Texas Public Policy Foundation

September 9, 2020

Chairman David Beck
State Commission on Judicial Selection
P.O. Box 12248
Austin, TX 78711

RE: Comment on the Reevaluation of Judicial Selection in Texas

Dear Chairman Beck:

The Texas Public Policy Foundation ("TPPF") supports the efforts being undertaken by the State Commission on Judicial Selection to review the current system of judicial selection in Texas. TPPF is a 501(c)3 non-profit, non-partisan research institute dedicated to promoting and defending individual liberty, personal responsibility, and free enterprise. Pursuant to this mission, TPPF seeks to highlight some of most concerning aspects of this state's current system while also cautioning against the adoption of alterations that could either exacerbate current shortcomings or create new ones. TPPF asserts that any reforms to the current system of selecting judges should seek to honor the independence of the judiciary while guarding against measures that would either sacrifice accountability or widen the ideological gulf between average Texans and those on the bench.

The 2018 election cycle once again brought many of our system's flaws into stark relief. This wave election included a clean sweep in both appeals courts in Houston, along with those in Austin, San Antonio, Dallas, El Paso, and Corpus Christi/Edinburg for reasons unrelated to the caliber of the judicial candidates. While the political ramifications of this were widely publicized, even more consequential was the resulting substantial loss of judicial experience and competency. Indeed, 20 of those 32 contested races featured the defeat of an incumbent judge. Worse still, the ability to attract highly qualified challengers in 2018 was undermined by the initial perception that some of those races would not be competitive, resulting in some individuals taking the bench that were unprepared to do the job. Ultimately, these losses did not stem from any unsuitable judicial temperament, poorly reasoned decision, or demonstrated lack of impartiality. Rather, these judges were discharged from their position for one reason: The letter next to their name on the ballot differed from that of a popular statewide candidate.

2018 was by no means the first time that the electoral process prevented highly competent candidates from taking the bench. After being appointed by Governor Rick Perry to the Supreme Court of Texas in 2001, Xavier Rodriguez lost his primary election the following year. Similarly, Jeff Brown was appointed by Governor Perry to a state district court in 2001, the Fourteenth Court

of Appeals in 2007, and the Supreme Court of Texas in 2013. However, he was only able to garner fifth place in the Republican primary for the state's Supreme Court when he ran in 2010. Both Judge Brown and Judge Rodriguez went on to demonstrate their impeccable credentials by being nominated and confirmed to a United States District Court position.

Texas' current system of judicial selection already often allows for top quality candidates to initially be appointed by the Governor and confirmed by the state Senate before facing election, thus establishing their judicial bona fides ahead of time. The Texas Supreme Court's Chief Justice Nathan Hecht, Justice Eva Guzman, and former Justice Dale Wainwright, along with Fifth Circuit Court of Appeals Judge Jennifer Elrod, all began their judicial careers by being appointed to a state district court. Similarly, before joining the Supreme Court of Texas, former Justice Deborah Hankinson was appointed to the Fifth District Court of Appeals in Dallas. And Governor Greg Abbott, former U.S. Attorney General Alberto Gonzales, and current Fifth Circuit Court of Appeals Judge Don Willett were all initially appointed to fill vacancies at the Supreme Court of Texas. In other words, our current system's limited allowance for judicial appointment has repeatedly produced excellence, with many appointees then going on to serve in some of the most consequential positions in both state and federal government.

That so many excellent judges began their careers on the bench this way should not be surprising, especially given that a significant number of Texas judges are initially appointed by the Governor under our current system. Indeed, from 1945 to 2019, 59 percent of Texas Supreme Court justices were initially appointed to their seats. And that percentage is even higher now: 78 percent of the justices on the Supreme Court of Texas will have been initially appointed to their position once Justice Green's replacement is seated. Additionally, as of September 1, 2018, 44 percent of the intermediate appellate court justices and 35 percent of the district court judges were also initially appointed to their seats. Given this prevalence of judicial appointments, any reform that reduces the election of judges in favor of expanding such appointments would represent more of an extension of the status quo than any radical departure.

Moving away from elections in favor of judicial appointments would also be fully compatible with the kind of constitutional republican form of government envisioned by our Founders. Thus, in considering such a move, TPPF encourages the Commission to begin with Alexander Hamilton's treatment of the judicial power in Federalist 78. That oft-cited essay famously observed that "complete independence of the courts of justice is peculiarly essential in a limited Constitution," since without it "all the reservations of particular rights or privileges would amount to nothing." Accordingly, TPPF would hesitate to encourage the adoption of any plan that increased the incentives for sitting judges to acquiesce to other branches of government.

At the same time, the fundamental role of a judge is to uphold the rule of law, not bend to popular whim. Here Federalist 78 again provides instruction, observing that judicial independence is also essential to guard against "those ill humors" that "sometimes disseminate among the people themselves," which could then "occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." Thus, Hamilton argued, if the selection of judges were left "to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws."

Given the flaws in our current system of judicial selection, TPPF is open to supporting reasonable, prudent efforts at reform of the method of state judicial selection compatible with the limited government framework that has served Texas so well throughout its history. Accordingly, while TPPF does not affirmatively advocate for any particular set of reforms at this time, there are two potential reforms that would move Texas in precisely the wrong direction: 1) nonpartisan elections; and 2) the "Missouri Plan." Indeed, ample research has demonstrated that both methods tend to skew the judiciary far to the left of the general population in a given state. *See* Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729 (2017).

First, the movement toward nonpartisan elections has been chiefly justified as a means of depoliticizing the electorate's choice of judicial candidates. However, such elections have utterly failed to achieve this goal, instead exacerbating problems such as candidates being selected based on even less relevant factors such as the characteristics of their name or place on the ballot. While party identity is uniquely unsuited for choosing members of the judiciary, providing the public with even less information on which to make an informed decision is not a viable solution.

Second, the so-called Missouri Plan, whereby a commission selects a group of candidates from which the Governor must choose, has also been shown to be a deeply flawed system. Members of the commission remain insulated from, and unaccountable to, the general public. Further, such commissions are often unduly influenced by members of the bar, particularly plaintiff's attorneys. Because these groups are almost always to the left ideologically, their judicial selections tend to follow their own ideological preferences rather than those of the public. TPPF cautions against delegating influence over judicial selection to unelected and unaccountable persons or entities.

However, opposition to these two forms of judicial selection should not be read to foreclose future support for a wide array of other possibilities. Some interesting alternatives include proposals for adjusting and modernizing the geographical boundaries for the intermediate courts of appeals, implementing ratification or retention elections for judges that have been appointed, strengthening the statutory prerequisites for being a judge, and forming advisory panels to research and publicize information of an individual's fitness for the bench. While we do not endorse any of these proposals, they at least come unencumbered by the proven track record of failure that is endemic to nonpartisan elections and the Missouri Plan.

Given both the indispensable nature of the judiciary to TPPF's pursuit of its mission and the unique opportunity for improvement in that system, the Foundation eagerly awaits the findings and recommendations of your Commission at year's end. By incorporating the principles and priorities outlined above, Texas's method of judicial selection may be added to the long list of Lone Star innovations that become a model for others across the nation.

Sincerely,

Robert Henneke