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Legislators file 20 bills in ongoing judicial selection dispute

In 16½ weeks, unless both houses act to save it, Tennessee's judicial selection system will cease to exist.

Legal authorities disagree on whether this would automatically restore popular election of appellate judges. The question would have to be resolved by the courts.

While some lawmakers — most of them Republicans — would welcome a return to selection by the voters, the legal community sees this outcome as a calamity of the first order. Judges would have to raise money for campaigns, and in the main the funds would come from trial lawyers, business interests, and other parties affected by the rulings the judges make. Some of the contributors likely would have cases already on appeal.

Allan Ramsaur, executive director of the Tennessee Bar Association, told the House Civil Practice Subcommittee last week that elections would be “expensive, corrosive, and not conducive to promoting public trust and confidence in the judicial system.”

There is no shortage of plans to address the issue. Twenty bills have been filed, offering such ideas as Senate confirmation of court appointees, a 60% election threshold for retention of appellate judges, and a commission to rate judges as qualified or not qualified rather than submit nominees to the governor.

Legislators also propose variously to enlarge the Judicial Selection Commission from 17 members to 18, drop it to 15, shrink it to 11, and slash it to four.

The key player in the controversy is Lt. Gov. Ron Ramsey (R-Blountville), who offered a compromise last year that didn't fly but which now forms the basis of legislation backed by the bar association.

Currently, trial judges run for election, though vacancies between elections are filled by appointment of the governor from names submitted by the selection commission. But an intermediate appellate judge or justice of the Supreme Court — appointed by the governor from slates submitted by the selection commission — faces a contested election only if the Judicial Evaluation Commission recommends against his or her retention. In such a situation, the judge probably wouldn't run anyway.

Otherwise, the judges are subject to a yes-or-no retention referendum every eight years.

Under the state's sunset law, both the selection commission and the evaluation commission were up for renewal last year. Ordinarily, such extensions are routine. But the selection commission and Gov. Phil Bredesen had feuded for a few years, with Bredesen successfully suing the commission in one dispute, and the governor wanted to reform the commission before it was renewed.

The members are appointed by the House and Senate speakers, who for the most part are required to choose from names submitted by various legal groups, including the bar, the trial lawyers lobby, district attorneys, and so forth. Ramsey had his own idea about reform, believing the speakers should be allowed to appoint whomever they wish. Rep. Jimmy Naifeh (D-Covington), then the House speaker, argued against changing the system.

So the issue wasn't resolved, and both commissions technically expired last June 30 and entered a one-year “wind-down” phase. If something isn't worked out by this June 30, they're out of business.

Bredesen. The governor is committed to preserving the selection system. An administration bill addresses his two main concerns: forcing the commission to deliberate in open meetings about the three nominees they pick and allowing the governor to request a second slate of nominees without rejecting the first.

Under present law, the commission screens all applicants and submits three names to the governor, who can get a second slate of three only if he rejects the first slate. To do so, he must state a reason.

The bar association bill, sponsored by House Judiciary Chairman Kent Coleman (D-Murfreesboro) and Sen. Doug Overbey (R-Maryville), also gives the governor the right to ask for three additional names without rejecting the original three. It provides for the speakers, in making appointments to the commission, to receive recommendations from at least eight different legal associations. But the speakers wouldn't be bound by them. Twelve to 14 of the members would have to be lawyers, and three to five would be non-lawyers.

Controversy. While the Supreme Court has upheld retention elections, not everyone is convinced they meet the state constitution's requirement that judges be "elected by the qualified voters of the state."

Others have complained that the law, giving various legal associations control over most of the speakers' appointments, is weighted too heavily in favor of the plaintiff bar. This has been a recurring theme for Ramsey, who believes it results in the appointment of liberal judges.

Business interests see revising the makeup of the commission as an important step. But there is another undercurrent to the controversy not so easily dealt with by reform. As with the appointment of federal judges, abortion rights are a concern to both the right and left.

Pro-life groups were incensed by the Tennessee Supreme Court's 4-1 ruling in 2000 that the state constitution — which says nothing directly on the subject — implicitly affords greater protection of abortion rights than the U.S. Supreme Court has found in the federal Constitution. The selection commission probably doesn't ask applicants their constitutional view of abortion, but candidates in a statewide election certainly would be asked.

What if? Last week, the House Civil Practice Subcommittee considered what will happen if the two commissions in wind-down are allowed to dissolve with no legislation enacted.

Brian Fitzpatrick, an assistant law professor at Vanderbilt University, told the panel he believes appellate judges could no longer be appointed and would have to obtain their posts through contested elections. But after their initial election, appellate judges would continue to be in retention elections even with the evaluation commission abolished. That's because the law states the judges shall run in retention referendums unless the evaluation commission makes a specific recommendation against retention. The commission obviously can't make such a recommendation if it doesn't exist, so every appellate judge would be eligible for a retention election.

In arguing the state would return to contested elections for the initial selection of appellate judges, Fitzpatrick contended provisions of the previous law on popular election were repealed only insofar as they conflicted with the replacement system. With conflicts gone, they come back.

Ramsaur said the bar association disagrees. Its position is that the old provisions in effect were deleted and that no system for selecting appellate judges would be in place without legislative action.

Talks. Judicial selection is one of several major issues likely to be resolved in behind-the-scenes discussions. Because saving it is the top priority of the legal establishment, something may be worked out.

But foes of the current system have an important advantage: They win if nothing is done. Proponents need affirmative action by both houses or the plan goes up in smoke. The issue likely will simmer for a few weeks before anything is done. With the key player now a candidate for governor, advocates for renewal must tread carefully.

Stimulus runs full steam ahead in state

After considering turning down \$141 million in federal stimulus money for expanding unemployment benefits, Gov. Phil Bredesen appeared headed toward acceptance of the funds this week.

Administration officials first feared employers would get stuck with greater costs than they could afford when the money runs out in two years, but they decided the money might help stabilize the current situation, in which the Unemployment Trust Fund is going broke, and overall be a good deal. Bredesen told reporters Wednesday he believed "we're going to be able to use it fine." The governor's initial caution in the matter drew national attention and some criticism from Democratic legislators.

Up and down. It first appeared the state would get about \$4.3 billion over two years in stimulus funds. That was revised to \$3.8 billion after state officials determined the original estimate was based on a Medicaid growth rate much higher than Tennessee's. This week the total was back up, to \$4.5 billion, largely because of a clarification concerning \$608 million in food stamp benefits.

Especially helpful for state budgeting is \$1.1 billion in extra federal funds for TennCare. This frees up state dollars that can be used not only to avoid cuts in the TennCare program, but in other areas of government.

The governor plans to present the budget no earlier than March 23 and not later than March 30.

The budget will make recurring reductions in the \$1 billion range as originally planned. Then it will show a non-recurring, partial restoration of much of the sum. The plan is to use the temporary funds to cushion a gradual, recurring reduction into the 2011-12 budget, with the expectation that some revenue growth over the next couple of years also will help. Bredesen's goal is for his successor to be able to balance recurring expenditures with recurring revenues.

Projects. Ten bridge projects were approved this week. In all, the state has \$572 million in stimulus funds for road and bridge construction. It has \$900 million or more of projects that are ready to go.

The administration plans to issue bonds for some of the projects to free up cash for dealing with immediate budget problems. Republican senators have raised concerns about this, though Transportation Commissioner Gerald Nicely may have eased them a bit Wednesday when he told the Senate Finance Committee the administration no longer intends to use bonds that pledge future federal revenues. Deputy Governor John Morgan, the former comptroller, suggested general obligation bonds instead, Nicely said. GO bonds sell at a lower interest rate.

Senate Finance Chairman Randy McNally (R-Oak Ridge) raised the possibility of a "Katrina effect" from the massive stimulus for construction that would result in higher costs because of labor and material shortages. Nicely said he believes "we have the capacity to handle it" because contract work and employment are down.

● Chattanooga Mayor Ron Littlefield won a second four-year term Tuesday, winning 57% of the vote to avoid a runoff as he defeated his only serious opponent, Rob Healy, 10,234 to 7,186.

● A bill by Rep. Hank Fincher (D-Cookeville) to require Tennessee restaurants to pay tipped employees at least \$3.28 an hour — instead of the \$2.13 required under current federal law — failed in the House Employee Affairs Subcommittee Wednesday on a tie vote,

with three Democrats voting yes, three Republicans no.

● Dortch Oldham, a Republican candidate for governor in 1974 who later served as state party chairman, died at his Nashville home Feb. 26. The retired Southwestern Co. president was 89.

● The Tennessee chapter of the ACLU and five journalism associations filed a friend of the court brief Tuesday with the state Court of Appeals supporting a prison reform advocate who is seeking

records from Corrections Corporation of America. The brief urges the court to uphold a July ruling by Nashville Chancellor Claudia Bonnyman that the requested documents are covered by the Tennessee Public Records Act.

● Cooley Public Strategies, a wholly owned subsidiary of McNeely Pigott & Fox, will spin off from the firm April 1. The principal, former deputy governor Dave Cooley, will operate out of offices in Nashville and Montgomery, Ala.

Political roundup

Ramsey forms exploratory committee

Lt. Gov. Ron Ramsey this week formed an exploratory committee and became the fourth Republican to enter the 2010 gubernatorial race. Last Friday night, at the Greene County Lincoln Day dinner, he announced his intention to run.

The other three candidates were present at the dinner — Knoxville Mayor Bill Haslam, U.S. Rep. Zach Wamp of Chattanooga, and Memphis District Attorney Bill Gibbons. Ramsey is expected to kick off his campaign formally at the end of the legislative session.

As a sitting legislator, he cannot raise money for his campaign until this year's session ends or June 1. But he felt he had to signal his intention because Haslam has been aggressively raising money and enlisting supporters. The mayor took in \$1.4 million at a single event Jan. 29.

Washington-based political consultant Brad Todd, a former Tennessee Republican Party executive director, at this point is volunteering for the exploratory committee, which has a website: www.TeamRonRamsey.com.

Two Democrats are running: former state House majority leader Kim McMillan of Clarksville and Nashville businessman Ward Cammack. Several others, including Jackson businessman Mike McWherter and former state party chairman Doug Horne, are considering a bid.

Persona non grata. House Speaker Kent Williams (?-Butler) was kept out of a Republican Caucus meeting Wednesday by caucus leaders. Williams was declared by state GOP Chairman Robin Smith on Feb. 9 to be not a "bona fide" Republican. Such a declaration prohibits him by state law from running for election as a Republican. He'll have to seek reelection as an independent but in the meantime considers himself still a Republican. The caucus hasn't voted to kick him out, and Williams believes only 12 or 13 members would vote to do so.

Democrats vent. House Democrats didn't bar any members from attending their meeting Monday evening, but no staff members or guests were allowed. The caucus aired out concerns about comments by Democratic Leader Gary Odom of Nashville in *The Memphis Flyer* denigrating former speaker Jimmy Naifeh's role in getting Williams elected speaker over Republican Leader Jason Mumfower of Bristol. Members said they put the matter behind them and were moving on.

Bredesen stays put. As he forecast, Gov. Phil Bredesen didn't receive President Obama's appointment as Health and Human Services secretary — much to the disappointment of Lt. Gov. Ramsey, who would have become governor. The job went to Kansas Gov. Kathleen Sebelius, for whom Bredesen had expressed admiration long before either was considered for the post. A former Tennessean, Nancy-Ann Min DeParle, was named the White House's health care reform czar. She served as commissioner of the Department of Human Services under Gov. Ned McWherter and later headed the Health Care Financing Administration under President Clinton.

Commissioners. The Senate passed Thursday a bill by Sen. Doug Overbey (R-Maryville) to make it clear that county commissioners can serve on boards that county commissions appoint. It's on Tuesday's House State and Local Government Committee agenda. A law passed last year in response to a Knox County controversy revised procedures for filling vacancies in county offices such as trustee and county clerk. But it's been interpreted to apply to anything from a beer board to a beautification commission. Sen. Tim Burchett (R-Knoxville), who sponsored the 2008 law, said the broader interpretation was what he intended. Burchett and Sen. Jamie Woodson (R-Knoxville) were the only senators to vote against Overbey's bill.

Ethics comeback. The Tennessee Ethics Commission, which hasn't met this year because its membership is short of a quorum, likely will be back at full strength next week. Two appointees of Gov. Phil Bredesen — former Jackson mayor Charles Farmer and Knoxville lawyer John King, a former state revenue commissioner — are scheduled for confirmation votes Monday evening in both houses. They'll undergo ethics training Monday afternoon to be available for a scheduled commission meeting Tuesday. If the houses suspend their rules to speed up the process, they could also confirm Monday the sixth member, Chattanooga lawyer Nathaniel Goggans, who was named by Lt. Gov. Ron Ramsey from a list provided by the Senate Republican Caucus. Goggans, 31, practices with Chambliss, Bahner & Stophel.

The current three members are Chairman Larry Brown, a retired FedEx executive, and Nashville attorneys Linda Knight and Dianne Neal. Assuming Farmer, King, and Goggans are confirmed, all six members of the commission will be lawyers. Until December, there were two non-lawyers, Tom Garland and Ben Purser.

Tennessee Notes & Quotes

■ The Metro Nashville Board of Health voted 4-1 Thursday to require chain restaurants to display the calorie content of their menu items starting March 31 of next year. What Nashville is imposing by rule, Gov. **Phil Bredesen** wants to establish statewide by statute. The Tennessee Healthful Menu Act (HB 2319/SB 2314), would apply to any Tennessee restaurant, beginning Jan. 1, 2010, that is part of a chain of 20 or more restaurants, regardless of whether or how many of the others are in the state. The Nashville rule affects chains of 15 or more. A federal proposal, the Labeling Education and Nutrition Act (LEAN), is now before Congress.

■ Hmm. So the federal proposal is LEAN, and the governor's bill is THM? He probably should have called it the Tennessee Helpful Information on Nutrition Act (THIN). Either that or the Forced Restaurant Information Guaranteed to Horrify Tennesseans Act (FRIGHT).

■ The governor's package of 97 bills also includes one to eliminate a tax exemption for family-owned rental properties — a move the Department of Revenue believes would yield the state an extra \$25 million or so. Last year, a late-session effort to repeal the tax break for family-owned non-corporate entities (FONCE) failed. Many legislators, including Lt. Gov. **Ron Ramsey** (R-Blountville), have expressed opposition to the measure, terming it a tax hike.

■ Nashville's WTVF-Channel 5 reported Thursday, in an entertaining story, that among out-of-state investors avoiding taxes under the FONCE provision is **Sam Zherka**, described as a New York strip club "king" who owns \$55 million worth of property in Middle Tennessee.

■ The Senate Transportation Committee approved unanimously Tuesday a bill designating a stretch of U.S. 70 in Warren County the "**Jerry Cooper** Highway" in honor of the former state senator from Morrison, who is ineligible to run for public office as long as a \$120,000 fine by the Registry of Election Finance is unpaid. Cooper, 60, served in the legislature for 23 years before resigning in December 2007 after the registry fined him for converting \$95,000 in a campaign account to personal use. He is paying off the fine in chunks and owes \$80,000. The highway bill was requested by the Warren County Commission.

■ Sen. **Paul Stanley** (R-Germantown) is no longer employed by the Stanford Group, the Houston-based investment firm whose assets have been frozen amid a federal investigation into an alleged fraud scheme. Stanley, who has not been accused of wrongdoing, says he got his last paycheck Jan. 15 and doesn't expect another.

■ **Zoyl Jones**, president of the Tennessee State Employees Association, quit his government job this week following a demotion by the Department of Correction and a vote by the TSEA executive board to suspend him as association president. The department demoted him from a \$63,204 job as director of classification to a \$45,888 position as a counselor at the Tennessee Prison for Women, charging that he had billed both the state and TSEA for \$2,770 in travel expenses. In a Feb. 17 letter to

Jones, Commissioner **George Little** said the department also had reported the matter to the district attorney's office. Jones, who was three years short of being eligible for full retirement, can receive a reduced state pension because he has more than 25 years of service.

■ Former state representative **Zane Whitson** of Unicoi died Tuesday in Johnson City Medical Center. He was a former high school basketball coach and Unicoi County industrial recruiter. Whitson, 75, was a Republican member of the House for 24 years. After losing the 2002 primary, he worked as a lobbyist.

■ "Obama's popular, but so are racist jokes." — *Page-one headline in The Tennessean Wednesday for a story on a statewide poll taken by Middle Tennessee State University. The poll found that roughly 16% of Tennesseans had told a joke "about Barack Obama's race." About the same percentage said they found such jokes funny.*

■ Gov. **Phil Bredesen's** approval rating in the poll, conducted in February, was 52%, down from 58% last fall and far below the 72% he enjoyed in spring 2004. Obama's approval rating was 53%. Of course, if 16% is the benchmark for popularity, both the president and the governor are doing fabulously. So is the state legislature at 34%.

■ At the request of Rep. **Eddie Bass** (D-Pulaski), the sponsor, the House Judiciary Committee deferred action Wednesday on a bill making gun permit records confidential. Bass is considering changing a controversial feature criminalizing the publication of such records to allow instead any permit holder who claims harm from such publication to file a civil lawsuit.

■ The *Chattanooga Times Free Press* reported this week that 34 of the legislature's 132 members hold gun-carry permits, according to Department of Safety records. This doesn't include at least five current or former law enforcement officers who can legally carry guns. The party breakdown is 22 Republicans, 12 Democrats.

■ "I want to be there if they do have a vote. I'd want to vote for myself. I've done that before." — *House Speaker Kent Williams, to The Knoxville News-Sentinel, on a possible GOP Caucus vote on whether to kick him out.*

■ Because Republicans now hold a majority in the General Assembly, county election commissions by law will become majority-Republican in April. But the State Election Commission, whose members were elected to four-year terms last year, isn't due to shift until 2012. A bill by Senate Majority Leader **Mark Norris** (R-Collierville) would temporarily add two Republicans to the commission, giving them a 4-3 majority until 2012. The Senate State and Local Government Committee approved the bill 9-0 Tuesday, with Democrats going along. But on the Senate floor Thursday a vote was postponed after questions were raised about per diem costs and technical issues.

■ "I'm interested in knowing, have you thought about just buying out one of the Democratic members?" — *Senate Democratic Leader Jim Kyle, to Norris.*