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Judicial Selection: *Options for Choosing Judges in Texas*

Texas is one of nine states that selects all state, district and county judges by partisan election. Elections — whether partisan or nonpartisan — are typically used to choose judges at the trial court level; 30 states use an elective system to select trial judges. Only 22 states use elections to select appellate judges. The majority of states that use an elective system for judicial offices hold nonpartisan elections. (See maps, pages 6 and 7, for a complete overview of state judicial selection methods.)

Under the federal system, the president, with the Senate's approval, appoints all judges for a life term. Twenty-eight states also use some form of appointment to select appellate judges, but only three of those states — Massachusetts, New Hampshire and Rhode Island — use the federal model of lifetime appointments. Twenty states also use appointments to select trial court judges. Most states that appoint judges do so for a relatively short initial term and then hold retention elections — unopposed elections where the voters give a thumbs up or down to retaining the incumbent in office — for subsequent terms.

When Texas joined the Union in 1845, the original state constitution called for judges to be appointed by the governor, subject to approval of the Senate. Soon thereafter, the Jacksonian democratic movement prompted changes nationwide, and Texas amended its constitution to provide for popular election of all judges. That system was abandoned during the Civil War and for the seven years that followed under the Reconstruction constitution of 1869. Popular election of judges was restored in Texas when the state adopted its current constitution in 1876.

Texas has retained the partisan election method of judicial selection for more than 100 years, but recently criticism of that system has gained momentum, spurred by the fact that party affiliation has become the key determining factor in many judicial elections.

Until relatively recently, the Democratic party dominated judicial elections. Candidates seeking election to statewide and to nearly every local office ran as Democrats. Single-party control in Texas meant that most elections for judgeships were uncontested, with serious competition, if any, coming in the party primary. Retiring judges typically stepped down before the end of their terms, allowing the governor to appoint a successor. The appointed successor more often than not would then run uncontested in the subsequent election.

The Current State of Judicial Selection in Texas

Beginning in the 1970s, the single-party standard began to change, as Republican candidates became a

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more powerful force in state and countywide elections and Republican governors filled vacancies. That trend gained momentum throughout the 1980s and into the 1990s, as in many counties contested general elections became the rule rather than the exception. Straight-party voting led by non-judicial candidates at the top of the ticket often sweeps in nearly all candidates of one party. Unaccustomed to having to choose between judicial candidates, voters increasingly must spend a great deal of effort attempting to differentiate between candidates, especially in some urban counties with many local judgeships to be filled. In Harris County in 1996, local voters faced judicial ballots in 45 primaries, eight runoffs and 59 general election contests.

Data from the State Office of Court Administration show the current makeup of the Texas judiciary is evenly balanced between Republicans and Democrats for locally elected judges. The 396 sitting district judges include 199 Republicans, 193 Democrats and four recently appointed judges who have not run in a partisan election. Among the 14 courts of appeals, there are 38 Republicans and 40 Democrats, as well as two recently appointed judges who have not yet run. However, in statewide judicial elections, Republican now have more than a two-to-one majority: Republicans hold seven of the nine seats on the Texas Supreme Court and six of the nine on the Court of Criminal Appeals.

According to Tom Phillips, chief justice of the Texas Supreme Court, the results of many races appear to be determined far more by party strength than by individual merit. Shifting tides of party fortune, not judicial performance, Phillips says, have caused the defeat of almost 10 percent of the state judiciary in the last two years. In the 1994 general election Republican challengers defeated 31 of the 40 incumbent Democratic district and appellate judges in Texas, while all Republican incumbents prevailed. In 1996, however, when the top of the Republican ticket had shorter coattails, Democrats lost only three of 18 opposed incumbents, while Republicans lost eight of 28.

Because judges are barred from stating positions on specific issues, factors like party affiliation or campaign advertising have gained new importance in judicial elections. *The Texas Lawyer* reports that political affiliation and fund-raising were the biggest factors in determining judicial races in the November 1996 elections. The Republican candidates won by nearly the same margin in all seven statewide judicial races, suggesting that many voters looked more at party affiliation than at the particular qualifications of the candidate. Additionally, party affiliation had a significant impact on fund-raising. During the 1996 campaigns, three incumbent Republican candidates for the Texas Supreme Court together raised over $3 million, while their Democratic opponents barely raised $100,000 collectively. In every contested court of appeals race held in the state, the candidate who spent the most money won the race.

The 1996 race for a seat on the 1st Court of Appeals in Houston illustrates the power of party affiliation. The race pitted incumbent Judge Margaret Mirabal, a Democrat, against Republican challenger James Gieske. Mirabal, who raised $240,000 to Gieske's $4,000, was preferred 9-to-1 over her opponent in a State Bar poll and rated as qualified by 96 percent of respondents to a Houston Bar poll. In that same poll, 65 percent rated Gieske as not qualified, according to *The Texas Lawyer*. However, Mirabel barely won, with 50.5 percent of the vote.

Many Texans are concerned that campaign financing, party affiliation, and name recognition may be overshadowing candidates' actual qualifications to hold judicial office. Many have also raised the issue of whether the at-large system of electing judges prevents adequate representation in the judiciary by qualified minority candidates. This concern is particularly pronounced in populous counties encompassing several judicial districts.

The at-large election system has been the subject of a number of court challenges, beginning in 1988, alleging that the system dilutes minority votes in violation of the federal Voting Rights Act. The legal issue was eventually settled in 1993 by the Fifth Circuit U.S. Court of Appeals in *LULAC v. Clements*, 999 F.2d 831, which the U.S. Supreme Court declined to review. The court decided that the evidence of minority vote dilution could just as easily be explained by variations in partisan affiliation. The court also said that the state had an interest in maintaining a link between the at-large electoral and jurisdictional bases of the trial courts. Because a judge can hear a matter originating in any part of the county, all citizens in that county should have a right to vote for that judge, and the state's interest in maintaining this link of accountability outweighs any inference of vote dilution, the court decided. Although unable to prevail in court, critics of the at-large system have continued to press their case in the Legislature.

Proposals to Revise Judicial Selection in Texas

The judicial selection system in Texas has not changed substantially since 1876. But especially since the *LULAC* decision and recent shifts in political power in Texas, there has been mounting interest in modifying the method of judicial selection. In 1995, the 74th Legislature initiated the most significant attempt to fundamentally change the way Texas selects and retains judges.

Recent Legislative Initiatives

With the support of Lt. Governor Bob Bullock, the Senate in 1995 approved SJR 26 and SB 313, both by Sen. Rodney Ellis, proposing major modifications to the system of judicial selection used in Texas.

As adopted by the Senate, SJR 26 would have required gubernatorial appointment and Senate confirmation for all justices of the Texas Supreme Court, Court of Criminal Appeals and 14 courts of appeals. The plan would have required the appointment and confirmation process to fairly reflect the geographic distribution and ethnic and racial composition of the population of the state or district served.

The initial term of appointment would have lasted for a minimum of 18 months, ending on January 1 of the first odd-numbered year following the initial term. In order to retain their offices, appointed judges would have had to successfully run in a retention election within two years of their appointment, beginning with the general election in November 1996. Those retained would have faced retention elections every six years, allowing citizens to vote up or down on whether the judge should be retained in office. Judges rejected by the voters would have been replaced by the governor through appointment, pending the next election.

The plan also provided for nonpartisan election and subsequent retention election of district judges. In multi-district counties, judicial candidates initially would have been selected by nonpartisan election in districts corresponding to the boundaries of the commissioners court precincts within the county. For subsequent terms, incumbent judges would have faced a countywide retention election. The plan would have required district judges to be residents of the county, but not necessarily of the precinct, from which they were initially elected.

The implementing legislation, SB 313 by Ellis, would have split the four most populous counties — Harris, Dallas, Tarrant and Bexar — into election subdistricts. Judges in those districts would have been required to run in nonpartisan elections for their first term, then alternate between countywide retention elections and precinct-sized district nonpartisan contested elections in all subsequent terms. In addition, SJR 26 would have authorized the Legislature to enact additional modifications to judicial selection, such as altering terms of offices by changing election dates or staggering terms of office.

The Senate approved both SJR 26 and SB 313. The House Judicial Affairs Committee substituted its own version of SJR 26, requiring justices of the Texas Supreme Court, Court of Criminal Appeals and courts of appeals be elected in partisan elections from single-member districts, with the governor filling any vacancies between elections. The Judicial Affairs Committee also would have allowed the Legislature to create election subdistricts for district judges, but did not specify any such districts. However, the committee-substituted versions of SJR 26 and SB 313 died without being considered by the House.

Commission on Judicial Efficiency

The 1995 Legislature, recognizing a need to further study various methods for selecting judges and to examine other aspects of the judiciary — such as funding parity, staff diversity, and technology resources — created the Texas Commission on Judicial Efficiency in the General Appropriations Act (HB 1 by Junell). The membership of the commission was chosen by the Texas Supreme Court.

The commission was chaired by Dr. Herbert H. Reynolds, chancellor of Baylor University. Its 15 members were drawn from the judiciary, county government, and the Legislature and included Sen. Ellis and Reps. Pete Gallego and Senfronia Thompson. Other legislators served on four task forces established to study each of the issue areas identified by the Legislature.

The Judicial Selection Task Force, chaired by Tom Luce of Dallas, was charged with determining how Texas could improve its system of selecting judges. The task force identified four targeted reform measures that could be individually implemented to improve the current system if an overall judicial selection plan was not approved by

the Legislature. The proposed modifications included:

- lengthening the terms of judges by two years, allowing eight-year terms for appellate judges and six-year terms for trial judges;

- increasing the minimum requirements for trial judges, mandating eight rather than four years of experience in practicing law;

- providing automatic recusal for judges who accepted campaign contributions from a party or attorney to a suit in excess of the limits set forth in the 1995 Judicial Campaign Fairness Act (SB 94 by Ellis; see box below); and

- removing judicial races from the straight-party voting system used for other elected offices.

The Commission on Judicial Efficiency approved the first three of the task force recommendations, but tabled the fourth in favor of developing a comprehensive system for judicial selection. However, half of the commission supported the task force's "Appoint-Elect-Retain" (AER) plan, while the other half supported a competing plan nearly identical to the 1995 plan adopted by the Senate.

The AER Plan. The task force proposed a new method for selecting Texas judges that would combine a system of appointments, nonpartisan elections, and retention elections for all judges. According to the task force, the AER plan would bring together the best aspects of various judicial selection systems:

- with appointments, only qualified candidates would be selected for office;

- with nonpartisan elections, citizens would retain their direct influence on judicial selection outcomes by being allowed to vote for the candidates; and

- with retention elections, judges would be free of numerous divisive and costly contests during subsequent terms in office while still remaining accountable to the electorate.

Under AER, judicial vacancies would be filled initially by gubernatorial appointment, but appointees could not take office until confirmed by two-thirds of a special Senate committee. The committee would be composed of all senators or their designees and have as its sole purpose the confirmation of judicial appointees. This committee could meet at any time to act on nominations. The Legislature could approve temporary early retirement incentives to induce current incumbent judges to step down so that appointees could be named.

After appointed judges served at least 10 months, they would run in the next general election as nonpartisan candidates and could be opposed by anyone qualified to run. All judges who were successful in the initial contested election would henceforth face only retention elections, i.e., elections with no

Judicial Campaign Finance Reform

SB 94 by Ellis, effective September 1, 1995, set mandatory limits on campaign contributions and voluntary limits on campaign expenditures for judicial positions on all state courts.

A candidate can knowingly accept contributions only during certain periods before and after elections. The location and jurisdiction of the court determines the limits on campaign contributions. Individuals, for example, can contribute up to $1,000 to a campaign for a seat in a district with fewer than 250,000 people and up to $5,000 for a statewide office. Law firms may contribute up to a maximum of six times the individual limit in contributions to a candidate no matter the size of the firm. That maximum also serves as a cap for further large contributions from other members of the firm, limiting them to contributions of $50 or less once the firm maximum has been reached. Candidates who accept contributions above these limits are subject to civil penalties.

Expenditure limits under SB 94 are voluntary and also based on the office being sought. The Judicial Campaign Fairness Act encourages statewide judicial candidates to spend no more than $2 million and candidates in districts with fewer that 250,000 people no more than $100,000. Candidates not abiding by these spending limits must note that fact on all political advertisements.

opponent. If an incumbent were rejected by the voters, the governor would appoint a replacement judge.

The AER plan is very similar to New Mexico's method of selecting judges. There, the governor appoints judges from a list of qualified candidates submitted by a nominating commission; however, legislative confirmation is not required. In the next general election after appointment, the judge must run in a partisan election. If the judge wins that election, all subsequent elections are retention elections. If the judge loses in the partisan election, the winning opponent serves as the judge and runs in subsequent retention elections. Terms of office for New Mexico judges are eight years for appellate judges and six years for trial court judges.

The MBED Plan. The alternative backed by half of the commission is called the Modified Bullock-Ellis-Duncan (MBED) plan. It retains nearly all of the provisions of the Senate's 1995 plan but would require that in Harris County district judges be elected from subdistricts smaller than commissioners court precincts. The other three most populous counties (Dallas, Tarrant and Bexar) would elect district judges from commissioners court precincts. The MBED plan has been introduced this session as SB 409 and SJR 23 by Ellis.

The Duncan Plan. A third alternative, introduced this session by Sen. Robert Duncan as SB 621 and SJR 25, was not presented to the commission. The Duncan plan would require an initial partisan election followed by subsequent nonpartisan retention elections for appellate court judges only. Vacancies would be filled by gubernatorial appointment with Senate confirmation and, as under the MBED plan, would have to reflect the ethnic, racial and geographic composition of the district being served. The Duncan plan would also require all partisan elections for both appellate and district courts be removed from straight-party voting on the ballot and that unopposed candidates for judicial offices also be listed.

Judicial Selection Systems in Other States

As the following maps show, great diversity exists among states in how judges are selected. Nonetheless, there are four basic patterns of selection: partisan elections, nonpartisan elections, appointments, and appointment with retention election. All three plans for revising judicial selection in Texas combine various elements from the different systems.

Partisan Elections

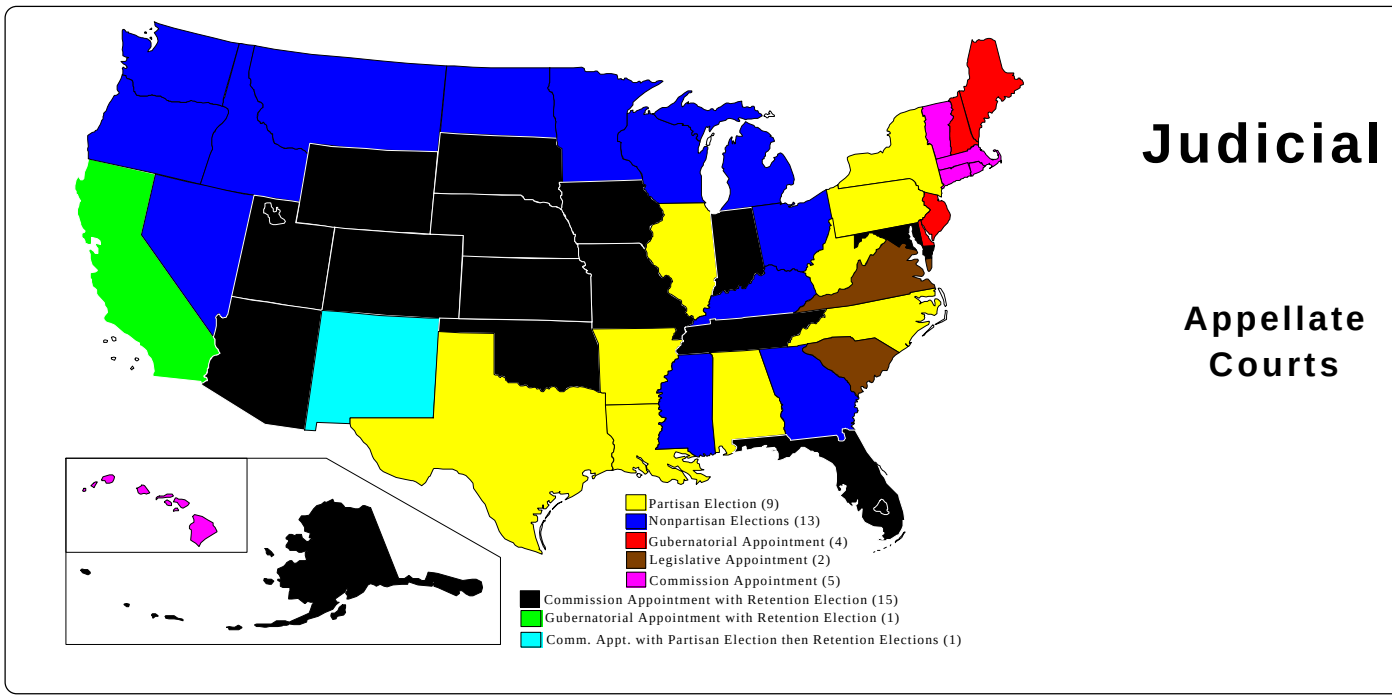
Under a partisan election system, like the current Texas system, each candidate for a judicial office must run under a party affiliation. Candidates first must run in a primary election, which may be contested if there is any opposition from a member of the same party. Partisan elections also incorporate straight-party voting, allowing voters to choose candidates from one party to fill all contested races.

Supporters of partisan elections say they allow people of a state a say in how the judiciary should be composed. Every citizen should have the ability to vote for a judge whose decisions may affect that citizen's life, liberty or property. By linking a candidate to a party and its platform, partisan elections allow voters to gain a general overview of how a candidate stands on basic issues. Changing from a partisan election system that has been in place for years would result in voter confusion. The state would be forced to spend both money and time to educate voters about the new system.

Campaign finance is a very necessary part of obtaining any political office. It should not be seen as disparaging the integrity of judges. The 1995 Judicial Campaign Fairness Act keeps lawyers and law firms from donating very large sums to judicial campaigns by setting limits on their contributions. Lawyers and litigants still make the bulk of contributions to judicial campaigns, but recent reforms make improprieties more a matter of perception than reality.

Opponents of partisan elections claim the amount of money required to run a judicial campaign either statewide or in large county makes it necessary for judges to actively pursue campaign funds. Because of general voter apathy, the only people who really contribute to judicial campaigns are those who have an interest in the process — lawyers and litigants. Contributions from these two groups create the perception of impropriety, regardless of whether such impropriety exists. This perception increases the belief among some Texans and many more throughout the country that justice in Texas can be bought and sold if the price is right.

In recent elections scores of qualified judges have been routinely defeated in party sweeps. The 1994 Republican sweep, for example, saw almost all Democratic judicial candidates in Harris County civil courts lose, regardless of their opponents' qualifications and despite their own fund-raising successes.



Notes: Maps show predominant method in each state. Methods may vary in a state's largest cities. Commission appointment can involve direct selection or selection by governor of commission nominees.

Similar straight-party sweeps have occurred in previous years based on the changing fortunes of the political parties: a sweep in 1982 saw many qualified incumbent Republican judges defeated.

Such sweeps are troubling not because incumbents are subjected to the vagaries of politics but, more importantly, because judges who are qualified and experienced are removed from office for reasons over which they have no control. Elections do not necessarily help voters feel a closer connection to their judges. Within days of an election, most voters are usually hard-pressed to name the judges for whom they have just voted. Party affiliation should not be used as a clue to a judge's philosophy because it would be unethical for a judge to decide a case based on partisan grounds.

Nonpartisan Elections

Nonpartisan elections require judicial candidates to run without party affiliation. The judicial ballot is separated from the rest of the ballot to prevent straight-party voting. A run-off election may be needed if no candidate gets 50 percent of the vote.

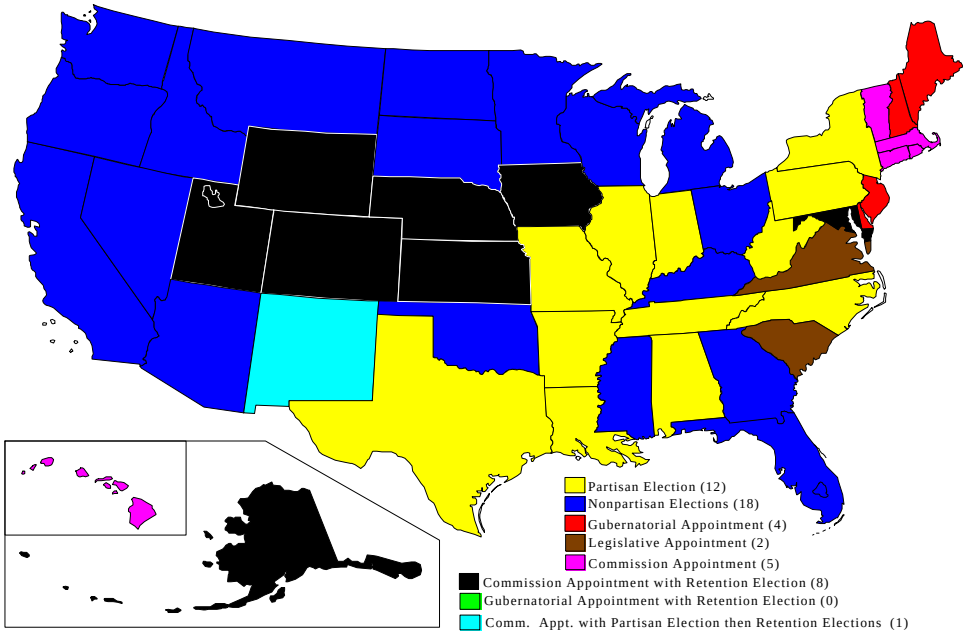
Supporters say nonpartisan elections allow citizens the same level of participation in the judicial selection process as is provided by partisan elections. But nonpartisan elections offer an additional benefit: the citizen can choose among candidates based on their own merits and qualifications without being swayed by party affiliation. Partisan affiliation should be irrelevant in deciding who would be the best judge because partisan considerations should play no role in judicial decision-making. Nonpartisan elections would help prevent party sweeps, where many qualified judges are voted out of office solely on the basis of party affiliation by those voting a straight-party ticket.

While campaign finance would still be a part of a nonpartisan election system, judicial candidates would not receive money from parties, and all contributions could, therefore, be easily traced. Simplifying the contribution process would make it easier to determine if a judge should be recused from a case because of campaign contributions from litigants or lawyers appearing before the court.

Opponents say that under a nonpartisan system fund-raising is still key, and campaign contributions from parties and lawyers who appear before the judges can continue to promote the perception of impropriety. Nonpartisan elections may make candidates even more dependent on contributions because they would not be supported by the parties and would have to try even harder to reach the voters to differentiate themselves from the other candidates.

Selection

Trial Courts



Source: American Judicature Society, *Judicial Selection in the States*, revised November 1995.

Additionally, nonpartisan elections would increase the influence of incumbency and name recognition, which currently results in significantly higher contributions to sitting judges. The common wisdom is that an incumbent judge has the advantage over an equally qualified challenger and is likely to attract larger campaign contributions. Furthermore, nonpartisan elections may actually increase voter apathy in judicial races because most voters would not be able to distinguish among candidates. Without being able to use party affiliation as at least a clue to the general philosophy of a candidate, more citizens simply would not bother to vote for judges.

Appointment

Systems for selecting judges by appointment vary greatly among the states. Usually, the governor — with legislative consent — selects the appointees independently or from a list proposed by a commission set up to objectively study the qualifications of potential candidates. In 20 states, the governor appoints judges from a list of commission-selected nominees without any confirmation by the legislature. In two states — South Carolina and Virginia — the legislatures appoint judges directly without any executive oversight.

Supporters of appointing judges say the system removes campaign contributions from the selection process. Appointed judges can make politically unpopular rulings without fear of losing votes or contributions for the next election. Judges are no longer dependent for campaign contributions on the litigants and lawyers whose cases they try. Removing such a burden from judges would eliminate the most criticized element of the judicial selection system.

Most judicial appointment systems are also designed to avoid other political pressures by ensuring that no one person decides who will be a judge. For example, a governor chooses nominees for appellate judges from a list of candidates selected by a judicial appointment commission, then forwards those nominations to the state senate for confirmation. This system may actually be beneficial to minority candidates, since a voting bloc in the state senate may wield enough power over confirmations to assure greater minority representation in the judiciary. The first female and Hispanic members of the Texas Supreme Court, for example, were chosen initially by appointment, not election.

Opponents of judicial appointment, however, say the process completely prevents the citizenry from having any say in who should become a judge and eliminates a democratic privilege. Regardless of how the appointment process is structured, only the upper echelon of the legal and political establishment is considered for appointments; many qualified minority candidates are excluded from the lists of possible

appointees. Research has also shown that appointed judges are not significantly different, and certainly no better, than elected judges.

Since the governor is usually responsible for making the appointment, the individual who is selected is typically someone whose political idealogy closely tracks that of the governor. Therefore, even though judges do not have to participate in the partisan process to be elected, they do need to identify themselves with a political party or a particular candidate in order to maintain contact with the governor. If appointments are used to select judges, a nominating commission should be established to ensure that the governor selects from a list of the most qualified candidates, regardless of their partisan affiliation, to prevent cronyism.

Appointment with Retention Elections

The system of appointment with retention elections, popularly called the Missouri plan, is the most common method for selecting state appellate court and supreme court judges. It is also used extensively for district courts. In this system, the initial term of an appointed judge is often short, usually one or two years or until the next general election. After their first term, judges who are successful in retention elections serve terms ranging from four to 12 years.

The initial selection method varies from state to state. In the original Missouri plan, judges are initially selected by a nominating commission. In other states, governors appoint judges to an initial term.

Supporters say that appointment with retention elections establishes an ideal balance of competing interests: it minimizes the influence of campaign contributions, ensures a roster of qualified candidates, guarantees citizens a voice in judicial selection, and promotes assessing candidates on the basis of their records rather than their public relations capabilities. Many states have abandoned partisan judicial elections, precisely because of the complaints cited by opponents of Texas' current system. Most of these states have adopted the retention election system.

Opponents say that a retention election system actually could work to retain incompetent judges. The onus would be on the voters to mount a campaign to oust bad judges. The effort to collect funds to combat a retention election would be made doubly hard without a clear candidate to oppose the incumbent. Furthermore, this system must inevitably suffer the same problems that plague both elective and appointive systems. Voters may be swayed to reject judges for the wrong reasons. In 1986, a high-dollar campaign unseated three California Supreme Court justices, allowing the new governor to replace his predecessor's appointees. Absent a clearly defined process for initially selecting judges, all of these systems may neglect to promote diversity among the judiciary. Finally, retention elections are subject to the same phenomenon of mass voter dissatisfaction with the status quo that has produced wholesale sweeps of incumbents, regardless of their particular qualifications.

— by John J. Goodson

House Research Organization
Texas House of Representatives
Capitol Extension
Room E2.180

P.O. Box 2910
Austin, Texas 78768-2910
(512) 463-0752
FAX (512) 463-1962

Steering Committee: Henry Cuellar, Chairman • Peggy Hamric, Vice Chairman

Tom Craddick, Dianne White Delisi, Harold Dutton, Roberto Gutierrez, John Hirschi, Bob Hunter, Mike Krusee, Brian McCall, Elliott Naishtat, Al Price, Bob Turner, Leticia Van de Putte, Steve Wolens

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