

# Judicial Reform in Texas: A Look Back After Two Decades

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One of the most frequently quoted comments on judicial reform is the late New Jersey Chief Justice Arthur T. Vanderbilt's remark, "Judicial reform is not for the short-winded."<sup>1</sup> Vanderbilt's remark illustrates a key point about judicial selection reform. Reforms do not occur simply because someone or some group in a state decides that change in the system of selection is desirable; rather, it is necessary for key interest groups in the judicial politics of a state to reach a sufficient political consensus that change can occur. A variety of factors may lead to such a consensus on the need for reform. In Oklahoma, for example, judicial reform came about as a result of a major scandal in the state's judiciary.<sup>2</sup> But in some states, consensus for change among key stakeholders is difficult.<sup>3</sup> Key interest groups can have competing objectives, making judicial reform impossible. At other times, political conditions—the political environment of a state—lessen the chances of reform.

This article will focus on Texas's judicial reform experiences for the past two decades. Texas has been a bellwether state in heralding a new era in judicial elections. It was the first state where widespread problems developed in judicial elections in the 1980s. There was judicial scandal, supreme court elections become a battleground for plaintiffs and business interests, there were huge sums spent in Supreme Court races, there was intense competition between the political parties for control of the state judiciary, and there were increasing demands from minorities for greater representation on the bench.<sup>4</sup>

In trial court elections, beginning in the early 1980s, first in Dallas County and later spreading to other counties, most notably Harris County where Houston is located, there was a pattern of partisan sweeps in judicial elections where large numbers of judges were defeated for reelection simply because they had a different party affiliation from the popular candidate at the top of the ticket. In Dallas County, Republicans swept the trial court elections to such a degree that many of the remaining Democratic judges changed their party affiliation to the Republican Party in a bid for political survival.<sup>5</sup>

At first Texas seemed an anomaly with its expensive, highly

partisan judicial elections. It did not take long, however, for other states to follow. The Texas judicial experience was actually a harbinger of things to come in other state judicial elections.

With the rise of this new level of competition in judicial elections, there was a major push to change the system of selection in Texas. However, just as in many other states where judicial elections have become highly competitive, the system of selection has not changed.<sup>6</sup> On the surface, Texas seemed to have all the components that one might think necessary for change: Intensely partisan and expensive judicial elections; a major judicial scandal; widespread negative publicity about the state's judiciary; and an active reform movement led by a well-known major figure. Still, the system did not change.

As in Texas, in states where judicial elections have become expensive and competitive, judicial reform efforts have developed. As a general matter, reform efforts in recent years have proven ineffective in changing the system of judicial selection. The Texas experience offers a lesson in the difficulties of judicial selection changes. What happened in Texas suggests the importance and the enormous difficulty in developing a political coalition among key interests in a state that can bring about change in the system of judicial selection. This article will explore what went wrong with the judicial reform movement in Texas. In the process, it will offer a blueprint of what can go wrong with a reform effort and explain why in Texas, and many other states, judicial reform efforts have failed. However, this article will also suggest that opportunities are now developing in Texas for a new reform effort—opportunities caused primarily by changing state demographics, which are quickly altering the state's political climate.

## I. A BRIEF BACKGROUND OF JUDICIAL ELECTIONS IN TEXAS

In Texas, like other states, judicial elections were once low-key, inexpensive, sleepy affairs. Judges were only rarely defeated and generally did not have opposition.<sup>7</sup> One description of this old era in judicial politics noted:

### Footnotes

1. Professor Roy Schotland of Georgetown University, for example, at a panel on *Judicial Elections and Campaign Finance Reform*, quoted Chief Justice Vanderbilt's remarks with the following preface: "[Y]ou have probably all heard [this quote] a thousand times...." Symposium, *Judicial Elections and Campaign Finance Reform* 33 U. Tol. L. Rev. 335, 340 (2002).
2. Phillip Simpson, *The Modernization and Reform of the Oklahoma Judiciary*, 3 OKLAHOMA POLITICS 1 (1994).
3. See, e.g., the case studies of judicial reform efforts found in ANTHONY CHAMPAGNE & JUDITH HAYDEL (EDS.), *JUDICIAL REFORM IN*

THE STATES (1993).

4. See generally, KYLE CHEEK & ANTHONY CHAMPAGNE, *JUDICIAL POLITICS IN TEXAS* (2005).
5. A discussion of partisan sweeps in Dallas and Harris counties as well as a discussion of party switching by judges is found in Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 71-80 (1986).
6. CHEEK & CHAMPAGNE, *supra* note 4, at 117.
7. Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URBAN L.J. 907, 910 (2002).

## Big-money judicial campaigns quickly led to problems in Texas.

At election time, sitting justices almost never drew opposition. Some justices resigned before the end of their terms, enabling their replacements to be named by the governor and to run as incumbents. In the event that an open seat was actually contested, the decisive factor in the race was the State Bar poll, which was the key to newspaper endorsements and the support of courthouse politicians.<sup>8</sup>

Things began to change in Texas judicial politics in the late 1970s. First, in 1976 an unknown lawyer ran for the Texas Supreme Court against a highly respected incumbent who had won the State Bar poll by a 90% margin. That unknown lawyer won even though a State Bar grievance committee had filed a disbarment suit against him alleging 53 violations—another 20 more allegations were later added. However, the lawyer had a famous Texas name, Yarbrough, which probably led voters to confuse him with another Yarbrough who had twice run a strong race for governor or with the long-time U.S. senator from Texas, Ralph Yarborough. Although Justice Yarbrough served only a few months before criminal charges and the threat of legislative removal led to his resignation,<sup>9</sup> the case provided a lesson: Name identification could elect nearly anyone to the bench in Texas. In 1978, a little known plaintiffs' lawyer named Robert Campbell successfully ran against an incumbent judge for the Texas Supreme Court. There was speculation that Campbell benefited from University of Texas running back Earl Campbell winning the Heisman Trophy the previous fall.<sup>10</sup>

A recognizable name could put someone on the bench in Texas. However, it was also possible to use advertising to create name identification.<sup>11</sup> That, of course, meant there was a need for campaign funds. Texas became a battleground between members of the civil bar, plaintiffs' attorneys and defense lawyers who realized that campaign funds could buy the name recognition for the judicial candidates who reflected their points of view.<sup>12</sup> And, once these opposing segments of the bar got into the battle for control of the Texas bench, they discovered they could not simply depart the battleground; else the opposing side would be victorious in the election.<sup>13</sup> Like warfare, once the fighting between the opposing sides of the bar started, it was nearly impossible for either to stop.

Another thing that was making it impossible to go back to the old style of judicial campaigns was that Texas was developing a viable two-party system. In 1978, Texas elected its first Republican governor since Reconstruction. With the election

of a Republican governor, appointments to vacant seats on major trial courts and the appellate courts were in his hands, and, with relatively few exceptions, he insisted that his judicial appointees

agree to run in subsequent elections as Republicans.<sup>14</sup> It was also the case that the election of a Republican governor heralded the emergence of a viable Republican Party in the state. The state quickly moved from a one-party Democratic state to a competitive two-party state before becoming largely a one-party Republican state.<sup>15</sup> That meant candidates for judicial offices had opposition, not just in their base, which had been the Democratic Party primary where opposition was often minimal and more easily controlled, but in the general election. Candidates for judicial office had to have money, often for media buys for television, which was not only an expensive form of campaigning, but a necessary one in a large, urban, and competitive state.

Where does really big money in judicial campaigns originate? It tends to come from economic interests that have a stake in judicial decisions.<sup>16</sup> As a result, candidates for judicial office tended to increasingly reflect one or the other of the opposing economic interests funding them.

Big-money judicial campaigns quickly led to problems in Texas. One was the claim that judges were biased in favor of their campaign contributors.<sup>17</sup> As a result, there was criticism about the new and very substantial role of money in judicial campaigns.<sup>18</sup> Another problem with big money in judicial campaigns was the risk of scandal caused by an unhealthy relationship between judges and their contributors.<sup>19</sup> One highly publicized example of that unhealthy relationship can be found in the case of *Manges v. Guerra*.<sup>20</sup> In *Manges*, a jury found Clinton Manges, acting as the manager of mineral leases on 70,000 acres of the Guerra family's land, violated his obligations to the Guerras. Manges was removed from his manager's position and the Guerras were awarded \$382,000 in actual damages and \$500,000 in exemplary damages.<sup>21</sup> Ultimately the case was taken to the Texas Supreme Court by Manges, who hired a well-known San Antonio plaintiff's lawyer to represent him.<sup>22</sup> The case was assigned to a justice who had received substantial campaign contributions from both Manges and his lawyer. Initially the justice proposed an opinion that supported Manges, but that opinion was rejected and so the justice tried again. Two justices eventually recused themselves—one

8. Paul Burka, *Heads, We Win, Tails, You Lose*, TEXAS MONTHLY, May 1987, at 138-139.

9. Champagne & Cheek, *supra* note 7 at 911.

10. *Id.* at n.25.

11. *Id.* at 911.

12. CHEEK & CHAMPAGNE, *supra* note 4, at 37-51.

13. Big money remained in Texas Supreme Court elections even after state elections moved into the Republican column. *Id.* at 50.

14. James Brian McCall, In the Shadow of John Connally: An Examination of Gubernatorial Power in Texas 66-68 (2006) (unpublished Ph.D. dissertation, University of Texas at Dallas) (on file with author).

15. *Id.*; see also Champagne, *supra* note 5, at 67-80.

16. Champagne, *supra* note 5, at 84-90.

17. See, e.g., Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, at 74; Mary Flood, *Justice Still for Sale? Clock Is Ticking on the Answer*, WALL ST. J., June 24, 1998, at T1.

18. See, e.g., Pete Slover, *Group Alleges Supreme Court Favors Donors*, DALLAS MORNING NEWS, Apr. 25, 2001, at 23A.

19. CHEEK & CHAMPAGNE, *supra* note 4, at 172-176.

20. 673 S.W.2d 180 (Tex. 1984).

21. Champagne & Cheek, *supra* note 7, at 912.

22. *Id.*

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With those recusals, the vote was 4-3 for Manges and for reversal of the lower court. The chief justice ruled that five votes were required for reversal. At that point, the justice who had recused himself due to the campaign contribution decided to vote in favor of reversal.<sup>23</sup> The attorney for the Guerras filed a motion for rehearing and asked that three justices, including the justice who had changed his vote from recusal to reversal, recuse themselves due to receiving significant campaign money from Manges and his attorney.<sup>24</sup> The justices did not recuse themselves.

The following year, a justice (one of the three whose recusal had been requested) told a different litigant (a litigant who also was a potential campaign contributor) that his case was a tough one and that if he did not win it, he would win the next.<sup>25</sup> The justice then discussed the court's deliberations and told the litigant that he would see what could be done back in Austin.<sup>26</sup> In 1985, at the request of the attorney in the Manges case, the justice attempted to transfer two cases from one court of appeals to another.<sup>27</sup> These matters, plus other misbehavior by the justice, led to his public reprimand by the State Commission on Judicial Conduct.<sup>28</sup> Another justice (also one of the three whose recusal had been requested) was swept into the scandal because two of his briefing attorneys had accepted a weekend trip to Las Vegas from a member of the same plaintiffs' firm that had represented Clinton Manges.<sup>29</sup> He had also solicited funds to prosecute a suit against a former briefing attorney who had testified before a House Committee in a manner unfavorable to the justice.<sup>30</sup> For these actions, the justice received a public admonishment by the State Commission on Judicial Conduct.<sup>31</sup>

At roughly the same time, the Texas Supreme Court refused to review an \$11 billion judgment against Texaco.<sup>32</sup> From 1984 until early 1987, more than \$355,000 was contributed to the then-justices on the Texas Supreme Court by lawyers representing Pennzoil and, although lawyers for Texaco also contributed, they gave far less.<sup>33</sup>

Not only was there scandal, but it was highly publicized

because he had been sued by Manges over a campaign statement he had made, and the other because he had received \$100,000 in campaign money from Manges and his lawyer.

scandal. On December 6, 1987, the national television program *60 Minutes* featured a story about the Texas Supreme Court that was titled, "Is Justice for Sale?"<sup>34</sup> The program explored the relationship between large campaign contributions and judicial decisions in Texas. It was a devastating portrayal of what can go wrong in the new politics of judicial selection.

Texas Supreme Court Chief Justice John Hill proposed merit selection of judges as an alternative to the current system of partisan election of judges.<sup>35</sup> He proposed himself as the leader of a movement for judicial reform.<sup>36</sup> Hill was a highly visible figure in Texas politics, far more than most state supreme court justices. He had been a successful lawyer in Texas, a former Texas Attorney General (a statewide elective office), and the Democratic candidate for governor of Texas in 1978. To get that nomination for governor, he had defeated the incumbent governor in the Democratic primary.<sup>37</sup>

Thus, there seemed all the components of a successful reform movement: There was a new politics of judicial elections in Texas where there were competitive, expensive races; these races involved major battles between competing economic interests, most clearly the business community and the plaintiffs' bar; there was highly publicized scandal with strong overtones of systemic corruption in a system that depended on money from lawyers and litigants who appeared before the courts; and there was a visible leader of a movement pushing for reform of the system by offering a well-established solution to the problem—merit selection of judges. Success seemed just around the corner.

## **II. TEXAS JUDICIAL SELECTION REFORM IN THE 1980S: POLITICS, INFLUENCE, AND THE PUBLIC'S PREDILECTIONS**

Texas's judicial reform movement was to die a slow death for a variety of reasons, mostly reflecting political conditions in the state and an inability to develop enough of a coalition of competing interests to change the system. Yet, the demise of the reform movement is instructive, not only for future reform efforts in Texas, but also for reform movements in other states.

The first notable problem with judicial reform in Texas was the problem of Chief Justice John Hill taking the leadership role in the movement. There was immense opposition to his reform efforts from within the court and unprecedented intra-court conflict emerged.<sup>38</sup> Fifteen months after Hill proposed

23. *Id.*

24. Motion for Recusal of Justice C.L. Ray, *Manges v. Guerra*, 673 S.W.2d 180 (Tex.1983) (No. C-771); Motion for Recusal of Justices Ted Z. Robertson and William W. Kilgarlin, *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1983) (No. C-771).

25. Champagne & Cheek, *supra* note 7, at 912.

26. *Id.*

27. *Id.* at 913.

28. State Commission on Judicial Conduct, *Findings, Conclusions and Public Reprimand Relating to Certain Activities of Justice C.L. Ray of the Supreme Court of Texas* (1987).

29. Champagne & Cheek, *supra* note 7, at n.34.

30. *Id.*

31. State Commission on Judicial Conduct, *Findings, Conclusions and Public Admonishment Relating to Certain Activities of Justice William Kilgarlin of the Supreme Court of Texas* (1987).

32. Champagne & Cheek, *supra* note 7, at 913.

33. *Id.* at n.35.

34. *60 Minutes: Is Justice for Sale?* (CBS television broadcast, Dec. 6, 1987).

35. Champagne & Cheek, *supra* note 7, at 913.

36. *Id.*

37. For a discussion of Chief Justice Hill and his earlier effort to become governor of Texas, see McCall, *supra* note 14, at 53, 58-60.

38. Champagne & Cheek, *supra* note 7, at 913.

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merit selection and only half-way through his six-year term as chief justice, Hill resigned.<sup>39</sup> His replacement in 1988 was Tom Phillips, a Republican and a Houston trial-court judge. Phillips was also a supporter

of judicial selection reform.<sup>40</sup> Judicial selection reform seemed to be in the air when Chief Justice Hill used the ceremony on January 4, 1988 that installed Phillips as his successor as a forum to argue for merit selection. The fires of opposition roared quickly in response: Justice Robert Campbell resigned January 6, 1988, explaining that, among other activities, he was going to actively campaign against merit selection.<sup>41</sup>

The turmoil on the Texas Supreme Court surrounding Hill's efforts turned out to be a small molehill compared to the major political opposition developing to prevent merit selection in Texas. Texas was evolving into a true two-party state after a century plus of almost complete Democratic Party dominance. The two parties found themselves in rare agreement on one issue: They were adamant in their support for partisan election of judges.<sup>42</sup>

It was not only the political parties, however, that were involved in the fight over judicial selection. Two key segments of the bar—the plaintiffs' bar and the defense bar—used the partisan election system to forward their objectives of controlling the bench. By 1980, the election of Texas Supreme Court justices (which has only civil jurisdiction; the Texas Court of Criminal Appeals is the highest court in the state for criminal matters) had become a battleground for plaintiffs' attorneys and defense lawyers, each trying to elect judicial candidates favorable to their perspective.<sup>43</sup>

Supreme court races were getting increasingly expensive.<sup>44</sup> Initially, competition between plaintiff-bar-backed and defense-bar-backed judicial candidates occurred in the Democratic primary because the Republican Party was so weak in the state. However, in 1988, several strong Republican candidates for the Texas Supreme Court moved campaign contributions to record levels.<sup>45</sup> Increasingly, the tendency was for defense interests to back Republican candidates and plaintiffs' lawyers to back Democratic candidates.<sup>46</sup> In 1994 there was an effort by a plaintiff-backed candidate to defeat a pro-defense Democratic justice in the Democratic primary. Total expenditures in that primary came to \$4,490,000 which made it one of the most expensive judicial races in history.<sup>47</sup> When the pro-defense Democratic justice won what was one of the most vicious judicial campaigns in Texas history, the Republican

candidate for the justice's seat withdrew, giving the pro-defense Democrat an easy electoral victory. It seemed clear the Republican was only in the race to compete against the Democratic nominee if the plaintiff-backed candidate won the primary.<sup>48</sup> Plaintiffs and business interests were fighting it out in partisan judicial elections and, at least at that time, were reluctant to change the battleground, though the plaintiffs' bar seemed to have more at stake in maintaining partisan elections than did business interests.

When Chief Justice John Hill was proposing merit selection in Texas in the late 1980s, the plaintiffs' bar was a powerful force in Texas Democratic politics. They were opposed to a change in the method of judicial selection.<sup>49</sup> Their campaign contributions had placed several pro-plaintiff justices on the Texas Supreme Court in the 1980s, and the result was that several key judicial decisions had been favorable to plaintiffs.<sup>50</sup> While the Republican Party was growing in the state, Democrats were still winning major judicial offices, and many of those Democrats had the backing of the plaintiffs' bar. The plaintiffs' bar could use its campaign contributions to back candidates sympathetic to plaintiffs. Although not all Democrats in Texas were pro-plaintiff, the plaintiffs' bar backed Democrats who were far more likely to be sympathetic to the plaintiffs' views than were Republicans.<sup>51</sup> With Texas electing in 1978 its first Republican governor since Reconstruction (Dallas oilman Bill Clements was the Republican who defeated John Hill for the governorship, by 18,000 votes), it seemed much more desirable for plaintiffs' lawyers to use the partisan election system to elect the type of judges they wanted than to use a merit selection system where the governor who would be appointing judges might well be a Republican or, given the history of Texas politics, a conservative Democrat.<sup>52</sup>

Additionally, the demographics of Texas were changing. Texas's Latino population was growing at a dramatic pace, and Texas's African-American population was increasingly concentrated in the state's urban centers, most notably Dallas and Houston. With Latino population growth and African-American population concentration came political power in Texas politics.<sup>53</sup> These two groups had an important voice in whether there would be change in the way Texas selected its judges. The problem for the judicial reformers was that neither Latino nor African-American interest groups wanted merit selection. Instead, they were interested in increasing the numbers of Latinos and African-Americans on the bench. As a method of achieving that objective, Latino and African-American interest groups wanted to continue to elect judges, but they wanted the districts to be smaller than currently

39. *Id.* at 913-914.

40. CHEEK & CHAMPAGNE, *supra* note 4, at 173.

41. Champagne & Cheek, *supra* note 7, at 914.

42. Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 502, 520 (1988).

43. CHEEK & CHAMPAGNE, *supra* note 4, at 37-54.

44. *Id.*

45. *Id.*

46. *Id.*

47. Champagne & Cheek, *supra* note 7, at 915.

48. *Id.* at 916.

49. Anthony Champagne, *Judicial Selection in Texas: Democracy's Deadlock*, in TEXAS POLITICS: A READER 96 (2d ed., Anthony Champagne & Edward J. Harpham eds., 1998).

50. *Id.*

51. *Id.*

52. *Id.*; see also McCall, *supra* note 14.

53. CHEEK & CHAMPAGNE, *supra* note 4, at 146-159.

existed. Given the numbers of trial judges in urban counties and given that all trial judges were elected countywide, the goal of these groups became the election of trial judges from districts considerably smaller than the county.<sup>54</sup> The problem for these interests was that to elect African-American judges, a different subdistrict had to be drawn compared to the subdistricts that had to be drawn to elect Latino judges. Nevertheless, although African-American interests and Latino interests would compete over which subdistrict boundaries were appropriate, neither group offered the politically necessary support for merit selection.

The other problem that Chief Justice Hill and the reform movement faced was the opposition of numerous incumbent judges. The incumbent judges had been elected by a partisan election system, and they were generally happy with that system—especially if their political party was dominant within their jurisdiction. A lot of opposition to reform came from judges who were secure in their positions, saw no need to change, and saw a change in the system of selection as a threat to their survival on the bench.<sup>55</sup>

Finally, another problem with the movement for merit selection in Texas was that voters like to vote for judges. True, the voters might not know the judicial candidates for whom they were voting, but they did not like the idea of giving up their decision-making powers to any blue-ribbon commission that presented names from which a governor must make a selection.<sup>56</sup> Indeed, then-Justice Franklin Spears, a vocal opponent of merit selection of judges, noted that a non-binding referendum issue appeared on the March 1988 Democratic primary ballot asking whether, “Texans shall maintain their right to select judges by a direct vote of the people rather than change to an appointment process created by the legislature.” Eighty-six percent of those voting on the issue cast their ballot in favor of elective judges.<sup>57</sup> A 1987 statewide poll found that 65% of those polled thought the elective judge system was “working all right as it is.”<sup>58</sup> Still another poll found that 60% of those polled favored the elective system over an appointive system.<sup>59</sup> Spears also cited a 1986 state bar poll where more lawyers disfavored a merit selection system than favored it for major trial courts: 50% to 43%. Additionally, more lawyers disfavored a merit selection system than favored it for appellate courts: 49% to 45%.<sup>60</sup> One can certainly quarrel with some of the language in the referendum and polling questions, but Spears seemed to have a point. Texans probably did favor voting for judges. Indeed, there is a long-standing practice in Texas for voting for a great number of officials. At the statewide level, for example, not only are nine Texas Supreme Court justices elected, but the nine Texas Court of Criminal Appeals judges are as well. Additionally, the three members of

the Railroad Commission of Texas are elected statewide, as is the governor, the Lt. governor, the comptroller, the commissioner of the General Land Office, and the commissioner of agriculture.<sup>61</sup>

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### III. TEXAS JUDICIAL SELECTION REFORM ACTIVITIES IN THE 1990S

In spite of former Chief Justice Hill’s best efforts, the judicial reform effort simply could not gain traction in the face of opposition from the political parties, the trial lawyers, African-American and Latino interest groups, incumbent judges, and a state political culture that favored election of large numbers of officials, including state judges. However, the politics of the state were changing dramatically, money was heavily involved in judicial elections, and the Clinton Department of Justice was suggesting that they would refuse to approve the creation of any more courts in Texas on the grounds that the current system discriminated against minorities. In 1994, judicial reform gained new life because the state’s Lt. governor, Bob Bullock, a Democrat and one of the most powerful and effective politicians in the state’s history, created a committee to explore the possibilities of developing a judicial reform proposal.<sup>62</sup>

The committee was designed to give key interests a voice in developing the proposal. Three Democratic state senators and three Republican state senators were appointed. One of the Democratic state senators was an African-American with close ties to civil-rights groups in Houston that advocated greater representation of African-Americans on the bench. One of the Democratic state senators was a Latino who had close ties to civil-rights groups in San Antonio that advocated greater representation of Latinos on the bench. Four other members of the committee were judges—one Republican and three Democrats. Three of the judges were Texas Supreme Court justices, and one was the presiding judge of the Court of Criminal Appeals. The Republican justice was Chief Justice Tom Phillips, the chief justice who replaced John Hill on the bench and who was himself a strong advocate of a retention system for selecting judges rather than the partisan election system. The president of the Texas Trial Lawyers Association, the major plaintiffs’ attorney organization in the state, regularly attended the meetings. Another participant was a public relations specialist who was a close friend of Lt. Governor Bullock and who represented business interests in political and legislative matters. No public or consumer representatives were on the committee, no lower-court judges, and no mem-

54. Champagne, *supra* note 49, at 97-98.

55. *Id.* at 98.

56. The loss of the right to vote for judges is, of course, a concern of voters nationwide. Former Texas Supreme Court Chief Justice Tom Phillips, writing about judicial elections, noted that a poll published in 2002 “shows clearly that voters cherish their franchise and in elected states they generally prefer to retain it by a two to one margin.” Thomas R. Phillips, *Electoral Accountability*

and *Judicial Independence*, 64 OHIO ST. L.J. 137, 140 (2003).

57. Spears, *supra* note 42, at 519.

58. *Id.*

59. *Id.* at 520.

60. *Id.*

61. *Statewide Elected Officials*, Texas Secretary of State, <http://www.sos.state.tx.us/elections/voter/elected.shtml>.

62. Champagne, *supra* note 49, at 99-100.

bers of the Texas House of Representatives. Notably, John Hill was not invited to attend the meetings. Bullock claimed that Hill had wanted to be on the committee, but because Hill had become such a political lightning rod, it was impossible for him to be asked to serve. At least one state senator, the chief justice, and the business representative were strong supporters of merit selection.<sup>63</sup>

It quickly became clear that there were no easy solutions to judicial selection issues in the state that could accommodate all the competing interests. Some sort of compromise had to be developed. Minorities were willing to support modifications of the appellate courts in exchange for greater representation of minorities on trial courts. While minorities believed it would be possible to draw smaller districts within counties that would increase minority representation on the bench, they knew that appellate court districts were so vast that small districts for appellate courts would still be so large that minorities would not benefit. Business interests saw an opportunity. They were willing to support greater minority representation on the trial court bench in exchange for an appointive system such as merit selection for the appellate courts. Plaintiffs' lawyers saw their influence on appellate courts weakening. It would not make much difference to their interests whether Republican governors appointed pro-business judges to the appellate bench or whether voters elected them. Smaller trial courts, however, opened up the possibility that at least some pro-plaintiff trial judges could continue to be elected.<sup>64</sup>

Creating a compromise was difficult, however, because minorities and plaintiffs' lawyers had long fought merit selection; they were fearful that such a system would not benefit their interests. Republicans and judges, on the other hand, were uncomfortable with the idea of small districts. Eventually, however, the committee agreed on a compromise where appellate judges would be appointed by the governor; trial judges in urban areas would be elected from county commissioners' precincts. After serving for a time, they would run countywide in retention elections. Later, they would have to be reelected from county commissioners' precincts. In order to depoliticize the judiciary, judges were to be elected in nonpartisan elections, which would protect judges from the party sweeps that had occurred in recent elections in urban counties where large numbers of trial court judges were swept out of office simply because their party affiliation was an unpopular one during a particular election.<sup>65</sup>

Although it was a complicated scheme, the compromise, on its face, seemed to have something for everyone. Business got an appointive appellate judiciary. Minorities and plaintiffs' lawyers got smaller trial court districts, which would allow for the election of more minorities and some plaintiff-oriented judges. Judges were protected from party sweeps.<sup>66</sup>

The problem, of course, was in the details of the compromise. Although African-Americans were very supportive of the

compromise, Latinos were not. At that time, Harris (where Houston is located) and Dallas counties were the two largest counties in Texas and elected a

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total of 96 of the 386 district court judges in Texas. These counties were so large, and so many judges were elected in each metropolitan area, they were the most important in any plan that would increase minority representation on the bench. Since every county in Texas is divided into four county commissioners' precincts, under the compromise, one-fourth of Harris and Dallas County trial judges would be elected from each precinct. However, Harris and Dallas County both had three white county commissioners and one African-American county commissioner. Latinos did not believe such a compromise would promote the election of more Latino judges; instead, they thought districts much smaller than a county commissioner's precinct were needed to elect Latino judges.<sup>67</sup>

The political parties also opposed the compromise. Nonpartisan elections would protect the interests of incumbent judges from party sweeps, but nonpartisan elections weakened the political parties. Additionally, an appointive system reduced the number of elective judges and therefore reduced the importance of the political parties. Then-Governor George W. Bush would have benefited from the compromise because of his power to appoint appellate judges; however, he opposed the compromise as well, probably because he did not want to oppose the Republican Party.<sup>68</sup>

Lt. Governor Bullock backed his committee's recommendations, and the compromise was turned into legislation that passed the Texas Senate, probably because Bullock had such sway over the state senate that any legislation that he endorsed had a high probability of success in that body. However, things did not go so well in the Texas House. Democratic Speaker Pete Laney did not give priority to judicial selection reform. Additionally, the opposition of the parties and of Governor Bush emboldened critics of the compromise. Moreover, Latino house members tried to amend the compromise. Instead of electing district judges by county commissioners' precincts in urban areas, they proposed that the judges be elected from state representative districts. Of course, that proposal increased the chance that Latino judges would be elected in urban counties, but it also reduced the number of African-American judges who were likely to be elected. The modified proposal also proved unacceptable to business interests and to Republicans who could not approve of even smaller constituencies for judges than commissioners' precincts. In the face of the various opposition constituencies, the compromise plan failed.<sup>69</sup>

Although the compromise effort led by Lt. Governor Bullock failed, it was not a total failure. Significantly, Bullock's judicial reform bill did pass the state senate. It was the first

63. *Id.* at 100.

64. *Id.* at 100-102.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

**[T]he compromise effort . . . was not a total failure . . . .**

time a judicial selection reform proposal survived that far in the legislative process. Of course, in Texas a judicial selection reform proposal would still have a

long way to go, since it is likely that most changes in the judicial selection system would not only have to pass the legislature, but would have to be submitted to the voters in the form of a constitutional amendment.

Buoyed by the passage of the proposed bill in the Senate, in 1996-97 the Texas Supreme Court created task forces to develop proposals for improving the Texas judiciary. One of the task forces was assigned to examine the issue of judicial selection, but, even though the task force expressed concerns over the current system for selecting judges, the members were unable to agree upon an alternative judicial selection system.<sup>70</sup> Chief Justice Phillips tried to push the issue of judicial selection reform in his State of the Judiciary address where he criticized the partisanship of judicial elections, the role of money in judicial races, and the lack of minority representation on the bench.<sup>71</sup>

Prospects for reform, however, seemed slim as the 1997 legislative session began to draw to a conclusion. In the senate, there was a proposal that provided for appointment of appellate judges and the election of district judges in nonpartisan elections. Both appellate and trial judges would then run in retention elections, although trial judges would run in regular nonpartisan elections after two retention elections. In counties larger than one million, district judges would be elected from county commissioners' precincts. Another senate proposal provided for the appointment, election, and retention of appellate judges and eliminated straight party voting for appellate and district judges. Appellate judges would have to run in partisan elections following the expiration of their appointed terms and then would be subject to retention elections.<sup>72</sup>

Of these two proposals, the first bill was sponsored by an African-American Democrat from Houston. He did not have enough support from non-minority legislators to pass the bill. The second bill was proposed by a white Republican from West Texas. Minorities threatened to oppose that plan on the grounds that it did not increase the likelihood of minority representation on the bench.

After considerable posturing by the sponsors of the two bills, a compromise bill was designed where appellate judges would be appointed. District judges would also be appointed, but the districts would be county commissioners' precincts. The appointed judges would then run against opponents in the next primary elections, but all candidates would run in all primaries, which created a nonpartisan primary election. If a candidate did not receive 50% of the vote, there would be a runoff in the general election. The winner would serve for four years and would then run in a nonpartisan retention election.

Much like Lt. Governor Bullock's committee's compromise, however, this proposal did not resolve the concerns of Latinos, who continued to believe that smaller judicial districts were needed to elect Latino judges. Incumbent trial judges were also concerned about the plan since it would affect their districts and also dramatically change the process by which judges were elected.<sup>73</sup>

#### **IV. TEXAS JUDICIAL SELECTION REFORM ACTIVITIES IN THE NEW MILLENNIUM**

In the 2003 legislative session, another major effort was made to change the system of judicial selection in Texas. The West Texas Republican senator who had pushed so hard for judicial selection reform in the 1996-97 session tried again with a bill that would have appellate and district judges appointed by the governor with the consent of the Texas Senate. After appointment, the judges would run for office in retention elections. One of the strongest supporters of the bill was Chief Justice Tom Phillips, a long-standing advocate of judicial selection reform. And, just as had occurred when Lt. Governor Bob Bullock took an interest in judicial selection reform, the bill cleared the senate, only to die in the house.<sup>74</sup>

The bill did have bipartisan support, however, including significant Republican support. A Republican group, "Make Texas Proud," was formed to support the bill, and membership in the organization included former Republican Governor Bill Clements, former Republican National Co-chairwoman Anne Armstrong, and three former state party chairs. Possibly this strengthened Republican support had something to do with Chief Justice Phillips's efforts to show that demographic changes in urban counties would shortly bring a Democratic resurgence to those areas. In contrast, this forecasted demographic change may have been what prompted important Democrats to oppose judicial selection reform. The Mexican American Legal Defense and Education Fund also opposed the reform. Most important, many Republican leaders, including the leadership of the state Republican Party, were opposed to changing the system of judicial selection in the state. Politics, of course, often relates to the here and now, not to future demographic changes. The Texas Republican Party mounted a mighty effort against the bill.<sup>75</sup>

In its effort to kill the judicial selection reform bill, the Texas Republican Party attacked one of their own, Chief Justice Tom Phillips, the first Republican chief justice of the Texas Supreme Court since Reconstruction and the first Republican Texas Supreme Court justice to win election to the state supreme court since Reconstruction. Texas Republican Party Chairwoman Susan Weddington claimed the bill was Chief Justice Phillips's idea and that he was the one "very out front on this."<sup>76</sup> The Texas Republican Party's website contained a petition that visitors could sign "to protect Texans' right to elect their judges!"<sup>77</sup> The state Republican Party sent out an e-mail to party members urging them to contact law-

70. *Id.* at 102.

71. *Id.*

72. *Id.*

73. *Id.* at 103.

74. CHEEK & CHAMPAGNE, *supra* note 4, at 103-105.

75. *Id.*

76. *Id.* at 104.

77. *Id.*

makers to oppose the bill.<sup>78</sup> Supporters in the house were lobbying colleagues, and Chief Justice Phillips, along with Associate Justices Craig Enoch and Harriet O'Neill, were seeking the support of house members. The bill was about to be voted out of the House Judicial Affairs Committee with majority support when staff members for the new Republican Speaker told the chairman of the committee to pull the bill from consideration. Although the Democratic Party also opposed the bill, it was the opposition of the state Republican Party that had the real impact.<sup>79</sup>

Not long thereafter, Chief Justice Tom Phillips retired from the bench, to be replaced by a chief justice, Wallace Jefferson, who is much less supportive of judicial selection reform than his predecessor.<sup>80</sup> Perhaps the most effective and respected advocate of selection reform in the state was no longer in a strong position to advocate change—and his harshest critics had been the leaders of the political party in which Chief Justice Phillips had been a pioneer. Judicial selection reform had again been defeated, this time with seemingly a fatal blow by the Texas Republican Party.

What a difference one election can make! In the November, 2006 elections, 42 Democrats opposed 42 Republicans in Dallas County judicial elections—the county that was at one time the core of the Republican Party in the state.<sup>81</sup> All 42 Democrats won, leaving only 17 Republican judges in Dallas County who either were unopposed or were not up for election in the cycle.<sup>82</sup> Immediately, speculation began as to whether the 17 Republicans would change their party affiliation in order to keep their positions, something a number of Democratic judges did in the early 1980s when the county moved from the Democratic to the Republican column.<sup>83</sup> There had been hints of a voting shift in Dallas County since at least 2002 when a Democrat won a position as a county trial judge. Then in 2004, three Democratic judicial candidates won elections as did a Democratic candidate for county sheriff. But 2006 was a Democratic sweep with all 42 Democratic judicial candidates elected, a Democratic district attorney elected, and a Democratic county judge (the equivalent of a county executive).<sup>84</sup> Some of the Democratic candidates won simply by riding the wave of Democratic voting and raised lit-

tle money, had no campaign Web site, did not appear at campaign events, and did not respond to candidate questionnaires.<sup>85</sup> Interestingly, some of the Democratic judges who were elected had been defeated years ago in the Republican electoral sweeps of the 1980s when Republican judges rapidly gained control of the courthouse.<sup>86</sup>

The movement to the Democrats was part of a demographic shift in Dallas County that had long been predicted by some.<sup>87</sup> As the minority population in Dallas County increased, so did the percentage of voters who selected Democratic candidates until finally there was a shift in the power of the political parties. Demographic trends suggest that Harris County, where Houston is located, should not, according to these demographic projections, be very far behind.<sup>88</sup> Harris County is the most populous county in the state with the largest number of judges. Further into the future, the growth of the Latino population in the state can be expected to eventually shift statewide elections into the Democratic column.<sup>89</sup>

Even though the greatest opposition to judicial reform in Texas has been the Texas Republican Party and a center of opposition has been Dallas County Republicans—most notably Dallas County judges, there is talk in Republican circles that it is time to reconsider their opposition to change in partisan election of judges.<sup>90</sup> As Charles Sartain, the lawyer who represents the Dallas County Republican Party was quoted as saying, “[t]he Republicans in Harris and Dallas thought things were just fine the way they were. Since the election I am speaking to more Republicans who favor a different method and want to figure out how to sell it to the Legislature.”<sup>91</sup>

At least for the time being, both the Texas Republican Party and the Texas Democratic Party remain opposed to merit selection. When a Republican state senator and a Republican state representative announced in the aftermath of the election that they would introduce merit selection legislation in the legislature, the state Republican Party stated that it was standing on principle and continued to support partisan elec-

## What a difference one election can make!

78. *Id.* at 104-105.

79. *Id.*

80. Chief Justice Wallace Jefferson, as part of his election bid in 2006, responded to a question posed by the League of Women Voters of Texas: “What method of selecting judges and justices best ensures an independent judiciary?” The caution in his response is notable:

We currently have an independent judiciary. Whether elections “ensure” and independent judiciary is a complex question. Because much of the public is unfamiliar with judicial candidates—particularly in large counties and at the State level—the judiciary is largely selected by partisan affiliation, which has the effect of sweeping qualified judges out of office when political winds shift. An appointment/retention system, emphasizing merit, may be a remedy. This is a matter the Legislature should explore.

League of Women Voters of Texas, *Voters Guide 2006 General*

*Election Edition*, <http://www.lwvtexas.org/VG%20General%202006-9-25-06.pdf>

81. Miriam Rozen, Mark Donald, & Mary Alice Robbins, *Dems Take Big D*, TEXAS LAWYER, Nov. 13, 2006, at 1.

82. *Id.* at 17, 19.

83. *Id.* at 19.

84. Gromer Jeffers Jr., *Democratic Trend Forecast*, DALLAS MORNING NEWS, Nov. 9, 2006, at 1, 18A.

85. Michael Grabell, *Democrats Short on Courtroom Recognition*, DALLAS MORNING NEWS, Nov. 9, 2006, at 18A.

86. *Id.*

87. *Id.*; see also Anthony Champagne, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections*, 43 S. TEX. L. REV. 9, 26-30 (2001).

88. Champagne, *supra* note 87, at 30.

89. *Id.* at 28-30.

90. Rozen, Donald, & Robbins, *supra* note 81 at 20.

91. *Id.*



**[T]he judicial reform movement has taken on new life . . . .**

tion of judges. The state Democratic Party announced it continued to support the voters' right to choose judges.

On the other hand, the Texas Association of Defense Counsel announced that it had historically

supported the concept of retention elections for appellate judges, and the Texas Trial Lawyers Association announced that it was open to considering the idea.<sup>92</sup> No doubt it will take more time for key interest groups to calculate the costs and benefits of taking a new position on merit selection—the strength and breadth of the demographic shift in voting in Texas needs to be assessed, especially since some argument is also being made that this shift is largely due to unhappiness with President Bush.<sup>93</sup> Moreover, the voting shift has so far been limited to one large county in the state.

## V. CONCLUSION

There is little doubt that the judicial reform movement has taken on new life now that a base of the Republican Party has been swept out of office. John Hill, wrote in the *Texas Lawyer* that Texas should have merit selection because, "Partisanship is a cancer on the judiciary. Lawyers should take all possible steps to remove it. There is no Republican or Democratic justice."<sup>94</sup>

It is looking like judicial elections are becoming competitive again in Texas. This advent of competitiveness in judicial elections in the state offers an opportunity for reformers and a challenge. If it is possible to change the system of selection while the parties are competitive in the state where no party has an advantage and both parties are at risk, it seems possible that change in the system of selection can occur as a way of reducing electoral uncertainty on the bench. However, if the demographic changes in the state lead to rapid political changes so that the Democratic Party sees a rapid emergence as the dominant party in Texas, it will be much harder to change the system of selection. If the Democrats are dominant in the state's judicial elections, they will likely become, as the Republican Party did before them, the major obstacle to judicial reform. The interests that support the Democratic Party, most notably plaintiffs' lawyers, African-Americans, and Latinos, will have an interest in insuring the continuation of partisan elected judges when those judges are Democrats.

Nevertheless, as John Hill has stated in reference to judicial

selection reform, "Maybe this is the time that lightning's going to strike."<sup>95</sup> Hill may be right. There are moments when policy proposals are timed to fit with the political needs of a state. This may be the moment. It is a cusp of a great demographic change that promises to create increased political competitiveness and immense political turmoil. If this period of great competitiveness is a consistent and relatively lengthy period where no key interests see an immediate forthcoming political advantage, the opportunity exists to build a political coalition that can bring about a change in judicial selection systems. The problem with the last great opportunity for change—the late 1980s—when John Hill first proposed judicial selection reform was essentially threefold:

- (1) the changes in Texas judicial politics were unprecedented so there was no sense of how lasting or dramatic the changes might be;
- (2) there was inconsistency in the changes occurring in the state's judiciary—Republicans, for example, had a political advantage with Ronald Reagan at the top of the ticket in 1980 and 1984, but Democrats had an advantage with Democratic Senator Lloyd Bentsen at the top of the ticket in 1982; and
- (3) the changes in Texas judicial politics were quite rapid. The first Republican to win a Texas Supreme Court seat won in 1988 and by 1994, Democrats could no longer win a contested Texas Supreme Court race.

Thus, with the previous great opportunity to change Texas judicial selection, it was difficult to understand what was happening without the benefit of hindsight, and some elections (most notably 1982) obscured the pattern of what was occurring in Texas judicial politics. Then, when the changes did occur, and Texas moved to being largely a one-party Republican state, the changes occurred rapidly. Now Texans should know what can happen in state judicial politics. The dramatic changes in Texas in the 1980s and early 1990s began with major Republican victories in judicial elections in Dallas County and spread from there. There is a historical pattern for what is happening now that did not exist in the earlier era. If those changes remain clear—so there are no confusing signals about what is happening such as occurred in the 1982 election—and if those changes are slow enough for key interest groups to be unable to identify a political advantage in remaining with the existing system of selection, the changes Hill first spoke about in 1986 may well occur.

92. Mary Alice Robbins, *Legislators Propose Post-Election Judicial Merit-Selection Bills*, TEXAS LAWYER, November 20, 2006, at 4.

93. A *Dallas Morning News* editorial claimed, "Some Dallas County Republicans blamed the national party—and specifically President Bush's travails—for depressing their local turnout." Editorial, *Inside the Blue Wave*, DALLAS MORNING NEWS, November 9, 2006, at 28A.

94. John L. Hill, Jr., *It's Time to Eliminate Partisan Election of Judges*, TEXAS LAWYER, Nov. 6, 2006, at 29. John Hill died of a heart ailment on July 9, 2007.

95. Robbins, *supra* note 92.

The Texas system offers valuable lessons for other states considering changing their system of judicial selection. This is not simply a case study of the failure and prospects for judicial reform in one state. The Texas case tells us that change in a system of selection really is not for the “short-winded.” It can be a difficult and time-consuming process of putting together a coalition of key interest groups that begin to see political advantages in alternatives to the present system of judicial selection and that see disadvantages in remaining with that system. The Texas reform movement shows the need for a lengthy and persistent political battle to build that political coalition. Most importantly, the Texas efforts at judicial reform show the importance of changes in the state political environment in creating changes in the state’s judicial politics.



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