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What's All the Fuss about the Tennessee Plan?

The Tennessee Plan is the best plan for selecting judges we have ever had in our state's history. But as things stand now, the Plan will vanish on June 30, 2009. In '78, '82 and '90, I lived through my late father's three tough judicial campaigns. I deflected calls from litigants trying to give him campaign money. I went to judicial endorsement committee meetings in which groups tried to extract promises about the handling of cases as a condition to support. I refused meeting requests from adult nightclub owners. You get the picture. Then, from 1991 through 2002, I served on the Appellate Court Nominating Commission and the Judicial Selection Commission. In 2005 and 2006, I was an unsuccessful and then a successful applicant before the Commission. Based upon my 30 years of experience with electing and selecting judges, the issue of whether we should have merit selection or not isn't even close. Every successful and unsuccessful applicant I know agrees.

"The Tennessee Supreme Court has twice held that the constitution authorizes the legislature to proscribe the features of judicial elections and that retention elections are constitutionally permissible. You can argue that those cases are wrongly decided if you want to spend your time doing that, but the fact is that the major constitutional issue has already been put to rest."

I have been very encouraged lately to see that Speaker Naifeh, Lt. Gov. Ramsey, and Gov. Bredesen seem to agree that we need merit selection. Speaker Naifeh has said that he supports the Plan as it is. Gov. Bredesen said in a speech to the judicial conference on June 11 that he wants to save the Plan. Lt. Gov. Ramsey has said in a recent article that he wants to reform the Plan (TriCities.com 6/1/2008). It sounds to me as if they all want to keep merit selection and avoid the bitter and expensive judicial elections we have seen in so many other states.

So, then, what are the issues that have kept the Tennessee Plan from being renewed and what are the contours of the debate? As I discern the landscape, there are two primary issues. The first is how the Commission members should be selected. The second is whether the Commission's interviews, deliberations and voting should be open to the public and, therefore, known to the applicants and their supporters.

Before dealing with those issues, let me deal with a couple of issues that ought not pose a serious problem. Lt. Gov. Ramsey has said that upper east Tennessee has been traditionally underrepresented. He is exactly right. We could all benefit from the wisdom of our fellow Tennesseans from that beautiful part of Tennessee. Second, a law professor and a few lawyers have been arguing lately that the Tennessee Plan's yes/no retention elections violate the Tennessee Constitution. To them, I say, "Please acknowledge and respect the Supreme Court's decisions in *State ex. rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973) and *State ex. rel. Hooker v. Thompson*, 249 S.W.3d 331 (Tenn. 1996)." The Tennessee Supreme Court has twice held that the constitution authorizes the legislature to proscribe the features of judicial elections and that retention elections are constitutionally permissible. You can argue that those cases are wrongly decided if you want to spend your time doing that, but the fact is that the major constitutional issue has already been put to rest.

Now, on to the two primary issues. For me, the guiding principle in resolving these remaining issues should be to have a system that produces fair, smart,

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experienced, hard-working judges who will have the courage to decide cases without being influenced by the political consequences of their decisions. I understand that elected officials, just like the rest of us, would rather not have their discretion limited. I also understand why it makes my friends in the press distraught not to be "in the room" when these decisions are being made. Nevertheless, I have serious concerns with some of the proposed changes that are being discussed.

How Should the Commission Be Selected?

Tennessee's professional associations and District Attorneys' and Public Defenders' conferences have sometimes been characterized as special interest groups in this debate. It is undeniable that some lawyers have a financial interest in the type of judges that are appointed. But the same could be said of farmers, bankers, doctors, business owners, educators and union leaders. The diversity of the professional associations represented on the Commission insures that no special interest and no elected official of either party can control the process.

I have served on the TBA Board of Governors during the last three meetings in which we chose three nominees to the Commission. There has never been any mention of a candidate's party affiliation, position on tort law issues, or connections with elected officials. There has been, rather, a discussion about the candidate's integrity, work ethic, and service to the public and the profession. When Speaker Naifeh chooses from our list of three, he is choosing from some of the best respected lawyers in the state. The present system gives lawyers who have never been particularly involved with partisan politics or campaigns a better chance to be appointed. And while Speaker Naifeh and Lt. Gov. Ramsey's unrestricted appointees to date have been gifted and well-respected lawyers, I worry that some day, under now unknown legislative leadership, we might not be so lucky in that regard. Having professional associations nominate most of the appointees promotes service by the best respected lawyers in the profession and provides a check and balance that might be critical some day.

I also think the three lay members we have now properly provide the lay perspective and that the other Commission members should be lawyers. I was honored to serve on the Commission with Joe Lancaster for many years, one the finest Tennesseans I have ever come to know. Joe was the conscience of the Commission on which I served. We were better by far because of Joe's involvement. Even my good friend Joe, however, would say that he had to rely on the lawyers to judge law school academic records, prior judicial performance, legal briefs, legal articles, and interview answers to questions involving complex legal issues or rules of procedure. As is true with so many other professions and occupations, it only makes sense that lawyers can best evaluate other lawyers and judges.

Should More of the Commission's Work Be Done Publicly?

What about whether the Commission's work should be public or private? First, we should remember that the present statute, in *Tenn. Code Ann.* 17-4-109(a)(1), requires that the

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Commission hold at least one public meeting. Any member of the public must be heard at that public meeting. I have been in several Commission meetings in which those rights were fully exercised, to put it politely. That can be painful and awkward for applicants but it is healthy on balance. Moreover, all the commissioners' contact information is available to the public, so anyone can contact them directly before or after a meeting with any comments or information they want to pass along. This right has also been exercised fully on previous occasions.

*Tenn. Code Ann.*17-4-109 (d) and (e), however, allow the Commission to hold public or private meetings as it deems necessary to carry out its duties. From the outset, the Commission has unanimously determined to have private interviews, private deliberations, and private voting. Here's why. If you were on a committee to select a new preacher or to pick a school's headmaster, or if you were the governor talking with your closest advisors about whom to appoint to the Court of Appeals, do you think you could make a better decision with the whole congregation, or PTA, or the voters, and all those seeking the position and all their families in the room? I don't think so.

During the Commission's interviews, applicants are now asked questions like, "You have left three law firms. Why?" or "You had a tax lien six years ago. Why?" or "Would you tell us about the disciplinary complaint that was made against you?" or "The court you are applying for has a judge on it who has been ill and has fallen behind on his case load. What would you do about that?" or "Do you think the clerk of your court is dysfunctional?" or "The Supreme Court overruled a case on this issue last year. Do you have any comment about that?" The way things are handled now, the Commission can press vigorously for candid answers to the toughest of questions, even questions relating to the performance of other judicial branch employees. I can already hear my friends in the press saying that the public has a right to know these things. I can't and won't argue with that, but my fear and belief is that opening up the interviews will only have the effect of turning the interviews into a superficial verbal tap dance that resembles most of those hearings we see on C-SPAN when a federal nominee appears before the judiciary committee. Remember, also, that all of the rather exhaustive applications are available to the press. These applications contain a bounty of personal information on each applicant as well as essays on equal access to justice, preventing bias, and improving the administration of the courts.

A fairness problem also arises if the deliberations are public. It is not uncommon for the Commission to ask each applicant about the same set of issues or problems. If the interviews are public, the applicants who are interviewed at the end of the day have the unfair advantage of hearing the questions, hearing the other applicants' answers, and noting the Commission's reaction to those answers before they are called upon to respond. Yogi Berra was right when he said, "You can observe a lot just by watching."

What about the deliberations? In all my years on both Commissions, it is difficult to remember a meeting in which my fellow commissioners did not share some concern, some information, or some observation that shaped my thinking. I came to respect and even admire most of the Commissioners with whom I served because they helped me cast better votes. But most of the advantages of meaningful deliberations would be lost in a public forum, not so much because reporters would hear them, as because the other applicants, their families and supporters, and other judicial branch officials would hear them. How can you expect Commissioners to meaningfully compare and contrast competing applicants' strengths and weaknesses with them and their friends and families all sitting right there!

What about voting? First, I would note that there are lots of ways this apple can be sliced. You could stick with the way it is now, which means the Commission votes by secret ballot. You could go public all the way, and have the public and all the applicants know exactly how each Commissioner votes on every ballot. You could make available to the public the vote totals on each ballot. You could have the Commissioners vote openly within the Commission meeting so each Commissioner would know how the others voted.

However we slice it, though, my main concern is political pressure on Commissioners. We have chosen merit selection over retail politics, so if we want nominees to be selected based upon merit and not political clout, it is terribly important that the Commissioners be protected from the political repercussions of their votes. Imagine being a Commissioner and being called upon to vote on the application of a trial or appellate judge before whom you regularly practice, or the spouse of a member of the general assembly, or a former co-worker or law school classmate, or your city attorney, or the assistant general counsel for your partner's client. If we want politics to play a very prominent role in who gets nominated, the best way to accomplish that is to tell all the applicants and their supporters how each Commissioner votes.

I certainly do not pretend to speak for all of the TBA's 10,000-plus members, and I am sure some will disagree, but for me at least, although modest amendments might be all right, I think we should be concerned about some of the more fundamental changes that are being considered. But for goodness sake, let's not let Tennessee be the first state ever to dump merit selection in favor of the bitter and expensive hand-to-hand political combat for judgeships that has been a disaster in so many other states.