



JUDICIAL SELECTION IN TEXAS

NOTHING'S PERFECT

A STUDY BY THE LEAGUE OF WOMEN VOTERS OF TEXAS EDUCATION FUND

In the 2002 Republican Primary election, Judge Xavier Rodriguez, a sitting Texas Supreme Court Justice appointed by Gov. Rick Perry, was defeated by Stephen Wayne Smith.

According to the Midland Reporter-Telegram, Judge Rodriguez was supported by the Republican Party — Governor Perry, President George Bush, Senators Phil Gramm and Kay Bailey Hutchison – and endorsed by the Houston Chronicle, the Dallas Morning News, the San Antonio Express-News, the Austin American-Statesman, the Corpus Christi Caller-Times and the El Paso Times. So, why did he lose?

Midland County Republican Party Chairman Sue Brannon said the candidate's name could have been a handicap with voters who didn't take the time or make the effort to get to know the man. "Unfortunately, people look at an Anglo, ordinary-sounding name and somehow think it's less threatening," Ms. Brannon said. (Midland Reporter Telegram, March 14, 2002)



This is but the latest example reformers use to point out why Texas system of selecting judges by partisan elections does not

give us the most qualified, diverse, and independent judicial system.

Since 1965, the League of Women Voters, the Texas Supreme Court, and others have proposed merit selection as the way to select judges to the highest courts and the courts of appeals in Texas. Defenders of the present system of selecting judges by partisan election have staunchly opposed those efforts.

Because of concerns raised by some members about the League's position, the 2001 LWV-TX Convention voted to restudy the issue of judicial selection.

BACKGROUND

Texas Judicial System

Texas is unique in having two highest courts – the Supreme Court to hear appeals in civil cases and the Court of Criminal Appeals for criminal cases. The Texas Supreme Court garners more attention because its decisions can involve billions of dollars, prompting many large corporations to donate heavily to Supreme Court races. The Court of Criminal Appeals has come into the limelight recently for its controversial decisions

TEXAS JUDICIAL SYSTEM

(All judges are elected for regular terms)

COURT	MAKEUP OF THE	TERMS	VACANCIES
Texas Supreme Court	One Chief Justice and eight justices	Six-year overlapping	Gubernatorial Appointment with Senate Approval
Court of Criminal Appeals	One Presiding Judge and eight judges	Six-year overlapping	Gubernatorial Appointment with Senate Approval
14 Courts of Appeals	One Chief Justice and from two to twelve judges	Six-year	Gubernatorial Appointment with Senate Approval
418 District Courts	One-member court	Four-year	Gubernatorial Appointment with Senate Approval
254 Constitutional County Courts	One County Judge per county	Four-year	Appointment by County Commissioners
211 Statutory County Courts (in 74 counties)	One-member court	Four-year	Appointment by County Commissioners

on death penalty appeals. However, candidates for this court do not receive large donations for the most part and cannot afford to run high profile races with the result that even fewer voters know the candidates for the Court of Criminal Appeals

In 74 counties, primarily in metropolitan areas, the state legislature has established statutory county courts intended to exercise subject-matter jurisdiction in only limited fields, such as civil, criminal, probate, or appellate, to hear appeals from justice of the peace courts or municipal courts.

The Texas Constitution also provides for justice of the peace courts in each county to handle criminal misdemeanor and serve as small claims courts. The Texas Legislature has established municipal courts in each incorporated city of the state to handle criminal misdemeanor cases and city ordinance violations. Because of their more limited jurisdiction, the scope of this paper will not extend to the justice of the peace courts and municipal courts.

Judicial Qualifications

A candidate for the *Supreme Court*, the *Court of Criminal Appeals*, or one of the *courts of appeals* must be a citizen of the United States and of Texas; age 35 or older; and a practicing lawyer or lawyer and judge of a court of record together for at least 10 years. Municipal courts and justice of the peace courts are not courts of record.

A *district court* candidate must be a citizen of the United States and Texas; age 25 or older; resident of the district for two years; licensed to practice law in Texas; and a practicing lawyer or judge or both combined for four years.

The *constitutional county court* judge shall be well informed in the law of the state. A law license is not required. The county judge presides over the County Commissioners Court, but, in many counties, does not exercise judicial duties.

Statutory county courts are one-judge courts. Candidates must be at least 25 years old, have resided in the county for at least two years, and be a licensed attorney who has practiced law or served as a judge for four years. (Office of Court Administration, Annual Reports 2000, 2001)

Those Are the Facts; What Are the Issues?

At the heart of the issues surrounding judicial selection and judicial campaigns is judicial independence — how to achieve and maintain a qualified, inclusive, and independent judiciary.

The Constitution Project (a nonpartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues) describes judicial independence this way: “From its beginning, our system of constitutional democracy has depended

on the independence of the judiciary. Courts are able to protect the basic rights of individuals and decide cases fairly only when they are free to make decisions according to the law, without regard to political or public pressure....Indeed, the cornerstone of American liberty is the power of the courts to protect the rights of the people from the momentary excesses of political majorities.” (Echols, “*Threats to Independence: How Safe is Your State.*” LWVUS, National VOTER, June/July, 2001)

The independence of the judiciary has been under serious attack at various times since the beginnings of this country. President Thomas Jefferson sought to impeach and remove Justice Samuel Chase because of Chase’s zeal in enforcing the Alien and Sedition Act. The Civil War Congress took away the Court’s jurisdiction in a pending case after the war to avoid a constitutional challenge to Reconstruction legislation. President Franklin D. Roosevelt attempted to increase the size of the U.S. Supreme Court in order to pack the Court with his appointees and prevent decisions hostile to the New Deal.

These previous attacks on judicial independence failed, so why should we be concerned with recent attacks? The answer: an increasing willingness to treat judges as if they were merely politicians in black robes who do not deserve to be independent, according to Bruce Fein and Burt Neuborne in an article, “Why Should We Care About Independent and Accountable Judges?” Journal of American Judicature Society, Vol 84, #2, Sept./Oct. 2000.

ELECTION OF JUDGES

The United States is the only country that elects its judges. And, in fact, judges in this country were appointed until the middle of the nineteenth century. Judicial reformers at that time sought election of judges to break the power of political bosses who controlled many of the courts. The Texas Constitution, written in the aftermath of the Civil War when Texans were smarting from the excesses of carpetbaggers and reconstruction, provided for election of judges from the very beginning. We have not known any other system in this state.

Proponents of electing judges feel that any system of selecting judges is open to politics, favoritism, and subjectivity, and the people — the voters — should choose judges. Electing judges keeps the selection process out of the hands of an elitist entity that would choose political cronies or donors and leaves it in the hands of the voters, where it ought to be.

Requiring judicial candidates to run for office keeps them humble and makes them work harder, according to those who favor judicial election. Running for office requires judges to get out into the community and meet voters and mobilize the grassroots to support their election. Proponents say that elections make judges more accountable to the people.

Some proponents argue that the periodic defeat of judges in partisan sweeps is good. Although we lose some experienced judges, we also remove some dead wood— judges who are not pulling their weight. Under the merit selection/retention system, given the low attention of the electorate, removing bad judges from office is difficult. Partisan tides assist in this removal process.

Until recently, judicial candidates were required to follow Canon 5(1) of the Texas Code of Judicial Conduct, which says, “A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held....” (Texas Code of Judicial Conduct)

That being the case, critics of judicial elections have questioned how candidates can run for office when they could not address any issue that may come before the court. On what could they run? How could they differentiate between themselves and their opponents, allowing the voter to make an informed decision?

However, on June 22, 2002, the U. S. Supreme Court in *Republican Party of Minnesota* struck down Canon 5(1). While it is clear that judicial candidates will be able to discuss issues in their campaigns, the full effect of this ruling is yet to be seen. (Austin American-Statesman, June 28, 2002)

A step in the right direction, some say, would be to continue electing judges but in nonpartisan elections. Voters could not, then, vote a straight party ticket for judges. Others argue that with nonpartisan elections voters have even less information upon which to base their vote because, at the least, party affiliation may be an indicator of judicial philosophy.

Nonpartisan elections are held in fourteen states (Arkansas voted in 2000 to go from partisan to nonpartisan elections), and five have appointment systems by the governor or legislature. Seven states, including Texas, hold partisan elections. These numbers may vary slightly depending on the compilers’ definitions. (ABA and the American Judicature Society)

MERIT SELECTION OF JUDGES

Merit selection has a long history dating back to the early years of the twentieth century. Enough questions had been raised about the judiciary becoming politicized that members of the bar association began a study of the merit selection process early in the 20th century. In 1913, the American Bar Association adopted a merit selection policy. In 1940, Missouri became the first state to adopt this method. Commonly known as the “Missouri Plan,” it is still in effect. Since then, it has been copied by other states in one form or another. (Standards on Judicial Selection, American Bar Assn., July 2000)

The American Judicature Society defines merit selection as “...the most commonly used term to a method of selecting state judges through a nominating commission process. The nominating commission recommends candidates to the appointing authority (usually a state governor) for final appointment, which also may be subject to legislative confirmation. Additional terms are achieved through retention elections.” A judicial nominating commission is “a bi-partisan body of lawyers and public members that independently generates, screens, and submits a list of judicial nominees to an official who is legally or voluntarily bound to make a selection from that list.”

Currently, 24 states and the District of Columbia have a merit selection system with varying initial terms of office and various retention terms. For example, in Missouri, Oklahoma, Florida, and Wyoming the initial term of office is one year. Each of these states have retention elections for terms ranging from one to twelve years. Rhode Island’s term is for life while New Hampshire’s is to age 70. Most use a nominating commission. Nine of these states combine merit selection for appellate courts with other methods for district courts.

Six states with judicial retention elections have established retention evaluation bodies to conduct surveys of those persons with knowledge of the judge facing a retention election. The results of these surveys are widely disseminated to voters before judicial retention elections. Those six states are Alaska, Arizona, Colorado, New Mexico, Tennessee, and Utah. (Standards on Judicial Selection Report, July 2000, Appendix 3, American Bar Association)

Proponents say merit selection does away with party affiliations and the necessity for judicial candidates to raise funds to finance campaigns and reduces the perception of the influence of contributors on judicial decisions, preserving the right of citizens to elect their judges through the retention/rejection process.

Opponents say that it is hard to remove bad judges from office under this system. They say that using merit selection would remove the selection of judges further from the electorate and only attorneys and other judges would even know who is in office.

INCLUSIVENESS/DIVERSITY

.0Since the late 1980’s, reform efforts to achieve a more diverse judicial system in Texas have been spurred and complicated by federal lawsuits challenging the at-large election of judges as a violation of the Voting Rights Act (VRA), charging that the system dilutes minority votes.

In 1988, the U.S. Court of Appeals for the Fifth Circuit held in *Chisom v. Edwards* that judicial elections are covered by Section 2 of the VRA. Because the U.S. Supreme Court declined to

further review this case, *Chisom* is binding law for the entire Fifth Circuit, which includes Texas. (Texas Policy Research Forum Report, November 8, 1989)

Following that decision, the League of United Latin American Citizens (LULAC) filed suit in U.S. District Judge Lucius Bunton's court in Midland, challenging the method of selection of district court judges in the five most populous counties (Harris, Dallas, Bexar, Tarrant, and Travis) as well as in Jefferson, Lubbock, Ector, and Midland counties. The suit charged violation of the VRA. (Texas Policy Research Forum Report)

Judge Bunton ruled that countywide partisan election of judges in the major urban areas does infringe on minority lawyers' right to win seats on the bench under the VRA. However, this decision (*LULAC vs. Clements*) was overturned by the appellate courts. Using the League of Women Voters of the United States position supporting the VRA, LWV-TX has, in the past, supported single-member judicial districts as part of a merit system plan.

Proponents of selecting district judges by district instead of countywide believe this would allow more minorities to be elected. District courts are perceived as being a stepping-stone to the appellate courts. More minority district court judges would lead to more minority appellate judges, they believe.

In 1995, Senator Rodney Ellis introduced a bill that would have had district judges chosen using county commissioner precincts in the four most populous counties. District judges would still hear cases from all over the county. It failed to get through the legislature.

Recent governors have appointed numbers of minority judges who fail to make it past the partisan election because, some believe, they cannot raise enough money to win. As of September 1, 2001, 84% of district judges in Texas were white, 11% Hispanic, 4% black, and 1% American Indian. (Office of Court Administration, Annual Report, 2001)

JUDICIAL CAMPAIGNS

An article in The Political Standard puts it this way: "Judicial campaigns have changed – and not for the better. For decades a quiet backwater of the electoral process, they have in recent years been flooded by money and attack ads, undermining the public confidence in the judiciary and prompting calls for reforms ranging from merit selection, to longer judicial terms, to public financing of judicial campaigns." (Alliance for Better Campaigns, "The Rising Cost of Judicial Campaigns Spurs a Movement for Reforms," The Political Standard, vol 5, number 2, March 2002)

Financing Judicial Campaigns

Frank Newton, former dean of the Texas Tech University Law School in Lubbock, says it now costs a candidate between 2 and

4 million dollars to run for a seat on the Texas Supreme Court. Candidates generally raise much of that money from corporations and organizations, many who are likely to appear before the Supreme Court. While direct, undue influence might not occur, certainly its appearance is all too apparent. (Sharon Blackburn interview, October, 2001)

A Texas Supreme court survey showed that a minority (48%) of judges say that campaign contributions have a "fairly" or "very" significant impact on judicial decisions.

Those most likely to feel that campaign contributions to judges affect their decisions were judges serving in local trial courts, minority judges, and rural judges.

Almost all (92%) minority lawyers in Texas thought that campaign donations have a significant impact on judicial decision-making. Large majorities of court personnel (69%) and attorneys (79%) believed that campaign contributions have a "very" or "fairly" significant influence on judges' courtroom decisions. That same poll shows that the Texas public surveyed strongly believes (83%) that campaign contributions influence courtroom decisions. (The Courts and the Legal Profession in Texas – The Insider's Prospective. May, 1999)

The American Bar Association (ABA) in the spring of 2002 for the first time recommended that states consider public financing of judicial elections. Publicly funded elections for the judiciary might be a fine idea says Dean Newton, but it is very unlikely that the Texas Legislature would adopt public funding for judicial campaigns lest this would lead to pressure for public funding of other offices. (*op cit*, Newton interview)

A Texans for Public Justice (TPJ) report showed that in an 18-month period from January 1, 1994 to October 30, 1997, the seven Texas Supreme Court Justices who faced election during that time raised \$9.2 million in campaign contributions with 42% of that money coming from lawyers and law firms. PACs and executives of 50 corporations contributed \$1.4 million or 15% of that money, with Enron being the largest contributor.

One study documented a case in which the Texas Supreme Court unanimously reversed an appeals court decision on school taxes owed by Enron to Spring Independent School District. This single decision saved Enron \$15 million that otherwise would have gone to the school district.

A change has occurred since a 1987 "60 Minutes" TV documentary on the Texas judiciary, "Justice for Sale," according to the TPJ report. During the '80s, plaintiffs' trial lawyers were doing the buying. Ten years later, corporations, corporate defense firms and business trade groups now finance the campaigns, and the current court is widely regarded as a sympathetic venue for defendants, the report states. (Texans for Public Justice, Payola Justice: How the Texas Supreme

Court Justices Raise Money from Court Litigants, February, 1998)

In April 2000, Public Citizen, Gray Panthers, and others filed suit, arguing that the current system in which judges are elected in partisan elections in Texas is discriminatory because low-income Texans do not have the financial means to influence court decisions by making large campaign donations. The suit was dismissed by an appellate court on the grounds that the plaintiffs had not proved their case.

Prior to June 1995, there were no restrictions on campaign contributions by individuals to judicial elections in Texas. Under the Judicial Campaign Fairness Act (JCFA) passed by the legislature in 1995, contribution limits were placed on individuals, campaign committees and law firms. The limits vary by the type of contributor and by the size of the district in which the election is held. The Act does not apply to candidates for Constitutional county judges, justices of the peace, or municipal judges.

Contribution limits apply to each election – primary, runoff (if necessary), and the general election — rather than to an election cycle. Other than county and district judges who must file with the county filing authority (generally the county clerk or county elections administrator), reports must be filed with the Texas Ethics Commission on a regular basis.

In some states, contributions from attorneys who would argue cases before the court are restricted, and in other states, such as Idaho, judicial candidates are barred from knowing who their contributors are.

Free Speech Issues in Judicial Campaigns

A case decided by the United States Supreme Court on June 28, 2002, *Republican Party of Minnesota v. Kelly*, will have significant repercussions on judicial campaigns across the country, including Texas. At issue was the constitutionality of Minnesota's prohibition of judicial candidate speech on issues likely to come before the court. Most states that elect judges, including Texas, have relied on the same American Bar Association rule (Canon 5) that forbids judicial candidates from stating their positions on issues that may come before the court. The Court ruled that states cannot stop candidates for judicial offices from talking about their stands on issues. In an article in the Austin American-Statesman, University of Texas Law School professor Doug Laycock was quoted as saying that, "... judicial candidates can now say whatever they want as long as they stop short of promising a specific ruling in a specific case."

Although he disapproved of the ruling, according to the AAS, Chief Justice Tom Phillips pointed out that judicial candidates will not be forced to take stands on issues but that they will have the option to. Other opponents of the change expressed

concern that judicial campaigns will be reduced to the "lowest level that the court allows with this decision."

Some, such as Craig McDonald of Texans for Public Justice, said that if judges are to be elected, it would be best to know where they stand. (Austin American-Statesman, June 28, 2002)

Special Interest Groups in Judicial Campaigns

In an earlier time, pressure on an independent judiciary came, primarily, from the other two branches of government. Lately, however, well-heeled special interest groups and partisan media representatives have placed enormous pressure on judges to rule a certain way on selected issues or suffer the consequence.

In the 2000 election in Texas, according to the Wall Street Journal, the Texas Association of Business & Chambers of Commerce spent \$100,000 to inform its members of the candidates it endorsed for various courts of appeals races, which decide both criminal and civil appeals. Chambers of Commerce and business interests have spent heavily, even in nonpartisan elections, and use unfair or misleading campaign attack ads in Ohio, Mississippi, Michigan, and Illinois to elect pro-business judges.

Have any judges in Texas failed to win an election apparently or allegedly due to special interests targeting a judge for an unpopular court ruling? Thirty-five of the 75 respondents to a League of Women of Voters of Texas questionnaire answered "yes." One judge said that he felt his election loss was due to dismissing criminal cases because evidence was obtained illegally. In Houston, a judge reversed the conviction of two men participating in homosexual activity in their own home. The party to which he belonged told people not to vote for him. He chose not to run again. A Harris County judge was targeted because of a ruling concerning pickets at abortion clinics. Friends of a prominent victim in Dallas organized and, in the next election, defeated the judge who reduced bail for the alleged assailant. (LWV-TX Judicial Independence Assessment Final Report, March 2002)

SUMMARY

Judicial independence is an important tenet of our form of government. In recent years the idea that judges should represent a certain philosophy has supplanted the allegiance to judicial independence. "When truly independent, judges are not influenced by personal interest or relationships, the identity or status of the parties to a case, or external economic or political pressures," says the Brennan Center.

How, then, should judges be selected to foster judicial independence? The most popular method among states is merit selection with a nominating commission – the so-called Missouri Plan – followed by a retention election. Merit selection does not eliminate politics from the process but it greatly diminishes

it. Judges can concentrate on interpreting the law fairly without fear of losing their position due to an unpopular ruling. They don't have to raise money to campaign thereby reducing the perception that dollars buy justice. The nominating commission can make sure candidates are qualified to serve and can promote inclusiveness on the bench.

Since politics permeates any method of selection, many feel that voters should be the ones to make decisions about judges. Elections pose interesting questions. If elections are partisan, do voters have more information upon which to base their vote than in nonpartisan elections? Do nonpartisan elections, which would eliminate straight party voting, prevent sweeps in counties where judges – regardless of how qualified – of one party are all replaced by judges of another party? Is it even a concern that all judges in certain large counties are of the same party?

Every regular session of the legislature in recent years has produced bills to change the method of selection of judges. None have passed. To achieve a change to merit selection in Texas would require a two-thirds vote of the legislature to send the constitutional amendment to the people and a majority vote of the voters to amend the constitution.

Professor Roy A. Schotland, in an interview in the March 2002 Political Standard, says, “Even with all the problems we’ve seen in recent years, it’s very difficult to persuade voters that they shouldn’t be the ones to select judges. For example, a recent referendum in Florida to replace nonpartisan elections for their trial judges with the same “merit” system as they have for appellate judges was overwhelmingly defeated.” There is

similar resistance in Texas. (*op cit*, “The Rising Cost of Judicial Campaigns Spurs a Movement for Reforms”)

In the 2001 legislative session, the League supported HB 4 by Rep. Pete Gallego (D-Alpine). It would have provided for nonpartisan elections; regulated campaign contributions; and introduced public financing of campaigns for statewide judicial office.

It did not pass.

Legislators are loath to make changes like these unless there is popular support for the changes. It is especially hard for them to advocate giving up any vote. In an article in the Amarillo Globe-News, May 20, 2002, House Speaker Pete Laney (D-Hale Center) is reported as saying he’s not opposed to change in the process---he just wants to see that the people of Texas want something new first. “I’m not as afraid of appointments as some may be, but there’s really not any good concrete ideas yet that have the votes to pass. When you’re taking away someone’s right to vote you ought to have a good alternative,” he said.

So, what do the people want? Is judicial independence important to the people of Texas? If so, how can we maintain it? Is the system of selecting judges in Texas due for a change? If so, how should it be changed? What steps would lead in the direction of judicial independence?

You be the judge.

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