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Legal opinion says ending Tennessee Plan for appellate judges could create problems

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By:

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NASHVILLE — Tennessee Attorney General Robert Cooper says in a new opinion that officials will be unable to fill vacancies on the state Supreme Court and appellate courts if lawmakers do not renew two judicial commissions.

“Vacancies occurring in the appellate courts on or after July 1, 2009, could not be filled because there would be no operative statutory procedure for the filling of vacancies,” Mr. Cooper says in the opinion.

Four Republican lawmakers sought the opinion to see what problems would occur if the Judicial Selection Commission, which makes recommendations to governors on judicial appointments, and the Judicial Evaluation Commission, which rates sitting appellate judges, go out of existence on June 30.

Both panels are integral parts of the so-called “Tennessee Plan,” in which the state’s five Supreme Court justices and appellate judges are appointed to their positions. Voters later decide whether to retain them.

The panels are scheduled to “sunset,” or expire, June 30 after Senate Republicans blocked extending them last year. Some Republicans contend the Selection Commission is too liberal. Others charge the Tennessee Plan itself is unconstitutional.

Mr. Cooper’s 14-page opinion conflicts with assertions recently made by Brian T. Fitzpatrick, a conservative and Vanderbilt University assistant law professor, who said in prepared testimony before the House Civil Practice and Procedure Subcommittee that if the two commissions expire, “that does not mean, however, that there would be no way at all to initially select appellate judges.”

He said he believes there could be elections under old statutes still in the code that require contested elections to select all judges.

Sen. Doug Overbey, R-Maryville, an attorney who requested the attorney general’s opinion, said, “I think this makes it clear that the General Assembly does need to do something” this year.

If lawmakers “fail to do anything,” he warned, “there will be no statutory mechanism in place for elections of appellate judges in 2010 and 2014, and there’s not a mechanism for filling vacancies.”

Rep. Beth Harwell, R-Nashville, who also requested the opinion, said that in her view “the best thing is to probably stay with the form. We have only to change the makeup” of the Judicial Selection Commission.

The 17-member panel is named by the House and Senate speakers, who have eight appointments each and share another. Under the law’s requirements, most of their picks come from names forwarded by special interests such as trial lawyers, prosecutors and the Tennessee Bar Association.

Lt. Gov. Ron Ramsey, R-Blountville, the Senate speaker, has said he wants freedom to name whomever he wants.

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