

# A Texas Plan to Establish a Highly Qualified Judiciary

## Overview of the Plan

Texans for Lawsuit Reform (TLR) and Texas Civil Justice League (TCJL) propose that Texas move from partisan election of judges to a system having the following major components:

- 1. Nominations by the Governor.** The Governor nominates judges to the Texas Supreme Court, Texas Court of Criminal Appeals, the fourteen intermediate appellate courts, and all district trial courts (not county courts at law, probate courts, justice of the peace courts, or municipal courts). All judges sitting on the bench at the time the constitutional amendment becomes effective will serve out their terms.
- 2. Review by an Independent Panel.** The nominee's qualifications are assessed by either a statewide panel or one of 12 regional panels specific to the judge's local district. Based on statutorily prescribed criteria, the panel rates a nominee as "not qualified," "qualified" or "well qualified." The panel's rating and explanation are provided to the Senate.
  - Each panel is comprised of non-lawyer citizens, current or retired judges, and members of the Texas House of Representatives appointed by the Lieutenant Governor, Speaker of the House, Chief Justice of the Supreme Court and Presiding Judge of the Court of Criminal Appeals.
  - Seats on each panel have staggered six-year terms. A person may not serve for more than 12 consecutive years on a panel.
- 3. Senate Confirmation.** The nominee must be confirmed by an affirmative vote of a majority of the members of the Texas Senate. The Senate bases its decision on the panel's assessment, its own application of the statutory list of qualifications, and other factors it deems relevant. A nominee assumes office only upon confirmation by the Senate.
- 4. Voter Ratification of Appointment.** The appointed judge will face the voters in a "ratification election" held at the first general election occurring more than one year after the date the person is confirmed by the Senate. If a majority of voters ratify the judge's appointment, the judge continues serving in office; otherwise, the judge must step down. There will be no partisan designation on the ballot for a judge in a ratification election.

5. **Twelve-Year Terms.** All judges serve a 12-year term, subject to winning a ratification election and subject also to removal for cause through established procedures. At the end of an appointed term, a judge can be nominated to serve in the same or another judicial office.
6. **Enhanced Constitutional Qualifications.** The constitutional qualifications for serving as a judge are enhanced, including, for example, that a person must have prior judicial experience to be appointed to either the Texas Supreme Court or the Texas Court of Criminal Appeals.
7. **Enhanced Removal Mechanisms.** Existing mechanisms for removing judges are clarified and strengthened, making certain that judges who are corrupt, convicted of a crime, incompetent, inattentive to the judge's responsibilities, persistently abusive, extremely prejudicial, or blatantly discriminatory or unfair can be removed by the Legislature or the Judicial Conduct Commission.

## Details of the Plan

### 1. Introduction<sup>1</sup>

Consistent with the general form of American government, the Texas judiciary stands as a separate branch of government with powers and duties distinct from the other branches. The principal role of the judiciary is to provide a neutral forum for the resolution of disputes that promotes the rule of law in the state. The principal role of a judge is to hear the specific disputes between parties and apply the law to resolve those disputes. In civil matters, judges serve as neutral arbiters of disputes between parties. In criminal matters, judges ensure that the state impartially and dispassionately administers justice.

The judiciary also functions as a check on governmental abuse of power. In the words of Alexander Hamilton, judges are “the bulwarks of a limited Constitution against legislative encroachments.” In fulfilling this purpose, courts act as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.” In this role, unlike the executive and legislative branches, the judiciary is not a constituency-driven, political arm of

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<sup>1</sup> This Introduction is taken from *Evaluating Judicial Selection in Texas: A Comparative Study of State Judicial Selection Methods*, TEXANS FOR LAWSUIT FOUNDATION (2019), available at [http://www.tlrfoundation.com/wp-content/uploads/2019/09/TLR-Foundation\\_JudicialSelection\\_FinalWebVersion\\_2019-09-17.pdf](http://www.tlrfoundation.com/wp-content/uploads/2019/09/TLR-Foundation_JudicialSelection_FinalWebVersion_2019-09-17.pdf). We have omitted the footnotes.

government. Instead, judges are called on to fulfill their duties with intellectual honesty and dedication to the enforcement of the rule of law, regardless of popular sentiment.

The judiciary also plays a role in shaping the law. It is the legislature's function to decide matters of public policy by enacting statutes and judges' function to apply those statutes to the facts of a particular case without interposing their own policy judgments. By adopting the common law of England, however, the Texas Legislature has allowed the judiciary to share the law-making role to a limited degree through the development of the common law in connection with the resolution of individual civil disputes. Texas courts have long held the view that the Texas Supreme Court has the sole authority to abrogate or modify the existing common law (but not statutory law) and that trial courts and intermediate courts of appeals must follow established judicial precedent.

To fulfill these functions, judges need certain characteristics. First, judges need to be competent to properly resolve disputes, appropriately check governmental abuse of power, and reasonably shape the common law. A variety of features make a judge capable of performing these tasks, including knowledge of the law, experience, decisiveness, temperance, patience, and thoughtfulness.

Second, a judge must be impartial. A fair judge seeks to reach a legally sound result in every case. She is evenhanded and does not act with preference or prejudice to the parties appearing in court, nor to advance her own or another's business, political, social, religious, or other personal interest. A judge must also ensure that court proceedings are conducted with procedural fairness and adherence to the relevant rules of evidence and procedure.

Third, a judge must be independent of extraneous pressures and influences. Sometimes judges are called on to make decisions involving divisive political and social issues. Other times the law requires a judge to make a decision that is contrary to a belief strongly held by a majority of the public. A judge's faithful performance of her duty requires the freedom to make the right decision even if it is currently unpopular. Without independence, a judge may feel compelled to follow the views of supporters or special interests, without regard to what the law requires. In doing so, a judge abdicates judicial responsibility and relegates the rule of law to the vagaries of public opinion. Individuals who hold the dominant view on an issue decided by the court may dislike judicial independence when a judge's decision goes against their view. This dissatisfaction is likely to change, however, when they find their view to be in the minority in the next matter requiring judicial review.

A final consideration of judicial selection systems is accountability. It is possible with any system that a judge may attain office who is not competent, fair, or independent. Or a judge, while in office, may become incompetent or unfair. Thus, the selection process needs mechanisms to compel judges to conform to their expected function or to remove

them from office if they do not. The wrong kind, or wrong degree, of accountability, however, can undermine judicial independence. For example, if a judge could be removed from office for any one decision, that would chill judicial independence.

In addition to producing judges who are competent, fair, and independent, the process of selecting judges should reassure the public that the judges selected in fact have those characteristics. Public confidence in the judiciary is critical to the orderly resolution of disputes. If the public does not trust that courts are neutral forums for the competent and fair dispensation of justice, the public may adopt other, less socially desirable means to resolve disputes. The public need not always agree with the results of court decisions but must believe in the integrity of the system and that judicial decisions were made competently and equitably.

The *best* method of selecting judges has been the subject of debate since the founding of the United States, and no particular method is dominant among the states. The TLR/TCJL plan will be unique to Texas. It is designed to maintain reasonable political accountability and to implement the checks and balances necessary to prevent any person, entity, or political philosophy from dominating the selection process.

## **2. Nominations by the Governor**

Today, the Governor has the power to appoint judges to fill vacancies on the appellate and district courts resulting from death, resignation, etc.<sup>2</sup> An appointment by the Governor made during a legislative session must be with the advice and consent of two-thirds of the Senators present on the day the confirmation vote is taken.<sup>3</sup> If an appointment is made during a legislative recess (*i.e.*, during the interim period between legislative sessions), the Governor must nominate the appointee to the Senate during the first ten days of the next legislative session.<sup>4</sup> If the Senate does not confirm an appointee during the legislative session, the appointee is “considered rejected” when the Legislature adjourns, and the Governor may appoint someone else to that office.<sup>5</sup> However, appointments to vacancies in elective offices “shall only continue until the next general election.”<sup>6</sup>

Under these provisions, a Governor’s appointee to a judicial office assumes the bench immediately, subject to either Senate confirmation or election to the office, whichever happens first. Because special sessions of the Texas Legislature are relatively

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<sup>2</sup> See TEX. CONST. art. IV, § 12.

<sup>3</sup> *Id.* § 12(b), (c).

<sup>4</sup> *Id.* § 12(c).

<sup>5</sup> *Id.* § 12(c)-(f).

<sup>6</sup> *Id.* § 12(g).

rare and the interim period between regular sessions is long, many interim appointees to judicial offices stand for election in November of the even-numbered year preceding the start of the regular legislative session in January of the following odd-numbered year. The appointee, therefore, is either elected to the office or defeated in the election, and therefore never faces Senate confirmation.

Today, no board or commission vets the Governor's appointees to judicial offices, although the Governor does require the filing of an application and employs an internal process for reviewing applications and selecting judges to fill interim vacancies.<sup>7</sup>

History shows that a significant number of Texas judges are initially appointed by the Governor. For example, as of September 1, 2018, 78 percent of the justices serving on the Texas Supreme Court were initially appointed, as were 44 percent of the intermediate appellate court justices and 35 percent of the district court judges. Over the 72-year period from 1945 to 2019, 59 percent of Texas Supreme Court justices were initially appointed to their seats.<sup>8</sup> Thus, while most Texas judges are initially elected to office, it is not altogether accurate to say that Texas has an entirely elected judiciary. Texans already have a judiciary composed of many men and women who are initially appointed by the Governor to judicial office.

The TLR/TCJL proposal, to a large extent, expands the *status quo* more than changes it. Under our proposal, the Governor will nominate prospective judges for service on the Texas Supreme Court, Texas Court of Criminal Appeals, the fourteen intermediate appellate courts, and approximately 480 district trial courts.<sup>9</sup> Thus, rather than filling only those vacancies occurring because of death, resignation and removal, the Governor will fill all judicial vacancies on the designated courts—an expansion of the Governor's authority, but not a new power. (It is important to note that all judges sitting on a bench at the time the constitutional amendment becomes effective will complete their terms of office.)

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<sup>7</sup> A description of the appointment process and the appointment application are available at <https://gov.texas.gov/organization/appointments> (last visited February 4, 2020).

<sup>8</sup> See *Judicial Selection in Texas, A Comparative Study of State Judicial Selection Methods*, TEXANS FOR LAWSUIT REFORM FOUNDATION (2019) at 4-6, available at [http://www.tlrfoundation.com/wp-content/uploads/2019/09/TLR-Foundation\\_JudicialSelection\\_FinalWebVersion\\_2019-09-17.pdf](http://www.tlrfoundation.com/wp-content/uploads/2019/09/TLR-Foundation_JudicialSelection_FinalWebVersion_2019-09-17.pdf).

<sup>9</sup> The Governor will *not* nominate judges to serve on county courts at law, probate courts, or justice of the peace courts, all of whom will continue to be elected in partisan elections, with interim vacancies on these courts (from death, resignations and the like) filled by county commissioner appointment as happens today. The Governor will not nominate judges to serve on municipal courts. These judges are selected in accordance with municipal ordinances, a process that will not be affected. The Governor will continue to name regional presiding judges using the current process. Administrative law judges at the State Office of Administrative Hearings and working in other agencies will continue to be employed as they are today.

At the same time, the TLR/TCJL proposal enhances the role of the Texas Senate because gubernatorial nominees will not take the bench until confirmed, which is a departure from the *status quo* and a check on the Governor's expanded authority.

### **3. Review by an Independent Panel**

#### *a. Review Panels, not Selection Commissions*

Unlike the process used in many other states, the TLR/TCJL proposal does not include the use of a commission or other board providing a list of potential nominees to the Governor. Instead, we suggest the creation and use of thirteen "Judicial Qualifications Advisory Panels."

We favor the use of advisory panels over selection commissions for several reasons.

**First:** Selection commissions in other states have tended to be captured by a particular segment of the bar, resulting in a judiciary that is ideologically driven or does not have the requisite impartiality of a professional judiciary.

**Second:** A Governor is accountable to the voters. If a Governor consistently makes bad appointments to the judiciary, the voters of Texas have the ability to elect a different governor. Selection commissions, on the other hand, are not democratically elected and have no accountability to citizens.

**Third:** On the whole, Governors past and present of both major political parties have shown great respect for our constitutional system and the rule of law by appointing qualified persons to judicial offices. We hope and believe that Texas Governors in the future will want to maintain a judiciary that is competent and fair and will appoint judges accordingly.

#### *b. Panels Assess Qualifications*

The goal of creating a new method for selecting judges in Texas is to build and maintain a highly qualified, independent and stable judiciary. We believe that most candidates and most voters have a strong desire for the election of judges to be based on qualifications and temperament, but it is practically impossible for the necessary information to be conveyed to thousands or millions of voters because most judicial candidates cannot raise the funds necessary to effectively communicate with voters. On the other hand, in the selection process we propose, the Governor, advisory panel members and senators will be fully informed about the qualifications of the judicial nominees.

TLR and TCJL, therefore, suggest that the selection process focus on statutorily prescribed criteria to determine if a person is qualified to serve as a judge. The advisory panels rate nominees as “not qualified,” “qualified” and “highly qualified” based on the statutory criteria. Then the panels provide written assessments of nominees’ qualifications to the Lieutenant Governor and the chair of the Senate committee with jurisdiction over gubernatorial appointment in time for the Senate to use the information in the confirmation process.

The sixteen criteria we propose are as follows:

- The nominee’s legal education, including academic performance, professional activities, publications, and honors.
- The nominee’s history taking bar examinations in Texas and other states.
- The nominee’s employment history after graduation from law school, including judicial clerkships, law firms, or other entities.
- The nominee’s years of employment with each employer and the nominee’s reasons for leaving the employment of that employer.
- The nominee’s years of legal practice and the type and extent of each area of practice in which the nominee has engaged, including whether the nominee has significant experience with respect to matters within the jurisdiction of the court to which the person is nominated or has practiced in that court or a court with similar jurisdiction.
- The federal or state courts to which the nominee has been admitted.
- Whether the nominee is certified by the Texas Board of Legal Specialization and whether such certification is relevant to matters within the jurisdiction of the court to which the person is nominated.
- Whether the nominee regularly participates in continuing legal education as a speaker or produces instructional material for continuing legal education programs or conferences.
- Whether the nominee has any prior judicial service inside or outside of this state.
- Whether the nominee has demonstrated knowledge of the Texas Rules of Civil Procedure, the Texas Code of Criminal Procedure, and the Texas Rules

of Appellate Procedure, as appropriate to the court to which the person is nominated.

- Whether and to what extent the nominee performs or participates in pro bono or other activities or programs for the purpose of providing legal services to underserved people and communities.
- Whether the nominee has been subject to a complaint or proceeding under the Texas Disciplinary Rules of Professional Conduct, the Texas Code of Judicial Conduct, or similar codes in any other state.
- Whether the nominee has been sanctioned by a court in any jurisdiction.
- Whether the nominee has been disbarred, censured, sanctioned, or otherwise reprimanded by the entity charged with reviewing attorney conduct in any jurisdiction.
- Whether the nominee has been involved in a dispute with a client that resulted in litigation or alternative dispute resolution, the nature of the dispute, and the outcome of the dispute.
- The nominee's reputation in the community for integrity, honesty, professional competence, and ethical conduct in the practice of law.

Our proposal makes clear that the Governor and Senate will consider these factors *as well as* any other information deemed relevant and important by the Governor and the Senate.

In sum, the advisory panels' authority is persuasive, not controlling. They will not dictate an appointment or even create a list from which the Governor must choose. Instead, the panel's assessment adds a meaningful element to the Senate confirmation process and, importantly, will inform *the public* as to the quality of a governor's judicial nominees. Additionally, the panels' ratings of nominees will be instructive to voters' consideration of an appointee in a ratification election (discussed below).

### *c. Composition of Panels*

The advisory panels consist of three groups: (1) members of the Texas House of Representatives, (2) current or former judges, and (3) non-attorney citizens. While all three groups are important to each panel, we believe it is particularly important for the House of Representatives to play a role—along with the Senate and Governor—in creating a well-qualified judiciary for the people of Texas. Consequently, House members serve on each panel.



Our proposal states that the composition of the advisory panels reflect the diversity of the state to the extent practicable, taking into consideration the race, color, disability, gender, religion, age, or national origin of the members. All panel members must be disinterested, meaning they have no financial or close familial relationship to a nominee.

One 15-person advisory panel will be created to review nominees to Texas's two high courts. The Speaker of the House will appoint six House members to this panel—three Democrats and three Republicans, with no more than two attorneys from each party. Either the Chief Justice of the Texas Supreme Court or the Presiding Judge of the Court of Criminal Appeals will appoint five current or former judges to the panel. The Lieutenant Governor will appoint four non-lawyer citizens to the panel.

In addition to the panel for Texas's two high courts, the TLR/TCJL proposal contemplates twelve regional advisory panels based on Texas's fourteen court of appeals districts.

- The First and Fourteenth District Advisory Panel<sup>10</sup> is a combined panel because the First and Fourteenth Courts of Appeals have a coextensive geographic jurisdiction, serving the same ten counties.
- The Sixth and Twelfth District Advisory Panel<sup>11</sup> also is a combined panel because the Sixth and Twelfth Courts of Appeals have overlapping geographic jurisdiction (they share four counties) and multiple district courts report to both courts.

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<sup>10</sup> The First and Fourteenth Courts of Appeals sit in Houston.

<sup>11</sup> The Sixth Court of Appeals sits in Texarkana and the Twelfth Court of Appeals sits in Tyler.

- The remaining ten panels are the Second<sup>12</sup>, Third<sup>13</sup>, Fourth<sup>14</sup>, Fifth<sup>15</sup>, Seventh<sup>16</sup>, Eighth<sup>17</sup>, Ninth<sup>18</sup>, Tenth<sup>19</sup>, Eleventh<sup>20</sup>, and Thirteenth District Advisory Panels<sup>21</sup>.

These regional panels review nominations to the applicable court of appeals *and* nominations to the district courts wholly contained within the court of appeals' territory. As to district courts reporting to two or more courts of appeals, our proposal assigns these district courts to a particular regional panel.

- For example, the 452nd district court sits for trials in Edwards, Kimble, Mason, McCulloch, and Menard counties. Appeals from judgments from McCulloch county go to the Third (Austin) Court of Appeals, while judgments from the other four counties go to the Fourth (San Antonio) Court of Appeals. Because four-fifths of the counties are within the Fourth Court of Appeals district, we propose that a nominee to fill a vacancy on the 452nd district court be reviewed by the Fourth District Advisory Panel.

The regional panels consist of 11 members each. Four members of each panel are members of the House of Representatives, whose districts are included within or overlap the applicable court of appeals' district. At least one of these House members must not be a lawyer. The four House Members are to be selected by the Speaker without regard to political party affiliation.<sup>22</sup> (Our proposal does not require that each of the regional panels include House Members of both parties because in some of these districts there are only House Members of one party.)

In addition to the four House members, each regional panel has four current or former judges as members, appointed by the Chief Justice of the Supreme Court and Presiding Judge of the Court of Criminal Appeals, along with three non-lawyer citizens

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<sup>12</sup> The Second Court of Appeals sits in Fort Worth.

<sup>13</sup> The Third Court of Appeals sits in Austin.

<sup>14</sup> The Fourth Court of Appeals sits in San Antonio.

<sup>15</sup> The Fifth Court of Appeals sits in Dallas.

<sup>16</sup> The Seventh Court of Appeals sits in Amarillo.

<sup>17</sup> The Eighth Court of Appeals sits in El Paso.

<sup>18</sup> The Ninth Court of Appeals sits in Beaumont.

<sup>19</sup> The Tenth Court of Appeals sits in Waco.

<sup>20</sup> The Eleventh Court of Appeals sits in Eastland.

<sup>21</sup> The Thirteenth Court of Appeals sits in Corpus Christi and Edinburg.

<sup>22</sup> At present, there are no Democrat House members whose districts overlap either the Seventh (Amarillo) or Eleventh (Eastland) Courts of Appeals' districts.

appointed by the Lieutenant Governor. All panel members must reside within the applicable region.

The requirement that members of the regional panels be residents of the region ensures that the Governor's nominees are reviewed by a panel that has insight into a nominee's qualifications and professional reputation.

*d. Terms*

Seats on each panel are assigned place numbers, and each place has a recurring six-year term of service. The terms are staggered so that a consistent number of members leave and join each panel every two years. A person appointed to an interim vacancy completes the vacating person's six-year term. A person may not serve for more than 12 consecutive years on a panel.

A vacancy on a panel is filled by the official who made the appointment of the person who is vacating the panel.

A member of the House of Representatives who is serving on a panel is deemed to have resigned from the panel on his or her last day in office as a member of the House.

*e. Oath*

To emphasize the seriousness of service on an advisory panel and the importance of the judiciary in our society, each person serving on an advisory panel will take the following constitutional oath of office:

I swear or affirm that I will perform my duties on this panel without prejudice and without regard to partisan affiliation, and that my conclusions about the qualifications of a potential justice or judge will be based on the nominee's academic credentials, substantive experience in the law, and reputation for competence, fairness, and integrity.

**4. Senate Confirmation**

Under the TLR/TCJL plan, the nominee *must* be confirmed by an affirmative vote of a majority of the members of the Texas Senate *before* the person assumes the bench.

As noted earlier, when gubernatorial appointments are made to the judiciary today, the appointee must be confirmed by an affirmative vote of two-thirds of the Senate

present<sup>23</sup> *unless* elected to the office in an election occurring between the time the appointment is made and the date the Senate convenes.

Additionally, an appointee in the current system assumes the bench when appointed by the Governor, subject to Senate confirmation or election to the office in the future. Consequently, under the current system, some appointed judges go through the Senate confirmation process *and* stand for election, but many only stand for election (and not Senate confirmation) due to the timing of the appointment.

TLR and TCJL regard Senate confirmation as a prerequisite to assuming the bench as fundamental to a judge-selection process designed to ensure that Texas judges are well qualified and temperamentally suited for the bench. Therefore, our plan requires *both* Senate confirmation *and* voter approval in a ratification election (discussed below) for all appointees. Senate confirmation will occur before the appointee takes the bench, while the ratification election will happen after the judge has served on the bench.

Under the Texas Constitution and Senate Rules, “two-thirds of all Senators elected” constitutes a quorum.<sup>24</sup> If all 31 places in the Texas Senate have an elected member, a quorum is achieved when 21 members are present in the chamber (two-thirds of 31); and a judicial appointment may be confirmed by as few as 14 (two-thirds of 21). Under our proposal, confirmation of a judicial appointment always requires at least 16 affirmative votes (a majority of the 31-member Texas Senate).

Of course, the Texas Legislature meets in regular session for only 140 days, starting in early January of every odd-numbered year.<sup>25</sup> Admittedly, when the Legislature is in session only 20 percent of a two-year period, requiring Senate confirmation before a judge assumes the bench is an impediment to filling vacant judgeships. We believe there are three responses to any argument that requiring Senate confirmation before a person assumes the bench is unworkable:

***First:*** If the Governor is going to have the power to appoint *all* state-level judges in Texas, that power cannot be unbridled but, instead, must be subject to reasonable checks. Senate confirmation is an important and meaningful check on the Governor’s expanded power. An after-the-fact confirmation process, in our view,

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<sup>23</sup> TEX. CONST. art. IV, § 12.

<sup>24</sup> See TEX. CONST. art. III, § 10; TEX. SEN. R. 5.02.

<sup>25</sup> See TEX. CONST. art. III, § 5(a) (“The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor.”); TEX. CONST. art. III, § 24(b) (“No Regular Session shall be of longer duration than one hundred and forty (140) days.”); TEX. GOV’T CODE § 301.001 (“The legislature shall convene at the seat of government in regular session at 12 noon on the second Tuesday in January of each odd-numbered year.”).

diminishes the role of the Senate, which is why our proposal allows a person to assume the bench only upon confirmation by the Senate.

**Second**, Senate confirmation helps ensure the judiciary is composed of judges who represent the diversity of the state, including political diversity.

**Third**: Visiting judges are available to fill vacancies on a temporary basis, which mitigates the impediment to judicial efficiency caused by vacancies.

**Fourth**: Under the TLR/TCJL proposal, the Governor can call special sessions<sup>26</sup> *of the Senate alone* to seek confirmation of nominees. During one of these special sessions, the only business the Senate will conduct is the consideration of judicial nominees.

- The ability to have Senate-only special sessions already exists in the Texas Constitution, and so the TLR/TCJL proposal does not break new ground in that regard.<sup>27</sup>
- We *do* break new ground in proposing that if the Senate convenes for the sole purpose of considering judicial nominations, it may “convene by any method and at any location allowed by a rule adopted in a regular session by an affirmative vote of two-thirds of its membership.”

## 5. Voter Ratification of Appointment

Voters continue to play an integral role in judicial selection in the TLR/TCJL plan. As noted above, when the Governor appoints a judge today, that judge must face the voters in the next general election. Under our proposal, a judge who has been nominated by the Governor and confirmed by the Senate also must soon face the voters by participating in the first general election occurring more than one year after the date the person is confirmed by the Senate. If a majority of voters ratify the judge’s appointment, the judge continues serving in office; otherwise, the judge must step down.

The name of a judge who is standing for a ratification election is submitted to the voters in substantially the following form:

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<sup>26</sup> The power to call a special session at any time, and special sessions are limited to the subjects designated by the Governor. *See* TEX. CONST. art. III, §§ 5, 40.

<sup>27</sup> *See* TEX. CONST. art. XV, § 9(b) (“If the legislature is not in session when the governor desires to remove an officer, the governor shall call a special session of the senate for consideration of the proposed removal. The session may not exceed two days in duration.”); *see also* TEX. CONST. art. IV, § 12(b), (c) (multiple references to a “session of the Senate”).

Do you favor or oppose allowing (Justice or Judge) \_\_\_\_\_ to continue serving as the judge of (name of court)?

Favor \_\_\_\_\_

Oppose \_\_\_\_\_

The judge's name appears on the ballot without a partisan designation.

Of course, judges cannot effectively participate in any election, including a ratification election, without raising and spending money in support of their election. Similarly, a person or group opposing the ratification of a judge's appointment must be allowed to fully participate in the democratic process.

Consequently, the Election Code is amended in the TLR/TCJL proposal to provide an "election period" for a ratification election, beginning on the 365th day before election day and ending on election day (except money can be raised and expended for 120 days after the election to pay campaign-related debts). A person who makes expenditures or accepts contributions outside of the election period is liable for a civil penalty of up to three times the amount of the untimely contribution or expenditure.

The contribution limits in the Judicial Campaign Fairness Act will apply to ratification elections.<sup>28</sup>

One of the fundamental problems with Texas's current system of electing judges is that it forces judges to raise money to fund their campaigns, often from lawyers practicing in the judges' courts. This gives rise to the appearance of impropriety and a perceived lack of impartiality, if not the actuality of impropriety and partiality in some instances. To avoid forcing judges to repeatedly raise money from lawyers who appear in their courts, our proposal does not include a requirement for subsequent "retention" elections, which are used in several states. Removal of judges from office for improper conduct, therefore, falls to the Judicial Conduct Commission and the Legislature in the TLR/TCJL plan, as discussed below.

## **6. Twelve-Year Terms**

Under the TLR/TCJL proposal, all judges serve a 12-year term, subject to winning a ratification election and subject also to removal for cause through established procedures. Currently, district judges serve four-year terms, while appellate court judges serve six-year terms.

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<sup>28</sup> See TEX. ELEC. CODE §§ 253.157, 253.159.

Judicial independence—typically thought of as the ability of a judge to make an unpopular decision without retribution by litigants, lawyers or special interests—is critical to establishing and maintaining a fair and impartial judiciary. In fact, it is the foundation on which the rule of law rests. At the same time, judges should not be wholly unaccountable to our citizens. Weighing independence against accountability, we have concluded that the terms of four and six years are too short, but lifetime appointments are inappropriate for our state’s judiciary. We believe 12-year terms for all judges reflect the proper balance. At the end of an appointed term, under our plan, a judge can be nominated to serve in the same or another judicial office.

We considered three other important factors in reaching our recommendation of 12-year terms.

***First:*** The term of office should be long enough to attract highly-qualified lawyers to the judiciary. Too few successful lawyers are willing to sacrifice their careers for a short-term stint on a bench—which they must obtain through an election and may lose four years later in another election. We believe longer terms will encourage a large pool of accomplished lawyers to serve in the judiciary.

***Second:*** Longer terms allow judges to gain experience and skill in their profession, benefitting litigants and society as a whole.

***Third:*** All state-level judges in Texas vest in the retirement system after 12 years. Again, we think highly-qualified lawyers are more likely to take up the call to judicial service if they have a reasonable expectation of enjoying meaningful retirement benefits as an offset to giving up income in the private sector.

## **7. Enhanced Constitutional Qualifications**

The Texas Constitution provides the qualifications for most judicial offices.<sup>29</sup> The requirements, especially for district judges, are minimal. Serving on a district court requires, for example, that a person may be licensed for as few as four years.

TLR and TCJL suggest enhancing the constitutional qualifications for serving on all of the courts to which judges will be appointed. The following chart compares the current qualifications to the qualifications in our plan (differences are bold italics).

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<sup>29</sup> The constitution does not state qualifications for serving on statutory county courts (called county courts at law) or probate courts. It does provide qualifications for serving on the Supreme Court, Court of Criminal Appeals, intermediate appellate courts, district courts, and justice courts, and for the county judge.

<b>Court</b>	<b>Current Qualifications</b>	<b>TLR/TCJL Proposal</b>
Supreme Court <sup>30</sup>	U.S. Citizen Texas Citizen Licensed in Texas 35 years old Practicing 10 years	U.S. Citizen Texas Citizen Licensed in Texas <b>45</b> years old Practicing <b>15</b> years <b>Resident of Texas 2 years</b> <b>Served as a judge 4 years</b>
Court of Criminal Appeals <sup>31</sup>	Same as Supreme Court	Same as Supreme Court
Courts of Appeals <sup>32</sup>	U.S. Citizen Texas Citizen Licensed in Texas 35 years old Practicing 10 years	U.S. Citizen Texas Citizen Licensed in Texas <b>40</b> years old Practicing <b>12</b> years <b>Resident of district 2 years</b>
District Courts <sup>33</sup>	U.S. Citizen Licensed in Texas Practicing <b>in Texas</b> 4 years Resident of district 2 years	U.S. Citizen Licensed in Texas Practicing <b>10</b> years Resident of district 2 years <b>Texas Citizen</b> <b>35 years old</b>

## 8. Enhanced Removal Mechanisms

Under current law, a Texas judge may be removed from office in a variety of ways:

- **Removal by the Judicial Conduct Commission.** A judge may be removed from office by the Judicial Conduct Commission for “willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.”
- **Removal by Impeachment.** A judge on the Supreme Court, a court of appeals, or a district court may be removed from office through

<sup>30</sup> TEX. CONST. Art. V. § 2(b).

<sup>31</sup> TEX. CONST. Art. V. § 4(a).

<sup>32</sup> TEX. CONST. Art. V. § 6(a).

<sup>33</sup> TEX. CONST. Art. V. § 7.



impeachment by the Texas House of Representatives and conviction on the vote of two-thirds of the Texas Senate.

- **Removal by the Supreme Court.** A district court judge “who is incompetent to discharge the duties of his office, or who shall be guilty of partiality, or oppression, or other official misconduct, or whose habits and conduct are such as to render him unfit to hold such office, or who shall negligently fail to perform his duties as judge; or who shall fail to execute in a reasonable measure the business in his courts, may be removed by the [Texas] Supreme Court.” This process is based upon “the oaths ... of not less than ten lawyers, practicing in the courts held by such judge, and licensed to practice in the Supreme Court.”
- **Removal by “Address.”** Judges of the Supreme Court, court of appeals, and district courts “shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful neglect of duty, incompetence, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment.”
- **Removal by the Governor.** “In addition to the other procedures provided by law for removal of public officers, the governor who appoints an officer may remove the officer with the advice and consent of two-thirds of the members of the Senate present.” If the Legislature is not in session when the Governor desires to remove an officer, the Governor must call a special session of the Senate for consideration of the proposed removal. The session may not exceed two days in duration.
- **Quo Warranto.** In unusual circumstances, a judge may be removed through a quo warranto action, which is used if “a person usurps, intrudes into, or unlawfully holds ... an office ... [or] a public officer does an act or allows an act that by law causes a forfeiture of his office.” Quo warranto is an action that may be pursued in district court by the Attorney General, or by a county or district attorney of the proper county.

In the TLR/TCJL proposal, we leave these existing mechanisms in place, but expand and clarify them.

The State Commission on Judicial Conduct (commonly called the Judicial Conduct Commission, or JCC) is a creature of the Texas Constitution.<sup>34</sup> The Constitution allows the JCC to remove a judge:

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<sup>34</sup> TEX. CONST. Art. V. § 1-a(2).

- for willful or persistent violation of rules promulgated by the Supreme Court of Texas,
- incompetence in performing the duties of the office,
- willful violation of the Code of Judicial Conduct, or
- willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.

We are proposing to expand and strengthen these constitutional grounds for removal of a judge by the JCC *and* make them applicable (explicitly) to impeachment and removal by address.

Under our plan, the grounds stated in the constitution for removal of a judge by the JCC—or the Legislature through impeachment or address—would be (new grounds for removal are italicized):

- willful or persistent violation of rules promulgated by the Supreme Court of Texas, *or the Court of Criminal Appeals,*
- *persistent inattention to the duties of office or a single instance of inattention to the duties of office that results in extreme prejudice to a person or the judicial system,*
- incompetence in performing the duties of the office,
- willful violation of the Code of Judicial Conduct,
- *persistent participation in ex parte communications or a single instance of an ex parte communication that results in extreme prejudice to a person,*
- *conviction of a felony,*
- *conviction of a misdemeanor involving official misconduct or moral turpitude,*
- *persistent disregard for this constitution, statutes, rules or binding precedent to effectuate the justice's or judge's desired outcomes in matters pending before the court,*

- *persistent demonstrations of favoritism in official acts or a single act of favoritism that results in extreme prejudice to a person,*
- *use of the office for a corrupt purpose, including abuse of power for public or private gain,*
- *persistent demonstrations of abusive or discriminatory behavior or a single, extreme abusive or discriminatory act, or*
- *other willful or persistent conduct, or a single, extreme instance of conduct, that is clearly inconsistent with the proper performance of his or her duties or casts public discredit upon the judiciary or administration of justice.*

We also are proposing the following changes:

- A judge—*on a single occasion*—may be disciplined or censured in lieu or removal if: (1) the judge acknowledged and accepted responsibility for the improper conduct, and (2) the review tribunal (part of the removal process involving the JCC) is satisfied that the person has the ability and intent to competently and ethically perform the duties of the office in the future.
  - This one-time exception does not apply if the judge is convicted of a felony or misdemeanor involving official misconduct or moral turpitude, in which case the judge *must* be removed from office.
  - Today, the JCC always has the power to censure or discipline a judge in lieu of removal, without regard to the seriousness of the offense.<sup>35</sup>
- A judge *must* be suspended immediately upon being indicted for a felony or charged with a misdemeanor involving official misconduct or moral turpitude.
  - Today, suspension on these grounds is not mandatory.
  - Suspension from office for committing other removable offenses will continue to be optional with the JCC.

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<sup>35</sup> A judge “may be disciplined or censured, in lieu of removal from office.” TEX. CONST. Art. V. § 1-a(6).

- A judge *must* be involuntarily retired, or removed from office if not eligible for retirement, for disability seriously interfering with the performance of his or her duties, which is, or is likely to become, permanent in nature.
  - Today, involuntary retirement or removal for these reasons is not mandatory.
- The process for removal upon the Governor’s request to the Legislature (removal by “address”)—which is an obscure and uncertain feature of the Constitution today—is clarified. Under the clarified procedure:
  - The Governor informs the Lieutenant Governor and Speaker of the House, in writing, of grounds for removing a judge from office.
  - Upon receiving this notice from the Governor, a member of the House or Senate *may* file a concurrent resolution providing for the removal of the judge from office.
  - The resolution, if filed, proceeds through the process as would any other resolution, *except* it is treated as an emergency matter by the Legislature.
  - Both houses must pass the resolution by a two-thirds vote.

## **9. Conclusion**

As many have said, there is no perfect way to select judges. Every system has drawbacks. The system we propose has sufficient checks and balances to prevent the unwise accumulation of power in a single official or entity and it assures public accountability. We recognize that proponents of significant change bear a burden of persuasion. And we are aware that even among those who agree that an appointment system should replace the election of judges, reasonable minds can differ on specific aspects of the new system. We look forward to those discussions. We believe strongly, however, that the judicial selection system we propose will establish a fair, competent and professional judiciary for our great State, free of the vagaries and uncertainties that plague our current system.