

# Sunsetting the Tennessee Judicial Nominating Commission: What Now?

*By Brian T. Fitzpatrick*



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## ADDITIONAL INFORMATION FOR ALTERNATIVE POINTS OF VIEW ON THE TOPIC

- Jacqueline Dixon, President, Tennessee Bar Association, *Speak Out on Behalf of Our Judicial System*, <http://www.tba.org/journal/speak-out-on-behalf-of-our-judicial-system>.
- Editorial, *Legislature must fix mess it made for judicial branch*, KNOXVILLE NEWS SENTINEL, May 31, 2013, <http://www.knoxnews.com/news/2013/may/31/editorial-legislature-must-fix-mess-it-made-for/>.
- Tennessee Bar Association, *Judicial Selection Bill Fails in Final Days of Session*, April 22, 2013, <http://www.tba.org/node/58237/>.

## ABOUT THE AUTHOR

Brian T. Fitzpatrick is a Professor of Law at Vanderbilt University, where his research focuses on class action litigation, federal courts, judicial selection, and constitutional law.

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# Sunsetting the Tennessee Judicial Nominating Commission: What Now?

**Brian T. Fitzpatrick**

## Introduction

The text of the Tennessee Constitution states all judges “shall be elected by the qualified voters of the state.”<sup>1</sup> Despite the unambiguous text calling for elections, two special Tennessee Supreme Courts have ruled that Tennessee’s judges can be selected by a system of appointment set forth only in statutes<sup>2</sup> and known as the “Missouri Plan.” Putting to the side the question whether Tennessee’s Missouri Plan statutes are constitutional (a question which I have answered elsewhere in the negative<sup>3</sup>), the purpose of this paper is to examine the impact of recent statutory changes on the existing system.

The existing system charges the governor with appointing new judges to the bench, but the governor is permitted to do so only from nominations sent to him by a small commission of individuals, mostly lawyers, known as the Judicial Nominating Commission.<sup>4</sup> After decades of public debate, the legislature decided, with the support of opponents of the current system, to permit the Judicial Nominating Commission to expire at the end of this month.<sup>5</sup> Some commentators have wondered whether it will be possible to select new judges once the commission expires, at least until voters decide in November 2014 whether to adopt a constitutional amendment implementing for Tennessee a system like

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1 TENN. CONST. art. VI, § 3; *see also* TENN. CONST. art. VI, § 4 (“The Judges of the Circuit and Chancery Courts, and of other Inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned.”).

2 *See* State *ex rel.* Higgins v. Dunn, 496 S.W.2d 480 (Tenn. 1973); State *ex rel.* Hooker v. Thompson, 249 S.W.3d 331 (Tenn. 1996).

3 *See* Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008); Brian T. Fitzpatrick, *Errors, Omissions, and Tennessee Plan*, 39 U. MEM. L. REV. 85 (2008).

4 *See* TENN. CODE ANN. § 17-4-102.

5 *See* Sheila Burke, *Legislature leaves open question about judges*, KNOXVILLE NEWS SENTINEL, May 1, 2013.

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the one set forth in the U.S. Constitution.<sup>6</sup> I conclude that Tennessee’s judicial appointment statutes have been amended over the years to permit the governor to select judges on his own if there is no commission to send him nominations. In other words, there will be no interruption in the provision of justice in Tennessee.

## I. THE JUDICIAL NOMINATING COMMISSION

The Judicial Nominating Commission is used to initially select all appellate judges, including Supreme Court Justices, and to fill interim vacancies on both the trial and appellate courts.<sup>7</sup> Every time an appellate judge leaves his or her position at the end of a term and a new judge must be placed on the court, the commission submits three names to the governor, and the governor must appoint one of the names on the list or request another list of three names.<sup>8</sup> If the governor requests another list of three names, the governor is required to pick from one of the six names.<sup>9</sup> The same process is used to fill interim vacancies on the trial and appellate courts, but, with respect to the trial courts, the governor cannot reject the first list of names.<sup>10</sup>

The commission has been very controversial for many years, and has remained controversial even after the special Tennessee Supreme Court rulings that have upheld much (but not all) of its work. At the end of the last legislative session, the Tennessee Legislature finally decided to permit the commission to expire at the end of June.<sup>11</sup> But the legislature did not change the underlying laws that make use of the commission. Instead, the legislature sent to the voters a constitutional amendment that will replace Tennessee’s current system for selecting judges with one that more closely resembles the method of selection set forth in the U.S. Constitution.<sup>12</sup> If the voters pass this amendment in November of 2014, the commission will no longer

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6 *See id.*

7 *See* TENN. CODE ANN. §17-4-109; *id.* § 17-4-118.

8 *See id.* § 17-4-112.

9 *See id.*

10 *See id.* § 17-4-118.

11 *See* Burke, *supra* note 5.

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

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be necessary.<sup>13</sup> In the meantime, however, some commentators have wondered how the absence of the commission will affect judicial selection in Tennessee.<sup>14</sup>

## II. SELECTION WITHOUT THE COMMISSION

In my view, Tennessee law has been amended over the years to permit the selection of appellate judges and interim trial judges to continue uninterrupted and with only minor changes from the status quo when the commission expires. As such, I do not believe there is much reason to worry about disruption to the provision of justice in Tennessee.

Until recently, the law in Tennessee did not permit the governor to make an appointment to a vacancy on the bench unless he received a list of nominees from the Judicial Nominating Commission. In 2009, however, the law was amended to permit the governor to appoint any qualified lawyer he chooses if he does not receive a list from the commission: “[i]f the judicial nominating commission does not furnish a list of three (3) nominees to the governor within sixty (60) days after receipt of written notice from the governor that a vacancy has occurred, then the governor may fill the vacancy by appointing any person who is duly licensed to practice in this state and who is fully qualified under the constitution and statutes of this state to fill the office.”<sup>15</sup> The plain text of this provision would appear to permit the governor to appoint any qualified judge to a vacancy on the trial<sup>16</sup> or appellate bench whenever

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<sup>13</sup> See *id.*

<sup>14</sup> See Burke, *supra* note 5.

<sup>15</sup> TENN. CODE ANN. § 17-4-113.

<sup>16</sup> The plain text of this provision does not distinguish between appellate and trial judges, but its placement in Chapter 4 creates some ambiguity as to whether it applies to trial judges. In particular, this provision immediately follows the sections in Chapter 4 relating to the appointment of appellate judges and precedes by several sections the section relating to the interim appointment of trial judges. One could argue from this placement that the legislature intended the provision to apply only to appellate judges. If this were so, then, as I have previously testified before the legislature, there would be no way to make interim selections to the trial courts in the absence of the commission before the next biennial August election. See *What would happen if the Judicial Selection and Evaluation Commissions Sunset?: Hearing before the H. Subcomm. on Civil Practice & Procedure*, 106th Gen. Assemb., Reg. Sess. (Tenn. 2009) (statement of Prof. Brian T.

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the commission does not furnish a list to him, even if the reason the commission does not furnish the list is because it is no longer in existence. The only difference between the status quo and what will take place once the commission expires is that the governor will no longer be forced to choose judges from a list of nominees sent to him by a commission.

Some have argued that the 2009 amendment cannot be invoked in the absence of the commission because the provision empowers the governor to make appointments only after he has given “written notice” to the commission of a vacancy, and there is no way for him to give that notice if the commission is no longer in existence.<sup>17</sup> If a court adopts this interpretation, then, as I have previously testified before the legislature, I think there will be no way to make selections to the appellate courts before the next biennial August election (and at that time the putative appellate judges would have to run in contested elections just like trial judges).<sup>18</sup> This interpretation would obviously frustrate the purpose of the 2009 amendment, which was to enable the governor to fill vacancies on his own if it became necessary. Indeed, the absence of the commission was hardly an unforeseen circumstance in 2009: the legislature contemplated terminating the nominating commission at that time as well.<sup>19</sup> For this reason, I think it is unlikely that a court will adopt this interpretation of the 2009 amendment. Even devoted textualists favor interpreting statutes so as not to render them ineffective. As Justice Scalia has written: “A textually permissible interpretation that furthers rather than obstructs the

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Fitzpatrick, Vanderbilt Law School). For this reason, I think it is unlikely that a court will adopt such an interpretation of this provision. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 63 (2012) (“A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.”).

<sup>17</sup> TENN. CODE ANN. § 17-4-113.

<sup>18</sup> See *What would happen if the Judicial Selection and Evaluation Commissions Sunset?: Hearing before the H. Subcomm. on Civil Practice & Procedure*, 106th Gen. Assemb., Reg. Sess. (Tenn. 2009) (statement of Prof. Brian T. Fitzpatrick, Vanderbilt Law School).

<sup>19</sup> See Fitzpatrick, *Election as Appointment*, *supra* note 3, at 485–86 (noting that the legislature did not renew the predecessor commission and sent it into a one-year wind down in 2008).

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document's purpose should be favored."<sup>20</sup>

### **Conclusion**

I believe that Tennessee law will permit the selection of judges to continue uninterrupted and with only minor changes from the status quo when the Judicial Nominating Commission expires at the end of this month. As a result, I do not believe any legislative action is necessary between now and November 2014 when the voters will decide whether to replace the current system for selecting judges. Nonetheless, some are urging the legislature to take action in this area by restoring the commission until November 2014. But I see at least three other options that would eliminate questions about the interim process:

1. The legislature could adopt statutes mirroring the method of selection that will be before voters in November 2014.
2. The legislature could clarify existing statutes to make it even more apparent that the governor can appoint judges on his own in the absence of the commission.
3. The legislature could repeal the remaining Missouri Plan statutes and revert to judicial elections as set forth in the Tennessee Constitution and elsewhere in the Tennessee Code.

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<sup>20</sup> SCALIA & GARNER, *supra* note 16, at 63.



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1015 18th Street, N.W., Suite 425 • Washington, D.C. 20036

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