

Legislators discuss judicial selection process

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Should Texas' judges be elected by the people or appointed by the executive branch?

The issue of judicial selection has persisted since the state's and the country's infancy. Lawmakers and judges squared off July 19 at the Texas Public Policy Foundation's conference to discuss the drawbacks and positives with each system.

Currently all judges in Texas must run for election at some point in their careers. In many cases, however, the Governor appoints a judge to fill a vacancy; once the new judge's term is up, he or she must run for election.

Texas is one of only six states that require partisan elections for most judges. Fourteen states hold nonpartisan elections in selecting judges, and a dozen appoint their judges for life tenure or use reappointment of some type.

Sen. **Robert Duncan** (R-Lubbock) has been the driving force behind trying to reform judicial selection in Texas. The problem, as Duncan sees it, is that many judges never face an opponent, especially in rural areas and small towns. In essence, voters don't really have a choice.

"I know we all talked about the notion, by God, we want to elect our judges; well, who's going to run against a sitting judge in a small town?" asked Duncan. "You've got to be crazy... [B]asically who wants to run against a judge and lose and then have to be before that judge for the rest of your career? That's why in rural counties like Lubbock, Amarillo, we see very few contested elections of sitting judges."

Duncan has authored several proposals over the years that would change the current election system to a merit-based, retention system where the Governor would appoint all judges, who then would face the electorate for approval or rejection. Seventeen states have this hybrid type of judicial selection.

"The people's power," said Duncan, "is more in an appointed retention system because they can vote and reject that judge not based upon his name or whether he wears a nice tie... but whether he's a good judge. You can vote on his record. And you don't have to find a sacrificial lamb with baggage of his own to run against a judge... I believe the system is more accountable and gives the people more power."

Rep. **Dan Gattis** (R-Georgetown) sees the move to change the current system to an appointed or retention system as "elitist and paternalistic." Eliminating elections - a choice between two candidates - would remove accountability within the system, said Gattis.

"Who in their right mind will take on a sitting judge?," he said. "I'll tell you who. I can name two different instances in Williamson County in the last ten years...where someone has taken on a sitting judge and won because the court wasn't paying attention to the people. They weren't paying attention to their business. They weren't taking care of business, and they weren't doing what they're supposed to do. Which all of us believe is to enforce the laws as written and don't write your own. It's called accountability."

Supreme Court Justice **Scott Brister** said the issue comes down to whether you prefer accountability or competence. Whereas elections, he said, can keep judges more accountable and less likely to make extreme rulings on one side or the other, appointment systems weed out the less experienced candidates and promote individuals with adequate credentials to the bench.

"The fact of the matter is," Brister said, "judges get a lot of power when they become a judge...So there has to be some kind of accountability for judges, with checks so they can't just do whatever they want to do with the power of the state and elections...require judges to take into consideration public reaction to what they do. And if you look at all the hot button issues from when a judge bans abortion or the Ten Commandments or the pledge of allegiance, 99 times out of 100, it just turns out by coincidence those judges are not elected... That could be a coincidence, but it could be because elections have a tendency, at least on the extremes, to remove the more extreme views about what the law should be or what the constitution requires or doesn't require..."

"Now of those two, I have to say after being a judge for 17 years now, surely competence is the more important...95 percent of opinions are technical matters that really have nothing to do with partisan political purposes."

Such technical matters, according to Brister, include complicated legal questions. Brister listed several examples: if a

contractor puts a rope up around a manhole to keep people from falling through and somebody else takes it down and someone does fall in the manhole, is it the contractor's fault, or is it the fault of whoever took the ropes down? Can an attorney-client contract provide that if the client fired the attorney, the typical one-third contingency fee is taken at the value of the claim at the time they were fired or the value of the claim when they finally end up settling the lawsuit?

Justice **Jan Patterson** of the Third Court of Appeals said that while she is a fan of elections, judicial service involves a fair amount of technical work. "There are many judges who are elected to our court who are startled by the amount of technical work that is done on the court and how difficult it can be," Patterson said. "So I think it's fair to say it's quite a responsibility... it requires a particular diligence and expertise, and rigor and legal thought and work ethic that may not be a product of the electoral system."

Patterson, a Democrat who was elected in a district that includes predominantly Republican Williamson County, said she had to go the extra mile while campaigning. She has supported Duncan's proposals in the past. But if Texas were to keep its election system, she'd like to see nonpartisan elections where the politics of labeling a judicial candidate as "right" or "left" is kept out of the electoral process.

"I kind of go back and forth on all of these issues, and I'm very open-minded about the issue of elections," Patterson said. "On the other hand I do think that there has to be an improvement over the current system."

Patterson said an incrementalist approach might work better in Texas, like keeping elections for district judges who are closer to the people and implementing a retention election system for the appeals court and Supreme Court.

Gattis, who opposes the merit-based, retention system, said Texas can fix the system without destroying it. He advocated requiring board certifications in certain areas of the law in order to sit as a judge.

"I think that we can do some things to make sure that we have an impartial, well-qualified jurist system," he said. "But it's not throwing the people out of the system. It's not removing the people's ability to elect those who sit in judgment over them."

Duncan, however, believes there needs to be a better way Texas selects its judges. In the 1980s, for example, the plaintiffs' bar hijacked the state Supreme Court using campaign contributions to elect candidates favorable to their cause, he said. In fact, in 1987, CBS' *60 Minutes* aired a report on judicial corruption and the influence of campaign money on the Texas Supreme Court called "Justice for Sale."

After years of trying to reverse the position of the court and after passing major tort reforms in the Legislature, Duncan doesn't want to see the court system come undone. "We don't need to allow the tobacco lawyers with all the money to come in and elect... a court that would basically undo the good work..." he said.

Gattis said judges who receive campaign dollars from lawyers are no different than legislators who raise money from lobbyists or the Comptroller when tapping accounting firms. "If we're going to fix that, we better fix all of them at the same time," Gattis said. "The point is... the best way to fix that system is with the most light... shine the light on them and it's antiseptic." O