

June 5, 2020

Mr. David Beck: Chair, Texas Commission on Judicial Selection

Texas Fair Courts Network public testimony

The **Texas Fair Courts Network** is an affiliation of respected good government organizations, committed to helping Texas strengthen its court system. Many of the undersigned organizations have worked for decades to improve judicial selection in Texas and believe wholeheartedly that a study to explore a Texas judicial system that is truly independent, impartial, fair and judicious is long overdue.

We recognize that there is no perfect judicial selection method and that the preferred selection method may differ for trial and appellate courts, but **what Texans deserve is a fair, impartial, and accountable judiciary beholden only to the rule of law and not money interests, and a judiciary composed of qualified judges.**

We polled our member organizations to determine which judicial selection methods they could support, which they could not support and what improvements, if any, might apply to any method to make it more acceptable.

There is overwhelming support for a merit selection method [O'Connor Plan/Missouri Plan] over elections [partisan or nonpartisan] for all courts but especially for the sixteen appellate courts. But the "devil is in the details", and we address those below. In addition, there are some components of our preferred plan that could also be included in proposals that received a lower ranking, in order to make those plans more acceptable.

Necessary "details" of the O'Connor Plan/Missouri Plan merit selection method:

- a. A merit selection system should rely on independent judicial nominating committees (separate committees for appellate courts and regional committees for district and county courts) The committees should give the Governor a list of three (3) nominees from which he or she must choose. The Governor's decision is final, without Legislative review or consent.
- b. This system should apply to all appointments, arising for whatever reason (regular, retirement, death, non-retention).
- c. Judicial Nominating Committees [Appendix 1] should include lawyers and non-lawyers and be diverse with regard to race and sex to the maximum extent possible. Selection of members should be done in a manner that protects against partisanship, provides meaningful and knowledgeable community input, and assures that the lawyer members are competent to objectively evaluate professional qualifications and integrity. Membership on the Committees should be open to a statewide and/or community-wide

application process, with final decisions about membership on the committees determined by the Texas State Commission on Judicial Conduct.

- d. We strongly recommended that there be Judicial Evaluation/Performance Committees [Appendix 3] and some type of "judicial review commission" (see h. below) and that those entities be separate and independent from Judicial Nominating Commissions. Like the Judicial Nominating Committees [Appendix 1], the Judicial Evaluation/Performance Committees should be diverse in all respects.

These next recommendations apply to any judicial selection method - merit selection OR elections. Regardless of any judicial selection changes the Commission may recommend, the following recommendations should be considered:

- e. Whether unopposed retention elections, or opposed partisan or nonpartisan elections, voters must be better informed about judicial candidates. Several states (Alaska, California, Oregon and Washington) require candidates to submit a profile to the SOS and these profiles are available to the public in the form of an election pamphlet. [Appendix 4]
- f. Expansion of minimum qualifications for judges, with new and additional experience and/or board certification requirements for all judges – and greater experience and/or specific appellate certification requirements for appellate judges. Experience requirements should not just include years of license, but also actual trial and/or appellate experience (a specific # of first-chair trials and/or lead appellate counsel).
- g. Texas must immediately bring its judicial recusal requirements into full conformance with the revisions in recusal jurisprudence mandated by recent US Supreme Court decisions in *Caperton v. A.T. Massey Coal Company*, *Williams v. Pennsylvania* and *Rippo v. Baker*. This could be accomplished by adoption of revised rules by the Texas Supreme Court or by legislation.
- h. We think any judicial selection regime should also include a judicial review commission with broader jurisdiction than the jurisdiction currently exercised by the Texas State Commission on Judicial Conduct. Such a commission could be established as a new state agency or accomplished as an expansion of the jurisdiction of the existing Texas State Commission on Judicial Conduct. It could include a revision of the Texas Code of Judicial Conduct to give the Commission expanded jurisdiction to review issues of conflict of interest in areas beyond its current mandate. Such expanded jurisdiction could include: an evaluation of contributions and contributors to a sitting judge, either direct contributors or independent expenditures by third parties, to determine if such contributions rise to a sufficient level that they require recusal whenever those parties are before the court; a periodic evaluation of judicial decisions to determine if any pattern of decisions the by judge indicates a bias favoring or opposing particular broad categories of parties (corporate, plaintiff, defendant, race or sex); and expanded restrictions on judicial solicitation of election funds at least to the extent permitted by the Supreme Court in *Williams-Yulee v. Florida Bar*.

## Endorsing organizations:

Joanne Richards, President, Common Ground for Texans

David Jones, President, Clean Elections Texas

Anthony Gutierrez, Executive Director, Common Cause Texas

Adrian Shelley, Director, Public Citizen Texas

Grace Chimene, President, League of Women Voter of Texas **WITH THE EXCEPTIONS NOTED BELOW\***

\*The League of Women Voters of Texas neither supports nor opposes items covered in Sections d, f, g, and h of this testimony because our organization has not studied and reached consensus on any of these points. It should also be noted that the League of Women Voters believes that judges should be subject to retention or rejection in an unlimited number of periodic nonpartisan elections.

**Appendix 1:** Bannon, Alice. (2018) Choosing State Judges: A Plan for Reform. Brennan Center for Justice, University of New York School of Law.

<b>Best Practices for Selecting Nominating Commissioners</b>	
<p><b>Power to appoint commissioners should be diffuse, with no single source having majority control.</b></p> <ul style="list-style-type: none"><li>▪ A majority of commissioners should be appointed by elected officials across the branches of government to ensure democratic input.</li><li>▪ There should also be an open application process allowing members of the public to serve as commissioners.</li></ul> <p><b>Commissions should have bipartisan membership, including independents.<sup>1</sup></b></p> <ul style="list-style-type: none"><li>▪ Such representation could be achieved by a formal partisan representation requirement or by giving minority leaders of the state legislature the power to appoint commission members (in the case of minority party members) and/or by having an application and screening process for commissioners, a system used for California's redistricting commission.</li></ul>	<p><b>The system should include concrete measures to encourage diversity among commissioners:</b></p> <ul style="list-style-type: none"><li>▪ Require appointing authorities to consider region, race, gender, sexual orientation, and other demographic factors in selecting commissioners.</li><li>▪ Require appointing authorities to ensure that the commission as a whole reflects a state's diversity.</li><li>▪ Reserve slots for underrepresented legal specialties, such as public defenders.</li><li>▪ Reserve slots for non-lawyers, who should comprise a majority of commissioners.</li><li>▪ Consider including ex officio representatives from the judiciary, the state bar, and the legal academy.</li></ul> <p><b>Commissioners should serve staggered terms, with term limits, to preserve institutional memory and prevent the formation of voting blocs.</b></p>
<p>FOR EXAMPLES OF STATE BEST PRACTICES, SEE APPENDIX 1.</p>	

## Best Practices for Nominating Commission Procedures

### **A clear and open application process with transparent criteria for selecting nominees.**

When there is a vacancy, there should be a public announcement and a formal application process. There should be transparent and public criteria for evaluating applicants and a standardized process.<sup>ii</sup> Notably, less than half the states with nominating commissions have any formal statutory criteria for assessing candidates.<sup>iii</sup>

### **Public disclosure of possible final nominees with public interviews and the chance for public comment.**

While the initial pool of applicants may be kept private, commissions should publicly disclose a list of potential finalists, hold public interviews, and offer the public the chance to comment either in person or through written submissions. (States may also want to allow for closed commission meetings to allow for discussions of confidential information, such as a candidate's health status.) Some have expressed concern that a public process may discourage otherwise qualified applicants. However, many states already provide for transparent processes without any apparent difficulty in attracting qualified candidates.<sup>iv</sup>

### **Commission votes should be public.**

The deliberations can be private to promote candor. However, votes on candidates should be made public so it is clear whether candidates have bipartisan support or if the commission has broken into factions.<sup>v</sup>

### **Commissioners should be bound by ethics rules.**

There should be clear guidelines for when and how commissioners can communicate with candidates as well as the governor's office during the vetting and interview process. The Institute for the Advancement of the American Legal System (IAALS) published a model code of conduct for judicial nominating commissions that addresses such issues, as well as disclosure and recusal requirements for conflicts of interest.<sup>vi</sup>

### **Commissions should collect and publish diversity data for judges and candidates.**

Data should be compiled and published on the diversity of the applicants at each stage of the process. A recent report by the American Constitution Society and Lambda Legal details best practices for collecting and releasing judicial diversity data.<sup>vii</sup>

## **Appendix 2: O'Connor, Sandra Day and IAALS (2014 ) The O'Connor Judicial Selection Plan. University of Denver. Effective judicial performance evaluation**

<https://iaals.du.edu/projects/oconnor-judicial-selection-plan#tab=judicial-performance-evaluation>

The IAALS recommendations for effective judicial performance evaluation:

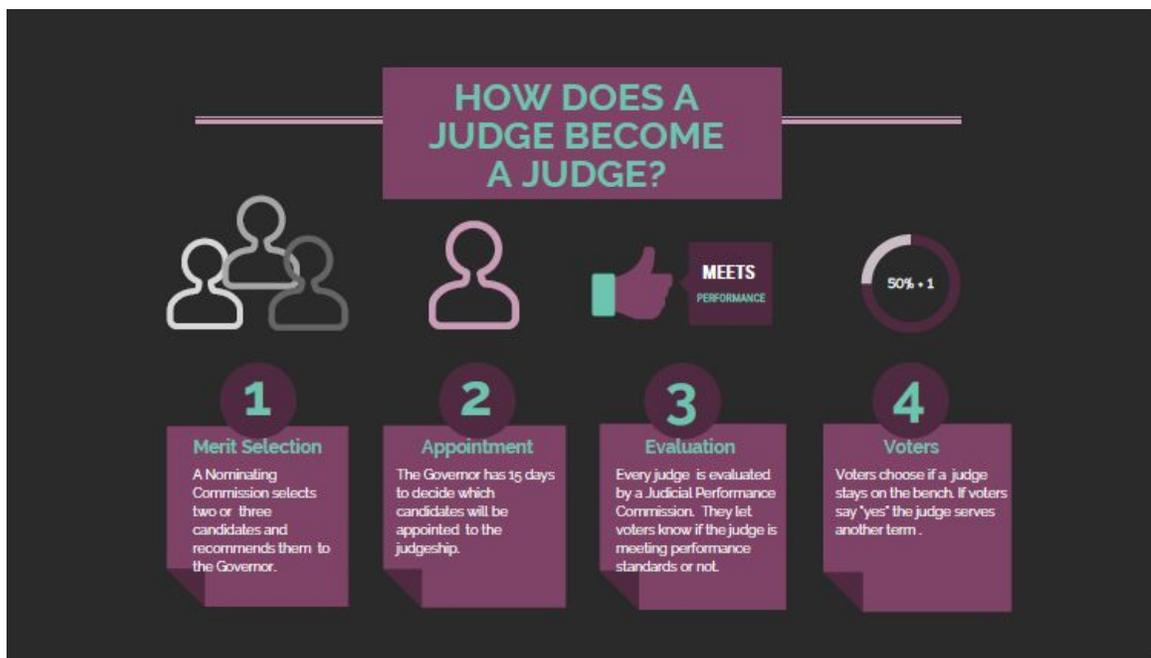
- Judicial Performance Evaluation (JPE) programs should be created by constitution or statute, rather than by a rule or directive.
- JPE programs should publicly disseminate regular evaluations of the performance of individual judges, based on criteria generally understood to be characteristics of a good judge:
  - Command of relevant substantive law and procedural rules
  - Impartiality and freedom from bias
  - Clarity of oral and written communications
  - Judicial temperament that demonstrates appropriate respect for everyone in the courtroom
  - Administrative skills, including competent docket management
  - Appropriate public outreach

- JPE of appellate judges should include a process for evaluating the legal reasoning and analysis, fairness, and clarity of a selection of the judge’s written opinions, without regard to the particular outcomes reached.
- Evaluations should be completed by people who have interacted with the judges in the courtroom and in the office.
- The entity responsible for administering the JPE process should be viewed as independent from other entities in performing its role. It should not be affiliated with the judicial branch.
- Like judicial nominating commissions, the members of a judicial performance evaluation commission should be selected by multiple appointing authorities and be comprised of a majority of lay members. It should reflect diversity, be politically, ideologically, and geographically balanced, and the terms of its members should be staggered.
- As part of JPE, judges should receive regular training. In addition to basic and broad judicial education, education programs should be tailored to the extent possible to the areas in which judges have been found wanting in their respective performance evaluations.

### Appendix 3: Performance Evaluation Commissions in several states.

#### Colorado Office of Judicial Performance

Commissions on Judicial Performance Evaluation review information from many valuable sources. One source includes “survey reports” compiled from completed surveys mailed to individuals after appearing in court. The selection process is complicated, and as such, not all who appear before judges can be guaranteed a mailed survey.



Source: <http://www.coloradojudicialperformance.gov/>

## **Colorado Commissioners**

There are 23 judicial performance commissions serving the State of Colorado: one State Commission and 22 District Commissions. The State Commission is comprised of eleven volunteer citizen commissioners: six non-attorneys and five attorneys. The State Commission evaluates the performance of Supreme Court Justices and Court of Appeals Judges. Each District Commission consists of ten volunteer citizen commissioners: six non-attorneys and four attorneys. The District Commissions evaluate District Court and County Court Judges.

Commissioners are appointed from one of six appointing authorities: The Chief Justice of the Colorado Supreme Court, the Governor of Colorado, the Colorado Speaker of the House, the Colorado President of the Senate, the House Minority Leader, and the Senate Minority Leader. The Chief Justice appoints two attorneys to the State and District Commissions. The Governor appoints one attorney and two non-attorneys to the State Commission, and two non-attorneys to the District Commissions. The Speaker of the House and President of the Senate appoint one attorney and one non-attorney to the State and District Commissions. The House Minority Leader and Senate Minority Leader each appoint one non-attorney to the State and District Commissions.

Commissioners are appointed to four-year terms. Commissioners can serve up to two terms, not to exceed eight years. The work of commissioners varies by district and the number of judges who are being evaluated. Commissioners evaluate judges during two different cycles: retention and interim. During a retention cycle, commissioners begin their work in January and finish by the end of July. During that time each commissioner will complete training, review the results of judicial performance surveys, read opinions and decisions authored by the judges they are evaluating (3 – 5 decisions for each judge), conduct courtroom observations, and attend commission meetings.

Source: <http://www.coloradojudicialperformance.gov/opportunities.cfm>

## **New Mexico Judicial Performance Evaluation Commission (JPEC)**

The JPEC was created by the Supreme Court of New Mexico to improve the performance of judges and provide useful, credible information to voters on judges standing for retention. Judges must receive 57% voter approval to remain on the bench.

## **New Mexico Commissioners**

The JPEC is made up of 15 individuals – 7 lawyers and 8 non-lawyers – who are appointed to staggered terms by the Supreme Court of New Mexico. Commission members are selected from nominations by the Governor, Chief Justice of the Supreme Court, Speaker

of the House, President Pro Tempore, House Minority Leader, Senate Minority Leader and President of the State Bar.

Members are appointed to represent divergent professions, backgrounds and geographical areas of the state.

Members go through an approval process and agree to donate a significant amount of time to evaluate judges midway through their terms in office as well as when they are standing for retention.

Source: <https://www.nmjpec.org/en/staff/jpec-commissioners>

## **Factors in evaluating judges**

The JPEC evaluates judges using an objective, carefully-monitored process. Evaluations are based on performance in four (4) main areas:

### Legal Ability

- Understanding of the substantive law and relevant rules of procedure and evidence
- Awareness and attentiveness to the factual and legal issues before the court
- Proper application of statutes, judicial precedents, and other appropriate sources of legal authority

### Fairness

- Avoiding impropriety or the appearance of impropriety
- Displaying fairness and impartiality toward all parties
- Avoiding *ex parte* communications (communications where all parties in a court case are not present)

### Communication Skills

- Clearly explaining all oral decisions
- Issuing clear written orders and/or opinions
- For trial judges, clearly explaining relevant information to the jury

### Preparation, Attentiveness, Temperament, and Control over Proceedings

- Being prepared for all hearings and/or trials
- Using court time efficiently
- Issuing opinions or orders without unnecessary delay
- Effective courtroom management
- Effective overall case management

Source: <https://www.nmjpec.org/en/how-we-evaluate/overall-factors>

## Utah Judicial Evaluation Performance Commission (JEPC)

### Utah JPEC Commissioner Members

The Commission consists of 13 members. The Utah Supreme Court and the Governor each appoint four members; the President of the Senate and Speaker of the House of Representatives each appoint two members; and the executive director of the Commission on Criminal and Juvenile Justice also serves on the Commission. No more than seven members may be attorneys. No more than half the members appointed by each branch of government may be of the same political party.

Source: <https://judges.utah.gov/about-us/>

### Utah Judicial Evaluation Process



Retention elections provide a mechanism whereby voters may decide whether or not a judge should continue to hold office for another term.

For retention evaluations, JPEC gathers data on a judge’s performance and prepares a written report that is made available to the public. That report is also used by JPEC to decide whether or not its commissioners recommend that the judge be retained in office for another term.

### Full Evaluation Details

A judge is scheduled to receive the full evaluation if more than 50 attorneys appear before them during the evaluation period. JPEC collects this data from the Administrative Office of the Courts. Judges in appellate courts, district courts, juvenile courts, and some justice courts receive a full evaluation.

### The Survey

A quantitative, electronic survey is sent to attorneys, court staff, jurors, and allied professionals, who have conducted business with the judge in the courtroom. Survey respondents answer questions on a 1-5 scale, and they do so anonymously. Results are computed for each judge in each of the minimum performance standard categories and viewed only in aggregate form.

## Minimum Performance Standards

The minimum performance standards the evaluation measures are: Legal Ability, Integrity and Judicial Temperament, Administrative Performance, and Procedural Fairness.

Three minimum performance standards must be passed with a score of at least 3.6:

- Legal Ability: understanding of the law and any relevant rules of procedure and evidence.
- Judicial Temperament and Integrity: behaviors and conduct that promote public trust and confidence in the judicial system.
- Administrative Performance: management of workload and issuance of opinions without unnecessary delay.

One standard must be passed by a “preponderance of the evidence.” This means the judge must score at least 3.0 on this standard on the survey and commissioners consider survey comments and detailed accounts by the courtroom observers and then vote to determine if a judge is considered to pass this element:

- Procedural Fairness: treating an individually fairly in the court setting.

Three additional standards are required. The following standards are not included in the survey but are gathered from the Administrative Office of the Courts:

- To participate annually in no less than 30 hours of continuing legal education.
- To hold no cases for advisement for more than two months.
- To not be the subject of more than one public reprimand issued by the Judicial Conduct Commission or the Utah Supreme Court.

## Courtroom Observation

In addition to the electronic survey, JPEC volunteers visit the courtroom and observe the proceedings. Courtroom observers are trained to evaluate the judge’s conduct in terms of procedural fairness. Appellate court judges do not receive courtroom observation.

[More details](#) about courtroom observation.

## Public Comments

JPEC accepts public comments from the public and those public comments are included in a judge’s evaluation report. Public input in the evaluation process is very important. If you or someone you know has an experience with a judge to share with JPEC, please use our [public comments page](#).

Source: <https://judges.utah.gov/process/full-time-evaluation-details/>

**Appendix 4:** Examples of judicial candidate questionnaires made available to voters in several states.

**Alaska:** <http://www.elections.alaska.gov/Core/official-election-pamphlets.php>

**California:** <https://voterguide.sos.ca.gov>

The secretary of state's office distributes a voter information guide for the general election that includes information about the education and professional background of appellate judges standing for retention and about the judicial selection process. The guide is available on the internet and is sent to the home of every registered voter.

**Oregon:** [https://www.osbar.org/\\_docs/elections/jvg/1604/EasterdayC.pdf](https://www.osbar.org/_docs/elections/jvg/1604/EasterdayC.pdf)

**Washington:** <http://votingforjudges.org>

In 2000, the secretary of state's office published its first voter pamphlet for the primary elections and worked with the OAC to provide expanded information about judicial candidates. The pamphlet included such information as candidate backgrounds and personal statements. In 2002, the OAC and Washington newspapers again assumed the responsibility for preparing and disseminating the judicial voter pamphlet for the primary elections. The guide was available on the Washington courts' website, and a video version featuring supreme court candidates was aired on the state's public television network. In 2010, judicial candidates were included in the secretary of state's voters' guide for the general election, along with a fact sheet on judicial elections in Washington.