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# Judicial Selection in Tennessee: Deciding “the Decider”

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# JUDICIAL SELECTION IN TENNESSEE: DECIDING “THE DECIDER”

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&  
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## PROLOGUE

*[P]eculiar qualifications being essential in the members [of the judiciary], the primary consideration ought to be to select that mode of choice which best secures these qualifications.<sup>1</sup>*

—James Madison

*Under some constitutions the **judges** are **elected** and subject to frequent reelection. I venture to predict that sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked.<sup>2</sup>*

—Alexis de Tocqueville

*We are today witnessing a sad consequence of this subordination of this Supreme Court to the Legislature. . . . [The] Supreme Court Judges and, possibly, all judges, can be kept in attendance by the Legislature, hat in hand, so to speak, whenever it suits the purpose of some disgruntled representatives to snap the Court to attention with a bill to change the manner of their election. If this is not subordination, nothing is. . . . I say this Court has opened Pandora's Box. . . .<sup>3</sup>*

—Hon. Allison B. Humphreys,  
Tennessee Supreme Court Justice

The quality of judges and the manner of selecting them matters; this is a basic premise underpinning the rule of law in the United States. From the inception of the United States' democratic system, the judiciary's Damoclean Sword has been the threat of subrogation at the hands of the Legislature, and perhaps the easiest way to rattle the sword has been to legislatively interfere with judicial selection—whether by changing the manner of appointment or by simply refusing to fill vacancies. The comments above span the eighteenth, nineteenth, and twentieth centuries, and today in Tennessee the proverbial horse's hair has never seemed more precarious.

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1. THE FEDERALIST No. 51, at 318 (James Madison) (Clinton Rossiter ed., 1961).

2. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269 (J.P. Mayer ed., George Lawrence trans.) (1966) (emphasis supplied).

3. State ex rel. Higgins v. Dunn, 496 S.W.2d 480, 494–95 (Tenn. 1973) (Humphreys, J., dissenting).

## I. AN OVERVIEW OF JUDICIAL SELECTION IN TENNESSEE

### A. 2013—The State of Play of Judicial Selection in Tennessee

On April 19, 2013, the 108th Tennessee General Assembly adjourned without passing any legislation regarding the Judicial Nominating Commission (“JNC”), which, as a result, ceased to exist effective June 30, 2013.<sup>4</sup>

The JNC functioned as one half of the “Tennessee Plan”—a process for merit selection of judges in Tennessee—through which the Commission reviewed applications for vacancies occurring on the trial and appellate courts and submitted a slate of nominees to the governor for appointment.

The General Assembly approved a constitutional amendment in the 2013 legislative session<sup>5</sup> that, if passed via statewide referendum in November 2014, will make the State’s appellate judges subject solely to gubernatorial appointment with legislative confirmation, followed by periodic retention elections.<sup>6</sup> Should the constitutional amendment fail, however, then there is no clear mechanism for the appointment or election of judges. Most importantly, at this moment there is no clear mechanism to fill vacancies in the judiciary.<sup>7</sup>

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4. The JNC was “sunset” beginning June 30, 2012, TENN. CODE ANN. § 4-29-233, and its one-year “winding up” period provided by law, TENN. CODE ANN. § 4-29-112 (2011), ended June 30, 2013.

5. Article XI, Section 3 of the Tennessee Constitution provides that any proposed constitutional amendment must be agreed upon by the members of the house and senate in two consecutive sessions. The proposed constitutional amendment was propounded by Senate Joint Resolution 710 (2012) and Senate Joint Resolution 2 (2013). Letter from Alan Whittington, Deputy Chief Clerk (April 2, 2013) *available at* <http://tnsos.org/acts/108/resolutions/sjr0002.pdf>. The amendment shall be effective “if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the State voting for Governor.” TENN. CONST. art. XI, § 3.

6. The proposed amendment of TENN. CONST. art. VI, § 3 reads:

Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state. Confirmation by default occurs if the Legislature fails to reject an appointee within sixty calendar days of either the date of appointment, if made during the annual legislative session, or the convening date of the next annual legislative session, if made out of session. The Legislature is authorized to prescribe such provisions as may be necessary to carry out Sections two and three of this article.

S.J. Res. 2, 108th Gen. Assemb. Reg. Sess. (Tenn. 2013).

7. The State Constitution requires the Legislature to determine the manner for filling all vacancies not otherwise provided for in the constitution. Since the Legislature has sunset the Tennessee Plan without fulfilling its constitutional obligation to provide for a mechanism

The other half of the Tennessee Plan, the Judicial Performance Evaluation Commission (“Evaluation Commission”), was “sunset” beginning June 30, 2013.<sup>8</sup> The Evaluation Commission is charged with “assist[ing] the public in evaluating the performance of incumbent appellate court judges”<sup>9</sup> by producing public reports regarding judges standing for election.<sup>10</sup> During its one-year “winding up” period, the Evaluation Commission will evaluate the appellate judges standing for election in August 2014.<sup>11</sup>

By June 4, 2013—scarcely six weeks from the conclusion of the legislative session and amid the lack of certainty as to how to fill judicial vacancies—three intermediate appellate court judges announced that they would retire at the expiration of their terms on August 31, 2014. The JNC operated on an expedited timeframe in order to nominate replacements before it ceased operations on June 30, 2013. In fact, the JNC submitted two panels for each appellate vacancy, in case the Governor exercised his statutory right to reject the first panel and request another one.<sup>12</sup> At the same time, the JNC was also busy addressing vacancies in four trial courts.<sup>13</sup>

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to fill vacancies in other courts, there is, in essence, no way to fill trial court level vacancies. See Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 526 (2008). It does not appear that the current proposed constitutional amendment addresses this inadequacy. See, e.g., *What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?: Hearing Before the H. Subcomm. on Civil Practice & Procedure*, 106th Gen. Assemb., Reg. Sess. (Tenn. 2009) (statement of Prof. Brian Fitzpatrick, Vanderbilt Law School).

8. TENN. CODE ANN. § 4-29-234 (2013).

9. TENN. CODE ANN. § 17-4-201 (2012).

10. TENN. CODE ANN. § 17-4-201(c) (2012).

11. TENN. CODE ANN. § 4-29-112; Telephone Interview with Aaron Conklin, Staff Contact for Evaluation Commission, Administrative Office of the Courts (Sept. 12, 2013).

12. TENN. CODE ANN. § 17-4-112(a)(1) (2009). See also *Nominating Commission Sends Eighteen Names to Governor Haslam This Week for Appeals Court Openings*, TNCOURTS.GOV (June 29, 2013), <http://www.tncourts.gov/news/2013/06/29/nominating-commission-sends-18-names-gov-haslam-week-appeals-court-openings>. The Governor made appointments to the Middle Section Court of Appeals, the Eastern Section Court of Criminal Appeals, and the Western Section Court of Appeals in late August 2013. *Chancellor Goldin Appointed to Court of Appeals Seat in Western Section*, TNCOURTS.GOV (AUG. 28, 2013), <http://www.tncourts.gov/news/2013/08/28/chancellor-goldin-appointed-court-appeals-seat-western-section>; *Haslam Appoints Judge Montgomery to Court of Criminal Appeals*, TNCOURTS.GOV (Aug. 27, 2013), <http://www.tsc.state.tn.us/news/2013/08/27/haslam-appoints-judge-montgomery-court-criminal-appeals>; *McBrayer Appointed to Court of Appeals Middle Section*, TNCOURTS.GOV (Aug. 26, 2013), <http://www.tncourts.gov/news/2013/08/26/mcbrayer-appointed-court-appeals-middle-section>.

13. See *Mike Faulk Appointed Circuit Court Judge for Third District*, TNCOURTS.GOV (June 27, 2013), <http://www.tncourts.gov/news/2013/06/27/mike-faulk-appointed-circuit-court-judge-3rd-district>; *Nominating Commission Selects Three Candidates in 30th District*, TNCOURTS.GOV (March 27, 2013), <http://www.tncourts.gov/news/2013/03/27/nominating-commission-selects-3-candidates-30th-district>; *Three Names Sent to Governor for Chancery Court Vacancy in First Judicial District*, TNCOURTS.GOV (June 14, 2013), <http://www.tncourts.gov/node/1899508>.

On June 26, 2013, Tennessee Supreme Court Justice Janice M. Holder announced her retirement at the end of her current term, effective August 31, 2014. With this announcement timed four days before the end of the JNC, it became official that, absent legislative intervention, there would be a vacancy on the State's highest court before the proposed constitutional amendment is voted upon, with no clear legal mechanism for replacement.

On July 19, 2013, a Special Supreme Court<sup>14</sup> heard argument in *Hooker v. Haslam*,<sup>15</sup> a case challenging the constitutionality of the Tennessee Plan. The trial court in this case upheld the constitutionality of the statutes, but concluded that intermediate appellate judges are subject to retention election only by the qualified voters of the "Grand Division" in which the judge resides, rather than the statewide elections. The Court of Appeals affirmed the constitutionality of the statutes and reversed the finding with respect to statewide elections, and the Supreme Court accepted the application for permission to appeal.<sup>16</sup>

On October 9, 2013, Tennessee's Attorney General issued an opinion that, despite the termination of the JNC, the Governor was still empowered to fill all judicial vacancies.<sup>17</sup> The repealed Tenn. Code Ann. § 17-4-113(a) had allowed the Governor to make judicial appointments if the JNC did not act within sixty days to fill a vacancy. In the opinion, the Attorney General noted that, during the course of passing the JNC's enabling legislation, an amendment had been proposed that would have explicitly reserved such authority to the governor in the event of sunset, but the amendment was withdrawn after comments from the floor indicating that it was not necessary.<sup>18</sup> Given this legislative history, the Attorney

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14. The moniker "Special Supreme Court" exists because each of the Justices who will preside over the case has been specially appointed by the governor to hear the matter. This is provided for via the Tennessee Constitution and by statute in cases in which a conflict of interest exists preventing a Supreme Court Justice from hearing a matter. *See* TENN. CONST. art. VI, § 11; TENN. CODE ANN. § 17-2-102 (2014); *see also* Holder v. Tenn. Judicial Selection Comm'n, 937 S.W.2d 877, 879 (Tenn. 1996). In *Hooker v. Haslam*, 393 S.W.3d 156, 169-70 (Tenn. 2012), each elected Supreme Court Justice recused herself or himself ostensibly to avoid passing on the manner of his/her own appointment and election to the bench. The Special Supreme Court then reviewed and granted the application for permission to appeal, held oral argument, and will issue an opinion. *Hooker v. Haslam*, No. M2012-01299-SC-R11-CV (Tenn. argued July 19, 2013). The judgment of the "Special Supreme Court" holds the absolute force of law. Holder v. Tenn. Judicial Selection Comm'n, 937 S.W.2d at 881-82.

15. No. M2012-01299-SC-R11-CV (Tenn. argued July 19, 2013).

16. Please see the Postscript to this Article for more information on *Hooker v. Haslam*.

17. Authority of the Governor to Fill Judicial Vacancies, Tenn. Att'y Gen. Op. 13-76 (Oct. 9, 2013), available at <https://www.tn.gov/attorneygeneral/op/2013/op13-076.pdf>.

18. Senator Dewayne Bunch had proposed the amendment saying, "[t]he language that I have is drafted so that if this were to sunset in the future, that the authority . . . for the governor to appoint an interim would still exist." S. 106-1573, 1st Sess., at 9-10 (Tenn. 2009), available at <https://www.tn.gov/attorneygeneral/op/2013/op13-076.pdf>. The amendment was withdrawn, however, after Senate Majority Leader Mark Norris stated his belief that it was unnecessary. *Id.* at 10.

General reasoned that the Governor could still use the statutory power in repealed Tenn. Code Ann. § 17-4-113(a) to make judicial appointments.<sup>19</sup>

One week later, on October 17, 2013, Governor Bill Haslam issued an Executive Order creating the Governor's Commission for Judicial Appointments ("Governor's Commission").<sup>20</sup> Through the Order, the Governor essentially reinstated the JNC, adopting, almost verbatim, the text of the repealed statutes. Eleven members of the JNC whose terms were unexpired when the JNC terminated were appointed to the Governor's Commission, and the Executive Order provided that the remaining spots would be filled by the Governor in consultation with the Speaker of the House and Speaker of the Senate. By its nature, the Executive Order is temporary; the terms of all members are set to expire on November 5, 2014—the day the proposed constitutional amendment will be voted upon.

The day after Governor Haslam reinstated merit selection via Executive Order, Knoxville attorney Herbert Moncier filed suit in federal district court challenging the Governor's Commission. Moncier alleged that he had a property right in seeking election to the Criminal Court of Appeals in August 2014 and that the existence of the Governor's Commission denied him that right.<sup>21</sup>

On October 31, 2013, the Tennessee Judicial Evaluation Commission released its preliminary reports of the judges slated to stand for election in 2014.<sup>22</sup> Three judges were not recommended for retention. While the judges can respond to the preliminary recommendations in advance of the Commission's final report, if the Commission ultimately recommends that a judge not be retained, then that judge's seat is subject to a contested election. One judge has since announced that he will not seek reelection.<sup>23</sup>

Thus, as of the drafting of this Article, the General Assembly has repealed all statutory mechanisms for appointing judges; the Attorney General has issued an opinion that the repeal has no effect on the Governor's statutory power; the Governor has established his own interim Commission which is accepting applications for two appellate court vacancies; and a federal suit is challenging the Commission's authority. The Judicial Evaluation Commission continues to release recommendations

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19. Authority of the Governor to Fill Judicial Vacancies, *supra* note 17.

20. Tenn. Exec. Order No. 34 (Oct. 16, 2013), available at [http://www.tncourts.gov/sites/default/files/docs/executive\\_order\\_no\\_34.signed.10.16.13\\_2.pdf](http://www.tncourts.gov/sites/default/files/docs/executive_order_no_34.signed.10.16.13_2.pdf).

21. Complaint, *Moncier v. Haslam*, No. 3:13-cv-00630-TAV-HBG (E.D. Tenn. Oct. 18, 2013).

22. Tom Humphrey, *Evaluation Commission Recommends Against New Terms for Three Appeals Court Judges in Preliminary Vote*, KNOXBLOGS.COM (Oct. 31, 2013), <http://knoxblogs.com/humphreyhill/2013/10/31/evaluation-commission-recommends-new-terms-three-appeals-court-judges-preliminary-vote>.

23. Chas Sisk, *Judge Jerry L. Smith Says He Won't Seek Re-election*, THE TENNESSEAN (Dec. 6, 2013), republished at <http://www.lawreport.org/ViewStory.aspx?StoryID=12885>.

that will shape the face of judicial elections immediately prior to the vote on the constitutional amendment. In short, there are a lot of open questions as the State approaches elections and a constitutional referendum next year.

The authors intend for this Article to function, in part, as historical overview. This necessarily incorporates some legal analysis, as Tennessee's constitutional dictates have played no small part in the State's sojourn into merit selection. The constitutionality of Tennessee's merit selection process, the effectiveness and desirability of merit selection, and the impact of campaigns (and campaign finance) on the judicial system are just a few areas addressed. In the spirit of the Symposium for which this Article has been prepared, however, the authors' main endeavor is to present editorial comments and personal reflections on judicial selection in Tennessee in conjunction with the historical overview. Author Margaret L. Behm has been extensively involved in the judicial selection process in this State for more than thirty years. Thus, the second part of this Article is relayed in first person.

## B. Historical Background, 1796–1970

Tennessee became a state in 1796.<sup>24</sup> Its first Constitution did not provide for a fully independent Judicial Branch of government. Rather, the Superior Court and lower courts were created by and subordinate to the Legislature. Many observers decried the defective nature of the judicial system, and the Legislature revamped the court structure several times in the early period of Tennessee history.<sup>25</sup>

The State's second Constitution was adopted in 1835.<sup>26</sup> For the first time, it established the independence of the judiciary, with the judicial power of the state "vested in one Supreme Court" and such inferior courts as established by the General Assembly.<sup>27</sup> The Supreme Court consisted of three judges—one from each Grand Division of the State.<sup>28</sup> Judges of courts of law and equity were appointed jointly by the General Assembly for a term of eight years.<sup>29</sup> County courts were presided over by Justices of the

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24. Tennessee history buffs might be interested to know that Tennessee's short-lived predecessor, the State of Franklin, rejected a constitutional scheme that provided for a system of local "arbitration" of personal disputes, complete with peremptory strikes. FRANKLAND CONST. of 1785, § 37, available at [http://www.tn.gov/tsla/founding\\_docs/33664\\_Transcript.pdf](http://www.tn.gov/tsla/founding_docs/33664_Transcript.pdf); see also *Tennessee's Founding and Landmark Documents*, TENN. VIRTUAL ARCHIVE, <http://teva.contentdm.oclc.org/cdm/compoundobject/collection/tfd/id/225> (noting that this constitution was rejected).

25. James W. Ely, Jr., *Law in Tennessee*, TENN. ENCYC. OF HIST. AND CULTURE (Dec. 25, 2009), <http://tennesseeencyclopedia.net/entry.php?rec=768>.

26. White & Reddick, *supra* note 7, at 504 (citing SAMUEL C. WILLIAMS, PHASES OF THE HISTORY OF THE SUPREME COURT OF TENNESSEE 5 (1944)).

27. TENN. CONST. art. VI, § 1 (1834); White & Reddick, *supra* note 7 at 504.

28. TENN. CONST. art. VI, § 2 (1834).

29. *Id.* § 3.



Peace and Constables, who were directly elected by their local constituents.<sup>30</sup>

In 1853, the Constitution was amended to provide for the election of Supreme Court judges.<sup>31</sup> Professor White and Dr. Reddick call this a “purely political” happenstance.<sup>32</sup> As they describe it, in 1849, United States Congressman Andrew Johnson and Democratic Governor William Trousdale began advocating for a popularly elected judiciary based on their belief that the otherwise dominant Tennessee Whig party “would oppose any change” that would reduce the Whig’s power.<sup>33</sup> Johnson then “co-opted” the media into the debate, reframing the issue as whether government officials questioned the public’s competency to select their own judges.<sup>34</sup> Thus, cross-party support was gathered, an 1851 legislative resolution to amend the Constitution was supported by both gubernatorial candidates, and, in 1853, “the voters approved the amendment which provided that the ‘Judges of the Supreme Court shall be elected by the qualified voters of the State.’”<sup>35</sup>

After the Civil War, Tennessee adopted its third and still-governing Constitution in 1870. The language of the 1853 amendment was retained, with an additional provision empowering the Legislature to prescribe rules to carry out the provisions of the constitutional article creating the Tennessee Supreme Court. No similar provision was adopted to empower the Legislature to prescribe rules relative to the election of circuit, chancery, or inferior court judges,<sup>36</sup> again evidencing the Legislature’s unwillingness to deny itself the power to “tinker” with the appellate judiciary of the State.<sup>37</sup>

Not to be overlooked in any examination of Tennessee politics (and, hence, Tennessee law) are the Grand Divisions of Tennessee. The Tennessee Blue Book describes the Divisions in geographic terms—“upland, often mountainous, East Tennessee, Middle Tennessee with its foothills and basin, and the low plain of West Tennessee.”<sup>38</sup> Tennessee’s Official Historian, the late Walter T. Durham, asserted that the “grand

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30. *Id.* § 15.

31. White & Reddick, *supra* note 7, at 506 (quoting TENN. CONST. art. VI, § 3 (as amended in 1853)) (citing Lewis L. Laska, *The Tennessee Constitution*, in TENNESSEE GOVERNMENT AND POLITICS: DEMOCRACY IN THE VOLUNTEER STATE 9 (John R. Vile & Mark Byrnes eds., 1998)). At this time, the Tennessee Supreme Court was the only continuing court with appellate jurisdiction. *Id.* at 508.

32. *Id.* at 505.

33. *Id.*

34. *Id.* at 506.

35. *Id.* (quoting TENN. CONST. art. VI, § 3 (as amended in 1853)).

36. White & Reddick, *supra* note 7, at 507.

37. “[T]he Tennessee practice of frequent legislative tinkering with the judiciary was begun early in the state’s political life.” *Id.* at 507 n.47 (quoting LEWIS L. LASKA, TENNESSEE LEGAL RESEARCH HANDBOOK (1977)).

38. Tenn. Sec’y of State, *A History of Tennessee*, TENN. BLUE BOOK (2011–2012) 471, available at [http://www.state.tn.us/sos/bluebook/11-12/TS1\\_AHistoryOfTennessee.pdf](http://www.state.tn.us/sos/bluebook/11-12/TS1_AHistoryOfTennessee.pdf).

division distinction is more geographical and cultural than political, and in each division the culture changes with the geography.”<sup>39</sup>

With all due respect to Mr. Durham, the Grand Divisions may trace their differences to geography and culture, but these differences certainly play out politically. They are even defined statutorily.<sup>40</sup> An examination of the State’s Grand Divisions and their political histories and legacies is fascinating but beyond the scope of this paper. Suffice it to say Tennessee’s politics have, from the very beginning, been influenced by the Divisions, with multiple constitutional provisions explicitly referencing them. Indeed, the Tennessee Supreme Court is required to convene in each of the three Grand Divisions, and no more than two justices can reside in any one Grand Division.<sup>41</sup> The importance of the Grand Divisions is also reflected repeatedly by statute, confirming Durham’s assertion that “State lawmakers have left [Tennesseans] the legacy of three states in one . . . .”<sup>42</sup> The next changes to the appellate judiciary would come a century later, but the importance of the Grand Divisions would remain.

#### 1. The Rise of Merit Selection, Circa 1971

In 1971, the Tennessee General Assembly acted to place all appellate courts under a version of the “Missouri Plan” of merit selection.<sup>43</sup> The Appellate Court Nominating Commission was created,<sup>44</sup> and for the first time, the entire appellate judiciary in the State became subject to merit-based selection and retention elections.

The Commission represented the General Assembly’s attempt at creating a “non-political” appellate judiciary.<sup>45</sup> As illustrated in Figure 1, it consisted of nine members, none of whom were allowed to be state or federal employees or hold office in any political party or organization.<sup>46</sup> Three members were gubernatorial appointees, representing each Grand

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39. Walter T. Durham, *Tennessee Heritage*, THE COURIER, June 2005, at 4, available at [http://www.tn.gov/environment/history/docs/courier\\_jun05.pdf](http://www.tn.gov/environment/history/docs/courier_jun05.pdf).

40. The Tennessee Legislature has enacted laws declaring that there are three Grand Divisions of the State: the Eastern, Middle, and Western and has specified the counties of which each Grand Division is comprised. TENN. CODE ANN. §§ 4-1-201–204 (1836).

41. TENN. CONST. art. VI, § 2.

42. Durham, *supra* note 39, at 4.

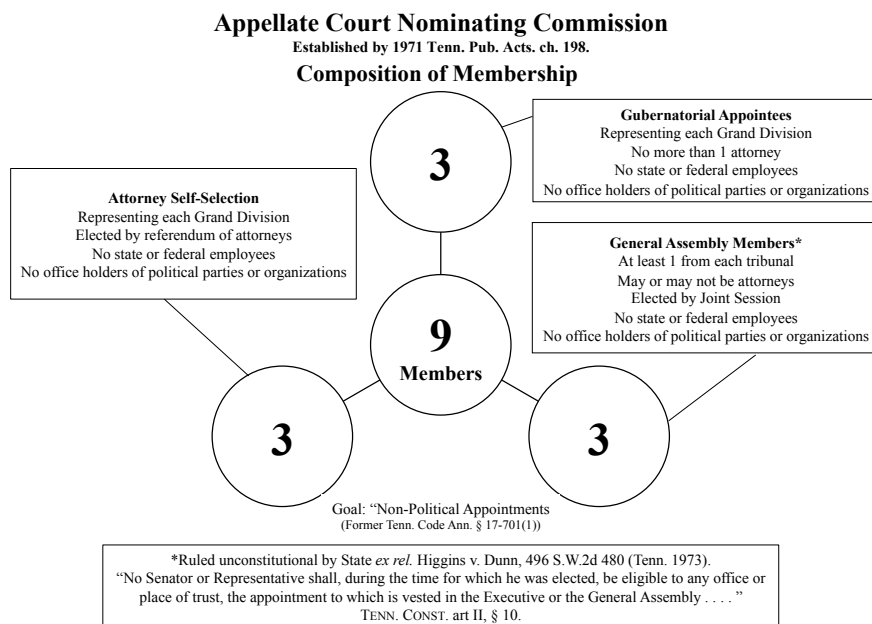
43. Under the Missouri Nonpartisan Court Plan, a nonpartisan judicial commission reviews applications, interviews candidates and selects a judicial panel from which the governor fills the vacancy. *Missouri Nonpartisan Court Plan*, YOUR MO. CT., <http://www.courts.mo.gov/page.jsp?id=297> (last visited Feb. 25, 2014). Judges are subject to nonpartisan retention elections, and an evaluation commission issues public reports to inform the electorate of the judge’s performance. *Id.* Missouri’s plan for merit-based selection and retention of judges has been a model for over thirty states. *Id.*

44. 1971 Tenn. Pub. Acts 641 (codified at TENN. CODE ANN. § 17-701 (repealed 2009)).

45. TENN. CODE ANN. § 17-701(1) (repealed 2009).

46. *Id.*

Division. No more than one of these three could be an attorney.<sup>47</sup> Three additional members of the Commission, one from each Grand Division, represented the bar and were elected by a referendum of attorneys. Finally three members were from the General Assembly and elected via joint session, with at least one member required from each tribunal.<sup>48</sup>



**Figure 1—Appellate Court Nominating Commission**

The preamble to the legislation declared that the “purpose and intent” of the Act was:

to assist the Governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee and to assist the electorate of Tennessee to elect the best qualified persons to said courts; to insulate the justices and judges of said courts from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the appellate courts by eliminating the necessity of political activities by appellate justices and judges; and, to make the appellate courts of Tennessee ‘non-political.’<sup>49</sup>

47. *Id.*

48. *Id.*

49. State *ex rel. Higgins v. Dunn*, 496 S.W.2d 480, 488 (Tenn. 1973).

The Act provided for the application process, nomination process, appointment process, and subsequent election process of the appellate judiciary. Every eight years, appellate judges were required to file a written declaration of candidacy. Thereafter, their names were placed on the ballot with the question “Shall (Name of Candidate) be elected and retained in office as (Judge) of the (name of Court)?” A majority vote in favor of re-election resulted in the candidate being issued a certificate of election.<sup>50</sup>

## 2. First Constitutional Challenge, 1972

It was not long before politics found its way into this new non-political nominating process. On June 19, 1972, Tennessee Supreme Court Judge Larry Creson passed away six weeks before the end of his term on August 31, 1972.<sup>51</sup> Governor Winfield Dunn gave notice to the Appellate Court Nominating Commission, and the Governor was provided with a three-name panel from which to choose a successor. Governor Dunn then announced that nominee Thomas F. Turley, Jr. would fill the vacancy, beginning September 1, 1972.<sup>52</sup>

In the meantime, the State’s regular biennial elections were held on August 3, 1972. Even though the Governor had not issued writs of election to place the judicial office on the ballot, attorney Robert L. Taylor conducted a write-in campaign for the vacancy on the court.<sup>53</sup> The Governor’s Office responded with a statement declaring that Mr. Taylor was ineligible for the position.<sup>54</sup> Gubernatorial decree notwithstanding, Mr. Taylor received 3,301 votes to Mr. Turley’s 555, and Mr. Taylor declared himself the winner of the election.<sup>55</sup>

On August 18, 1972, the Secretary of State issued Mr. Taylor a Certificate of Election.<sup>56</sup> The Governor subsequently issued Mr. Turley a commission appointing him Justice of the Supreme Court from September 1, 1972 until September 1, 1974, “until he shall have been elected and retained in office.”<sup>57</sup> Mr. Taylor responded by taking the oath of office. The District Attorney became involved via a quo warranto action. In addition to determining the matter of who was entitled to the judgeship, the Davidson County Chancery Court was asked to address the constitutionality of the Act creating the Appellate Court Nominating Commission.<sup>58</sup>

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50. White & Reddick, *supra* note 7, at 509–10.

51. N. Houston Parks, *Judicial Selection—The Tennessee Experience*, 7 MEM. ST. U. L. REV. 615, 615 (1976–77) (discussing the facts surrounding the merit selection plan for filling vacancies on the appellate courts).

52. *Higgins*, 496 S.W.2d at 482.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 482–83.

58. *Id.* at 482.

Chancellor Frank Drowota<sup>59</sup> determined that neither man was entitled to the office and declined to rule on the constitutionality of the Appellate Court Nominating Commission.<sup>60</sup> The Supreme Court agreed with the trial court's analysis, essentially stating that the Governor only had the power to make an appointment to fill the unexpired term, and the appointee could have then been retained by election.<sup>61</sup> However, since the necessary prerequisites were not met for a contested election, the write-in candidate was similarly unentitled to the office.<sup>62</sup>

The Court went on to address the constitutionality of the Appellate Court Nominating Commission and determined that the three General Assembly members who held seats on the Commission could not do so, as "No Senator or Representative shall, during the time for which he was elected, be eligible to any office or place of trust, the appointment to which is vested in the Executive or the General Assembly . . . ."<sup>63</sup> The Court held, however, that the Act as a whole survived constitutional review and that the retention election was a constitutionally permissible method of fulfilling the requirement of judicial elections.<sup>64</sup>

In his dissent, Justice Humphreys addressed the expressed legislative intent of depoliticizing the courts and opined that the scheme behind the Appellate Court Nominating Commission was inherently political—more so than direct elections could ever be:

We are today witnessing a sad consequence of this subordination of this Supreme Court to the Legislature. Judicial notice can be taken of the fact that a bill has been introduced in the Legislature to repeal the Modified Missouri Plan. This bill may be defeated. But, that need not be the end of it. Another bill can be introduced next session, or the session after that, ad infinitum, so that Supreme Court Judges and, possibly, all judges, can be kept in attendance by the Legislature, hat in hand, so to speak, whenever it suits the purpose of some disgruntled representatives to snap the Court to attention with a bill to change the manner of their election. If this is not subordination, nothing is. If this is not more political than election by the people, nothing is. Have we not, like Esau,

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59. Chancellor Drowota would be elected to the Tennessee Supreme Court in 1980. See *Chief Justice Drowota Retiring from Supreme Court*, TNCOURTS.GOV (June 6, 2005), <https://www.tncourts.gov/press/2005/06/06/chief-justice-drowota-retiring-supreme-court>.

60. *Higgins*, 496 S.W.2d at 482.

61. *Id.* at 491 ("We hold that the Governor was without power to appoint Mr. Turley to the term to which he appointed him. We therefore overrule his assignments of error and dismiss his appeal.").

62. *Id.* at 487.

63. *Id.* at 490 (quoting TENN. CONST. art. II, § 10).

64. *Id.* at 490–91.

sold our precious birthright, equality and freedom for a mess of potage, a cheap, easy way to be perpetuated in office? I say this Court has opened Pandora's Box, and, that although the evils locked up therein may not surface immediately, and in fact may never surface, there is no longer any constitutional guarantee that they cannot, as was the case before the majority opinion was written.<sup>65</sup>

In challenging judicial selection by raising the question of whether a "retention election" is an "election," those who oppose merit selection created a diversion that recurs to this day. Scholars have pointed out that there really is no question.<sup>66</sup> The Tennessee Supreme Court addressed the question in *Higgins*, but that would not be last word on the subject. The "retention election" question still simmers.

### 3. Second Iteration of Merit Selection—The Return of Statewide Elections for the Supreme Court, 1973

With the General Assembly's first attempt at eliminating politics having achieved mixed results at best, the Legislature went back to work and revised the composition of the Appellate Court Nominating Commission. Less than two months after the Supreme Court's decision in *Higgins* (and a mere month after the Court's order on rehearing declaring that the Governor could move forward to appoint the still-existing vacancy on the Court), the General Assembly modified the composition of the Appellate Court Nominating Commission.<sup>67</sup>

The revised Appellate Court Nominating Commission had two additional members, for a total of eleven. The Governor's influence was enhanced, as gubernatorial nominees were increased to four, with no more than two attorneys permitted in that group. In place of the three General Assembly members, each tribunal's speaker was charged with appointing two members who may or may not have been attorneys, with no more than one representative from each political party.

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65. *Id.* at 494–95 (Humphreys, J., dissenting).

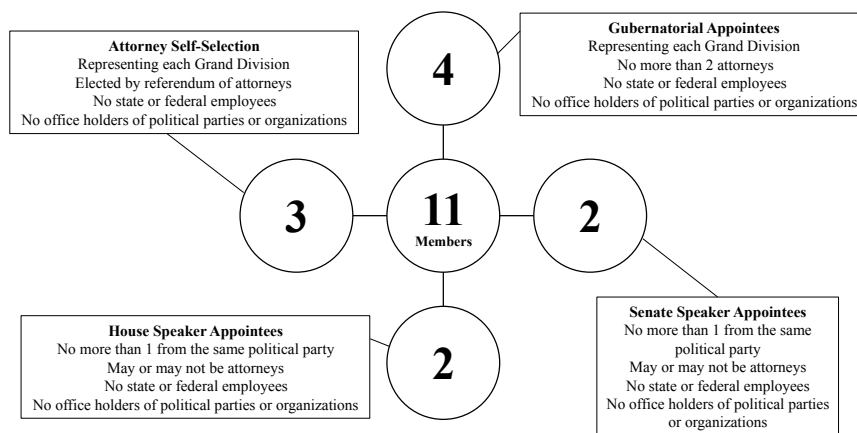
66. *See generally* White & Reddick, *supra* note 7, at 527–29 (arguing that a retention election satisfies both the traditional definitions of the word "election" as well as the Tennessee Supreme Court's construction of it). Indeed, one probably does a disservice to the jurisprudence by continuing to call it a "retention election" as if it differed in character from an "election."

67. 1973 Tenn. Pub. Acts 1027–30.

### Appellate Court Nominating Commission\*

As amended by 1973 Tenn. Pub. Acts ch. 265

#### Revised Composition of Membership



\*In 1974, Supreme Court seats were removed from the jurisdiction of the Commission. 1974 Tenn. Pub. Acts ch. 433.

**Figure 2—Revised Composition of Appellate Court Nominating Commission**

Less than one year after altering the composition of the Appellate Court Nominating Commission, the General Assembly again changed the Commission's enabling legislation, this time removing the Supreme Court from its purview.<sup>68</sup> Justice E. Riley Anderson described this turn of events as quid pro quo. "Democratic fears of a Republican governor making Supreme Court appointments combined with the desire of Upper East Tennessee Republicans for a medical school. The result: popular partisan elections for the Supreme Court and a medical school in Johnson City."<sup>69</sup>

Then-Governor Winfield Dunn vetoed the repealing legislation, noting the lack of principled basis for creating a two-tiered system of appointments to the appellate judiciary. If the modified Missouri Plan presented a good basis for appointments, it should be retained across the board. If it did not, then it should be repealed in its entirety.<sup>70</sup> The General Assembly overrode the veto, and the seats on the Tennessee Supreme Court became subject to direct, statewide elections. This arrangement would not

68. 1974 Tenn. Pub. Acts ch. 433.

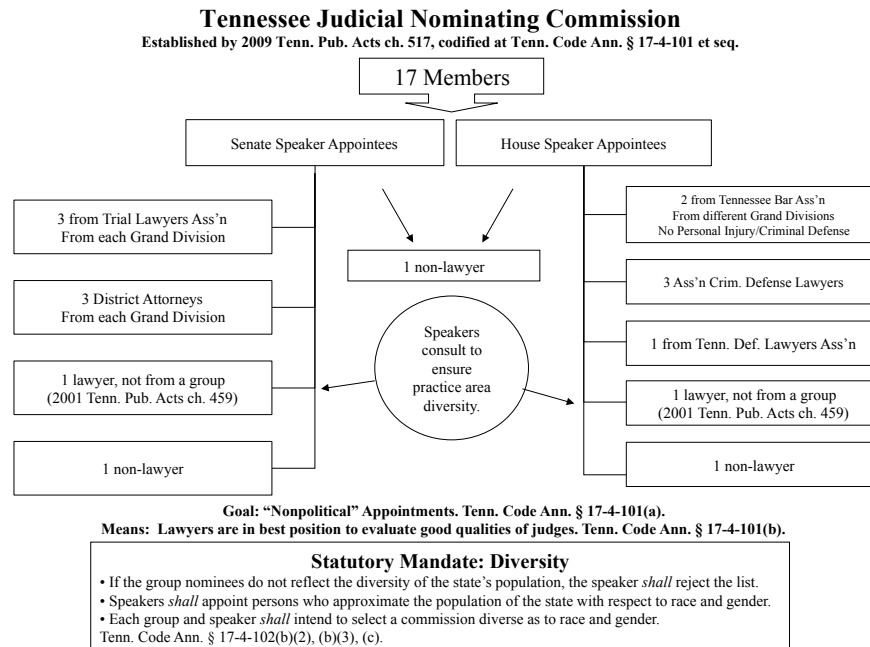
69. Riley Anderson, Valerius Sanford, & Janet Leach Richards, *A New Group Forms to Preserve Old Treasures: The Tennessee Supreme Court Historical Society*, 33 TENN. BAR J. 12 (1997), available at [http://www.tba.org/sites/default/files/journal\\_archives/1997/TBJ0397.pdf](http://www.tba.org/sites/default/files/journal_archives/1997/TBJ0397.pdf) (quoting Justice Riley Anderson's speech at the founder's meeting).

70. White & Reddick, *supra* note 7, at 512. Republican Dunn, who subsequently lost a gubernatorial bid in 1986, has recently claimed that signing the election retention scheme into law was a "mistake." Tom Humphrey, *Ex-Gov. Dunn Regrets Signing Appellate Judges Retention Law*, KNOXVILLE NEWS SENTINEL (July 21, 2013), <http://www.knoxnews.com/news/2013/jul/21/ex-gov-dunn-regrets-signing-appellate-judges-law/>.

last long, however.

### C. The Tennessee Plan, 1994–2013

By 1994, judicial selection was once again a hot topic, and the General Assembly overhauled the entire nomination process, disbanding the Appellate Court Nominating Commission and instituting in its place what would come to be known as the Tennessee Plan, anchored by the Tennessee Judicial Selection Commission.<sup>71</sup> The new Commission would have fifteen members, with the Speaker of the House and Senate each making seven appointments and conferring to make one joint appointment. Nominations for the appointments would come from a variety of lawyer groups.



**Figure 3–Judicial Selection Commission<sup>72</sup>**

With the new Judicial Selection Commission, the goal of nonpolitical appointments was maintained,<sup>73</sup> and the General Assembly also specifically recognized that lawyers are in the best position to evaluate

71. Tenn. Pub. Acts ch. 942, § 3 (1994).

72. A 2001 revision to the Judicial Selection Commission statute added two members to the Commission, one to be appointed by each speaker. The new members were to be lawyers that were not affiliated with any of the specified groups identified in the statute. Tenn. Pub. Acts ch. 459, §§ 4–8 (2001).

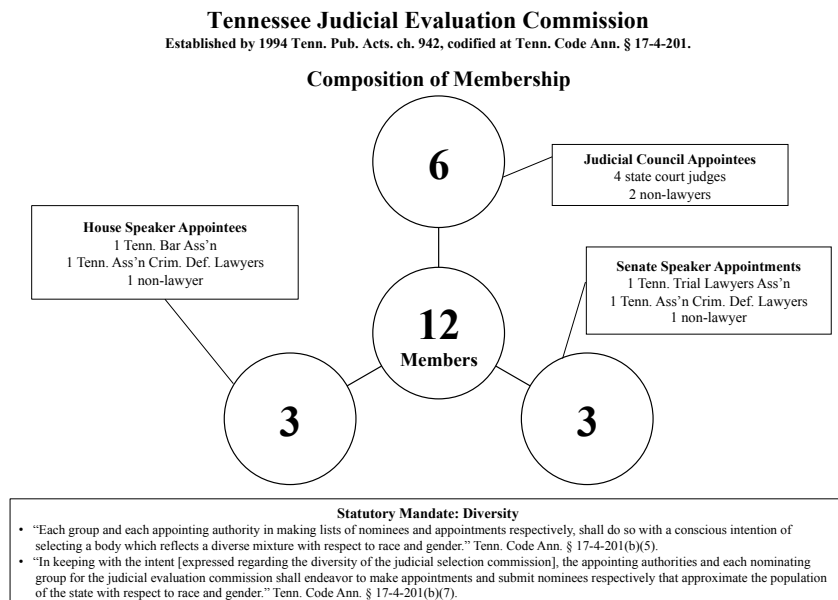
73. TENN. CODE ANN. 17-4-101(a) (2008) (amended 2009).



good qualities in judges.<sup>74</sup> The new legislation also brought with it a new statutory mandate: diversity.

The diversity mandate included three requirements designed to encourage diversity among the members of the bench. First, nominees for membership on the Judicial Selection Commission were to “approximate the population of the state with respect to race and gender,” including representation from the “dominant ethnic minority population.”<sup>75</sup> Thus, the various groups of lawyers were on notice to submit appropriately diverse panels for nomination to serve on the commission. Second, the speakers were required to reject any list of nominees that did not “reflect the diversity of the state’s population.”<sup>76</sup> Third, the various groups involved, as well as the speakers, were given this ultimatum: “each group and speaker shall intend to select a commission diverse as to race and gender.”<sup>77</sup> Unlike the Appellate Nominating Commission, there was no requirement of diversity regarding differing political party affiliations.

Also key to the Tennessee Plan was the institution of the judicial performance evaluation program through which court personnel, lawyers, and other judges could evaluate the performance of Tennessee judges, with one goal the ability to assist the electorate by providing information that could promote informed retention decisions.<sup>78</sup>



**Figure 4—Judicial Evaluation Commission**

74. TENN. CODE ANN. 17-4-101(b) (2008) (amended 2009).

75. TENN. CODE ANN. § 17-4-102 (2008) (amended 2009).

76. TENN. CODE ANN. § 17-4-102(b)(3) (2008) (amended 2009).

77. TENN. CODE ANN. § 17-4-102(c) (2008) (amended 2009).

78. White & Reddick, *supra* note 7, at 519–20.

1. The Tennessee Plan Is Implemented and Legal Chaos Ensues<sup>79</sup>

It may not have been Justice Humphrey's proverbial "Pandora's Box," but two decades after *Higgins*, a Special Supreme Court was forced to acknowledge that the judicial selection system had resulted in "legal chaos."<sup>80</sup> In 1994, Governor Ned McWherter appointed Penny White to the Tennessee Supreme Court to fulfill the unexpired term of retiring Justice Charles O'Brien—who had been elected in 1990 prior to the enactment of the Tennessee Plan. In 1996, Justice White became the center of an upwelling of controversy regarding judicial selection. Her candidacy for the Supreme Court sheds light on the difficulties that can ensue when both the Justice and the method of selection are subject to frequent and simultaneous attack.

Justice White's appointment was subject to retention election on August 1, 1996. However, she was not reviewed by the Judicial Evaluation Commission prior to being placed on the ballot for election. This was apparently due to the belief on behalf of the State and the Judicial Evaluation Commission that subsequent to its creation by July 1, 1995, it was not required to conduct judicial evaluations until judicial candidates were standing for complete terms, which would not occur until August 1998.<sup>81</sup> Indeed, this belief likely came from the language of the statute itself: "The judicial evaluation program, including the public report and the ballot information, shall apply to each appellate court judge who seeks to serve a complete term after September 1, 1994."<sup>82</sup> However, others took the position that the overall construction of the Tennessee Plan provided that no appointed judge could have his or her name placed on a retention ballot without having first been evaluated by the Commission, and, indeed, at least one appellate judge in the State who was slated to stand for election after having been appointed to an unexpired term repeatedly and unsuccessfully requested evaluation by the commission.<sup>83</sup>

Operating on the argument that no judge could appear on a retention ballot without having first been evaluated, attorneys Lewis Laska and John J. Hooker each sought to declare their candidacy for the statewide election in early 1996. The State Coordinator of Elections declined to provide them with nominating positions, noting that Justice White would be running unopposed on the ballot in a retention election. Both sued, and their

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79. See *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331, 345 (Tenn. 1996) ("We take judicial notice that following the issuance of our orders in these cases something approaching legal chaos ensued.").

80. *Id.*

81. *Id.* at 340.

82. *Id.* (quoting TENN. CODE ANN. § 17-4-201(e) (1996) (amended 2009)).

83. "The Evaluation Commission appears to have taken the position that 'any action in furtherance of speeding up an abbreviated and unapproved election process would in fact undermine the goals, objectives, and overall integrity of the program.'" *Lillard v. Burson*, 933 F. Supp. 698, 700 (W.D. Tenn. 1996) (quoting Commission Memo, May 13, 1996).

suits were eventually consolidated for review by a Special Supreme Court since the sitting Justices recused themselves on a matter regarding their own election.

The Special Supreme Court agreed that the Tennessee Plan required Justice White to be evaluated by the Commission prior to standing for election by retention ballot. In the absence of such an evaluation, the Special Supreme Court essentially held that a statewide contested election was required but that no candidates had validly qualified for election prior to the deadline.<sup>84</sup> The Special Supreme Court gave Justice White dispensation to file belatedly for candidacy and ordered that Hooker could not be placed upon the ballot because he failed to meet the necessary requirement, as his law license had lapsed. The Court also eventually ordered that Mr. Laska's name could not be placed on the ballot under state law because Justice White was appointed to fill the unexpired term of Justice O'Brien, and his vacancy must be filled by a resident of the same Grand Division as he. While Justice White met the residency requirement, Mr. Laska did not. The Court allowed John King, the putative Republican candidate for the office held by Justice White, to file an *amicus curiae* brief. He was ultimately granted an extension of the qualifying deadline so that he would have the opportunity for his name to be placed on the ballot, should the matter have ultimately proceeded to a contested election.<sup>85</sup>

In its final opinion on the matter, the Special Supreme Court concluded "that the yes/no retention vote provided for in the Tennessee Plan is in compliance with the Article VI, Section 3 mandate of the Tennessee Constitution that Judges of the Supreme Court be 'elected by the qualified voters,'" adding that "[n]o authority was cited by any party to these proceedings, nor has any been found by this Court, that would dictate a different result under the United States Constitution."<sup>86</sup> The Special Court further found that neither Article I, Section 5 of the Tennessee Constitution, requiring elections to be "free and equal," nor Article II, Section 1 of the Tennessee Constitution, providing for the separation of powers among the three branches, were in conflict with the terms of the Tennessee Plan.<sup>87</sup>

Meanwhile, two federal court cases addressing the August 1996 judicial elections were filed and consolidated. Several appellate judges, including Justice White, asserted a property right to a retention election as bestowed by the Tennessee Plan's statutes and by the assurances of State officials made to her regarding the official status of her candidacy. Hooker countered that the Special Supreme Court's ruling required a contested election. Ultimately, the federal district court determined that Justice White

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84. See *Hooker v. Burson*, 960 F. Supp. 1283, 1285 (M.D. Tenn. 1996) (characterizing the holding in *Thompson*, 249 S.W.3d at 346).

85. *Thompson*, 249 S.W.3d at 335–36.

86. *Id.* at 338.

87. *Id.*; see also *Hooker v. Haslam*, 393 S.W.3d 156, 163 (Tenn. 2012) (characterizing the holding of *Thompson*, 249 S.W.3d at 338).

was entitled to appear on a retention ballot. Thus, the retention elections were ordered to proceed.<sup>88</sup> The federal court left undisturbed the Special Supreme Court's ruling that the General Assembly was empowered to dictate the manner of judicial elections in the State.

While the litigation surrounding her retention election was ongoing, Justice White also became the subject of an aggressive campaign against her retention in which she was portrayed as opposing the death penalty. Professor Bright describes the situation succinctly. In addition to a political hit piece mailed by the Tennessee Conservative Union,

[t]he Republican Party also mailed a brochure to voters entitled, *Just Say NO!* with the slogan, "Vote for Capital Punishment by Voting *NO* on August 1 for Supreme Court Justice Penny White." Inside, the brochure described three cases to demonstrate that Justice White "puts the rights of criminals before the rights of victims." It described the case of Richard Odom as follows: "Richard Odom was convicted of repeatedly raping and stabbing to death a 78 year old Memphis woman. However, Penny White felt the crime wasn't heinous enough for the death penalty—so she struck it down."

Neither mailing disclosed that Richard Odom's case was reversed because all five members of the Tennessee Supreme Court agreed that there had been at least one legal error which required a new sentencing hearing. The court affirmed Odom's conviction and remanded his case for a new sentencing hearing. No member of the court expressed the view that the crime was not heinous enough to warrant the death penalty. Indeed, the remand for a new sentencing hearing at which a jury would decide between the death penalty and life imprisonment made it quite clear that the court did not find the death penalty inappropriate for Odom. Justice White did not write the majority opinion, a concurring opinion, or a dissenting opinion. Yet Tennessee voters were led to believe that she had personally struck down Odom's death penalty because she did not think the crime was "heinous enough."

White's opponents also blamed her for the fact that Tennessee has not carried out any executions in the last thirty-six years. But the Odom case was the only capital case which came before the Court during White's nineteen-

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88. *Lillard*, 933 F. Supp. at 704–05.

month tenure. Tennessee's political leaders did not call attention to this distortion; instead, Tennessee's governor and both its United States Senators, all Republicans, opposed White.<sup>89</sup>

Ultimately, Justice White became the first and only appellate judge in Tennessee to be removed from office due to losing a retention vote.<sup>90</sup> The election was held after the Special Supreme Court had issued its orders in the matter, but prior to the final issuance of its opinion. In the meantime, the Tennessee Attorney General had issued its opinion that the new vacancy on the Court could be filled by residents of either the Eastern or the Western Grand Division, since each of those divisions was then represented by only one Justice. The Special Supreme Court took judicial notice of the post-judgment fact of Justice White's defeat and, deeming the Attorney General's opinion erroneous, determined that "the 'at large' vacancy created by the resignation of Justice O'Brien [and the subsequent defeat of Justice White<sup>91</sup>] must be filled by a resident of the Eastern Grand Division, the Grand Division in which the vacancy originally occurred."<sup>92</sup>

The Judicial Selection Commission thus proceeded to accept applications only from residents of the Eastern Grand Division.<sup>93</sup> Janice Holder, a resident of the Western Grand Division of the State who was then a circuit court judge in Memphis, sought a declaratory judgment that the vacancy on the Tennessee Supreme Court could be filled by applicants from either the Eastern or the Western Grand Divisions.<sup>94</sup> Ultimately, the Tennessee Supreme Court determined that the question of the Grand Division residency of the new justice had not properly been before the Special Supreme Court. The Supreme Court then ruled that the Tennessee Plan and the State Constitution were in harmony, and applicants from both the Eastern and Western Divisions must be considered. Eventually, Judge Holder secured appointment to the bench.

The Tennessee Bar Association responded to these events by creating a task force to study judicial selection.<sup>95</sup> It would later decide to continue backing merit selection, as it had since 1987.<sup>96</sup>

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89. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 314–15 (1997) (internal citations omitted).

90. Mark Pickerell, *Bench Presses: Judicial Reform, a Year After Penny White*, NASHVILLE SCENE (Oct. 30, 1997), <http://www.nashvillescene.com/nashville/bench-presses/Content?oid=1181693>.

91. At this point, your authors would suggest to those who maintain that elections via retention ballot are not "elections," that if there was no "election," then what did the voters do to cause Penny White to no longer be on the Court?

92. *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331, 346 (Tenn. 1996).

93. *Holder v. Tenn. Judicial Selection Comm'n*, 937 S.W.2d 877, 879 (Tenn. 1996).

94. *Id.*

95. Hon. J. Daniel Breen, *President's Perspective*, 32 TENN. BAR J. (1996), available at [http://www.tba.org/sites/default/files/journal\\_archives/1996/TBJ1196.pdf](http://www.tba.org/sites/default/files/journal_archives/1996/TBJ1196.pdf).

## 2. A Decade Later, a New Controversy Erupts

Within a few years, the political landscape in Tennessee would begin to change. In 2007, Ron Ramsey became Tennessee's Lieutenant Governor, the first Republican to hold such office in more than 140 years. The Lieutenant Governor is the Senate Majority Leader and serves as the Speaker of the Senate.<sup>97</sup> Lieutenant Governor Ramsey made clear his distaste for having legal interest groups dictate his nominees to the Judicial Selection Commission.<sup>98</sup> Not long after, Governor Bredesen, who in his tenure would have the opportunity to appoint four Supreme Court Justices, entered into a very public dispute with the Selection Commission.

In 2006, two Supreme Court Justices announced their retirement, including Tennessee's second African-American Supreme Court member, Justice Adolpho A. Birch, Jr.,<sup>99</sup> and the only African-American Justice who had ever been elected to the office.<sup>100</sup> After the only African American on a three-name panel selected by the Commission withdrew from consideration for the position, the Governor rejected the remaining panelists and asked for a new panel, one that included "qualified minority candidates."<sup>101</sup> The Commission responded by tendering a new panel that consisted of one African-American and two Caucasian males.<sup>102</sup> One of the Caucasian men had been on the previously rejected panel.

The Governor filed suit, arguing that the Commission could not return the name of a rejected panelist.<sup>103</sup> Eventually, a Supreme Court comprised of three Justices (one a Bredesen appointee) and a Special Justice determined that the second panel was void for having contained the name of a previously-rejected applicant and that the Commission was to

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96. Dan L. Nolan Jr., *President's Perspective*, 34 TENN. BAR J. (1998), available at [http://www.tba.org/sites/default/files/journal\\_archives/1998/TBJ0198.pdf](http://www.tba.org/sites/default/files/journal_archives/1998/TBJ0198.pdf).

97. *Methods of Election, Team Election Data for the Office of Lieutenant Governor*, Nat'l Lt. Governors Assc. (Dec. 17, 2010), <http://www.nlga.us/lt-governors/office-of-lieutenant-governor/methods-of-election/>.

98. See Richard Locker, *Lt. Governor Ramsey Offers New Plan on Supreme Court Elections*, THE COM. APPEAL (Apr. 19, 2009), <http://www.commercialappeal.com/news/2009/apr/19/official-offers-new-judge-03/>.

99. *Justice Adolpho A. Birch, Jr., to Retire After 43 Years of Judicial Service*, TNCOURTS.GOV (Jan. 26, 2006), <https://www.tncourts.gov/press/2006/01/26/justice-adolpho-birch-jr-retire-after-43-years-judicial-service>.

100. Justice George Brown, Jr. was appointed by Governor Lamar Alexander in 1980 to fill the last few months of the late Justice Joe Henry's unexpired term. He ran in the general election in that year as a Republican and was defeated by Democratic nominee Frank F. Drowota. Carl A. Pierce, *The Tennessee Supreme Court and the Struggle of Independence, Accountability, and Modernization, 1974–1998*, in A HISTORY OF THE TENNESSEE SUPREME COURT 270, 276 (James W. Ely Jr., ed., 2002).

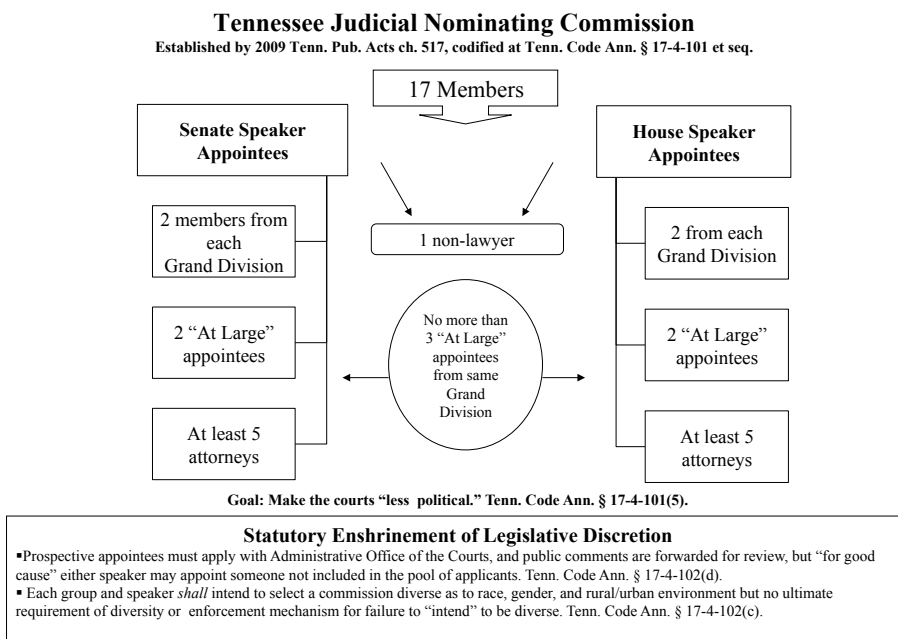
101. *Bredesen v. Tenn. Judicial Selection Comm'n*, 214 S.W.3d 419, 421–23 (Tenn. 2007).

102. *Id.* at 422.

103. *Id.* at 423.

tender a new panel.<sup>104</sup>

The episode again brought statewide attention to the idea of merit selection and drew new scrutiny surrounding the idea of diversity on the bench. Moreover, the brouhaha resulted in the decision of the General Assembly to allow the Judicial Selection Commission to sunset<sup>105</sup> and threatened the very existence of merit selection in Tennessee. Eventually, a one-year solution was adopted that overhauled the composition of the Judicial Selection Commission, renaming it the Judicial Nominating Commission. The revised application process was overseen by the State's Administrative Office of the Courts but allowed the Speakers of the House to choose anyone they like to serve on the JNC—even persons who forego the application process.<sup>106</sup>



**Figure 5—Tennessee Judicial Nominating Commission**

The 2009 legislation retained merit selection for Tennessee until June 30, 2012, but it did not retain a key provision of the former system. Gone was the explicit recognition that lawyers are the best judges of judges. While lawyers still made up the majority of the JNC, the language explaining their presence was eliminated, and the ratio of lawyers to non-lawyers was decreased. As a response to *Bredesen v. Tenn. Judicial*

104. *Id.* at 439–41.

105. *Sunset for the TJSC*, THE COM. APPEAL (Apr. 15, 2009), <http://www.commercialappeal.com/news/2009/apr/15/sunset-for-the-tjsc/>.

106. TENN. CODE ANN. § 17-4-102(d) (2009).

*Selection Comm'n*, the Governor was given the explicit right to request a second panel of three nominees and the ability to appoint from among any of the six total names that might be submitted for his consideration.<sup>107</sup>

Also notably changed was the law's take on the importance of diversity. Where in the past speakers were required to reject nominee panels that were not diverse, there was no longer such a requirement. Instead, the general assembly simply retained the instruction that speakers must have a conscious intention to create a diverse commission. The definition of diversity was expanded, with an additional aspect of diversity acknowledged—diversity with respect to “representation of rural areas as well as urban centers.”<sup>108</sup>

In perhaps the most honest change reflected in the law, the language making court appointments “nonpolitical” was eliminated; the articulated goal was simply “to make the courts less political.”<sup>109</sup> The realization that nothing in a democracy is ever truly nonpolitical is perhaps the only point upon which everyone involved can agree.

### Tennessee Judicial Performance Evaluation Commission

Established by 2009 Tenn. Pub. Acts. ch. 517, codified at Tenn. Code Ann. § 17-4-201.

#### Composition of Membership

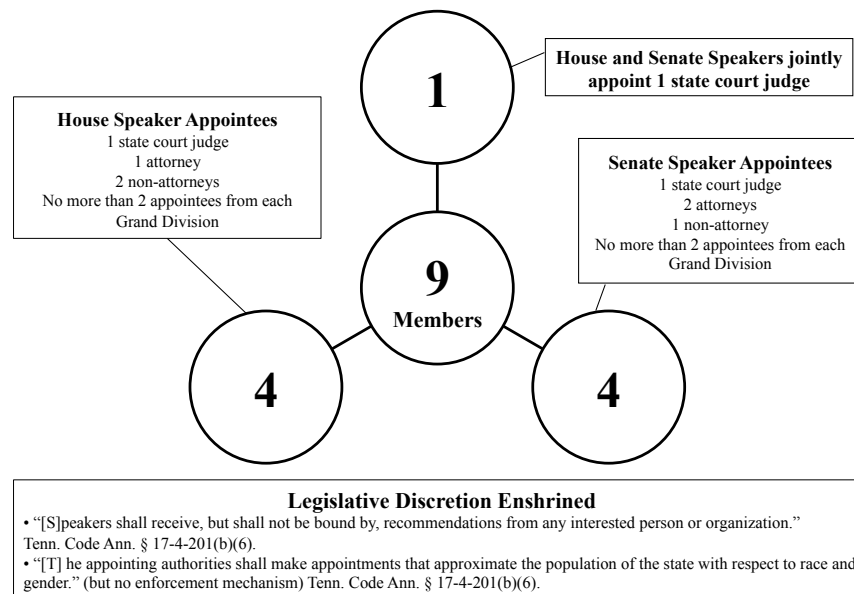


Figure 6—Judicial Performance Evaluation Commission

107. TENN. CODE ANN. § 17-4-112(a)(1) (2009).

108. TENN. CODE ANN. § 17-4-102(c)(3) (2009).

109. TENN. CODE ANN. § 17-4-101(5) (2009).



Under the new law appellate judges were subject to a judicial evaluation process, but the Commission's composition was strikingly different. The previous version of the Commission had four lawyers (from four different lawyer groups, each of which has a regular presence in the state courts), four non-lawyers, and four judges. The new Commission eliminated the direct input of the lawyer groups. And, whereas previously the Tennessee Judicial Council (a group of lawyers, judges, and non-lawyers<sup>110</sup>) could appoint state court judges to serve on the evaluation commission, the new Commission called for the appointment of judges directly by the Speakers of the House and Senate.<sup>111</sup>

Additionally, the General Assembly allowed the Tennessee Judicial Council to sunset effective June 30, 2009. Thus, the organization created by the General Assembly through which "judges, chancellors, public officers, members of the bar and others" could have an official mechanism to make reports and recommendations as to legislation affecting the administration of justice,<sup>112</sup> was officially disbanded, leaving the bench, bar, and general public without a voice in the General Assembly with which they could make meaningful comment on the status of justice in the State. It is hard to interpret this move to silence the voice of the judiciary as anything other than another step by the General Assembly to subrogate the judiciary and diminish its effectiveness.

### 3. A Sea Change in Tennessee Politics

Between 2009 and 2013, the political landscape surrounding judicial selection saw radical shifts. In January 2011, for the first time since Reconstruction, the Tennessee General Assembly convened in Nashville with a Republican majority in both houses.<sup>113</sup> It was not long before the 107th General Assembly of the State of Tennessee began the process of repealing the Tennessee Plan.

A flurry of legislative proposals followed. Just two weeks into the legislative session, a bill was introduced to abolish the Tennessee Plan in favor of contested elections for all appellate judges.<sup>114</sup> Another similar bill was introduced the following month.<sup>115</sup> Additional proposals included allowing the governor the opportunity to appoint a judge even if that judge was not on the list of the Selection Commission's nominees,<sup>116</sup> and a requirement that appellate judges be retained by a margin of 75% of votes,

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110. TENN. CODE ANN. § 16-21-101 (2002).

111. TENN. CODE ANN. § 17-4-201(b) (2009).

112. TENN. CODE ANN. § 16-21-107 (2002).

113. Judy M. Cornett & Matthew R. Lyon, *Contested Elections as Secret Weapon: Legislative Control over Judicial Decision-Making*, 75 ALB. L. REV. 2091, 2092 (2012).

114. H.B. 0173, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

115. H.B. 0958, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

116. H.B. 1017, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

rather than a majority.<sup>117</sup> Additionally, a proposed constitutional amendment providing for gubernatorial appointment of appellate court judges subject to Senate confirmation was introduced but did not move forward.<sup>118</sup>

Lieutenant Governor Ramsey responded with a proposed constitutional amendment that incorporated the statutory Tennessee Plan into the body of the State's Constitution, apparently to alleviate lingering fears that retention elections were, in fact, unconstitutional.<sup>119</sup> This proposal was supported by Republican Governor Bill Haslam and Republican House Speaker Beth Harwell. One reason the bill was proposed was ostensibly to insulate the appellate judiciary from the negative ramifications of injecting judicial political campaigns with the complications of campaign finance, as corporate campaign contributions became legal in Tennessee effective June 1, 2011.<sup>120</sup>

The General Assembly broke with its leadership, however, and charged on, eventually consolidating its efforts toward a constitutional amendment to require gubernatorial appointments subject to approval of the entire Legislature, with periodic retention elections—the proposed amendment discussed at the beginning of this Article. Since proposed constitutional amendments must be presented in two consecutive sessions, the proposed amendment was presented and approved in 2012 and 2013 and will appear on the ballot in November 2014.

#### **D. Back to the State of Play: Where Are We & Where Should We Be Going?**

As to where we are now, there is much uncertainty. Justice Holder announced her retirement without a system in place to fill her vacancy. Governor Haslam has created his own Commission for Judicial Appointments based upon an Attorney General Opinion interpreting a

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117. H.B. 1702, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012). This bill was arguably a veiled attempt at simply eliminating retention elections, as historically, appellate judges have tended to secure retention with less than 75% of the vote. Indeed, the fact that the judges were not generally retained by a supermajority indicates that the electorate is not simply giving judges a “free pass” at election time.

118. S.J. Res. 0475, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

119. Tom Humphrey, *Haslam, Harwell, Ramsey Unite Behind Judge Selection Plan*, THE KNOXVILLE NEWS SENTINEL (Jan. 25, 2012), <http://www.knoxnews.com/news/2012/jan/25/haslam-harwell-ramsey-unite-behind-judge-plan/>; see Cornett and Lyon, *supra* note 113, at 2092–93. Again, the unfounded specter of unconstitutionality has permeated the judicial selection debate and served to steal focus from more fruitful lines of inquiry regarding the “best” method of selection. See generally Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008) (providing a history of the prolific litigation regarding the constitutionality of the Tennessee Plan and arguing that the Plan is unconstitutional).

120. See *Candidate FAQs*, Bureau of Ethics and Campaign Finance, [http://www.tn.gov/tref/cand/cand\\_faqs.htm#17](http://www.tn.gov/tref/cand/cand_faqs.htm#17) (last visited Feb. 25, 2014).

repealed statute, and the new Commission is already the subject of federal litigation. At this point, it appears that the voters will be asked to vote on a constitutional amendment for the selection of appellate judges without knowing for certain what system they are replacing. In addition, because the proposed constitutional amendment on the November 2014 ballot only addresses appellate judges, the system for filling the vacancies for trial judges remains uncertain. There are many opportunities to set off new rounds of “judicial chaos.”

If the proposed constitutional amendment passes, Tennessee’s system of appointed appellate judges will resemble the federal system in that the executive’s discretion to choose a nominee will be subject to the willingness of both houses of the Legislature to confirm the nominee. Of course, with defined terms rather than lifetime appointments, the opportunities for appointment (and legislative deadlock) will be more frequent. The extent to which the federal system of merit appointments can be considered a good model in the post-Bork era is a debate for another day. The proposed amendment may well end the debate of judicial selection in Tennessee regarding appellate judges. As set forth above, however, it does not solve many aspects of the problem, and, in fact, it leaves a gaping hole, particularly as to the trial courts.

As this Article demonstrates, Tennessee’s courts have always faced the threat of subrogation from the General Assembly and have frequently been used as pawns in the political process. This is likely not unique to our State; after all, the country’s Founders noted that “all possible care” must be taken to prevent the judiciary from being “overpowered, awed, or influenced” by the other branches of government.<sup>121</sup> One need only look at the six graphs in this Article for a pictorial representation of how, in just the last forty years, the General Assembly has frequently wielded its influence to “decide ‘the deciders.’” And now, the proposed constitutional amendment would make the Legislature the ultimate “decider” of all appellate judges.

The question of who “decides ‘the deciders’” impacts the administration of justice in ways that go beyond articulation. And it is justice that is the end-all and be-all.<sup>122</sup> Lawyers have long played a pivotal role in the process of serving justice. The Preamble to the American Bar Association’s Model Rules of Professional Conduct provides that “a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their

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121. THE FEDERALIST NO. 78, at 425–26 (Alexander Hamilton) (E.H. Scott ed., 1898).

122. THE FEDERALIST NO. 51, at 289 (James Madison) (E.H. Scott ed., 1898) (“Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained or until liberty be lost in the pursuit.”).

authority.”<sup>123</sup> Thus, today, as in the past, lawyers must work within whatever system they have—especially when there is “legal chaos”—to secure the best judiciary.

## II. PERSONAL PERSPECTIVES ON JUDICIAL SELECTION IN TENNESSEE

*Margaret L. Behm has been extensively involved in Tennessee’s judicial selection process for more than three decades. This Section relates a firsthand account of her personal experiences with the judicial selection process in this State.*

### A. The Face of the Tennessee Judiciary, 1976–2013<sup>124</sup>

In 1976, when I graduated from law school, I knew nothing about judicial selection except what I knew about the U.S. Constitution and the selection of federal judges. Nothing in my law school education prepared me for the impact and importance of the selection of state judges. What I did notice immediately, however, was that none of the judges were women. At that time, Tennessee had one female judge serving on a court of record, who was appointed to the bench in 1975.<sup>125</sup> My involvement in the process

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123. MODEL RULES OF PROF’L CONDUCT Preamble & Scope ¶ 6 (2013), available at [http://pards.org/main/AmericanBarAssociation\(ABA\)ModelRulesofProfessionalConduct\(DOC,201KB\).doc](http://pards.org/main/AmericanBarAssociation(ABA)ModelRulesofProfessionalConduct(DOC,201KB).doc).

124. For additional information, please see Mary Wood, *Women Stronger Than Ever in the Judiciary, Panel Says*, U. OF VA. SCH. OF L. (Sept. 30, 2003), [http://www.law.virginia.edu/html/news/2003\\_fall/women\\_judiciary.htm](http://www.law.virginia.edu/html/news/2003_fall/women_judiciary.htm); Ken Whitehouse, *Kurtz Retiring*, NASHVILLE POST (Jan. 14, 2008), [http://nashvillepost.com/news/2008/1/14/kurtz\\_retiring](http://nashvillepost.com/news/2008/1/14/kurtz_retiring); *Judge Martha Craig Daughtrey 68 Honored with Distinguished Service Award*, VAND. L. SCH., [http://law.vanderbilt.edu/donor/distinguished\\_service.php](http://law.vanderbilt.edu/donor/distinguished_service.php) (last visited Feb. 25, 2014); *Chancery Court, Part I*, <http://trialcourts.nashville.gov/portal/page/portal/trialCourts/judges/ClaudiaBonnyman/> (last visited Feb. 25, 2014); *Law’s History*, LAWYERS ASS’N FOR WOMEN, <http://www.law-nashville.org/LAW%27s%5FHHistory/> (last visited Feb. 25, 2014); *Rose P. Cantrell*, <http://www.visalaw.com/Parker/rpc.htm> (last visited Feb. 25, 2014); David C. Rutherford, *Criminal Court History*, <http://trialcourts.nashville.gov/portal/page/portal/trialCourts/history/ourHistorySubPages/criminalCourtHistory> (last visited Feb. 25, 2014); *Cornelia A. Clark*, TENN. STATE CT., <https://www.tncourts.gov/courts/supreme-court/judges/cornelia-clark> (last visited Feb. 25, 2014); *Sharon G. Lee*, TENN. STATE CT., <https://www.tncourts.gov/courts/supreme-court/judges/sharon-g-lee> (last visited Feb. 25, 2014); TENN. CODE ANN. § 17-4-201(b)(6)(2012); *Haslam Appoints Holly M. Kirby to Tennessee Supreme Court*, THE CHATTANOOGAN (Feb. 25, 2014), <http://www.chattanooga.com/2013/12/17/265742/Haslam-Appoints-Holly-M.-Kirby-To.aspx>; Geert De Lombaerde, *Haynes Stepping Down from Bench*, NASHVILLE POST, (Sept. 12, 2011), [http://nashvillepost.com/news/2011/9/12/haynes\\_stepping\\_down\\_from\\_bench](http://nashvillepost.com/news/2011/9/12/haynes_stepping_down_from_bench).

125. That judge was Martha Craig “Cissy” Daughtrey, now Senior Judge of the Sixth Circuit Court of Appeals. Prior to her 1995 appointment to the Sixth Circuit, Judge Daughtrey had never held a job for which she was not the first woman ever to hold the position. She was the first female Assistant U.S. Attorney in Nashville, the first female District Attorney in Nashville, and the first female professor at Vanderbilt Law School before she made history as the first woman judge of a court of record in Tennessee.

of judicial selection over the past thirty-seven years has been fueled by my desire to change the face of justice in Tennessee.

My legal career began shortly after the institution of merit selection with retention elections for the intermediate appellate courts and during the era of statewide, head-to-head elections for state Supreme Court justices. At that time, local trial judges were elected in contested races, with mid-term vacancies filled by gubernatorial appointment without any merit selection screening.

I began my practice at Legal Services of Middle Tennessee,<sup>126</sup> in Nashville, as a University of Tennessee graduate in a town where there were few opportunities for women lawyers and fewer opportunities for women who were not at the top of Vanderbilt Law School's class with good family and business connections. At Legal Services I learned first-hand what an impact lawyers could make, not only to assist those with limited resources, but also to make changes in systems that needed change.

I had been out of law school for just over a year when a coalition of Nashville lawyers decided to address the quality of representation of criminal defendants rendered by the local public defender's office. This coalition of determined, idealistic lawyers crossed gender and political lines and worked together in 1978 to elect Walter Kurtz, a former Legal Aid Director, as Nashville, Davidson County's public defender.<sup>127</sup> Through this process, I got to know lawyers committed to using their influence to affect the political process. I also got my first taste of how to run a countywide campaign.

This kicked off a period during which I was intensely involved in politics and judicial elections. By 1980, I had left Legal Services and started with Marietta Shipley the first female law firm in Nashville, Shipley & Behm. Meetings that brought about the organization Lawyers Association for Women ("LAW") in 1981 occurred in our law office.<sup>128</sup>

Most of my political activity occurred with the help of lawyers who are women. In one respect, my lawyer friends and I did not do anything particularly unusual; we just figured out how the system worked, and then worked within the political system. In other words, our focus was not so much on which system was better or which system resulted in a more diverse judiciary—we simply worked within the system to create a better judiciary.<sup>129</sup>

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126. Now the Legal Aid Society of Middle Tennessee and the Cumberland.

127. Walter Kurtz was elected four years later as a Davidson County Circuit Judge and later served as a Senior Judge until he retired in August 2013.

128. Claudia Bonnyman, now Davidson County Chancellor, was LAW's first President and Aleta Trauger, now Federal District Judge of the Middle District of Tennessee, was LAW's second President.

129. These women include Barbara Haynes, Cissy Daughtrey, Marietta Shipley, Connie Clark, Jeanie Nelson, Mary Shaffner, Claudia Bonnyman, Aleta Trauger, and Susan McGannon.

By 1982, no woman had ever run in a contested countywide judicial election in Nashville, but the face of the judiciary was about to change. Barbara Haynes took the challenge to run against a General Session judge and became the first woman to beat an incumbent in any countywide Davidson County race.<sup>130</sup> Having gained experience in Walter Kurtz's race, I ran her campaign. Also in 1982, Muriel Robinson won a contested trial court judgeship in Davidson County for an open seat. Elsewhere in the State, Julia Gibbons, who had worked as legal counsel for Governor Lamar Alexander and been appointed by him at age thirty to fill an unexpired term on the circuit court bench in Shelby County, Tennessee, won her seat in the 1982 elections.<sup>131</sup>

With judicial elections every eight years, in order to make any significant headway in the intervening years, gubernatorial appointments to the bench were key. By 1988, there had been only one other woman appointed as judge,<sup>132</sup> so a meeting was sought with Governor Ned Ray McWherter. I participated in this meeting with the Governor and Deputy Governor Harlan Matthews along with Connie Clark and Jeanie Nelson<sup>133</sup> to discuss the appointment of women to the bench. Our message was simple: only four women in the history of our State had been appointed by a governor to courts of record.<sup>134</sup> I have no way of knowing if this meeting had any impact, but within the next year, two women were appointed to the trial bench. Governor McWherter appointed Mary Beth Leibowitz to the Criminal Court in Knox County on February 15, 1989. On October 1, 1989, he appointed Connie Clark to the Circuit Court of Williamson, Perry and Hickman Counties, and she became the first female judge of a court of record in Tennessee's rural counties.<sup>135</sup> The next year in 1990, I ran the campaign of my law partner Marietta Shipley, who defeated an incumbent for election to the Davidson County Circuit Court bench.

While the face of the bench was beginning to change at the trial court level, Judge Daughtrey remained the sole appellate judge who was a woman. As for the Tennessee Supreme Court, statewide elections were in

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130. Eight years later, Barbara Haynes was elected to a Circuit Court judgeship, where she served until she retired in 2011.

131. Gibbons was married to Alexander's campaign manager of the state's largest county. She later became a Federal District Court Judge before now serving on the Sixth Circuit Court of Appeals. Rose Cantrell, also appointed by Governor Alexander to the Circuit Court of Davidson County, lost her seat to Walter Kurtz in the 1982 election.

132. Ann Lacy Johns, now Filer, was appointed on April 28, 1987 by Governor Ned Ray McWherter to the Criminal Court of Davidson County.

133. Jeanie Nelson later became General Counsel of the United States Environmental Protection Agency and is now President and Executive Director of the Land Trust of Tennessee.

134. Judge Daughtrey in 1975 by Governor Blanton, Judges Gibbons in 1991 and Cantrell in 1992 by Governor Alexander, and Judge Johns in 1987 by Governor McWherter.

135. Connie Clark was appointed Justice of the Supreme Court in 2005, elected in 2006, and in 2010, she was sworn in as the second woman in history to serve as Chief Justice.

place for nominees of political parties for the Court, and with the next judicial election in 1990 approaching, several of us turned our attention to changing the face of our highest court. At that time, the Democratic Party was the only party to submit a slate, and thus the Democrat nominees were always elected.<sup>136</sup> The key was to get the Democratic nomination.

In 1990, the Executive Committees of each party determined the nominees to the Supreme Court seats. Since at least 1972, the Executive Committees for the party were comprised of one man and one woman from each of the State's sixty-six senate districts.<sup>137</sup> Thus, the equal number of women as gatekeepers or decision-makers was encouraging for a woman candidate. Knowing that this opportunity comes only once every eight years, a coalition was built around the candidacy of Judge Daughtrey. Due to the requirement that no more than two Justices could reside in the same grand division, Judge Daughtrey faced a choice of which Justice's seat to seek in the Middle Grand Division. She decided to campaign for the seat occupied by Justice William Harbison, a respected justice who was elected to the Supreme Court in 1974.

Judge Daughtrey traveled extensively throughout the state, meeting with executive committee members and asking for their support. This was no easy feat, for Judge Daughtrey traveled by herself at night, before the days of cell phones, to find the homes of committee members, many of whom lived in isolated rural areas. Tennessee is a large state, with Memphis being closer to Dallas, Texas, than Mountain City, Tennessee—the state's easternmost county seat.<sup>138</sup> In the end, Judge Daughtrey attributed much of her success to her willingness to go meet people in their homes and specifically ask for their support.<sup>139</sup> She was chosen by the Executive Committee as one of its five nominees.

After failing to secure his party's nomination, Justice Harbison resigned in March 1990.<sup>140</sup> Thereafter, Judge Daughtrey was appointed as the first woman on the Supreme Court by Governor Ned McWherter to fill Justice Harbison's remaining term. When the Republicans fielded no opposition to the Democratic slate in the August 1990 election, Judge

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136. Pierce, *supra* note 100, at 277.

137. See 1972 Pub. Acts ch. 740, § 1. Formerly § 2-1304; TENN. CODE ANN. § 2-13-103. Both national political parties have some form of gender balance requirement among their committees. See Lisa Schnall, Comment, *Party Parity: A Defense of the Democratic Party Equal Division Rule*, 13 AM. U. J. GENDER SOC. POL'Y & L. 381, 384 (2005) ("The Democratic and Republican Parties, as well as select states, have long required gender-balanced national or state committees.").

138. *Part Ten, Things That Surprise People*, [http://www.tnhistoryforkids.org/geography/a\\_10](http://www.tnhistoryforkids.org/geography/a_10) (last visited Feb. 25, 2014).

139. Interview with Judge Daughtrey as part of the oral history collection of the Women Trailblazers in the Law, a project of the American Bar Association, Commission on Women in the Profession (May 20, 2008).

140. Pierce, *supra* note 100, at 306.

Daughtrey became the first woman elected to the Tennessee Supreme Court.

The efforts to change the face of the judiciary also included a look at the all-male Appellate Court Nominating Commission. We determined the timing of appointments and proposed women to the Governor and Speakers for appointment when a term expired. The Speakers appointed two women, including Holly Lillard.<sup>141</sup> As for the lawyer positions, every two years an election among lawyers was held from one of the Grand Divisions. In 1991, I ran and won a seat as the representative for the Middle Grand Division, and two years later, a woman won from the Western Grand Division. By 1994, four of the eleven members were women, Holly Lillard served as Chair, and we saw a sharp increase in woman applicants for intermediate appellate judgeships.

However, in 1994, there was a move to change the system for selecting judges. Justice Aldolfo A. Birch, Jr. was up for election after having been appointed by Governor McWherter in December 1993, and his supporters worried that an African-American could not win a statewide contested election. Lieutenant Governor Wilder had long supported an enlarged role for merit selection and wanted to pass such legislation as his legacy. The Supreme Court was led by Chief Justice Lyle Reid, an advocate of retention elections for the Supreme Court. Governor McWherter, a Democrat who was term limited, was completing his second term, and because it was unknown whether a Democrat or Republican would succeed him, both parties were receptive to instituting a system that would allow a Governor to appoint trial and Supreme Court judges, in addition to intermediate appellate judges, by a merit selection process.

I had the opportunity to be involved in the crafting of the Tennessee Plan, and as with most pieces of legislation this broad in scope, there were hard-fought battles on many fronts and tricky, intriguing political bedfellows. My particular focus was to mandate diversity in the statutory language. It had taken a long time to get representation on the Appellate Court Nominating Commission. We had seen the benefits of diverse gatekeepers with the Supreme Court nomination of Justice Daughtrey.

The proposed statute required particular lawyer groups, such as the trial lawyers and the district attorneys, to submit names for appointment, which had few women in leadership positions. We knew it would be tough to have women as appointees from these gatekeepers. Our coalition proposed that a diversity mandate be included as part of a consensus

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141. Holly Lillard, now Holly M. Kirby, served on the Appellate Court Nominating Commission from 1989–1994. She was appointed by Governor Don Sundquist in 1995 as the first woman to serve on the Court of Appeals. In November 2013, she was nominated by the Governor's Commission on Judicial Appointments to fill the vacancy on the Tennessee Supreme Court caused by the retirement of Justice Janice Holder. In December 2013, Governor Bill Haslam appointed her to the Supreme Court, effective after Justice Holder's retirement on August 31, 2014.



amendment to the bill supported by Lieutenant Governor Wilder. Even though our group was working with the lawyer groups to draft a consensus amendment, we learned just hours before the Senate Judiciary Committee meeting that the “consensus” bill did not contain this diversity language. Senator Joe Haynes sponsored another amendment to require diversity on the basis of gender and race according to the population of the State. It passed in Committee, and on the night the bill was to be considered on the floor of the Senate, Lieutenant Governor Wilder called me and asked me to withdraw the amendment stating that he thought it would defeat his signature legislation. We did not withdraw the amendment, and it passed. This time our amendment was part of the consensus amendment when the House passed it. Therefore, the Tennessee Plan contained a statutory mandate of diversity with respect to gender and race, with a directive to the Speakers of the General Assembly that the nominees to the Commission be rejected if the panel was not diverse as to race and gender.<sup>142</sup>

In 1994, with the Tennessee Plan in place, I was proposed as a member of the Judicial Selection Commission by the Tennessee Bar Association and appointed to the Commission by House Speaker Jimmy Naifeh. I was elected by the Commissioners as the Commission’s first Chair. At that time, we had fifteen members, seven of whom were women and three African-Americans. Within the next ten years, two more women were appointed to the Supreme Court and three women were appointed to the intermediate appellate courts. Tennessee’s second-ever African-American was appointed to the Court of Criminal Appeals. Diverse representation in the trial courts in Davidson County increased with the appointment of Ellen Lyle as Chancellor in 1995, Cheryl Blackburn as Criminal Court Judge in 1996, and in 2003, Monte Watkins as Criminal Court Judge and Claudia Bonnyman as Chancellor.

While the face of the judiciary continued to change during that time, so did the face of the Judicial Selection Commission. Although the Speakers followed the statute with their appointments at the outset, the legislation did not have a remedy if appointments were not made pursuant to the directives of statute. Despite language that they “shall intend” to create a diverse Commission and that they “shall” reject panels of nominees that lacked such requirement, as Commissioners vacated their positions, the statutory mandate for diversity with respect to gender and race was not followed by the Speakers. By the time I left the Commission ten years later, there were only three women out of the then seventeen members, and I was the only white woman. In the end, the Speakers did not like the diversity requirement and chose not to follow it. When the Judicial Nominating Commission was substituted for the Judicial Selection Commission in 2009, the diversity mandate was not included, although the appointing authorities

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142. I regret that the statute did not require diversity as to political party, which was an important aspect of the success of the Appellate Court Nominating Commission.

to the revised Judicial Performance Evaluation Commission were instructed to make appointments that approximated the population of the state with respect to race and gender. As of its conclusion in the summer of 2013, the Judicial Nominating Commission consisted of fourteen white men, two white women, and one African-American woman. For each opening of the three intermediary appellate positions it considered, the Commission sent two panels to the Governor in case he elected to reject the first panel. No women appeared on the first choice list of panels for any of the openings.<sup>143</sup> The only women to appear on any panels were three women who together comprised the back up “Panel B” for the Middle Section Court of Appeals. The governor made his selections from the first-choice “Panel A.” All three appellate court appointments made in August 2013 were white men.

### **B. Thoughts on Moving Forward**

With the state of judicial selection in confusion, the question arises as to what is the best way to select judges in Tennessee. I have been involved in over one hundred judicial selection processes. Most involved my tenure on the Judicial Selection and Appellate Court Nominating Commissions. I have also managed election campaigns for trial court and Supreme Court judges. I have served on selection panels for federal magistrate judges and bankruptcy judges and was appointed by the U.S. Court for the Sixth Circuit to chair the Merit Selection Panel in 2011 for the appointment of bankruptcy judge for the Middle District of Tennessee. Each process is different and involves different persons to serve as gatekeepers and “deciders” of judges.

In Tennessee, unlike the federal system, the voters are ultimately the deciders. As for trial court judges, the system with a merit screening process for vacancies from 1994 through the summer of 2013 was a good one. This system encouraged applicants from all walks of life to apply for vacancies and built confidence in the judiciary. Facing the voters in their communities every eight years has served the system well, and even though elections cost money, the cost of elections thus far for these seats has been manageable.

In my opinion, the best system for the selection for the intermediary appellate courts was the method of selection under the Appellate Court Nominating Commission from 1973 to 1994. Both Speakers of the General Assembly had appointees, as did the Governor. Lawyers from each Grand Division could run for election, and the statute required the appointment of commissioners who were not lawyers. Most importantly, appointees of the Speaker and Governor had to be from differing political parties. This

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143. *Nominating Commission Sends 18 Names to Gov. Haslam This Week for Appeals Court Openings*, TENN. STATE CT., <http://www.tsc.state.tn.us/news/2013/06/29/nominating-commission-sends-18-names-gov-haslam-week-appeals-court-openings> (last visited Feb. 25, 2014).

process assured representation from all constituencies and built confidence that partisan politics was not steeped in the process. Regarding the filling of vacancies on the Supreme Court, in my opinion the previous Appellate Court Nominating Commission system would have best served filling its vacancies.

As for the elections of all appellate judges, the system of coupling the election by retention with screening by the Judicial Evaluation Commission brought about in 1994 was the best system to date. In this system, a form of merit screening took place. For those who disagree with the previous Supreme Court decisions that elections by retention satisfy the constitutional requirement for election by the voters, it is hard for me to understand how one categorizes what happened to Justice White. I was there with others a couple of months before her election in 1996, trying to ascertain how best to help Justice White deal with the surprise, negative media attacks. Justice White was voted out of office by the voters. If that was not an election, what was it?

Whatever the system, one that encourages diversity, as does merit screening, is paramount. In deciding *Bredesen v. Tenn. Judicial Selection Commission*, the Supreme Court described how essential it is that the bench (and bar) represents the faces of the community.<sup>144</sup> This same idea was specifically expressed by the General Assembly in 1994 when it declared that both the Judicial Selection Commission and the appellate bench itself should reflect the faces of Tennessee. It bears considering, then, the extent to which merit selection actually does result in a diverse bench. Long-time Selection Commissioner (and intervener in the *Bredesen* case) Buck T. Lewis suggested that merit selection, by removing the need for political connections, gives anyone a chance at a judgeship.<sup>145</sup> Data from around the country supports this view,<sup>146</sup> as does my experience in Tennessee.

In the twenty years under the Tennessee Plan, the appointments through April 2013 were sixty-nine percent men and thirty-one percent women. Nine percent of those appointed were members of minority groups. Tennessee saw the first-ever majority-women Supreme Court with its first-

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144. *Bredesen v. Tenn. Judicial Selection Comm'n*, 214 S.W.3d 419, 438–39 (Tenn. 2007).

145. George “Buck” T. Lewis, *Connections and Cash Should Not Decide*, CHATTANOOGA TIMES FREE PRESS, (May 3, 2009), <http://www.timesfreepress.com/news/2009/may/03/lewis-connections-and-cash-should-not-decide/?print>.

146. See Malia Reddick, Michael J. Nelson & Rachel P. Caufield, *Racial and Gender Diversity on State Courts*, AM. JUDICATURE SOC'Y, 4 (2009), available at [http://www.judicialselection.us/uploads/documents/Racial\\_and\\_Gender\\_Diversity\\_on\\_Stat\\_8F60B84D96CC2.pdf](http://www.judicialselection.us/uploads/documents/Racial_and_Gender_Diversity_on_Stat_8F60B84D96CC2.pdf). The American Judicature Society identified six methods among the fifty states whereby appellate judges assume their seats: merit selection, gubernatorial appointment, partisan election, nonpartisan election, legislative appointment, and court appointment. *Id.* Of these six methods of appointing judges, a minority candidate is more likely to acquire appellate judicial office by merit selection than by any other method. *Id.* For women, merit selection is more likely than any other method to result in placement on a court of last resort. *Id.*

ever female Chief Justice<sup>147</sup> succeeded by another female Chief Justice. Two women and one African American serve on the twelve-member Court of Appeals, and two women sit on the twelve-member Court of Criminal Appeals, with one of those women being the first African-American woman to serve on an intermediate appellate court in Tennessee. Prior to merit selection for replacing trial bench vacancies between elections in 1994, there had been eight women serve as state trial court judges. As of April 2013, there were twenty-six female trial court judges and nine minorities out of 152 such judges.<sup>148</sup>

As Tennessee faces the specter of statewide judicial elections in August 2014, two unknowns are on the horizon. First, how will money shape the elections? Tennessee has not seen statewide judicial elections in the post-*Republican Party of Minnesota v. White*<sup>149</sup> and post-*Citizens United*<sup>150</sup> era. As prescient as Justice Humphreys's 1973 comments<sup>151</sup> regarding judicial elections might have been, even he simply could not have contemplated the huge amount of resources that are now used to fund elections in this country, and the extent to which judicial candidates are allowed to discuss election issues.

Second, in light of these new "freedoms" to campaign with money and political stances, how will statewide elections play out in a state that now has only one other contested statewide election for a state office? Tennessee elects its Governor on a statewide ballot, but the Lieutenant Governor and other constitutional offices are selected by the Legislature and the Attorney General is selected by the Supreme Court. Questions also remain as to whether the results of the August 2014 statewide judicial elections will impact the public's November 2014 vote on the proposed constitutional amendment.

We do not yet have answers to these questions. If the proposed constitutional amendment passes, will the General Assembly institute a

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147. In 2008, Court of Appeals Judge Sharon Lee was appointed to the Supreme Court by Governor Phil Bredesen.

148. Jacqueline B. Dixon, *Speak Out in Favor of Merit Selection as It's Put to Vote*, TENN. BAR J., Apr. 2013, at 3, 11. Also as of the writing of this Article, six out of the eighteen trial judges in Davidson County are women, and there are two male African-American judges.

149. 536 U.S. 765, 788 (2002) (holding that Minnesota's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment).

150. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (holding that the First Amendment prohibits the government from suppressing political speech on the basis of the speaker's corporate identity).

151. *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480, 494-95 (Tenn. 1973) (Humphreys, J., dissenting) ("We are today witnessing a sad consequence of this subordination of this Supreme Court to the Legislature. . . . [The] Supreme Court Judges and, possibly, all judges, can be kept in attendance by the Legislature, hat in hand, so to speak, whenever it suits the purpose of some disgruntled representatives to snap the Court to attention with a bill to change the manner of their election. If this is not subordination, nothing is. . . . I say this Court has opened Pandora's Box . . .").

merit screening process to occur prior to the Governor's appointment? Will the Legislature give due deference to the Governor's appointment or politicize further the process in its role as the ultimate "decider," which could discourage potential applicants? If the proposed constitutional amendment fails, what system will the Legislature enact to ensure that this equal branch of government is properly selected? With the proposed constitutional amendment only dealing with appellate courts, is merit selection screening for trial courts to remain subject to the individual policy determination of the Governor? Or will the Legislature resurrect it?

The General Assembly (or the people, via constitutional amendment) has the prerogative to pick the manner of judicial selection. They should do so with a merit selection screening system. The real lesson from over thirty years of experience is that judicial selection, so vitally important to the public at large, ultimately depends on a system that encourages good lawyers to put themselves forward for such crucial positions. At the present in Tennessee, no such system is in place.

#### POSTSCRIPT

This Article was presented in draft form as part of Belmont College of Law's Inaugural Symposium. Since then, the issue of judicial selection in Tennessee remains a source of continuing news and uncertainty. As of the final revisions to this Article, the Special Supreme Court has issued an opinion in *Hooker v. Haslam* holding that the election of judges to the Tennessee Court of Appeals and Court of Criminal Appeals on a statewide basis did not violate the constitutional requirement that judges be elected by the qualified voters of the districts.<sup>152</sup> Regarding whether election on a retention ballot satisfied the constitutional requirements of an election, the Court determined that while it could dispose of the matter on the basis of *stare decisis*, it had elected to undertake an independent review examining particular facets of the issues that had not been part of the analysis in prior cases. Based upon its independent analysis, the Court determined that the retention election portion of the Tennessee Plan passes constitutional muster because the plain meaning of "election" was satisfied and because "elective offices in Tennessee do not depend upon opposition from another candidate, but upon whether the office is filled by the direct exercise of the franchise of the voters."<sup>153</sup>

While *Hooker v. Haslam* may have been settled, many other matters remain outstanding. The Evaluation Commission made preliminary votes recommending the replacement of three intermediate appellate judges, subsequent to which one judge on the Criminal Court of Appeals

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152. *Hooker v. Haslam*, No. M2012-01299-SC-R11-CV (Tenn. Mar. 17, 2014).

153. *Id.* at \*19.

announced his retirement.<sup>154</sup> Another Tennessee Supreme Court Justice announced his retirement effective at the end of his term in August 2014,<sup>155</sup> the result of which is that the Governor's Commission on Judicial Selection has been involved in the appointment of two of the five Supreme Court seats during the pendency of both the legal challenges and constitutional amendment referendum regarding merit selection. Both of those Supreme Court appointments resulted in intermediate appellate court judges being elevated to the Tennessee Supreme Court, and this created two additional judicial vacancies to be addressed by the Governor's Commission.<sup>156</sup>

Further, a new lawsuit was filed, arguing that because the Evaluation Commission did not reflect the diversity in its membership required by statute, it was an "invalid" commission.<sup>157</sup> The trial court judge agreed that the Commission was discriminatory and invalid, but the court did not enjoin the Commission from meeting.<sup>158</sup> The Commission, with advice from the Attorney General's office, then met notwithstanding the order regarding its validity, and, in split votes, revised its recommendations as to the two appellate judges it had previously determined should not be recommended for retention.<sup>159</sup> Meanwhile, Governor Bill Haslam (a Republican) and his predecessor Phil Bredesen (a Democrat) announced the formation of an alliance to campaign for the passage of the pending constitutional Amendment.<sup>160</sup> And, while Tennessee faces the specter of electoral uncertainty in judicial campaigns, the United States Supreme Court issued its opinion in *McCutcheon v. FEC*, which the Washington Post has referred to as the "sequel" to *Citizens United*.<sup>161</sup> In light of the continually-shifting landscape, the only certainty at this point is that 2014 is poised to be a watershed year for the issue of judicial selection in Tennessee.

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154. Travis Loller, *Judge Rules Tennessee Judicial Evaluation Commission Invalid*, THE COM. APPEAL (Jan. 14, 2014), <http://www.commercialappeal.com/news/2014/jan/14/judge-rules-tennessee-judicial-evaluation/>.

155. *Supreme Court Justice Koch Announces Retirement to Become Dean at Nashville School of Law*, TNCOURTS.GOV (Dec. 19, 2013), <http://www.tncourts.gov/news/2013/12/19/supreme-court-justice-koch-announces-retirement-become-dean-nashville-school-law>.

156. *Gov. Haslam Appoints Bivins to the Tennessee Supreme Court*, TNCOURTS.GOV (Apr. 4, 2014), <http://www.tncourts.gov/news/2014/04/04/gov-haslam-appoints-bivins-tennessee-supreme-court>; *Haslam Names Court of Appeals Judge Kirby to Supreme Court*, TNCOURTS.GOV (Dec. 18, 2013), <http://www.tncourts.gov/news/2013/12/18/haslam-names-court-appeals-judge-kirby-supreme-court>.

157. Loller, *supra* note 154.

158. *Id.*

159. Tom Humphrey, *Judge Selection Debate Getting Foggier*, THE LEBANON DEMOCRAT & WILSON COUNTY NEWS (Jan. 20, 2014), <http://www.lebanondemocrat.com/article/state-government/323931>.

160. *Id.*

161. Sean Sullivan, *Everything You Need to Know About McCutcheon v. FEC*, WASH. POST (Apr. 2, 2014 10:30 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/08/supreme-court-takes-up-the-sequel-to-citizens-united/>.

