

A Report on Tennessee Attorney General Selection

By J. Ammon Smartt & Keith W. Randall



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A REPORT ON TENNESSEE ATTORNEY GENERAL SELECTION



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I. Introduction

Under the Tennessee Constitution, attorneys general are selected by the justices of the Supreme Court of Tennessee for eight-year terms with no limit on term renewals.¹ Justices of the Tennessee Supreme Court, in turn, are selected by a version of the Missouri Plan known as the “Tennessee Plan,” which calls for the governor to fill vacancies on the court from a list of three judges submitted by a nominating commission composed primarily of lawyers.² After a period of time, the justices on the court are subject to retention referenda where voters are asked whether to retain the justices.³ The Tennessee Plan has been amply debated by others, including Vanderbilt Law Professor Brian Fitzpatrick,⁴ but the effects of the Tennessee Plan on the attorney general of Tennessee have yet to be extensively explored. This paper seeks to explore the effects of both judicial selection generally, and the Tennessee Plan specifically, on the attorney general of Tennessee. The first section of this paper examines the methods used by states to select attorneys general. This paper will then examine Tennessee’s selection method. Finally, this paper will examine Tennessee’s method of selecting attorneys general in relation to issues of governmental accountability.

II. Survey of State Attorney General Selection Methods

Attorneys general across the country play immensely important roles, setting policy on matters from consumer protection to criminal prosecutions.⁵ These essential functions have led all but one state, Tennessee, to subject their attorneys general to some

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level of democratic accountability through elections or appointments through the political branches.⁶

Attorneys general who are subject to direct elections have an incentive to make at least some of their decisions with re-election in mind. For attorneys general appointed by governors, the influence of the electorate is once removed, but it is still true that they are subject to direct oversight by an official who is directly accountable to the people. The same is not true in Tennessee. Maine is the only state that provides for attorney general selection through joint ballot of both houses of the state congress, but, even with a legislative appointment method, an enduring political trend is more likely to impact the selection of the state attorney general than the current Tennessee method. Changing the political makeup of a two-house congress is significantly easier than changing the political makeup of the Tennessee Supreme Court, which is itself shielded from direct elections or pure political appointment.

III. The Tennessee Attorney General and Democratic Accountability

Attorneys general in Tennessee are appointed by the supreme court, and to retain their position they need only satisfy the justices on the supreme court—a group not accountable to the people in the same way that the governor or state legislators are. The stated goal of the Tennessee Plan is to insulate state justices from political accountability.⁷ In so doing, the Tennessee Plan not only insulates the judiciary from political accountability, but also insulates every officer of the judicial branch, which includes the attorney general.⁸

There is a rich debate about the benefits and risks of insulating justices from political influences, and there are a number of different approaches toward selection. Currently, however, a survey of methods of selecting attorneys general indicates they are almost all subject to elections or political accountability through appointment by the political branches.⁹

Even during the twenty-year period, from 1974 to 1994, when the state elected supreme court justices,¹⁰ attorneys general still had limited political accountability. The term of supreme court justices during that twenty-year period of contested elections was, as it is today, eight years.¹¹ To replace a majority

of the five supreme court justices, assuming staggered elections every two years, a political trend would have to affect the state with enough force to last for four years. For example, assuming a contested election for one seat on the five-member supreme court in 1970 and another every two years following that, to replace a majority of justices, a political group would have to win elections in 1970, 1972, and 1974. In reality, a trend affecting three separate election cycles would have to be extremely powerful, and the cycle could leave the office of attorney general unaffected as Tennessee attorneys general also enjoy an extremely long tenure in comparison to the attorneys general of other states.^{12,13} Without a direct mechanism for imposing democratic accountability, Tennessee voters would have to rely on pressure from the elected branches of the state government or private litigation. Neither option has much chance for success, as elected officials would be challenged on the basis that they are threatening the separation of powers, and private litigation would likely be dismissed for lack of standing and under the political question doctrine.¹⁴

IV. Impact of Tennessee’s Selection Method

Political affiliation is an imprecise lens to determine what priorities are most important to an acting attorney general, as political parties encompass a wide variety of views and beliefs, and it can be misleading to prejudge an individual’s stance on any particular issue solely from his party affiliation. However, party affiliation does serve as one frame of reference to measure how a method of selection works in practice.

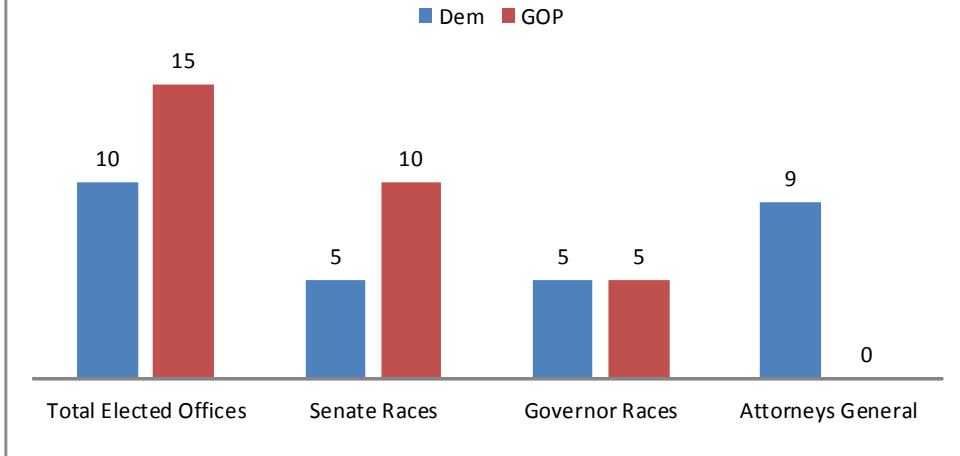
For this study, the party affiliation of past attorneys general was determined by exploring their curriculum vitae published in the *Tennessee Blue Book*, newspaper articles, and other scholarly literature which reported on their party affiliation. There is sufficient evidence that Tennessee’s attorney general selection method does not benefit both political parties equally.

Since 1970 Tennessee has had nine attorneys general who served for significant periods of time.¹⁵ All nine attorneys general have been Democrats.¹⁶ The overall voting record of Tennesseans in statewide elections during the same period of time has been fairly evenly divided between Republicans and Democrats.¹⁷ The first chart presented below compares the political party of the Tennessee Attorneys General to the political party of the governor. Under a gubernatorial appointment method, the party affiliation of the governor and attorney general are usually the same. This chart lists the party affiliations of the governor and corresponding attorney general at the start of the last ten gubernatorial terms.¹⁸ For ease of analysis, this report compares the sitting attorney general at the beginning of each gubernatorial term because an appointed attorney general would begin his term the same year as the new governor.

Under a hypothetical system of direct elections, the analysis is not as neat. Many different factors can result in a candidate winning an election outside of party affiliation. Disparities in campaigns—fundraising and get-out-the-vote efforts are obvious examples—can

Election Year ¹⁹	Governor (Party) ²⁰	Attorney General (Party) ²¹	Disconnect
1971	Bryant W.C. Dunn (R)	David M. Pack (D)	X
1975	Leonard Ray Blanton (D)	R.A. Ashley Jr. (D)	
1979	Lamar Alexander (R)	William M. Leech Jr. (D)	X
1983	Lamar Alexander (R)	William M. Leech Jr. (D)	X
1987	Ned R. McWherter (D)	W.J. Michael Cody (D)	
1991	Ned R. McWherter (D)	Charles W. Burson (D)	
1995	Donald K. Sundquist (R)	Charles W. Burson (D)	X
1999	Donald K. Sundquist (R)	John Knox Walkup (D)	X
2003	Philip Bredesen (D)	Paul G. Summers (D)	
2007	Philip Bredesen (D)	Robert E. Cooper Jr. (D)	

Comparative Results in Statewide Offices by Party Affiliation Since 1970



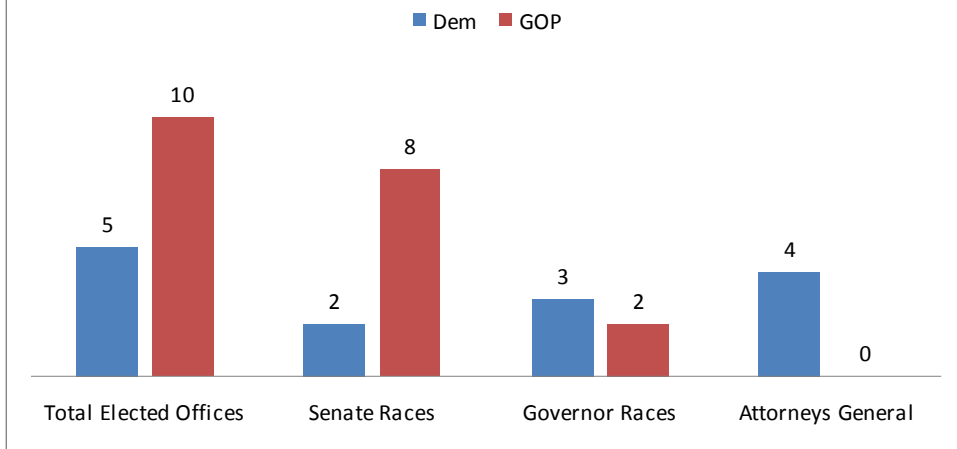
have an enormous impact on the final outcome of a campaign, much beyond simple party affiliation. These other variables make the analysis of a disconnect between Tennessee’s current selection method and voter preference under a direct election method harder to pinpoint. The chart at the top of this page attempts to demonstrate that disconnect by comparing the outcomes of all statewide races since 1970 to the political affiliation of the attorneys general for the same time period.²²

Republicans have won a majority of statewide races. This contrasts with the history in the office of

attorney general. Republicans have won fifteen of twenty-five statewide campaigns in the past forty years. The disconnect is even larger in the period covering 1990 to 2010, a period during which the Tennessee Plan was reauthorized for Tennessee Supreme Court justice selection.²³

Republicans have been particularly successful recently in campaigns for the United States Senate. At least for this twenty-year period, it is easy to see a consistent Republican trend in statewide elections that is not reflected in the party affiliation of the contemporaneous attorneys general.

Comparative Results in Statewide Offices by Party Affiliation Since 1990



V. Conclusion

Tennessee attorneys general are not subject to elections or political appointment, and the state supreme court's appointment of attorneys general has yielded attorneys general whose party affiliation is rather different than the other officials voters have elected. Some believe these outcomes are simply proof that the selection process is serving its purpose of maintaining a nonpartisan environment. Others believe

that an increased level of political or electoral influence is essential because the attorney general's decisions could have a significant and long-standing impact on everything from the state's economic climate to its obligations under federal law. Hopefully this analysis will help to further inform the public debate about the current method and the various arguments for and against potential alternatives.

Appendix One: Attorney General Party Affiliation

<u>Attorney General</u>	<u>Tenure</u>	<u>Party Affiliation</u>	<u>Evidence</u>
David M. Pack	Sept. 1969 – May 1974	Democrat	Appointed as a Chancellor in the 13th Chancery division by Democratic Governor Clement in 1954. Appointed to State Highway Commission by Democratic Governor Clement in 1963. ²⁴ Ran in the Democratic Primary for Governor in 1974. ²⁵
Milton P. Rice ²⁶	May 1974 – Sept 1974	Unknown	
R. A. Ashley Jr.	Sept. 1974 – Oct. 1976	Democrat	Selected as a compromise candidate in 1974 due to his involvement in the liberal wing of the Democratic Party and his non-committal stance on expanding the powers of the attorney general. The previous attorney general Milton Rice decried the “partisan selection” of Mr. Ashley. ²⁷ Donated \$1,000 to Democrat Roy Herron’s campaign for U.S. Representative for Tennessee’s 8th congressional district. ²⁸
Brooks Mclemore	Oct. 1976 – July 1978	Democrat	Democratic member of the State Senate in 1954. ²⁹
William M. Leech Jr.	July 1978 – July 1984	Democrat	Lamar Alexander commended General Leech for pursuing an investigation into Democratic Governor Blanton, even though many in his own party would be unhappy about it. ³⁰

W. J. Michael Cody	July 1984 – Sept. 1988	Democrat	Reference to General Cody as a Democratic former Attorney General of Tennessee. ³¹
Charles W. Burson	Oct. 1988 – Feb. 1997	Democrat	At Large Delegate to the 1988 DNC, Counsel Chief of Staff to Senator Al Gore. ³²
John Knox Walkup	Feb. 1997 – Jan. 1999	Democrat	Donated at least \$14,811 to Democratic candidates between 1994 and 2010. ³³
Paul G. Summers	Jan. 1999 – Oct. 2006	Democrat	Discussed as potential Democratic candidate for governor. ³⁴
Robert E. Cooper Jr.	Oct. 2006 – Present	Democrat	Served as Democratic Governor Bredesen's Chief counsel. ³⁵

Appendix Two: Attorney General Selection Procedures and Tenure

<u>State</u>	<u>Selection Procedure</u>	<u>Tenure</u>	<u>Citation</u>
Alaska	Appointed by Governor	Pleasure	ALASKA CONST. Art. III, § 25
Hawaii	Appointed by Governor	W/Advice & Consent of Senate	HAW. CONST. Art. V, § 6
Massachusetts	Appointed by Governor	Pleasure	MASS. CONST. Ch. 2, § 1, Art. IX
New Hampshire	Appointed by Governor	Pleasure	N.H. CONST. Art. XLVI
New Jersey	Appointed by Governor	Pleasure	N.J. CONST. Art. V, § IV, Para. 3
Wyoming	Appointed by Governor	Pleasure	WYO. STAT. ANN. § 9-1-601
Tennessee	Appointed by Supreme Court	8 Years	TENN. CONST. Art. VI, § 5
Maine	Chosen by Joint Legislature	2 Years	ME. CONST. Art. IX, § 11
Alabama	Elected	4 Years	ALA. CONST. Art. V, § 114
Arizona	Elected	4 Years	ARIZ. CONST. Art. V, § 1
Arkansas	Elected	2 Years	ARK. CONST. Art. VI, § 1
California	Elected	4 Years	CAL. CONST. Art. V, § 11
Colorado	Elected	4 Years	COLO. CONST. Art. IV, § 1
Connecticut	Elected	4 Years	CONN. CONST. Art. IV, §§ 2, 4
Delaware	Elected	4 Years	DEL. CONST. Art. III, § 21
Florida	Elected	4 Years	FLA. CONST. Art. IV, § 5
Georgia	Elected	4 Years	GA. CONST. Art. III, § 3, Para. 1
Idaho	Elected	4 Years	IDAHO CONST. Art. IV, §§ 1, 2
Illinois	Elected	4 Years	ILL. CONST. Art. V, §§ 1, 2

Indiana	Elected	4 Years	IND. CODE § 3-10-2-6
Iowa	Elected	4 Years	IOWA CONST. Art. V, § 12
Kansas	Elected	4 Years	KAN. CONST. Art. I, § 1
Kentucky	Elected	4 Years	KY. CONST. Part I, § 91
Louisiana	Elected	4 Years	LA. CONST. Art. IV, § 3
Maryland	Elected	4 Years	MD. CONST. Art. V, § 1
Michigan	Elected	4 Years	MICH. CONST. Art. V, § 21
Minnesota	Elected	4 Years	MINN. CONST. Art. V, §§ 1, 4
Mississippi	Elected	4 Years	MISS. CONST. Art. VI, § 173
Missouri	Elected	4 Years	MO. CONST. Art. IV, § 17
Montana	Elected	4 Years	MONT. CONST. Art. VI, §§ 1, 2
Nebraska	Elected	4 Years	NEB. CONST. Art. IV, Ch. 4, § 1
Nevada	Elected	4 Years	NEV. CONST. Art. V, § 19, Cl. 1
New Mexico	Elected	4 Years	N.M. CONST. Art. V, § 1
New York	Elected	4 Years	N.Y. CONST. Art. V, § 1
North Carolina	Elected	4 Years	N.C. CONST. Art. III, § 7
North Dakota	Elected	2 Years	N.D. CONST. Art. V, § 2
Ohio	Elected	4 Years	OHIO CONST. Art. III, §§ 1, 4
Oklahoma	Elected	4 Years	OKLA. CONST. Art. VI, §§ 1, 4
Oregon	Elected	4 Years	OR. REV. STATE. § 180.020
Pennsylvania	Elected	4 Years	PA. CONST. Art. IV, § 4, Cl. 1
Rhode Island	Elected	4 Years	R.I. CONST. Art. IV, § 1
South Carolina	Elected	4 Years	S.C. CONST. Art. VI, § 7
South Dakota	Elected	4 Years	S.D. CONST. Art. IV, § 7
Texas	Elected	4 Years	TEX. CONST. Art. IV, § 2
Utah	Elected	4 Years	UTAH CONST. Art. VII, § 2
Vermont	Elected	2 Years	VT. STATE ANN. 3 § 151
Virginia	Elected	6 Years	VA. CONST. Art. V, § 15
Washington	Elected	4 Years	WASH. CONST. Art. III, §§ 1, 3
Wisconsin	Elected	4 Years	WIS. CONST. Art. VI, § 1, Art. VII, § 2
West Virginia	Elected	4 Years	W. VA. CONST. Art. VII, § 1

Appendix Three: Gubernatorial Elections in Tennessee Since 1970³⁶

<u>Election Year</u>	<u>Governor</u>	<u>Party</u>
1970	Bryant W.C. Dunn	Republican
1974	Leonard Ray Blanton	Democrat
1978	Lamar Alexander	Republican
1982	Lamar Alexander	Republican
1986	Ned R. McWherter	Democrat
1990	Ned R. McWherter	Democrat
1994	Donald K. Sundquist	Republican
1998	Donald K. Sundquist	Republican
2002	Philip Bredesen	Democrat
2006	Philip Bredesen	Democrat

Appendix Four: Senatorial Elections in Tennessee Since 1970³⁷

<u>Election Year</u>	<u>Senator (Class)</u>	<u>Party</u>
1970	William Brock (1)	Republican
1972	Howard Baker (2)	Republican
1976	Jim Sasser (1)	Democrat
1978	Howard Baker (2)	Republican
1982	Jim Sasser (1)	Democrat
1984	Al Gore, Jr. (2)	Democrat
1988	Jim Sasser (1)	Democrat
1990	Al Gore, Jr. (2)	Democrat
1992	Harlen Mathews (2) ³⁸	Democrat
1994	Fred Thompson (2)	Republican
1994	Dr. William H. Frist, Sr. (1)	Republican
1996	Fred Thompson (2)	Republican
2000	Dr. William H. Frist, Sr. (1)	Republican
2002	Lamar Alexander (2)	Republican
2006	Robert Corker (1)	Republican
2008	Lamar Alexander (2)	Republican

Endnotes

- 1 TENN. CONST. art VI, § 5.
- 2 See TENN. CODE ANN. § 17-4-112(a) (2010). The Governor can request a second panel of an additional three candidates if he is not satisfied with the first. The nominating commission is composed of seventeen members. Eight members are selected by the Speaker of the House, five of which must be lawyers; eight members are selected by the Speaker of the Senate, five of which must be lawyers; and one non-lawyer member is chosen jointly by the two Speakers. TENN. CODE ANN. § 17-4-102(a) (2010).
- 3 See *id.* §§17-4-114 to 116.
- 4 See Brian Fitzpatrick, Essay, *Election as Appointment, the Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008); Penny J. White & Malia Reddick, Essay, *A Response to Professor Fitzpatrick, the Rest of the Story*, 75 TENN. L. REV. 501 (2008); Brian Fitzpatrick, *Errors, Omissions, and the Tennessee Plan*, 39 U. MEM. L. REV. 85 (2008).
- 5 See, e.g., Tennessee Attorney General and Reporter, <http://www.tn.gov/attorneygeneral/> (describing function and role of Tennessee Attorney General).
- 6 See Appendix Two.
- 7 See TENN. CODE ANN. § 17-4-101(a) (“It is the declared purpose and intent of the general assembly by the passage of this chapter to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee . . . and . . . to insulate the judges of the courts from political influence and pressure . . . and . . . to make the courts ‘nonpolitical.’”).
- 8 TENN. CONST. art VI, § 5.
- 9 See Appendix Two.
- 10 See 1974 Tenn. Pub. Acts, ch. 433, § 1.
- 11 TENN. CONST. art. VI, §§ 3, 4.
- 12 See Appendix Two.
- 13 The attorney general serves eight years and is not subject to any term limits, meaning that one person could potentially serve as the attorney general for an exceptionally long time. See Tenn. Const. art. VI, § 5. Interestingly, since 1970, only two attorneys general, Charles W. Burson and Paul G. Summers, have served their full terms. See Appendix One. However, before 1970, one attorney general, George F. McCanless, served a span of sixteen years, from 1954 to 1969, see State of Tennessee, Tennessee Bluebook 2009-2010, at 532 (2009) (hereinafter 2009 Bluebook), and before General McCanless, Roy H. Beeler served for a span of twenty-two years, from 1932 to 1954.
- 14 Elected branch officials attempting to influence the actions of the Attorney General could conceivably face charges that they are violating the principle of separation of powers since the Attorney General is a member of the judicial branch. Tenn. Const. Art VI, § 5. Members of the elected branches would have difficulty

exercising direct control over the attorney general because of the state’s unique structure. This difficulty would be compounded by the fact that any attempt by the governor or the legislature to control the attorney general would likely be challenged in the judicial branch. The current attorney general, Robert Cooper, recently cited separation of powers concerns as one of the primary reasons that the Tennessee Health Freedom Act, an act calling for the attorney general to join the lawsuit against Patient Protection and Affordable Healthcare Act, was unconstitutional under the Tennessee Constitution. Validity of SB 3498/HB 3433 and HJR 745 Relative to Health Care, Op. Tn Att’y Gen 10-43, at 3 (2010), *available at* <http://www.tn.gov/attorneygeneral/op/2010/op/op10-43.pdf>. Separation of powers provides another layer of protection for the attorney general from political influences, another indication of the near immunity the position has from democratic accountability.

Private litigation is also likely an impossibility. Tennessee courts follow federal court precedent in relation to standing and the political question doctrine. *Norma Fay Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W. 3d. 196, 202 (Tenn. 2009). A private citizen or citizen group that sought to force the attorney general to enter into a lawsuit against a federal law—a highly political position—probably could not resort to the courts. The action would likely be dismissed for lack of standing and under the political question doctrine.

To satisfy the standing requirement, a litigant must show a cognizable injury, fairly traceable to the defendant’s conduct, which is redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984). An action to force the Tennessee Attorney General to enter into a lawsuit challenging a federal law or regulation would likely be dismissed as non-justiciable due to the reluctance of courts to interfere with prosecutorial discretion. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1974). Prosecutorial discretion is a well-founded rationale for dismissing actions seeking to compel government officials to “enforce the law.” *Id.* While attempting to get the Tennessee Attorney General to join in a lawsuit challenging a federal law would not involve criminal prosecution, any claim would rely solely on a generalized grievance that would be insufficient to satisfy the standing requirement. *U.S. v. Richardson*, 418 U.S. 166, 173 (1974). The inability to sue under the doctrine of standing is further evidence that attorneys general are classically considered policy-making positions. The non-justiciability of “generalized grievances” cases represents the ideal that the conduct of the political branches should be decided through the political process, not in the courts. *Id.*

The political question doctrine might also bar any action brought to force the attorney general to bring a claim against the federal government. *Baker v. Carr* lists six factors that courts generally consider when deciding whether a particular case is non-justiciable due to the political question doctrine:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving

it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). An action to force the attorney general to bring a lawsuit against the federal government falls under at least three of the six factors: a lack of judicially manageable standards for resolving the issue; the impossibility of deciding without making an initial policy decision of a non-judicial nature; and out of respect for coordinate branches of government. Here again, a well-established judicial doctrine considers most of the actions of the attorney general to be political decisions, the very decisions generally made in this country only by government officials subject to some level of democratic accountability.

15 See 2009 BLUEBOOK, *supra* note 13, at 532. Milton P. Rice was not included in the analysis of Tennessee Attorneys General due to the brevity of his tenure.

16 See Appendix One.

17 See Appendix Three, Four.

18 Due to the long tenure of Tennessee attorneys general and the tendency of sitting attorneys general not to finish their terms, governors over the last forty years usually served with more than one attorney general.

19 For this chart, election year refers to the year the election winner would take office, not the year of voting.

20 See Appendix Three.

21 See Appendix One.

22 See Appendices One, Three, & Four.

23 See generally 1994 Tenn. Pub. Acts, ch. 942.

24 STATE OF TENNESSEE, TENNESSEE BLUEBOOK 1969-1970, at 201 (1969).

25 STEPHEN J. RECHICHAR, ELECTORAL TRIUMPH AND ADMINISTRATIVE TRIALS: GUBERNATORIAL ELECTIONS IN TENNESSEE, 1970-1982, at 53 (1986).

26 Attorney General Rice was not included in the empirical analysis due to his relatively short tenure.

27 Kenneth Post, *A Divided Court Finally Settled on 'Dark Horse,'* TENNESSEAN, SEPT. 1, 1974, at B1.

28 Open Secrets, <http://www.opensecrets.org/indivs/index.php>; search for Ashley, R A JR.

29 STATE OF TENNESSEE, TENNESSEE BLUEBOOK 1977-1978, at 102 (1977).

30 *William M. Leech Dies; Former State Official*, CHATTANOOGA FREE PRESS, June 12, 1996.

31 George Altman, *AGs Backing Siegelman Mostly Dems*, MOBILE REGISTER, Oct. 3, 2009, at A1.

32 STATE OF TENNESSEE, TENNESSEE BLUEBOOK 1989-1990, at 241 (1989).

33 Open Secrets, <http://www.opensecrets.org/indivs/index.php>; search for Walkup, John.

34 John Commins, *Speaker Naifeh Says Won't Push for House Procedural Reforms*, CHATTANOOGA FREE PRESS, at B4 ("While Mr. Summers won't rule out running for governor, he said he'll have to be urged to do so by an 'organized Democratic Party' effort.").

35 2009 BLUEBOOK, *supra* note 13, at 325.

36 See *id.* at 530.

37 Biographical Directory of the United States Congress, <http://bioguide.congress.gov/biosearch/biosearch.asp>.

38 Nominated to serve after Al Gore Jr. became Vice President in 1992. Not included in analysis due to his selection as opposed to his election to office.



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