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Judge selection debate flares in Tennessee

Groups who want judges elected instead of appointed intensify their campaign

By Chas Sisk
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Tennessee's judicial system is coming under its sharpest attack in a generation, as groups of lawmakers and activists are trying to overturn the state's process for selecting judges.

After a string of controversial decisions, Gov. Phil Bredesen and state legislators are divided over whether to stick with the state's method of appointing higher court judges. That has opened the door to a constitutional amendment, and possibly direct elections to the state's highest courts.

At stake is the future of Tennessee's courts.

The current selection system has made the state's bench one of the most professional and least politicized in the region, proponents say. They believe judicial selection has spared Tennessee from nasty and expensive election campaigns that have led to corruption and distrust of the judiciary in other states.

But on issues like abortion, the death penalty and a host of legal issues, Tennessee's highest courts have been far more liberal than voters, say critics. They believe that the system is unconstitutional and that it's time the judiciary was brought back to heel through open and contested elections.

"We have the rule of lawyers," said Ned Williams, a Brentwood adoption attorney and an organizer with the Justice Reform Coalition, a state group that has been lobbying to ditch the current system. "That's not representative of the general public."

The debate, which does not affect trial court judges who are already elected, has been pushed to the fore now that Republicans control both houses of the state legislature after last November's elections. That power shift has emboldened activists, who have pressed party leaders throughout the session to reform the judiciary.

Some party leaders say they are convinced.

Many favor making only slight changes to the current system, which has been in place since the early 1970s.

They concede that the 17-person Judicial Selection Commission, which chooses the slate of candidates from which governors appoint new judges, gives too many seats to lawyers groups, such as the Tennessee Bar Association and the Tennessee Trial Lawyers Association.

But, they say, a group of some sort needs to vet candidates to ensure judges are chosen based on talent, not their political connections.

"I think we still need to have a group that is unbiased and nonpartisan who's looking at this and saying here are the qualifications that we need for our jurists," said Rep. Jon Lundberg, an East Tennessee Republican who has sponsored legislation keeping the commission.

But others, including Lt. Gov. Ron Ramsey, say the issue needs to be put before voters. They believe that the system violates sections of the state constitution that call for elections to the judiciary, and that it has stood only because judges, who favor the system, have looked the other way.

"This is birthed in partisan politics," Ramsey said. "I see no reason why 17 people need to decide who our next Supreme Court justice is going to be."

The debate has been simmering for several years, but it has taken on added urgency as lawmakers face a June 30 deadline to decide the fate of the Judicial Selection Commission and the related Judicial Evaluation Commission, which reviews sitting judges.

On that date, the commissions, whose mandates expired last summer, are required to cease operations after a one-year wind-down period. The state's attorney general has said letting the commissions end would leave the governor with no way to appoint new judges to the bench.

Solutions suggested

Several bills have surfaced to resolve the issue. Some people, including Bredesen, would simply extend the old commissions' mandate. This solution enjoys wide support from lawyers groups.

"We have had a judicial branch which has been very well-regarded," said Buck Lewis, Tennessee Bar Association president. "We have very little campaign spending, and people are able to get selected on their merits, not because of their political connections, because of the selection commissions."

Others would give lawmakers more discretion over the commissions' membership to reduce the power of lawyers groups. Still others, including Ramsey, favor wholesale reform that would give the governor discretion to choose anyone he wants for the bench, without input from lawyers.

And a fourth group leans in favor of making all judgeships, from the state Supreme Court on down, elected positions chosen directly by the voters.

"Judges need to be held accountable," said Rep. Brian Kelsey, a West Tennessee Republican who has favored elections in the past and now says he'd consider a compromise solution.

Spurring the debate are some controversial opinions from the state Supreme Court, including a 1996 ruling that said a man convicted of raping and killing a 78-year-old woman was not eligible for the death penalty under state law.

Advocates for judicial reform also point to a 2000 decision that said the Tennessee Constitution has broader protections for abortion than the U.S. Constitution as spelled out in the *Roe v. Wade* decision.

"You can't take politics out of judging," said Brian Fitzpatrick, a professor at Vanderbilt University Law School who has challenged the selection system. "The law is ambiguous. How a judge exercises judgment is correlated to their political beliefs."

Bredesen, a supporter of the selection system, also opened it to attack by criticizing the commission in 2006 for not doing enough to promote diversity on the bench. Reform advocates have used his complaints as evidence that the commissions have too much power.

"If I'd known how much of a Pandora's box it was going to be, maybe it would have been better to not say anything about it, or maybe to deal with it a little more privately," Bredesen said last week. "I don't think anyone at the time knew how this was going to play out."

Another point of debate is the constitutionality of the selection system.

Under the state's first constitution, judges were chosen by the state legislature, but in the 1850s, the constitution was amended to make all judgeships elected positions, from the lowest local courts to the Supreme Court.

Elections upheld

That amendment has stood ever since, but its enactment has changed. In 1971, the state adopted what is now called the "Tennessee Plan," a system by which the state's 24 appeals court judges are appointed by the governor. The system was extended in 1994 to include its five Supreme Court justices.

After their appointment, judges must run once every eight years in what are called retention elections. In these retention elections, voters are asked only if they want to keep a judge on the bench or throw the judge off. No other candidates appear on the ballot.

State courts have upheld these elections as constitutional. But critics continue to argue that they violate the spirit of the law.

"I think we need to leave it up to the people of Tennessee to make that decision of whether they want to give up their right to elect Tennessee justices," Kelsey said.

Only one judge has been removed through a retention election in the nearly 40 years since they were established. That was Justice Penny White, who was booted from the bench after a campaign that focused on her death penalty decisions.

The Tennessee Plan also set up the judicial commissions. Supporters say these commissions keep unqualified candidates from getting seats on the bench and have spared the state from more campaigns like the one to remove White.

Judges who face direct election would have to pay more attention to fundraising, creating the potential for conflicts of interest, and they would be less willing to issue decisions that are legally correct but politically unpopular, supporters say.

"Campaigns don't belong in the courtroom," said Deborah Woolley, president of the Tennessee Chamber of Commerce and Industry. "Elections tend to be determined on predetermined issues. I just don't see a good way to elect judges."

As it stands, the House is set to debate three bills in coming weeks that will extend the judicial commissions. Legislation on the issue is also moving in the Senate, where Ramsey is trying to build support for a plan that would extend the commission long enough to let voters weigh a constitutional amendment that permanently settles the issue.

Supporters of judicial reform are pushing hard to bring about change before their window of opportunity closes. They say they face stiff odds.

Additional Facts

WHAT'S AT STAKE?

Lawmakers are divided over whether to extend the Judicial Selection Commission, which has been used to pick judges since the 1970s and its sister group, the Judicial Election Commission. Critics say the commissions are unconstitutional and make judges unaccountable to voters. Proponents say they shield judges from politics and make the bench more professional. The commissions' mandates expired last summer, and they are now in a one-year wind-down mode. Lawmakers must extend the commissions or replace them with a new way to appoint judges by June 30.

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