

**TEXAS COMMISSION ON JUDICIAL SELECTION
FINAL REPORT**



Texas Commission on Judicial Selection Final Report

Public Policy Research Institute - Texas A&M University

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EXECUTIVE SUMMARY

The Texas Commission on Judicial Selection (TCJS) was established in 2019 by the 86th Legislature through House Bill 3040. The Commission was charged “to study and review the method by which statutory county court judges, including probate court judges; district judges; appellate and Supreme Court justices are selected for office in Texas.”¹

In order to inform its work, the Commission held public hearings, received testimony from many organizations, foundations, and experts, and conducted a survey of Supreme Court Justices and directors of court administration offices across the United States.

Currently, Texas utilizes partisan elections for all judicial offices. However, the Texas Constitution allows for appointment by the Governor or county officials and confirmation by the Senate for interim court vacancies. Changing the judicial selection method has been attempted numerous times throughout the state’s history, with many advocating a change to a merit selection system.

After examining judicial selection methods in other states and considering the advantages and disadvantages of various judicial selection methods, the Commission made the following recommendations:

- A majority of the Commissioners recommend against the continuation of our partisan judicial selection system.
- A majority of the Commissioners recommend against the adoption of a nonpartisan judicial selection system.
- When focusing on the alternative of an appointive judicial selection system followed by a retention election, 7 Commissioners recommend in favor of such a system and 7 Commissioners recommend against (with one abstention).
- The Commissioners overwhelmingly recommend increasing the minimum qualifications of our judges.
- The Commissioners overwhelmingly recommend the adoption of rules to regulate further the role of money in judicial elections.
- The Commissioners, with 2 abstentions, unanimously reject term limits for our judges.
- The Commission was unanimous that any change to the status quo should not impact the judges selected under the current system.
- Representative Todd Hunter, the author of H. B. 3040, proposed that, due to the pandemic and related issues, the work of the Commission continue beyond its current life. A majority of the Commissioners stand ready to continue studying potential reforms to judicial selection if the Legislature is so inclined.

¹ See House Bill 3040, <https://www.txcourts.gov/media/1445440/hb-3040-86th-legislature.pdf>

INTRODUCTION

The Texas Commission on Judicial Selection (TCJS) was established in 2019 by the 86th Legislature through House Bill 3040.¹ The Commission contains 15 members. Four members were appointed each by the Governor, Lieutenant Governor, and Speaker of the House with one appointment each by the Supreme Court of Texas, the Court of Criminal Appeals, and the State Bar of Texas.² The members of the Commission are listed below.

Chair

Mr. David J. Beck, Attorney

Legislative Members

Hon. Brian Birdwell, Senator

Hon. Juan “Chuy” Hinojosa, Senator

Hon. Joan Huffman, Senator

Hon. Robert Nichols, Senator

Hon. Todd Hunter, Representative

Hon. Brooks Landgraf, Representative

Hon. Ina Minjarez, Representative

Hon. Carl Sherman, Representative

Citizen Members

Mr. Charles “Chip” Babcock, IV, Attorney

Hon. Martha Hill Jamison, (Ret.)

Hon. Wallace Jefferson, (Ret.)

Ms. Lynne Liberato, Attorney

Mr. David Oliveira, Attorney

Hon. Thomas Phillips, (Ret.)

The Commission was charged “to study and review the method by which statutory county court judges, including probate court judges; district judges; appellate and Supreme Court justices are selected for office in Texas.” Additionally, the report “must consider the fairness, effectiveness, and desirability of selecting a judicial officer through partisan elections; the fairness, effectiveness, and desirability of judicial selection methods proposed or adopted by other states; the relative merits of alternative methods for selecting a judicial officer.”³ The alternative methods listed in House Bill 3040 are:

- Lifetime appointment
- Appointment for a term
- Appointment for a term, followed by a partisan election
- Appointment for a term, followed by a nonpartisan election
- Appointment for a term, followed by a nonpartisan retention election
- Partisan election for an open seat, followed by a nonpartisan retention election for incumbents
- Any other method or combination of methods for selecting a judicial officer

¹ See House Bill 3040, <https://www.txcourts.gov/media/1445440/hb-3040-86th-legislature.pdf>

² See <https://www.txcourts.gov/tcjs/members/>

³ *Supra* note 1.

- Merits of using a public member board to nominate or assess the qualifications of candidates for judicial office

The Texas Commission on Judicial Selection must submit a report on the Commission's findings and recommendations no later than December 31, 2020 to the Governor and state legislature. The Texas Commission on Judicial Selection requested the Public Policy Research Institute (PPRI) at Texas A&M University in July 2020 to assist with its report.

TCJS PROCESS

The Commission has held 15 meetings from January 2020 to December 2020. The Commission created three subcommittees with specific charges and members. These subcommittees are shown below.

- **Appointments & Confirmations**
 - Charge: Study the pros and cons of the various methods for appointing judges, terms of office, and the desirability and nature of legislative confirmation of gubernatorial appointments.
 - Members:
 - Hon. Wallace Jefferson, Chair
 - Sen. Joan Huffman
 - Rep. Todd Hunter
 - Rep. Brooks Landgraf
 - Mr. Charles Babcock

- **Citizen Panels and Judicial Qualifications**
 - Charge: Consider the role, if any, of citizen panels in a system with an appointed judiciary and consider changes to the current qualifications of Texas judges.
 - Members:
 - Ms. Lynne Liberato, Chair
 - Sen. Brian Birdwell
 - Rep. Carl Sherman
 - Mr. David Oliveira
 - Mr. David Beck

- **Elections**
 - Charge: Critique the current system of partisan elections, provide the pros and cons of nonpartisan elections, and discuss the usefulness of retention elections in a new system.
 - Members:
 - Hon. Thomas Phillips, Chair
 - Sen. Juan Hinojosa
 - Rep. Ina Minjarez
 - Hon. Martha Hill Jamison
 - Sen. Robert Nichols

Each of these committees has provided reports to the full Commission and has met independently. The Commission has also held public hearings, received testimony from many organizations, foundations, and experts, and conducted a survey of Supreme Court Justices and directors of court administration offices across the United States.

The members of the Commission also invited various organizations and foundations to provide documents, data, and testimony for their review. Additionally, public hearings were held throughout the state, including San Antonio, Dallas, Odessa, and Corpus Christi. Commission staff sent out emails with multiple reminders and advertised with a flyer on social media for the public hearings. Interested parties

were asked to register via a survey link to testify before the Commission, and numerous members of the public appeared and provided testimony. All of the Commission's meetings were streamed via YouTube.⁴

All of the hearings, testimony, documents, data, and various survey analyses have informed the Commission's work. Appendix A presents information (including names and organizations) relating to the invited testimony the Commission received.

⁴ See <https://www.youtube.com/user/TexasCourtAdmin>

JUDICIAL SELECTION REFORM IN TEXAS

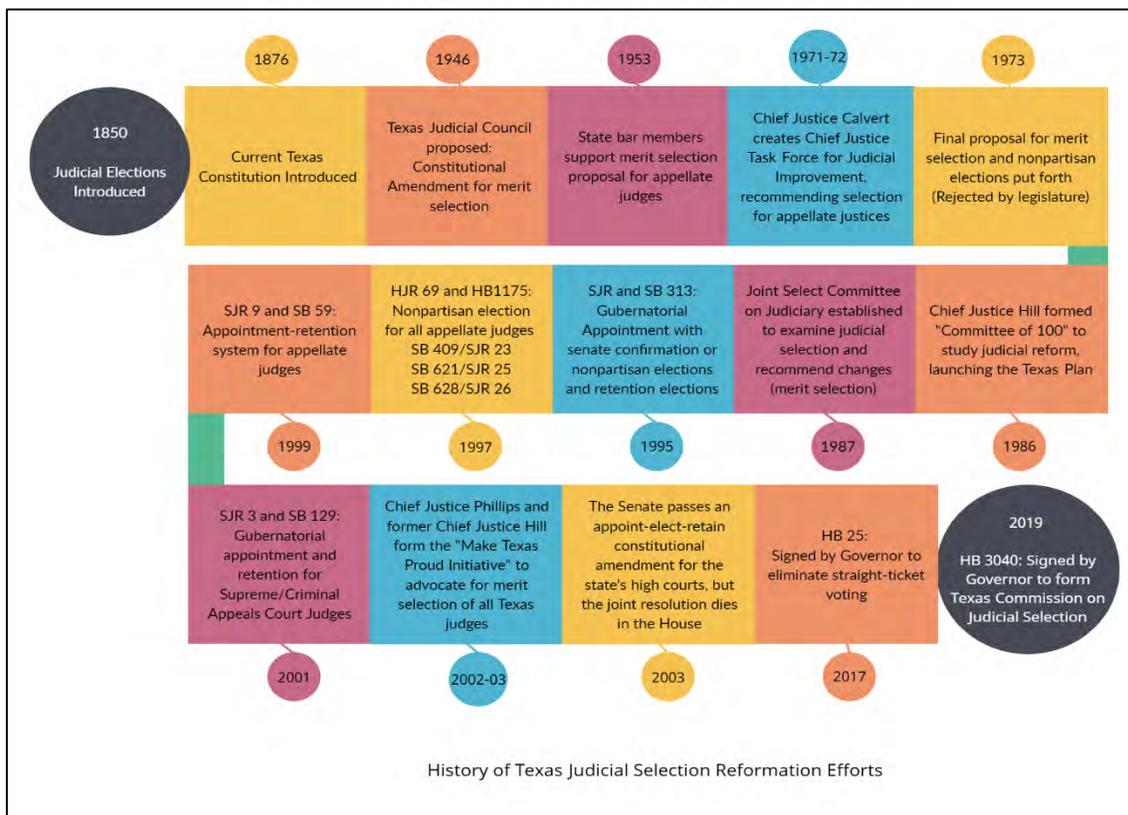
The Texas Commission on Judicial Selection was tasked with examining the fairness, effectiveness, and desirability of various methods of judicial selection. Plainly, all methods of judicial selection have both positive and negative attributes, and each needs to be considered when making policy recommendations. Currently, Texas is one of six states that requires judicial selection for all judicial offices by partisan elections.⁵ Proponents of partisan elections argue that elections provide voters with a direct voice and accountability for the judiciary. On the other hand, opponents of partisan elections assert that voters do not have sufficient information to make informed decisions regarding qualifications of judges, and that they make their decisions based on party affiliation, with the result that incumbent judges win or lose elections for reasons that typically have nothing to do with their performance.

The Texas Constitution allows for appointment by the Governor or county officials and confirmation by the Senate for interim court vacancies. The Texas Constitution provides the method for judicial selection, and any change to the current method must be made through a constitutional amendment. In order to amend the Constitution, an amendment must be approved by two-thirds of the members of each house of the legislature and then approved by a majority of voters in the next general election.

Changing the judicial selection method has been attempted numerous times throughout the state's history, with many advocating a change to a merit selection system. Chart 1 presents a brief historical timeline of Texas judicial selection reform.

⁵ Tex. Const. Art. V; Hugh Kelly and David Haug, "Evaluating Judicial Selection in Texas: A Comparative Study of State Judicial Selection Methods," Texans for Lawsuit Reform Foundation, 2019.

Chart 1: Timeline of Efforts for Texas Judicial Selection Reforms



Texas is a large and diverse state, which makes changing judicial selection methods a complex endeavor. Different issues need to be considered when making recommendations for change. Texas is the second largest state by population with almost 29 million residents as of 2019.⁶ It is also the second largest state by area size accounting for slightly more than 268,000 square miles of total area.⁷ Texas includes the largest number of counties of any state with 254 and 95 more counties than the second state, Georgia.

The size of the population, total area, and number of counties are not the only factors that make judicial selection challenging. Texas' population has grown by almost 4 million between 2010 and 2019 (or about 15%). Out of the ten counties with the largest population growth in the US, six are in Texas (Chart 2: these are Harris, Tarrant, Bexar, Dallas, Collin, and Travis Counties).⁸ The population growth is also evident in terms of percentage with Texas having four of the top ten counties in population growth for the same time period (Chart 3: these are Hays, Comal, Kendall, and Williamson Counties).

⁶ United States Census Bureau, accessed December 12, 2020, https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-total.html#par_textimage_1574439295

⁷ United States Census Bureau - Population and Housing Unit Counts 2010 Census of Population and Housing, accessed December 12, 2020, <https://www.census.gov/prod/cen2010/cph-2-1.pdf>

⁸ United States Census Bureau, accessed December 12, 2020, <https://www.census.gov/newsroom/press-releases/2020/pop-estimates-county-metro.html>

Chart 2: Top 10 Counties in the US in Growth of Population (Numeric Growth)

| Rank | State | County | 2010 | 2019 |
|------|------------|-----------|-----------|-----------|
| 1 | Arizona | Maricopa | 3,817,365 | 4,485,414 |
| 2 | Texas | Harris | 4,093,176 | 4,713,325 |
| 3 | Washington | King | 1,931,287 | 2,252,782 |
| 4 | Nevada | Clark | 1,951,268 | 2,266,715 |
| 5 | Texas | Tarrant | 1,810,664 | 2,102,515 |
| 6 | Texas | Bexar | 1,714,781 | 2,003,554 |
| 7 | California | Riverside | 2,189,765 | 2,470,546 |
| 8 | Texas | Dallas | 2,367,419 | 2,635,516 |
| 9 | Texas | Collin | 781,419 | 1,034,730 |
| 10 | Texas | Travis | 1,024,444 | 1,273,954 |

Chart 3: Top 10 Counties in the US in Growth of Population (Percentage Growth)

| Rank | State | County | 2010 | 2019 | % Growth |
|------|--------------|------------|---------|---------|----------|
| 1 | North Dakota | Williams | 22,399 | 37,589 | 68% |
| 2 | Texas | Hays | 157,103 | 230,191 | 47% |
| 3 | Utah | Wasatch | 23,525 | 34,091 | 45% |
| 4 | Texas | Comal | 108,520 | 156,209 | 44% |
| 5 | Texas | Kendall | 33,384 | 47,431 | 42% |
| 6 | Florida | Sumter | 93,420 | 132,420 | 42% |
| 7 | Iowa | Dallas | 66,139 | 93,453 | 41% |
| 8 | Florida | Osceola | 268,685 | 375,751 | 40% |
| 9 | Texas | Williamson | 422,504 | 590,551 | 40% |
| 10 | Florida | St. Johns | 190,038 | 264,672 | 39% |

Growth in numbers and percentages suggest that the population growth in Texas is not only limited to large counties, but medium to small counties are also experiencing population changes. This growth also coincided with changes in the composition of the population. Between 2010 and 2019, Hispanics as a percentage of the total population has increased from 38% to 40% and that of African Americans from 12% to 13%.⁹ The share of eligible Hispanics has gone from 22% to 30% and that of Whites declined from 62% to 51%.¹⁰ The above statistics suggest that Texas' voting population is growing. In fact, 74% of the state's population is of age to vote, and a record 16.9 million Texans registered to vote in the 2020 US presidential elections.

While the latest demographic statistics suggest that Texas' congressional delegation should expand in the near future, for local elections such changes further emphasize the importance of the judicial selection process. Additionally, urban and rural areas in the state face different challenges. In 2019, House Bill 4504 proposed changes to the selection of all district and appellate court judges in judicial districts with a

⁹ Authors' calculations from the State Population by Characteristics: 2010-2019 United State Census Bureau, accessed December 12, 2020, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-detail.html>

¹⁰ Pew Research Center: The Changing Racial and Ethnic Composition of the US Electorate, accessed December 12, 2020, <https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/>

population over 500,000 or whose voters decided to fill judicial vacancies by gubernatorial appointment. The appointee's qualifications would have been reviewed by a Judicial Appointments Advisory Board, which would have made recommendations as to the qualifications of each candidate. However, this bill was left pending in committee.

A survey in May 2020 obtained 546 responses and expressed the views of attorneys from the Appellate Section of the State Bar of Texas on judicial selection. Almost 90% (88.3%) of appellate attorneys believed it was "extremely" or "very important" to reduce or eliminate the selection of judges who lack relevant qualifications or experience. When asked about their preference for selecting appellate judges, attorneys ranked nonpartisan elections as the most preferable. Over 50% (54.5%) of attorneys believed that if Texas were to establish a Bipartisan Judicial Qualifications Committee, it could fairly and objectively assess the qualifications of potential judges without regard to political considerations. Over 60% (62.0%) of attorneys stated that Texas should require a potential judge to be approved by a judicial qualifications committee before either being appointed or included on a ballot.

A survey of the San Antonio Bar Association in September 2020 with 451 responses suggested that the majority supported changing the method of selecting judges in Texas. Of additional significance, almost 90% of those responding to the survey were in favor of adjusting the qualifications of judges and the minimum number of years and types of experience required. The majority also favored nonpartisan elections or appointment. With respect to a Judicial Qualifications Commission to vet judicial candidates, concerns were expressed about how such a Commission would be created and whether it would function in a true nonpartisan fashion. The survey participants mentioned their support of the current judge term lengths.

The Austin Bar Association collected data from its members (and members of the Austin Young Lawyers Association) through an online survey in October 2020 and that focused on judicial selection. The response rate was slightly below 20% (at 18.4%), reflecting the opinions of about 682 lawyers. The majority of participants (95%) ranked relevant experience or qualifications as "very important" or "extremely important" for judicial selection. In addition, more than 60% of lawyers believed that diversity among judges and approval ratings from lawyers are "very important" to "extremely important." Popularity with voters was deemed less important.

In terms of judicial method selection, more than 66% would like to eliminate the selection of judges based on political relationships. Among the participants, nonpartisan elections were the top method for judicial selection followed by appointment by a bipartisan committee as a second choice. Over 70% of the lawyers would like to add a requirement for any potential judge to be approved by a bipartisan judicial qualifications committee. The ideal term length conveyed in the survey was 4-years. This recommended length term had more support in county and district courts (75.8% and 63.9% of responses) than in intermediate appellate courts and Supreme Court (43.3% and 39.4%). The second choice was a 6-year term.

During invited testimony, the Commission heard from many groups, who voiced concerns about the current system and advocated for a different system to be adopted. Many of the invited speakers urged the adoption of a merit-based selection system with retention elections. One major concern related to ensuring there were protections in place, such as review or nomination by a nonpartisan or bipartisan Commission, if the Governor appointed the judicial candidate. Moreover, several invited speakers also spoke about the need to enhance the qualifications of judicial candidates.

Testimony at public hearings demonstrated that the constitutional right to vote for judges was important to many members of the public who spoke at the hearings. Additionally, at public hearings, nonpartisan elections were advanced as an option for change, as well as some limited interest in an appointment/retention system.

The Commission heard testimony about the need for diversity of all kinds in the judicial branch. Without it, citizens express skepticism that the justice system will respond to their basic needs for civil and criminal justice. Recent tragic events triggering protests have captured a feeling of alienation that many in the nation feel plagues our system of justice. Additionally, people of modest means are too often denied representation when confronting profound legal dilemmas – involving housing, domestic violence, veterans’ benefits, and more. The citizens of Texas should be reassured that, regardless of their background, they will receive equal protection under law. An advanced system of justice would thus recruit, appoint, and retain judges who commit to adjudication without regard to race, gender, financial circumstance, or other barriers to justice. A judiciary that is as diverse as Texas would ensure that the public has confidence that these values are present in the laws that govern them and in the judges who preside over them.

In order to be eligible to be elected or appointed, judges must meet certain qualifications. Chart 4 displays the current legal criteria for judgeships in Texas. In the 86th legislative session, Senate Bill 561 proposed changes to the Texas Government Code in relation to the qualifications of judges. The bill would have increased the age requirements for statutory county and statutory probate courts from age 25 to 30. It also proposed changes to the requirements for municipal court judges. Senate Joint Resolution 35 proposed a constitutional amendment to increase the number of years Supreme Court, appellate, and district court judges must practice as an attorney or a judge prior to election or appointment. The resolution proposed increasing the required number of years for Supreme Court and appellate judges from 10 years to 12 years. The resolution also proposed increasing the number of years for district judges from four years to eight years. These changes were not adopted by the 86th legislature.

Chart 4: Legal Criteria for Judgeships¹¹

| Type of Judge | Qualifications |
|------------------------------------|--|
| Supreme Court Justices | <ul style="list-style-type: none"> • Citizen of U.S. and of Texas • Age 35 to 74 • A practicing lawyer, or lawyer and judge of court of record together, for at least 10 years |
| Court of Criminal Appeals Justices | <ul style="list-style-type: none"> • Citizen of U.S. and of Texas • Age 35 to 74 • A practicing lawyer, or lawyer and judge of court of record together, for at least 10 years. |
| Court of Appeals Justices | <ul style="list-style-type: none"> • Citizen of U.S. and of Texas • Age 35 to 74 • A practicing lawyer, or lawyer and judge of court of record together, for at least 10 years. |
| District Judges | <ul style="list-style-type: none"> • Citizen of U.S. and of Texas • Age 25 to 74 • Resident of the district for 2 years; and a practicing lawyer or judge, or both combined, for 4 years. |
| Constitutional County Court Judges | <ul style="list-style-type: none"> • “Shall be well informed in the law of the State.” (Law license not required.) |
| Statutory County Court Judges | <ul style="list-style-type: none"> • Citizen of U.S. • Age 25 or older • Resident of county for at least 2 years • Licensed attorney who has practiced law or served as a judge for 4 years. |
| Statutory Probate Court Judges | <ul style="list-style-type: none"> • Citizen of U.S. • Age 25 or older • Resident of county for at least 2 years • Licensed attorney who has practiced law or served as a judge for 5 years. |
| Justice Court Judges | <ul style="list-style-type: none"> • No specific statutory or constitutional provisions apply. |
| Municipal Court Judges | <ul style="list-style-type: none"> • Determined by the governing body of the city. |

Chart 5 summarizes the current terms of office for judges in Texas. Previous Texas Supreme Court Justices have advocated for changes to term lengths. Plainly, extending judicial term lengths could potentially lessen upheaval in the judiciary due to election cycles.

Chart 5: Current Terms for Texas Judges

| Office | Terms |
|---------------------|---------|
| District Judges | 4 years |
| Appellate Justices | 6 years |
| High Court Justices | 6 years |

¹¹ See https://www.txcourts.gov/media/48745/Judge-Qualifications-6_26_14.pdf; Texas Const. Art. V. § 2(b), 4(a), 6(a), 7; Texas Govt. Code Sec. 24.001, 25.0014, 25.2602, 25.2652. District Judges includes Criminal District Judges and Civil District Judges.

In February 2019, Chief Justice Nathan Hecht provided The State of the Judiciary address to the 86th Legislature. This speech highlighted a multitude of subjects, including pretrial bail reform, access to justice, modernizing the judiciary using technology, juvenile justice, and mental health issues. However, Chief Justice Hecht also discussed the topic of judicial selection. He stated:

“Historic as was the blow Hurricane Harvey dealt the Texas Judiciary, so was the blow from the November election. Of the 80 intermediate appellate justices, 28—35%—are new. A third of the 254 constitutional county judges are new. A fourth of trial judges—district, county, and justices of the peace—are new. In all, I am told, 443 Texas judges are new to their jobs. On the appellate and district courts alone, the Texas Judiciary in the last election lost seven centuries of judicial experience at a single stroke.

No method of judicial selection is perfect. Federal judicial confirmation hearings are regarded as a national disgrace by senators themselves. States have tried every imaginable alternative. Still, partisan election is among the very worst methods of judicial selection. Voters understandably want accountability, and they should have it, but knowing almost nothing about judicial candidates, they end up throwing out very good judges who happen to be on the wrong side of races higher on the ballot. Merit selection followed by nonpartisan retention elections would be better. At a minimum, judicial qualifications should be raised, as the Judicial Council recommends. I urge you: at least, pass Senate Bill 561 and Senate Joint Resolution 35.

Don’t get me wrong. I certainly do not disparage our new judges. I welcome them. I’ve been in their shoes—though it was a while ago. My point is that qualifications did not drive their election; partisan politics did. Partisan sweeps—they have gone both ways over the years, and whichever way they went, I protested—partisan sweeps are demoralizing to judges, disruptive to the legal system, and degrading to the administration of justice. Even worse, when partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty. Make no mistake: a judicial selection system that continues to sow the political wind will reap the whirlwind.”¹²

As Chief Justice Hecht stated, the judiciary underwent several changes due to partisan elections in recent years. Almost 50% of judges left office from September 2017 to August 2019 due to defeat in their elections. From the 2018 election, the total years of experience of the defeated district court judges was 389 years and the county court at law judges’ experience lost was 245 years. Almost 50% of appellate incumbent judges were defeated in the 2018 election, 22% of district judges, 29% of probate judges, and 14% of county court at law judges. Previous election cycles have produced similar results; however, they were not as drastic as the 2018 election cycle. In 2006, 2008, 2012, and 2016 election years in the biennium, the percentage of appellate and district judges defeated in an election was over 30%.¹³

In 2017, Governor Abbott signed House Bill 25 into law, eliminating straight-ticket voting after September 2020. Concerns were raised about whether voters would be “fatigued” and not vote on down ballot races after straight-ticket voting was eliminated. The 2020 election results nevertheless resulted in “sweeps” in judicial races, even with the elimination of straight-ticket voting. Additionally, while roll-off (voting in presidential race, but not down ballot races) was higher than 2016, it was only marginally higher (Chart

¹² Nathan Hecht, Chief Justice, Tex. Sup. Ct., State of the Judiciary in Texas: An Address to the 86th Texas Legislature (Feb. 6, 2019), <https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2019.pdf>

¹³ Statistics from <https://www.txcourts.gov/media/1445450/judicial-selection-landscape-192020-002.pdf>

6). For instance, for county-level elections, where there were 180 pairs in 2016 and 186 pairs in 2020, the median difference across judicial candidates dropped from 1% to 0.74%, suggesting voters actually were exhibiting strong straight-ticket voting behavior. The data indicates that when straight-ticket voting was not available, many voters still replicated the straight ticket manually and voted on down ballot races. It is not clear what could explain this finding, but the conjecture is that state and local elections were influenced by the strong partisan nature of the last US presidential election.

Chart 6: Statewide Roll Off¹⁴

| Race | Number of Votes Cast | Percentage of Presidential Vote 2016 | Percentage of Presidential Vote 2020 |
|-------------|-----------------------------|---|---|
| President | 11,231,799 | | |
| US Senate | 11,066,168 | | 98.53 |
| RRC | 10,929,038 | 97.67 | 97.30 |
| SCTX-CJ | 10,926,306 | | 97.28 |
| SCTX-P8 | 10,888,265 | 97.75 | 96.94 |
| SCTX-P6 | 10,882,388 | 97.70 | 96.89 |
| SCTX-P7 | 11,012,804 | 97.60 | 98.05 |
| CCA-P4 | 10,827,089 | 97.33 | 96.40 |
| CCA-P9 | 10,811,455 | 97.39 | 96.26 |
| CCA-P3 | 10,847,955 | 97.04 | 96.58 |

Source: Dr. Mark Jones, James A. Baker III Institute for Public Policy of Rice University

Calls for change and reforms for judicial selection in Texas have continued and intensified in the last decade.¹⁵ These calls have come from policy stakeholders, such as Senators, Supreme Court Chief Justices, and others, regardless of political affiliation, and were heightened in many respects by the results of judicial election “sweeps.” Several judicial reforms advanced include the adoption of a merit selection system, nonpartisan elections, regulating the amount of contributions that judicial candidates can accept, monitoring judicial campaign conduct through an independent watchdog committee, and disseminating information about candidates and incumbents’ performance to voters. The most recent legislation contained in House Bill 3040 established the current Commission and its charges.

¹⁴ 2016: SCTX Places 3,5,9. CCA: Places 2,5,6. 2020 election analysis (including chart and statistics) provided by Dr. Mark Jones and presented to the Texas Commission on Judicial Selection on November 13, 2020.

¹⁵ *Supra* note 5.

CURRENT JUDICIAL SELECTION IN TEXAS

It is important to identify the current method of judicial selection in Texas and highlight some of the demographics of current judges. Texas selects judges via partisan elections. To fill interim court vacancies, the Texas Constitution allows appointments by the Governor (and county officials) in place of interim elections. Historically, and with the frequency of occurrence of court vacancies along with how rare judicial elections are contested, one could argue that the current judicial selection system in Texas is not solely election based, but also to a large extent relies on appointments.¹⁶

Overall, there are 3,187 current judges (as of December 14, 2020) out of 3,219 available positions, which means that less than 1% of judicial positions are currently vacant (Chart 7).

Chart 7: Texas Judiciary Summary

| Type of Court | Total Positions | Filled Positions |
|---------------------------|-----------------|------------------|
| Supreme Court | 9 | 9 |
| Court of Criminal Appeals | 9 | 9 |
| Courts of Appeals | 80 | 80 |
| District Courts | 465 | 463 |
| Criminal District Courts | 13 | 13 |
| County Courts at Law | 250 | 249 |
| Probate Courts | 18 | 18 |
| County Courts | 254 | 254 |
| Justice Courts | 802 | 799 |
| Municipal Courts | 1,319 | 1,293 |

Source: Office of Court Administration (as of December 14, 2020)

In terms of demographics, the graphs below provide a brief summary of the demographics of current judges (as of December 14, 2020). Chart 8 shows the age distribution of judges by type of court. Across all offices, the majority of judges are above 44 years old. The average age hovers between 54 and 62 depending on the court, with municipal courts having both the youngest judge (at 28 years old) and the oldest judge (at 91 years) (Chart 9).

¹⁶ *Supra* note 5.

Chart 8: Age Distribution of Judges

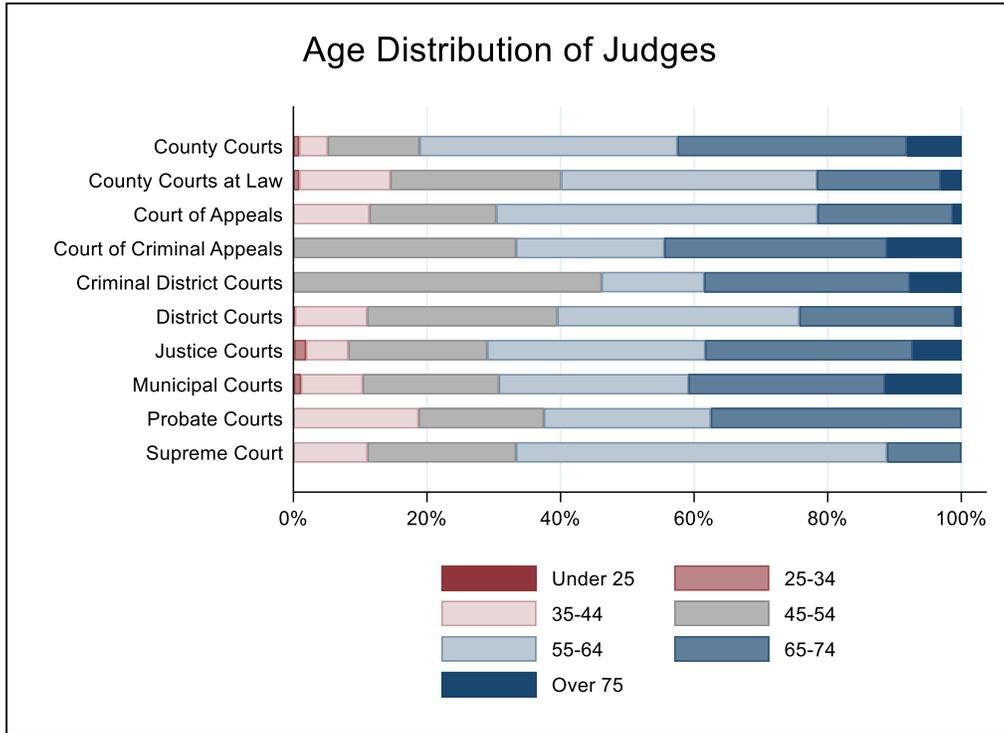
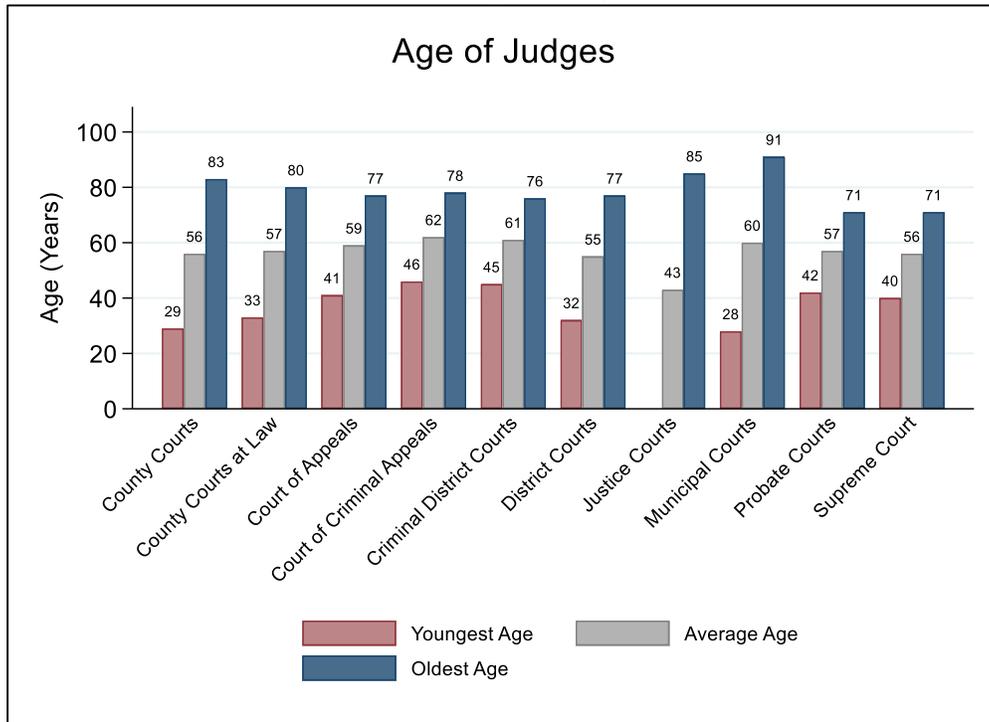


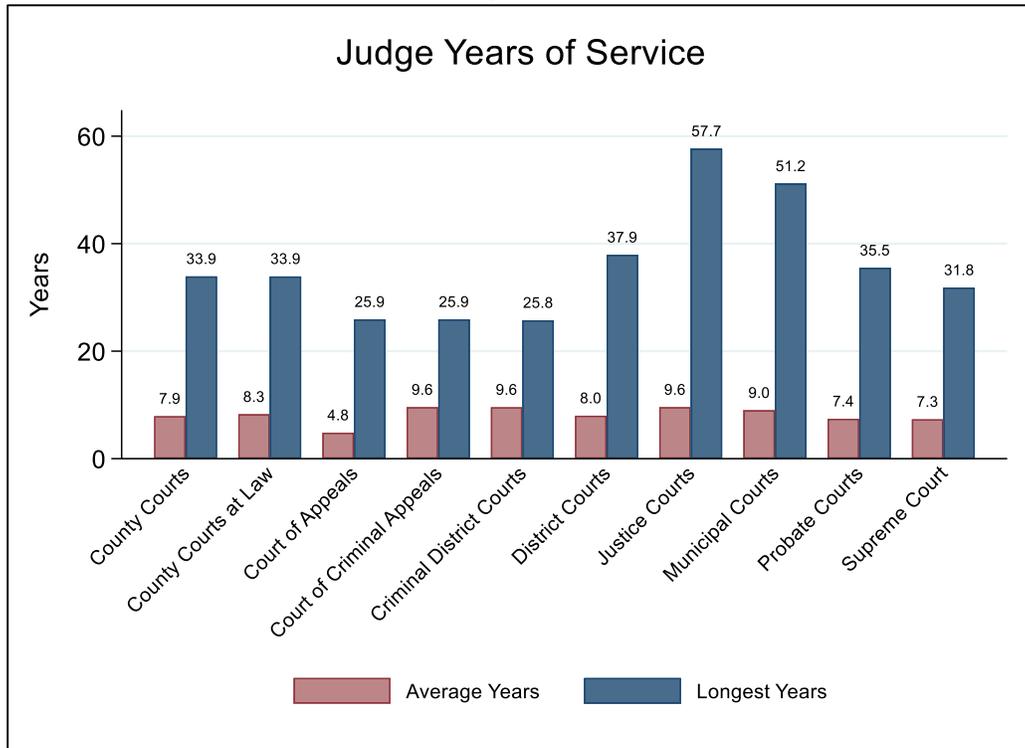
Chart 9: Age of Judges



In terms of length of service, Chart 10 below presents the average length of service in years. The average number of years of service ranges between a low of 4.8 (in court of appeals) to almost 10 years in three

courts (Court of Criminal Appeals, Criminal District Courts, and Justice Courts). The longest service is almost 58 years in a justice court.

Chart 10: Judge Years of Service



Another important demographic is the gender composition of judges. Chart 11 presents gender distributions across all courts. Only the criminal district courts exhibit a majority of female judges, with probate courts having equal gender representation. The remaining eight court offices reflect gender imbalance, with more than 55% of judges being male (with more than 90% of county courts having male judges).

Chart 11: Gender Distribution of Judges

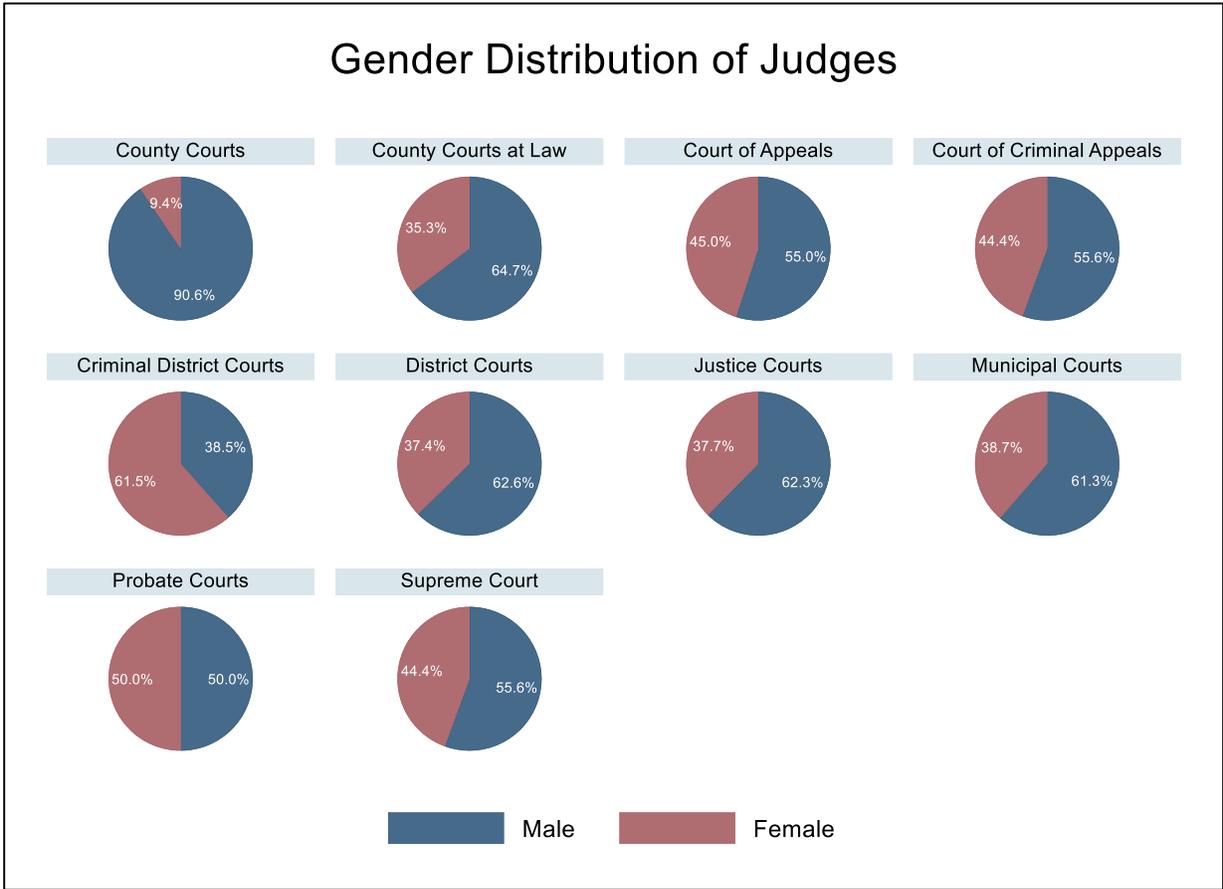


Chart 12 shows the distribution of race/ethnicity across all courts.

Chart 12: Race/Ethnicity of Judges

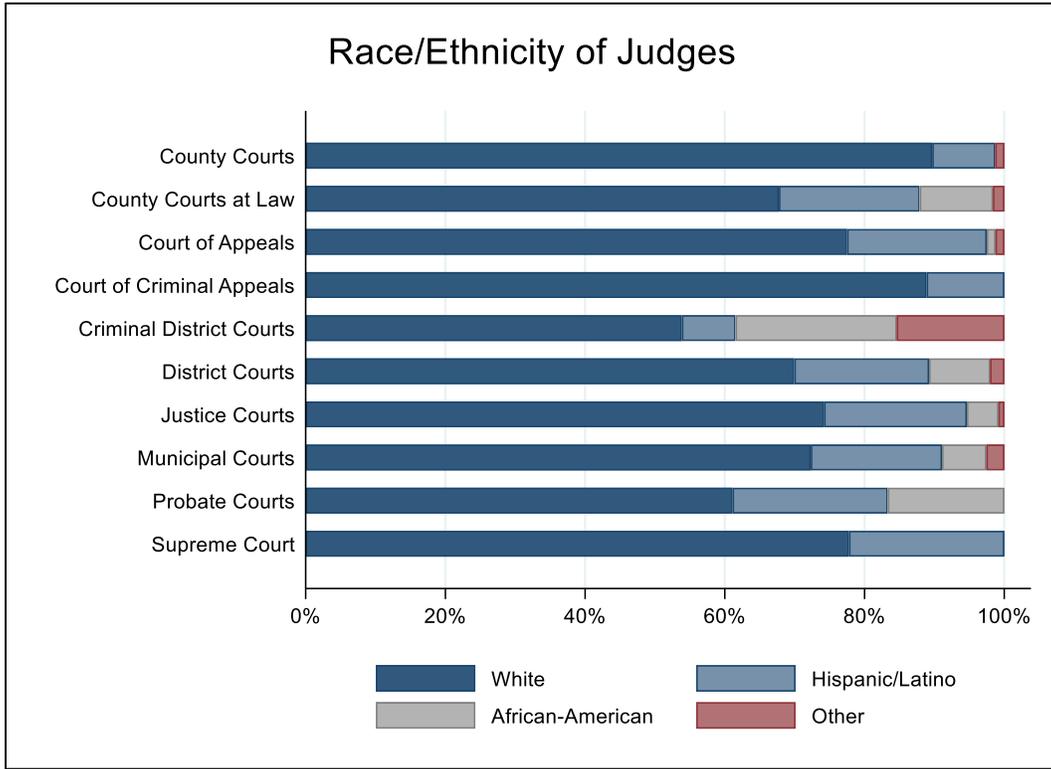
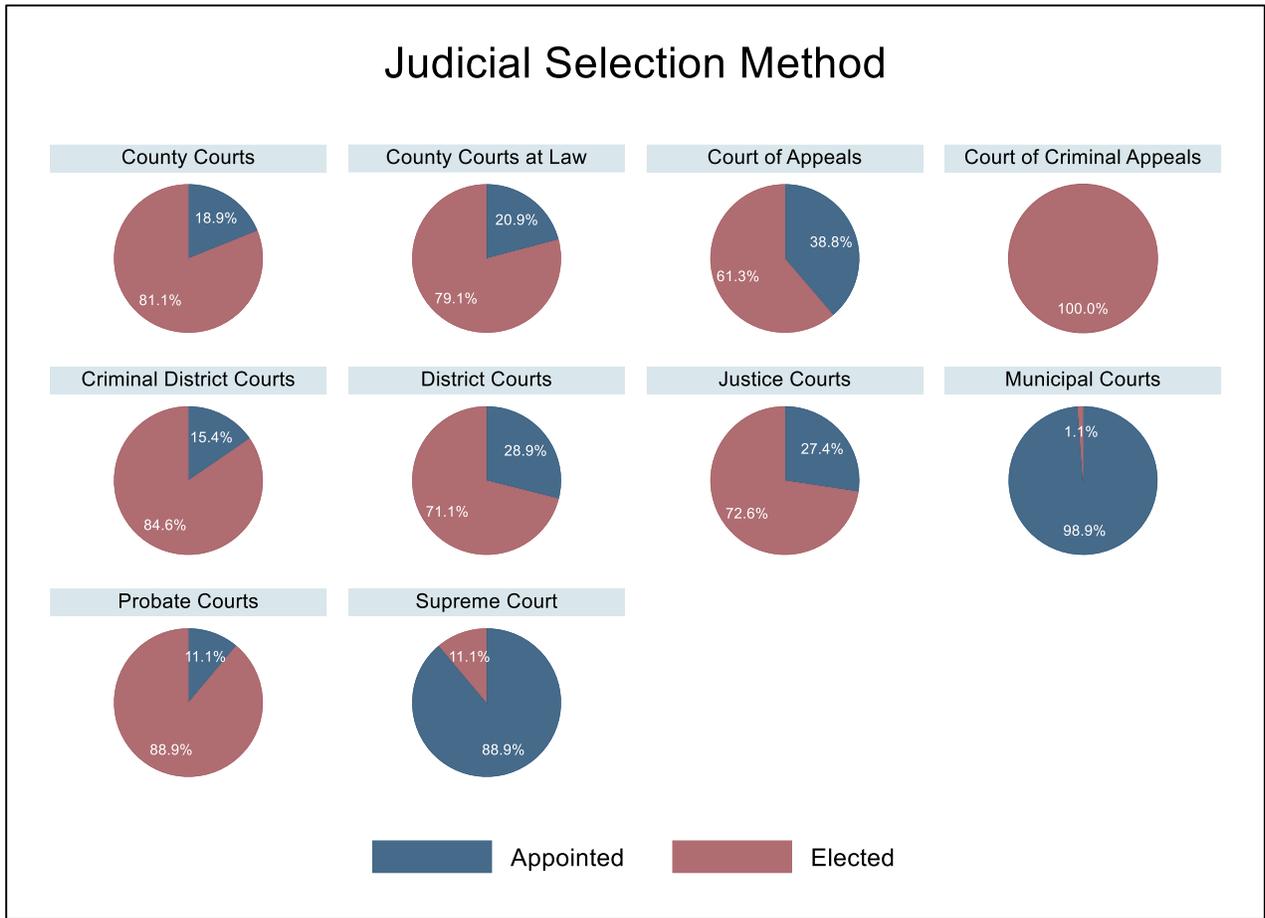


Chart 13 summarizes the judicial selection method by which current judges were selected. While judges in Texas are mainly selected through partisan elections, the Governor and county officials appoint to fill vacancies. Chart 13 confirms that the majority of judges are being elected, but the rate of appointment certainly is not negligible. Indeed, appointments range between about 15% in criminal district courts up to 40% in courts of appeal. However, one needs to exercise caution in interpreting the statistics in Chart 13 because they do not, for example, reflect time trends.

Chart 13: Judicial Selection Method



Most judges in Texas are elected in partisan elections. To be successful, a judicial candidate must either obtain the nomination of their party or pursue the campaign as an independent and then eventually win a position on the election ballot without initial party nomination. Candidates seeking party nomination need to file a petition signed by qualified voters. For those running as independent but aiming for a party backing in the general election, they must receive a majority of the total votes cast in the primary election.

Financial Contributions

While Texas law does not actually limit contributions a candidate for a state office may accept, concerns over fundraising in judicial elections led to the Judicial Campaign Fairness Act in 1995, which was amended in 2019. The Judicial Campaign Fairness Act sets forth limitations on financial contributions to judicial candidates. The Judicial Campaign Fairness Act limited individual contributions to statewide judicial candidates to \$5,000, and based on the district’s population, the individual contributions to other candidates to no more than \$5,000. Law firms and their members’ contributions were limited to \$30,000, and PACs to up to \$300,000 per judicial office. The law also mandates publicly disclosing contact information of contributors and amounts contributed.

Term Limits

In addition, Texas law does not impose terms limits on judges, and the Texas Constitution enforces vacancy of specific seats (high court, intermediate appellate, and district courts) when the incumbent

reaches seventy-five years of age. In terms of disciplinary actions, serving judges may be removed from office by a Judicial Conduct Commission for violation of rules, incompetence in performing duties, violation of the Code of Judicial Conduct, or inappropriate conduct.¹⁷ A judge on the Supreme Court, court of appeals, or a district court also may be removed by impeachment by the Texas House of Representatives and conviction by the Texas Senate, or by the Governor with two-third confirmation in the House and Senate. Instead of removal, judges also may be disciplined, suspended, or censured.¹⁸

The Commission also was requested to examine judicial selection methods in other states. One consistent concern expressed in several states is limiting the role of politics to preserve an independent judiciary. Consequently, many states use differing methods of judicial selection to limit political influence. Information concerning judicial selection methods in other states is presented in the next section.

¹⁷ *Supra* note 5.

¹⁸ *Id.*

JUDICIAL SELECTION METHODS IN OTHER STATES

The common methods of judicial selection used in other states are partisan election, nonpartisan election, gubernatorial appointment, commission selection (assisted appointment, merit selection), and a mixture of these methods differing across court type (supreme, appellate, trial, district) and initial/subsequent terms (judicial retention). Virtually every state has at some point in its history had judges selected through partisan elections. Most have since adopted other judicial selection procedures. Texas remains one of six states to continue to elect all judges based on partisan elections. However, several states do have partisan elections for at least some of their judicial offices.¹⁹

Partisan Election

The basic premise of candidates being listed on a ballot that indicates their political party is the same, but specific election procedures vary from state to state. Texas, Alabama, Maryland, Louisiana and Ohio hold partisan primaries in which candidates are nominated from each party and compete to represent the Republican or Democratic party in the general election. In New York's Supreme Court (trial judges) elections, party representation is determined by party convention delegates who nominate general election candidates.

- Supreme Courts and Intermediate Appellate Courts
Alabama, Louisiana, North Carolina and Texas use partisan election for both initial and subsequent terms, Illinois and Pennsylvania for initial terms and New Mexico for subsequent terms. Michigan and Ohio selection processes mix partisan and nonpartisan methods.
- Trial Courts
Alabama, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, Tennessee and Texas select all trial court judges through partisan elections. Ohio's trial court judges are selected through partisan primary nomination and nonpartisan general election process, same as appellate court judges. Connecticut, Georgia, Maine, South Carolina, and Vermont select probate court judges through partisan elections (partisan probate court elections).

Seven states incorporate partisan elections with other judicial selection methods. Arizona selects other state judges through assisted appointment but selects only Justice Court judges through partisan election. Similarly, Maryland's orphans' court judges participate in partisan election and circuit court judges in partisan primaries, while other judges are selected through assisted appointment. Indiana trial court judges are selected through partisan election, except for tax court judges (appointment) and some circuit court judges (nonpartisan election). In Kansas, the method of judicial selection is decided by the voters of a district, so some districts use partisan election while others use assisted appointment. In Missouri, all circuit court judges participate in partisan elections except several districts, who are chosen by assisted appointment. In New York, all trial court judges except for family court judges participate in partisan elections. Ohio trial court judges participate in partisan primaries with nonpartisan general elections.

¹⁹ Information presented in this chapter from: Texas Judicial Branch, "Judicial Selection Binder, Fact Sheet," <https://www.txcourts.gov/media/1449558/judicialselectionbinder.pdf>; National Center for State Courts, "Methods of Judicial Selection," http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state; Texans for Lawsuit Reform Foundation, "Judicial Selection Methods in the States," https://www.tlrfoundation.com/foundation_papers/summary-of-judicial-selection-methods-in-the-states/; BALLOTPEDIA, "Judicial Election Methods by State," https://ballotpedia.org/Judicial_election_methods_by_state

Nonpartisan Election

In contrast from partisan primaries, nonpartisan primaries nominate the top two candidates regardless of party affiliation to run in the general election. In both primary and general elections, party affiliation is not listed on ballots. Methods of nonpartisan election differ from state to state. For example, some states include codes of conduct regulating the process before elections, and to what extent candidates can reveal party affiliation or stances on controversial issues. States frequently allow candidates to announce their political affiliation in the campaigning process, but not their affiliation listed on the general election ballot.

- Supreme Courts and Intermediate Appellate Courts
Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oregon, Washington, West Virginia, and Wisconsin use nonpartisan elections to select state Supreme Court justices. Michigan and Ohio selection processes mix partisan and nonpartisan methods.
- Trial Courts
15 states (Arkansas, California, Florida, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin) use nonpartisan elections to select judges of all trial courts. Candidates in Maryland and Ohio initially compete in partisan primaries and then participate in nonpartisan elections. In smaller counties, Arizona selects its superior court judges through nonpartisan election, whereas in the most populated three counties, an assisted appointment method is used. In Georgia, all trial court judges except for probate court judges (partisan election) are selected through nonpartisan elections.

Gubernatorial and Assisted Appointment

The three main methods of gubernatorial and assisted appointment, which are set out below, choose a judge for an initial term and to fill an interim and then retain a judge for a subsequent term. There is a variation in the manner in which these methods are implemented. The Governor is involved in selecting a judge to fill a vacancy in the middle of a term in 48 states, excluding Illinois and Louisiana, and in several states the Governor is involved in selecting judges for initial and subsequent terms. Many states use assisted appointment, meaning candidates must be approved by a nominating committee, commission or other entity before or after the Governor's appointment.

- Gubernatorial Appointment Followed by Council, State Senate or Commission Approval
The Governor appoints judges followed by approval of another body for all courts in Massachusetts and New Jersey, Supreme Court in Tennessee, courts of appeal in Kansas, Supreme Court and courts of appeal in California, Supreme Court, superior courts and the district courts in Maine, and Supreme Court, superior courts and the circuit courts in New Hampshire.

- Commission Selection Followed by Gubernatorial Appointment (Assisted Appointment, Merit Selection, Missouri Plan)
Candidates are nominated by a judicial selection commission followed by Governor's appointment in the 12 states of Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, New Mexico, Oklahoma, and South Dakota.
- Commission Selection and Gubernatorial Appointment Followed by Council, State Senate or Commission Approval
Candidates are selected through a combination of the two former methods in Delaware, Connecticut, Hawaii, Kansas, Maryland, New York, Rhode Island, Utah, and Vermont.

Judicial Retention Methods

There are two main methods of retaining judges: through retention elections or through gubernatorial/ assisted reappointment. Retention election is a type of nonpartisan "yes or no" election, where candidates do not compete with others, but are evaluated by voters approving an additional term for the candidate.

- Retention Election
Alaska, Colorado, Illinois, Iowa, Nebraska, New Mexico, Pennsylvania, and Utah use retention elections for selection of judges in all court levels. Arizona, California, Colorado, Florida, Indiana, Kansas, Missouri, Oklahoma, and Tennessee use retention elections in selecting Supreme and appellate court judges. Maryland and South Dakota use retention elections for only Supreme Court judge selection. Wyoming selects supreme and trial court judges through retention elections.
- Gubernatorial / Assisted Reappointment
Connecticut, Delaware, Hawaii, Massachusetts, New Jersey, South Carolina, Vermont, and Virginia grant life tenure or use some type of reappointment system for all court levels.
New York uses this method for supreme and appellate court judges, Maryland and North Dakota for appellate judges, and Maine, New Hampshire, and Rhode Island for supreme and trial court judges.

Mixture of Partisan, Nonpartisan Elections, Appointment Systems and Other Methods

As can be seen above, most states use a hybrid method, which differs among the supreme, appellate and trial courts. Methods vary depending whether the term the candidate is seeking is their initial or subsequent term.

Appointment Methods

- Lifetime appointment
Life tenure or lifetime appointment is granted in states of Connecticut, Delaware, Hawaii, Maryland, New Jersey, South Carolina, Vermont, and Virginia (all levels of court), New York (supreme & appellate courts), Maine, New Hampshire, Rhode Island (supreme & trial court).
The specific method of initial lifetime appointment and granting reappointment vary by state.
 - Supreme Courts (12): Connecticut, Delaware, Hawaii, Maryland, New Jersey, South Carolina, Vermont, Virginia, New York, Maine, New Hampshire, and Rhode Island

- Appellate Courts (9): Connecticut, Delaware, Hawaii, Maryland, New Jersey, South Carolina, Vermont, Virginia, and New York
- Trial Court (11): Connecticut, Delaware, Hawaii, Maryland, New Jersey, South Carolina, Vermont, Virginia, Maine, New Hampshire, and Rhode Island
- Appointment for a term, followed by a partisan election
In New Mexico, all judges are initially selected through assisted appointment, compete in partisan elections the following term and then participate in retention elections for subsequent terms.
- Appointment for a term, followed by a nonpartisan retention election
This method, the so called “Missouri Plan,” is utilized in all levels of court in Alaska, Colorado, Iowa, Nebraska, New Mexico, and Utah, in supreme and appellate courts in Arizona, California, Florida, Indiana, Kansas, Maryland, Missouri, Oklahoma, and Tennessee, in supreme and trial courts in Wyoming, and in only Supreme Courts in South Dakota.
 - Supreme Courts (17): Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming
 - Intermediate Appellate Courts (15): Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, and Utah
 - Trial Courts (7): Alaska, Colorado, Iowa, Nebraska, New Mexico, Utah, and Wyoming

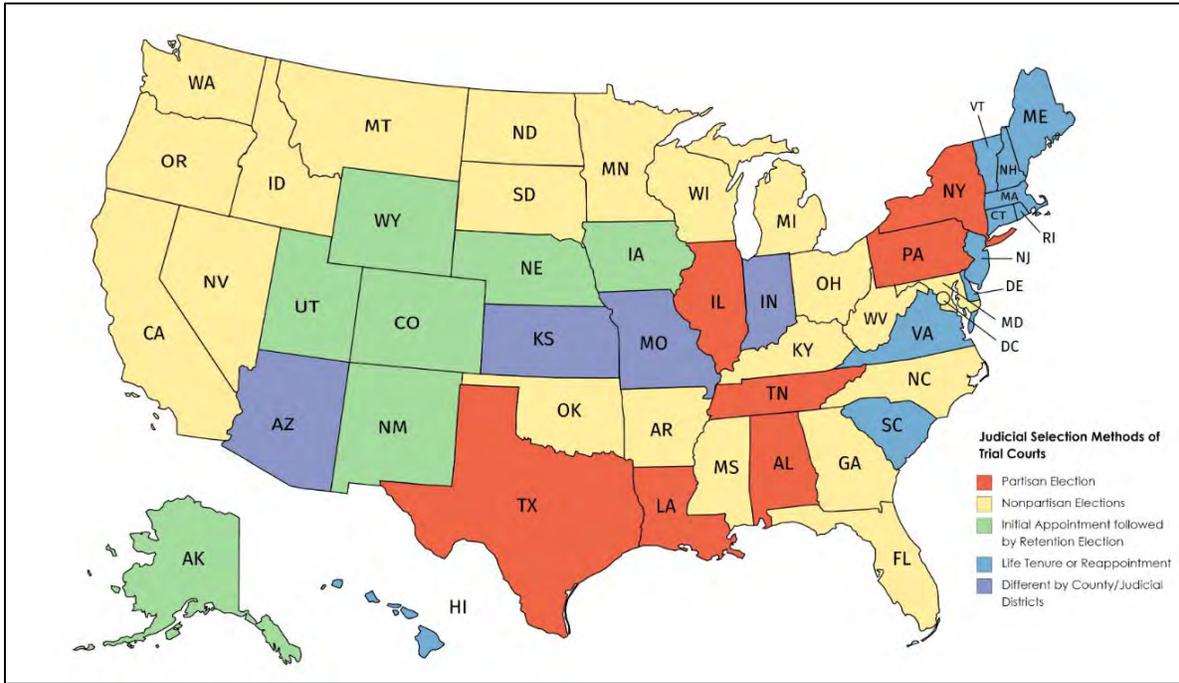
Election Methods

- Partisan election for an open seat, followed by a nonpartisan retention election for incumbents
Illinois, North Carolina, and Pennsylvania
- Initial nomination through partisan primaries followed by nonpartisan general election
Michigan Supreme Court candidates are initially nominated through party conventions while their party affiliation is not indicated on ballot in elections, whereas courts of appeal and circuit court judges are elected through nonpartisan election.
Ohio’s supreme, appellate, and trial court candidates are all nominated through partisan primaries, but no party affiliation is listed in general election ballots (nonpartisan general election).

Hybrid Methods

- Any other method or combination of methods for selecting a judicial officer
In Georgia, all trial court judges except for probate court judges (partisan election) are selected through nonpartisan elections.
Indiana utilizes three different general methods for initial selection: the supreme, appellate courts, and tax courts are selected using assisted appointment, while other trial courts select judges through partisan elections. The method of judicial selection is decided by the voters of a district, so some districts use partisan election while others use assisted appointment.
Arizona selects other state judges through assisted appointment but selects only Justice Court judges through partisan election.
Maryland’s orphans’ court judges participate in partisan election and circuit court judges in partisan primaries, while other judges are selected through assisted appointment. Indiana trial court judges are selected through partisan election except for tax court judges, some circuit/superior court judges.
In Missouri, all circuit court judges participate in partisan elections except several districts, who are chosen by assisted appointment.

Chart 16: Judicial Selection Methods of Trial Courts



Office of Court Administration (OCA) Judicial Selection Survey

The Office of Court Administration conducted a national survey in July of 2020 to evaluate the different judicial selection methods across the United States for trial and appellate courts. 52 State Supreme Court Justices and directors of state court administration offices outlined their state’s process and expressed the positive aspects of that process as well as its deficiencies. The states of the self-identifying participants are listed in Chart 17.

Chart 17: Location of Survey Participants

| | | | |
|----------|---------------|---------------|----------------|
| Arizona | Illinois | New Hampshire | Vermont |
| Alabama | Iowa | Oklahoma | Virginia |
| Alaska | Massachusetts | Pennsylvania | Wisconsin |
| Colorado | Minnesota | Rhode Island | Washington |
| Florida | Nebraska | South Dakota | Wyoming |
| Idaho | Nevada | Tennessee | Virgin Islands |

Chart 18

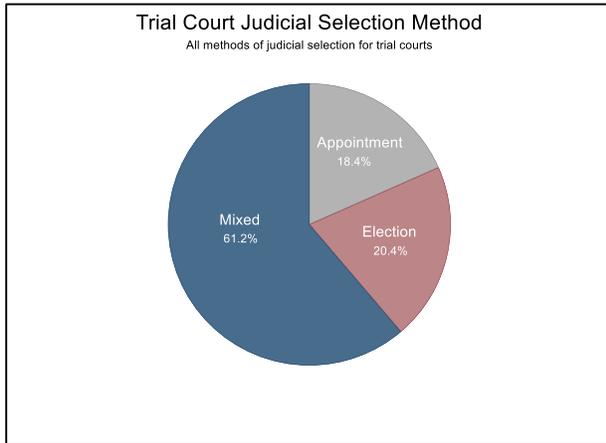


Chart 19

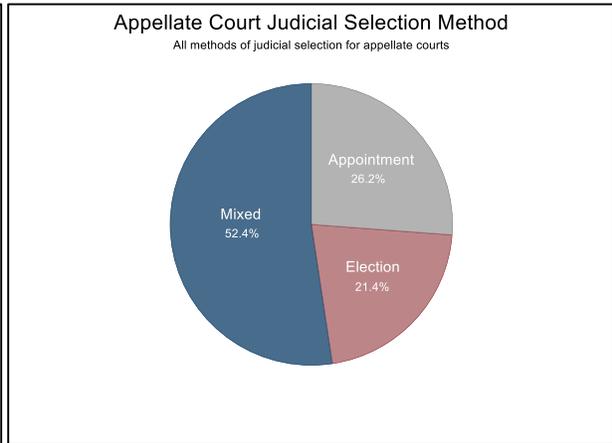


Chart 20

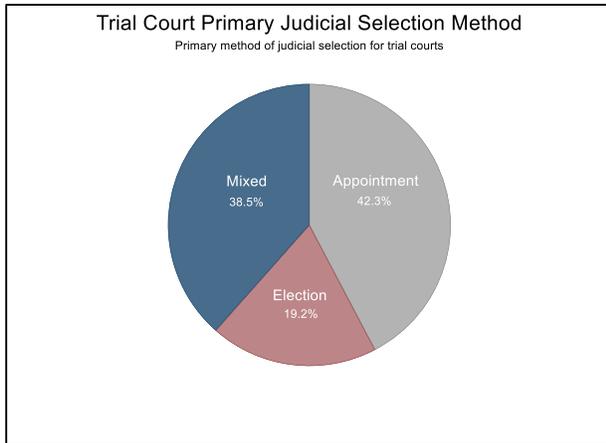


Chart 21

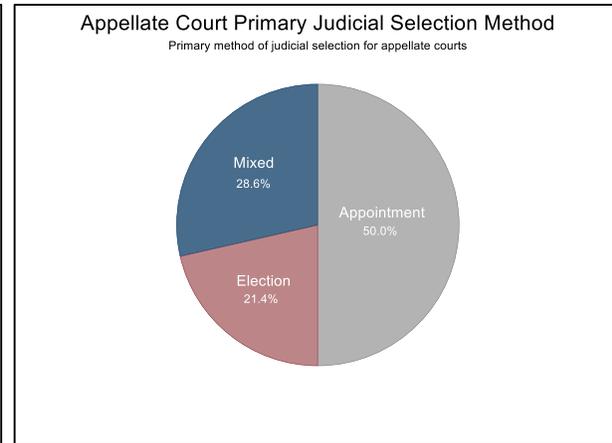


Chart 18 and Chart 19 display the percent of survey participants by judicial selection method for trial and appellate courts in their state. The method of selection is broken down into three general categories – elections only, appointments only, and a combination. For both courts, over 50% of participants live in a state that employs both appointment and elections. The percent of participants that reside in a state that only utilizes elections is similar across trial and appellate courts, while participants in states solely using appointments are slightly less in trial courts. Similarly, the primary method of judicial selection is examined for both types of courts in Chart 20 and Chart 21. Comparing Chart 20 and 21 to the two previous charts reveals that although states use a mixture of appointments and elections when selecting judges, appointment methods are largely preferred over elections. The results are similar across both types of courts. Elections are the least utilized method of selection. About 20% of participants indicate that elections are the primary method of selection in their state. Roughly 80% indicate that selection by appointment is utilized in some way as their primary selection method. Referring to Chart 22 and 23, when appointment methods are used, the majority of trial and appellate court judges are appointed by the Governor, with the percent of appointments by the Governor in trial courts being slightly lower.

Chart 22

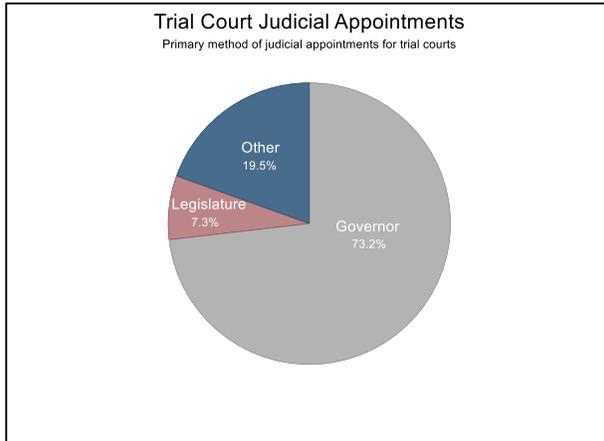
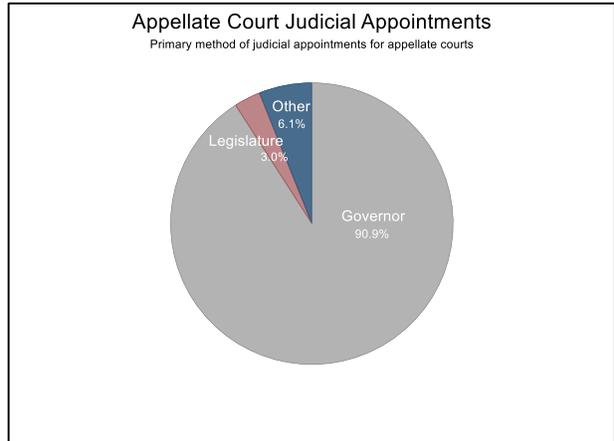


Chart 23



From Chart 24, approximately one third of trial and appellate appointments are subject to confirmation. Half of participants indicate that appointments are confirmed by the Senate in their state. Other sources of appointment approval include the Legislature, the Governor’s Council, the General Assembly, and the House. Almost 100% of participants believe that the appointment process in their state works well in recruiting and selecting the best candidates for judicial office. Participants are particularly in favor of having a Judicial Nominating Commission to interview applicants, receive public comments, conduct background investigations, and recommend a small number of candidates to the Governor. This approach is believed to yield better qualified nominees with less political influence and results in highly qualified judges who reflect the diversity of their community.

Although over 80% of participants live in a state where the election of trial and appellate court judicial officers is held on the same day as partisan elections, only 3% would recommend modifying the timing of the state’s election. A larger percentage of participants would recommend modifying the qualifications for holding judicial office and the campaign finance system in trial courts. 3.5% of participants would modify the qualifications for holding judicial office and 19.2% of participants would modify the campaign finance system in appellate courts, while 12.9% of participants would modify the qualifications for holding judicial office and 27.6% of participants would modify the campaign finance system in trial courts. Additionally, 9.7% of participants would modify the term length of trial court judges in their state.

Chart 24: Summary of Statistics

| | Court | |
|--|---------------|---------------|
| | Trial | Appellate |
| Appointments are subject to confirmation by the legislature or another body | 31.7% n=41 | 36.4% n=33 |
| Believes that the appointment process works well in recruiting and selecting the best candidates for judicial office | 97.1% n=35 | 96.8% n=31 |
| Election of judicial officers is held on the same day as partisan elections (i.e. presidential, Governor, legislative, local etc.) | 87.1% n=31 | 86.2% n=29 |
| Would recommend modifying the timing of the state's election | 3.2% n=31 | 3.5% n=29 |
| Would recommend modifying the qualifications for holding judicial office | 12.9% n=31 | 3.5% n=29 |
| Would recommend modifying the term length of judges in the state | 9.7% n=31 | – |
| Would recommend modifying the campaign finance system | 27.6% n=41 | 19.2% n=26 |

Referring to Chart 25, 77.5% of participants report that their state impanels a Commission for some aspect of judicial selection, such as policy recommendations, rule setting, and policy evaluation, with 83.3% indicating that such Commissions are involved in both trial and appellate judicial selections. The process in which Commission members are selected varies by state. Commission members may be selected by the Chief Justice, the Supreme Court, the Legislature, or the State Bar Association. However, the Governor is involved in the selection of Commission members for a majority of the states in the survey sample. The Commissions may include a mix of judges, lawyers, non-attorneys, citizen members, and non-voting advisors from the community. Around 50% of participants are from states with selection requirements that ensure that the makeup of the Commission reflects the diversity of the population. A majority of the Commissions become involved in the selection process soon after a judicial vacancy and begin the process by reviewing applications from potential candidates.

91% of participants believe that the use of Commissions works well in recruiting and selecting the best candidates for judicial office. Only 26.3% would recommend modifying their state’s use of a Commission.

Chart 25: Summary of Statistics

| Judicial Selection Survey Summary Statistics | |
|--|---------------|
| State impanels commissions for some aspect of judicial selection including policy recommendations, rule setting, or evaluating policy 30 | 77.5% n=40 |
| Commission involvement applies to both trial and appellate judges | 83.3% n=36 |
| State has requirements in selection process to ensure the makeup of the commission reflects the diversity of the population | 50.0% n=24 |
| Believes that the use of commissions works well in recruiting and selecting the best candidates for judicial office | 90.9% n=33 |
| Would you recommend modifying state's use of a commission | 26.3% n=19 |
| State provides information to voters regarding judicial candidates | 47.2% n=36 |

Voter Education Options from Other States

Incumbency designation (one type of ballot notation when the incumbent candidate is on the ballot) has been utilized in six states: Arkansas, California, Georgia, Michigan, Minnesota, and Oregon. Other states provide voter information guides to address the potential issue of low voter information. These states vary in terms of how much information about the candidate is published, which agency publishes the information, and how widely it is distributed. Seven states provide extensive voter information guides: Alaska, Arizona, California, North Carolina, Oregon, Utah, and Washington.

ADVANTAGES AND DISADVANTAGES OF VARIOUS JUDICIAL SELECTION METHODS

The Texas Commission on Judicial Selection, as required, considered the advantages and disadvantages of the current judicial selection system (partisan elections) versus other methods of judicial selection. The results are as follows:

Today, the most common judicial selection methods are nonpartisan elections, merit/retention (Missouri Plan), and gubernatorial appointment. Within each of the listed categories, there are subcategories which offer nuances to the judicial selection process. Judges can be appointed by the Governor, by the legislature, or by current sitting judges. In the event of a Commission involved in judicial selection, there are two existing and distinct approaches: the Missouri plan and California plan. Under the Missouri plan, a judicial nominating commission, composed of lawyers, and non-attorney lay people, present a list of judicial nominees to the Governor who then appoints from the list. After one year, the judge then runs uncontested to retain his or her seat. If successful, the judge then serves until his or her next retention election. Under the California plan, the Commission has veto power on the Governor's choice. Judicial elections can occur either by partisan or nonpartisan elections.

Nonpartisan elections remove judicial elections from the current political environment by either creating nonpartisan ballot (avoiding straight party voting), or scheduling the elections in off years. Just like nonpartisan elections, partisan elections subject judges to the electoral process as a direct accountability from voters, but in this case party affiliation is listed on the ballot. Under the hybrid selection system, judges are appointed by the Governor, but they have to be confirmed by a democratic body.

Each method of judicial selection includes common (across the board) or unique advantages/disadvantages. The below chart summarizes these methods.

Chart 26: Summary of Advantages and Disadvantages of Judicial Selection Methods

| Method | Advantages | Disadvantages |
|--|--|---|
| Appointment Followed by Retention Election | <ul style="list-style-type: none"> • Judicial independence • Reduces substantially the need for judges to raise money • Preserves the role of the electorate to vote on judges • Increases the pool of qualified judges who would consider appointment but not run for election • Avoids partisan sweeps • Reinforces the public’s perception of judges as different from other office seekers | <ul style="list-style-type: none"> • Judicial accountability • Political considerations |
| Commission Selection | <ul style="list-style-type: none"> • Increases the likelihood of appointing qualified judges • Balances the appointment power of the Governor • Retention election acts as an electoral public accountability | <ul style="list-style-type: none"> • Commissions don’t necessarily produce highest rated judges • Commissions don’t disrupt partisan consideration • Removes voter participation during the initial nomination • Bestows power to an unelected commission • Commissions can be co-opted by interest groups |
| Nonpartisan Election | <ul style="list-style-type: none"> • Removes judicial elections from political considerations • Subjects judges to the electoral process • Avoids partisan sweeps • May enhance pool of potential judges because their time in office will be less tied to political considerations • May attract candidates who lack partisan affiliations or are affiliated with party that is unlikely to achieve success in a particular district • Candidates do not need to run in both primaries and general election, potentially reducing campaign expenditures • Helps public perceive judicial officers as different from effective policymakers • Enhances confidence in integrity of judicial process from non-Texans | <ul style="list-style-type: none"> • Fails to separate from political parties • Voters do not have sufficient information and knowledge of candidates |

| | | |
|-------------------|---|---|
| Partisan Election | <ul style="list-style-type: none"> • Party affiliation provides important information to voters • Subjects judges to electoral process • Voters have direct say • Judicial candidates required to appear before voters and consider community feedback • Candidates run in both primary and general elections and enhance accountability | <ul style="list-style-type: none"> • Judges represent constituency rather than independent popular will • Voters do not have sufficient information and knowledge of candidates, and therefore results are often based on political affiliation • Voters' perception is that judicial function is mainly political rather than based on the rule of law • Judges may lack basic qualifications for office like experience in trial or appellate courts, although they may be able to learn on the job |
|-------------------|---|---|

Retention elections theoretically provide voters the ability to hold judges accountable for their performance. A constitutional amendment would be required to adopt a judicial selection system based on merit selection with retention election. Such system would mainly rely on the duties of the Judicial Selection Commission, which could include either of the following approaches:

1. Provide the Governor a list of recommended nominees; the Governor must select from this list.
2. Rate the Governor's chosen nominees as highly qualified, qualified, or unqualified.

In any event, any Judicial Selection Commission should be nonpartisan or bipartisan and could include the following members (or in some instances their representatives):

1. The Governor
2. The Lieutenant Governor
3. The Speaker
4. A senator from the minority political party
5. A representative from the minority political party
6. The president of the State Bar of Texas
7. A constitutional county judge
8. Public non-lawyer members

Even though the main method of judicial selection in Texas today is through partisan elections, a significant portion of judges are still appointed. This occurs because the Governor appoints district court and higher level judges to fill vacant posts.²⁰ Indeed, the Governor appointed the majority of appellate judges to their offices before the previous election. Appointment was also the method of selection for more than a third of district judges and more than a fifth of county judges in the same time frame.²¹

A common concern across various judicial selection methods is identifying and measuring judicial quality.²² One main obstacle for measuring judicial quality is that a single metric representing quality does not really exist. Several measures of quality have been discussed in the literature. These include whether judges are representative of the local population, have the maturity, competence, experience, and integrity as evaluated by the American Bar Association (ABA), or as evaluated by an independent commission (of lawyers and lay people), ranked by larger bar associations, or directly evaluated by

²⁰ Anthony Champagne, "The Selection and Retention of Judges in Texas," *SMU Law Review*, 40(6), (1986): 53-117.

²¹ See <https://www.txcourts.gov/media/1445450/judicial-selection-landscape-192020-002.pdf>

²² *Supra* note 20.

lawyers. Each of these approaches have their pros and cons. The ABA evaluation has been criticized as subjective and serving the interest of the bar. Moreover, Commissions evaluate judicial nominees only and not current active judges, and these evaluations do not typically provide any explanation about the method and their ranking. Bar polls overlook jurisdiction with smaller (or nonexistent) bar associations, and bar polls do not necessarily reflect judicial quality and hence may only be useful for campaign purposes. Relying directly on the judicial evaluation by lawyers supposedly places great confidence in the objectivity of the attorneys evaluating judges.

Specifically, in judicial selection based on partisan elections, voters typically have very little, if any, knowledge of judicial candidates nor the experience to evaluate them.²³ The literature suggests that voters know little about the quality of judicial candidates and hence their decisions are mainly influenced by party affiliations. Further, judicial elections typically reflect the level of the campaign resources.²⁴ Such resources could come from the very attorneys who will be representing cases in front of the judges, raising serious concerns about conflict of interest. On the other hand, large campaign resources could play a positive role by giving candidates the means to create and share information, allowing voters to make better informed decisions. Another argument against judicial elections is the perception of the public about the loyalty of the judge. The majority of the public believes that elected judges' decisions are influenced by campaign contributors.²⁵ In theory, this concern would affect fairness and impartiality. Existing empirical evidence is mixed.²⁶ Recent empirical evidence suggests that judges in Harris County award attorney contribution donors more than double indigent defense cases relative to attorney non-donors.²⁷ From the attorney's perspective, this is a lucrative endeavor in which the average donor attorney's earnings are greater than a 27-fold return on their donations. Even worse, evidence suggests that an indigent defendant's outcomes (charge reduction, dismissals, acquittals, or incarcerations) under attorney donors are worse relative to those non-donors. Such differences in outcome performance could be explained by different caseloads for donor and non-donor attorneys, where donor attorneys are taking on many more cases. More data and studies (from other jurisdictions) are needed to better understand the relationship between campaign contributions and voting decisions.

²³ Anthony Champagne, "The Selection and Retention of Judges in Texas," *SMU Law Review*, 40(6), (1986): 53-117; Maida Milone, "No system for choosing judges is perfect, but a hybrid system would be better," Pennsylvanians for Modern Courts, accessed on October 7, 2020, <https://www.pmconline.org/blog/no-system-choosing-judges-perfect-hybrid-system-would-be-better>

²⁴ Mark Jones, "The Selection of Judges in Texas: Analysis of the Current System and of the Principal Reform Options," James A. Baker III Institute for Public Policy, Rice University, 2017.

²⁵ Charles Geyh, "Why Judicial Elections Stink," *Ohio State Law Journal*, (2003): 43-79.

²⁶ Chris Bonneau, "A Survey of Empirical Evidence Concerning Judicial Elections," The Federalist Society, 2012.

²⁷ Neel Sukhatme and Jay Jenkins, "Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel," *Duke Law Journal* (forthcoming).

Recommendations

The Texas Legislature established the Texas Commission on Judicial Selection to study and examine the method by which judges are selected including county court judges, probate court judges, district judges, appellate justices, and justices of the Court of Criminal Appeals and Supreme Court. The Commission reviewed the merits of each of these judicial selection methods on multiple occasions, and its recommendations are as follows:

- A majority of the Commissioners recommend against the continuation of our partisan judicial selection system.²⁸
- A majority of the Commissioners recommend against the adoption of a nonpartisan judicial selection system.²⁹
- When focusing on the alternative of an appointive judicial selection system followed by a retention election, 7 Commissioners recommend in favor of such a system and 7 Commissioners recommend against (with one abstention).³⁰
- The Commissioners overwhelmingly recommend increasing the minimum qualifications of our judges.³¹
- The Commissioners overwhelmingly recommend the adoption of rules to regulate further the role of money in judicial elections.³²
- The Commissioners, with 2 abstentions, unanimously reject term limits for our judges.³³
- The Commission was unanimous that any change to the status quo should not impact the judges selected under the current system.
- Representative Todd Hunter, the author of H. B. 3040, proposed that, due to the pandemic and related issues, the work of the Commission continue beyond its current life. A majority of the Commissioners stand ready to continue studying potential reforms to judicial selection if the Legislature is so inclined.³⁴

²⁸ See Appendix B for a breakdown of the votes of each Commissioner. The questions addressed by the Commission during its deliberations are attached as Appendix C.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

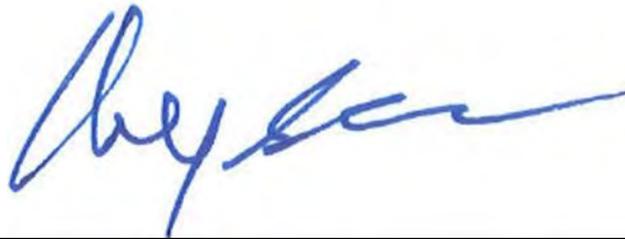
³⁴ *Id.* The four Senators who served on the Commission submitted a letter, dated December 21, 2020, stating their basic views. Additional Commissioners submitted letters stating their opinions. These letters are attached as Appendix D.

1200 Congress Avenue
Austin, Texas 78701

Dear Governor Abbott and Members of the Texas Legislature,

The Texas Commission on Judicial Selection hereby submits its final report including recommendations for consideration by the Eighty-Seventh Legislature.

Respectfully submitted,



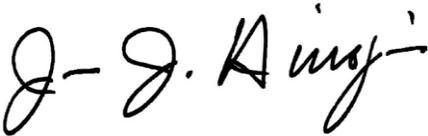
Mr. David J. Beck, Chair



Sen. Brian Birdwell



Rep. Ina Minjarez



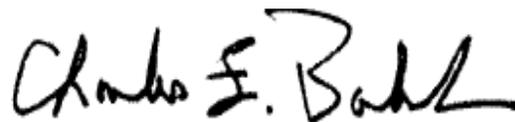
Sen. Juan Hinojosa



Rep. Carl Sherman



Sen. Joan Huffman



Mr. Charles Babcock

Robert Nichols

Sen. Robert Nichols

Martha Hill Jamison

Hon. Martha Hill Jamison

Todd A. Hunter

Rep. Todd Hunter

Wallace B. Jefferson

Hon. Wallace Jefferson

Brooks Landgraf

Rep. Brooks Landgraf

David G. Oliveira

Mr. David Oliveira

Lynne Liberato

Ms. Lynne Liberato

Thomas R. Phillips

Hon. Thomas Phillips

APPENDIX A

INVITED TESTIMONY

March 6, 2020

- Dick Trabulsi and Lee Parsley, Texans for Lawsuit Reform
- Lisa Kaufman and George Christian, Texas Civil Justice League

June 5, 2020

- Julie Lowenberg, League of Women Voters of Texas
- David Jones, Texas Fair Courts Network
- Jeff Moseley, CEO, Texas Association of Business
- George S. Christian, Texas Association of Defense Counsel
- Robby Alden, TEX American Board of Trial Advocates
- Jim Perdue, Texas Trial Lawyers Association
- Kent Rutter, Appellate Section of the State Bar of Texas

July 10, 2020

- Ann Timmer, Vice Chief Justice, Arizona Supreme Court
- James Tinley, Deputy Director of Enforcement, Texas Ethics Commission

August 7, 2020

- Gary Bledsoe, President, Texas NAACP
- Chief Justice Ruth McGregor, Chair of The O'Connor Advisory Committee, Institute for the Advancement of the American Legal System (IAALS)
- Judge Martin Hoffman, 68th Civil District Court

September 18, 2020

- Rob Henneke, General Counsel, Texas Public Policy Foundation
- Judge Robert Schaffer, 152nd District Court, Harris County
- Peggy Venable, Appointments Director, Office of the Governor
- Jeff Oldham, General Counsel, Office of the Governor

October 16, 2020

- Judge Mark Davidson, MDL Judge
- Dr. Mark P. Jones, Baker Institute for Public Policy at Rice University

November 13, 2020

- Dr. Mark P. Jones, Baker Institute for Public Policy at Rice University
- Ross Fischer, Former Chair of the Texas Ethics Commission

APPENDIX B

DETAILED VOTING RESULTS

| | Member | Yes | No | Abstain |
|--|--------------------------|----------|----------|----------|
| Do we recommend the continuation of our partisan judicial selection? | Mr. David Beck | | ✓ | |
| | Sen. Brian Birdwell | ✓ | | |
| | Sen. Juan Hinojosa | ✓ | | |
| | Sen. Joan Huffman | ✓ | | |
| | Sen. Robert Nichols | ✓ | | |
| | Rep. Todd Hunter | | ✓ | |
| | Rep. Brooks Landgraf | | ✓ | |
| | Rep. Ina Minjarez | ✓ | | |
| | Rep. Carl Sherman | ✓ | | |
| | Mr. Charles Babcock | | ✓ | |
| | Hon. Martha Hill Jamison | | ✓ | |
| | Hon. Wallace Jefferson | | ✓ | |
| | Ms. Lynne Liberato | ✓ | | |
| | Mr. David Oliveira | | ✓ | |
| | Hon. Thomas Phillips | | ✓ | |
| | Tally | 7 | 8 | 0 |

| | Member | Yes | No | Abstain |
|---|--------------------------|-----------|----------|----------|
| Regardless of our recommendations above, do we recommend increasing the minimum qualifications of judges? | Mr. David Beck | ✓ | | |
| | Sen. Brian Birdwell | ✓ | | |
| | Sen. Juan Hinojosa | ✓ | | |
| | Sen. Joan Huffman | ✓ | | |
| | Sen. Robert Nichols | ✓ | | |
| | Rep. Todd Hunter | | | ✓ |
| | Rep. Brooks Landgraf | | | ✓ |
| | Rep. Ina Minjarez | ✓ | | |
| | Rep. Carl Sherman | | ✓ | |
| | Mr. Charles Babcock | ✓ | | |
| | Hon. Martha Hill Jamison | ✓ | | |
| | Hon. Wallace Jefferson | ✓ | | |
| | Ms. Lynne Liberato | ✓ | | |
| | Mr. David Oliveira | ✓ | | |
| | Hon. Thomas Phillips | ✓ | | |
| | Tally | 12 | 1 | 2 |

| | Member | Yes | No | Abstain |
|--|-----------------------------|-----------|----------|----------|
| Do we recommend the adoption of rules to further regulate the role of money in judicial elections? | Mr. David Beck | ✓ | | |
| | Sen. Brian Birdwell | | ✓ | |
| | Sen. Juan Hinojosa | ✓ | | |
| | Sen. Joan Huffman | | ✓ | |
| | Sen. Robert Nichols | | ✓ | |
| | Rep. Todd Hunter | ✓ | | |
| | Rep. Brooks Landgraf | ✓ | | |
| | Rep. Ina Minjarez | ✓ | | |
| | Rep. Carl Sherman | | ✓ | |
| | Mr. Charles Babcock | ✓ | | |
| | Hon. Martha Hill Jamison | ✓ | | |
| | Hon. Wallace Jefferson | ✓ | | |
| | Ms. Lynne Liberato | ✓ | | |
| | Mr. David Oliveira | ✓ | | |
| Hon. Thomas Phillips | ✓ | | | |
| | Tally | 11 | 4 | 0 |

| | Member | Yes | No | Abstain |
|---|-----------------------------|----------|----------|----------|
| Do we recommend a non-partisan judicial selection with any of the following requirements? | Mr. David Beck | | ✓ | |
| | Sen. Brian Birdwell | | ✓ | |
| | Sen. Juan Hinojosa | | ✓ | |
| | Sen. Joan Huffman | | ✓ | |
| | Sen. Robert Nichols | | ✓ | |
| | Rep. Todd Hunter | | | ✓ |
| | Rep. Brooks Landgraf | ✓ | | |
| | Rep. Ina Minjarez | ✓ | | |
| | Rep. Carl Sherman | ✓ | | |
| | Mr. Charles Babcock | | ✓ | |
| | Hon. Martha Hill Jamison | ✓ | | |
| | Hon. Wallace Jefferson | | ✓ | |
| | Ms. Lynne Liberato | | ✓ | |
| | Mr. David Oliveira | ✓ | | |
| Hon. Thomas Phillips | ✓ | | | |
| | Tally | 6 | 8 | 1 |

| | Member | Yes | No | Abstain |
|---|--------------------------|----------|-----------|----------|
| Do we recommend that initially all judges be appointed? | Mr. David Beck | | ✓ | |
| | Sen. Brian Birdwell | | ✓ | |
| | Sen. Juan Hinojosa | | ✓ | |
| | Sen. Joan Huffman | | ✓ | |
| | Sen. Robert Nichols | | ✓ | |
| | Rep. Todd Hunter | | | ✓ |
| | Rep. Brooks Landgraf | | ✓ | |
| | Rep. Ina Minjarez | | ✓ | |
| | Rep. Carl Sherman | | ✓ | |
| | Mr. Charles Babcock | | ✓ | |
| | Hon. Martha Hill Jamison | | ✓ | |
| | Hon. Wallace Jefferson | | ✓ | |
| | Ms. Lynne Liberato | | ✓ | |
| | Mr. David Oliveira | | ✓ | |
| | Hon. Thomas Phillips | | ✓ | |
| | Tally | 0 | 14 | 1 |

| | Member | Yes | No | Abstain |
|--|--------------------------|----------|-----------|----------|
| Regardless of our recommendations above, do we recommend term limits for all judges? | Mr. David Beck | | ✓ | |
| | Sen. Brian Birdwell | | ✓ | |
| | Sen. Juan Hinojosa | | ✓ | |
| | Sen. Joan Huffman | | ✓ | |
| | Sen. Robert Nichols | | ✓ | |
| | Rep. Todd Hunter | | | ✓ |
| | Rep. Brooks Landgraf | | ✓ | |
| | Rep. Ina Minjarez | | ✓ | |
| | Rep. Carl Sherman | | ✓ | |
| | Mr. Charles Babcock | | ✓ | |
| | Hon. Martha Hill Jamison | | ✓ | |
| | Hon. Wallace Jefferson | | ✓ | |
| | Ms. Lynne Liberato | | ✓ | |
| | Mr. David Oliveira | | ✓ | |
| | Hon. Thomas Phillips | | | ✓ |
| | Tally | 0 | 13 | 2 |

| | Member | Yes | No | Abstain |
|---|-----------------------------|----------|----------|----------|
| Do we also recommend an appointive judicial selection system, with retention including any of the following requirements? | Mr. David Beck | ✓ | | |
| | Sen. Brian Birdwell | | ✓ | |
| | Sen. Juan Hinojosa | | ✓ | |
| | Sen. Joan Huffman | | ✓ | |
| | Sen. Robert Nichols | | ✓ | |
| | Rep. Todd Hunter | | | ✓ |
| | Rep. Brooks Landgraf | ✓ | | |
| | Rep. Ina Minjarez | | ✓ | |
| | Rep. Carl Sherman | | ✓ | |
| | Mr. Charles Babcock | ✓ | | |
| | Hon. Martha Hill Jamison | ✓ | | |
| | Hon. Wallace Jefferson | ✓ | | |
| | Ms. Lynne Liberato | | ✓ | |
| | Mr. David Oliveira | ✓ | | |
| | Hon. Thomas Phillips | ✓ | | |
| | Tally | 7 | 7 | 1 |

| | Member | Yes | No | Abstain |
|---|-----------------------------|-----------|----------|----------|
| Any change to the status quo should not impact the judges were selected under the current system. | Mr. David Beck | ✓ | | |
| | Sen. Brian Birdwell | ✓ | | |
| | Sen. Juan Hinojosa | ✓ | | |
| | Sen. Joan Huffman | ✓ | | |
| | Sen. Robert Nichols | ✓ | | |
| | Rep. Todd Hunter | ✓ | | |
| | Rep. Brooks Landgraf | ✓ | | |
| | Rep. Ina Minjarez | ✓ | | |
| | Rep. Carl Sherman | ✓ | | |
| | Mr. Charles Babcock | ✓ | | |
| | Hon. Martha Hill Jamison | ✓ | | |
| | Hon. Wallace Jefferson | ✓ | | |
| | Ms. Lynne Liberato | ✓ | | |
| | Mr. David Oliveira | ✓ | | |
| | Hon. Thomas Phillips | ✓ | | |
| | Tally | 15 | 0 | 0 |

| | Member | Yes | No | Abstain |
|--|-----------------------------|-----------|----------|----------|
| <p>Representative Todd Hunter, the author of H. B. 3040, proposed that, due to the pandemic and related issues, the work of the Commission continue beyond its current life.</p> | Mr. David Beck | ✓ | | |
| | Sen. Brian Birdwell | | ✓ | |
| | Sen. Juan Hinojosa | | ✓ | |
| | Sen. Joan Huffman | | ✓ | |
| | Sen. Robert Nichols | | ✓ | |
| | Rep. Todd Hunter | ✓ | | |
| | Rep. Brooks Landgraf | ✓ | | |
| | Rep. Ina Minjarez | ✓ | | |
| | Rep. Carl Sherman | ✓ | | |
| | Mr. Charles Babcock | ✓ | | |
| | Hon. Martha Hill Jamison | ✓ | | |
| | Hon. Wallace Jefferson | ✓ | | |
| | Ms. Lynne Liberato | ✓ | | |
| | Mr. David Oliveira | ✓ | | |
| Hon. Thomas Phillips | ✓ | | | |
| | Tally | 11 | 4 | 0 |

APPENDIX C

QUESTIONS ADDRESSED BY THE COMMISSION

QUESTIONS TO BE ADDRESSED

Question 1: Do we recommend the continuation of our partisan judicial selection?

If yes:

Question 2: Do we also recommend any of the following changes:

- a. Retention after initial election and, if so, what percentage is necessary for retention?
- b. Election on a date separate from primary and general elections?
- c. Designate incumbency and/or other qualifications on ballot?
- d. Candidates required or permitted to run in multiple primaries or conventions (e.g., New York, Texas in 1952).
- e. Any district elections for multi-member courts?

If no:

Question 3: Do we recommend a non-partisan judicial selection system with any of the following requirements?

- a. Candidates run in general election with no party designation, with either a plurality winner or a majority vote determined by a ranked choice method or a runoff?
- b. Initial election conducted in party primaries, with runoff in general election?
- c. Retention after initial open election?
- d. Election on a date separate from primary and general elections?
- e. Designate incumbency and/or other qualifications on ballot?
- f. Any district elections for multi-member courts?

If no:

Question 4: Do we recommend that all judges initially be appointed?

- a. Appointment for life (federal)?
- b. Appointment with mandatory retirement age (e.g., Massachusetts)?
- c. Appointment for a term of years (e.g., New Jersey, merit selection systems)?

If yes to 4:

Question 5: Who should be the appointing authority?

- a. Governor
- b. Joint legislative session?
- c. One house of legislature only?
- d. Supreme Court
- e. Commission
- f. Combination of more than one of the above?
- g. If reappointment is required, should it be by the initial appointing authority, another body or combination, or retention election?

If no to 4:

Question 6: Do we also recommend an appointive judicial selection system, with retention including any of the following requirements?

- a. For all judges and justices, but differentiate between level of court or population of jurisdiction?
- b. Length of terms?
- c. Senate confirmation?
- d. House of Representatives confirmation?
- e. Require a broad based and diverse Judicial Nominating Commission:
 - 1. Role of Commission?
 - 2. Method of Selection of members?
 - 3. Length of term?
 - 4. Creation of local bi-partisan Committee to vet candidates?
- f. Grandfather all current judges through end of their terms, and decide if they then run in a retention election? If no:

Question 7: Regardless of our recommendations above, do we recommend increasing the minimum qualifications of judges?

- a. Years of experience?
- b. Age?
- c. Type of experience?
- d. Methods to provide additional information to voters in elections?
- e. In considering the judiciary as a whole or the level or geographic location of the court, racial, ethnic, gender, or partisan diversity?

Question 8: Regardless of our recommendations above, do we recommend the adoption of rules to limit the role of money in elections?

- a. Further limit the amount of contributions?
- b. Public financing in whole or in part?
- c. Limit or eliminate judicial officeholder accounts?
- d. If retention elections are incorporated into a plan, limit contributions a judge may seek unless active opposition is identified?

Question 9: Regardless of our recommendations above, do we recommend term limits for all judges?

APPENDIX D

LETTERS FROM COMMISSIONERS



December 21, 2020

Mr. David Beck
Chair
Texas Commission on Judicial Selection
Via email: DBECK@beckredde.com

Mr. Beck:

As the Texas Senate representatives on the Texas Commission on Judicial Selection, we would like to personally thank you for your time and dedication while serving as Chair of this Commission. You have been committed to a fair and diligent process to study and review the method by which judges and justices are selected for office in Texas. Under your leadership, the Commission has held over fifteen public meetings and hearings, and heard invited and public testimony from around the State. The information and testimony that the Commission has received has been extremely informative and useful.

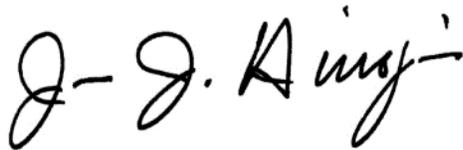
We have carefully listened to and reviewed all information presented to the Commission, as well as several extensive public opinion polls. After doing so, we find no apparent consensus among either the Commission's members or the public regarding the most efficient and effective way to select judges and justices in this State. In fact, alternative methods that the Commission studied present their own challenges, and opinions differ widely regarding which if any of these alternatives might be superior to our current process. These issues make the task of recommending specific constitutional or statutory changes to the 87th Legislature extremely difficult. Especially in light of the foregoing, in our opinion, there is no compelling evidence to suggest that the State of Texas should strip a Texan's right to vote for their preferred judicial candidates.

This is an extremely complex issue that the legislature has grappled with for decades. We do believe that a report documenting the information received would be a valuable resource for both the legislature and the public moving forward. Thank you again for serving as Chair of this Commission, and for your hard work in that capacity. Please do not hesitate to contact any of us if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Brian Birdwell". The signature is written in a cursive style with a large, prominent 'B' at the beginning.

Brian Birdwell

A handwritten signature in black ink that reads "J-J. King". The signature is written in a cursive style with a large, prominent 'J' at the beginning.

Juan "Chuy" Hinojosa

A handwritten signature in black ink that reads "Joan Huffman". The signature is written in a cursive style with a large, prominent 'J' at the beginning.

Joan Huffman

A handwritten signature in black ink that reads "Robert Nichols". The signature is written in a cursive style with a large, prominent 'R' at the beginning.

Robert Nichols

December 29, 2020

**Statement of Charles L. “Chip” Babcock, Vice Chair,
Texas Commission on Judicial Selection (“Commission”)**

A majority of the fifteen member Commission has recommended to the Legislature that it change Texas’ method of judicial selection. I joined that majority because I believe Texas would be better served by a system where the governor appoints the judge or justice subject to review by a Commission (which would include members of the House of Representatives and others reflecting the diversity of the state) followed by confirmation of two-thirds of the Senate. At the end of the judge’s first term, and periodically thereafter, the judge would be subject to a non-partisan retention election by the voters. All current judges or justices would be assured of their judicial office as if they had been appointed and confirmed under the new system, and would face a retention election.

A. The Current System Undermines Public Confidence In Texas’ Justice System

Texas demands that its judges and judicial candidates “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹ Yet our current system forces them to do the exact opposite by requiring both incumbent judges and judicial candidates to raise money from lawyers and parties with cases that are or will likely be before them thereby accepting financial assistance, sometimes unknowingly, from industries with recurring matters before the courts.

In the 2020 election, millions of dollars were solicited by judicial candidates to fund their campaigns. Common sense tells us that when judges must pan handle for money from lawyers with clients appearing before them, a regrettable *perception* of unfairness follows. I do not believe that these monies *actually* influence judicial decisions, but many litigants in and outside Texas do, and that assumption denigrates the basic principle that we are governed by an impartial rule of law.

This sense of unfairness is not isolated or undocumented. The San Antonio Bar Association’s survey of its members found: “A majority believed that campaign reform would increase confidence in the impartiality of the bench.” One member wrote that “The public’s perception of the judiciary is that ‘justice is for sale’ in this state”.²

¹ Canon 2 (A), Code of Judicial Conduct.

² San Antonio Bar Association, Judicial Selection Survey: Testimony to the Texas Commission on Judicial Selection, 2, 8 (September 13, 2020) .

In 2007 a Yale University undergraduate and member of a longtime Texas family of lawyers, Ryan Atlas, wrote in a research thesis, based on a statistical survey, that: “I find empirical evidence consistent with the view held by many lawyers that the current system creates the perception that the partisan election process may influence judicial decision-making. Finding that large donors win on appeal at a statistically significant rate higher than the average appellate party, I argue that Texas needs a new method of judicial selection to remove the widespread perception of partiality under the current system.”³

The Texas Ethics Commission told the Commission that of the \$21,269,014.76 contributed to judicial candidates in the 2016 election cycle, 66% came from attorneys, law firms and law firm political action committees (PACs). While that percentage was the same two years later, the amount of money contributed had increased to \$35,977,250.88.⁴ Many, if not most, of the contributing lawyers, law firms and law firm related PACs had, or would likely have, cases before the judges seeking election. And that percentage does not include contributions from businesses such as insurance companies with recurring matters before the courts, nor does it capture unreported money that is spent on a campaign but is not coordinated with the candidate.

Gary Bledsoe, President of the Texas State Conference of NAACP Units told the Commission that, while his Conference supports the current system, “money can be a major source of concern and we should recognize that”⁵. Indeed, a survey of Texas jurors conducted by the National Center for State Courts found that 85% of African-Americans rate the job being done by courts in Texas as “only fair” (44%) or “poor” (41 %). 56% of Latino jurors said the job performance was “only fair” (43%) or “poor” (13%).⁶

A wealthy Republican businessman from West Texas conducted a statistical study of Texas Supreme Court decisions which, he claimed, demonstrated that if you are a wealthy company represented by one of nine elite law firms you are 5.4 times more likely to win some or all of what you seek from the justices.⁷

The Honorable Martin Hoffman, Judge of the 68th District Court for Dallas County presented a memo that introduced us to “studies [that] show that voter confidence in the judiciary’s ability to be impartial has dropped”⁸

³ R. Atlas, *Texas Justice: Perceptions and Reality of the Effect of Campaign Contributions to Judges*, 1 (April 16, 2007).

⁴ B. Gallegos & J. Tinley *Texas Ethics Commission* (August 10, 2020).

⁵ G. Bledsoe, *Texas NAACP Addresses Important Issues to Facilitate the Discussion Regarding Proposed Changes for Selecting Members of Texas’ Judiciary in the Aftermath of the George Floyd Tragedy*, 6-7 (2020).

⁶ National Center for State Courts: *Texas Juror Poll* (June 2020).

⁷ E. Platoff, *Speaking Statistically, this GOP donor wants to convince you that money buys justice in Texas*, *Texas Tribune* (February 24, 2020).

⁸ Memo from Lilian Marrs to Judge Hoffman citing, Alice Bannon, *Choosing State Judges: A Plan for Reform*, Brennan Center for Justice, 2018 at 1.

In public testimony both supporters and critics of the current system lamented the fundraising driving judicial campaigns. “It’s a problem” said the Honorable Mary Lou Alvarez, judge of the 45th District Court of Bexar County. “[It’s] a little outrageous” Justice Patricia Alvarez of the Fourth District Court of Appeals said: “Our current system undermines public confidence in the justice system... raising money through attorneys is difficult, distasteful and demeaning...people don’t trust us when we’re financed by attorneys and big donors. It all stinks.”⁹ Robert Schaffer, Judge of the 152nd District Court for Harris County said “[r]aising money is a problem, it is uncomfortable.”¹⁰ Judge Denn Whalen of the 70th District Court for Ector County said that the “most distasteful” part of the existing system is “raising money”¹¹. Justice W. Stacy Trotter of the 11th District Court of Appeals said raising money for a contested election “was the most miserable experience of my life.”¹²

The Texas Judicial Campaign Fairness Act of 1995¹³ sought to lessen the impact of money in our judicial races and it did. But so long as judges run for office in contested elections they will continue to fund their campaigns with money from litigants and law firms who regularly appear before them; thus, the appearance of impropriety will not go away. Although the Commission considered a proposal that lawyers should be prohibited from contributing to judicial campaigns, I am skeptical that the idea would survive scrutiny under the First Amendment. In any event, prohibiting lawyers from contributing would not banish money from the system. For example, the Commission heard testimony that district judges with a criminal docket raised campaign funds from bail bondsmen. And all manner of interest groups and litigants, from inside and outside the state, pour money into these judicial campaigns.

Financial support of a judicial campaign does not generally justify recusal of a judge in Texas even though to the lay person “the judge’s impartiality might be reasonably questioned” by large cash donations and therefor a basis for recusal under our Rules of Civil Procedure. However, the United States Supreme Court held in *Caperton v. A. T. Massey Coal Co.*¹⁴ that the due process clause of the federal constitution was violated when a justice “received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the [defendant] corporation found liable for damages.” With the current system that could happen in Texas.

B. The Need For a Diverse Judiciary

The Commission observed that within the last four years our judiciary, at least at the trial court level in urban counties, has become much more diverse. This welcomed trend must not be reversed

⁹ Comments at Public Hearing before the Commission on Judicial Selection September 22, 2020.

¹⁰ Comments to the Commission, September 18, 2020.

¹¹ Comments to the Commission October 26, 2020.

¹² *Id.*

¹³ Tex. Elec. Code § 253.151, *et seq.*

¹⁴ 556 U.S. 868, 872 (2009).

by a change in the system. One protection is to freeze those gains by treating all current judges as if they had been appointed and confirmed and only require them to face a retention election.

But, as former Chief Justice Wallace Jefferson raised on several occasions, that is not enough. The Governor's judicial appointments should reflect Texas' diversity and the Commission I propose should have the power to monitor whether those goals are being met and to take action if they are not. The Senate reflects, of course, the entirety of the state and providing a requirement of a two-thirds majority to confirm a nominee would act as a deterrent to the days when, as Gary Bledsoe said, only "white males occupied judicial positions"¹⁵.

Gubernatorial appointments of diverse justices to the Texas Supreme Court have outpaced the electorate in the past four decades. Since 1945 nine women have served on the court and six of them were appointed. In that time period, six Hispanics were appointed and none elected initially; one African American was appointed (Wallace B. Jefferson as Justice and later Chief Justice), and he was later elected. Dale Wainwright, the only other black justice to serve, was initially elected. It is not only good politics in an increasingly diverse state to appoint judges from all walks of life, but it also strengthens the public's confidence that the justice system is designed to afford equal justice to all of its citizens. In any event, the change I propose would keep the electorate involved in the process through retention elections. Frankly this mirrors our current system where the governor fills vacancies and the judge then stands for election. The proposed change would not alter that dynamic. The governor would still appoint, but the electorate would have an up or down vote at the end of the first term and periodically thereafter.

C. The Appoint and Retention Election System Allows the Public a Vote But Greatly Reduces the Amount of Campaign Money Necessary and Recognizes the Fundamental Difference Between Judicial Campaigns and Other Elective Office

The appoint and retain system would also recognize that judicial elections are fundamentally different from elections to the other branches of government. A judicial candidate, for example, is prohibited by Texas law from that staple of non-judicial elections, the campaign promise. The Texas Code of Judicial Conduct states that: "a judge or judicial candidate shall not makes pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge."¹⁶ As Justice Ruth Bader Ginsburg wrote: "[J]udges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office. 'Judges represent the law'".¹⁷

¹⁵ G. Bledsoe, Texas NAACP Addresses Important Issues to Facilitate the Discussion Regarding Proposed Changes for Selecting Members of Texas' Judiciary in the Aftermath of the George Floyd Tragedy, 1 (2020).

¹⁶ Texas Code of Judicial Conduct, Canon 5 (1)(i).

¹⁷ *Republican Party of Minnesota v. White*, 536 U.S. 765, 803-04 (2002), Ginsburg, J.,dissenting.

The voter in our current system is left with little substantive information about the judicial candidate and her opponent. Absent independent research which is often difficult, especially in large counties with multiple judges on the ballot, the voter has only what the ballot tells her: the name of the candidate and from that most likely their sex and perhaps ethnicity and the party to which they are affiliated. That contrasts rather sharply with the information available for non-judicial candidates. At least with a retention election the judicial candidate will have amassed a judicial track record on which to run.

As the United States Supreme Court held in an opinion by Chief Justice Roberts: “Judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.”¹⁸

Texas should do so here.

D. The Commission(s)

A Statewide Commission (“Statewide Commission”) should be established to vet nominees to the appellate courts, that is, the Supreme Court, Court of Criminal Appeals and the fourteen courts of appeals. This Statewide Commission should consist of five members from the House of Representatives chosen by that body but with a least two members who are not of the majority party. In addition, it should include a member chosen by the State Bar of Texas, a member chosen by the Texas State Conference of the NAACP and African American Bar Association, a member chosen by the Texas Chapter of the American Academy of Appellate Lawyers and a member chosen by the Texas Hispanic Bar Association. The Statewide Commission will rate the nominee either “Highly Qualified”, “Qualified” or “Not Qualified”. The Statewide Commission will consider the nominee’s experience in handling appeals. In deciding whether to confirm, the Senate will weigh this evaluation heavily and will rarely confirm a nominated judge or justice who is rated not qualified. On an annual basis The Statewide Commission would report to the Legislature and Governor on whether that year’s nominees reflect the diversity of the state and, if not, how to better meet that goal.

With respect to all other judicial nominations, Local Commissions (“Local Commissions”) should be established covering the same geographical area that the nominated judge will serve (“The Area”). All members of the Local Commissions will reside in The Area and will consist of one member of the House of Representatives, one member appointed by the state bar, one member appointed by the Texas chapter of the American College of Trial Lawyers and Texas ABOTA, one member appointed by the area chapter of the NAACP and African American Bar Association and one member appointed by the area chapter of the Hispanic Bar Association. The Local Commissions will rate the nominees as “Highly Qualified”, “Qualified” or “Not Qualified” and will report on an annual basis to the Legislature and the Governor on whether that year’s nominees

¹⁸ *Williams-Yule v. Florida Bar Association*, 575 U.S. 433, 437-38 (2015).

December 29, 2020

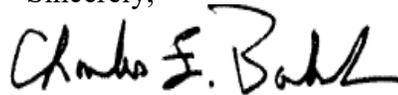
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reflect the diversity of The Area and, if not, how to better meet that goal. As with the Statewide Commission, the Senate will weigh this evaluation heavily and will rarely confirm a nominated judge who is rated "Not Qualified". Each of these Commissions will consider the nominee's experience in conducting jury trials or handling appeals.

E. Conclusion

Although no system is perfect, an appointment/retention plan that includes safeguards to ensure diversity would minimize the current cancer on our system that, is causing our judges to solicit campaign contributions in ever-expanding amounts, mostly from lawyers and interested parties, thereby lowering confidence in the fairness of our justice system in the eyes of the public.

Sincerely,

A handwritten signature in black ink that reads "Charles L. Babcock". The signature is written in a cursive, slightly slanted style.

Charles L. Babcock

CLB:smz

Martha Hill Jamison
Senior Appellate Justice
3717 Chevy Chase
Houston, Texas 77019

December 29, 2020

Mr. David Beck
Chair, Commission on Judicial Selection
Beck Redden
1221 McKinney Street, Suite 4500
Houston, Texas 77010

Dear Chairman Beck and Commission Members:

Thank you for your participation in the work of the commission. The many experts, officeholders and fellow Texas citizens who testified during our meetings added nuance and context to the discussions about judicial selection methods in Texas. I regret that our final recommendations did not make more productive use of this input.

As you know, I am a second-generation advocate on the issue of judicial selection in Texas. In the 1980s, my father, former Texas Chief Justice of the Texas Supreme Court John L. Hill, was one of many to raise concerns about the appearance of impropriety embedded in our process of partisan judicial elections funded by donations from lawyers and special interest groups. He was not the first or the last. Yet, Texas remains an outlier in electing all its judges in partisan elections.

My almost-twenty-year judicial career (1999-2018) came about because 1) I was willing to run as a Republican, 2) my father knew a Governor, 3) connections (and hard work and brass) enabled me to raise a large amount of campaign funds for initial primary and run-off campaigns, 4) I married a man with a nice, Irish last name, and 5) I have a woman's first name. I have no illusions that more than one million voters knew my real qualifications for office or my record as I was swept into office with other Republicans three times and swept out of office with other Republicans twice. Any Texas judicial candidate, if honest with themselves, could list non-relevant factors that elected (or defeated) them. Surely, Texas can do better.

In their letter dated December 21, 2020, the four Commission members who also serve as Texas Senators state "there is no compelling evidence to suggest that the State of Texas should strip a Texan's right to vote for their preferred judicial candidates." However, Texans' right to vote for judicial candidates was never in jeopardy during the Commission discussions. Even in the event that an initial-appointment system were adopted by the Legislature and the voters, every judge who sought re-election would be voted on by the electors at the end of their terms.

We discussed strengthening qualifications for office, nonpartisan elections and retention elections. We discussed judicial nominating commissions that would be more effective than those in other states—less partisan, more diverse. We discussed the need to limit the role of money in judicial elections, consistent with First Amendment rights.

The 87th Legislature should focus on these areas where useful improvements can be made. The Senators are correct in part that “recommending specific statutory changes to the 87th Legislature” is “extremely difficult”. We knew that at the outset of our task. However, because of the Commission’s hard work and your leadership, Mr. Chair, we have uncovered some low-hanging fruit that could make the Texas judiciary better. The 87th Legislature should act on those issues.

With gratitude,

A handwritten signature in blue ink that reads "Martha Hill Jamison". The signature is written in a cursive, flowing style with a large initial 'M' and 'J'.

Martha Hill Jamison

Lynne Liberato

direct dial: (713) 547-2017

Lynne.Liberato@haynesboone.com

December 29, 2020

Mr. David Beck
Chair
Texas Commission on Judicial Selection
Via email: DBECK@beckredde.com

Dear Mr. Beck:

This is to express my deep appreciation for your leadership of the Texas Commission on Judicial Selection and for the commitment, wisdom, integrity and insight of all my fellow commissioners.

I also write to express separately the reason I voted for retaining partisan elections in the near future.

Many judges, especially women of color, played by the old rules and won their benches in 2018 and 2020. To now change the method we use to select Texas judges would cast a shadow on the entire process. The research and hearings in which we have engaged show that other methods are no less flawed; they merely have different flaws. Thus, in the absence of a compellingly superior system, for now I believe we should retain partisan election of judges as our method of judicial selection.

However, I also believe (and voted accordingly) that modification to other aspects of our selection and retention process merit consideration by the Legislature.

Thank you.

Sincerely,



Lynne Liberato