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

by
Mark A. Behrens & Cary Silverman

Mark A. Behrens is a Partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. His e-mail address is: mbehrens@shb.com. Cary Silverman is an associate with the firm. His e-mail address is: csilverman@shb.com.

Texas is one of a handful of states in which judges at all levels are selected through partisan elections.[1] 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.[2] 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 "nosier, nastier, and costlier."[3] Five out of nine seats on the Texas Supreme Court are up for election.[4] Furthermore, unlike in 2000, the sitting Republican justices face significant opposition from Democratic challengers.[5] 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."[6] According to one political consultant, each Texas Supreme Court candidate will need to raise approximately $2 million to run an effective race in 2002.[7]

[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.

[2] See AM. BAR ASS'N, COMM'N ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS, REPORT, at 11 (July 2001) [hereinafter ABA Report] (citing Janet Elliot, "60 Minutes" Visit Finds Court's Defenders in Hiding, TEX. LAW., Aug. 24, 1998, at 1). Nationwide, candidates in 2000 spent more than $45 million on state supreme court campaigns – a 61 percent increase from 1998. See Neil A. Lewis, Gifts in State Judicial Races Are Up Sharply, N.Y. TIMES, Feb. 14, 2002, at A27.

[3] David B. Rottman & Roy A. Schotland, What Makes Judicial Elections Unique?, 34 LOY. L.A. L. REV. 1369, 1373 n.5 (2001) (quoting Richard Woodbury, Is Texas Justice For Sale?, TIME, Jan. 11, 1988, at 74).

[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.

[5] See Max B. Baxter, 28 Running for Seats on High Courts, STAR-TELEGRAM, Jan. 20, 2002, available at

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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Elections Threaten Independence And Impartiality

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."[8] 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.

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.[9]

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.[10] It revealed that those who contributed to the campaigns of Texas Supreme Court justices had greater acceptance rates for their petitions for review than those who did not contribute or contributed less.[11]

http://www.dfw.com/mld/startelegram/news/state/2501587.htm (last visited Feb. 18, 2002).

[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, a Austin political consultant).

[8] Anthony Champagne, Interest Groups and Judicial Elections, 34 LOY. L.A. L. REV. 1391, 1407-08 (2001).

[9] See ABA Report, supra note 2, at 11 (citing Janet Elliot, "60 Minutes" Visit Finds Court's Defenders in Hiding, TEX. LAW., Aug. 24, 1998, at 1).

[10] See TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY (2001), available at http://www.tpj.org/reports/paytoplay/ (last visited Feb. 18, 2002).

[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]

Elections Undermine Public Confidence in the Judiciary

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

[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.

[13] Richard Woodbury, Is Texas Justice For Sale?, TIME, Jan. 11, 1988, at 74.

[14] Anthony Champagne, supra note 8, at 1391.

[15] Id.

[16] The Federalist Soc'y, White Paper: The Case for Judicial Appointments, available at http://www.fedsoc.org/judicialappointments.htm (last visited Feb. 18, 2002) [hereinafter Federalist Soc'y White Paper].

[17] Peter A. Joy, Insulation Needed for Elected Judges, NAT'L L.J., Jan. 10, 2000, at A19 (quoting Justice Ken-

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.

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Elections Are Incompatible With Judicial Selection

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 legislature 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]

nedy).

[18] Federalist Soc'y White Paper, supra note 16.

[19] Charles Gardner Geyh, Publicly Financed Judicial Elections: An Overview, 34 LOY. L.A. REV. 1467, 1470-71 (2001).

[20] See id.

[21] William Glaberson, Fierce Campaigns Signal a New Era for State Courts, N.Y. TIMES, June 5, 2000, at A1.

[22] Stephen P. Crowley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, U. CHI. L. REV. 689, 780 (1995).

[23] Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503, 1583 (1990) (quoting Paul Reidinger, The Politics of Judging, A.B.A. J., Apr. 1987, at 52, 58)).

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.[24] The public, faced with a lack of information, may choose a judge solely based on party affiliation and without respect to qualifications.[25] 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.[26]

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.[27] Numerous editorials have supported judicial selection reform.[28] Nonprofit organizations continue to make their case for change.[29] Chief Justice Phillips also has been a frequent advocate for reform.[30]

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,

[24] See Ty Meighan, Judicial Reform Problems Aired, CORPUS CHRISTI CALLER-TIMES, Sept. 3, 1999, at B8.

[25] See Partisan Elections Almost Guarantee Some Poor Judges, HOUSTON CHRON., July 27, 2001, at A34.

[26] Hon. Thomas R. Phillips, State's Top Judge Says Change Need to be Made, ABILENE REPORTER-NEWS, Feb. 25, 2001 (excerpt from Chief Justice Phillips' address to the legislature on Feb. 13, 2001).

[27] See SUPREME COURT OF TEXAS, STATE BAR OF TEXAS & TEXAS OFFICE OF COURT ADMIN., THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE (May 1999).

[28] See, e.g., Editorial, Give Judges Chance to Speak on Issues; An Appointive System Would be Better. But if They Must Campaign, Judges Should Speak Their Minds, SAN ANTONIO EXPRESS-NEWS, Dec. 10, 2001, at 4B; Partisan Elections Almost Guarantee Some Poor Judges, HOUSTON CHRON., July 27, 2001, at A34; An Uphill Battle for Judicial Reform, AUSTIN AMERICAN-STATESMAN, Feb. 19, 2001, at A12.

[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 unsuccessfully 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).

[30] See, e.g., Hon. Thomas R. Phillips, Judges: Texas Needs to Change Selection System, DALLAS MORNING NEWS, Mar. 4, 2001, at 5J; Hon. Thomas R. Phillips, State's Top Judge Says Change Need to be Made, ABILENE REPORTER-NEWS, Feb. 25, 2001 (excerpt from Chief Justice's address to the legislature on Feb. 13, 2001); Hon. Thomas R. Phillips, Judicial Independence and Accountability, 61 LAW. & CONTEMP. PROBS. 127 (1998). See also Hon. Craig Enoch, Foreword, 48 SMU L. REV. 723 (1995) (urging reassessment of Texas's system of judicial selection).

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.

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

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. Simple inertia may be the greatest enemy of change. Texans have come to regard elections as a critical part of the democracy that they hold dear, even if most citizens cannot name their choice for judicial office five minutes after pulling the lever. Overcoming this attitude may be especially difficult to overcome because Texas' method of judicial selection has been in place for 150 years.

Furthermore, 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.[31] A majority of voters must then approve a ballot initiative to effectuate the change.

Momentum for Judicial Selection Reform Is Building in Texas

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.[32] 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,

[31] See TEX. CONST. art. 17, § 1

[32] See TEX. S.J.R. NO. 3 (2001). As introduced, the joint resolution called for gubernatorial appointment subject to senate confirmation. At the conclusion of a six-year term, judges would be subject to a non-partisan retention election. The Senate, however, ultimately adopted a substitute bill, that eliminated retention elections in favor of a traditional appointive system. See TEX. C.S.S.J.R. NO. 3 (2001). Although the proposed amendment did not explicitly provide for a judicial nominating commission, after passage of the constitutional amendment the legislature could provide for merit selection through ordinary legislation or the governor could institute such a system by executive order.

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.