

Reforming Judicial Selection: The Case for Judicial Elections in Texas

by

Justice Tom James

Court of Appeals, Fifth District of Texas at Dallas

Justice Tom James serves on the Court of Appeals for the Fifth District of Texas at Dallas. He is a native of Amarillo and has been a resident of the Dallas area since 1952, where he has been a civic leader for more than 35 years.

The independence of the judiciary is the cornerstone of a free society. It falls to the judicial branch of government the oft times controversial and politically dangerous role of protecting the minority from the majority and of going against the will of the Governor and the Legislature when the law demands it.

For more than three decades, Texans have debated judicial selection in their state. The engine that has driven the debate has been the public's negative perception of how judicial campaigns are financed. The real tension in this process comes from two respected points of view:

★ Those who want judges to be free and independent in the exercise of their duties and see the elective political process with its fund-raising activities to be contrary to independence. They recall the era described in the *60 Minutes* program entitled "Justice for Sale;" *or*

★ Those who believe they have suffered too long under irrational social and political edicts of an appointed federal judiciary and want their state judges to remain accountable at the ballot box to those they serve.

Special Interests Seek Judicial Control

Add to this debate those promoting special interests who see any revisions to judicial selection as an opportunity to advance their own private agendas, and you have a situation fraught with peril for the independence of the judiciary.¹ These include the interests carrying the banners of tort reform and affirmative action, and others who want to improve their chances of controlling the process by which judges are selected.

Lawyers overwhelmingly favor appointment rather than popular election of judges. This is true, in part, because in filling vacancies on the courts between elections, lawyers have traditionally controlled the appointment process through

1 Daniel W. Shuman and Anthony Champagne, *Removing the People from the Legal Process, Psychology, Public Policy, and Law*, Vol. 3, No. 2/3, 242-258 (1997), at 248.

their relationships with the incumbent Governor and members of the State Senate. Subsequent popular elections often unseat these appointees to the dismay of the lawyers who sponsored their appointment.

At the core, lawyers believe if they can control the appointive process, they can be assured of having judges who will likely decide legal disputes in their favor. Popular election of judges often frustrates their attempts to shape the judiciary to their advantage.

In many judicial districts where the advent of a two-party system has only recently impacted the election of local officials, experienced judges have been swept from office in general elections where the top of ticket has a very popular (or, in some cases, unpopular) candidate. These partisan sweeps may result in the unintended defeat of incumbent judges who are far more qualified than their opponents. For example, such was the case with the election of an inexperienced lawyer to the Texas Court of Criminal Appeals. Many complained the voters did not know who the judicial candidates were and must vote blindly. In effect, they were saying voters are not capable of selecting good judges. All of these are matters deserving of thoughtful study and debate.

The Texas Legislature's Response

The Texas Legislature responded to these issues in 1995 by passing the Judicial Campaign Fairness Act which not only sharply limits the amount of campaign contributions to judicial campaigns, but also greatly restricts the frequency in which judges and judicial candidates can seek them.²

2 The Judicial Campaign Fairness Act (S.B. 94), 74th Leg. R.S., ch. 763, 1995 Tex. Gen. Laws 3956-68 (codified at TEX. ELEC. CODE ANN. § 253.151-176; TEX. LOC. GOV'T CODE ANN. § 159.051-056; and in scat-

However, these reforms have not satisfied some segments of the judiciary's constituency, including major businesses, insurance companies and their defense counsel, editorial staffs of most major newspapers, and judges who have suffered or fear they will suffer the indignity of being swept out of office by a change in local political party control. Opponents of judicial elections have maintained multiple lobbyists at every legislative ses-

sion, retained the services of the former chief justice of the State Supreme Court, and expended substantial sums to convince the public that there is a crisis in the Texas court system.

The "Missouri Plan"

These advocates of change cite a recent survey in Texas in which 82 percent of those asked said campaign contributions to judges have an effect on the outcome of cases.³ Accordingly, the reformers report there is a crisis of confidence in Texas' system of justice that demands citizens give up their constitutional right to the popular election of judges in favor of an appointment system with or without some form of subsequent, non-partisan retention elections. This so-called "merit selection system" is also known as the Missouri Plan. However, the "reformers" cite only part of the results of the survey. Consider these additional conclusions of the same survey:

tered sections of TEX. ELEC. CODE ANN. § 253, 254).

3 Survey of Texas Regarding Public Trust and Confidence in the Courts and in the Legal Profession in Texas, December 1998; Summary Report, The Office of Court Administration.

- ★ Of those with experience in Texas courtrooms, 82 percent said they were satisfied with the process and the judges they observed during their courtroom experience.⁴
- ★ About 73 percent of Texans felt they would be treated fairly, compared to only 19 percent who did not feel they would receive fair treatment.⁵
- ★ Despite the *60 Minutes* programs and the reformers' rhetoric, 77 percent viewed the Texas Supreme Court as honest and ethical.⁶
- ★ An overwhelming 70 percent, despite campaign financing concerns, favored popular election of their judges.⁷

Proponents of the Missouri Plan say people, in general, are incompetent to elect members of the judicial branch of government, and this constitutional right should be given to the executive and legislative branches. This, they claim, would remove judicial selection from partisan politics, eliminate campaign funds solicitation, and allow the Governor, with the advice and consent of the Senate, to appoint judges based solely on merit. It sounds good, but it's a bad idea. A stronger case can be made for fixing the existing method of electing judges rather than abandoning it.

The Task Force on Judicial Selection

The Texas Legislature has before it a variety of proposals to change the 150-year-old system of selecting members of the state's judiciary. Some of these proposals are based on reports of the Task Force on Judicial Selection of the Commission on Judicial Efficiency.

4 *Id* at 3.

5 *Id* at 5.

6 *Id* at 4.

7 *Id*.

The Commission was created in 1996 by the Legislature. It conducted public hearings across the state, and issued its report to the Commission in December 1996. Unfortunately, members of the Commission were unable to agree upon its recommendations. The conflicting positions taken by members of the Commission are typical of those represented in the on-going debate over judicial selection of the past 40 years.

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The appealing rhetoric of merit selection of judges is contradicted by authoritative research of the subject. A recent study funded by the respected M.D. Anderson Foundation was conducted by two nationally recognized authorities in the field of judicial selection, Dr. Daniel W. Shuman of the Dedman School of Law at Southern Methodist University, and Dr. Anthony Champagne of the University of Texas at Dallas. In the study which was published by the American Psychological Association, the subject of popular selection of judges was researched in depth.⁸ The report included the results of the new research and the extensive studies the authors had previously conducted.⁹

Careful comparison of benefits claimed for the Missouri Plan with the facts revealed in research reported by these respected authorities is essential to any serious consideration of changing the method of judicial selection in Texas.

8 Daniel W. Shuman and Anthony Champagne, *Removing the People from the Legal Process*, Psychology, Public Policy, and Law, Vol. 3, No. 2/3, 242-258 (1997).

9 *Id*.

The advocates for change argue partisan politics should have no place in judicial selection and that judges should not be listed on a ballot under their party affiliation. The report indicates otherwise:

Extensive studies of bipartisan state supreme courts have consistently shown Republican judges are more conservative and likely to rule in favor of business and professionals, and Democratic judges are more liberal and likely to favor individual plaintiffs in deciding cases that come before them. While it is true many voters do not know the judicial candidates or their qualifications, it is not true that party affiliation does not give voters a common sense reason to vote for one candidate over another.¹⁰

The Missouri Plan supporters claim the plan will remove partisan politics from the judicial selection process. Research indicates this is not true:

In merit selection states, Governors rarely appoint judges who are not members of the Governor's political party. Most merit selection states have a commission of lawyers and laymen who make recommendations to the Governor. Lawyers, especially, conduct aggressive campaigns to win seats on these commissions. Knowing the Governor is unlikely to appoint candidates from the opposing party, the commissions often "rig" the process by including only one candidate from the Governor's party and all others from the opposing party, to assure their choice will be accepted by the Governor. This process does not take politics out of judicial selection; it merely shifts the political forum where the

political battles are fought out, far away from the public's view and participation.¹¹

Merit plan proponents say the judges will remain accountable to the people because they will sometimes run in retention elections. The facts:

Sometimes described as "sham elections," all judges run unopposed with only the question of whether they should be retained.¹² If they are not, the Governor and the commission appoint someone to the vacancy. In the more than 70 years since the Missouri Plan came into use, in less than 2 percent of the elections have judges been turned out of office, and in those rare cases, most were on a non-partisan ballot with traditionally low voter participation that allowed a small, alienated group to control the outcome.

Finally, the reformers claim the Missouri Plan will result in a more qualified judiciary. The facts revealed in the research study do not support this claim:

The research reviewed judicial evaluations routinely conducted in Missouri, which has both elected judges and appointed judges. They revealed that elected judges were among the most highly rated members of the judiciary, while appointment eliminated only the lowest qualified candidates.¹³ In Dallas County, where judicial evaluations for many years have compared elected state district court judges and appointed federal district court judges, the results are the same as those found in Missouri.¹⁴

... claims that the appointed system is a better way of selecting judges than partisan elections are not supported by studies of jurisdictions using the appointed system.

¹⁰ *Id* at 245-46.

¹¹ *Id* at 247.

¹² *Id* at 248.

¹³ *Id* at 247-48.

¹⁴ *Id*.

In summary, claims that the appointed system is a better way of selecting judges than partisan elections are not supported by studies of jurisdictions using the appointed system. Serious research in states utilizing an appointed system similar to the Missouri Plan proves it is not a better way.

Since the merit selection plan does not eliminate partisanship and campaign contributions from the judicial selection process, and does not give Texas more qualified judges than the present system, why take the power to select the judiciary away from the people and give it to the Governor and his or her political supporters?

... since judges in retention elections must seek voter approval to continue in office, they also solicit campaign funds to support their retention campaigns.

Voters in Texas overwhelmingly believe their judges ultimately must be accountable to them through popular election.¹⁵ Otherwise, judges may become, through bias or incompetence, a detriment to citizens' lives, liberty, and property.

It is no answer that most cases can be appealed to a higher court. There is tremendous impact on people's lives at every level of the judicial process.

It is equally true, however, that judges must be sufficiently insulated from political retribution to be able to act independently. It is for this reason the retention election provisions of the proposed legislation pose the greatest threat to an independent judiciary. History tells us voter partici-

15 Survey of Texas Regarding Public Trust and Confidence in the Courts and in the Legal Profession in Texas, December 1998; Summary Report, The Office of Court Administration.

pation in non-partisan elections is woefully sparse, often less than ten percent of eligible voters. With such a low turnout, a small, but well-organized group of disappointed litigants could rather easily unseat the judge who appropriately decided a case against their wishes.

Also, since judges in retention elections must seek voter approval to continue in office, they also solicit campaign funds to support their retention campaigns. Thus, the Missouri Plan does not eliminate the very element its proponents insist is the compelling reason for its adoption in Texas.

Pending Legislation

Legislation has been introduced in Texas that effectively addresses most of the problems identified by the recent statewide Task Force on Judicial Selection of the Commission on Judicial Efficiency and by reformers. The widely diverse 42-member task force unanimously adopted these four reforms:

- ★ Extend the terms of trial court judges from four to six years and appellate court judges from six to eight years to lessen the frequency of judicial re-election campaigns.
- ★ Provide automatic recusal of a judge who accepts from an attorney or party appearing in his or her court a campaign contribution which is in excess of the limits of the Judicial Campaign Fairness Act.
- ★ Remove judicial races from straight-party ballot selection to prevent partisan sweeps from inadvertently removing able judges from office.
- ★ Increase the minimum required experience for judicial candidates by two years as an additional safeguard to retaining experienced judges.

After more than three decades of debate, research, and legislative-mandated study, it is clear that no system of judicial selection is without flaws, including the present ones in Texas, Missouri, and elsewhere. But, by adopting these specific measures, Texas will reform the selection process without sacrificing the accountability of judges to the people they judge and without surrendering to the Governor's political supporters the people's constitutional right to select their judges

Texans have a traditional mistrust of centralized government control and great faith in the ultimate wisdom of the people to make the right choices. Indeed, the election of an unqualified lawyer to Texas' highest criminal court was an

embarrassment. But so has been the appointment of several federal judges.

In a system of popular election of judges, when the voters make a mistake, they can correct it at the next election. When a mistake is made in the federal appointed judiciary, we must live with it for a lifetime.

Texas should fix its judicial selection system, not abandon it.

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