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## Amendment II: A Consideration of the History, Passage & Potential Effects of the Latest Judicial Selection Process in Tennessee

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AMENDMENT II: A CONSIDERATION OF THE  
HISTORY, PASSAGE & POTENTIAL EFFECTS OF THE  
LATEST JUDICIAL SELECTION PROCESS IN  
TENNESSEE

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I. INTRODUCTION

On November 4, 2014, the Judicial Selection Amendment (Amendment II) to the Tennessee Constitution came before the state’s electorate. Amendment II sought to replace the role played by the Judicial Nominating Commission by expanding the governor’s appellate judiciary appointment power while simultaneously clarifying and codifying what is known as the Tennessee Plan for judicial selection. Although some felt that this amendment went directly against the measured determinations of the state constitution’s drafters, Amendment II passed by a relatively wide margin, thereby altering and solidifying the judicial selection process in the State of Tennessee. While the voters of Tennessee expressed resounding approval for the Tennessee Plan as altered by Amendment II, some fundamental questions still remain pertaining to its potential democratic and political effects on the impartial administration of justice in the state. A consideration of the history of Tennessee’s judicial selection process will bring these fundamental questions into focus and provide a baseline for analysis of Amendment II’s future impact.

II. JUDICIAL ELECTION AND APPOINTMENT PRIOR TO AMENDMENT II

Prior to the recent passage of Constitutional Amendment No. 2 for the November 4, 2014, General Election Ballot (Amendment II), Article VI, section III of the Tennessee Constitution stated that “[t]he judges of the

Supreme Court shall be elected by the qualified voters of the state.”<sup>1</sup> This provision stood in contrast to its sister provision in the United States Constitution which provides that “[the President] shall have Power, by and with the advice and Consent of the Senate, to . . . appoint . . . Judges of the Supreme Court . . . .”<sup>2</sup> This distinction is not a novel one. Thirty-eight states have some form of election—be it partisan, nonpartisan, or retention—for the judges on their high courts.<sup>3</sup> Similarly, of the thirty-nine states that have intermediate appellate courts, thirty-one of them have some form of election for the judges sitting on those courts.<sup>4</sup>

Though Tennessee’s form of judicial election was not abnormal among the states, many felt that a change was necessary. To that effect, the Tennessee Plan was passed in 1971 with the purpose of minimizing the effects of partisan politics on the judiciary while still satisfying the electoral mandate of the Constitution.<sup>5</sup> Under this plan, the Judicial Nominating Commission (or its predecessor), selected by the governor, nominated the judges of the intermediate appellate courts in Tennessee and then put them up for retention elections before the people of their jurisdiction.<sup>6</sup> In 1994, the Tennessee Plan was expanded to include the justices of the Tennessee Supreme Court as well.<sup>7</sup> The Tennessee Plan governed how the judges of the Tennessee appellate courts were selected for the last two decades. The purpose behind this judicial selection process was to assist the governor and the electorate in selecting qualified judges for the State of Tennessee, while at the same time reducing outside influences, and making the bench less political.<sup>8</sup> The Judicial Nominating Commission and its predecessor have been a main catalyst in affecting this purpose since 1994.

The make-up of the Judicial Nominating Commission (Commission) was prescribed by statute.<sup>9</sup> There were seventeen members of the Commission: eight appointed by the Speaker of the Senate, eight appointed by the Speaker of the House, and one member appointed jointly

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<sup>1</sup> TENN. CONST. art. VI, § 3 (revised Nov. 4, 2014).

<sup>2</sup> U.S. CONST. art. 2, § 2, cl. 2.

<sup>3</sup> *Fact Sheet on Judicial Selection Methods in the States*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf) (last visited Dec. 18, 2014).

<sup>4</sup> *Id.*

<sup>5</sup> *The Tennessee Plan: Keeping the Influence of Politics and Money Out of Our Courts*, AMERICAN BAR ASSOCIATION, [http://www.tba.org/sites/default/files/tennplan\\_brochure.pdf](http://www.tba.org/sites/default/files/tennplan_brochure.pdf) (last visited Dec. 18, 2014).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> TENN. CODE ANN. § 17-4-101 (2014).

<sup>9</sup> TENN. CODE ANN. § 17-4-102 (2014).

between the two.<sup>10</sup> In each pool of eight commission members, there were to be two from each grand division of the state (East, Middle, and West Tennessee), followed by two at-large appointees.<sup>11</sup> Further, at least five of the eight appointees from each speaker had to be lawyers, while the jointly appointed member could not be an attorney.<sup>12</sup> Lastly, no more than three of the four at-large appointees could be from the same grand division.<sup>13</sup> The selection of members was to be done with an eye toward racial, gender, and geographic diversity, and any citizen that met the requirements prescribed in Tennessee Code Annotated section 17-4-103<sup>14</sup> could apply for membership via an application on a statute-mandated website developed and maintained by the Administrative Office of the Courts.<sup>15</sup>

When a vacancy on an intermediate appellate court or the Supreme Court arose, the Commission would convene as early as possible and hold a public meeting.<sup>16</sup> Any citizen was welcome to attend and give their thoughts on suggested nominations to fill the relevant judicial vacancy, and attorneys could voice their opinions on their own nominations.<sup>17</sup> Following the hearing, the Commission was to publicly interview and vet any potential candidates, and all interviews and meetings were to be made public.<sup>18</sup> Within sixty days of the vacancy, the Commission would vote on nominees, name three candidates to fill the position, and submit its list to the governor.<sup>19</sup> Once the governor received this list, he was to make his selection to fill the judicial vacancy.<sup>20</sup> If he was not satisfied with the three nominees, he could request another panel of three possible judges.<sup>21</sup> Within sixty days of receiving that second list of nominees, the governor was to make his selection to the bench from the six possible choices.<sup>22</sup> The term of judges appointed in this manner expired on the thirty-first of August after the next regular August election.<sup>23</sup> Once that term was up, the judge or

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Any member of the judicial nominating commission must be a citizen of the United States, must be at least 30 years of age, and must have been a citizen of the State of Tennessee for at least five years. Further, anyone appointed from a specific grand division must have been a resident of that grand division for at least one year immediately prior to appointment. TENN. CODE ANN. § 17-4-103 (2014).

<sup>15</sup> S.B. 1573, 106th Leg., 1st Sess. (Tenn. 2009).

<sup>16</sup> TENN. CODE ANN. § 17-4-109 (2014).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> TENN. CODE ANN. § 17-4-112 (2014).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

justice was to file his or her intention to run for re-election, and was then subject to a retention vote in his or her relevant jurisdiction.<sup>24</sup>

After nearly a decade of this appointment system and significant debate on the topic, the legislature decided to let the Commission expire in May of 2013.<sup>25</sup> Consequently, the expiration of the Commission necessitated a change in the system, prompting Senate Joint Resolution No. 2 from the Tennessee General Assembly.<sup>26</sup> This Resolution became known as Amendment II, vesting the executive with appointment power and ultimately removing from Article VI, section 3 the express requirement that the people should elect the Supreme Court justices.<sup>27</sup> Many already felt that the Tennessee Plan directly conflicted with this language and opposed Amendment II on the grounds that it would permanently reduce the role of the electorate in the judicial selection process and centralize that power in the hands of the governor.<sup>28</sup> Opponents felt that the language of Article VI, section III was plain, and that requiring Supreme Court justices to be elected was a measured decision made by the state's founders.<sup>29</sup> While these dissenters felt that the judicial selection process needed change, they believed that the new process should match the Constitution, not the other way around.<sup>30</sup>

### III. EXPLANATION OF AMENDMENT II

Amendment II, born of the language of Senate Joint Resolution No. 2, states that Article VI, section III of the Tennessee Constitution should be amended by deleting its first two sentences and replacing them with the following:

Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state. Confirmation by default occurs if the Legislature fails to reject an appointee within sixty calendar days of either the

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<sup>24</sup> TENN. CODE ANN. § 17-4-115 (2014).

<sup>25</sup> Brian T. Fitzpatrick, *Sunsetting the Tennessee Judicial Nominating Commission: What Now?*, THE FEDERALIST SOCIETY (June 26, 2013), <http://www.fed-soc.org/publications/detail/sunsetting-the-tennessee-judicial-nominating-commission-what-now>.

<sup>26</sup> S.J. Res. 2, 107th Leg., 2d Sess. (Tenn. 2012).

<sup>27</sup> Ciara Matthews, *Adding a Layer of Accountability to Judicial Appointments in Tennessee*, NATIONAL REVIEW ONLINE (Oct. 9, 2014, 11:17 AM), <http://www.nationalreview.com/unnaturally-political/389943/adding-layer-accountability-judicial-appointments-tennessee-ciara>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

date of appointment, if made during the annual legislative session, or the convening date of the next annual legislative session, if made out of session. The Legislature is authorized to prescribe such provisions as may be necessary to carry out Sections two and three of this article.<sup>31</sup>

The language of Amendment II seems to bring Tennessee's appointment regime in line with the federal system by placing the appointment power squarely in the governor's hands, as opposed to the Commission.<sup>32</sup>

On November 4, 2014, over one-third of Tennessee's registered voters cast their votes in favor of Amendment II.<sup>33</sup> While this amendment has effectively changed the constitutional judicial election language, there is still a question as to whether these changes will have any practical impact on the democratic judicial electoral process in Tennessee. Without understanding the potential effects that this amendment may have on the democratic process, executive power, and judicial decision-making, it is impossible to determine whether its passage is actually a net benefit to the people of the state.

#### IV. POTENTIAL EFFECTS OF AMENDMENT II

##### 1. *Effect on Tennessee's democratic process*

In the United States, state and federal judicial selection processes are somewhat different. These differences have typically arisen in response to the electorate's desire to be consulted on the appointment of judges to the state's appellate courts. In light of this understood electoral directive, one should ask whether Amendment II supports this movement, or whether its implementation will take the appointment of appellate judges a step further away from the desires of the public. One should also consider whether this potential change is beneficial to democracy as a whole.

Amendment II's passage has consolidated the pre-1994 judicial electoral process and the post-1994 statutory appointment process into a constitutional judicial selection procedure led by the governor.<sup>34</sup> Proponents of Amendment II claimed that this change would move the appointment

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<sup>31</sup> S.J. Res. 2, 107th Leg., 2d Sess. (Tenn. 2012).

<sup>32</sup> *Id.*

<sup>33</sup> *Tennessee Judicial Selection, Amendment 2 (2014)*, BALLOTPEDIA.ORG, [http://ballotpedia.org/Tennessee\\_Judicial\\_Selection,\\_Amendment\\_2\\_%282014%29](http://ballotpedia.org/Tennessee_Judicial_Selection,_Amendment_2_%282014%29) (last visited Dec. 18, 2014).

<sup>34</sup> *See generally* TENN. CONST. art. 6, § 3; TENN. CODE ANN. § 17-4-102; S.J. Res. 2, 107th Leg., 2d Sess. (Tenn. 2012).

process back toward the voters.<sup>35</sup> Voters were told that Amendment II would protect their democratic rights because: (1) they are able to vote for the governor who would then make appointments; (2) they vote for their state senators and state representatives who hold the power of confirmation; and (3) the electorate gets the opportunity to retain or replace their appellate judges and justices at the end of their respective terms.<sup>36</sup> While these proposed protections are unquestionably democratic tenets, the question remains as to whether this amendment is actually giving the people their desired say in the judicial appointment process. It seems that Amendment II's appointment mechanism has once and for all rescinded the direct vote on appellate judges, and given ultimate appointment power to the executive.

Superficially, it may seem as though Amendment II has quieted the democratic voice of the people of Tennessee. However, Amendment II's appointment mechanism not only seems to be a legitimate attempt to protect the democratic process, but the ideals embodied within were also understood as democratic virtues by the framers of the United States Constitution. In Federalist 76, Alexander Hamilton opined that there were three ways to carry out a selection process. Officers, ambassadors, and judges could be appointed: (1) solely by the executive; (2) by a "select assembly of a moderate number"; or (3) by the executive with a concurrence from the assembly.<sup>37</sup> Hamilton believed that the initial selection of judges should be exercised by a single man—the executive—with a concurrence from the legislature.<sup>38</sup> It was his belief that the executive would be subject to a concern for his reputation and sheltered from the large number of "personal attachments" that an assembly of men would have.<sup>39</sup>

The necessity of the executive appointment regime is born out in an example that Hamilton describes as "the manner of appointment in [the State of New York]."<sup>40</sup> This case study provides a look into his second option—appointment by an assembly.<sup>41</sup> Hamilton paints a picture of a small group of individuals, "shut up in a private apartment, impenetrable to the public eye . . ."<sup>42</sup> In this small assembly, the governor is understood to have the power to appoint, but the state's constitution left his actual duties pertaining to appointment ambiguous.<sup>43</sup> As a result of this ambiguity, there is no ability for the people to hold the governor or the members of the

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<sup>35</sup> *Amendment 2 to the Tennessee Constitution*, TENNESSEE BAR ASSOCIATION, <http://www.tba.org/info/amendment-2-to-the-tennessee-constitution> (last visited Dec. 18, 2014).

<sup>36</sup> *Id.*

<sup>37</sup> THE FEDERALIST NO. 76, at 378 (Alexander Hamilton) (The Gideon ed., 2001).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 378–79.

<sup>40</sup> THE FEDERALIST NO. 77, at 378 (Alexander Hamilton) (The Gideon ed., 2001).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 398.

<sup>43</sup> *Id.*

assembly accountable.<sup>44</sup> Hamilton proposed that an appointment mechanism similar to that reflected in Amendment II's provisions would provide the correct motivations for the governor and the assembly to make appointments less political and more merit-driven.<sup>45</sup> Hamilton believed that appointments made by governors and confirmed by a body of the assembly, just as Amendment II provides, would "produce all the good, without the ill . . . ."<sup>46</sup>

Finally, the founders saw the type of appointment system proscribed by Amendment II as a valuable check on both executive and legislative powers.<sup>47</sup> The powers given to each branch in this system would secure a balance, curbing personal desires and preventing powerful influences from commanding federal appointments.<sup>48</sup> Hamilton saw the assembly's ability to restrain the president in his appointments as a powerful tool against tyranny.<sup>49</sup> Similarly, the same principles apply to Amendment II's provision for a legislative concurrence on judicial appointments by the governor.<sup>50</sup> The restraints inherent within this system, as understood by the framers of the Constitution, would be equivalent on both the executive and the assembly, but would not negate a single desirable advantage of having an executive alone make the appointments.<sup>51</sup> Admittedly, while the provisions of Tennessee's Amendment II are somewhat different than those of the United States Constitution, the democratic virtues seem to parallel. Amendment II may have rescinded the possibility for a one person, one vote system for appointing appellate court judges in Tennessee, but its provisions move the state closer to a tried and true, checks and balances approach that was ratified by America's founders and continues to be accepted by the people of the United States.

## 2. *Effect on executive power*

While this loss to the electorate is mainly a hypothetical one—because there has not been a direct “one person, one vote” regime for appellate judges for quite some time—some consideration should be given to whether this solidification of the appointment process is good for state democracy in general. There is no doubt that Amendment II represents an increase in the power of the executive in Tennessee. Rather than being limited to six candidates to fill an appellate judicial vacancy, the governor

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 397.

<sup>46</sup> *Id.*

<sup>47</sup> See generally THE FEDERALIST NO. 77 (Alexander Hamilton) (The Gideon ed., 2001).

<sup>48</sup> *Id.* at 397.

<sup>49</sup> *Id.*

<sup>50</sup> S.J. Res. 2, 107th Leg., 2d Sess. (Tenn. 2012).

<sup>51</sup> See THE FEDERALIST NO. 76, at 378 (Alexander Hamilton) (The Gideon ed., 2001); THE FEDERALIST NO. 77, at 397 (Alexander Hamilton) (The Gideon ed., 2001).



is now only limited by the requirements set forth in Tennessee Code Annotated section 17-1-101, *et seq.*<sup>52</sup> This power is checked, however; while the governor's selection prior to Amendment II was final, now the nominee must face confirmation before the state legislature.<sup>53</sup>

This check on the governor's power brings little solace to opponents of Amendment II. The plain language of Article VI, section III of the Tennessee Constitution made clear that the power to elect justices to the Supreme Court resided with the people, and some argue that any plan circumventing that power in favor of executive appointment directly contradicts the careful considerations of the constitution's framers.<sup>54</sup> Opponents fear that judicial appointment will lead to a lack of transparency, which would be wholly avoided if the people of Tennessee were allowed to exercise the constitutional right to elect their appellate judges.<sup>55</sup>

The question still remains as to whether Amendment II makes judicial selection in the state of Tennessee more or less political. Though many supporters of Amendment II proclaimed that it would put an end to the influence of outside money and partisan politics in the judiciary, this assertion is based on a faulty comparison to a previous system. While Amendment II would certainly achieve that goal as compared to a "one person, one vote" regime, that system has not been used in Tennessee for decades.<sup>56</sup> After Amendment II, the filling of judicial vacancies is solely in the hands of elected officials from appointment through confirmation, but judges selected to fill those vacancies will still be subject to retention votes at the end of their respective terms. There is little doubt that these elections will remain volatile and partisan attacks will persist when a controversial judge is faced with retention.

Despite the potential misconception that Amendment II will curb the impact of outside political pressures on Tennessee's judiciary, it does reduce partisanship and encourage cooperation. The absence of direct elections as called for by Article VI, Section III of the Tennessee Constitution in effect eliminates the adverse nature of the judicial selection process. Further, judges being appointed and confirmed by directly elected officials, rather than nominated by a commission, increases accountability leading to greater cooperation and efficiency.

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<sup>52</sup> Supreme court justices are required to be at least 35 years of age and judges of other courts must be at least 30 years of age. TENN. CODE ANN. § 17-1-101.

<sup>53</sup> S.J. Res. 2, 107th Leg., 2d Sess. (Tenn. 2012).

<sup>54</sup> Ciara Matthews, *Adding a Layer of Accountability to Judicial Appointments in Tennessee*, NATIONAL REVIEW ONLINE (Oct. 9, 2014, 11:17 AM), <http://www.nationalreview.com/unnaturally-political/389943/adding-layer-accountability-judicial-appointments-tennessee-ciara>.

<sup>55</sup> *Vote No on Amendment 2, Sends Message of Accountability*, THE TENNESSEAN (Oct. 16, 2014, 4:02 PM), <http://www.tennessean.com/story/opinion/editorials/2014/10/15/amendment-tennessee-voting/17317859/>.

<sup>56</sup> *Id.*

Under Amendment II, all officials involved in the judicial selection process are answerable to the people. In order to make a suitable selection, the governor must investigate and vet the candidates on his own, or he will no doubt be subject to scrutiny and questioning by the electorate. Likewise, the state legislature must tread carefully to make sure that the governor's nominee is the right candidate for the job and can competently serve the state in his or her judicial capacity. Finally, the newly appointed judge or justice will be answerable to the electorate during his or her inevitable retention election, where the people of Tennessee can voice their pleasure or displeasure with the individual.<sup>57</sup> Proponents of Amendment II believe that this accountability and lack of an adversarial election process provides constitutional clarity and an unhindered judiciary, while opponents feel that direct elections strike a better balance between accountability, transparency, and democratic principles.<sup>58</sup>

Ultimately, it can be said that Amendment II increases accountability in the way that our appellate judges are appointed. Moreover, while the amendment undoubtedly expands executive power, that power is checked by the legislature, and both are answerable to the state's electorate for their decisions.<sup>59</sup> These checks, however, do not assuage the argument that the direct election of Tennessee's judges was a measured right given to the people, and taking it away confounds the separation of powers in a way that the Constitution's framers may have thought improper.<sup>60</sup>

## V. EFFECT ON JUDICIAL DECISION-MAKING

One of the worst potential pitfalls of any judicial selection process is that it could chill judicial autonomy by compelling judges to consider their job security when writing opinions. Society needs judges to make fair, impartial, and legally correct rulings from the bench. The specter of adversarial campaign politics coloring judicial decisions is a danger that many in Tennessee see as a threat to impartiality.<sup>61</sup> The Tennessee Plan was

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<sup>57</sup> S.J. Res. 2, 107th Leg., 2d Sess. (Tenn. 2012).

<sup>58</sup> *Vote No on Amendment 2, Sends Message of Accountability*, THE TENNESSEAN (Oct. 16, 2014, 4:02 PM), <http://www.tennessean.com/story/opinion/editorials/2014/10/15/amendment-tennessee-voting/17317859/>; Phil Bredesen & Fred Thompson, *Vote Yes on 2 is Best Path for Judicial Selection*, THE TENNESSEAN (Apr. 29, 2014, 3:31 AM), <http://www.tennessean.com/story/opinion/contributors/2014/04/29/vote-yes-best-path-judicial-selection/8427555/>.

<sup>59</sup> S.J. Res. 2, 107th Leg., 2d Sess. (Tenn. 2012).

<sup>60</sup> Ciara Matthews, *Adding a Layer of Accountability to Judicial Appointments in Tennessee*, NATIONAL REVIEW ONLINE (Oct. 9, 2014, 11:17 AM), <http://www.nationalreview.com/unnaturally-political/389943/adding-layer-accountability-judicial-appointments-tennessee-ciara>.

<sup>61</sup> *The Tennessee Plan, Keeping the Influence of Politics and Money Out of Our Courts*, <http://www.tba.org/sites/default/files/tennplanbrochure.pdf> (last visited Dec. 18, 2014).

introduced to alleviate that threat and its ideals continue to be popular with the electorate, as evidenced by the recent passage of Amendment II.<sup>62</sup>

The potential of election ambitions effecting judicial opinions is alarming and brings to mind the worst types of political corruption and deprivations of rights by a greedy political class. Opponents of Amendment II, however, argue that this new judicial selection process will lead to an increase in back door bargaining, secret political favors, and an opaque process that threatens judicial independence, all the while removing a constitutional right explicitly granted to the electorate.<sup>63</sup> It is yet to be seen whether the potential desire for executive favor will be any more or less of an issue than the vices associated with direct election, but the passage of Amendment II makes clear that the people of Tennessee trust all three branches of their government to work together and effectuate the impartial administration of justice.<sup>64</sup>

## VI. CONCLUSION

While the people of Tennessee have been explicitly deprived of their right to directly elect their appellate judges, the new, merit based approach of Amendment II provides an efficient system with its own high level of accountability. Further, the amendment will likely reduce political influences in the judiciary by embracing the familiar checks and balances of the federal appointment system. Overall, the passage of Amendment II will likely be considered a net gain for representative democracy, but it is clear that its enactment has left several fundamental questions unanswered.

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<sup>62</sup> TENN. CODE ANN. § 17-4-101(2014); *Tennessee Judicial Selection, Amendment 2 (2014)*, BALLOTPEDIA, [http://ballotpedia.org/Tennessee\\_Judicial\\_Selection,\\_Amendment\\_2\\_%282014%29](http://ballotpedia.org/Tennessee_Judicial_Selection,_Amendment_2_%282014%29) (last visited Dec. 18, 2014).

<sup>63</sup> *Vote No on Amendment 2, Sends Message of Accountability*, THE TENNESSEAN (Oct. 16, 2014, 4:02 PM), <http://www.tennessean.com/story/opinion/editorials/2014/10/15/amendment-tennessee-voting/17317859/>.

<sup>64</sup> *Tennessee Judicial Selection, Amendment 2 (2014)*, BALLOTPEDIA, [http://ballotpedia.org/Tennessee\\_Judicial\\_Selection,\\_Amendment\\_2\\_%282014%29](http://ballotpedia.org/Tennessee_Judicial_Selection,_Amendment_2_%282014%29) (last visited Dec. 18, 2014).