Spring 2015

If It Ain't Broke, Break It - How the Tennessee General Assembly Dismantled and Destroyed Tennessee's Uniquely Excellent Judicial System

Penny White

Spring 2015 | Volume 10 | Issue 2
Tennessee Journal of Law and Policy 329

IF IT AIN'T BROKE, BREAK IT – [1]
HOW THE TENNESSEE GENERAL ASSEMBLY DISMANTLED AND DESTROYED TENNESSEE'S UNIQUELY EXCELLENT JUDICIAL SYSTEM

By: Penny J. White[2]

"The concentrating [of all government power] in the same hands is precisely the definition of despotic government. . . . If therefore the legislature assumes . . . judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual. . . . The time to guard against corruption and tyranny is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered." [3]

---

[1] The title is taken from the common phrase, "if it ain't broke, don't fix it," popularized by Bert Lance, White House Director of the Office of Management and Budget under President Jimmy Carter.

[2] Penny J. White is the E.E. Overton Distinguished Professor of Law and the Director for the Center for Advocacy and Dispute Resolution at the University of Tennessee College of Law and previously served as a trial and appellate judge in the state of Tennessee.

[3] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 451 (1969) (quoting Thomas Jefferson, *Notes on the State of Virginia*, Query 13, 120-21 (1784)).

I. Introduction[4]

In Tennessee, the wolf has entered the fold. The Tennessee General Assembly has assumed judicial power by reasserting its role as the "preeminent" branch of government and reclaiming its historic dominance over the state judiciary.[5] This unfortunate development has led me to write this article for a variety of reasons. For future generations, I wish to chronicle the events that led to the dismantling of Tennessee's unique, high-quality judicial system.[6] In this way, I seek to archive essential information for those who trumpet the important role that fair courts play in our society. I hope to inspire vigilance, triggering watchful eyes as the new judiciary unfolds; and perhaps, I also aspire to encourage efforts to draw the teeth and talons before more damage is done.

---

[4] I am grateful to Professor Judy Cornett for her insight and ingenuity; to Jacob Feuer whose enthusiasm and acumen inspired me; and to Jason Collver, Cassie Kamp, Benjamin Lemly, Patrick Morrison, Brianna Powell, and David Samples, students at the University of Tennessee College of Law who provided excellent research assistance.

[5] N. Houston Parks, *Judicial Selection – the Tennessee Experience*, 7 MEM. ST. U. L. REV. 615, 619 (1977) (noting that Tennessee's first constitution "resembl[ed] other early state constitutions, [and] made the popularly elected legislature, or general assembly, preeminent").

[6] I am using the phrase "judicial system" in this article to refer to the method by which judges are selected initially for the bench and the means by which their continued service is determined.

II. Evolution of a Model Judicial Selection, Evaluation, and Retention System-a/k/a Tennessee's Judicial System Was Not Broken

The early Tennesseans gave the legislative branch the power to control the creation, composition, and jurisdiction of the courts.[7] Following North Carolina's lead,[8] the first Tennessee Constitution, adopted in 1796, provided for three separate branches of government and granted judicial power to the courts, but left entirely to the legislature whether to create courts at all.[9] Notably, Tennessee's first Constitution referred to "superior" and "inferior" courts, but did not require the legislature to create any courts.[10] Although the legislature did create courts "from time to time," as the Constitution provided,[11] it was more than a decade before the legislature created a

---

[7] For a complete discussion of the history of the Tennessee judicial branch, *see* Parks, *supra* note 5, at 617-34; *see also* Thomas R. Van Dervort, *The Changing Court System*, *in* TENNESSEE GOVERNMENT AND POLITICS: DEMOCRACY IN THE VOLUNTEER STATE 55-64 (John R. Vile & Mark Byrnes eds., 1998).

[8] Tennessee was viewed as the "daughter of North Carolina," which led her "quite naturally" to adopt the "judicial system of the Mother State." SAMUEL C. WILLIAMS, PHASES OF THE HISTORY OF THE SUPREME COURT OF TENNESSEE 5 (1944).

[9] JOSHUA W. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 149 (2d ed. 1907).

[10] The 1796 Constitution provided that "[t]he judicial power of the state shall be vested in such superior and inferior courts of law and equity as the legislature shall, from time to time, direct and establish." TENN. CONST. art. V, § 1 (1796).

[11] *Id.*

court of last resort and even then, the legislature retained the power to abolish the Tennessee Supreme Court until 1835.[12] Only with the passage of Tennessee's 1834 Constitution did the Tennessee Supreme Court gain constitutional status, sufficient to forbid its abolition by the legislature.[13]

This legislative preeminence in Tennessee was consistent with the model in place in most states during the early days of the Nation.[14] But this legislative dominance

---

[12] The Tennessee Supreme Court was created in 1809, but was not given appellate jurisdiction until 1819. That appellate jurisdiction did not become exclusive until 1834. WILLIAMS, *supra* note 8, at 75-76.

[13] *Id.* at 76-77. The 1834 Constitution vested judicial power in "one Supreme Court [and] in such Inferior Courts as the Legislature shall from time to time ordain and establish." TENN. CONST. art. VI, § 1 (1834).

[14] Despite the separation of powers provided for in Article III, Section 1 of the United States Constitution, the framers had mixed feelings about the implications of the separation of powers doctrine, in general, and about what would come to be known as judicial independence, in particular. John Adams, for example, believed "that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both . . . ." 4 THE WORKS OF JOHN ADAMS 198 (C. Adams, ed. 1851). Others, including Thomas Jefferson, occasionally, held an altogether different view of the role of the courts. In a letter to Edmund Pendleton written just eight years before the quote that introduces this article, Jefferson advocated that "mercy [should] be the character of the law-giver, but . . . the judge [should] be a mere machine." Letter to Edmund Pendleton, Document 9 (Aug. 26, 1776) in THE PAPERS OF THOMAS JEFFERSON (J. Boyd, ed. 1950). Initially, according to historian and scholar

was short-lived, due in part to the public's growing "fear of legislative despotism" and the resulting threat to individual freedom.[15] Additionally, with the establishment of the power of judicial review[16] came the realization that courts would assume prominence as guardians of individual sovereignty and, thus, should be more accountable to the public.[17]

Over the course of the next two centuries, states detached their judiciaries from legislative control by removing judges from legislative appointment and adopting a variety of other selection methods for state court judges. Initially, most states moved to partisan elections believing that judges who were accountable to the voters would be more independent. This idea was prompted by the principles of Jacksonian democracy and the emergence of the populist movement.[18] But "by the early twentieth century, elective judiciaries were increasingly viewed as plagued by incompetence and corruption."[19] The growth of

---

Gordon Wood, "[t]he Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it." WOOD, *supra* note 3, at 161.

[15] *Id.* at 453-54. As Wood explains, this fear was brought about by legislative overreaching and the public's reaction to the effect that this abuse of power had on the judicial function. *Id.*

[16] *Marbury v. Madison*, 5 U.S. 137 (1803).

[17] Parks, *supra* note 5, at 622-625 (stating that the "single most significant manifestation of the changing conception of the judicial function was the emergence of the doctrine of judicial review."). *Id.* at 622.

[18] *Id.* at 624-25.

[19] Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 723 (1994).

a more urban and industrialized society had complicated the law, demanding that judges be skilled and intelligent, rather than partisan and political.

Some states turned to nonpartisan elections to solve the issues of incompetence and political cronyism,[20] but other states, prompted by professional organizations, tinkered with creating judicial selection and retention methods that would insulate judges more completely from the political aspects of the electoral process.[21] By 1990, almost half of the states had adopted a new model – a so-called merit selection system – as the selection method for state judges.[22] Under merit selection systems, a broad-based commission comprised of diverse and representative individuals screens and evaluates candidates for judicial office. Following a rigorous application and vetting process, the commission nominates the most qualified candidates to the appointing authority, generally the governor, who makes the judicial appointment. Tennessee

---

[20] F. Andrew Hanssen, *Learning about Judicial Independence, Institutional Changes in State Courts*, 33 J. LEGAL. STUD. 431, 442 (2004) (noting that by 1930, twelve states had adopted nonpartisan elections as their method of judicial selection).

[21] Parks, *supra* note 5, at 632.

[22] Charles Gardner Geyh, *Methods of Judicial Section & Their Impact on Judicial Independence*, 2008 DAEDALUS 88-89 (2008) *in* Paul J. De Muniz & Phillip Schradle, *A Modest Proposal for Selection of Oregon Judges*, 75 ALB. L. REV. 1759 (2012)(Professor Geyh also refers to this statistic in the background papers for "The Debate Over Judicial Elections and State Court Judicial Selection," a 2007 conference sponsored by the National Center for State Courts and the Sandra Day O'Connor Project on the State of the Judiciary. The background papers are on file in the author's archives.).

joined the group of states opting for merit over politics and adopted the Tennessee Plan, a merit-based selection system for appellate court judges in 1971.[23]

Despite this progressive step by Tennessee's 1971 bipartisan General Assembly,[24] the Tennessee Plan became the spoils of a highly partisan battle between a Republican governor and a Democratic legislature in 1974, leading to the repeal of the Plan as it applied to the Tennessee Supreme Court.[25] Over the next twenty years, judicial reform in Tennessee would arguably fail miserably (when a cumbersome 1500-word amendment to the judicial article was rejected by the voters in the 1977 Limited Constitutional Convention[26]) and succeed beyond all expectations when, in 1994, another bipartisan General

---

[23] For all of the versions of Tennessee's judicial selection, evaluation, and retention statutes, other than the current version, I will cite to the original public chapter number in order to avoid confusion. 1971 Tenn. Pub. Acts, ch. 198 (codified at TENN. CODE ANN. § 17-701). Trial judges in Tennessee continued to be chosen in popular elections. I use the phrase "the Tennessee Plan" and the phrase "Tennessee's judicial selection, evaluation, and retention system" to designate the manner of judicial selection, evaluation, and retention set out in the 1971 and 1994 statutes.

[24] The 87th Tennessee General Assembly consisted of 20 Democrat, 12 Republican, and 1 American Independent Senators, http://www.tn.gov/tsla/history/misc/tga-senate3.pdf, and 56 Democrats and 43 Republicans Representatives, http://www.capitol.tn.gov/house/archives/87GA/Members/Members.htm.

[25] Van Dervort, *supra* note 7, at 62; Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 510-12 (2008).

[26] *See* White & Reddick, *supra* note 25, at 515-19.

Assembly[27] provided that all judicial vacancies would be filled by merit-based appointments. This returned the Tennessee Supreme Court to retention elections and marked the first time in Tennessee's history that the appointment of trial judges had been removed from a system of pure political patronage.[28]

Under the 1994 Tennessee Plan, the Governor was required to fill judicial vacancies from a list of three nominees provided by the Judicial Selection Commission (JSC).[29] By statute, the JSC's membership was required to reflect diversity.[30] Trial judges appointed under the Tennessee Plan held their seats until the next general election, at which time they ran in popular elections. But

---

[27] The 98th General Assembly consisted of 19 Democrat and 14 Republican Senators, http://www.tn.gov/tsla/history y/misc/tga-senate3.pdf, and 64 Democrat and 35 Republican Representatives, http://www.capitol.tn.gov/house/archives/98GA/Members/Members.htm

[28] Van Devort, *supra* note 7, at 64.

[29] The Tennessee Judicial Selection Commission consisted of 15 members, appointed by the Speaker of the House and Senate from recommendations made by the Tennessee Bar Association, the Tennessee Trial Lawyers Association, the District Attorneys General Conference, the Tennessee Defense Lawyers Association, and the Tennessee Association of Criminal Defense Lawyers. 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §17-4-102).

[30] *Id.* (including requirements that the Commission "approximate the population of the state with respect to race and gender;" include representation "from the dominant ethnic minority population;" that the Speakers reject any list that did not "reflect the diversity of the state's population;" and requiring the nominating groups and speakers to "intend to select a commission diverse as to race and gender"). *See* Van Dervort, *supra* note 7, at 64-65

appellate judges appointed under the Tennessee Plan ran in retention elections, thus returning Tennessee's appellate courts to a full merit-based selection and retention system.[31] In addition to adopting merit-based selection and retention for appellate court judges, the General Assembly added a unique dimension to the selection system, adopting a judicial performance evaluation system that was new to Tennessee and unique in the Nation.[32]

Despite the increased use of and support for merit-based judicial selection systems, critics expressed concerns about the retention aspects of merit-based systems. In all but a very few states,[33] judges selected via a merit-based selection system were reviewed periodically by the electorate who voted whether the judges should be retained in office. Opponents of merit-based systems charged that retention elections did not entice voter interest and that those who did vote did not have sufficient information about incumbent judges to enable them to cast informed votes on retention.[34] At its core, this criticism was based on the presumption that party labels provided relevant

---

[31] 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §§ 17-4-101 & -102); Van Devort, *supra* note 7, at 64.

[32] White & Reddick, *supra* note 25, at 519; 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §17-4-101 (1994)).

[33] Only Rhode Island appoints state court judges for life; judges in New Hampshire, New Jersey, and Massachusetts serve until age 70. http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state.

[34] *See generally* James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87, 97 (2013).

information to voters about candidates,[35] a presumption that is fallacious when applied to judges.

In order to address the criticisms and confront the fallaciousness head on, a small minority of merit-selection states began to experiment with methods of evaluating judicial performance[36] for the purpose of providing voters with relevant information about judges' performance and identifying areas in which judges needed to improve.[37] By

---

[35] *See generally* Scott Ashworth & Ethan Bueno de Mesquita, *Informative Party labels with Institutional and Electoral Variation*, 20 JOURNAL OF THEORETICAL POLITICS 251, 251 (2008) (citing studies that support the proposition that in traditional elections "party labels provide voters with information about candidates"). To prove low voter interest, critics of merit selection rely upon ballot roll-off percentages. Because judicial races are often at the bottom of the ballot, the phenomenon of ballot roll off results in voters not casting a vote in those races. The percentage of ballot roll off is calculated by determining the number of voters who cast ballots but who did not complete their ballots by voting in each contest. Critics cited ballot roll-off percentages as proof of low voter interest. *See* Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L. REV. 1375, 1377 (2001) (discussing various complaints about retention elections).

[36] For more than a century, bar groups and associations had polled members as a means of evaluating judicial performance, but bar poll results were (and are) regarded largely as assessing a judge's popularity and not as a meaningful measurement of judicial performance. JAMES H. GUTERMAN & ERROL E. MEDINGER, IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES 2 (1977).

[37] Richard L. Aynes, *Evaluation of Judicial Performance: A Tool for Self-Improvement*, 8 PEPP. L. REV. 255, 261-70

providing voters with objective, relevant information about judges' performance, voters could cast informed ballots. Thus, judicial performance evaluations, though scarcely used, were a "key component of efforts to make judicial elections more meaningful contests."[38]

As states experimented with judicial performance evaluations for self-improvement, the American Bar Association (ABA) drafted and adopted guidelines to objectify judicial evaluations. The *Guidelines for Evaluation of Judicial Performance*, consists of concrete principles and explanatory commentary concerning the adoption and implementation of a judicial performance system.[39] While the adoption of the ABA Guidelines prompted more states to adopt performance guidelines for judicial self-improvement, the number of states that utilized judicial performance as a means of informing the electorate about judicial qualifications remained very small.

The early pioneers in the use of judicial performance evaluations were New Jersey, Colorado, and Alaska, but Tennessee, which adopted its program in 1994, was not far behind. Moreover, unlike many of the pioneers, Tennessee's judicial performance evaluation program (JPE) included the dual purposes of promoting voter awareness and self-improvement from the outset. While other programs focused exclusively on identifying areas for judicial self-improvement during the first decade of the programs' existence, Tennessee's JPE contained a robust

---

(1981); Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1064-66 (2002).

[38] Andersen, *supra* note 35, at 1375.

[39] ABA SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985) (hereinafter "GUIDELINES").

voter awareness and self-improvement component from the very start.[40]

Thus, the 98th Tennessee General Assembly added Tennessee to that very short list of states willing to devote state resources to assure that an informed electorate made judicial retention decisions. The Tennessee Plan incorporated a rigorous performance evaluation program that had been developed and scrutinized by members of the bench and the bar[41] and that placed Tennessee in the forefront. With the adoption of the Tennessee Plan, the Tennessee Municipal League, for example, proudly boasted that Tennessee became the "only state with a judicial

---

[40] *See* White, *supra* note 37, at 1066-67. Both a lack of resources and a lack of support led some states to use judicial performance evaluations exclusively for judicial self-improvement.

[41] Justice Bill Koch, who was at the time a Court of Appeals Judge, and I chaired the committee appointed by the Tennessee Supreme Court and the Tennessee Judicial Conference to study and determine whether to propose a judicial performance evaluation system for Tennessee's judges. The committee, consisting of lawyers and judges, worked for months reviewing the few judicial performance evaluation programs in existence, consulting with experts, and drafting proposals. To my knowledge, the significant amount of energy, resources, and relationship capital invested to propose and ultimately adopt Tennessee's JPE has not been documented. My archives (and I am sure the archives of Justice Koch and others) contain reams of evidence documenting the amount of work involved as well as the degree of difficulty encountered in proposing and gaining acceptance of JPE by Tennessee's lawyers, judges, and legislators.

evaluation program this expansive, and only one of eight states with a program." [42]

From its inception, Tennessee's expansive JPE embraced multiple vital objectives: assuring a "responsive and respected appellate judiciary,"[43] providing a means of improving the quality of justice by improving individual judge's judicial skills,[44] and promoting "informed retention decisions."[45] By connecting JPE with the Tennessee Plan's broad-based selection system and retention elections, the General Assembly and the courts worked hand in hand to select a qualified judiciary, to improve judicial performance, and to "aid the public in evaluating the performance of [incumbent appellate] judges."[46] In addition to acknowledging the acute importance of an exceptional appellate judiciary, the implementation of JPE alleviated accountability concerns voiced by some critics of retention elections[47] by providing an evaluative process "based on a well-defined set of non-political performance criteria."[48]

---

[42] Tennessee Municipal League, *Town and Country*, July 17, 1995 (quoted in Van Dervort, *supra* note 7, at 63).

[43] TENN. SUP. CT. R. 27, § 1.01.

[44] *Id.* at §§ 1.02 & 1.03.

[45] *Id.* at § 1.04. "In addition to its primary purpose of self-improvement, the JPEP must provide information that will enable the Judicial Performance Evaluation Commission to perform objective evaluations and to issue fair and accurate reports concerning each appellate judge's performance."

[46] 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §17-4-201). The Tennessee Plan did not change the method of election for Tennessee's trial judges; thus, JPE's voter awareness goal affected only incumbent appellate judges.

[47] *See* Bopp, *supra* note 34, at 97 (stating that "[t]he primary pitfall is that merit selection lacks any strong accountability mechanism since retention elections are a

Tennessee's JPE not only met, but exceeded the recommended standards for judicial evaluation programs.[49] The program had official status[50] and was sanctioned by both statute and Supreme Court Rule.[51] Despite this linkage, JPE retained institutional independence from both the legislature and the judiciary.[52] The program's well-

---

weak substitute for popular elections."); Andersen, *supra* note 35, at 1377 (noting that "[r]etention elections provide accountability in theory, but in practice they can suffer from the same lack of publicity and voter interest as competitive judicial elections often do.").

[48] Andersen, *supra* note 35, at 1389.

[49] Generally, the ABA GUIDELINES, *supra* note 39, are considered the model for judicial evaluation programs. For a discussion of the specifics of effective evaluation programs, *see* Andersen, *supra* note 35; *see also* Kevin M. Esterling & Kathleen M. Sampson, *Judicial Retention Evaluation Programs in Four States – A Report with Recommendations* (1998), *available at* http://www.Judicialselection.us/uploads/documents/Exec_Summ_Jud_Ret_Eval_4C67B5A81A9B3.pdf.

[50] Andersen, *supra* note 35, at 1376.

[51] 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. §17-4-201 (1994)); TENN. SUP. CT. R. 27.

[52] *See* GUIDELINES, *supra* note 39, at 1-2 (noting that a "judicial evaluation program should be structured and implemented so as not to impair the independence of the judiciary"); 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-201(a)(3) (1994) (providing that information collected for purposes of evaluating judges shall be confidential); TENN. SUP. CT. R. 27, § 2.04 (stating that the "Judicial Performance Evaluation Commission . . . shall be considered independent of the Administrative Office of the Courts"); TENN. SUP. CT. R. 27, §§ 6.02 & 6.03 (providing for limited disclosure of "[a]ll records and

defined goals and objectives [53] were broad and comprehensive in scope,[54] but the overarching program objectives were complemented with precise rules and procedures.[55]

Tennessee's JPE utilized professionally-designed survey instruments to solicit views from a variety of court users, including jurors, lawyers, litigants, and other judges. But evaluation also took into account non-survey information acquired through public comments, personal interviews, observations, and caseload and workload statistics.[56] The program evaluated judges based upon "clear, measurable performance standards," [57] utilizing questionnaires that assessed specific relevant criteria, such as integrity, knowledge and understanding of the law, ability to communicate, preparation and attentiveness, service to the profession and the public, and effectiveness

---

information obtained and maintained by the Judicial Performance Evaluation Commission concerning the performance of individual judges"); TENN. SUP. CT. R. 27, § 6.04 (providing that "all information, questionnaires, notes, memoranda or data" shall be in admissible as evidence and not discoverable in any action or by any board or tribunal); TENN. SUP. CT. R. 27, § 6.05 (providing for the destruction of records six months after a judge's death or retirement).

[53] GUIDELINES, *supra* note 39, at 1-1; *see* text accompanying notes 43-48 *supra.*

[54] Andersen, *supra* note 35, at 1377-79.

[55] TENN. SUP. CT. R. 27, §§ 4 & 5.

[56] GUIDELINES, *supra* note 39, at 4.1 – 4.3. *See* TENN. SUP. CT. R. 27, §§ 5.02 & 5.04; Tennessee Appellate Judges Evaluation Reports are presently available at http://www.tsc.state.tn.us/boards-commissions/boards-commissions/judicial-performance-evaluation-commission.

[57] Esterling & Sampson, *supra* note 49, at xix.

in working with others.[58] The final evaluation reports were disseminated by print media[59] and, ultimately, were available electronically,[60] allowing the public easy access to the evaluation results and assuring that the results provided a useful and meaningful voter information tool.[61]

Tennessee's JPE was administered by the Judicial Performance Evaluation Commission (hereafter JPEC), comprised of lawyers, judges, and lay persons appointed by various professional organizations and office holders.[62]

---

[58] GUIDELINES, *supra* note 39, at 3-1 – 3-8; TENN. SUP. CT. R. 27, § 3. I have previously discussed the relationship of these performance criteria to the qualities of good judges. *See* Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 657-661 (2009).

[59] 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-201(c) (1994)).

[60] *See supra* note 56.

[61] As the Institute for the Advancement of the Legal System has noted "[a] commitment to public judicial performance evaluation involves a concomitant commitment to assuring that the results are widely known . . . ." INSTITUTE FOR THE ADVANCEMENT OF THE AMER. LEGAL SYS., TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION 10 (2006), *available at* http://iaals.du.edu/images/wygwam/documents/publications/TCQ_Blueprint_JPE2006.pdf) (hereafter "TRANSPARENT COURTHOUSE").

[62] GUIDELINES, *supra* note 39, at 2-2 & Commentary; 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-201(b)(1)-(4) (1994) (providing that the Judicial Council and the Speakers of the House and Senate would appoint attorneys, judges, and non-attorneys to the JPEC).

Commissioners' terms were staggered and limited.[63] Similarly, the JPEC's structure and composition mirrored suggested standards.[64]

III. Tennessee's Model Judicial Selection, Evaluation, and Retention System Worked

Thus, in 1994, Tennessee had a model and respected judicial selection, evaluation, and retention system for its appellate court judges. More importantly, the system worked. It produced a highly qualified, diverse appellate bench, whose members adjudicated cases both fairly and efficiently. In short, the Tennessee judicial selection, evaluation, and retention system was not broken.

A. Tennessee's judicial selection, evaluation, and retention system met the goals set by the legislature.

The respect for the Tennessee Plan was well-deserved. When the Plan was adopted, the General Assembly outlined four specific and noble goals: selecting the best qualified judges, bringing greater racial and gender diversity to the bench, insulating judges from political pressure and influence, and enhancing the prestige of and public respect for the courts.[65] Between 1994 and 2010, the Tennessee Plan met each of these laudable goals.

---

[63] Andersen, *supra* note 35, at 1383; 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-201 (b)(7) & (8) (1994).

[64] TRANSPARENT COURTHOUSE, *supra* note 61, at 8.

[65] 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101 to 102) (2009).

1. The Tennessee Plan produced a highly qualified, diverse appellate bench.

In a judicial selection system based on merit, judicial vacancies are publicized. Applicants are required to provide detailed information about their personal and professional background, work experiences, education, abilities, and achievements. After viewing these relevant qualifications, a diverse selection commission nominates the most qualified applicants to the appointing authority. The Tennessee Plan embraced each of these important aspects of merit selection.[66]

The clarity and pertinence of the selection process attracted qualified applicants. In particular, those lacking political connections[67] were still able to compete for a

---

[66] *See* text accompanying *supra* notes 29-31.

[67] I am well aware that many qualified applicants fell victim to politics at its worst on occasion, when the JSC "stacked the deck" with its nominees. In writing about the design and potential of the Tennessee Plan and contrasting its value relative to the value of our current system, I am not suggesting that the Tennessee Plan always worked perfectly or apolitically. One example of imperfect operation occurred in 2006. The JSC submitted a slate of three nominees to Governor Phil Bredesen to fill a vacancy on the Tennessee Supreme Court. The slate included Davidson County Chancellor Richard Dinkins, who is an African American, and attorneys J. Houston Gordon and George T. "Buck" Lewis. Chancellor Dinkins withdrew from consideration, prompting the Governor to request a new slate of nominees reflecting diversity, The JSC asked the Governor to clarify his rejection and ultimately submitted a second slate, which included J. Houston Gordon and two others. The Governor then filed a declaratory judgment action against the JSC alleging that

nomination based on their qualifications.[68] Knowing that the JSC was largely comprised of experienced lawyers who knew the essential qualities of a good judge encouraged qualified candidates who possessed the necessary intellect, temperament, and judgment to serve. Additionally, those experienced lawyer JSC members were well-positioned to evaluate and predict suitability for the bench.

Admittedly, determining the quality of an appellate judge is no easy task. An appellate court's caseload is predominantly determined by litigants and their lawyers, not the judges.[69] But one measurement of appellate efficiency is the length of time it takes an appellate court to

---

the second slate was invalid because it included a previously rejected nominee. Gordon and Lewis were allowed to intervene in the lawsuit. Following trial proceedings, and pursuant to its reach-down prerogative, the Tennessee Supreme Court concluded that the JSC could not include on a subsequent slate of nominees an individual who had been included on a rejected slate. Bredesen v. Tennessee Judicial Selection Commission, 214 S.W.3d 419 (Tenn. 2007).

[68] While measuring whether merit selection systems in and of themselves produce more qualified judges is a difficult proposition, studies uniformly show meaningful differences between appointed and elected judges.

[69] Parties have an automatic right to appeal trial court decisions to the Tennessee Court of Appeals and the Tennessee Court of Criminal Appeals. Only the Tennessee Supreme Court has "control" over the size of its docket because its appellate jurisdiction is largely discretionary, but even the Supreme Court is required to hear certain kinds of cases. *See generally* TENN. R. APP. 9-12 (outlining the methods of appeal in Tennessee); TENN. CODE ANN. § 39-13-206 (2014 Repl.) (establishing the Supreme Court's mandatory review of capital cases).

conclude a case after the case is heard. This measurement is sometimes referred to as the case-disposition or clearance rate. National organizations have promoted time guidelines to encourage the expeditious disposition of cases.[70] Tennessee appellate courts have long adhered to case processing deadlines, have a clear enforcement mechanism,[71] and regularly have impressive case-clearance rates.[72]

In addition to evaluations based on a courts' clearance rate, some nonprofit organizations evaluate state appellate courts based on other factors, usually reflective of the groups' ideology. One example is an evaluation conducted by the Center for Public Integrity,[73] Global

---

[70] The American Bar Association and the National Center for State Courts, for example, have promoted time standards for appellate courts. *See* National Center for State Courts, Appellate Court Performance Measures (2011), *available at* http://www.courtools.org/~/media/Microsites/Files/CourTools/courtools_appellate_measure2_Time_To_Disposition.ashx.

[71] TENN. SUP. CT. R. 11 (setting out mechanism for collecting court statistics, deadlines for rendering decisions, and procedure for prompting a dilatory judge).

[72] The annual statistics for Tennessee's appellate courts are compiled in annual reports, which are posted on the website for the Tennessee Administrative Office of the Courts. The most recent annual report, covering fiscal year 2012-13, may be viewed at http://www.tsc.state.tn.us/sites/default/files/docs/annual_report_fy2013.pdf. In 2012-13, during a time of upheaval and uncertainty about the tenure of appellate judges, Tennessee's appellate courts averaged a clearance rate that exceeded 100 percent.

[73] The Center for Public Integrity, according to its website, is a nonpartisan, nonprofit investigative news organization whose mission is to "serve democracy by revealing abuses

Integrity,[74] and Public Radio International,[75] which ranked the integrity of state institutions based upon their transparency, accountability, and corruption risk.[76] Although the state of Tennessee fared poorly overall, the score received for judicial accountability was among the state's highest score and ranked Tennessee favorably based upon the transparency of judicial selection, the integrity of the judiciary, and the accountability of judges for their actions.[77]

---

of power, corruption and betrayal of public trust by powerful public and private institutions, using the tools of investigative journalism." http://www.publicintegrity.org/.

[74] According to its website, Global Integrity "champions transparent and accountable government around the world by producing innovative research and technologies that inform, connect, and empower civic, private, and public reformers seeking more open societies." https://www.globalintegrity.org/about/mission/.

[75] Public Radio International is a global nonprofit media company whose mission is to "serve audiences as a distinctive content source for information, insights and cultural experiences essential to living in our diverse, interconnected world." http://www.pri.org/about-pri.

[76] Tennessee's corruption risk report card can be viewed at http://www.stateintegrity.org/tennessee.

[77] Tennessee's judicial accountability report can be viewed at http://www.stateintegrity.org/tennessee_survey_judicial_accountability. At the other extreme, it may be worth noting that the Tennessee court system has never made the list of so-called "judicial hellholes," catalogued by the American Tort Reform Foundation in annual reports. According to its website, the American Tort Reform Foundation (ATRF) is a nonprofit corporation whose primary purpose is to "educate the general public about how the American civil justice system operates; the role of

In addition to producing a highly qualified and effective appellate bench, the Tennessee Plan produced a significantly more diverse appellate bench.[78] The increase in diversity under the Tennessee Plan was consistent with the findings of national studies showing that racial and gender diversity is more likely to occur through an appointed system[79] and that women are significantly more likely to be appointed, rather than elected, to state supreme courts. [80]

Under the Tennessee Plan, membership on the JSC was required to reflect the state's diversity; the Speakers were required to reject nomination lists that did not reflect diversity. [81] The presence of a diverse selection body encouraged more diversity among applicants and ultimately enhanced the likelihood that minority candidates and women would be appointed.[82] Although the number of

---

tort law in the civil justice system; and the impact of tort law on the private, public and business sectors of society." *available at* http://www.judicialhellholes.org/about/. The ATRF defines judicial hellholes as "places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits." *Id.*

[78] *See* TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK (1994-2014).

[79] Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort through Interim Appointments,* 27 JUST. SYS. J. 1, 7 (2006)

[80] Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 504 (2002).

[81] *See supra* notes 29-30.

[82] Research supports the conclusion that demographically diverse nominating commissions attract more diverse

racial minorities serving as appellate judges in Tennessee remains distressingly low, the number more than tripled under the Tennessee Plan.[83] Similarly, Tennessee's female appellate judges increased nearly ten-fold.[84] Thus, the Tennessee Plan yielded the state's most diverse appellate judiciary, clearly advancing the legislature's stated purpose of bringing more racial and gender diversity to the bench.[85]

---

candidates and select more diverse nominees. Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report* in RESEARCH ON JUDICIAL SELECTION 1999 (American Judicature Society 2000 ed.).

[83] *See* Margaret L. Behm & Candi Henry, *Judicial Selection in Tennessee: Deciding the Decider*, 1 BELMONT L. REV. 143,176 (2014) (stating that in 23 years under the Tennessee Plan, "appointments through April 2013 were sixty-nine percent men and thirty-one percent women. Nine percent of those appointed were members of minority groups.") These totals include trial and appellate level appointments.

[84] In 1992, Tennessee had two female appellate judges. Eight additional women have been appointed to the appellate bench since 1992. *See supra* note 78. Prior to 1996, the Tennessee Supreme Court had never had more than a single female member; since 2008, it has had three female members, making it one of four states with a majority of women on its highest court. The others three are North Carolina, Ohio, and Wisconsin. http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state).

[85] 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101 to 102) (1994).

2. The Tennessee Plan insulated judges from political pressure and thereby enhanced the prestige of and public respect for the courts.

After the Tennessee Plan became fully operational in 1998, forty-one appellate judges were evaluated and subsequently retained in office in the years 2000, 2006, 2008, 2010, and 2012.[86] During a decade in which spending in judicial races skyrocketed and special interest groups battered judicial candidates with negative, nasty campaigns, [87] no Tennessee judge was targeted for

---

[86] *See generally* http://www.tsc.state.tn.us/boards-commissions/boards-commissions/judicial-performance-evaluation-commission. In 1998, Chief Justice Adolpho Birch, Jr., was retained on the Tennessee Supreme Court, but the Commission's webpage does not include his evaluation. Although the Tennessee Plan was operational at the time, I have been unable to determine whether the JPC evaluated or disseminated Chief Justice Birch's evaluation. In 2000, 5 judges were evaluated and retained; in 2006, 27 judges were evaluated and retained; in 2008, 5 judges were evaluated and retained; and in both 2010 and 2012, 2 judges were evaluated and retained.

[87] Since 2000, the Brennan Center for Justice has produced annual reports that catalogue the trends in judicial elections. The reports are available on the Center's website at http://www.justiceatstake.org/resources/the-new-politics-of-judicial-elections/. The 2000-2009 report summarizes the trend: Campaign fundraising more than doubled, from $83.3 million in 1990–1999 to $206.9 million in 2000–2009. Three of the last five Supreme Court election cycles topped $45 million. All but two of the 22 states with contestable Supreme Court elections had their costliest-ever contests inthe 2000–2009 decade. *Available a*t http://www.j

opposition or required to raise more than nominal campaign funds. The unique evaluation component of the Tennessee Plan provided voters with pertinent, apolitical information about the judges, filling the vacuum often occupied by special interest groups' misleading campaign ads.[88] Tennessee's appellate bench avoided the trend that plagued so many state judiciaries and remained largely insulated from political pressure. As studies show, a fortunate by product of apolitical courts is enhanced public respect for the judiciary.[89]

3. The Tennessee Plan gave meaningful information to allow voters to cast informed ballots in retention races.

Beginning in 2000,[90] the JEC evaluated every appellate judge who sought election to fill either an unexpired or full term.[91] In evaluating each judge, the JEC considered the application submitted by the judge to the JSC; the judge's self-report form and formal interview with the JEC; the results of survey questionnaires; the judge's caseload and workload statistics; and public input. The

---

usticeatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

[88] *See* White, *supra* note 58 (discussing how relevant evaluation information replaces irrelevant campaign advertising as meaningful voter cues).

[89] The Brennan Center's 2000-2009 summary report on pages 77-87 cites numerous studies on these issues. http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

[90] *See supra* note 86.

[91] The reports are available on the website of the Administrative Office of the Courts at www.tsc.state.tn.us/sites/default/files/docs/judeval.pdf.

final evaluation was based on criteria pertinent to the task of judging and included an assessment of the judge's integrity; knowledge and understanding of the law; ability to communicate; preparation and attentiveness; service to the profession; and effectiveness in working with other judges and with court personnel.[92] The evaluation report included a summary of the judge's legal education, experience, and service to the profession; the survey results; the JEC's impressions of the judge's experience and performance; the JEC's recommendation regarding retention; and, if desired, the judge's written response.[93] The evaluation report was published in newspapers and made available on the Administrative Office of the Courts website, accomplishing the legislature's stated purpose of promoting "informed retention decisions" and assuring a "responsive" appellate judiciary.[94]

IV. The Dismantling of Tennessee's Model Judicial Selection, Evaluation, and Retention System-a/k/a They Broke It.

A. Introduction

Through a series of calculated legislative actions, the Tennessee General Assembly dismantled Tennessee's unique judicial selection, evaluation, and retention system and replaced the system with one that is dominated by and dependent upon the legislature. Tennessee's 21st century judiciary is reminiscent of its 18th century judiciary,[95]

---

[92] TENN. SUP. Ct. R. 27.
[93] *See supra* note 86.
[94] *See* text accompanying *supra* notes 43, 45.
[95] TENN. CONST. art. V, § 1 (1796) (giving legislature the power to determine whether to create courts); TENN. CONST. art. V, § 2 (1796) (giving legislature the power to

controlled by the legislative branch and susceptible to the corruption that accompanies the "concentrating [of all government power] in the same hands."[96] The modification and repeal of statutes outlining the mechanisms for judicial selection, evaluation, and retention spawned the adoption of a constitutional amendment that ultimately retains gubernatorial appointment and retention elections for appellate judges, but critically alters the judicial selection system and entirely removes the system for judicial performance evaluation. By eliminating two of the three essential components of the Tennessee Plan, the legislature has produced a judicial system accountable only to politicians.

The adoption of the constitutional amendment replacing Tennessee's judicial selection, evaluation, and retention system was preceded by a clever, if disingenuous campaign. Backing the amendment was an impressive array of former and current governors, legislators, judges, and popular citizens. They argued that Tennesseans were limited to two choices. They could adopt the amendment and preserve retention elections (albeit by placing the courts under legislative control), or they could submit the courts to partisan elections. The far better choice—retaining the Tennessee Plan with its unique selection and evaluation components—was clouded with the persistent, yet preposterous claim [97] that the Plan, adopted by the

---

elect judges); TENN. CONST. art. IV (giving legislature the power to impeach judges); TENN. CONST. art. VI, § 3 (giving legislature the power to elect judges); TENN. CONST. art. VI, § 6 (1834) (giving legislature the power to impeach judges).

[96] *See supra* note 3.

[97] Courts consistently have upheld the constitutionality of the Tennessee Plan. The predecessor to the 1994 Tennessee Plan was upheld in State ex rel. Higgins v. Dunn, 496

legislature and utilized to appoint every appellate judge in the last twenty years, was unconstitutional. [98]

B. The Beginning of the End of the Tennessee Plan

That Tennessee's unique judicial selection, evaluation and retention system was in danger of being dismantled became readily apparent in early 2008. Although the legislature had tinkered with the size and composition of the JSC and the JEC in 2001,[99] a more

---

S.W.2d 480 (Tenn. 1973). The 1994 Plan was upheld in State ex rel. Hooker v. Thompson, 249 S.W.3d 331 (Tenn. 1996) and Hooker v. Haslam, 437 S.W.3d 409 (Tenn. 2014). Other cases endorsing the constitutionality of the Tennessee Plan include Hooker v. Andersen, 12 Fed. Appx. 323 (6th Cir. 2001); Hooker v. All Members of Tenn. Supreme Court, No. 3-02-0787 (M.D. Tenn. July 28, 2003); Johnson v. Bredesen, 356 Fed. Appx. 781 (6th Cir. 2009); and Delaney v. Thompson, 982 S.W.2d 857 (Tenn. 1998).

[98] The basis for my characterization of the constitutional challenge to the Tennessee Plan as preposterous is detailed elsewhere and will not be repeated here. *See* White & Reddick, *supra* note 25; *see also* Behm, *supra* note 83.

[99] In 2001, the General Assembly increased the size of the JSC from 15-17 members. 2001 Tenn. Pub. Acts, ch. 459 (codified at TENN. CODE ANN. § 17-4-102(a) (2001)). More important than the increase in size, however, was the implicit change in mindset concerning who should vet judicial candidates. The two new members of the JSC were required to be lawyers, but the Speakers were not required to receive input or recommendations from bar organizations. 2001 Tenn. Pub. Acts, ch. 459 (codified at TENN. CODE ANN. § 17-4-102(b) (2001)). By removing the organized bar, the legislature began to assert greater control over the judicial selection process. As discussed at text

pervasive threat arose in 2008 by the operation of Tennessee's Governmental Entity Review Law ("TGERL").[100] This law provides for the periodic review of all state government entities "to ensure that regulation was beneficial rather than detrimental to the public interest."[101] A legislative committee evaluates the "quality, efficiency, and success of [governmental entities and] programs"[102] in light of legislative mandates and recommends continuation of "successful and efficient entities that are beneficial to the citizens" and elimination of inactive, duplicative, and "ineffective, inefficient, unnecessary or undesirable entities."[103] Following this so-called "sunset review," the committee proposes legislation to terminate or continue entities.[104] A terminated entity has one year to wind up its affairs, before it permanently expires.[105]

---

accompany *infra* notes 124-126, the General Assembly completed the removal of lawyers from the selection process in 2009 when it eliminated altogether the requirement that the Speakers appoint JSC members from lists provided by bar organizations. 2009 Tenn. Pub. Acts, ch. 517 (codified at TENN. CODE ANN. § 17-4-102(a)&(b) (2009)).

[100] TENN. CODE ANN. §§ 4-29-101, -236 (2011 Repl.) (as amended).

[101] TENN. CODE ANN. § 4-29-102(a) (2011 Repl.) (as amended).

[102] TENN. CODE ANN. § 4-29-105(1) (2011 Repl.) (as amended).

[103] TENN. CODE ANN. §§ 4-29-105(2)-(5) (2011 Repl.) (as amended).

[104] TENN. CODE ANN. §§ 4-29-107, -108 (2011 Repl.) (as amended).

[105] TENN. CODE ANN. § 4-29-112 (2011 Repl.) (as amended). This process is referred to both as winding up the affairs and winding down the entity. *Compare id. with*

Both the JSC and JEC were scheduled to terminate under the terms of the TGERL in 2008. Although the process of sunset review was routine and ordinary, the circumstances surrounding the sunset review and subsequent winding-up of the affairs of the JSC and JEC were anything but conventional.

When the General Assembly adjourned on May 21, 2008, without providing for the continued existence of the JSC and JEC,[106] the two Commissions terminated[107] and began the one-year wind-up, setting the course for both to expire completely on June 30, 2009.[108] Although this situation was troubling, no appellate judges were on the August 2008 ballot for retention, so the failure to provide for the continued existence of the JSC and JEC did not create an immediate crisis. Presumably, the General Assembly would address the issue when it reconvened in January 2009.

During the 2009 legislative session, numerous bills were introduced in reaction to the scheduled expiration of

---

Tn. Att'y Gen. Op. 09-43, 2009 WL 837837 (March 26, 2009). The term "terminate" refers to the date on which the entity sunsets and the term "expire" refers to the date one year later, after the entity's wind-up year. The term "sunset" and "terminate" are used interchangeably here. Thus, an entity terminates (or sunsets), winds up, and then, expires.

[106] A number of statutes designate the sunset date for various governmental entities, but the legislature routinely repeals or transfers subsections of the statutes, which has the effect of changing the date of the entity's termination and expiration. *See generally* TENN. CODE ANN. §§ 4-29-230, 238 (2011 Repl. & 2014 Supp.)

[107] TENN. CODE ANN. §§ 4-29-229(a)(46) & (47) (2011 Repl.) (as amended).

[108] *Id.*

the JSC and the JEC. Some bills proposed partisan elections, while others altered the existing retention system. None of the judicial selection proposals included the unique selection and evaluation components of the existing Tennessee Plan. Ultimately, the 106th General Assembly failed to adopt a new judicial selection system; however, the overall tenor of the proposals and debate suggested that the legislature intended to allow the permanent expiration of the JSC and the JEC the following year.[109]

By early 2009 concern about the effect of the permanent expiration of the JSC and JEC was mounting. Leaders in the Senate and House asked the Attorney General to offer an opinion on the legal effect of the expiration of the JSC and JEC. That opinion, released in late March of 2009, advised that if both Commissions permanently expired, no appellate judges could be elected in either 2010 (when two appellate judges were scheduled to be on the ballot)[110] or in 2014 (when all twenty-nine appellate judges would be on the ballot seeking retention for a new eight-year term).[111] Additionally, no vacancies in appellate judgeships occurring after July 1, 2009, the final wind-up date for both Commissions, could be filled.[112]

Perhaps the Attorney General's Opinion prompted the legislature's next step. A few days before adjourning the 2009 session, the legislature passed comprehensive legislation that altered many aspects of the Tennessee

---

[109] *See generally* H.B. 0173, 0958, 1017, 107th Gen. Assembly, Reg. Sess. (Tenn. 2012).

[110] Chief Justice Sharon Lee and Court of Appeals Judge John W. McClarty were both scheduled for retention votes on August 5, 2010.

[111] Tn. Att'y Gen. Op. 09-43, 2009 WL 837837 (March 26, 2009).

[112] *Id.*

Plan.[113] In the abstract, the 2009 Act seemed peculiar, but when viewed with the advantage of time and perspective, the 2009 legislation was obviously the beginning of the end of the Tennessee Plan. The new legislation signaled a fundamental shift in the legislature's attitude toward the courts.

C. The 2009 Legislation

This fundamental shift was evident from the opening sentences of the 2009 legislation. There, the General Assembly modified its statement of legislative purpose, likely revealing more than it intended and exposing a new view of the role of the courts. This revision in the underlying purpose of the Tennessee Plan now seems prescient. [114] Whereas, the original purpose of the Tennessee Plan was to "insulate the judges . . . from political influence and pressure [and to] eliminate[e] the necessity of political activities," in order to make the courts "nonpolitical," [115] the General Assembly's newly stated purpose dismissed the importance of an apolitical judiciary. Now, the purpose underlying judicial selection was not to totally remove judges from politics, but only to "[b]etter" insulate judges, to minimize, but not eliminate political activity, and to make the courts only "less political."[116]

In harmony with this more political view of judicial selection and retention, the General Assembly also modified the ballot language for retention elections in

---

[113] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. §§17-4-101 to 108) (2009).
[114] *See* Appendix 1.
[115] 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101(a) (1994)).
[116] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(a) (2009)).

2009.[117] As was true in other retention states, Tennessee voters previously responded "yes" or "no" to the question whether a judge "should be elected and retained in office," but the new ballot language required voters to choose "to retain" or "to replace" the judge.[118] The JEC, renamed the Judicial Performance Evaluation Commission (JPEC),[119] would now recommend judges for retention or replacement, rather than recommending for or against retention.[120]

The 2009 legislation included many changes to the selection process that were consistent with this jaded view of the courts. For example, when the Tennessee Plan was adopted, the advice and counsel of lawyers concerning judicial selection was viewed as essential to the mission of "finding and appointing the best qualified persons available for service."[121] Specifically, the legislature noted that due to their "experience and observation," lawyers were "familiar with the best qualities and characteristics of judges." [122] To capitalize on this legal expertise, membership on the JSC and the JEC consisted largely of

---

[117] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-114(b)(1) (2009)).
[118] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-114(b)(1) (2009)).
[119] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-115(b)(2) (2009)).
[120] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4 -115(b)(1) (2009)). If a judge was not retained, the statute allowed the governor to bypass the appointment process and fill the vacancy by direct appointment. 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-113 (2009)).
[121] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(a) (2009)).
[122] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(b) (2009)).

lawyers, nominated by four state-wide lawyer organizations.[123] But in 2009, along with the change in the name of both Commissions,[124] the legislature changed the selection process for Commission members, giving the Speakers of the Senate and the House the exclusive power to appoint the members of both Commissions.[125] The previous provisions requiring the Speakers to appoint from a list of lawyers submitted by bar organizations was deleted.[126]

---

[123] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-102(a)(1)-(4) (2009) (requiring nominees for the JSC to be submitted by the Tennessee Bar Association, the Tennessee Trial Lawyers Association, the Tennessee District Attorney General Conference, and the Tennessee Association of Criminal Defense Lawyers)); 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-201(b) (2009) (requiring selection of commission members from lists submitted by bar groups); 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-201(b) (2009) (requiring that the JEC consist of members appointed from lists submitted by the bar groups).

[124] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-102(a) (2009) (changing the name of the Judicial Selection Commission to the Judicial Nominating Commission); 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-201(b) (changing the name of the Judicial Evaluation Commission and program to the Judicial Performance Evaluation Commission and program).

[125] *See supra* note 99 for details concerning an earlier change in the provisions related to Commission members.

[126] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-201(b)(6) (2009) (noting that "[i]n appointing attorneys to the commission, the speakers shall receive, but

The 2009 legislation also omitted another significant provision relevant to the composition of the Commissions – the provision that required the Speakers to reject entire lists of nominees that did not "reflect the diversity of the state's population."[127] Coupled with the deletion of that diversity initiative was the relaxation of another provision also aimed at assuring diversity. Under the original statute creating the Tennessee Plan, the Speakers were required to appoint commission members "who approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender."[128] This provision was replaced with one that required only that the Speakers make appointments with a "conscious intention of selecting a body that reflects diversity."[129] Only geographic diversity was still required.

---

shall not be bound by, recommendations from any interested person or organization").

[127] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(b)(2) (2009)). The 1994 Act provided, "[i]f the nominees do not reflect the diversity of the state's population, the speaker *shall reject* the entire list of a group and require the group to resubmit its nominees." 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101(b)(2) (1994) (emphasis added). To effectuate this requirement, the groups were required to "include background data" about each nominee. 1994 Tenn. Pub. Acts, ch. 942 (codified at TENN. CODE ANN. § 17-4-101(c) (1994). This provision was also eliminated in 2009.

[128] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(b)(3) (2009)).

[129] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-101(c) (2009)). In addition to race and gender, the Speakers were required to make appointments with a "conscious intention of selecting a body that" represented "rural as well as urban centers."

The Speakers were required to appoint at least four Commissioners, and were prohibited from appointing more than seven from the same grand division of the state.[130]

The changes in the composition and role of the JSC, now called the Judicial Nominating Commission (JNC), mirrored the changes in the composition and role of the JEC, now the JPEC. Judicial evaluation had not been a simple sell in Tennessee. Judges were resistant to the new idea initially, but were consoled, perhaps, by the fact that judges, who were familiar with the tasks of judging and the essential qualities of good judges, were involved in each step of the process—from designing and refining the evaluation system to actually participating in the evaluations.

When JPE was initially adopted, the Supreme Court retained authority over the details of the program. The original JPC, for example, included twelve members, six of whom were judges appointed by the Judicial Council (JC).[131] But in 2009, the same year the JC was scheduled to

---

[130] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-102(a)(1)-(2), (4) (2009)).

[131] Since its creation in 1943, the Judicial Council had made recommendations to the General Assembly "for changes in rules, procedures or methods of administration, or upon any other matter pertaining to the judicial system." TENN. CODE ANN. § 16-21-107(a)(2) (2014 Supp.) Each year the Judicial Council made an annual state of the judiciary report to the executive, legislative, and judicial branches; made recommendations about legislation affecting the judiciary; and assisted in allocating and reallocating scarce judicial resources. *Id.* at 107(a)(3)(A)&(B) (2014 Supp.) (noting Judicial Council's duty to report annually and to recommend "creation or reallocation" of judicial, prosecutorial, and public defender positions). The Judicial Council expired on June 30, 2009,

expire, the membership of the JPEC decreased to nine members, with the JC's appointing authority cut in half.[132] A year later, after the JC had terminated and was winding up its affairs, the General Assembly eliminated input from the Judicial Council, assumed the role of appointing all of the members of the JPEC, and again, decreased the number of judges on the JPEC, this time from five to three.[133] The 2009 legislation advanced politics as the core component of judicial selection and evaluation, greatly decreased the opportunity for input from the legal profession, and removed entirely diversity requirements.

Initially, perhaps because both the JSC and JEC were replaced with different but similar Commissions that began their operations immediately, the actual termination of the JSC and the JEC on June 30, 2009 seemed innocuous. Revealing in hindsight was the short life given to both of the replacement Commissions. Both the JNC and the JPEC were scheduled to sunset a mere two years after their creation, on June 30, 2012.[134]

With the new statutory mechanism in place, two appellate judges, who were appointed to fill unexpired terms, filed qualifying petitions to seek retention in the August 5, 2010, election.[135] The new JPEC evaluated the

---

and terminated completely following its wind-up on June 30, 2010. Tenn. Code Ann. § 4-29-230(a)(32) (2011 Repl.)

[132] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. §17-4-201(b)(1) (2009)).

[133] 2009 Tenn. Pub. Acts, ch. 517 (amending TENN. CODE ANN. § 17-4-114(b)(1) (2009)).

[134] TENN. CODE ANN. §§ 4-29-233(a)(15) & (16) (2011 Repl.)

[135] The two judges were Justice Sharon G. Lee, appointed to the Tennessee Supreme Court in October 2008, and Judge John Westley McClarty, appointed to the Tennessee Court of Appeals in January 2009.

judges and reported its findings to the general public as required by law.[136] The voters in the 2010 election applied the new ballot language and overwhelmingly voted to retain, rather than replace, the two appellate judges.[137] The looming crisis, foreshadowed by the Attorney General's 2009 opinion, had been avoided for at least temporarily.

Between 2009 and 2012, the JNC nominated candidates and the Governor filled four judicial vacancies with three men and one woman, all of whom would join other incumbent judges to stand for retention election in August 2010.[138]

D. The End of the Tennessee Plan and the Adoption of Amendment Two

Meanwhile, however, the General Assembly continued to flirt with various proposals that offered additional revisions to Tennessee's system. A potpourri of options were proposed, but none passed, leaving the 2009 Act virtually intact. While the JNC and JPEC had continued to operate, both were nearing their impending sunset dates. In 2012, days before adjournment, the General Assembly pardoned the JPEC, extending its life for an additional year.[139] This meant that the JPEC would expire

---

[136] The 2010 report is available at http://www.tsc.state.tn.us/sites/default/files/docs/jpec_evaluations_2010.pdf.

[137] The election results are available at http://www.tn.gov/sos/election/results/2010-08/CCState%20General.pdf.

[138] In 2010 Justice Sharon Lee was appointed to the Tennessee Supreme Court; her seat on the Court of Appeals was filled by Judge John McClarty. In 2012 Judge (now Justice) Jeffrey Bivins and Judge Roger Page were named to the Tennessee Court of Criminal Appeals.

[139] TENN. CODE ANN. § 4-29-333(a)(16); TENN. CODE. ANN. § 4-29-334(37) (2014 Repl.).

on June 30, 2012, and terminate completely on June 30, 2013, approximately five weeks before the 2014 election. The legislature offered no similar reprieve for the JNC, allowing it to expire on June 30, 2012. But before adjournment, the legislature approved Senate Joint Resolution (SJR) 710, filed just three weeks earlier.

SJR 710, which would come to be known as "Amendment 2,"[140] proposed an amendment to Article VI, Section 3 of the Tennessee Constitution. Article VI, Section 2 provided for the selection of Tennessee's Supreme Court justices by the "qualified voters of the State."[141] Pursuant to its legislative power, the legislature had adopted the Tennessee Plan as the means of judicial selection in 1994; now the legislature was proposing an amendment that would replace Tennessee's model selection, evaluation, and retention system with a gubernatorial appointment-legislative confirmation judicial selection system.

In Tennessee, proposed constitutional amendments must be approved by increasing majorities of both houses in two consecutive General Assemblies before being placed on the ballot during a gubernatorial election.[142] SJR 710 swiftly passed both the House and the Senate and was signed by both Speakers on April 30, 2012, one day before the adjournment of the 107th Session of the General Assembly.[143]

---

[140] This designation was as a result of its being the second of four constitutional amendments which ultimately were placed before the Tennessee voters in November 2014.

[141] TENN. CONST. art. VI, § 3.

[142] TENN. CONST. art. XI, § 3; *see* State ex rel. Cohen v. Darnell, 885 S.W.2d 61 (Tenn. 1994) (noting that amendment procedure was added to the 1834 Constitution and has remained essentially the same since enactment in 1835).

[143] *See* Appendix 1; *infra* note 174

The legislature's swift action on SJR 701 made it clear why the JPEC was given another year of operation and the JNC was not. The legislature intended to complete the elimination of the Tennessee Plan. By allowing the statutory selection mechanism to terminate, the legislature created its own calamity. Because Tennessee had no judicial selection or appointment mechanism after the JNC terminated, it was unclear how judges who retired or died after 2012 would be replaced. Additionally, the August 2014 retention election (at which time all appellate judges would be on the ballot) was a mere two years away. Each judge had to be evaluated by the JPEC before the election. While the JPEC could do preliminary evaluations for the judges standing for retention, it too was set to terminate completely before the August 2014 election. Even presuming completion of the evaluation reports, no mechanism existed for filling the seats of those judges who were not retained.

This time it was the Governor's office that asked the Attorney General for advice. Did the Governor retain authority to appoint judges now that the JNC no longer existed to provide the list of nominees to the Governor? Ironically, and almost certainly unintentionally, the General Assembly had provided an easy answer in a provision of the 2009 legislation. A "failsafe" provision, not a part of the original Tennessee Plan but included in the 2009 revisions, gave the Governor the power of appointment notwithstanding the demise of the JNC.[144]

The failsafe provision, codified in Tennessee Code Annotated Section 17-4-113(a), was included to assure that a judicial vacancy did not linger due to the failure of the JNC to act in a timely manner. The provision authorized the Governor to fill vacancies after 60 days if the JNC

---

[144] Tenn. Op. Att'y Gen. 13-76, 2013 WL 5669872 (Oct. 9, 2013).

failed to provide a list of nominees within that time period.[145] Although the JNC no longer existed, the Attorney General concluded that the failsafe provision "evidenced a separate intent to ensure that judicial vacancies are filled in a timely manner and recognized that the need for a functioning judiciary carries a greater priority than the JNC's advisory role."[146] Thus, the statute "empower[ed] the Governor to fill judicial vacancies in *all* circumstances in which the JNC fails to act, including when the JNC has been terminated and therefore cannot act."[147] As a result, the Governor retained the statutory authority to fill judicial vacancies even after the JNC ceased to exist.[148]

Within a week of the Attorney General's opinion confirming the Governor's power, the Governor signed an Executive Order that distributed his power in a fashion similar to what had existed prior to the JNC's termination. In Executive Order 34, the Governor validated the role that lawyers had played in the judicial selection process over the last forty years[149] and emphasized the importance of the division of power between the branches of government.[150] To assist in the judicial appointment process, the Governor

---

[145] TENN. CODE ANN. § 17-4-113(a) (2009 Repl.).
[146] Tenn. Att'y Gen. Op. 13-76, 2013 WL 5669872, *3 (Oct. 9, 2013).
[147] *Id.* at *4.
[148] *Id.* at *5.
[149] Exec. Order No. 34 (Oct. 16, 2013), *available at* https://www.tn.gov/sos/pub/execorders/exec-orders-haslam34.pdf.) (noting that "for over forty years, Governors of the State of Tennessee have been assisted in their search for highly qualified judicial nominees by a commission composed of distinguished attorneys and laypersons").
[150] *Id.* (noting in the preamble that the Executive Order's purpose includes "sustain[ing] the third and equal branch of government and its continued operation").

appointed a new Commission, the Governor's Commission for Judicial Appointments (CJA), to "select" and "certify" the names of the three persons deemed "best and most qualified" to fill a judicial vacancy.[151] Existing JNC members were appointed to serve on the CJA, along with six additional members. Executive Order 34 detailed the process that the CJA would follow in making its recommendations to the Governor,[152] as well as the process the Governor would follow in making the appointment.[153] A subsequent Executive Order, No. 38, amended Executive Order 34 with regard to particularized circumstances.[154]

Executive Order 34 is commendable in its establishment of a transparent and orderly judicial selection process. The process was followed in the appointment of four appellate judges and numerous trial judges after the expiration of the JNC.[155] But any executive order is potentially fleeting. An executive order exists at the whim and with the mercy of the executive. Even with its positive aspects, Executive Order 34 left much uncertainty as to the future of Tennessee's judicial selection process.

When the 108th General Assembly convened in January 2014—the first General Assembly in decades to include a Republican supermajority—many hoped that the

---

[151] *Id.* at 4(j).
[152] *Id.* at (3), (4).
[153] *Id.* at (5).
[154] Exec. Order No. 38 (June 9, 2014) (providing for appointment without CJA nomination when trial court candidates, running for a vacated seat, have won primary elections and have no opposition in the general election and providing that the Governor may request the CJA to assist in filling vacancies on the Workers' Compensation Appeals Board), *available at* http://www.tn.gov/sos/pub/execorders/exec-orders-haslam38.pdf.
[155] *See* Appendix 1. *But see* text following note 171 *infra.*

legislature would debate and adopt a more permanent selection process for Tennessee's judges, but other than approving the second resolution (SJR 2) necessary to place Amendment 2 on the November 14 ballot, the legislature took no other action related to the selection, evaluation, or retention of Tennessee's judges.[156] This meant that most of the details about how Amendment 2's so-called Founding Father's Plan would work remained unknown. Amendment 2 clearly provided that judges would be appointed by the Governor, confirmed by the legislature, and retained by the voters,[157] but the remaining details of the selection and

---

[156] Senate Joint Resolution 2. As required by Article XI, Section 3, SJR 2 was the second resolution "entered" on the House and Senate journals. TENN. CONST. art. XI, § 3.

[157] The Amendment provided:

> 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

retention system was left entirely to legislative discretion by the amendment's provision that the authorized the legislature was authorized to "prescribe [the necessary] provisions" to carry out the amendment.[158]

But when the time came for the vote on Amendment 2, the legislature had not proscribed *any* provisions. No proposals set out the specifics of the selection and confirmation process; no legislative study group was tasked with seeking input or vetting options. Voters who went to the polls in November 2014 were being asked to give the legislature a proverbial blank check.

Among the blanks that the legislature had not filled were the particulars of the legislative confirmation process. For example, what percentages were required for the legislature to confirm a governor's judicial appointment? Would a simple majority of both houses confirm an appointment? What process would be followed if a nominee failed to acquire the required percentage in one house or both houses? Similar uncertainty remained about the public's retention vote. Would judges be retained in office if a majority of the voters cast "retain" votes, or would the legislature ultimately require a higher percentage, as some members had proposed in earlier legislation? Although Tennessee, and most retention states, generally required a simple majority for retention, the

---

> 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.

TENN. CONST. art. VI, Section 3 (2014).

[158] *Id.*

amendment arguably gave the legislature the authority to decide that issue.

What happened when a judicial vacancy occurred during legislative recess, often encompassing two-thirds of the year? Although the amendment imposed a time limit on legislative confirmation, the time period began to run on the "convening date of the next legislative session" for recess appointments. If a vacancy occurred in May, shortly after recess, would the legislature have until March of the following year to confirm the appointment?

The amount of uncertainty and ambiguity that surrounded the proposed amendment led one commentator to conclude that Tennesseans were being asked to "buy a pig in a poke."[159] But despite the many uncertainties and the wealth of unanswered question raised by Amendment 2's ambiguity, Tennessee presently had no mechanism for judicial selection. Was the passage of Amendment 2 the only way out of this calamity?

That was the clear message of many proponents. Governors, former governors, current and former legislators, judges, bar leaders, politicians and virtually everyone, it seemed, undaunted by the lack of detail, joined forces and funds to encourage the voters to approve the amendment.[160] Some Supreme Court justices joined in, combined their voices with those who had sought to oust

---

[159] Frank Cagle, "Pig in a Poke: There are no Rules in Place for Confirming Judges Under Amendment Two," METRO PULSE (Sept. 10, 2014), *available at* http://www.metropulse.com/stories/pig-in-a-poke-there-are-no-rules-in-place-for-confirming-judges-under-amendment-two).

[160] More than a million dollars was spent to advance the passage of Amendment 2 in November 2014.

them three months earlier,[161] and endorsed the amendment as the best selection and retention system for Tennessee.[162]

Those who supported Amendment 2 marketed the amendment in a number of clever ways. The most modest strategy was to characterize the amendment as simply constitutionalizing the Tennessee Plan.[163] That characterization was wrong in both of its assertions. Firstly, although often used as a stooge, the constitutionality of the Tennessee Plan had been resolved repeatedly since 1994.[164] Secondly, the selection process under Amendment 2 was not comparable to the selection, evaluation, and retention

---

[161] The concerted effort to remove three Tennessee Supreme Court justices failed, thankfully, but not until in excess of one million dollars was spent on advertising and marketing.

[162] Johnathan O. Steen, *I Say YES on 2*, 2014 TENN. BAR. J. 3 (Oct. 2014) (stating that "Amendment 2 is also strongly supported by leaders in the judiciary, including Chief Justice Sharon Lee and Justices Wade, Clark, Bivins and Kirby, and many other appellate and trial court judges."); *Newly Installed Tennessee Supreme Court Justice to Campaign for Constitutional Amendment*, THE REPUBLIC (Aug. 14, 2014) (referring to Justice Bivins who was not a target of the August 2014 ouster campaign).

[163] Former Governor Phil Bredesen and former U.S. Senator Fred Thompson co-wrote an editorial that stated that passing the amendment would "put an end to the questions [of constitutionality] and will help ensure we get the most qualified, diverse, fair and impartial judges that Tennesseans want and deserve." *Vote Yes on 2*, THE TENNESSEAN (April 29, 2014), *available at* http://www.tennessean.com/story/opinion/contributors/2014/04/29/vote-yes-best-path-judicial-selection/8427555/.

[164] *See supra* note 97.

process under the Tennessee Plan.[165] Amendment 2 replaced the Tennessee Plan's broad-based selection process with a purely political process. It eliminated entirely judicial performance evaluations, which were based on objective criteria and were intended to inform the electorate's vote. Amendment 2 gave the legislature the prerogative to apply its own criteria, including one based purely on politics.[166]

One of the most ironic deceptions used by some proponents was the assertion that passage of the amendment would "keep the influence of special interest money away from our judges and out of our state." Tennesseans had just witnessed the most expensive judicial race in the state's history waged by three justices fighting for retention, the very type of system that the Founding Fathers' Plan embraced.[167] Those claiming that retention

---

[165] *See supra* notes 27-65 and accompanying text.

[166] Some organizations that supported Amendment 2 claimed that they possessed additional information about the process the legislature ultimately would adopt. On its website, the Tennessee Bar Association, for example, asserted that "[a]s the Tennessee Judicial Selection Amendment *is expected to be implemented*, the system will give us a way to select the best possible candidate because the system will have independence; provide expert guidance; be made up of a diverse group; have transparency; be completely informed as to the qualifications of the candidates; be deliberate; and will result in a list of the best qualified candidates being recommended to the governor." http://www.tba.org/info/amendment-2-to-the-tennessee-constitution.

[167] According to the Justice at Stake the amount raised and spent neared two million dollars, with the justices raising more than one million, the Tennessee Forum investing almost half a million, and out-of-state groups including the

elections would inoculate against expensive campaigns waged by special interest groups were undoubtedly aware that special interest money had infiltrated many retention elections in recent years.[168]

But by far the most troubling aspects of this pro Amendment 2 marketing message was its adoption and assertion of an ultimatum: adopt the amendment or subject appellate judges to expensive, contested, popular elections. The assertion was based on the threat by some legislators to enact popular elections in the event the amendment failed. Their threat was premised on the same straw man, the indefensible assertion that the Tennessee Plan was unconstitutional. The validity of the assertion depended completely on the willingness—and the ability—of those legislators to make good on their threat. As commentators noted, this strategy constructed a disingenuous choice: pass Amendment 2 or succumb to popular judicial elections.[169]

Republican State Leadership and the State Government Leadership Foundation spending another quarter of a million dollars. http://www.justiceatstake.org/newsroom/press-releases16824/?tv_spending_surges_past_14_million_in_hardfought_tennessee_judicial_race&show=news&newsID=18890).

[168] *See supra* note 89.

[169] Judy Cornett, *Why I Oppose Proposed Amendment 2 to the Tennessee Constitution*, Presentation to Hamilton Burnett Chapter American Inns of Court (Aug. 18, 2014) (available in author's office) (noting that the "dichotomy between Amendment 2 and contested popular elections has been used to blackmail those who oppose contested popular elections into supporting a plan that gives the General Assembly unprecedented power in selecting appellate judges and contains no real safeguards against abuse of either the appointment power or the confirmation power.").

Despite the absence of details and the presence of deception, the Tennessee voters overwhelmingly approved Amendment 2, placing Tennessee in the majority of states who give the legislature a veto power over judicial appointments and with the majority of states who fail to provide voters with meaningful information to inform their retention votes. The following day, through another Executive Order, the Governor reaffirmed his commitment to a more precise judicial selection process.[170] Like the process outlined in the two previous Executive Orders, the judicial selection process under Executive Order 41 closely resembles the selection process under the Tennessee Plan.[171] But despite an acceptable nomination process, the gubernatorial appointments have not reflected the diversity accomplished by the Tennessee Plan, and the percentage of female judges and judges of color in Tennessee is steadily declining.

Additionally, as is true of all executive orders, Executive Order 41 is as easy to alter as it is to dissolve.[172]

---

[170] Executive Order 41 (Nov. 6, 2014), *available at* http://www.tn.gov/sos/pub/execorders/exec-orders-haslam41.pdf. Executive Order 41 established the Governor's Commission for Judicial Appointments (JAC), replacing the CJA (established by Executive Order 34). The JAC, which consists of 11 members, 8 of whom are required to be attorneys, nominates three persons deemed "best and most qualified" to fill judicial vacancies.

[171] Under Executive Order 41, the JAC accepts applications, conducts public interviews and hearings, and deliberates privately, before nominating the three "best and most qualified" persons to fill judicial vacancies.

[172] The power to issue executive orders is not addressed explicitly in either the Tennessee Constitution, statutes, or case law. Article III, Section 10 provides that governors "shall take care that the laws be faithfully executed," so

It clearly does not bind future governors or the General Assembly and, because of its transient nature, it does not actually even bind the current governor. [173]

V. Politics First

With the passage of Amendment 2, the public entrusted the General Assembly to complete the task of defining the details of judicial selection in Tennessee. Because of the general nature of Amendment 2, the passage of Amendment 2 gave the legislature virtually unchecked power to define the confirmation and retention process. But, ultimately, the General Assembly failed to complete the task and instead, became embroiled in a political struggle that once again put a premium on political power.

---

presumably, based upon that Section and the inherent power of the executive to enforce the law, Tennessee governors have regularly issued executive orders. For example, the Tennessee State Library and Archives, for example, has archived and microfilmed hundreds of executive orders dating back to 1953. *See* http://tenessee.gov/tsla/history/state/recordgroups/findingaids/rg95.pdf.

[173] The question whether a potential candidate, for example, could seek judicial enforcement of an executive order seems to be an open question in Tennessee although in other jurisdictions some scholars have suggested that a cause of action may be available to force compliance with an executive order. *See* Stephen Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO WASH. L. REV. 659, 664 (1987) (citing Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975) (suggesting that a cause of action exists when the order is authorized and evidences an intent, explicitly or implicitly, to create a private right of action)).

Senate Bill 1 was filed for introduction on November 5, 2014, before the 109th General Assembly convened. Senate Bill 1[174] created a 14-member "special, continuing committee of the General Assembly, (JCC),[175] which would investigate, interview, and vote on appointees, before filing a joint resolution recommending confirmation or rejection of the governor's judicial appointee. The JCC was required to convene "at least one" public "meeting" [176] and was allowed to conduct "additional interviews" with,

---

[174] S.B. 1, 109th Gen. Assem., Reg. Sess. (Tenn. 2014), *available at* http://www.capitol.tn.gov/Bills/109/Bill/SB0001.pdf.

[175] Section 9(b) of Senate Bill 1 provided that "[t]he political composition of the judicial confirmation committee shall reflect as nearly as possible the same ratio of members from each of the two (2) major political parties as the parties are represented in the respective houses." *Id.* § 9(b).

[176] Section 10(b)(1) provided that the JCC "shall convene at least one (1) meeting of the judicial confirmation committee." *Id.* § 10(b)(1). Although subsection (2) of Section 10(b) provided that "[a]ny citizen shall be entitled to attend the meeting and express in writing the citizen's approval of, or objections to, the governor's appointee," nothing specifies whether the appointee would also be in attendance. *Id.* § 10(b)(2). An additional uncertainty was raised by Section 10(b)(4)(A), which provided that "[a]fter one (1) public hearing, the judicial confirmation committee may hold such additional interviews with the appointee as it deems necessary. . . ." *Id.* § 10(b)(4)(A). It is unclear whether this "public hearing" is the same as or in addition to the "meeting," which the public is entitled to attend, referenced in Section 10(b)(1) & (2). *Compare Id. with Id.* §§ 10(b)(1), (2).

and independent investigations of, the appointee.[177] The members of the JCC, "with each house voting separately," would vote to determine whether the respective house confirmed or rejected the appointee[178] and then would file a joint resolution reflecting the recommendation, which would be voted on by the respective houses.[179]

Within days of convening, the Senate passed Senate Bill 1 on first and second reading and referred the bill to the Senate Judiciary Committee. Ultimately, the Senate passed an amended version of Senate Bill 1, which significantly altered the confirmation process and removed any provision for public input.[180] Under the amended version,

---

[177] Section 10(b)(4)(A) provided that the JCC "may make independent investigation and inquiry to determine the qualifications of the appointee for the judicial vacancy." *Id.* § 10(b)(4)(A). *See also Id.* § 10(b)(4)(B) (providing that the JCC may request that the Tennessee Bureau of investigation "perform appropriate financial and criminal background investigations and inquiries of a *prospective* appointee") (emphasis added). The use of the phrase "prospective appointee" presumably is intended to refer to the governor's appointee, which is the phrase used throughout the remainder of the legislation.

[178] Section 10(b)(1) provided that "[t]he judicial confirmation committee shall vote with each house voting separately and shall determine by a majority vote of the committee members of that house present and voting whether that house recommends confirmation or rejection of the governor's appointee." *Id.* § 10(b)(1).

[179] Section 10(c)(1) provided that a member of the JCC of each house "shall file a joint resolution reflecting the recommendation of the member's house." *Id.* § 10(c)(1).

[180] The amended legislation allowed the "chair of any standing committee of the general assembly to which a notice of appointment . . . [was] referred" to request an

the General Assembly was required to meet in joint session for the purpose of voting either to confirm or reject the appointee, who was required to receive a majority vote from both houses to be confirmed.[181]

The House version of the bill, House Bill 142, generated a series of amendments, also impacting the confirmation process. Multiple House amendments offered various mechanisms for tabulating the votes of each house,[182] with the common theme being to secure House

---

investigation or, "in accordance with the rules of the applicable house[, to] conduct a hearing, vote to recommend confirmation or rejection of the appointee, and submit a written report of the action taken. . . ." S.B. 1, 109th Gen. Assem., Reg. Sess. (Tenn. 2014), *amended by* by S.A. 435 §§ 10(b), (c), 109th Gen. Assem., Reg. Sess. (Tenn. 2014) *available at* http://www.capitol.tn.gov/Bills/109/Amend/SA0435.pdf. Amendment 2 also created a separate Trial Court Vacancy Commission, consisting of ten legislators and one attorney, created to submit nominees for trial court vacancies to the governor. *Id.* § 17.

[181] Section 10(d) of Senate Bill 1, as amended by Amendment 2, provided that "[t]he governor's appointee shall be confirmed if both houses vote to confirm the appointee by a majority of all the members to which each house is entitled. . . ." *Id.* § 10(d).

[182] House Amendment 2 to House Bill 142, referred to as House Amendment 452, provided that the votes of each house would be tabulated separately and that confirmation would occur if an appointee received a majority vote from both houses. H.B. 142, 109th Gen. Assem., Reg. Sess. (Tenn. 2014), *amended by* H.A. 452, 109th Gen. Assem., Reg. Sess. (Tenn. 2014) *available at* http://www.capitol.tn.gov/Bills/109/Amend/HA0452.pdf. Amendments 3 and 4 (House Amendments 470 and 482) created tabulation systems by which each house member's vote equaled one

supremacy. The version eventually adopted by the House did so, by providing that confirmation or rejection would be determined by a majority vote of the general assembly meeting in joint session.[183] Unsurprisingly, the Senate

---

point, while each senator's vote equaled three points. *See* H.B. 142, 109th Gen. Assem., Reg. Sess. (Tenn. 2014), *amended by* H.A. 470, 109th Gen. Assem., Reg. Sess. (Tenn. 2014) *available at* http://www.capitol.tn.gov/Bills/109/Amend/HA0470.pdf; H.B. 142, 109th Gen. Assem., Reg. Sess. (Tenn. 2014), *amended by* H.A. 482, 109th Gen. Assem., Reg. Sess. (Tenn. 2014) *available at* http://www.capitol.tn.gov/Bills/109/Amend/HA0482.pdf. "A tabulation of one hundred (100) points to "confirm" result[ed] in the appointee being confirmed by the general assembly. *Id.*

[183] The House adopted Amendments 6 and 7. Amendment 6 (House Amendment 519) provided that "[a] majority of votes, to which the general assembly is entitled, cast in the affirmative shall confirm the appointee." H.B. 142, 109th Gen. Assem., Reg. Sess. (Tenn. 2014), *amended by* H.A. 519, 109th Gen. Assem., Reg. Sess. (Tenn. 2014) *available at* http://www.capitol.tn.gov/Bills/109/Amend/HA0519.pdf Amendment 7 (House Amendment 520) altered the language of Senate Amendment 2. *Compare* H.B. 142, 109th Gen. Assem., Reg. Sess. (Tenn. 2014), *amended by* H.A. 520, 109th Gen. Assem., Reg. Sess. (Tenn. 2014) *available at* http://www.capitol.tn.gov/Bills/109/Amend/HA0520.pdf *with supra* note 182. By authorizing the standing committee to which a notice of appointment has been referred, rather than the chair of the committee, to conduct a hearing, vote to recommend or reject, and submit a written report on the appointee. H.B. 142, 109th Gen. Assem., Reg. Sess. (Tenn. 2014), *amended by* H.A. 520, 109th Gen. Assem., Reg. Sess. (Tenn. 2014) *available at* http://www.capitol.tn.gov/Bills/109/Amend/HA0520.pdf

rejected the House's approach and the House refused to recede.[184] A report generated by the Senate Conference Committee failed to receive a majority vote, leaving the state with nothing but Executive Order 41 to define the details of its judicial selection, confirmation, and retention process.

VI. Conclusion

When the 109th General Assembly convened on January 13, 2015, the legislators, like their frontier ancestors, had the power to control, in large part, the composition and, thus, the quality of Tennessee's appellate bench. With the adoption of Amendment 2, the public entrusted the legislature with the most essential task of designing a confirmation process that would assure a high-quality appellate judiciary and a retention process that would allow meaningful voter input. But rather than complete the task, and despite the fact that a single party controlled both houses,[185] the House and Senate engaged in an intra-party squabble and, in the end, promoted political dominance over public trust on a matter of extreme importance.

If we as Tennesseans value a fair and independent judiciary, if we truly desire to "keep the influence . . . away

---

[184] The House and Senate Conference Committee recommended that the House Amendments 6 and 7, *supra* note 183, be deleted.

[185] In 2014, Tennessee Republicans expanded the supermajorities in both the House and the Senate, holding a 28-5 majority in the Senate and a 73-26 majority in the House. The supermajority was acquired in November 2012, making the 108th General Assembly the first since the 90th General Assembly to have both houses controlled by one party.

from our judges and out of our state," then we must demand that our General Assembly take seriously the trust we have placed in them with our adoption of Amendment 2. We must require that they adopt a confirmation process that includes public input and maintains the judiciary as a separate and independent branch of government as well as a retention process that provides a meaningful basis upon which voters may exercise their right to vote. Otherwise, we too will suffer the tyranny that befalls those governments in which all government power is concentrated in the same hands.