elections in several other states. Elections in several sister states have resulted in highly partisan, multi-million-dollar contests in which judicial candidates are pressed to commit to a particular viewpoint in exchange for partisan support and campaign contributions.

It is frequently said that our national system of government may have faults, but it is still the best and fairest form of government in the world. The same statement applies to the Tennessee Plan — some people criticize it, but it is still the best and fairest plan for Tennessee.

It provides a balanced approach to the judicial branch of government. Local judges are elected, while statewide appellate judges are nominated and appointed based on merit selection with public hearings during the nomination process. Once elected, judges are subject to performance evaluations, which are published before an election on their retention.

appointed by the two speakers of the legislative houses (who have been elected by the public).

Surveys are conducted among parties to lawsuits, jurors, and lawyers who appear before the judges. Other performance evaluation tools are used — for example, how efficiently judges dispose of cases. The commission publishes for public review all evaluation results as well as its recommendations.

The Tennessee Plan has been created over the years to ensure the quality and fairness of state-wide judges, and to share with the public the performance evaluations of those judges: it is an important and essential part of our system of government and should be preserved.

*The writer, a Chattanooga attorney, is the president of the Tennessee Bar Association.*

## 'Yes: Self-Interest Is Behind Judicial Selection Plan'

By NED WILLIAMS

Lt. Governor Ron Ramsey and Republicans in the State Senate have proposed some changes to what is commonly known as "the Tennessee Plan" for how someone becomes an appellate judge in our state. The GOP's reform proposal would lessen the influence of bar groups and provide more flexibility to the people's representatives, the Speakers of the House and Senate, who select the commission members.

This does not sit well with Tennessee Bar Association president Marcy Eason, who recently expressed the TBA's view that "our current Tennessee Plan for merit selection, evaluation, and retention of judges has served the citizens of Tennessee well. We will continue to advocate for reauthorization of the current plan."

Yes, advocates of the Tennessee plan typically refer to it as a "judicial merit selection" system, but Tennesseans ought not be awed by that label, nor should they be surprised that the TBA is hankering to maintain the status quo.

The TBA and other special lawyers' groups are predictably keen on the current system because it makes them the gatekeepers over the process of who can sit on our Supreme Court and intermediate appellate courts. Predictably, these groups have an interest in preserving "merit" selection because they get to define the meaning of "merit," and they get to do the selecting.

Unfortunately, that is not the system preferred by most of Tennessee's voters, and it wasn't the system preferred by the framers of our state constitution.

In the mid-1800s, one of Tennessee's favorite sons, U.S. President Andrew Jackson, spear-headed a nationwide movement for popular election of judges. They viewed popular election as the best expression of democratic values.

Regardless of whether you favor this method of selecting judges, the advocates of popular election instituted their preferred method the right way — they amended their respective state constitutions. Indeed, since 1853 the Tennessee

Constitution has required that judges be "elected by the qualified voters of the state."

Fast forward to the present, where recent polling demonstrates that a majority of Tennesseans disagree with the TBA on this point. In a January poll by the polling company inc, 59 percent of registered voters polled in Tennessee said they should have the greatest input on who is appointed to sit on the Supreme Court, while 6 percent believe lawyers should have the greatest input. And data concerning the make up of those sitting as local trial courts, intermediate appellate courts and the Supreme Court manifests the democratic results of popular elections.

Tennessee still uses popular election to place judges at the local level, and after three decades of using "merit" selection to choose intermediate appellate judges (and 13 years of using it to select Supreme Court justices), a comparison of the two systems provides no evidence that "merit" selection has produced a more diverse body of judges than has popular election.

Just ask Governor Bredesen about the current system's service to racial and gender diversity. He spent months in legal wrangling with Tennessee Plan defenders to fill the seat of retiring Supreme Court Justice Adolpho Birch.

Tennessee Plan advocates contend their system takes politics out of the process. In reality, it merely moves the politics behind closed doors. Sixteen of the 17 members of the Judicial Selection Commission are lawyers. All but one member has come from a pool of candidates hand-picked by lawyers' special interest groups [ . . . ]. This is less political?

There is little evidence the Tennessee Plan is good public policy for our state. The TBA's interest in this or any legislation is that which benefits its membership—lawyers. It is time for Tennessee to have a judicial selection process based on the principles of our state Constitution rather than the interests of our state's lawyers.

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