



The Supreme Court of Texas

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Chambers of
THE CHIEF JUSTICE

February 18, 2016

Hon. Joan Huffman, Chair
Texas Senate Committee on State Affairs
Texas State Capitol
Austin, Texas

Re: Interim charge re judicial compensation and selection

Dear Madame Chair:

Thank you for inviting my views on judicial compensation and selection, matters in the interim charge to the Senate Committee on State Affairs. On matters of compensation, I believe I speak for the Texas Judiciary. On selection matters, I speak only for myself, but from more than 34 years' judicial service, 27 of which have been as a Member of the Supreme Court.

Two principles should govern compensation of Texas judges. Judges' pay should be commensurate with their professional responsibilities as stewards of the justice system and should be comparable to that of other judges in the country. Texas judicial compensation violates both.

Texas judges are paid like first-year lawyers. State judges make \$140,000-\$168,000. First-year associates at big firms start at \$160,000 but often receive signing and year-end bonuses. The judge, it is too-often said, is usually the lowest-paid lawyer in the courtroom. Judicial service is public service, judges get that. We don't take the jobs for the pay. But let me ask: is reviewing document discovery really worth as much as administering the justice system and upholding the rule of law, day in, day out, risking job security and physical safety? Justice is "the end of government," Madison wrote in *Federalist No. 51*, "pursued until it is obtained, or until liberty be lost in the pursuit." To treasure justice and not her ministers is unjust.

A U.S. Supreme Court Justice's salary is \$244,000. Salaries for state high court judges range from \$230,750 to \$129,625. Texas is in the middle of the pack – 23rd, at \$168,000. In no respect, this or any other, should Texas be mediocre. The Texas justice system has created a legal climate in the state that has fostered economic development. It has helped lead the nation in championing legal services for the poor; reforming juvenile justice, school law, and truancy; reviewing criminal exonerations; improving guardianship procedures; stopping human trafficking; working with the Executive and Legislature to create veterans courts and other specialty courts; and adopting

technological advancements, including e-filing and docket management. Texas leadership draws on the skills, training, experience, dedication, and courage of her judges. As Chief Justice, I work with federal and state judges all over the country. Texas judges are among the best there are, anywhere. They're not 24th.

Attracting the best lawyers to the bench and keeping them there is difficult when pay is a big issue. Again, no one aspires to judicial service to get rich. The people deserve and expect service. But they also get what they pay for. When your child's been arrested, or your family is falling apart, or someone's cheated or injured you, or has refused to keep his word in a contract – in any of the myriad situations in which people find themselves in court – you want to look up and see sitting on the bench the incarnation of Solomon – the wisest, fairest, smartest, hardest-working, most experienced judge there is. When the most important issues in life are at stake, one should not look for bargains. We cannot promise the justice system that people expect and to which they are entitled when the best in our profession must stay in the private sector to provide for their families.

Cost is not the object. The entire appropriation for the Judicial Branch is less than 0.5% of the state budget, and judicial compensation is a tiny part of that. The obstacle to fair judicial compensation – in the federal government and every state – is in the perils of legislative politics. Despite the small price tag and the large benefits to the justice system, judicial salary increases are rarely a priority and often a target in legislative sessions. Any success is limited and comes in fits and starts. In the 1980s and 1990s, judicial raises were more frequent, yet judicial compensation sank to very low levels. In the past 17 years, judges have had two raises. The Legislature created the Judicial Compensation Commission in 2007 to research and make recommendations, to “better serve[]”, in the words of the bill analysis, legislative consideration of judicial salaries. For four bienniums, the Commission has worked diligently, annually surveying all available information in the country, and filing a thorough report recommending increases. All this effort has produced . . . one raise.

The Commission cannot achieve its intended purpose unless its recommendations carry a presumption of adoption. The law should be changed to provide that the recommendations must be included in the state budget unless removed by statute. This would allow regular review of judicial compensation as part of the budgeting process, allowing legislators and the public to see the proposed increase as part of the broader budget rather than a last-minute discussion. This has been tried in 15 of the 22 states with judicial compensation commissions. Everywhere it has succeeded. Without such a presumption, the Commission is no more than another voice to be ignored.

This change in the Commission's authority might also help resolve whether legislators' retirement should be linked to district judges' salaries. As far as I have been able to determine, Texas first adopted this practice in 1975. Act of May 20, 1975, 64th Leg., R.S., ch. 218, § 7, 1975 Tex. Gen. Laws 551, 555 (S.B. 90, by Doggett), formerly Tex. Rev. Civ. Stat. Ann. art. 6228a, § 5-1, now Tex. Gov't Code § 814.103. Somewhat relatedly, salaries of Members of Congress have generally been in parity with federal judges' salaries since at least 1955. On the one hand, the

linkage provides a sensible basis for setting elected officials' retirement. On the other, legislators may not support increasing judicial salaries to avoid the unfair criticism that they are really only voting to benefit themselves. Giving the Commission's recommendations presumptive force could avoid the problem. It could provide a substantive basis for addressing both judicial compensation and legislative retirement, without session politics.

The other matter on which you have been kind enough to invite my views is judicial selection. I have been elected to the Supreme Court 6 times. In 34 years, I have stood for election or re-election as a judge in 17 primary and general elections, 12 of them statewide. All those contests, except two primaries, were contested. In 1981, I set out for a judicial career with the view that partisan, popular elections ill serve *the interests of the people of Texas* in selecting judges, and while I have enjoyed some success in the process, every election season confirms my view.

The people want judges who are independent enough to protect their rights yet accountable for their decisions, two goals fundamentally at odds. They can never be reconciled; they can only be balanced. The federal system, with lifetime appointments, strongly favors independence and entrusts accountability to the character and conscience of the judges. Texas, with partisan elections, partisan re-elections, and short terms, seems to favor accountability, leaving independence to the conscience and courage of the judges. But the Texas system cannot deliver the accountability it appears to promise, and its threat to judicial independence increases with every election cycle.

The reason is that people, at least in urban areas, do not, and cannot, know judges and judicial candidates well enough to vote for whom they really want. There are too many on the ballot, and a person's qualifications to be a judge are hard to discover and evaluate. Judicial campaigns often lack the finances to take a candidate's case to voters, certainly through the public media but even through social media. Voters end up deciding based on seemingly recognizable names (like Don Yarbrough, no relation to Don Yarborough or Ralph Yarborough, or like Gene Kelly, no relation to the dancer), or ballot position, or incumbency, or misunderstandings about qualifications, or party. In party primaries, voters interested in races higher on the ballot are often completely adrift when it comes to the sea of judicial positions.

There is no perfect solution. The states have tried every conceivable plan there is: appointment by the executive, appointment by the Legislature, merits recommendations by a citizen commission, appointment for life, appointment/re-appointment, appointment/retention election, nonpartisan election – if it can be imagined, it's been tried. The judicial selection process cannot be rid of politics. The federal judicial appointment process is intensely, shrilly political, as the tragic death of Justice Scalia this past weekend reminds us.

One thing is clear: last session's omission of the petition signature requirement for ballot applications for judicial positions is a step in the wrong direction. Absent a state mechanism for assuring minimal qualifications for judicial candidacy, the petition signature requirement has come to serve that essential gate-keeping function. It minimally assures that there is statewide support for

a judicial candidacy, precluding opportunism. Elimination of the petition-signature requirement was below the radar, and restoration should be among the Legislature's highest priorities.

Politics threatens not only judicial selection but judicial service. And here, the federal system offers a valuable benefit. Federal judges, when finally confirmed, can be free of political influence in their decisions, as elected judges can never be. The politics ends; judging begins. For elected judges, being forced to worry how decisions will be received, or worse, misstated, saps the independence essential to the proper functioning of the judiciary.

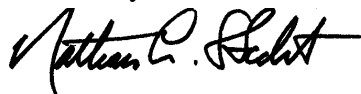
Top-of-the-ballot political swings can cost good judges their jobs and threaten the stability of the judiciary, deprive it of valuable experience, and make judicial service less attractive. As pernicious as such swings are to the judiciary, at least they are beyond any judge's control. It is when a judge begins to think that a decision can improve or worsen the continuation of his or her career that judicial independence is threatened.

The sad irony is that judicial elections do not improve judicial accountability. Elections do not necessarily or regularly provide voters with reliable information about a judicial candidate's qualifications and record. Voters are left with the choice of guessing or abstaining. The public's desire for accountability would be better served if judges were selected in a process focused on their qualifications and retained, or not, in an election focused only on their records. Partisan elections promise voters judicial accountability, then cheat them out of it.

Perfection need not be the enemy of improvement. Removing judges from straight-ticket voting would improve judicial accountability by requiring that votes for individual judges be intentional. It would increase the likelihood that judges would be elected based on qualifications and their records and lessen partisan sweeps. Only one other state still allows straight-ticket voting in judicial retention elections – Alabama.

The Judiciary has benefitted from the Legislature's interest. I stand ready to assist the Committee in any way I can. Thank you for your consideration.

Sincerely,



Nathan L. Hecht
Chief Justice