

## MEMORANDUM

Date: February 9, 2020

**To:** Sen. Brian Birdwell, Rep. Carl Sherman, David Oliviera & David Beck  
(Commission on Judicial Selection Working Group #3)

**From:** Lynne Liberato (Chair, Working Group #3)

**Subject:** Background on Judicial Qualifications & Use of Citizen Panels<sup>1</sup>

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This is to provide some basic information regarding the topics on which we were assigned to develop and report on.

Our specific charge is as follows:

Citizen Panels and Judicial qualifications: The group will consider the role, if any, of citizen panels in a system with an appointed judiciary and consider changes to the current qualifications of Texas judges.

This memo is not meant to be a recommendation or comment on our assigned topics. Rather, it is an attempt to put in one place some background on our topics and to identify considerations that may require further review and analysis.

Changes for current qualifications is examined first because there is much less information to consider; that topic is followed by review of the role of citizen panels.

### **Topic 1: Changes to the Current Qualifications of Texas Judges**

#### **Current qualifications for Texas judges:**

Summary:

Appellate Justices: The key current qualifications for appellate justices is that they must have been a practicing judge or lawyer for at least 10 years at the time of election and shall be at least 35 years old. (Both are constitutional requirements.)

Trial Judges: The key current qualifications for trial judges is that they must have been a practicing judge or lawyer for 4 years (constitutional) and must be at least 25 years old (statutory).

#### **Relevant sections of constitutional provisions and Texas Government Code sections:**

Art. V Texas Constitution:

Sec. 2. SUPREME COURT; JUSTICES ... (b) No person shall be eligible to serve in the office of Chief Justice or Justice of the Supreme Court unless the person is licensed

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<sup>1</sup> This is meant to be a working document providing background information and not meant to be a comment on any aspect of this information. In addition, the information contained in this document comes largely from other written sources and in some cases may be lifted almost directly from a source. We have been provided many of these sources and I am glad to provide any others.

to practice law in this state and is, at the time of election, a citizen of the United States and of this state, and has attained the age of thirty-five years, and has been a practicing lawyer, or a lawyer and judge of a court of record together at least ten years.

Sec. 4. COURT OF CRIMINAL APPEALS; JUDGES. (a) ...The Judges shall have the same qualifications ... as the Associate Justices of the Supreme Court, and the Presiding Judge shall have the same qualifications ... salary as the Chief Justice of the Supreme Court.

Sec. 6. COURTS OF APPEALS; JUSTICES; JURISDICTION. (a) ... The Justices shall have the qualifications prescribed for Justices of the Supreme Court....

Sec. 7. JUDICIAL DISTRICTS; DISTRICT JUDGES; TERMS OR SESSIONS; ABSENCE, DISABILITY, OR DISQUALIFICATION OF DISTRICT JUDGE....Each district judge... shall be a citizen of the United States and of this State, who is licensed to practice law in this State and has been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election, who has resided in the district in which he was elected for two (2) years next preceding his election, and who shall reside in his district during his term of office and hold his office for the period of four (4) years,...

Sec. 15. COUNTY COURT; COUNTY JUDGE. There shall be established in each county in this State a County Court, which shall be a court of record; and there shall be elected in each county, by the qualified voters, a County Judge, who shall be well informed in the law of the State; ...

Section 25, Government Code:

Tex. Govt. Code Sec. 24.001. AGE QUALIFICATION OF JUDGES. A district judge must be at least 25 years old.

Tex. Govt Code Sec. 25.0014. QUALIFICATIONS OF STATUTORY COUNTY JUDGE. The judge of a statutory county court must:

- (1) be at least 25 years of age;
- (2) be a United States citizen and have resided in the county for at least two years before election or appointment; and
- (3) be a licensed attorney in this state who has practiced law or served as a judge of a court in this state, or both combined, for the four years preceding election or appointment, unless otherwise provided for by law.

Tex. Govt. Code Sec. 25.2602. JUDGE FOR MULTICOUNTY COURT AT LAW. (a) The judge is elected by the qualified voters of the counties at the election at which other statutory county court judges are elected.

(b) The judge must be:

- (1) at least 25 years of age;
- (2) a resident of one of the counties; and
- (3) a licensed attorney in this state who has practiced law or served as a judge of a court in this state, or both combined, for the four years preceding election or appointment.

Tex. Govt Code Sec. 25.2652. STATURORY PROBATE JUDGE. (a) The judge is elected by the qualified voters of the counties at the election at which other statutory probate court judges are elected.

(b) The judge must be:

- (1) at least 25 years of age;
- (2) a resident of one of the counties; and
- (3) a licensed attorney in this state who has practiced law or served as a judge of a court in this state, or both combined, for the four years preceding election or appointment.

### **Previous recommendation in Texas:**

A Task Force of the Texas Commission on Judicial Efficiency (Created by Legislature in 1995) recommended an increase the minimum trial judge qualification requirements from four to eight years of experience practicing law.

Texas Judicial Committee Recommendation 1B (Created by Civil Justice Council; report issued 2018):

The Legislature should pass a joint resolution proposing a Constitutional amendment to modify the qualifications to serve as justices/judges as follows:

o Eliminating or increasing the maximum age restrictions as a qualification to serve as a justice/judge and placing greater emphasis on years of experience.

o Alternatively:

- Raising the age to preside over statutory county courts and statutory probate courts from 25 to 30 years;
- Requiring justices of the peace and municipal judges (not a court of record) to be at least 25 years old if the justice/judge is a licensed attorney or 30 years old if the justice/judge is not a licensed attorney; and

- Requiring municipal judges (court of record) to have the same qualifications as a district judge.
- Requiring justices of the peace in counties with a population exceeding 500,000 to be licensed attorneys.
- Increasing the required number of years of service as a practicing attorney or judge to twelve years to serve as an appellate justice/judge and to eight years for a district judge.

**Subjective qualifications:**

Any assessment of judicial qualities is complicated by the intangible nature of those qualities. Among the qualities identified and investigated by nominating commissions are temperament, sobriety, health, professional reputation, patience, impartiality, and courteousness. As one commentator noted, these qualities are “vague and imprecise” and cannot always objectively be proven.

**Possible changes:**

1. Extend the time required for a judge to have been a practicing judge or attorney.
2. Raise age limits.
3. While not directly a change to judicial candidate qualifications, other study groups may consider additional ways—under elective systems—to educate voters on candidates’ qualifications such as designation on the ballot that a candidate is an incumbent and/or preparation and distribution of candidates’ qualifications.
4. There are few recommendations in the literature on this topic. We should consider whether there are other options.

**Topic 2: Role, if any, of Citizen Panels in a System with Appointed Judiciary**

**Recent proposed legislation: Legislation House Bill 4505 (2019):**

- This legislation would have applied to all state district court and appellate court judges and justices in a judicial district (1) that includes a county with a population of over 500,000,<sup>2</sup> or (2) whose voters have chosen to fill district judge vacancies by gubernatorial appointment.
  - A “Judicial Appointments Advisory Board” would review each appointee’s qualifications and made recommendations to the senate on whether the appointee was “unqualified,” “qualified,” or “highly qualified.”

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<sup>2</sup> These include Bexar, Collin, Dallas, Denton, El Paso, Fort Bend, Harris, Hidalgo, Montgomery, Tarrant, Travis, and Williamson County. *Texas Counties: 2018 Population Estimates from the U.S. Census Bureau*, The County Information Program, <http://www.txcip.org/tac/census/morecountyinfo.php?MORE=1044>.

- The Board’s assessments would have been provided to the lieutenant governor and the senate committee chair of the committee with jurisdiction over gubernatorial appointments.
- The Board composition would have been as follows:
  - three members appointed by the house majority party,
  - two members appointed by the house minority party,
  - two members appointed by the senate majority party,
  - two members appointed by the senate minority party,
  - one member appointed by the chief justice of the Texas Supreme Court, and
  - one member appointed by the presiding judge of the Texas Court of Criminal Appeals.
- Members would have served staggered terms of six years, limited to a total of 12 years on the Board.
- Under HB 4504, all state district court judges and appellate court judges and justices would have been subject to nonpartisan judicial retention elections during the fourth and eighth years of a twelve-year term.

**Citizen commissions under the Missouri Plan/Merit Selection:**

The use of citizen panels, typically referred to as “Nominating Commissions,” usually arises under what is known as the Missouri Plan and/or Merit Selection. This system combines elements of appointment- and election-based selection methods.

Under this system, a nominating commission selects a slate of candidates. The governor then picks from this slate to fill judicial vacancies. Sitting judges approaching the end of their terms may seek additional terms through standing in an unopposed yes/no retention election.

No two states have adopted merit selection in the same way. Some states use senate confirmation after appointment based on commission nominations. Some states use retention elections, and some do not. Some nominating commissions are populated by lawyers while others focus on broader public representation. The methods of selecting nominating commission members also vary greatly. However, there are some common elements.

**Common elements of citizen commissions under the Missouri Plan/Merit Selection:**

- A commission vets candidates for judicial vacancies and sends a list of qualified candidates to the appointing authority, typically the governor.
- Commission membership varies by state, but usually the governor appoints at least some members, and in some states the legislature and state bar also play a part in appointing commissioners.

- In most states, the appointing authority (typically the governor) must choose from the list provided by the commission.
- A state may choose to use a nominating commission for one level of courts, but not another.
  - In 36 states and D.C., nominating commissions are used to help fill vacancies on the high court.
  - In 25 states, judicial nominating commissions are used to select trial court judges.
- Whether the commission recommendations are binding varies by state.
  - Most of those commissions — 29 of them and D.C. — issue binding recommendations.
  - In the seven states where commission's recommendations are nonbinding, the appointing authority receives a list of vetted candidates from the commission but is not required to appoint from it.
- While some states use a single nominating commission for their courts, other states have created multiple county-level commissions to supply trial court nominees in each county. (Minnesota, for example, uses a commission for its trial courts, but not its appellate courts.)

**Advantages attributed to use of citizen commissions through the Missouri Plan/Merit Selection:**

The most noted advantage is the removal of partisan politics from the selection of judges. By eliminating the many unseemly influences inherent in a partisan election system, merit selection frees judges to render impartial decisions without any appearance of impropriety, resulting in enhanced public trust and confidence. Thus, the selection of judges through nominating commissions will result in a more qualified and competent judiciary.

Other advantages cited are as follows:

- Judges selected through such commissions will be more independent than elected judges. This independence stems from partisan balance on the commission and freedom from political pressure from the electorate or other appointive authority.
- The selection of judges via a commission bolsters judicial independence by removing partisan politics, political patronage, and money from the equation to a greater degree than under the electoral alternatives.
  - One advantage of the Missouri Plan is the elimination of campaign funding. The need for campaign funding in elections, the increased politicization of judicial elections, and the various restrictions implemented by states on campaign conduct create numerous problems for judicial candidates.

- Without the check of a nominating commission or legislative consent, the appointing authority could use judicial appointment as a reward for personal or political considerations.
- Commission members are better able to identify and evaluate the credentials and abilities of potential judicial candidates than are voters.
- Appointed judges may be less likely to be swayed by public opinion than judges who are initially selected in competitive nonpartisan or partisan elections.
- If reappointment done through retention elections, it allows voters to play a role in determining whether a judge should be retained or removed and is therefore more democratic and increases the popular accountability of judges.
- Bolsters the independence of judges vis-à-vis the governor and legislature (compared to systems where reappointment is not done through retention elections).
- Several commentators also assert that appointment may actually increase diversity on the bench since it focuses more on qualifications than on political alliances, thus permitting nontraditional candidates for the bench to stand on their own achievements.
- Finally, many nominating commissions actively solicit potential candidates for judicial office, which arguably results in a larger pool of qualified individuals from which to draw.

**Disadvantages attributed to use of citizen commissions through the Missouri Plan/Merit Selection:**

The most common criticism of the Missouri Plan is that it deprives the public of the right to vote for judges and the accompanying accountability to the electorate.

Other disadvantages cited are as follows:

- Does not provide voters with a voice in the initial selection of judges and is therefore still in many ways undemocratic.
- Uses an initial appointment process that is often opaque and lacks transparency.
- Is not entirely divorced from partisan politics and patronage, since the members of the commission are normally chosen by individuals with partisan and/or policy agendas.
- May result in judges who are more easily swayed by public opinion than in an appointment system without retention elections.
- It merely shifts the political emphasis to unaccountable commissioners.
- Selection of judicial nominees by a commission does not screen well for ideology and therefore does not represent the electorate through representational democracy (as opposed to gubernatorial or legislative appointment).
- Appointment systems tend to replace electoral politics with a “subterranean” set of state bar politics. There is a risk of lawyer control inherent in nominating commission members selected, at least in part, by state bar associations.

### **Other issues for consideration (assuming a commission is created):**

Among the states that use commissions, there are numerous differences concerning the number and composition of commissions, their methods of selecting members, and requirements regarding the commissions' geographic and political makeup.

The following are some of the issues requiring determination when a state chooses to use commissions:

**Should there be one or multiple commissions?** Of those states that use some form of nominating commission, more than one-half use only a single commission. Of those remaining states using multiple commissions, the total number of nominating commissions ranges from three in Arizona to 57 in Kentucky and 114 in Iowa.

**How are commissioners selected?** The most prevalent method to select commission members involves a hybrid system in which the attorney members are either appointed or elected by the state bar association, and the non-attorney members are gubernatorially appointed.

Both attorney and non-attorney members may also be confirmed by the Legislature or Senate.

Other states provide for the selection of at least some commission members by appointment but disperse that appointive power among various state officials, including the governor, the attorney general, the legislature and the chief justice.

Elsewhere, nearly all members of other states' commissions are appointed by the governor, but such autonomy is often restrained by requirements that at least some appointments be made from nominees submitted by various groups such as the state bar and leaders in the legislature.

**How should attorney and lay members be apportioned to determine commission composition?** Nominating commissions typically must include both attorney and non-attorney members.<sup>287</sup> States often require that at least one judge serves on a commission. The proportion of attorney and non-attorney membership varies greatly, with some states allocating commission slots to a majority of lawyers, others to a majority of non-lawyers and others an equal number.

A more common membership structure involves one judge (usually the chief justice of the state's supreme court or his or her designee) and an equal number of attorney members and non-attorneys drawn from the general public.

**Should, and if so how, should partisanship factor into commission composition?** Many states have adopted provisions concerning the political activities or affiliations of nominating commission members. Some states provide that commission members may not hold an official position in a political party. Other states require that the selection of commission members and/or the nomination of commission candidates be done on a nonpartisan basis.



Other states have adopted specific requirements regarding the representation of political parties among members of nominating commissions to ensure that the two major parties are represented either equally or by a majority of no more than one member.

A small number of other states—including Kentucky and Oklahoma—require that non-attorney commissioners be split equally along party lines, but do not impose a similar requirement for attorney members.

**Should, and if so how, gender, race, and ethnicity factor into commission composition:**

Some states have provisions seeking to ensure that the makeup of their nominating commissions reflects the diversity of their population. That provision may be a generalized statutory directive or provisions that a specific number of women or racial or ethnic minorities must be appointed to their nominating commissions.

(In the absence of clear evidence of discrimination, however, lower courts have ruled that specific requirements concerning the composition of nominating commissions are constitutionally suspect.)

**Should, and if so how, should the residence of the commissions factor into commission composition?** The commission structure adopted by many states requires that commission membership correspond to the geographic layout of those states. As with race and gender, some states simply encourage broad geographical representation in general terms, while others have adopted more specific requirements.

In the states using multiple judicial nominating commissions, geographic diversity is often a nonissue, given that their membership is usually drawn from the same district or county over which that specific commission has jurisdiction.

**Should, and if so how, does the practice area of attorney members factor into commission composition?** In a few states, membership criteria for certain nominating commissions include the practice areas of its attorney members. New Mexico, for example, requires that four of the attorney members on its commissions be chosen so that all aspects of the “civil and criminal prosecution and defense” bars are represented. Similarly, in Alabama, the four attorney members of the Tuscaloosa County Commission are to be selected from each of four groups: plaintiffs’ civil practice, defense civil practice, domestic relations, and criminal defense. Some states stipulate that no more than two of the attorney-members of their commission can be from the same law firm.

**Should, and if so how, should industry, business, or profession of commissioners factor into commission composition?** Another membership requirement adopted in connection with certain state nominating commissions involves diversity of representation of businesses and industries among their non-lawyer members. For example, the four non-attorney members of Montana’s Commission must each represent different industries, businesses, or professions. Similarly, the membership of the advisory council that serves as a nominating commission for the housing courts of the New York City civil court system must include three members drawn from the real estate industry and three from tenants’ organizations.

## Other options relating to use of Citizen Commissions:

**Hybrid Selection:** Some states use a version of the Missouri Plan without a binding nominating commission and Hawaii uses a judicial selection commission instead of retention elections to decide whether sitting judges are retained for additional terms.

**Judicial Nominating Commission/Governor Retains:** The difference in this system and the Missouri Plan concerns retention. When the judge's initial term is up, the governor has the option to re-nominate the justice--either pending or not pending legislative ratification. Initially, a judicial nominating commission provides the governor with a short list of potential candidates for a judicial post. The governor then appoints a specific candidate either alone or (more commonly) with the advice and consent of the state senate.

Advantages attributed to this selection method:

- Most are the same as the Missouri Plan with a focus judicial independence by removing partisan politics, political patronage, and money from the equation to a greater degree than under the electoral alternatives.

Disadvantages attributed to this selection method:

- Many of the disadvantages attributed to this system are the same as for the Missouri Plan.
- It does not provide voters with any voice in the selection or retention of judges and is therefore undemocratic.
- It may result in judges who are less willing to block or overturn executive orders or legislation.
- Judges within pure appointment systems are more likely to be perceived by the public as political cronies.

**The O'Connor Variant to the Missouri Plan/Merit Selection (Giving retention voters information on judges):** Former United States Supreme Court Justice Sandra Day O'Connor helped create the O'Connor Judicial Selection Plan, which is a variation of the Missouri Plan.<sup>661</sup>

An element of the plan involves a method for judicial performance evaluation, yielding information to be disseminated to voters to use when deciding whether to retain a judge in office. In this way, the O'Connor Plan seeks to balance judicial independence against accountability. By giving voters relevant and impartial information upon which to base the retention decision, the plan attempts to create a better accountability model.

At the same time, the O'Connor Plan stresses that retention elections should be conducted without fundraising or political efforts by the incumbent judge, thus preventing the judge from being exposed to influences that naturally tend to reduce judicial independence, or at least the appearance of independence.

**Commission merely determines merit of applicants:** One commentator suggested that a commission make a threshold decision about whether applicants are sufficiently meritorious and

send everyone who clears that bar to the governor. (Greg Goelzhauser, “Judicial Merit Selection.”)