

## MEMORANDUM

TO: David Beck, Chair of Texas Commission on Judicial Selection

FROM: Wallace B. Jefferson, Chair of Appointments and Confirmations Working Group

DATE: March 4, 2020

Re: Report of Appointments and Confirmations Working Group

The working group on appointments and confirmations is comprised of the following Commission members:

Wallace B. Jefferson (Chair)  
Senator Joan Huffman  
Representative Todd Hunter  
Representative Brooks Landgraf  
Chip Babcock

The working group was asked to study “the pros and cons of the various methods for appointing judges, terms of office, and the desirability and nature of legislative confirmations of gubernatorial appointments.” We met by phone February 4, 2020 and reported our findings to the full Commission on February 11, 2020. This memorandum summarizes that report.

### **Pros and Cons of Various Judicial Selection Methods**

#### **Partisan Election (current system)**

Pros: Voters have a direct say in judges who decide cases that have a huge impact on their lives and may theoretically oust a judge who is performing poorly. The judicial candidate is required to appear before the voters, explain qualifications, and consider lawyer and community approaches to a robust administration of justice.

Cons: In statewide races and counties with large populations, voters do not have enough information to learn candidates' qualifications. Their vote is thus based on proxies that have little to do with the candidates' merit. Instead of voting based on experience and qualifications, most judicial elections for these statewide and populous counties are based on political affiliation, the candidate's name, and the amount of money the candidate has raised and expended for the campaign. Because party affiliation is prominent in these elections, voters tend to assume the judicial function is largely political – that a republican judge will rule differently from a democratic judge, whereas the rule of law shuns such characteristics as a basis for a court decree. A judicial election is often unduly influenced by the fact that the candidate either has a surname that is unusual or ethnic, or whose surname is associated with a popular political name – neither of which reflects the candidates' projected quality of or potential for excellent service on a court. This surname issue also makes it more difficult for members of minority or majority groups to prevail in certain counties. The large sums of money donated by lawyers, litigants, and political action committees undermines the public's confidence in a fair and impartial system of justice.

Option: If the current partisan-election system is retained, but enhanced qualifications are desired, eligibility for the ballot could be conditioned on satisfaction of a minimum standard. Examples include board-certification; a minimum number of first-chair trials or appeals; and peer review. It appears that no state in the country has adopted such enhanced qualifications as a predicate to judicial office.

### Merit Selection with Retention Election

Pros: Assures that candidates for judicial office have the experience, integrity, and temperament to perform the duties of office. Retains voters' ability to hold judges accountable through a non-partisan up or down vote based on their performance in office. Substantially reduces amounts of money in the system. Assuming a bi-partisan appointing Commission, this system protects against extreme ideological appointments. Objective criteria for eligibility could include experience trying cases or arguing appeals, depending on the judicial seat in play. This system can pay intentional consideration to concerns about diversity on the bench.

Cons: Eliminates direct voter participation for judges who make critical decisions that impact individuals, corporations, and the State. Confers power on an unelected Commission that scrutinizes candidates for judicial office. Candidates selected through this system tend to win retention elections without intense voter scrutiny. A constitutional amendment would be required to adopt this system.

Options: A Commission that supports this new judicial selection system may be (1) tasked with making recommendations to the Governor, who must select from a list the Commission provides; or (2) may be directed to rate, as qualified, highly qualified, or unqualified, the Governor's chosen nominees. Commissioners should be selected on a bipartisan basis and subject to Senate confirmation. Possible composition of Commission could include appointments from (1) the Governor (who would have the most Commission appointees); (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.

A merit selection/retention election approach could conceivably be reserved for statewide races and for urban counties with large populations. For rural counties, the electorate is much more likely to know the backgrounds of judicial candidates and, consequently, fight to retain the right to hold their judges accountable through direct election.

### **Terms of Office for Judges**

The current terms of office are:

District Judges	4 years
Intermediate Appellate Justices	6 years
High Court Justices	6 years

The working group favors longer terms:

District Judges	6 or 8 years
Intermediate Appellate Justices	8 or 10 years
High Court Justices	10 or 12 years

### **Desirability and Nature of Legislative Confirmation of Judicial Appointments**

The working group suggests that all appointments to judicial office be subject to confirmation by 2/3 of the Senate. If a merit selection/retention system is employed, the working group also suggests that all members of a nominating or evaluating commission also be subject to 2/3 Senate confirmation.