

Picking the deciders

Tennessee lawmakers face a big choice this year: how to select or elect the interpreters of law

By Richard Locker

Sunday, March 15, 2009

NASHVILLE --

Pop quiz: How many justices are on the Tennessee Supreme Court?

Name two. (Lawyers are excused from the test.)

Describe how each voted on the latest death penalty case, the latest liability case, the latest employer-employee rights case.

Now imagine it's election day and you want to vote for the best candidates for the five Supreme Court justice positions on the ballot. Multiply that decision by almost five: You'll be voting on Tennessee's 24 Court of Appeals and Court of Criminal Appeals judges as well.

That's a sample of what's at stake in the Tennessee legislature's debate over whether to renew the state's appellate judicial selection system. Unless lawmakers renew or reform the system by June 30, Tennessee will revert to

direct contested elections of all 29 appeals court judges, the system that existed in Tennessee from 1853 to 1971.

The "yes" or "no" retention elections held every eight years, allowing voters to decide whether to retain the judges on the bench, would continue, experts on both sides of the issue told lawmakers last month.

Judicial selection is one of the most important and far-reaching issues the General Assembly faces this year.

Rulings by the state's three appellate courts affect Tennesseans in ways large and small. A ruling by the state Supreme Court in 2000 found a stronger right to privacy in the Tennessee Constitution than the U.S. Supreme Court found in *Roe v. Wade* in 1973, guaranteeing abortion rights in Tennessee even if *Roe v. Wade* is reversed. The state ruling struck down several attempts by the legislature to restrict abortion.

The state's high court also settles workers compensation cases arising from workplace

injuries. It has upheld the death penalty. Even divorce cases often are resolved in the appeals courts. (All three appeals courts post their rulings, biographies of judges and other news on the judiciary's Web site, tncourts.gov.)

Here's why the issue has surfaced:

Under Tennessee's Governmental Entity Review Act, all state agencies, boards and commissions cease to exist every four to eight years unless the legislature specifically renews them.

Two major commissions integral to the 1994 version of the "Tennessee Plan" -- a "merit selection" system for Tennessee's appeals court judges -- are set to expire June 30: the Judicial Selection Commission and the Judicial Evaluation Commission. Lawmakers stalemated last year on renewing them.

Under the Tennessee Plan, the governor appoints all appellate judges when a vacancy occurs, from nominees sent up by the Judicial Selection Commission.

At the next biennial statewide election -- and every eight years thereafter -- voters decide whether to retain them in "yes" or "no" referendums.

The Judicial Evaluation Commission reviews judges' performance. Its recommendations to retain or not appear on the ballot for each judge. If a judge is not recommended for retention, the position is declared open and the judge must stand in a regular contested election. That has not happened in the 66 evaluations issued since 1994.

And only one Tennessee Supreme Court justice has ever lost a retention election.

Vanderbilt University law professor Brian T. Fitzpatrick told the House Judiciary Committee last month that the absence of the two commissions "would leave Tennessee with a system that relied on contested elections for the initial selection of appellate judges, followed by uncontested referenda for their retention" -- a system in place only in Illinois.

Fitzpatrick argued in a Tennessee Law Review article last spring that the current system violates the constitutional requirement that Supreme Court judges be "elected."

Many Republicans and some Democrats agree. Many social conservatives are lobbying for elections as a remedy to the 2000 abortion decision. And businesses are divided over the issue.

Tennessee Bar Association executive director Alan Ramsaur said that while there's "no specificity in the Constitution about how the elections are to be conducted," for almost 40 years the legislature's judgment has been that merit selection and retention elections are better than contested elections.

"The General Assembly's judgment has been that contested, partisan elections are expensive, corrosive and not conducive to promoting the public trust and confidence in

our system," he said.

The issue may come down to a restructuring of the Selection Commission itself. Senate Speaker Ron Ramsey wants to transfer to the legislature more control over who gets appointed to the commission, away from the several, mostly lawyer organizations that get to nominate commission appointees'

Ramsey believes groups with representatives on the Commission -- the TBA, trial lawyers and others -- control who gets nominated and appointed as judges.

Richard Locker is The Commercial Appeal's Nashville reporter. Contact him at (615) 255-4923.

A HISTORY OF JUDICIAL SELECTION IN TENNESSEE

1796: The first Tennessee Constitution gives the state legislature authority to appoint judges of "superior and inferior courts," who are given life tenure. Most of the original states had judges appointed by the governor or legislature.

1809: The Tennessee Supreme Court was created.

1834: During the populist era of "Jacksonian Democracy," many states move to direct election of judges. The Tennessee Constitutional Convention of 1834 considers recommending elected judges but does not. The Tennessee Supreme Court becomes exclusively an appellate court.

1853: Tennesseans approve a state constitutional amendment (Article VI, Sec. 3) providing that all judges "shall be elected by the qualified voters" to terms of eight years.

1870: Tennesseans approve a post-Civil War constitutional amendment giving the legislature "power to prescribe such rules as may be necessary to carry out" the provisions of Article VI, Sec. 2, which established the state Supreme Court. Tennessee's method of selecting its judges would remain unchanged for more than 100 years.

1937-40: Progressive groups begin advocating for "merit selection" of judges to lessen the influence of politics. Merit selection typically involved appointment of judges by the governor from nominees selected by commissions, followed by retention elections in which voters decide whether a judge remains on the bench. The American Bar Association endorses merit selection in 1937, and in 1940, Missouri becomes the first state to change from popular election to merit selection.

1971: The Tennessee legislature adopts a new merit-selection "Missouri Plan," in which all appellate court judges -- judges on the Court of Appeals, Court of Criminal Appeals and state Supreme Court -- are initially appointed by the governor, from nominees selected by an Appellate Court Nominating Commission. The judges then run in "yes" or "no" retention referendums at the next biennial statewide election, and every eight years thereafter. Direct, contested elections remain for trial judges.

1973: The Tennessee Supreme Court upholds the constitutionality of the new system, saying that retention referendums qualify as "elections."

1974: Climaxing a political battle between Republican Gov. Winfield Dunn and the Democratic legislature, the legislature removes the five Supreme Court justices from the merit-selection plan and returns them to direct popular election, while Court of Appeals and Criminal Appeals judges remain under the retention election system.

1977: The last Tennessee Constitutional Convention ever held proposes 13 amendments to the state Constitution on a wide array of subjects, including allowing two consecutive gubernatorial terms, restructuring county governments, giving the legislature authority to set maximum interest rates, lowering the voting age from 21 to 18 and repealing a prohibition against interracial marriage. Voters approve 12 of the 13 amendments, rejecting only an amendment that would have completely restructured the court system, including repeal of the provision requiring judges to be "elected" and providing for their appointment by the governor from three nominees recommended by a commission and retention elections at the end of six-year terms.

1994: The state legislature adopts the "Tennessee Plan" for selecting all of its appellate court judges, including the Supreme Court justices. The Tennessee Plan provides for appointment of appellate judges by the governor, from nominees selected by a Judicial Selection Commission. Voters later decide in uncontested "yes" or "no" referendums whether to retain them on the bench. A Judicial Evaluation Commission is created to evaluate judges and its recommendations on each appellate judge appear on the retention election ballot with the judge's name. If the commission does not recommend the re-election of a judge, that judge must run in a contested election in which other candidates may appear on the ballot.

1996-98: Two lawsuits challenging the constitutionality of the Tennessee Plan and specifically its retention referendums are filed. In both cases, the Tennessee Plan is upheld.

2008: Legislation creating the Judicial Selection Commission and Judicial Evaluation Commission expires, or "sunset," under the state's Governmental Entity Review Act and the state legislature declines to renew it, putting both into a one-year "wind down."

2009: Experts on both sides of the issue agree that if the two commissions are not renewed, Tennessee will revert to direct elections of its appellate judges on July 1. The legislature is considering whether to renew the commissions -- and by extension, the Tennessee Plan.

Sources: Tennessee Law Review articles by Brian T. Fitzpatrick, Penny J. White and Malia Reddick.

