
POINT
JUDICIAL SELECTION

MY VIEW

REFORM THE PARTISAN SYSTEM

By Wallace B. Jefferson

Texas's judicial selection process is broken. Judges are fundamentally different than legislators, but that important distinction is rendered meaningless by partisan elections. There are so many judges in Texas, arranged in such a confusing system, that even the most well-intentioned voter could not hope to make an informed choice. Judicial values we would favor—honesty, integrity, inquisitiveness—thus take a back seat to partisanship, fundraising, and name-based voting.

In the 2014 election, voters in Harris County had the opportunity to select nine statewide officials,¹ as well as a representative in Congress, a state senator, and a state representative. In addition to these 12 positions, they would have voted for an incredible 77 judges.

These would have included judges on a dizzying and disparate array of courts. Seven were from Texas's two high courts; another five were from Houston's two courts of appeals. There were 29 district court judges and another 35 trial judges.

In 2015, Texas had 1,882 judges in its appellate, district, county, and justice courts,² which have different but frequently overlapping jurisdictions. Some handle only criminal matters; some only specified subject matters; and some only claims worth more (or less) than a specified amount of money. Most of the judges must be lawyers, but the judges of our justice courts need not be. Despite my years as chief justice of the Texas Supreme Court, the size and complexity of this system sometimes leaves me reeling.

For the average voter, the basic outline of these positions—frankly, even their existence—will be unknown. And, yet, each of these judges is elected in a partisan election.

Even among judges running statewide, name recognition is extremely low. So when Harris County voters went to the polls in 2014, they were choosing who among unknown candidates could best perform a job they didn't fully understand. This is an impossible task, and so voters unsurprisingly don't perform it. Most simply vote a straight-party ticket; in Harris County in 2014, the number who did was an astounding 68 percent. Many others (about 4 percent in the same Harris County election) just don't vote in most judicial elections. And some commentators suspect that voting based on name is perhaps to the detriment of candidates whose names sound "foreign" or "ethnic."

These ills are magnified by the fact that partisanship is, in most instances, a poor proxy for judicial competence. What the average voter knows about the judiciary is driven by media coverage of the U.S. Supreme Court, especially its cases touching on hot-button social or political issues. But the vast majority of judging looks nothing like what the

Supreme Court occasionally does.

Most of what Texas's 1,882 judges do is more mundane, if nonetheless important. They probate wills and apportion divorcing spouses' assets. They determine child support and custody. They oversee trials and changes of pleas in criminal cases. They police discovery and preside over settlement conferences.

Rarely do these matters implicate a judge's politics. But they consistently implicate a judge's sense of proportion and fairness, patience, compassion, and intelligence. A judge's party is a proxy only for the former, never the latter.

It is thus a shame that in every election cycle, good judges of all political affiliations are swept out of office not as a judgment on their record but as a consequence of the state's political mood. We expect our legislators to be responsive to the populace's changing sentiments. Our constitution protects citizens' right to petition legislators and move them to one position or another. In judges, by contrast, we look to impassivity in the face of particular interests, be they special or general. We want independence and for each person before the court to have an equal chance. As U.S. Supreme Court Justice Ruth Bader Ginsburg recently put it, "Partiality, if inevitable in the political arena, is disqualifying in the judiciary's domain."³

But partisan elections, especially those that include fundraising, shake the public's confidence in the judiciary. Opinion polling shows that voters believe that campaign contributions influence judicial decision-making. And many judges struggle—as I myself struggled—to square their ethical obligation to be and to appear beyond corruption with the practical realities created by our partisan electoral system.

Texas must value competence and integrity in its judges. But its current system, in which an overwhelmed electorate ineffectually uses partisanship and name recognition as a proxy for these attributes, fails to do so. The result is the loss of good judges and a decrease in public confidence.

Reform, beginning with merit selection followed by retention elections, is imperative.

NOTES

1. Governor, lieutenant governor, attorney general, comptroller, commissioner of the Texas General Land Office, commissioner of agriculture, railroad commissioner, State Board of Education member, and U.S. senator.
2. See <http://www.txcourts.gov/media/1097010/Court-Structure-Chart-Sept-2015.pdf>. More if you include municipal judges, of which there were 1,272 in 2015, some of whom were elected.
3. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1674 (2015) (Ginsburg, J., concurring).



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The views expressed in this article are those of the author and do not necessarily represent the policy, position, or views of, and should not be attributed to, the State Bar of Texas.

COUNTERPOINT
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MY VIEW

A DEMOCRATIC PROCESS IS THE BEST CHOICE

By David Butts

Concern has grown over whether our system of selecting judges makes Texas justice appear tarnished. With a few notable exceptions, the call for reform has been met, up to this point, with “not now.”

No doubt we are to soon embark on another crusade to save us from our own worst instincts of which there are many to go around. Because efforts to achieve the changes deemed necessary require the diligence of the Texas Legislature, the results will prove challenging.

It is the election of judges and the necessity of soliciting campaign contributions that has our reformers distressed. Keeping them up at night is the raising of campaign funds and the knowledge that a ruling that upsets deep pockets could become a costly profile in courage. This is a serious issue, one that has been greatly exacerbated by the U.S. Supreme Court’s rulings that money virtually trumps all in the field of free speech. The U.S. Supreme Court is an appointed bench that requires no campaign money but nevertheless believes that democracy must be a costly business.

Now the goal is to have our judges appointed. Those in favor say that voters know nothing of whom they are voting for when it comes to judges. Others would say that this is usually true of most elections. Reformers say judges are elected because of partisanship and that there is no Democratic or Republican justice. Looking at how people vote in different parts of the state, the voters do not count on that.

In Texas, we do have an appointment system. The governor fills new courts and vacancies with confirmation by the Senate. Former Gov. Rick Perry appointed more district and higher court judges in the state of Texas, including seven of the nine sitting members of the Texas Supreme Court, than any previous governor.

The *Austin American-Statesman* reported on September 20, 2014, that Perry “appointed reliably like-minded people—donors to his campaigns, one-time staffers in his office, former lobbyists—to dozens of boards, commissions and judgeships.”

Attempts at reform should start with restricting a governor’s ability to appoint whom he or she chooses. Otherwise, with a strictly appointed system, even with re-

tention, we will see a judiciary that is reflective of one mindset. Texans are not of one mind. In Travis County, it is unlikely that most of the district judges that currently serve would be on the bench, and yet many have soundly beaten a governor’s appointee.

The reform argument usually proposes a merit selection process sometimes combined with a retention election. There is one major problem with this: The only politics that are restricted from the selection of our judges are the voters’. The governor, the Legislature, the elite group of lawyers on the selection committee, and the special interest groups will continue to influence and decide who those select candidates are and who is chosen.

For retention elections, the judge that crosses deep-pocket special interests or ideological fault lines is just as subject to defeat as he or she would be in a partisan sweep. As proven in California, Wisconsin, and Iowa, judges are not protected from being thrown out for the decisions they make, as opposed to misconduct or lack of work ethic, and in fact may be made more vulnerable if they have to stand alone without a ticket to provide support.

We will always have some form of politics determining who serves us, but money often bends the process and creates a distorted and even a sometimes-corrupt environment.

We currently have limits on individual and group contributions to judges as well as overall spending limits. To make the election of judges fairer, there should be reductions in the level of personal contributions and a move toward public funding that will also serve to balance the playing field for candidates who are at a disadvantage against personally wealthy opponents.

The governor’s ability to use a judgeship for patronage should be eliminated. Create judicial selection committees with rotating membership comprised of a cross section of citizens. This approach could exist regionally and could fill new courts and vacancies.

Trust the voters with the final say. Voters will not always make the best choice, but they usually get it right.

In the end, a balanced democratic process is our best choice. **TBJ**



DAVID BUTTS

believed as a boy that Texas would become a great state, that in spite of some of its more reactionary ways, Texas would overcome those limitations to become a leader in so many areas. He has spent his life trying to elect people who believed in the potential greatness of Texas. His dream does not die.

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