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Can a Twenty-First Century Texas Tolerate Its Nineteenth Century Judicial Selection Process Commentary.

Charles Bleil

COMMENTARY

CAN A TWENTY-FIRST CENTURY TEXAS TOLERATE ITS NINETEENTH CENTURY JUDICIAL SELECTION PROCESS?

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I. INTRODUCTION

As the turn of the century approaches, repeated and heightened calls are heard for a better method of selecting Texas judges. To most thoughtful observers, the partisan election of judges in Texas is no longer an intellectually acceptable practice.

This Commentary traces the history of Texas's judicial selection process and, with a special focus on the Texas Supreme Court, examines some changes in judicial politics that have occurred over the past twenty years.

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This Commentary is dedicated to the present and former members of the Texas judiciary, whose tireless efforts to fairly administer justice under sometimes intolerable circumstances make me proud to be counted among them.

The perennial debate concerning the precise method that is best for judicial selection has been adequately explored elsewhere and is beyond this Commentary's scope. This Commentary questions whether our current judicial selection process is adequate for the next century.

II. HISTORICAL PERSPECTIVE

The Texas courts were created by the Constitution of the Republic of Texas, under which judges were selected by joint ballot of both houses of the Texas Congress.[1] This process was considered more democratic than selection by executive appointment. When Texas acquired statehood, however, it essentially adopted the federal method of choosing judges.[2] Through the Civil War and Reconstruction period, Texas adopted several different methods of judicial selection.[3]

The present system for the popular election of judges emerged in 1876 with the adoption of the current Texas Constitution.[4] An understanding of the present Texas court structure requires an examination of the original framers' intent. The constitution was framed in reaction to the Reconstruction era. It was written by people who felt that they had suffered from too much government and who wanted to limit governmental intervention.[5] Reform was effected by various means, including procedural limitations on legislative action, reduction of the terms of legislative members, and direct election of the judiciary.[6] Although the current system of electing judges by popular vote may have best served Texas in 1876, whether the system continues to be effective is the subject of much debate.

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1. Constitution of the Republic of Texas, art. IV, § 9 (1836), *reprinted in* TEX. CONST. app. 482, 486 (Vernon 1993).

2. TEX. CONST. of 1845, art. IV, § 5; *see also* Glenn R. Winters, *Selection of Judges—A Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966) (noting "intensity of popular interest in government" during nation's early years).

3. *See* TEX. CONST. of 1869, art. V, §§ 2, 6, 9 (giving public opportunity to determine method of selection); TEX. CONST. of 1866, art. IV, §§ 2, 5, 10 (allowing public election of judges and appointment by governor for vacancies); TEX. CONST. of 1861, art. IV, § 5 (providing for selection of judges by gubernatorial appointment and senate confirmation); John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 346 (1988) (noting that Texas has fluctuated between appointment and popular election methods of judicial selection).

4. *See* TEX. CONST. art. V, § 2 (providing for general election of supreme court justices by qualified voters).

5. *See* C. Raymond Judice, *The Texas Judicial System: Historical Development and Efforts Towards Court Modernization*, 14 S. TEX. L.J. 295, 313 (1973) (concluding that Texas Constitution was written in reaction to government extravagances and excesses).

6. *See id.* (noting severe limitations on public officials' "powers to accomplish that which they were elected to accomplish").

For one hundred years following 1876, the Democratic Party generally dominated Texas politics and the state judiciary. Until the 1960s, most judges originally were appointed to the bench, and few were opposed when they ran for re-election.[7] Thus, until recently, the Texas judicial selection process resembled an appointment-retention election system and provided a relatively stable and independent judiciary.

III. THE PAST TWENTY YEARS

In recent years, an incredible transformation of the Texas judiciary has unfolded. Many forces have influenced this change, including partisan politics, catchy names, big money, and special interest groups. An examination of these factors is revealing.

A. *A Two-Party State*

The emergence of the Republican Party in Texas substantially affected judicial elections. William Clements's 1978 victory in the gubernatorial race was key to Texas's development as a two-party state. Since then, Texas has fully emerged as a bipartisan state.[8]

In 1986, Anthony Champagne published the results of his extensive study of judicial selection, which was funded by the Texas Bar Foundation.[9] Champagne's study chronicled the impact that a popular top-of-the-ticket candidate may have on judicial races.[10] Popular candidates high on the ballot provide coattails for candidates farther down on the ballot. Such coattails were supplied by United States Senator Lloyd Bentsen, a Democrat, in 1982, and President Ronald Reagan, a Republican, in 1980 and 1984.[11] In 1994, the Republican Party as a whole appears to have provided the coattails. Straight-party voting may be more

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7. *See* Bancroft C. Henderson & T. C. Sinclair, *The Selection of Judges in Texas*, 5 HOUS. L. REV. 430, 442 (1968) (reporting that 55% of judges on bench in 1962 attained their position by appointment).

8. *See* Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 71 (1986) (special issue) (citing Lance Tarrance's calculations which indicated that, by 1984, straight-party voting percentages were essentially balanced).

9. *Id.* at 53.

10. *See* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 147 (1988) (noting impact of straight-ticket voting upon candidates for lesser offices, including judicial offices).

11. *See id.* at 147–48 (reporting successes of Republican judicial candidates in 1984, when President Reagan garnered 64.1% of vote).

determinative of victory in many judicial races than the qualifications, or lack thereof, that a candidate possesses.[12]

Before the 1994 elections, commentators claimed that the Republicans had gained control of the Texas Supreme Court.[13] The Republican members of the court currently enjoy numerical superiority. In 1994, several Republican judicial candidates rode into office statewide on the national and state Republican tidal wave.[14] Although most of the victorious judicial candidates were well qualified, one result may only be termed a disaster attributable to straight-party voting by those unfamiliar with the judicial candidates. Stephen Mansfield's defeat of Chuck Campbell for a seat on the Texas Court of Criminal Appeals was an aberration solely due to party politics.[15] The development of the two-party system in Texas, while perhaps healthy for state politics generally, has led to renewed questions about whether political partisanship is appropriate for the judiciary.[16]

B. *Catchy Names*

A catchy name has long provided easier access to a judicial post. Some of the more electable names include Sam Bass, Sam Houston Clinton, Ira Sam Houston, John Marshall, and Jefferson Smith.[17] However, the use of a name to obtain a judicial position startled the state in 1976 when an

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12. *Cf.* Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 71 (1986) (special issue) (illustrating impact of three-percentage-point advantage to party candidates in straight-party voting).

13. *See* Walt Borges, *Outnumbered 5-4, GOP Still Controls Court*, TEX. LAW., July 25, 1994, at 1 (finding that unified rulings of Republican justices allow them to control court without numerical superiority).

14. *See* Richard Wolf, *GOP Rattles Dems, Power Shifting in Senate, House, States: Voters' Mood: "Time for a Change,"* USA TODAY, Nov. 9, 1994, at A1 (reporting Republican takeover in Senate, House, and states in 1994 elections). The 1994 Republican wave was not confined to statewide judicial races. For example, the Democratic judicial incumbents were virtually swept out of the courthouses in Harris and Tarrant counties.

15. *See* Bruce Nichols, *Election System Questioned After Upset*, DALLAS MORNING NEWS, Nov. 10, 1994, at A40 (describing Mansfield's victory as result of riding Republican tidal wave and detailing bipartisan skepticism regarding Mansfield's qualifications and defects in partisan election system). Campbell, a 12-year veteran on the Texas Court of Criminal Appeals and an intellectual leader of the court, enjoyed almost total support of the bar and media. In contrast, Mansfield enjoyed no support, overstated his qualifications, and had prior run-ins with the law, yet handily defeated Campbell. *Id.*

16. *See* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 148 (1988) (raising concerns that party affiliation may be sole reason for defeat of able judges and may adversely affect judiciary's stability).

17. *See generally* Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 100–02 (1986) (special issue) (discussing positive and negative impacts of various names on candidates' electability).

unqualified, unknown, and undeserving Don Yarbrough was elected to the Texas Supreme Court.[18]

Like most judicial candidates whose primary qualification is a popular name, Don Yarbrough was unknown to the public and the bar, was not supported by the bar, the media, or any group, and did not campaign for his election.[19] Many observers speculated that voters confused him with Don Yarborough, a prominent Democratic Party leader who had thrice run for governor.[20] Others opined that the candidate may have benefitted from the respect for former United States Senator Ralph Yarborough.[21] Yarbrough defeated Charles Barrow, who had served seventeen distinguished years on the bench, was endorsed by most state newspapers, and was a six-to-one favorite in the state bar poll.[22] As events developed, even before Yarbrough's election, the state bar filed a disbarment suit against him alleging unethical conduct and fifty-three violations of the law.[23] After Yarbrough was elected, he was indicted for perjury and forgery.[24] When the Texas Legislature instituted formal removal proceedings, Yarbrough resigned under pressure.[25] One year after he assumed the bench, Yarbrough was a disgraced former justice and a convicted felon.[26]

Since 1976, many judicial candidates have sought to take advantage of a catchy name. Names familiar to the public because soup is "mmmmmm good"[27] or because bread is "baked fresh daily"[28] have been well

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18. *See* Paul Holder, *That's Yarbrough—Spelled with One "O": A Study of Judicial Misbehavior in Texas* (describing voter confusion about candidate identity when candidate's honesty and integrity is questionable), *in* PRACTICING TEXAS POLITICS 453, 456–57 (Eugene W. Jones et al. eds., 5th ed. 1983).

19. *See id.* at 456 (noting that candidate opposing Yarbrough lacked name identification with Texans).

20. *Id.* at 456–57.

21. *Id.* at 457.

22. Paul Holder, *That's Yarbrough—Spelled with One "O": A Study of Judicial Misbehavior in Texas*, *in* PRACTICING TEXAS POLITICS 453, 456 (Eugene W. Jones et al. eds., 5th ed. 1983).

23. *Id.* at 458.

24. *Id.*

25. *Id.* at 459.

26. Paul Holder, *That's Yarbrough—Spelled with One "O": A Study of Judicial Misbehavior in Texas*, *in* PRACTICING TEXAS POLITICS 453, 459 (Eugene W. Jones et al. eds., 5th ed. 1983). The governor appointed Charles Barrow to fill the vacancy on the court left by Yarbrough's departure. *Id.* Barrow continued distinguished service as a justice on the Texas Supreme Court, retired from that court, and then served as Dean of the Baylor Law School until his retirement.

27. Despite the public uproar over the 1976 Don Yarbrough election, a similar election occurred in 1978. Robert M. Campbell ran for the Texas Supreme Court against incumbent T. C. Chadick. Chadick had been appointed by Governor Briscoe after

received by Texas voters. Similarly, Gene Kelly became the Democratic nominee for the Texas Supreme Court in 1990 based on his name, familiar because of the legendary entertainer with the same name.[29] After Kelly's loss in the 1990 general election, he unsuccessfully sought a seat on the Court of Criminal Appeals in 1994. George Busch also ran unsuccessfully for the supreme court in 1994, relying on the similarity between his name and that of former President George Bush and the former President's son, current Texas Governor George W. Bush.

Conversely, some solid jurists have found that, no matter how competently and diligently they perform their duties, their names proved to be a liability on the ballot. For example, in losing races to retain their seats on the Court of Criminal Appeals, Carl Dally and, more recently, Pete Benavides found themselves outnamed.

An attractive or unattractive name, although sometimes a major factor in judicial races, is not a proper criterion for the selection of qualified judges. Nevertheless, name may be more important than legal ability for those aspiring to obtain a judicial position in Texas.

C. *Big Money*

In a 1970 speech at Baylor Law School, Justice Joe Greenhill expressed that it was high time to get the Texas judiciary out of politics.[30] He warned that, in addition to the tragic truth that most voters do not cast an informed vote in most judicial races, judicial elections were becoming cost-prohibitive.[31] During the early 1970s, campaigning for a spot on the

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exemplary service as a state senator, district judge, and chief justice of the Texarkana Court of Civil Appeals. Chadick, like Barrow before him, enjoyed the overwhelming support of the media and the bar. Campbell, who enjoyed no visible support and who did not campaign, won easily. Fortunately, Campbell proved to be an able and competent jurist.

28. Judge Charles Baird has capitalized on the name of Mrs. Baird's Bread in his Texas Court of Criminal Appeals races.

29. In gaining the Democratic nomination for a seat on the Texas Supreme Court, Kelly defeated Fred Biery, who, like Charles Barrow before him, enjoyed years of distinguished service on the bench and the support of the media and the bar. In that election, Kelly, like Yarbrough, did not campaign. After the election, Biery continued his service on the San Antonio Court of Appeals until President Clinton appointed him to the United States District Court for the Western District of Texas. He began service on that bench in March 1994.

30. *See* Joe R. Greenhill & John W. Odam, Jr., *Judicial Reform of Our Texas Courts—A Re-Examination of Three Important Aspects*, 23 BAYLOR L. REV. 204, 218–19 (1971) (remarking that "[t]oday . . . only a very small percentage of the people can possibly cast an intelligent vote in a judicial race").

31. *See id.* at 219 (referring to costs as "staggering," especially for statewide races).

two high courts in Texas could easily cost up to $100,000.[32] By 1980, the cost of a race for the Texas Supreme Court had exceeded $1 millon.[33] In the 1994 Democratic primary race between incumbent Raul Gonzalez and challenger Rene Haas, about $5 million was spent.[34] High-court candidates also spent millions on the two fully contested campaigns in the 1994 general election. If the spending in 1970 could be termed prohibitive, the current cost of some judicial campaigning may be said to approach obscenity.[35]

Undeniably, a lot of money is normally a necessary evil in statewide election races. However, a candidate's personal wealth or ability to raise large sums of money does not necessarily translate into an ability to serve as a competent and impartial judge.

D. *Special Interests*

The way in which certain special interest groups line up to support judicial contestants, especially at the supreme court level, is reminiscent of the cattlemen-sheepherder feuds of bygone days. This alignment contrasts sharply with the historical pattern, which reflected an almost total absence of interest by the public or any special segments of society.

Until quite recently, the Texas Supreme Court had an established reputation as a conservative, but nonetheless docket-neutral court. By 1980, however, supreme court elections had become a battleground between

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32. *See* W. St. John Garwood, *Judicial Revision—An Argument for the Merit Plan for Judicial Selection and Tenure*, 5 TEX. TECH L. REV. 1, 10 (1973) (noting that money is solicited from lawyers whose economic and professional interests are impacted by judges' decisions on bench).

33. *See* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 149 (1988) (finding that average campaign fund for winning supreme court candidates in 1986 totaled $750,000, with several candidates raising more than $1 million). The race for a supreme court seat became expensive in 1980 as plaintiff and defense lawyers battled to elect candidates favorable to their views. *Id.* at 148.

34. Bruce Nichols, *Gonzalez Tops Haas in Runoff for High Court: Battle Called Costly, Bitter*, DALLAS MORNING NEWS, Apr. 13, 1994, at A21. The runoff set a spending record for state court contests, which was especially notable because the spending occurred in a primary rather than the general election. *Id.*

35. *See generally* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 149 (1988) (reporting campaign fund statistics for 1980s and noting that one candidate's fund exceeded $1.4 million). The 1982 contribution by Clinton Manges and his attorney of about $500,000 to Texas Supreme Court candidates while Manges had a case, *Manges v. Guerra*, pending before the court exemplifies the type of money contributed by interested individuals. Charles Bleil & Carol King, *Focus on Judicial Recusal: A Clearing Picture*, 25 TEX. TECH L. REV. 773, 787 (1994).

plaintiffs' lawyers and the defense bar.[36] By the mid-1980s, the plaintiffs' bar appeared to have gained substantial influence over the court. This phenomenon was showcased in a well-publicized CBS *60 Minutes* segment entitled *Justice for Sale*.[37]

In 1987, one justice took pains, in a concurring opinion, to explain how the court could flip-flop on a significant legal issue in a brief period. He wrote: "The answer to that question is that the makeup of this court has changed."[38] As with all cyclical movements, the makeup of the court has changed again. Some legal professionals believe that medical groups, coupled with an insurance and defense-lawyers' coalition, have gained the court's favor.[39] Others have observed that a conservative majority of the Texas Supreme Court has delivered pro-business decisions consistently over the past few years.[40] During the 1994 elections, one Texas Supreme Court candidate stated that justice is as much for sale now as it has ever been, but merely to a new set of buyers.[41] Justice Gonzalez, in his campaign against Rene Haas, proclaimed that trial lawyers wanted to buy Haas a seat on the court.[42] Understandably, the public still perceives that justice is for sale in Texas.[43]

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36. *See* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 148 (1988) (commenting that plaintiffs' attorneys have especially strong economic interest in supreme court decisions).

37. *60 Minutes: Justice for Sale?* (CBS television broadcast, Dec. 6, 1987) (interviewing Texas trial lawyer Joe Jamail and several past and present supreme court justices). The *60 Minutes* segment was critical of the judicial election system in Texas, suggesting that when the biggest campaign contributors are lawyers practicing before the very judges they help elect, the judges' votes are influenced by pocketbooks instead of convictions. *Id.*

38. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 362 (Tex. 1987) (Mauzy, J., concurring). Justice Mauzy further wrote that "[t]he people, speaking through the elective process, have constituted a new majority of this court which has not only the power but the duty to correct the incorrect conclusion arrived at by the then-majority."

39. *See, e.g.*, Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 33 (Tex. 1994) (Doggett, J., concurring) (asserting that court "has replaced protection of insureds with protection of insurers, leaving the insurance industry largely free to do as it pleases"); David Elliot, *Haas-Gonzalez Race Renews Calls for Change*, AUSTIN AMERICAN-STATESMAN, Mar. 10, 1994, at A1, A16 (quoting political consultant George Christian as stating that, in 1994 primary, Gonzalez was financially supported by "health care providers, business people, [and] people that get sued").

40. Michael Totty, *High-Court Cases Await Voters' Verdict*, WALL ST. J., Sept. 14, 1994, at T1.

41. Walter Borges, *New High Court Ammo: Reform Pledges*, TEX. LAW., Jan. 31, 1984, at 5 (quoting Democrat Jimmy Carroll, who characterized Republican Party as new buyer).

42. Michael Totty, *Gonzalez vs. Haas: A High-Court Battle*, WALL ST. J., Apr. 6, 1994, at T1.

43. *Id.*

Many individuals and groups have common interests. Prominent among those who have sought to influence the makeup of the Texas Supreme Court are insurance groups, the Texas Association of Defense Counsel, the Texas Medical Association, the Texas Trial Lawyers' Association, and, of course, the Texas Republican and Democratic parties.[44] Interest groups may influence the composition of the supreme court by providing a preferred candidate with substantial campaign funds. This funding at least gives rise to suspicion that the particular candidate, once elected, may owe a debt of gratitude for the job.

Partisan politics, the use of catchy names, the large sums of money involved in judicial races, and the involvement of special interest groups have given many a suspicion, if not a conviction, that justice is not above reproach in Texas. More than a century ago, Justice Bonner wrote:

> [T]he first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality . . . . It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. . . . [I]t is of great importance that the courts should be free from reproach or the suspicion of unfairness.[45]

The coalescence of various factors has made the Texas judicial system one that, rightly or wrongly, does not enjoy the respect and confidence of the people.

Perhaps an awareness of this judicial crisis, combined with the failure of legislation addressing the problem, led the governor, lieutenant governor, and speaker of the house of representatives to join together and appoint the Select Committee on the Judiciary in 1983.[46] The problem was labeled "a judicial system stuck in time, one foot in the past century and another in the present."[47]

IV. THE JUDICIARY'S ACHILLES HEEL

Public policy demands that a judge appear and act absolutely impartial so that no doubts or suspicions arise with respect to the fairness of the

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44. *Cf.* Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 148 (1988) (noting particular interest of insurance defense and plaintiffs' bar in influencing court's composition).

45. Newcome v. Light, 58 Tex. 141, 145–46 (1882).

46. *See* SELECT COMMITTEE ON THE JUDICIARY, FINAL REPORT at vi (1985) (finding that judicial system is plagued with chronic problems, such as jurisdiction and redistricting of trial courts and compensation and selection of judges).

47. *Id.* The committee found that virtually no changes in the structure and organization of Texas courts had occurred since the adoption of the Texas Constitution in 1876. *Id.*

court.[48] An independent judge is essential to constitutional due process within the judicial system.[49] One significant vulnerability of the Texas judiciary is the general perception that judicial independence, a *sine qua non* of any sound judicial system, is lacking. This vulnerability might well be the entire system's Achilles heel.

The absence of actual or apparent judicial independence in Texas stems from the fact that judges are chosen in partisan elections. At the appellate court level, judges must be aware that the much-needed financial support they receive from special interest groups or individuals depends upon satisfactory performance in decisions on specific cases. This awareness also holds true for the trial courts, where, especially in rural areas, a trial judge may hold office at the whim of one or more influential persons.

A lack of independence, real or apparent, breeds distrust of the judiciary. The existence of this distrust is so obvious that some judges are suspected of outright favoritism in performing their judicial duties. An interesting phenomenon in certain trial courts demonstrates this distrust. In some jurisdictions, after a lawsuit is filed and assigned to a particular judge, lawyers for both sides often associate other attorneys who appear to have some special standing with the judge. Although this practice is completely legal, it perpetuates a belief that judicial decisions in those courts are not based solely on the facts and applicable law.

V. At the Threshold of Change

As the turn of the century approaches, Texas is perhaps at the threshold of changing its method of selecting judges. Almost one hundred years ago, Roscoe Pound cautioned that "[p]utting courts into politics and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench."[50] In the last century, many prominent groups and individuals have advocated a change from the partisan election system.[51] In 1949, the members of the Texas bar favored

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48. *See* CNA Ins. Co. v. Scheffey, 828 S.W.2d 785, 792 (Tex. App.—Texarkana 1992, writ denied) (concluding that "[j]udicial decisions rendered under circumstances that suggest bias, prejudice or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the principles on which the judicial system is based").

49. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986) (emphasizing importance of protecting adjudicator's independence).

50. *See* John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 349 (1988) (relating Pound's remarks to American Bar Association regarding public's dissatisfaction with judicial system).

51. *See* W. St. John Garwood, *Judicial Revision—An Argument for the Merit Plan for Judicial Selection and Tenure*, 5 TEX. TECH. L. REV. 1, 6 (1993) (reporting results of poll that asked questions about alternative methods of selection and retention).

change by more than a two-to-one margin.[52] In 1985, the Select Committee on the Judiciary concluded that the present system could no longer be tolerated and recommended three alternative systems.[53] The last five chief justices of the Texas Supreme Court, including Chief Justice Tom Phillips, have advocated a change.[54] Judge Chuck Campbell, a strong force on the Texas Court of Criminal Appeals for a dozen years before his bizarre defeat last fall, has stated that Texas's system of judicial selection is "the worst possible system that we could have."[55] One political leader, Senator Rodney Ellis, in urging the state bar to provide a reasoned debate on how judges should be selected, noted that many feel the need to change the present system.[56]

Various efforts have been made to instigate reform and to refine the judicial selection process. The most recent call for change was initiated by Texans for Judicial Reform, a group that supports merit selection. The group has attracted broad-based support from such well-known figures as former Governor Bill Clements, a Republican, and John Hill, a Democrat and former chief justice of the supreme court.[57] In the most recent primary and general elections, certain groups such as the League of Women Voters, Common Cause, Public Citizens of Texas, and the Texas Consumer Rights Action League devised a Fair Campaign Practices Pledge.[58]

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52. *See id.* (noting preference for merit selection and discussing similar poll results in 1953).

53. SELECT COMMITTEE ON THE JUDICIARY, FINAL REPORT 61, 70 (1985). In order, the alternative recommendations were: (1) a merit selection system; (2) a nonpartisan election system; and (3) separate placement on the ballot to prohibit straight-party voting. *Id.*

54. Thomas R. Phillips, State of the Judiciary, Address to the Joint Session of the 73d Legislature at 3 (Feb. 23, 1993) (transcript on file with the *St. Mary's Law Journal*) (noting that statistics show little public confidence in current system of choosing judges). In his address, Chief Justice Phillips agreed with Attorney General Dan Morales, who said that " 'Texans deserve a judiciary free of partisanship, free of political influence, free of obligations to financial interests which exercise too much influence in the selection of our judges, and most importantly, Texans deserve a judiciary that gives meaning to the notion of fair and equal representation.' " *Id.*

55. *Candidates Forum: Size Up the Criminal Appeals Candidates*, TEX. LAW., Oct. 10, 1994, at 1, 24. Judge Campbell further noted that, "where you have obscene amounts of money being paid to candidates . . . [e]ven if the money doesn't affect the judge's decision, surely the public perceives that it does and that it will." *Id.*

56. Letter from Rodney Ellis, Texas State Senator, to Karen R. Johnson, Executive Director, State Bar of Texas (Apr. 24, 1994) (on file with the *St. Mary's Law Journal*).

57. David Elliot, *Haas-Gonzalez Race Renews Calls for Change*, AUSTIN AMERICAN-STATESMAN, Mar. 10, 1994, at A1, A16.

58. *See* LEAGUE OF WOMEN VOTERS OF TEXAS, ET AL., JUDICIAL CAMPAIGN FINANCE REFORM: A REPORT ON THE FAIR CAMPAIGN PRACTICES PLEDGE 1–2 (1994) (responding to Texas Legislature's failure to enact campaign-finance reform bill). The pledge

The pledge represented an effort to limit campaign contributions.[59] The Texas Supreme Court, by judicial fiat, jumped into the reform movement, seeking to reform campaign contributions by limiting the time within which a judge or judicial candidate may solicit or accept contributions.[60] Lieutenant Governor Bob Bullock appointed a select group to devise the best judicial selection method and instructed the group to consider every possible method.[61] In late 1994, the appointed group recommended a plan that proposed merit selection for appellate judges and nonpartisan elections, with re-election by voter approval, for district court judges.[62]

After each judicial election, the movement for changing the way Texans select their judges is renewed. To date, the call remains unanswered. Anthony Champagne, after studying judicial reform for a decade, has ob-

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essentially asked each candidate for targeted judicial offices to adhere to the following rules:

> Accept no contributions greater than $50 unless a bona fide effort has been made to identify the contributor by name, principal occupation and place of employment. . . .
>
> Accept no contributions from an individual, an individual's spouse, or dependent members of an individual's family that in the aggregate exceed $5,000.
>
> Accept no contributions above $50 from employees or members of the same law firm, or from their spouses or dependent family members, that in the aggregate exceed $25,000.
>
> Accept no contributions from a Political Action Committee if that contribution, when aggregated with other contributions received from Political Action Committees, would exceed $50,000.
>
> Transfer no funds raised after July 1, 1993 for another office into the campaign fund for this election unless that money would qualify under the other fundraising restrictions in the Pledge.
>
> Spend no more than $10,000 of the candidate's own money in the campaign, nor loan more than $10,000 of the candidate's own money to the campaign for subsequent reimbursement.
>
> Neither knowingly allow nor participate in any indirect or direct PAC expenditure supporting the candidate's election or attacking the candidate's opponent that exceeds $5,000.
>
> Spend no more than $2 million.

Id. The report noted that over two-thirds of all judicial candidates signed the pledge, evidencing the candidates' willingness to voluntarily implement campaign finance reform. *Id.* at 2.

59. *See* Walter Borges, *New High Court Ammo: Reform Pledges*, TEX. LAW., Jan. 31, 1994, at 5 (reporting candidates' opinions of pledge).

60. TEX. CODE JUD. CONDUCT, Canon 5(4) (effective Jan. 1, 1995).

61. *See* Robert Elder, Jr. & Walt Borges, *A Bullock in a China Closet? Group Tackles Judge Selection*, TEX. LAW., Aug. 15, 1994, at 1, 40 (discussing several options being evaluated).

62. Bob Bullock, News Release, *Working Group Proposes Judicial Selection Reform Legislation* (Nov. 29, 1994) (on file with the *St. Mary's Law Journal*). In April 1995, the Texas Senate passed a bill that would allow voters to amend the constitution to require gubernatorial appointment of all appellate judges and nonpartisan elections for district judges. Tex. S.B. 313, 74th Leg., R.S. (1995); Tex. S.J. Res. 26, 74th Leg., R.S. (1995).

served that "[p]ractically after every election for judges, you get a call for changing the system of selecting judges to a merit system. There's a lot of discussion for a while and then it all dies down and it all goes away."[63] The "business as usual" approach of the past must be discarded to bring about the needed change.

VI. CONCLUSION

Society is becoming increasingly complex. In the legal world, for example, technology has progressed from the use of carbon copies, to photocopies, to computer-generated duplicate originals in the span of a little more than a generation. Society, with all of its intricacies, has advanced far beyond the 1876 method of selecting judges. One can scarcely imagine how much more sophisticated and complex tomorrow's society will be. The antiquated method of judicial selection, already inadequate and distrusted, cannot begin to properly serve the Texas of tomorrow.

Thus, it seems apparent that twenty-first century Texas will not tolerate the nineteenth century system of judicial selection by partisan election. To effectuate this change, members of the bench and bar, together with the citizens of Texas, must agree to rise above their personal interests to serve the interests of the people of Texas.

63. David Elliot, *Haas-Gonzalez Race Renews Calls for Change*, AUSTIN AMERICAN-STATESMAN, Mar. 10, 1994, at A1, A16.