

A REPORT ON THE POLITICAL BALANCE OF THE TENNESSEE PLAN

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A Report on the Political Balance of the Tennessee Plan

By Brian T. Fitzpatrick

In Tennessee, all appellate judges are initially appointed by the Governor from a list of three names selected by a nominating commission made up primarily of lawyers who belong to a small number of Tennessee bar associations. After a period of time, these judges then have their names put on the ballot in uncontested retention referenda where voters are asked whether to keep the judges appointed by the Governor. This process, known as the “Tennessee Plan,” was modeled after the Missouri Plan, the first of such commission-based judicial selection systems.¹

In June 2009, some of the operative provisions of the Tennessee Plan will expire unless they are reauthorized by the Tennessee General Assembly.² Many people have urged the legislature to allow the Plan to expire either because they believe it is unconstitutional or because they believe it is not serving its intended purposes.³ Others contend that it should be fully renewed because it is a non-political form of judicial selection. This report is an effort to further the debate over whether the Tennessee Plan should continue by examining whether the Plan is serving one of its principal stated purposes: “to make the courts ‘nonpolitical.’”⁴ This report finds as follows:

** Assistant Professor of Law, Vanderbilt University Law School. J.D., 2000, Harvard Law School. I am grateful to many people who provided helpful comments on earlier drafts of this report. I am also indebted to Ben Bolinger, Jessica Pan, and Roman Hankins for their helpful research assistance, as well as to the librarians at Vanderbilt Law School, personnel at the Tennessee Administrative Office of the Courts, and many county election commissions across Tennessee for gathering the raw data discussed in this report. Some of this data will also appear in The Politics of Merit Selection, 74 Mo. L. REV. (2009) (forthcoming). This report was commissioned by the Federalist Society for Law and Public Policy. The views expressed herein are my own.*

- Between 1995 and 2008, the Tennessee Plan's selection commission nominated twice as many appellate judges more affiliated with the Democratic Party (67%) than with the Republican Party (33%).
- The imbalance between Democratic and Republican nominees is not reflected among the Tennessee electorate. Although 67% of the Tennessee Plan appellate nominees between 1995 and 2008 were more affiliated with the Democratic Party, during the same time period Democratic candidates for the state House received only 51% of votes and Democratic candidates for Tennessee's federal House delegation received only 49% of votes.
- In almost every two-year legislative period since 1994, the Tennessee Plan's appellate nominees leaned more towards the Democratic Party than did the Tennessee electorate. The one exception was 1995-1996, when the nominees closely approximated the political balance in the electorate.
- When the Governor in Tennessee was a Democrat, the vast majority (84%) of the Tennessee Plan's appellate nominees were more affiliated with the Democratic Party. In years when the Governor was a Republican, still a majority (54%) of the Tennessee Plan's appellate nominees were more affiliated with the Democratic Party.

I. A Brief Overview of the Tennessee Plan

Under the Tennessee Plan, the Governor initially appoints all appellate judges in Tennessee. The Governor is not permitted, however, to appoint any person he or she wishes. Rather, by law, the Governor can appoint only a person that appears on a list of names submitted by a judicial selection commission.⁵ The judicial selection commission is presently comprised of 17 members.⁶ All of these members are appointed by the two Speakers of the Tennessee General Assembly.⁷ By law, fourteen members must be lawyers.⁸ Moreover, by law twelve of the 14 lawyer members must come from names supplied by five special lawyer's organizations.⁹ Two members must be taken from names submitted by the Tennessee Bar Association, one from the Tennessee Defense Lawyers Association, three from the Tennessee Trial Lawyers Association (now known as the Tennessee Association for Justice), three from the Tennessee District Attorneys General Conference, and three from the Tennessee Association of Criminal Defense Lawyers.¹⁰

The judges appointed by the Governor under the Tennessee Plan are permitted to serve until the next biennial August election, at which time they face a retention referendum.¹¹ In these referenda, voters are asked: "Shall (Name of Candidate) be elected and retained in office as (Name of Office)? Vote Yes or No."¹² If a majority of the public votes to retain the judge, the judge serves for the remainder of the 8-year term, at which time the judge faces another retention referendum.¹³ If a majority of the public votes against retention, then the Governor appoints a new judge from a list of names submitted by the selection commission.¹⁴ Thus, voters do not know at the time of the retention referendum who will replace a judge if they vote against retention of the incumbent. Since the Tennessee Plan was created in 1971, there have been 153 retention referenda.¹⁵ In 152 of the 153 referenda, the public voted in favor of retention, a retention rate of 99.3%.¹⁶ The only exception was in 1996, when 55% of the public voted against retaining a Supreme Court Justice, Penny White.¹⁷

II. The Political Balance of the Tennessee Plan

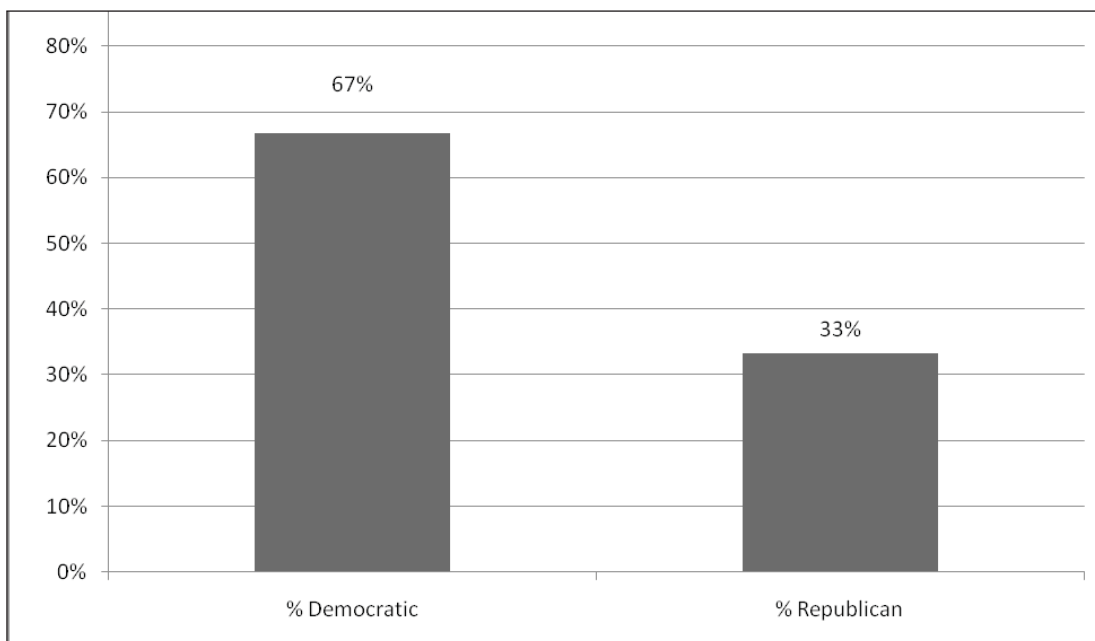
One of the principal stated purposes of the Tennessee Plan is to take the politics out of judicial selection. This is made clear in the Tennessee Code itself:

It is the declared purpose and intent of the general assembly by the passage of this chapter... to insulate the judges of the courts from political influence and pressure... and... to make the courts 'nonpolitical.'¹⁸

One way to examine whether the Tennessee Plan has been “nonpolitical” is to examine the balance in the political affiliation of the judicial candidates nominated by the Plan’s selection commission and compare it to the political balance within the Tennessee electorate as a whole. The Tennessee Plan took its modern form in 1994, and, according to the Tennessee Administrative Office of the Courts, between January 1995 and July 2008,¹⁹ the selection commission made 90 appellate nominations to the Governor. A list of these nominees appears in Appendix A.

Tennessee holds open primaries and does not require registration with a political party. As such, the political affiliation of nominees can only be assessed by examining which political party’s primaries each nominee chose to vote in most frequently.²⁰ Primary voting records are available from county election commissions in Tennessee, and several years of state and federal primary voting data were obtained for 88 of the 90 appellate nominations.²¹ In 87 of the nominations, the nominee voted more often in either Democratic or Republican primaries; in one case, the nominee voted with equal frequency in each party’s primaries. As Figure 1 shows, among the 87 nominations in which the nominee voted more often in one party’s primaries, 67% voted more often in Democratic primaries and only 33% voted more often in Republican primaries. That is, between 1995 and 2008, the Tennessee Plan’s selection commission nominated twice as many judicial candidates with greater affiliation to the Democratic Party than judicial candidates with greater affiliation to the Republican Party.

Figure 1: Percentage of Tennessee Plan appellate nominees 1995-2008 who voted more often in Democratic primaries versus percentage who voted more often in Republican primaries



In order to assess how the political balance of the Tennessee Plan compares to the political balance of the Tennessee electorate as a whole, the percentage of nominees who voted more often in Democratic primaries can be compared to the percentage of state and federal House votes received by Democratic candidates in Tennessee since 1995. As Figure 2 shows, although 67% of the Tennessee Plan nominees voted more often in Democratic primaries, over the same time period only 51% of the votes cast for state House candidates and only 49% of the votes cast for Tennessee’s federal House delegation were for Democratic candidates.²²

Figure 2: Percentage of Tennessee Plan appellate nominees 1995-2008 who voted more often in Democratic primaries versus percentage of state and federal House votes received by Democratic candidates over the same time period²³

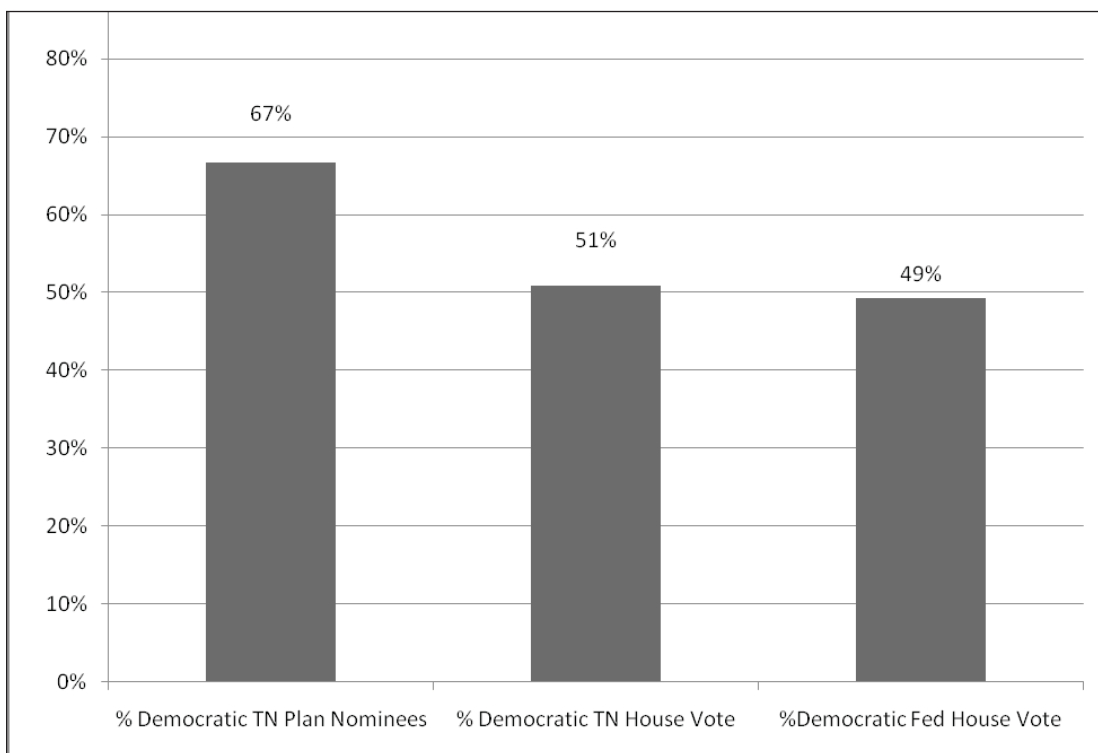


Figure 3 shows the same comparison as Figure 2, but in increments of two-year legislative periods. In all but one two-year period, the Tennessee Plan nominated a greater percentage of judicial candidates who voted more often in Democratic primaries than Democratic candidates received in state and federal House races. The one exception was 1995-96, where the percentage of nominees with a greater affiliation to the Democratic Party (50%) was roughly the same percentage of the vote Democratic state and federal House candidates received in Tennessee (50.1% and 53.2%, respectively).

Figure 3: Percentage of Tennessee Plan appellate nominees who voted more often in Democratic primaries versus percentage of state and federal House votes received by Democratic candidates²⁴

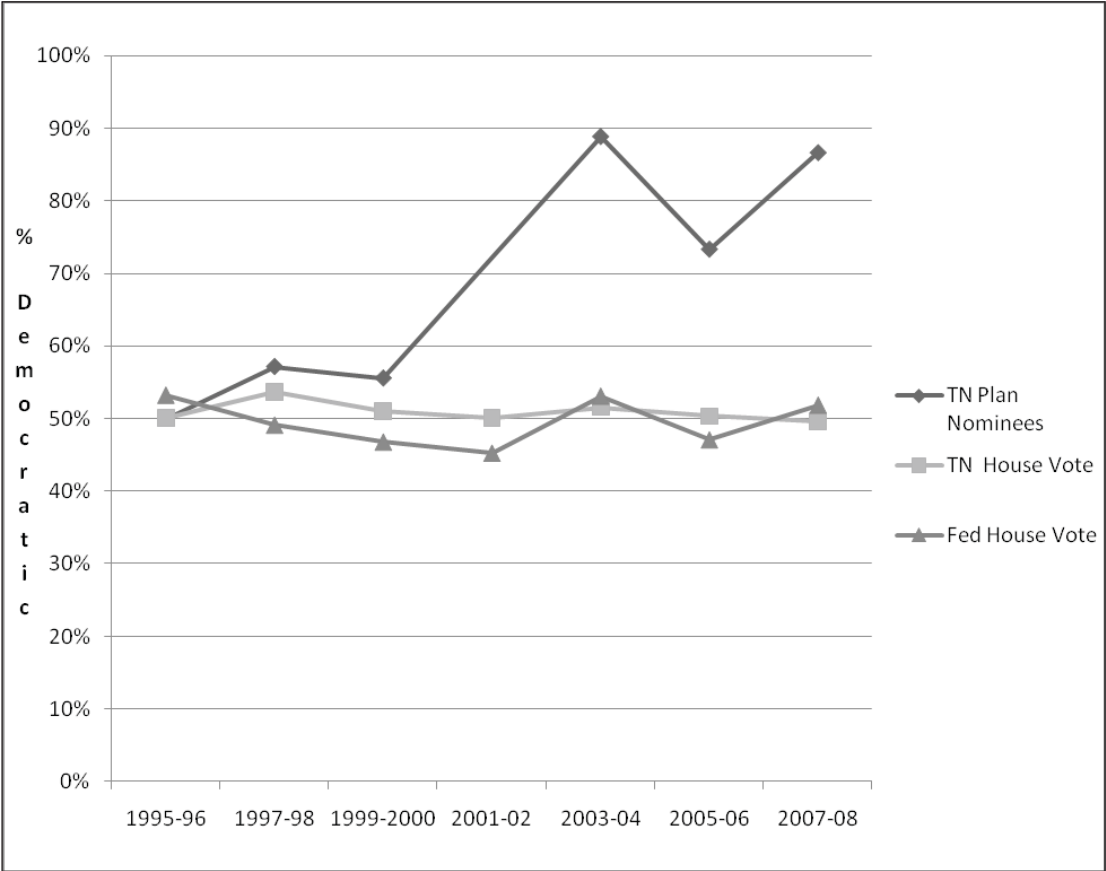
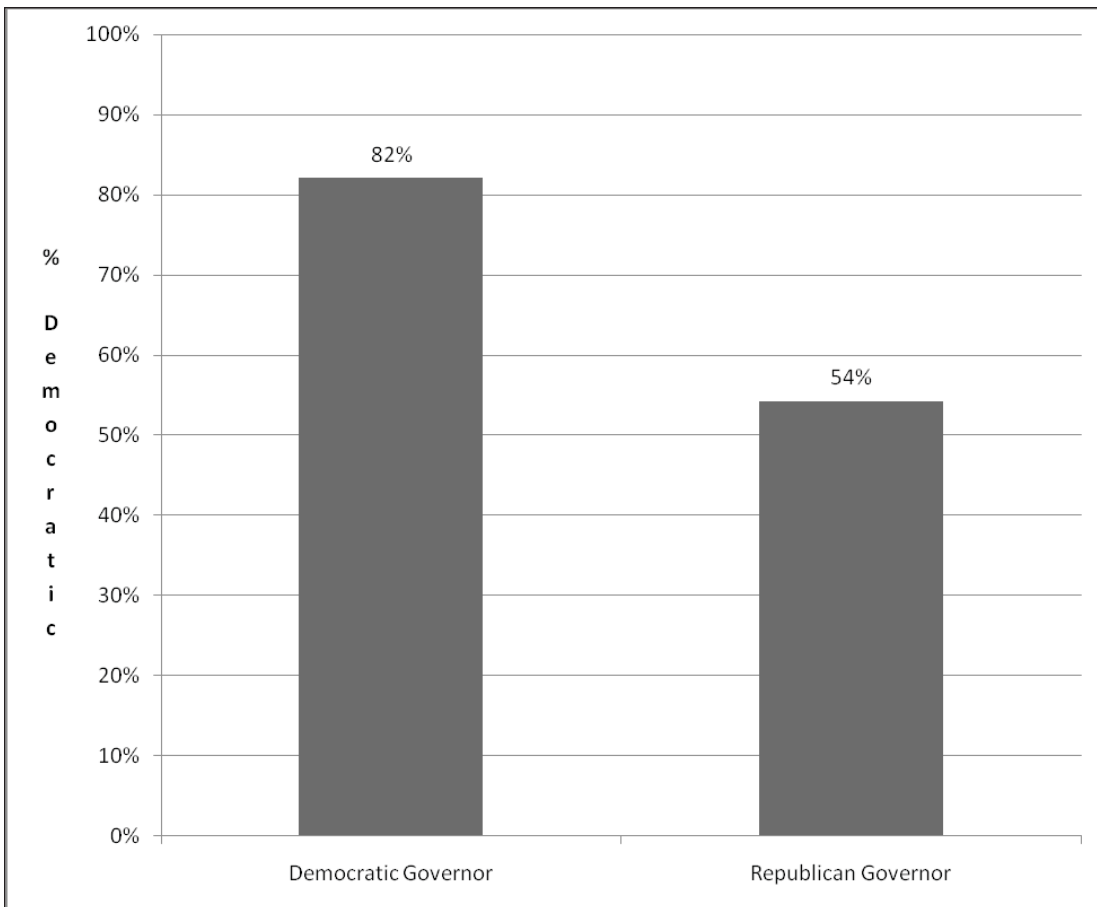


Figure 4 compares the percentage of appellate nominees who voted more often in Democratic primaries when the Governors of Tennessee were Democrats to the percentage when the Governors were Republicans. The Tennessee Plan sent an overwhelmingly percentage of Democratic nominees to Democratic Governors (82%) and a less overwhelming percentage of Democratic nominees to Republican Governors (54%). In both cases, however, the majority of nominees were still more affiliated with the Democratic Party.

Figure 4: Percentage of Tennessee Plan appellate nominees who voted more often in Democratic primaries during years with Democratic versus Republican Governors



The fact that the selection commission nominated so many more candidates with greater affiliation to the Democratic Party does not necessarily mean that the commission favored judicial candidates with greater affiliation to the Democratic Party. It may be that the commission did not consider political affiliation and the disparity arose by random chance. It may also be that more candidates with an affiliation to the Democratic Party applied for judgeships in the first place.²⁵

On the other hand, it is also possible that the commission did in fact favor candidates with a greater affiliation to the Democratic Party. For example, members of the commission are selected by the Speakers of the Tennessee General Assembly,²⁶ and both Speakers were Democrats for almost all of the time between 1995 and 2008.²⁷ Moreover, for a majority of spots on the commission, the speakers can only appoint individuals nominated by state bar associations.²⁸ Some believe that lawyers in general and bar associations in particular are much more liberal than the public at large.²⁹

There are a number of political scientists and legal scholars who have expressed skepticism that any method of judicial selection, even those like the Tennessee Plan—often referred to as “merit selection”

systems—can be “nonpolitical.” It has long been thought that the decisions judges make are associated with their political beliefs, and conservative and liberal scholars alike have expressed this view.³⁰ This is not because judges are bad people, but because the law judges are asked to apply is often ambiguous.³¹ That is, judges not only apply the law, but they often have no choice but to make law as well. This is especially true of state court judges like those selected by the Tennessee Plan. Not only do state court judges have the power to shape the vague commands of statutes and constitutions, but, much more so than their federal counterparts, they also have the power to make common law.³²

There is no empirical evidence that the lawyers who serve on the Tennessee Plan’s selection commission are any more or less concerned with how judges will exercise their discretion to make law than those who select judges in other systems (i.e., voters or elected officials). Lawyers as a class, however, most certainly have a stake in the process. They often practice before the very judges they select, and they may have a vested interest in the decisions these judges make. For example, one of the bar associations from which the Speakers of the General Assembly must appoint members of the Tennessee Plan’s selection commission is the Tennessee Trial Lawyers Association (now known as the Tennessee Association for Justice).³³ Members of trial lawyers’ associations often represent plaintiffs on contingency, and, accordingly, how much money they earn every year can be tied to how often and how much their clients win in court. For this reason, the commissioners from the Tennessee Association for Justice might be very interested in how often judicial candidates will be inclined to dismiss suits filed by plaintiffs and how often those candidates might be inclined to reduce or overturn damages awarded to plaintiffs.³⁴

Although it may be difficult for commission members to ascertain these judicial inclinations at the selection stage, it may be less difficult to ascertain whether judicial candidates are Democrats or Republicans, and this may be good enough: scholars have shown that judicial inclinations to dismiss many of the kinds of suits filed by lawyers who represent plaintiffs on contingency vary with the judge’s political affiliation.³⁵

For this reason, some scholars believe that “merit” systems like the Tennessee Plan may do little more than replace one set of political preferences (the preferences of voters or elected officials) with another (the preferences of the lawyers who serve on the selection commissions). As one scholar has explained:

Is [‘merit selection’] nonpolitical? Of course not The politics come into play in determining who actually gets appointed to the commission, in what role is played by the staff of the commission, in whom the commission consults in assessing candidates, and in how the commission chooses to weigh various criteria in making both initial nominations and in doing the periodic evaluations. The system is not nonpolitical; it is simply differently political.³⁶

As another scholar has summarized the research, “far from taking judicial selection out of politics, [‘merit selection’] actually tend[] to replace [electoral] [p]olitics, wherein the judge faces popular election ... , with a somewhat subterranean process of bar and bench politics, in which there is little popular control.”³⁷ That is, in “merit” systems, “raw political considerations masquerade[] as professionalism via attorney representation of the socioeconomic interests of their clients.”³⁸ Another scholar has explained:

[T]he repetition of unsuccessful efforts to banish politics makes one wonder whether this is ultimately a quixotic quest. So too do studies of selection under current merit systems. The classic study of the first merit selection system in Missouri concluded that appointment transformed the politics of judicial selection but did not eliminate politics. More recent accounts have documented either partisan conflict or competition between elements of the bar (e.g., plaintiffs’ attorneys vs. defense attorneys) in several merit selection systems.³⁹

In other words, a number of commentators believe that “merit selection does not take politics out of the judicial selection process. It merely changes the nature of the political process involved. It substitutes bar and elitist politics for those of the electorate as a whole.”⁴⁰

CONCLUSION

Between 1995 and 2008, the Tennessee Plan’s selection commission nominated twice as many appellate judicial candidates with greater affiliation to the Democratic Party (67%) than with greater affiliation to the Republican Party (33%). Over the same time period, Democratic candidates in Tennessee received only 51% of state House votes and 49% of federal House votes.

It is difficult to determine why the selection commission nominated so many more judicial candidates with affiliation to the Democratic Party. Many scholars, however, believe that it is futile to try to remove “politics” from any system of judicial selection. To these scholars, the more helpful question to ask about designing a system of judicial selection is *whose* political views should drive judicial selection: the political preferences of the public and their elected representatives, or the perspectives of a professional class of lawyers within the bar associations that control the membership on the nominating commissions.⁴¹ Tennessee is having just such a debate right now, and this debate is a healthy one.

Appendix A: Tennessee Plan Appellate Nominees, January 1995 – July 2008

Ash, Don R. 2000, Tennessee Court of Criminal Appeals
Bailey, D'Army 2006, Tennessee Supreme Court; 2007, Tennessee Supreme Court
Barker, William M. 1995, Tennessee Court of Criminal Appeals; 1996, Tennessee Supreme Court; 1998, Tennessee Supreme Court
Bennett, Andy D. 2007, Tennessee Court of Appeals
Brown, George H., Jr. 1996, Tennessee Supreme Court
Brown, Mark A. 2004, Tennessee Court of Appeals
Cain, William B. 1998, Tennessee Court of Appeals
Capparella, Donald 2003, Tennessee Court of Appeals; 2007, Tennessee Court of Appeals
Clark, Cornelia A. 1995, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Appeals; 2003, Tennessee Court of Appeals; 2005, Tennessee Supreme Court
Clement, Frank G., Jr. 2003, Tennessee Court of Appeals
Corlew, Robert E. III 1995, Tennessee Court of Criminal Appeals
Cottrell, Patricia J. 1998, Tennessee Court of Appeals; 1998, Tennessee Court of Appeals
Crossley, Robert L. 1998, Tennessee Supreme Court
Daniel, Joseph S. 1996, Tennessee Court of Criminal Appeals
DeVasher, Jeffrey A. 2000, Tennessee Court of Criminal Appeals
Dinkins, Richard H. 2006, Tennessee Supreme Court; 2006, Tennessee Supreme Court; 2007, Tennessee Court of Appeals
Duncan, Christine H. 2007, Tennessee Court of Appeals
Glenn, Alan E. 1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals; 1999, Tennessee Court of Criminal Appeals
Gordon, J. Houston 2006, Tennessee Supreme Court; 2006, Tennessee Supreme Court; 2006, Tennessee Supreme Court
Haltom, William H., Jr. 2008, Tennessee Court of Appeals
Higgs, W. Otis, Jr. 1998, Tennessee Court of Criminal Appeals
Holder, Janice M. 1996, Tennessee Supreme Court
Hollars, Amy V. 2007, Tennessee Court of Appeals; 2007, Tennessee Court of Appeals
Irvine, Kenneth F., Jr. 1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals
Johnson, G. Richard 2004, Tennessee Court of Appeals
Jones, Robert L. 1996, Tennessee Court of Criminal Appeals
Knowles, E. Clifton 1998, Tennessee Court of Appeals
Koch, William C., Jr. 2005, Tennessee Supreme Court; 2006, Tennessee Supreme Court; 2007, Tennessee Supreme Court

Lafferty, Leonard T. 1996, Tennessee Court of Criminal Appeals
Lanier, Robert A. 1995, Tennessee Court of Appeals
Lee, Sharon G. 2004, Tennessee Court of Appeals
Lewis, George T. 2006, Tennessee Supreme Court
Lillard (Kirby), Holly K. 1995, Tennessee Court of Appeals
McGinley, C. Creed 2007, Tennessee Supreme Court
McLin, J. C. 2004, Tennessee Court of Criminal Appeals
McMullen, Camille R. 2008, Tennessee Court of Criminal Appeals
Moore, Hugh J., Jr. 2006, Tennessee Court of Criminal Appeals
Mowles, Linda J.H. 1999, Tennessee Court of Appeals
Ogle, Norma M. 1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals
Page, Roger A. 2008, Tennessee Court of Criminal Appeals
Redding, Robert V. 1995, Tennessee Court of Appeals
Riley, Joe G. 1996, Tennessee Court of Criminal Appeals
Rose, Todd A. 2008, Tennessee Court of Appeals
Schaffner, Mary M. 1998, Tennessee Court of Appeals
Shipman, Janet L. 1999, Tennessee Court of Criminal Appeals
Smith, Jerry L. 1995, Tennessee Court of Criminal Appeals
Stafford, James S. 2008, Tennessee Court of Appeals
Swiney, David M. 1998, Tennessee Supreme Court; 1999, Tennessee Court of Appeals
Thomas, Dea K., Jr. 2006, Tennessee Court of Criminal Appeals
Turnbull, John A. 2005, Tennessee Supreme Court
Voss, Paula R. 1995, Tennessee Court of Criminal Appeals; 1996, Tennessee Court of Criminal Appeals;
1998, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals; 2006,
Tennessee Court of Criminal Appeals
Wade, Gary R. 2006, Tennessee Supreme Court
Walker, Joe H. 2004, Tennessee Court of Criminal Appeals; 2008, Tennessee Court of Criminal Appeals
Ward, William M. 1996, Tennessee Court of Criminal Appeals; 1998, Tennessee Court of Criminal Appeals;
1998, Tennessee Court of Criminal Appeals; 1999, Tennessee Court of Criminal Appeals; 2004,
Tennessee Court of Criminal Appeals
Wedemeyer, Robert W. 2000, Tennessee Court of Criminal Appeals
Williams, Frank V., III 1999, Tennessee Court of Appeals
Williams, John E. 1998, Tennessee Court of Criminal Appeals
Witt, James C., Jr. 1996, Tennessee Court of Criminal Appeals
Woodall, Thomas T. 1996, Tennessee Court of Criminal Appeals
Wright, Thomas J. 1995, Tennessee Court of Criminal Appeals; 1996, Tennessee Court of Criminal Appeals

Endnotes

- 1 See Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 480 (2008).
- 2 See TENN. CODE ANN. §§ 4-29-112, -229(a)(46)-(47) (2008).
- 3 See Brian T. Fitzpatrick, *Errors, Omissions and the Tennessee Plan*, 39 U. MEM. L. REV. 85, 88-89 & nn. 16-18 (2008) (citing some of the objections to the Tennessee Plan).
- 4 TENN. CODE ANN. § 17-4-101(a) (2008).
- 5 See *id.* § 17-4-112. As originally enacted, the statute permitted the Governor to reject names from the commission indefinitely. The statute now permits the Governor to reject only one list of three names; the Governor is required to select someone from the second list submitted by the commission. See *id.*
- 6 See *id.* § 17-4-102.
- 7 See *id.*
- 8 See *id.* § 17-4-102(a)(1)-(6).
- 9 See *id.* § 17-4-102(a)(1)-(4).
- 10 See *id.*
- 11 See *id.* §§ 17-4-114, -115.
- 12 *Id.* In theory, incumbent judges could face a contested election instead of a retention referendum if another commission, a judicial evaluation commission, recommended that the judge not be retained. See *id.* §§ 17-4-201, 17-4-114(c), 17-4-115(c). Since this commission was created in 1994, however, it has never recommended that a judge not be retained. See Fitzpatrick, *supra* note 1, at 484.
- 13 See TENN. CODE ANN. § 17-4-114, -115 (2008).
- 14 See *id.* §§ 17-4-114(d)(2), -115(d)(2).
- 15 Telephone interview with Tim Gregory, Tennessee Division of Elections (Dec. 2007) (providing election results through 2006); TENNESSEE DEP'T OF STATE, CERTIFIED ELECTION RETURNS (2008), <http://www.state.tn.us/sos/election/results/2008-08/index.htm> (providing election results in 2008).
- 16 See *id.*
- 17 See RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1995-1996, at 543 (1996) (listing results for the August 1, 1996, general election). For an account of the ruling that led to Justice White's defeat, see Carl A. Pierce, *The Tennessee Supreme Court and the Struggle for Independence, Accountability, and Modernization*, in A HISTORY OF THE TENNESSEE SUPREME COURT 308-11 (James Ely ed., 2002).
- 18 TENN. CODE ANN. § 17-4-101(a) (2008).
- 19 Research for this report began in July 2008 and individuals nominated thereafter were not examined.
- 20 It is common to use proxies for political affiliation in studies of this kind. See generally CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (using the political party of the President who appointed the judge as a proxy for the judge's political affiliation); John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167 (2005) (using campaign contributions as proxies for political affiliation). Like any proxy, of course, primary voting records will not always perfectly reflect the political affiliation of a judicial nominee. For example, a nominee may vote in one party's primary not because the nominee favors that party, but because the other party's primary is not contested.
- 21 Data could not be obtained for one nominee who was nominated twice. The data for the other nominees were not over identical time periods; for some nominees, the records went back to the 1980s, whereas for others the records went back only to 2000. The numbers reflected in this report are based on all of the data available for each nominee. Although in theory this lack of uniformity in time periods might not capture changes in political affiliation for some nominees that it captures in others, in this case, even if only the data back to 2000 are used for each nominee, the percentage of nominees who voted more often in Democratic primaries (67%) is no different than the percentage when all of the available is used for each nominee.

22 State and federal House races were used because these races occur every two years, and, as such, they offered a more precise reflection of the political affiliation of the Tennessee electorate over time. If races for candidates elected statewide were used instead, it would suggest the same or even greater divergence between the Tennessee Plan nominees and the Tennessee electorate. While votes for Democratic and Republican candidates were split in roughly the same way in statewide gubernatorial elections as they were in state and federal House races over the same time period (with Democrats receiving 52% of the gubernatorial votes), Republican candidates won *all but one* statewide federal race in Tennessee in that time (and often by very large margins). See TENNESSEE DEP'T OF STATE, CERTIFIED ELECTION RETURNS (2008), <http://www.state.tn.us/sos/election/index.htm>; RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2007-2008, at 564-65, 578-79 (2008); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2005-2006, at 560-61 (2006); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2001-2004, at 560-61, 565-66, 617-18, 626-627 (2004); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1999-2000, at 542-43 (2000); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1997-1998, at 526-27, 531-32 (1998); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1995-1996, at 516-17 (1996).

23 The state and federal House vote percentage is based on the sum of votes in biennial November elections from 1994 to 2006 exclusive of any votes received by independent or third-party candidates. The voting data was gathered from the Tennessee Blue Books in 1996, 1998, 2000, 2004, 2006, 2008, and the Tennessee Department of State's website in 2008. See TENNESSEE DEP'T OF STATE, CERTIFIED ELECTION RETURNS (2008), <http://www.state.tn.us/sos/election/results/2008-11/index.htm>; RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2007-2008, at 570-73, 620-37 (2008); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2005-2006, at 566-69, 597-613 (2006); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 2001-2004, at 570-72, 598-612, 633-36, 659-73 (2004); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1999-2000, at 563-64, 595-606 (2000); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1997-1998, at 539-41, 572-84 (1998); RILEY C. DARNELL, TENN. SEC'Y OF STATE, TENNESSEE BLUE BOOK 1995-1996, at 531-32, 558-67 (1996).

24 There were no appellate nominations during 2001-2002. The state and federal House vote percentage for each two-year period is based on the percentage of votes Democratic candidates received in the November election of the year before each period began, exclusive of any votes received by independent or third-party candidates. The voting data was taken from the Tennessee Blue Books in 1996, 1998, 2000, 2004, 2006, 2008, and the Tennessee Department of State's website in 2008. See note 23, *supra*.

25 On the other hand, if the commission favored judicial candidates with greater Democratic affiliation, one reason why fewer candidates with a Republican affiliation may have applied (if in fact fewer applied) is because they thought they had a smaller chance of receiving nominations.

26 See TENN. CODE ANN. § 17-4-102 (2008).

27 See Andy Sher, *Tennessee: General Assembly Landscape Changes as GOP Takes Over*, CHATANOOGA TIMES, Nov. 6, 2008 (describing Republicans' take-over of the House as the first since Reconstruction); Andy Sher, *Nashville: Parties Fight for Control of Assembly*, CHATANOOGA TIMES, Jun. 29, 2008 (noting that in 2007 Senate Republicans made history by electing "the first Republican speaker since post-Civil War Reconstruction").

28 See TENN. CODE ANN. § 17-4-102 (2008).

29 See *Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."). Although the conventional wisdom is that lawyers are more liberal than the public at large, the point has never been rigorously demonstrated. The few efforts to examine the matter have not been comprehensive. See Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First? Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 842-44 (1998) (surveying 234 partners from the "100 most prestigious law firms in the United States," and finding them more likely to describe themselves as Democrats, 42%, than Republicans, 33%, and that "large majorities favor . . . more 'liberal' social policies," including, for example, that 83 percent "agreed that women have a right to choose an abortion"); Frederick D. Herzon, *Ideology, Constraint, and Public Opinion: The Case for Lawyers*, 24 Am. J. Pol. Sci. 233, 244 (1980) (interviewing 226 randomly-selected, Philadelphia-area lawyers in 1975, and finding 52.9% were to "some degree liberal, [while] 39.0 % [were] conservative"); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 509-10 (1985) (studying 224 lawyers drawn from four Chicago law firms, and finding that 38.5% were Democrats, 23.5% Republicans, and 38.0% Independent); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF

THE BAR 19, 181-82 (2005) (reviewing surveys of random samples of 800 Chicago lawyers in 1975 and 1995, and finding Democrats outnumbered Republicans by approximately 56% to 29% in both years, and that “Chicago lawyers tend to be, overall, somewhat more conservative than the general population on issues concerning free markets and support for large companies, but somewhat more liberal than the public at large on social issues”); ROBERT LERNER ET AL., AMERICAN ELITES 50, 142 (1996) (interviewing a “random sample of elite corporate lawyers consist[ing] of partners from New York and Washington, DC, law firms with more than fifty partners” in 1982, and finding 32% identified themselves as conservative, 22% as moderate, and 47% as liberal).

30 See generally, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (showing that federal appellate judges appointed by Republican presidents vote in a more conservative direction than judges appointed by Democratic presidents).

31 See generally Kenneth Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

32 See *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) (“Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.”).

33 See TENN. CODE ANN. § 17-4-102(a)(1)-(4).

34 See Fitzpatrick, *supra* note 3, at 120 (“[G]iven that the livelihoods of these lawyers will often depend on the jurisprudential inclinations of the judges they nominate, it would be nothing short of superhuman if these considerations did not enter into their deliberations.”).

35 See, e.g., SUNSTEIN ET AL., *supra* note 30, at 30-36 (showing that Democratic federal court of appeals judges voted with plaintiffs more often than Republican judges in cases involving, for example, workplace discrimination and sexual harassment).

36 Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 466 (2007).

37 HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 167 (1988).

38 *Id.*

39 G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 300 (2007).

40 Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. B. J. 20, 24 (1996).

41 See, e.g., Michael R. Dimino, *The Worst Way of Selecting Judges—Except All the Others that Have Been Tried*, 32 N. KY. L. REV. 267, 288 (2005) (“Whatever the form of judicial selection, ideology matters. The question is whose ideology should matter.”).