

JUDICIAL SELECTION

TN League of Women Voters

POSITION: The League supports retention of the Tennessee Plan, the merit-based process for selection and retention of judges at the appellate level, or its equivalent.ⁱ A merit-based process best promotes a fair, competent, and impartial appellate bench and enhances respect for our court system.

THE TENNESSEE PLAN is a merit selection process. When a vacancy on the intermediate appellate courts or the Supreme Court occurs, a 17-member judicial selection commission selects three nominees for the judgeship for consideration by the Governor, who then selects one of the three. The Governor may request a second list of names from which to select. Once appointed, the judge then holds office until the next general election, when his/her name appears on the ballot for a vote to retain or reject the nominee. This is known as a retention election. If the nominee is rejected by the qualified voters of the state, the nominating process starts over. If the nominee is accepted, he/she serves the remainder of an eight (8) year term. Then, before the end of his/her term, a 12-member judicial evaluation commission publishes an evaluation of the judge.ⁱⁱ If the evaluation commission recommends that the public retain the judge, then he/she runs in a retention election. If the evaluation commission does not recommend retention, then the general election laws apply and the judge must run in a contested, partisan election.

STATUS OF TENNESSEE PLAN: The Plan originally was to sunset in June 2007, but was extended for one year until June 2008. As no legislative action was taken by June 2008, the Judicial Selection Commission and the Judicial Evaluation Commission expired under the sunset provision. Both entities are currently operating in the statutory one year wind-down period with full authority until June 2009. Unless legislative action is taken *by or before June 2009*, the Tennessee Plan will cease operations and the process for selecting, evaluating, and retaining appellate level judges will be unclear and subject to debate. Not only do commentators disagree as to whether, under such circumstances, there would be any proper statutory basis for filling vacancies, but there appears to be agreement that there would be *no legal process* within the State of Tennessee for filling interim vacancies (with respect to unexpired terms). Such legislative gaps and uncertainty would risk both substantial disruptions to the judicial appeals process and further litigation.

MERITS OF TENNESSEE PLAN

The TN Plan was originally adopted in 1971 with bi-partisan support to secure a highly qualified, nonpolitical appellate bench. As amended from time to time, it has operated effectively for almost four decades in achieving its goals.ⁱⁱⁱ

1. *Merit* – the Tennessee Plan provides for an extensive screening process, including lengthy application processes, public meetings on candidates qualifications, and investigations and interviews with applicants. It also provides for an extensive evaluation process of judicial performance to enable voters to make informed decisions in retention elections. Merit selection tends to enhance the professional qualifications of the appellate bench (in studies from other jurisdictions, judges who were found to be very poor performing judges and/or who were disciplined or removed from office were more frequently elected judges than merit-selected judges^{iv}).

2. *Independence* – Judicial independence is the foundation of our legal system, which is based on the principle that all who come before the court will be heard in a fair and impartial manner. As John Adams stated, "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit." Independent judges are able to act impartially and to make decisions consistent with the rule of law without concern for the day-to-day whims of politics or public opinion. Judicial independence also promotes our constitutional principles of separation of powers and serves to protect individual liberties and to ensure that minority rights are protected against popular or powerful interests. In an interview in September 2008, Associate Justice Antonin Scalia, when asked whether there was a role for politics in our judicial system answered, "None whatsoever. The absolute worst violation of the judge's oath is to decide a case based on a partisan political or philosophical basis, rather than what the law requires."^v Contested judicial elections nationwide are becoming increasingly expensive, with negative advertising and attacks on unpopular judicial decisions on the rise. Candidates increasingly are called upon to describe their political views on controversial issues without regard to the facts or law of particular cases.^{vi} Under the merit-selection-retention process of the Tennessee Plan, contested partisan elections are virtually eliminated for appellate judgeships. The Tennessee Plan promotes independence, fairness, and impartiality of appellate judges by limiting partisan politics from appellate selection and retention. Under the plan, appellate court judges are not required to raise money, seek party support or campaign for appellate office. The perception that judges may be influenced by partisan politics, and the attendant financial donations, thus is avoided. In this way, public confidence in the integrity of the courts system as fair and impartial is enhanced.
3. *Promotes Racial, Ethnic and Gender Diversity* – A merit selection process tends to enhance opportunities for selecting a more diverse group of judges. In Tennessee and nationwide, appointive systems have the potential for promoting more diversity on the appellate bench than systems with only elections.

The Tennessee Plan is a proven process for selecting and retaining appellate judges that balances the principals of ensuring that judges serving lengthy terms were chosen based upon professional merit with an evaluation and retention election process that holds appellate judges accountable to the voters of Tennessee.

THE TENNESSEE PLAN IS CONSTITUTIONAL

Courts are responsible for interpreting our federal and state constitutions and laws. The Tennessee Supreme Court has held (and subsequently reaffirmed) that the Tennessee Plan is constitutional. A federal district court also has acknowledged that the Tennessee Plan was held to be constitutional. While opponents of the Tennessee Plan note that the Tennessee Constitution provides for the election of judges, the Tennessee Constitution also grants the Legislature the power and discretion to design the manner in which judges will be selected and retained. Courts have held that the Tennessee Legislature was acting within its constitutional powers in adopting and maintaining the Tennessee Plan as the method for nominating, selecting, and retaining appellate judges.

The Judicial Independence Project of the LWVEF has been ongoing since 2001. For additional information on the importance of judicial independence and merit-based processes of selection, visit www.lwv.org. For additional resources, visit the website of the American Bar Association Standing Committee on Judicial Independence at www.abanet.org/judind/home.html; the American Judicature Society website at www.judicialselection.us and Citizens for Independent Courts at www.faircourts.org

Preserving a merit-based selection and retention process for appellate judges is in the best interest of the citizens of Tennessee.

ⁱ The Tennessee Plan, as discussed here, relates to the selection, evaluation, and retention of appellate level judges *only*. Trial court judges in Tennessee run in contested, partisan elections. The retention or expiration of the Tennessee Plan, therefore, would not change or affect the state-wide process of electing trial judges by contested elections.

ⁱⁱ Judicial performance is evaluated based upon integrity; knowledge and understanding of the law; ability to communicate; preparation and attentiveness; and service to the profession and the public; and effectiveness in working with other judges and court personnel. Tenn. Sup. Ct. R. 27 §3.01.

ⁱⁱⁱ Those original goals, as enacted in May 1971, included, among others: i) selecting the best qualified persons; ii) assisting voters of Tennessee to elect the best qualified persons; iii) enhancing judicial independence by insulating appellate judges from undue political influence and pressure; iv) improving the administration of justice; and v) enhancing the prestige and respect for the appellate courts. *See* 1971 Tenn. Pub. Acts 510, later codified as Tenn. Code Ann. §17-701 (Supp. 1976) The 1994 amendment to the Tennessee Plan required members of the two commissions to reflect racial and gender composition in an effort to enhance the diversity of the group of judges selected for the appellate bench. *See* Tenn. Code Ann., §17-4-102(b),(d)(2007).

^{iv} *See* Vol. 75 Tennessee Law Review 501, 538, n. 243(2008) (summarizing studies based upon the discipline of judges within the New York City's Courts from 1977 to 2002, a review of discipline rates by the California Commission on Judicial Performance for years 1990 to 1999, and the Florida Bar's review of removal and discipline of judges over several decades.)

^v Parade magazine, Sept 14, 2008, page 9. Interview by Lyric Wallwork Winik

^{vi} *See* Vol. 75 Tennessee Law Review 501, 541 (2008).