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Judicial Selection Debate Expected To Heat Up

BILL DRIES | The Daily News

The legislation to continue the existence of the Judicial Selection Commission wasn't approved by the Tennessee Legislature when the legislative session ended last week. That means the commission moves into a roughly yearlong phase legislators call a "wind down."

But in the next year, the political debate over the commission and its central role in the selection of appellate judges in Tennessee is expected to intensify.

The Legislature, along with Gov. Phil Bredesen and much of the state's legal community, will be discussing in the next year whether the commission should be allowed to go out of business, be resurrected as it is, or be changed in some way. A changed system still would allow for the screening of candidates for the appeals court, their appointment by the governor and then their retention by voters in a yes/no vote.

To keep or not to keep

The 17-member Judicial Selection Commission is at the heart of that system. The commission submits a list of three finalists to the governor for each vacancy. The governor must pick one or get another list from the commission.

If the commission doesn't continue to exist, the rest of the system in place since 1994 must be changed as well.

Memphis attorney Barry Ward, appointed to the commission by House Speaker Jimmy Naifeh, is among the most vocal advocates of keeping the current system.

"I believe it has certainly increased the level of the quality of the judges and therefore the justice that exists in the state of Tennessee," Ward said the week after legislators adjourned their election-year session.

"We don't discuss politics about whether they are liberal or conservative. We want to put someone on the bench that won't get black robe fever. We want them to be an absolute advocate for equal justice to all and equal access to justice for everyone."

Ward and Vanderbilt law professor Brian Fitzpatrick have debated the merits of the current system across the state in the last year including in Memphis.

“I think you’re going to hear a big contingent of people who do not believe that voters are well educated enough to select judges,” Fitzpatrick said. “A lot of people hold that view, not just lawyers – that the law is a specialized field and people with legal training are really the best judges of who the best judges are.”

Fitzpatrick isn’t one of them.

“Four of our last five presidents have not been lawyers and they’ve selected hundreds of federal judges,” he said. “It’s frankly a bit paternalistic to tell people that they are not educated enough to make decisions about public officials who have a lot of power over their lives.”

Fitzpatrick sees more than two possible changes to the appointment and retention election system being forwarded in the Legislature. And so far he said none of them seem to have enough votes to pass.

“We will return to contested elections that we had in this state for 120 years before the Tennessee Plan and that we currently use for trial judges. I actually think there’s a pretty good chance that will be the outcome of the whole thing,” Fitzpatrick said. “The Legislature seems pretty divided to me. I think it could be hard to get all of these people on board with a single reform.”

Politics

Naifeh and the House’s Democratic majority are in the category of not doing anything to it, Fitzpatrick and Ward said. But there is a split in the Senate that isn’t as easy to read.

Ward sees the fault line as political and reflecting the chamber’s 16-16 Democratic-Republican split with one independent.

“I think this is a manifestation of exactly that,” Ward said.

He pointed to a group of several Republicans who have parted company with Senate Speaker and Lt. Gov. Ron Ramsey, who favors but doesn’t have the votes to pass a plan that would continue the Judicial Selection Commission but would allow Ramsey and Naifeh to have more appointees to the panel. That would give each legislative leader a larger voice than the bar groups who also have appointees to the commission.

Bredesen has helped to give the issue a higher profile with his 2007 court battle with the Judicial Selection Commission. Bredesen said then he wanted to change the method but didn’t advocate a specific reform other than making the process more open and less political.

The court battle was narrowly focused on whether the commission could include in its list of three finalists to the governor candidates who already had been rejected by Bredesen. The commission cannot. Bredesen said he would save for another time the larger question of whether the current method of judicial selection is the best.

Governor's influence

Bredesen did propose a bill this past year that would have banned the Judicial Selection Commission from meeting privately. The bill was rejected in a Senate committee in April.

"We have a Democrat standing up against this system that produces more Democrats than Republicans," Fitzpatrick said. "That really gets people's attention. I think that was an act of courage. I think that he really added a lot of weight that something else may need to be done. I think he's been very influential. I think that he has a lot of power because of his role in the process. He could push through something if he got behind it."

Ward said that he is open to some change in the process including having a list of more than three finalists for the governor to choose from.

"That could be dealt with in a fashion that still made it merit selection and those numbers fluctuate. Another would be to add members to the commission to give Speaker Ramsey one or two more appointments," Ward said. "I believe the governor is wanting to shed some light on the process and one way to do that would be to have some part of the interview process open."

If nothing is agreed on, Fitzpatrick said appellate judicial elections could look just like other multi-candidate races without too much trouble.

"I believe there will not be any judicial elections until 2010 just by a matter of the election calendar. If in 2009 they get rid of the Tennessee Plan we will have a year to get used to it," he said. "All of the old election statutes are still on the books."