Promoting Judicial Independence & Public Confidence In The Courts: The Case for Judicial Appointments in Texas

by

Mark A. Behrens & Cary Silverman

Texas is one of a handful of states in which judges at all levels are selected through partisan elections. Court races in the state have long been costly affairs. For example, the seven winning candidates for the Texas Supreme Court raised nearly $9.2 million between 1994 and 1997. This enormous sum was in addition to the millions spent on “issue” advertisements by special interest groups.

The 2002 judicial campaigns are likely to be even “noisier, nastier, and costlier.” Five out of nine seats on the Texas Supreme Court are up for election. Furthermore, unlike in 2000, the sitting Republican justices face significant opposition from Democratic challengers. Experts already predict that these elections “could be among the nastiest—and the most expensive—in years as special interest groups try to get their candidates elected to the bench.” According to one political consultant, each Texas Supreme Court candidate will need to raise approximately $2 million to run an effective race in 2002.

1 States using partisan elections include Alabama, Illinois, Indiana (certain trial courts), Kansas (certain trial courts), Louisiana, Missouri (certain trial courts), New Mexico (after initial gubernatorial appointment), New York (trial courts), North Carolina, Ohio (partisan primary only), Pennsylvania, Texas, and West Virginia. While Michigan and Ohio have a nonpartisan ballot, judicial candidates are nominated through the political parties.


4 Chief Justice Tom Phillips is running for reelection. Recently appointed Justices Wallace Jefferson and Xavier Rodriguez are running to retain their seats on the court. Justices Deborah Hankinson and James Baker, whose terms expire in 2002, have opted not to seek reelection. Their seats will be filled in November of 2002 by two new justices.

The staggering cost of judicial elections and the increasingly fierce rhetoric in judicial campaigns are threatening judicial independence and undermining the moral authority of the courts. There is a sound solution to these serious problems. Next session, the Texas Legislature should give voters the option of replacing the problematic elective judicial selection system with an appointive system.

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The threat to judicial independence, or at least the appearance thereof, is exacerbated by the fact that a substantial portion of the contributions to the campaigns of Texas judicial candidates come from those who seek favorable decisions from the court. For example, more than 40 percent of the nearly $9.2 million contributed to the seven winning candidates for the Texas Supreme Court between 1994 and 1997 was contributed by parties or lawyers with cases before the court or from contributors linked to those parties.

There is at least some empirical evidence that the threat to judicial impartiality caused by campaign contributions is more than mere perception—lawyer contributions may in fact influence court decisions. One recent study compared contributions by attorneys and law firms to Texas Supreme Court campaigns and the Texas Supreme Court’s rate of accepting petitions for appeal between 1994 and 1998. The study suggested a strong correlation between lawyer giving and judicial decision-making.

Judicial candidates who are subject to popular election, and reelection, face substantial threats to their independence and impartiality—the core values of the judicial system. The public believes that campaign contributions are made to influence a result; campaign contributors are not benevolent donors. A recent national poll indicates that four out of five people believe that “elected judges are influenced by having to raise campaign funds” and that “judges’ decisions are influenced by political considerations.” The spiraling cost of judicial elections is leading to increased pressure on judicial candidates to seek financial support from those with an interest in judicial decisions.

6 Pete Slover, Costly Battles Predicted in Judicial Races, DALLAS MORNING NEWS, Jan. 3, 2002 (reporting competition for several seats on the Texas Supreme Court).

7 See Max B. Baker, Stakes High in Court Campaign, FORT-WORTH STAR-TELEGRAM, Nov. 26, 2001, at 1 (quoting Bill Miller, an Austin political consultant).


11 See id. at V.D (“While the average overall petition-acceptance rate was 11 percent, this rate leapt to an astonishing 56 percent for petitioners who contributed more than $250,000 to the justices. In contrast, non-contributing petitioners enjoyed an acceptance rate of just 5.5 percent. For every level studied, there was a direct correlation between the amount of money contributed and the court’s petition-acceptance rate.”).
This report suggests that campaign contributions may influence justice at its most basic level – in determining whether a person will get his or her appeal heard in court.¹²

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Lawyers and their clients should not fear losing a case because they did not give enough money to the right candidate. The public expects justice to be “blind,” and not influenced by campaign contributions. Citizens want to know that when they walk into court, they will win or lose based solely on the merits of their case. The huge amount of money spent in judicial races, however, could lead some in the public to question whether justice in this country is “for sale.”¹³ This is not the type of situation that promotes public confidence in the courts.

The growing involvement of special interest groups in judicial politics further pressures judicial candidates who are strapped for cash. Professor Anthony Champagne of the University of Texas School of Law has observed that “[t]he result [of elections] can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve and retain judicial office.”¹⁴ To some analysts of the Texas judicial system, the increasing involvement of interest groups in judicial elections challenges the appearance of impartiality. Some have gone so far to suggest that judges “are becoming ‘captives’ of influential interest groups.”¹⁵

Texas’s use of partisan elections renders judges and candidates especially vulnerable to political influence. At the outset of the election process, potential candidates must curry favor with party leaders to gain their party’s nomination. After election, the judge may feel indebted to the party for his or her position and remain reliant on the party for reelection. Chief Justice Tom Phillips of the Texas Supreme Court has questioned, “When judges are labeled as Democrats and Republicans, how can you convince the public that the law is a judge’s only constituency? And when a winning litigant has contributed thousands of dollars to the judge’s campaign, how do you ever persuade the losing party that only the facts of the case were considered?”¹⁶

United States Supreme Court Justice Anthony Kennedy has remarked that “the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral.”¹⁷ As Texas Chief Justice

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¹² The Texans for Public Justice study, however, does not prove that there is a causal relationship between the size of campaign contributions and acceptance rates. Contributors may simply decide to give money to candidates who they believe are most likely to review matters of concern to them.


¹⁴ Anthony Champagne, supra note 8, at 1391.

¹⁵ Id.


Phillips has candidly observed, campaign contributions and party labels "compromise the appearance of fairness."\(^{18}\) Whether or not the influx of money and partisanship actually impact the impartiality of the Texas judiciary, judicial elections are undermining the public's respect for judges and the judicial system.

Texas faces a significant challenge in winning back the public's confidence. A 1998 study sponsored by the Texas Supreme Court found that 83 percent of Texas adults, 69 percent of court personnel, and 79 percent of Texas attorneys believed that campaign contributions influenced judicial decisions "very significantly" or "fairly significantly."\(^{19}\) Even 48 percent of Texas judges confessed that they believed money had an impact on judicial decisions.\(^{20}\)

To make matters worse, the increasing fierceness of judicial campaigns is spewing forth nasty rhetoric and partisanship that no lawyer or judge can feel good about. "Attack advertising, the use of aggressive political consultants and what are often thinly veiled promises to sustain or overturn controversial decisions are now established parts of the campaign for seats on state courts."\(^{21}\) Little, if anything, now separates the tone of judicial campaigns from other elected offices. Special interest groups take full advantage of the luxury of attacking candidates without the limitations imposed on candidates by judicial codes of conduct.

The heart of the problem with judicial elections is that the popular election of judges is fundamentally at odds with the concept of an impartial judiciary. Texas has two political branches: the legislative and the executive. Members of the judicial branch, however, are not direct representatives of the people, but are expected to act as impartial arbiters of cases and controversies. As Professor Steven Crowley of the University of Michigan Law School has recognized, "Where the judiciary as well as the legislative and executive is elected, no branch remains to safeguard against majoritarian excesses."\(^{22}\) Minority groups, criminal defendants, and unpopular industries (particularly large, out-of-state corporations) may all fear that an elected judge will succumb to local political pressure. The pressure on an elected judge may be particularly strong in visible cases when an election looms near. As the late California Supreme Court Justice Otto Kaus remarked, "ignoring the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub.'"\(^{23}\)

\(^{18}\) Federalist Soc'y White Paper, supra note 16.


\(^{20}\) See id.


Choosing judges based on party labels also does not promote a qualified judiciary and stable government of laws. The elective process emphasizes party loyalty, political connections, the ability to raise money, and charisma. While these attributes may be appropriate for selection of candidates for legislative or executive office, they have no relevance to the legal scholarship, impartiality, and experience required of a judge. Furthermore, qualified candidates may opt not to participate in a system that requires massive fundraising, political savvy, and a huge sacrifice of time and privacy for a salary that is often meager compared to private practice. The public, faced with a lack of information, may choose a judge solely based on party affiliation and without respect to qualifications. As public shifts in ideology change, competent and experienced judges lose elections for no reason other than political affiliation. According to Chief Justice Phillips, “207 district and appellate judges have been tossed out of office, often simply because of their party label” since 1980. 

A Better Method of Judicial Selection

Given the inherent problems of judicial elections in Texas, there is widespread acceptance that the current system must go. According to a 1999 report prepared by the Texas Supreme Court, the State Bar of Texas, and the Texas Office of Court Administration, only 11 percent of attorneys, 21 percent of judges, and 26 percent of court personnel prefer the current partisan election system. Numerous editorials have supported judicial selection reform. Nonprofit organizations continue to make their case for change. Chief Justice Phillips also has been a frequent advocate for reform.

Judicial appointments may provide a solution to the various problems associated with judicial elections. In the traditional appointive system, the chief executive (Governor) appoints judges with the advice and consent of the Senate. This has been the model used at the federal level since the nation’s founding. A merit selection system,

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29 Public Citizen, a national government watchdog group, even went so far as to challenge Texas’s partisan election of judges as violating due process under the United States Constitution. Public Citizen un成功fully alleged that the partisan election system discriminates against low-income Texans because they do not have the financial means to influence court decisions by making campaign contributions. See Public Citizen, Inc. v. Bomer, 115 F. Supp. 2d 743 (W.D. Tex. 2000), aff’d, 274 F.3d 212 (5th Cir. 2001). At least one author has suggested a similar challenge rooted in the Texas Constitution’s Due Process Clause. See Cristen Feldman, A State Constitutional Remedy to the Sale of Justice in Texas Courts, S. TEX. L. REV. 1415 (2000).

a variant of the appointive system, involves the use of a nonpartisan judicial nominating committee to provide the governor with a list of candidates from which he or she must appoint. When structured fairly, the use of a nonpartisan judicial nominating commission can focus judicial nominations on experience and qualifications while alleviating the need for strong party ties. If Texas considers utilizing a judicial nominating commission to select judges, it is essential that the composition of the commission not be skewed to favor any one interest group, party, or profession.

Appointive systems are a major improvement over elected judiciaries, because they are not subject to the problems inherent to an elected judiciary. These problems include: the appearance of impropriety caused by judges taking money from those who appear before them, the threat to judicial independence resulting from a judge’s dependence on campaign contributions and party support, the reduced perception of impartiality caused by statements of judicial candidates on political or social issues, the elimination of qualified lawyers who would otherwise be willing to serve as jurists, and the loss of public confidence caused by the vile rhetoric of judicial campaigns.

Despite the shared sentiment that partisan elections are the wrong system for selecting judges, Texas has not yet achieved meaningful reform.

Moreover, abandoning the elected system will require more than a simple act of the legislature. The legislature must approve a joint resolution by a two-thirds majority of all members elected to each house proposing to amend Article V of the Texas Constitution. A majority of voters must then approve a ballot initiative to effectuate the change.

Despite these potential roadblocks, the Texas Senate approved a constitutional amendment in 2001 that would have replaced the partisan election system with an appointive system for appellate court judges and supreme court justices. Although reported favorably out of the House Committee on the Judiciary, the proposed constitutional amendment died when the House failed to take action on the bill before the end of the session.

Pre-filing of legislation for the 78th Texas Legislature begins on November 11, 2002 – just six days after the November general election. Before the fresh wounds of the 2002 election heal, only to be reopened in the next election cycle,
the legislature should take the opportunity to cure the system for good. The legislature should pick up where it left off and pass a joint resolution that will allow Texas voters to decide whether they want to move from partisan elections to an appointive system for selecting judges.

Conclusion

Texas' method of judicial selection is in dire need of reform. All evidence suggests that the money and rhetoric involved in judicial campaigns is spiraling out of control. With each passing election, public confidence in the integrity and impartiality of the courts falls lower. Judges should be appointed, not elected.

A few states have returned to appointive systems and, whether they adopted pure-appointive or merit selection systems, they have not changed their view that appointive judicial selection systems provide the best means of ensuring judicial independence. Texas should follow this path to sounder, fairer justice.

We appreciate that cultural and other hurdles may make change difficult to achieve. Yet, the goal of judicial independence is worth striving for in order to improve Texas' judiciary and maintain the moral authority of the courts. Movement from partisan elections to an appointive system for selection of state court judges and justices should rank among the legislature's top priorities in 2003.

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