

# The Tennessee Journal

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## Constitutional change could end bickering over judge selection

At times, Tennessee's method of selecting high-level judges has been caught up in partisan politics or a power struggle between the legislature and the governor. For Gov. Phil Bredesen, it turned into a fight against bureaucracy, one he eventually took — you guessed it — to court.

Lt. Gov. Ron Ramsey (R-Blountville) thought legal interest groups, including the Tennessee Bar Association, had too much control over the selections, and four years ago he managed to change the law to diminish their influence — and increase his own.

Along with political tension, there has always been a constitutional issue. The state constitution provides in Article VI, Section 3 that “judges of the Supreme Court shall be elected by the qualified voters of the state.” That issue is now before a special court — for the third time.

All the disputes presumably will be settled in November 2014 if a proposed constitutional amendment is approved by voters. The amendment would allow the governor to make appointments, without a screening apparatus, subject to confirmation by the legislature.

Retention elections for appellate judges would continue. Trial judges still would be popularly elected, with the governor, as now, filling vacancies between elections.

But approval of the amendment — which will require an affirmative vote equaling a majority of those voting in the 2014 governor's election — is by no means assured. Citizens tend to favor popular election, and the bar association opposes ratification because it prefers a screening system for “merit selection.”

**Limbo.** In the meantime, because the legislature allowed the Judicial Nominating Commission to go out of existence July 1, uncertainty has clouded the appointment process. By law, the governor fills vacancies only from slates of nominees given him by the commission.

Thursday, Attorney General Bob Cooper issued a formal opinion that the governor has statutory authority to make appointments on his own if the commission does not submit nominees — which it can't do, of course, if it doesn't exist.

Gov. Bill Haslam, who had indicated he favored restoration of the commission in next year's legislative ses-

sion, now plans further discussions with legislative leaders. They could decide to hold off on legislation until they see how the referendum goes.

Haslam supports the constitutional amendment and has signaled he plans to campaign for it and two other proposed amendments as a package. The other propositions would prohibit a general state income tax and make the state constitution neutral on the issue of abortion, in effect undoing a 2000 Tennessee Supreme Court decision that found stronger implicit constitutional protections for abortion than those in the federal Constitution as interpreted by the U.S. Supreme Court in *Roe v. Wade* and other cases.

The three amendments have virtually no connection, except that some of the strongest support for the popular election of judges has come from pro-life activists. But Tennessee Right to Life, the state's main anti-abortion organization, has no position on the judicial and tax amendments. It welcomes the governor's support as part of a package but will wage its own campaign for a yes vote on the abortion amendment, the first one on the ballot. A coalition called Healthy and Free Tennessee, which includes Planned Parenthood and the ACLU, will fight Amendment One.

Tennessee Right to Life this week engaged longtime political consultant Tom Perdue to handle its campaign. Perdue may best be remembered in Tennessee as the consultant to Bill Frist's successful 1994 campaign to unseat Democratic Sen. Jim Sasser.

The judicial amendment is strongly supported by the Tennessee Chamber of Commerce & Industry and other business organizations, which won't be involved in the abortion amendment battle.

**Override.** In 1971, the legislature enacted a modified Missouri Plan under which the governor was to appoint members of the Court of Appeals, Court of Criminal Appeals, and Tennessee Supreme Court. Two years later, the Democratic-controlled legislature grew concerned because all five Supreme Court terms would end in 1974, in time for Republican Gov. Winfield Dunn to name replacements. It passed a bill removing the

Supreme Court from the plan. Dunn vetoed it, but in one of the most famous political horse trades in state history, Republicans from northeast Tennessee helped override that veto in return for House Speaker Ned McWherter's aid in overriding the veto of a bill creating a medical school in Johnson City.

In 1994, Lt. Gov. John Wilder (D-Somerville) steered into law a new system, dubbed the Tennessee Plan, which included members of the Supreme Court.

A Republican governor, Don Sundquist, was the first to make appointments under the plan, having to do so from lists sent him by a Judicial Selection Commission whose members were appointed by the Democratic speakers of the House and Senate. The speakers, as required by law, made their choices mainly from names submitted by the bar association, the trial lawyers lobby, district attorneys, and other groups.

No significant trouble arose until the Bredesen administration, when the commission repeatedly submitted slates of nominees that seemed designed to force the governor to appoint the one it favored. Bredesen publicly stated his desire to appoint an African-American, but a black Court of Criminal Appeals judge whom he favored for the Supreme Court was repeatedly passed over by the commission.

After Bredesen rejected an entire slate and requested another one as the law allowed, the commission gave him a second slate with two nominees who seemed unlikely to win the Democratic governor's appointment: a trial judge whose performance had been ranked 71st of 71 judges in a Memphis Bar Association survey and a Republican judge on the Court of Appeals, Bill Koch. The third name was that of prominent trial lawyer Houston Gordon, who had been on the first slate too.

Bredesen sued the commission, arguing the second slate was supposed to have three new names. He won.

Later, for another high court seat, the commission again nominated the Memphis judge, D'Army Bailey, and Koch, along with a rural circuit judge. Bredesen appointed Koch, who still serves.

The feud between Bredesen and the commission opened the door for reform in 2009, when Senate Republicans were in no mood to extend the expiring selection commission. With Ramsey's backing, Senate Majority Leader Mark Norris amended a broadly captioned bill to create a new Judicial Nominating Commission, whose members would be appointed by the Senate and House speakers. Legal interest groups could make suggestions, but the speakers would no longer have to pick from their lists.

As a result, with Ramsey and House Speaker Beth Harwell (R-Nashville) making the appointments, the commission became conservative, and its nominees tended to be Republicans.

**Another reform.** But after Republicans took firm control of both houses in 2011, the push for popular election picked up steam. Even some lawmakers who favor appointed judges, such as Ramsey, argued that the constitution demands elected judges.

Competing constitutional amendments were floated, and one by Sen. Brian Kelsey (R-Germantown), now set for next year's ballot, won favor with the governor. Ramsey and Harwell also have endorsed it.

**Another challenge.** It is unclear how the current court case involving the Tennessee Plan might affect the campaign for ratification.

Twice, special supreme courts have upheld the constitutionality of gubernatorial appointments and uncontested retention elections.

Judicial reform activist and former Democratic gubernatorial nominee John Jay Hooker, who has a sizable following of sympathetic legislators, is challenging the system once again. A special supreme court, appointed by Haslam after the state's five justices recused themselves, heard arguments in July but has yet to rule. The court's decision, however it comes out, won't matter for long if the constitutional amendment prevails Nov. 4, 2014. If the amendment fails, though, a strong push for popular election is inevitable.

**Judges in waiting.** The expiration of the nominating commission has created an unusual situation. Three appellate judges planning to retire when their terms end in 2014 announced their intentions last June, enabling the commission to take applications, hold hearings at the end of the month, and send the governor nominations before it faded into extinction. In late August, Haslam made the three appointments — Sullivan County Criminal Court Judge Robert Montgomery to the Court of Criminal Appeals, Shelby County Chancellor Arnold Goldin and Nashville lawyer Neal McBrayer to the Court of Appeals — though they won't assume the positions until Sept. 1, 2014.

**The opinion.** Meanwhile, Justice Janice Holder has announced she will retire next year. The opinion Cooper issued Thursday means Haslam will be able to name her successor — and fill other vacancies as they occur — without the nominating commission.

The 2009 law establishing the nominating commission provides that if the commission fails to furnish a list of nominees within 60 days "after receipt of written notice from the governor" that a vacancy has occurred, the governor may go ahead and fill the position. The legal question, in part, was what this meant if there was no commission for the governor to notify.

Cooper's opinion finds it "logical," in light of case law, to interpret the language "to empower the governor to fill judicial vacancies in all circumstances" in which it fails to act, including when it has been terminated. But it also says that if a court were to conclude the language is ambiguous, the legislative history of the statute should resolve any concern.

The opinion quotes a lengthy exchange on the Senate floor May 28, 2009, between then-Sen. Dwayne Bunch (R-Cleveland), who wanted to amend the language to make it clear the governor could make appointments if the commission went out of existence, and Norris, who argued the amendment wasn't necessary because the language already provided for that.

# Tennessee News Digest

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- Hankook Tire Co., headquartered in South Korea, may soon announce plans to build a plant in Clarksville employing more than 1,000 workers, various publications reported.
- Gov. Bill Haslam said he is discussing with Tennessee congressmen the feasibility of using state funds to reopen the Great Smoky Mountains National Park and other areas closed because of the partial federal shutdown.

- Tennessee had the highest rate of violent crime in the nation in 2012, according to new FBI statistics, with 644 people per 100,000 reported as victims of murder, rape, robbery, or aggravated assault. Much of the violence was concentrated in urban areas, with Memphis ranked fifth among U.S. cities and Nashville 18th.
- U.S. District Judge Tom Wiseman, who turns 83 next month, is retiring. Wiseman, who took senior status in the

Middle District in 1995, is a former state treasurer who unsuccessfully sought the Democratic gubernatorial nomination in 1974. President Jimmy Carter appointed him to the bench in 1978.

- U.S. Rep. Steve Cohen (D-Memphis) joined the list of wealthy Tennessee lawmakers refusing federal pay amid the partial government shutdown: Lamar Alexander, Bob Corker, Diane Black, Jim Cooper, and Chuck Fleischmann.
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## An Akbari, not a Ford, wins in District 91

Political newcomer Raumesh Akbari, a 29-year-old lawyer and community activist, emerged as the winner Tuesday of a low-turnout special Democratic primary election to fill the seat of the late Rep. Lois DeBerry (D-Memphis). She won with 502 votes, or 27.7%, in a seven-candidate field.

No Republicans ran for the seat in the heavily Democratic House District 91, so Akbari faces only an independent candidate, libertarian Jim Tomasik, in the special general election Nov. 21.

A Cordova High School graduate, she attended Washington University in St. Louis and Saint Louis University School of Law, where she was president of the Black Law Students Association. She is a member of the nondenominational Life Church.

Based on family name recognition, Kemba Ford, daughter of former state senator John Ford, had been considered the favorite. Her campaign literature included a picture of her father, who went to prison in the 2005 Tennessee Waltz sting. She finished third with 355 votes. The runner-up was Terica Lamb with 399.

Akbari funded her race mainly with a \$21,000 loan, according to her pre-primary report to the Registry of Election Finance. Ford raised nearly \$14,000 while Lamb took in \$10,000 through September.

Only 1,812 people voted.

Among Akbari's supporters was Rep. Barbara Cooper (D-Memphis), in whose District 86 campaigns both Akbari and her identical twin sister, UT medical school student Raumina Akbari, have worked.

A now white-haired former senator Roscoe Dixon, who also served time in the '05 bribery sting, backed Joshua Forbes, who came in fourth with 261 votes. Doris Deberry-Bradshaw, sister of Rep. John Deberry (D-Memphis), placed sixth with 111.

Assuming Akbari wins as expected Nov. 21, she will become the legislature's only female or black attorney.

### Political roundup

## Registry tosses Forrester's complaint

On a 3-1 vote, the Registry of Election Finance dismissed Wednesday a complaint against Gov. Bill Haslam by former state Democratic chairman Chip Forrester, who contended Haslam's employment of Tom Ingram as a personal consultant, at his personal

expense, was a violation of state law because Ingram's work was campaign-related.

Ingram, who was paid with campaign funds for his work during Haslam's 2010 election campaign and went on the 2014 reelection campaign payroll in July, said in an affidavit the work he did for the governor in the interim was "to provide strategic consulting and other advice generally relating to organization and structural issues at various state agencies."

That Ingram's work in some cases was political wasn't in dispute, but Haslam's attorneys, Woody Woodruff and Lana Johnston of Waller Lansden, insisted it was not campaign-related. Ingram said he attended a meeting at a Nashville hotel last October related to the 2014 campaign but was not paid. It is not unusual for consultants to work without compensation in the early stages of a campaign, knowing they'll reap their rewards later when it gears up.

The lone no vote on dismissal came from Chairman Hank Fincher of Cookeville, a former Democratic state representative, who wanted to grant Forrester's request for time to gather state email records he believed would bolster his case. Norma Lester of Memphis abstained.

Last month, in closed session as required by law, the Tennessee Ethics Commission dismissed a similar complaint filed by Forrester.

**Democrat eyes Senate.** Knoxville lawyer Terry Adams emailed Democrats throughout the state Thursday to express his interest in running for U.S. senator next year. Sen. Lamar Alexander (R-Maryville) is a prohibitive favorite for reelection, but Democrats have taken note of tea party upsets in GOP primaries in other states. They would like to have a credible candidate against Alexander, but they especially want someone in place in the event long-shot GOP challenger and tea party champion Joe Carr upsets the incumbent, which would enhance Democratic prospects in the general election. Adams, who served in the Navy, is a political newcomer. But he's also a fresh face.

**Mancini joins fray.** The 2014 Democratic primary in state Senate District 21, where Sen. Douglas Henry (D-Nashville) isn't seeking reelection, is now a three-person race. Mary Mancini resigned Thursday as executive director of Tennessee Citizen Action to enter the contest. Already running were attorneys Jeff Yarbrow and Metro Council member Jason Holleman.

## Tennessee Notes & Quotes

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■ Rep. **Charles Curtiss** (D-Sparta), a former Commerce Committee and Fiscal Review Committee chairman who has served in the House for 19 years, has decided not to seek an 11th term. Curtiss, 66, is one of the legislature's few remaining rural Democrats. His anti-abortion and business-friendly views sometimes put him at odds with the increasingly urban Democratic Caucus. At the same time, Republicans have gained ground in his district and in the last election attacked him in radio ads and mail pieces, and the lawmaker said he does not want his family to "go through that again." Perhaps his most controversial vote — one he regretted but overcame — was cast May 22, 2002, in favor of a state income tax.

■ Rep. **Eric Watson** (R-Cleveland), also will forgo a reelection bid next year. He will run instead in the May GOP primary for Bradley County sheriff. Watson, 40, chairman of the House Judiciary Committee, has been a legislator for seven years. He served as a deputy sheriff for 12 years and left the department in 2011 as a captain.

■ **President Obama** has really got trouble now. The Republican Caucus of the Tennessee State Senate sent the president a letter this week expressing "extreme displeasure" with his handling of the budget impasse and blaming him for exploiting a government "shutdown" that in truth is merely a "slowdown." Twenty-four of the Senate's 26 Republicans signed the letter. The two who didn't were Sens. **Brian Kelsey** (R-Germantown) and **Stacey Campfield** (R-Knoxville).

■ The League of Women Voters and the state Department of Commerce and Insurance settled Monday the league's lawsuit claiming emergency rules for Affordable Care Act health plan navigators and certified application counselors (CACs) were unconstitutionally broad. Under an agreed order signed by Davidson County Chancellor **Russell Perkins**, the rules, which call for background checks and fingerprinting, will apply only to navigators and CACs who are registered with the federal government, hold themselves out to be, or are required by law to be. About the time the league, represented by the Tennessee Justice Center, was settling its complaint, Service Employees International Union Local 205 was in federal court in Nashville with a similar suit. The union won a temporary restraining order, despite the state's argument it was now unnecessary.

■ "You may have to attend more funerals because denying people access to reliable health care costs lives." — *From a Thursday op-ed piece in the Chattanooga Times Free Press by state Democratic Chairman **Roy Herron**, offering 10 reasons people should care whether TennCare coverage is expanded under the Affordable Care Act. This was No. 5.*

■ Nashville Mayor **Karl Dean** is backing a proposed 0.25% "fee" on the sale of food, beer, retail items, and certain services within the city's Central Business Improvement District, which includes most of downtown. The levy, which the Metro Council is set to consider Tuesday, would not apply to professional services,

sports tickets, liquor, lodging, or parking. City officials hope to bring in \$1 million a year for use in recruiting major conventions. The city's local option sales tax rate is 2.25%, a half-cent below the maximum. But raising the rate would require a referendum, and the tax would have to apply throughout Nashville/Davidson County to items and services the existing rate covers. The state legislature passed a law this year authorizing a fee, within precise limits, but only for metropolitan governments, which besides Nashville means only Lynchburg/Moore County and Hartsville/Trousdale County.

■ Local governments may impose a sales tax up to 2.75%, on top of the 7% state rate, but the state's four largest cities levy a 2.25% tax. In Memphis, Mayor **A C Wharton** backs an increase to the maximum proposed by Councilmen **Shea Flinn** and **Jim Strickland**. A referendum is set for Nov. 21. The smallest of the six cities with populations above 100,000, Clarksville and Murfreesboro, levy rates of 2.5% and 2.75%, respectively.

■ Last week, the ACLU wrote school superintendents to warn against "school-sponsored prayer" at football games. This week, state GOP chairman **Chris Devaney** wrote them to argue the ACLU is wrong. He said it's a "Tennessee issue, not a partisan one" and quoted from an op-ed piece penned by **Roy Herron**, the Democratic chairman, when a state senator: "The Constitution does not require government hostility to religion."

■ Former congressman **Harold Ford Sr.**, 68, is back in Memphis and has opened a new funeral home on Sycamore View, the family's fourth. The original, N.J. Ford & Sons, is still operating. Former city councilman **Edmund Ford Sr.** owns another one, at which former state senator **John Ford** now works, and **Joe Ford**, formerly a city councilman, county commissioner, and interim county mayor, also is in the funeral business.

■ State Sen. **Stacey Campfield** (R-Knoxville) emailed legislative colleagues and staff Monday to invite them to an Oct. 22 fundraiser at a Nashville pizza parlor. Trouble was, he used the state's email system. A few minutes later, he sent another message asking recipients to "please disregard the previous email. It went out on my wrong account." The Democratic Party pounced on the "misuse" of a service funded by "taxpayers" and demanded Campfield reimburse the state.

■ "I talked to the Democrat leadership and they've agreed to downgrade the punishment from a firing squad to 100 lashes with a wet noodle if I promise to order veggie pizzas for all their staffers." — **Campfield**.

■ Apparently, the event hadn't been cleared with the pizza restaurant, whose owner said he knew nothing of it until customers began calling and threatening a boycott if it took place — a tactic **Campfield** suggested belonged in "the 1930s." He's moving the event, at which Lt. Gov. **Ron Ramsey** is the featured speaker.

■ Let's hope the new joint has a bipartisan menu. Could be even a Republican or two will want vegetarian pizza.