



March 29, 2009

'Election' system for judges is wrong

Decision is for public, not a few lawyers

By Mac Davis

Tennessee Voices

My friend and law partner, Paul G. Summers, wrote recently on this op-ed page ("Keep selection system for appellate judges," March 2) that Tennessee's appellate judges should not be required to run in contested elections.

Instead, he favors the "Tennessee Plan," which provides that a select group of lawyers control the selection of the candidates who can run for appellate judgeships in retention elections without opposition. The Tennessee Constitution is clear: All judges "shall be elected" by the voters. Mr. Summers' op-ed does not mention this constitutional requirement.

Since 1994, the elections of Tennessee Supreme Court judges for eight-year terms have been conducted pursuant to the Tennessee Plan. Under this unconstitutional system, only incumbent judges are allowed to participate in the "retention" votes, and voters are never allowed to elect Supreme Court judges from candidates of their choice. We are simply allowed to vote only for the retention or rejection of unopposed candidates who have been selected by the judicial selection commission, composed of members recommended by lawyer associations.

The state constitution contains a procedure for changes by the amendment process. It was clearly the intention of the people who adopted the constitution that its original meanings could be changed only by amendments. The people have never consented to the election of state Supreme Court judges by retention elections.

Amendment was rejected

In 1977, the legislature proposed an amendment to the state constitution to authorize the election of Supreme Court judges by retention elections rather than by the voters. That amendment was rejected in a referendum, establishing that the people have never consented to retention elections of Supreme Court judges or to add incumbency as a required qualification for Supreme Court candidates.

The original meaning of "elected by the qualified voters" in the constitution should be followed, because that is the meaning consented to in writing by the governed. As George Washington cautioned: "If, in the opinion of the people, the distribution or the modification of the constitutional powers be in any particular wrong, that it be corrected by an amendment in the way which the (U.S.) Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

Clearly, the Tennessee Plan usurps the constitutional right of all Tennesseans to choose for themselves, through contested elections, who will serve as appellate judges.

If we are to continue to have a government by the consent of the governed, the Tennessee Plan must be allowed to expire and a constitutional system put in its place. In the meantime, let us hope the legislature does not enact a statute providing that the governor and members of the legislature may also be "elected" by uncontested, retention elections.
