



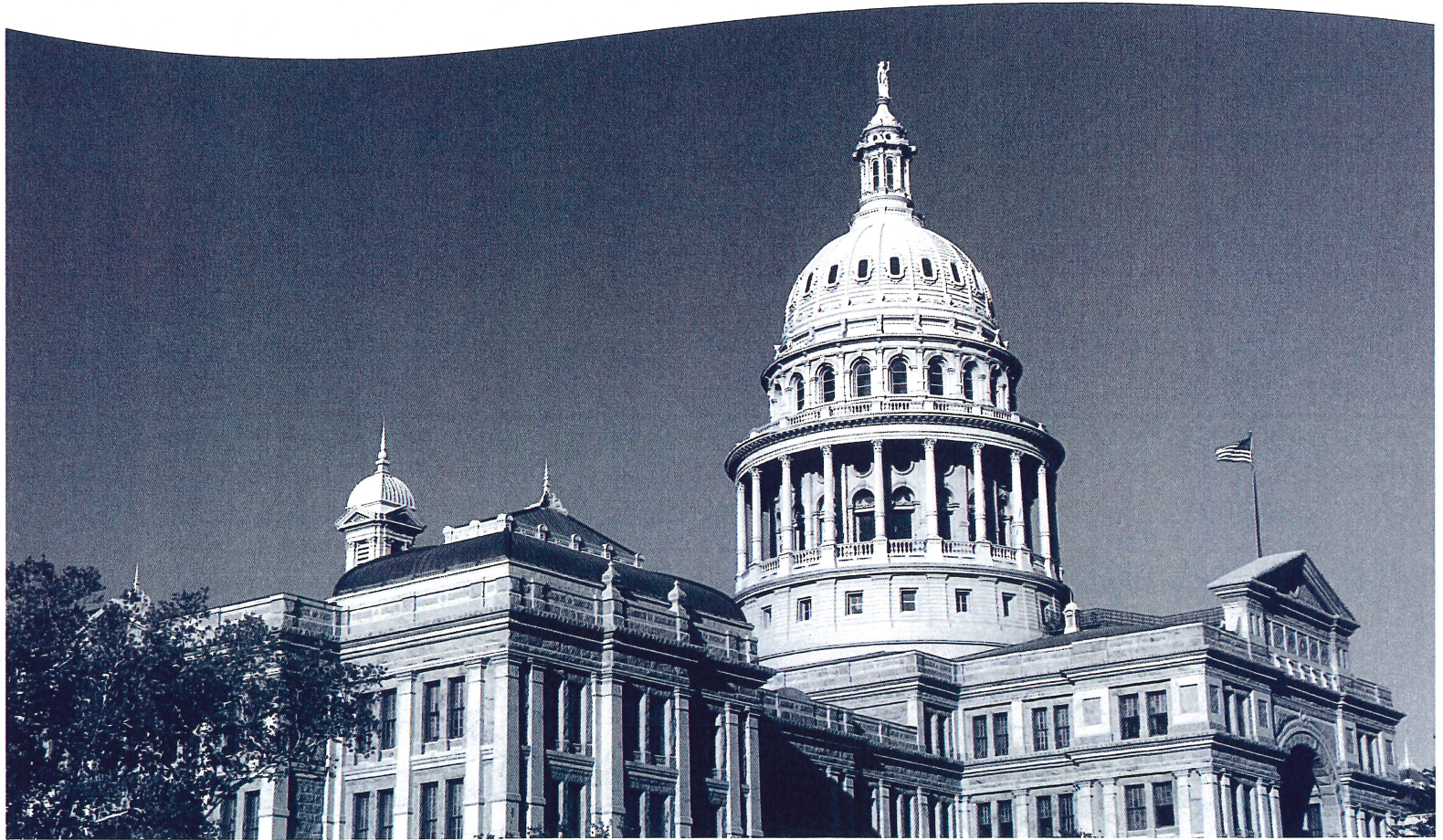
TEXANS FOR LAWSUIT REFORM



2007

LEGISLATIVE PROPOSALS

BRIEFING BOOK



January 2007

Over the last decade, the Texas Legislature has enacted the most comprehensive civil justice reform in our nation's history. In the process, legislators worked closely with two Governors, listened to their constituents, carefully considered the public policies at issue, and scrupulously studied the complex and arcane details of each bill.

The positive results for our state are manifest: a restored respect for the fairness of the law, enhanced access to health care, and an improved competitive environment for business and industry that is fuelling a robust economy and enormous job growth.

There will continue to be abuses to the civil justice system that emerge over time which the Legislature will be asked to address, such as the current venue problem described in this Briefing Book. The future thrust of reforming the civil justice system, however, will concern the quality of our state's judges, the efficiency and accountability of our judiciary, and the impact of jury service and juror selection on the impartiality of trials.

This Briefing Book lays out four initiatives. Only one, the amendment to a venue statute, can be termed "tort reform." The other three proposals – concerning juries, the selection and removal of judges, and the modernization of the antiquated Texas court structure and administration – all address issues of government efficiency and citizen participation in our civil justice system.

The jury is the centerpiece of the American trial system. It is critical that citizens from throughout our society answer the call to jury service and, when they do, that the trial process treats them efficiently and respectfully, and gives them every opportunity to make informed decisions on the questions put to them.

A party to a lawsuit in Texas should receive fair, efficient, honest and competent treatment in any courthouse in our state. Toward that goal, Texas should modernize the structure of its antiquated court system, which has been built in bits and pieces over the last century and a half. Rationalizing our courts will make them more efficient and accountable and better assure that cases are assigned to judges whose experience and knowledge make them best suited to handle particular types of lawsuits.

Finally, Texas should improve its methods of selecting, retaining and removing its judges. It is important to attract the best men and women for service in the judiciary. TLR is part of a large coalition of lawyers, judges and lay citizens who believe that an appointment and retention system, with thoughtful checks and balances, would be a serious improvement over the present partisan system of elections.

We in TLR are proud to be part of Texas's robust representative democracy, and we look forward to once again working with statewide officials, legislators, their staffs, and the people of Texas to improve our civil justice system.

Sincerely,



Richard W. Weekley
Chairman & CEO



Richard J. Trabulsi, Jr.
President



IMPROVING JUDICIAL SELECTION AND REMOVAL IN TEXAS

Introduction

The selection of judges in Texas by popular, partisan vote in contested elections has become increasingly problematic as the population of Texas has grown and the number of judicial positions has increased. The public's ability to make meaningful distinctions between judicial candidates has therefore declined.

It is simply not possible for the voting public to obtain enough information about judicial candidates to allow rational decision-making as to who should occupy judicial positions.

Consequently, when judicial positions are filled by contested election, the vast majority of voters select judges based on the only information available to them—name recognition and party designation. Of these *de facto* criteria, party affiliation is the most significant and dictates the outcome in nearly all judicial races.

In those races where party affiliation is not determinative, the outcome turns (with exceptions in certain small communities) on a candidate's gender, name, or ethnicity (when discernible from the name). Any correlation between the more qualified candidate and the candidate actually elected is usually coincidental or random.

Under our current system, the voting public will – albeit with the best intentions – remove good judges that happen to be affiliated with the party out of favor and replace them with candidates from the opposing party. Voters will do this regardless of whether the replacement candidate is better qualified or completely unqualified, simply because there is a general desire for change due to issues unrelated to the judiciary. The converse is also true. Voters will put into office and retain judges simply because there is satisfaction with the way things are generally being done in either our executive or legislative branches. While this is the way our democracy is intended to work from a legislative and executive standpoint, it is not a desirable way to build and maintain a stable, professional, and competent judiciary.

The reality is that we are selecting and removing our judges based, in large part, on criteria that have almost nothing to do with attributes and qualities we want and need in the people who make legal decisions that affect every one of us.

Partisan elections are not a sensible way to select people to serve in highly technical judicial positions that require particular legal skills, experience, and analytical abilities. Partisan elections are also not a reliable way to remove judges from office who are not performing their judicial duties in an acceptable manner. Good judges can be affiliated with either major party as can bad judges. Party affiliation, gender, name, and ethnicity cannot tell us whether we ought to keep a judge or not. With the current method of selecting and removing judges – which in many instances can amount to the equivalent of a lottery – our judicial system suffers and our society suffers.

We need to change the way we select and remove our judges. This is not to say that we, the voting public, do not have a role in the process. We do. It is an important role. Our judicial system, after all, exists to serve us and it must serve us in a manner that we collectively agree is appropriate. However, our role in selecting and removing judges should be consistent with what we are actually capable of knowing and doing as a body politic.

A system where our judges are *initially selected* through an appointment process—that includes a blue-ribbon screening commission to interview and evaluate judicial candidates—and then *retained or removed* by the voting public based on job performance will better serve our goal of building a stable, professional, and respected judiciary. Such a system will also better serve our need for a judiciary that is independent enough to apply the rule of law to everyone regardless of position or status as well as provide an appropriate measure of accountability so that ultimate control remains with the people our judiciary serves.

Judicial Independence

- Judicial independence is crucial to a properly functioning representative democracy based on a constitution and the rule of law.
- Judges must have the ability to make decisions that protect individual rights, the rights of minorities, the rights of persons and organizations that are unpopular or repugnant, as well as decisions that may be adverse to persons or entities that are wealthy or powerful. The fact that judges may be called upon to render unpopular decisions in accordance with the rule of law creates an internal contradiction in our judicial system when judges are then subject to popular election.
- On the other hand, complete judicial independence can create a lack of accountability that sometimes results in the abuse of power. A balance must be struck between the need for judicial independence and the need for judicial accountability. The federal system of lifetime appointments subject to good behavior can be improved upon by having limited, rather than lifetime, terms for

judges. An additional check can be established by retention elections, in which a judge is subject to a popular “approve/disapprove” vote periodically. A system of this kind would make judges much more accountable to the people than are federal judges, who have lifetime appointments. Yet, an appoint/retain system allows the appropriate level of judicial independence for judges to fulfill their duties without undue political pressure.

Checks on Judicial Power

- The process of *selecting* judges should be considered distinct from the process of *removing* judges. Before a judge takes office, it is virtually impossible for the voting public to garner enough information about the potential judge to make an informed decision regarding whether he or she will be a good judge or a better judge than other candidates. However, after a judge takes office, the voting public has the judge’s actual performance on which to measure the judge.
- Most of the time this will not be controversial and a qualified, appointed judge will retain his or her position.
- In rare instances, a judge’s performance will be outside the parameters of what the voting public will accept from a judicial officeholder. In those instances, the retention election will provide a way for the voters to essentially “impeach” a sitting judge and remove him or her from office. This process offers a substantial check on judicial power. Although likely to be rarely used, the simple fact that it exists will work to check certain potential judicial abuses that might arise if appointments were not subject to popular review.
- Converting to an appointment and retention system is designed, in part, to encourage lawyers to consider the judiciary as a career. By having a more stable and predictable system of selection and removal, a larger and better pool of lawyers would be interested in serving as judges.
- Career jurists will many times be seeking to retain their positions beyond the term to which they were initially appointed. To do so, they will have to be reappointed at the time their initial appoint/retain term ends, which means that they will have to have performed in a manner satisfactory to the Governor and the Senate.

Retaining the Right to Remove Judges

- Although not commonly recognized, our current system of selecting judges has a substantial appointment feature embedded in it. Our constitution allows the Governor to appoint judges to fill vacancies for unexpired judicial terms. This has

resulted in 36% of our judges statewide reaching the bench via appointment and over 50% of our court of appeals and Supreme Court judges being selected initially by gubernatorial appointment.

- The significance of this is that we do not feel a collective disenfranchisement of our ability to select judges simply because the Governor has, in many instances, appointed the judges initially. This underscores the reality that it is not the initial selection of judges that most concerns us as voters. Rather, the people's primary concern is retaining the ability to hold judges accountable and remove them from office if they overstep their authority, are dishonest or incompetent, or otherwise fail to conduct themselves as judicial officers should.
- Finally, it should be noted that the current Judicial Conduct Commission would remain in place, with its power to discipline and seek removal of judges.

Expanding the Pool of Qualified Candidates

- A judicial selection system that does not depend on popular elections will expand the pool of qualified and skilled lawyers willing to consider and seek a judicial position. Many of our best legal minds will not consider a judicial position under our current system.
- One reason for this is, of course, compensation. Successful lawyers can make more money in private practice.
- However, there is another reason that keeps good lawyers out of the judicial arena even when compensation issues are not a decisive factor. It is difficult to justify a career change as drastic as closing down a successful legal practice when your ability to achieve or retain a judicial position depends almost entirely on the partisan political landscape and has almost nothing to do with your own integrity, skills, qualifications, or performance. Many successful lawyers quite rightly view such a career move as an unacceptable risk.
- Still another deterrent to good men and women seeking judicial office is the distaste that many have for raising campaign funds from litigators and potential litigants. Almost every good judge dislikes this aspect of judicial campaigning and many good lawyers who would otherwise seek to serve on the bench do not do so because of this need to raise money for campaigning.
- While the vast majority of Texas judges are honest and do their best not to be influenced by campaign contributions, there nevertheless is frequent public criticism of the role of campaign contributions in judicial elections. Yet our

current judicial election system leaves judicial candidates no choice but to engage in fundraising for their campaigns.

- It should be noted that frequently there is an inherent personality disconnect between a person who would be a good judge and one who would be a good political candidate. Often a good judge is absolutely terrible at campaigning. Conversely, often, a person who is naturally adept at campaigning would not necessarily have the attributes to be a fine judge.
- This is not to say that no highly qualified, successful lawyers choose to move to the bench today. Some do. We have a number of very fine judges serving despite, rather than because of, our current lottery-like system of judicial selection and retention.
- However, there is little question that if we changed our system to make it more predictable, more qualification-based, and less politically volatile, we would greatly expand the number of qualified lawyers who would consider and seek judicial positions. A less volatile system would also allow more of these candidates to retain their positions. This would result, over time, in raising the overall quality of our judiciary—a result which would benefit all of us.

Judicial Retirement Benefits

- The availability of dependable retirement benefits can also affect a person's willingness to make a career move from lawyer to judge. Under our current plan for judicial retirement in Texas, the minimum number of years of service before one can become fully vested in retirement benefits is ten years. Yet a person who is contemplating a run for a judgeship in many counties today must contemplate that he or she will be voted out of office before vesting her retirement benefits for no reason other than a partisan electoral sweep. That lottery-like possibility discourages many good people from seeking judicial posts.

Contradiction in Electing Judges

- Judges are not representatives of political majorities. Their role is to be impartial, fair, and apply the rule of law regardless of the political ramifications or the parties before them. Our society wants a judge to be objective and competent in presiding over a trial or deciding a case based on the facts and the law. We need a judicial selection and removal system which reflects that societal goal.
- We do not want our judges to “vote their district.” Indeed, we require them to ignore the will of the majority if that will is contrary to law. Yet, when we subject

our judges to contested, partisan elections we are, by definition, asking them to be responsive to majority views in the same way that we require our legislators to be responsive to a majority of their constituents.

- Thus, we have an internal contradiction in our political system with respect to our judiciary. A fundamental feature of our governmental process is that our judges are not supposed to function strictly as “representatives” of a political constituency. When we select and remove our judges based on popular, partisan, and largely uninformed votes, we are requiring our judges to perform their job based on one set of standards – impartial, apolitical, protective of minority rights – and selecting or removing them on an entirely contradictory set of standards – the votes of a political majority whose turnout and voting is largely driven by non-judicial issues. This type of internal inconsistency does not promote the kind of judiciary we want as a society.

Examples of Problems with Electing Judges

- The problems with our current elective system of selecting and removing judges can and do reveal themselves in dramatic fashion. Examples include:

In 2006, all 42 Republican trial court judges on the ballot in Dallas County were removed in a Democrat political sweep. No one would argue that all of the sitting Republican trial court judges should have been removed. Yet, they were. Since the removal decision was not made on any qualitative basis on the judicial races themselves, one can only conclude that the mass removal was the result of Dallas County voters expressing their views on non-judicial races. The corollary to this removal was the installation of 42 new Democrat judges for a reason unrelated to their qualifications, backgrounds, or abilities. Many of these new judges will be fine jurists. Some will not. The significance of this event is that it illustrates the lottery-like nature of our current selection and removal system.

It is reported that one of the persons who was elected this year to a criminal court in the Dallas County sweep is a lawyer who has never before tried a felony case. He replaces an experienced and respected criminal court judge.

A similar event took place in the early 1980s in Harris County. All of the sitting Democrat judges, many of whom were quite able, were removed in a Republican sweep of Harris County political

offices. Again, this illustrates the failure of popular elections to provide voters real qualitative oversight in selecting and removing judges.

In the 1990s, as statewide political power began to shift from Democrats to Republicans, an unknown and completely unqualified Republican challenger defeated a sitting, longtime Democrat incumbent on the Texas Court of Criminal Appeals. Among those knowledgeable of the two candidates, there was no real comparison to be made—the incumbent was plainly better qualified. The result was a completely unqualified judge sitting on our highest criminal court for six years simply because he filed as a Republican in a year that Republicans were sweeping the state. The designation of “Republican” or “Democrat” simply is not determinative of the particular skills needed in a good judge, any more than they would be determinative of the skills of a good surgeon.

Over the years there have been a number of instances in which the voters have elected or nominated a judge based solely on the fact that the candidate’s name was similar to that of prominent political figure, a well-known entertainer, or other well-known person.

It is an accepted principle in political circles that a candidate’s ballot name can be determinative in a judicial election. When voters know nothing about the candidate other than ballot name and party affiliation, candidates with particularly unusual names or with ethnically-oriented names will fare worse or better than others simply on the basis of their names alone. This is not a rational selection process. A number of highly qualified sitting judges who had initially obtained their seats by appointment have lost their seats simply because of their name or ethnicity.

Retention Elections Offer Additional Benefits

- An often-overlooked feature of election of judges is that when an incumbent judge does not draw an opponent, the incumbent is reelected without any contest or any form of voter review at all. There is no means of removing an elected sitting judge who does not draw an opponent. Coupled with the fact that the majority of incumbent judges in Texas never draw an opponent, there is, in reality, very little real ability by citizens to remove bad judges under our current system.

- In the event that a sitting incumbent judge draws an opponent and the voting public is inclined to remove the incumbent, the choice is limited to the incumbent's opponent who may or may not be a preferable candidate.
- Nonpartisan retention elections change this dynamic. In the event that the voters believe that a sitting incumbent judge is performing poorly enough to warrant removal, they can vote to remove the judge without reference to an opponent. The choice of a replacement is then available from the full pool of interested applicants who apply to the nominating commission.
- It must be noted that it is very difficult to find challengers to an incumbent judge in Texas today. The most likely pool of potential challengers to an incumbent judge is composed of practicing litigators – but a challenger to an incumbent judge who loses has to consider how that judge will view the challenger in the courtroom in the future, which is a serious deterrent to challenging the incumbent judge in the first place. In fact, a judge who most deserves a challenger is frequently the one who is least likely to draw an opponent – because that is the kind of judge most likely to take retribution against a challenger who fails to defeat the incumbent.