

## COMMENTARY

# Process of picking judges broken

BY BRIAN T. FITZPATRICK

In June, Tennessee's system for selecting appellate judges — called the "Tennessee Plan" — will expire unless it is reauthorized by the Legislature. This is, therefore, an opportune time to begin considering whether the Tennessee Plan has served the people of Tennessee well.

For most of Tennessee's history, appellate judges were selected in elections like other public officials. But, in 1971, the Legislature decided to change things by adopting the Tennessee Plan. The Tennessee Plan is one of several so-called "merit selection" plans used across the country. The professed goal of these "merit" plans is to take politics out of judicial selection. The way the plans achieve that goal, however, is simply by taking the power to choose judges away from the public and placing it in the hands of lawyers.

Under the Tennessee Plan, the governor is charged with appointing all appellate judges in the state — including Supreme Court justices — from a list of candidates submitted by a nominating commission made up, primarily, of members of special lawyers organizations, such as the Tennessee Trial Lawyers Association. Only after the judges have served for a period of time do they come before the public, and, even then, they come before the public only in uncontested retention referendums. In these referendums, voters are asked only "yes" or "no" on whether the appointed judges should stay on the bench; voters are not given the choice of an alternate candidate, and, indeed, voters are not even informed who might replace the judges if they vote "no."

The Tennessee Plan has been controversial ever since it was adopted. Many commentators have doubted that the lawyers who make up the nominating commission are any less political than members of

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the public at large, and many more have doubted that the judges they select are any less political than those selected by the public. (Indeed, only a few weeks ago a sitting Supreme Court justice served as the featured speaker at an event for the Williamson County Democratic Party.)

Nonetheless, the most controversial aspect of the Tennessee Plan has been whether it is even legal. Since 1853, the Tennessee Constitution has required that all judges "be elected by the qualified voters of the state," and a number of lawsuits have been filed over the years (including one that is pending in federal court) claiming that judges who come to the bench under the plan are anything but "elected."

Although the Tennessee Supreme Court has twice addressed the constitutionality of the plan, the decisions have left a number of unanswered questions. Consider, for example, the appointment feature of the plan. How can it be that all judges are "elected" if they are all appointed by the governor? The Tennessee Supreme Court has never said.

Consider as well the retention feature of the plan. At the time the current Constitution was written in 1870, retention referendums were unknown in the United States. Thus, it is hard to believe that the framers of the Constitution had them in mind when they wrote the provision requiring that all judges be "elected." Moreover, because voters have no idea who might replace a judge when they vote in retention referendums, they almost

never vote "no." Indeed, although there have been 146 retention referendums in Tennessee since 1971, in only one did the public vote against retention. This means that incumbents are retained 99.3 percent of the time. Is that an election or a coronation? Although the Tennessee Supreme Court has upheld the retention feature of the plan, it has never considered these points.

But perhaps most significant is what transpired in 1977. In that year, the voters of Tennessee were asked by a limited Constitutional Convention to amend the state Constitution to replace the provision calling for elected judges with the provisions of the Tennessee Plan. The public voted against that amendment (despite voting in favor of twelve others). Although the rejected amendment would have made other changes to the judiciary besides the Tennessee Plan, surely it is worth asking how the Tennessee Plan can be constitutional in light of the fact that the voters rejected it in 1977. Yet, the Tennessee Supreme Court has never said.

These unanswered questions raise serious doubts in the minds of many that the Tennessee Plan is constitutional. Under these circumstances, the most prudent course for the Legislature may be to vote against reauthorization of the plan until the people of Tennessee have had another chance to amend the Constitution. This will give the lawyers of Tennessee one more opportunity to convince the rest of the citizenry that the best way to choose judges is by giving them the power to do so under the Tennessee Plan. If they fail, however, it will be hard for the Legislature to ignore for a second time the public's desire for the direct election of judges.

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