SUBJECT: Nonpartisan election of appellate judges

COMMITTEE: Judicial Affairs — committee substitute recommended

VOTE: 5 ayes — Thompson, Garcia, Luna, Solis, Zbranek

4 nays — Hartnett, Clark, Crabb, Shields

WITNESSES: None

BACKGROUND: Appellate judges are chosen by partisan election in the same fashion as other candidates running in the general election, except that judicial candidates are subject to different campaign finance standards under the Judicial Campaign Fairness Act enacted in 1995. Candidates for the Supreme Court and the Court of Criminal Appeals run statewide, and those for the 14 courts of appeal run in multi-county districts, all for six-year terms. The governor, with Senate consent, fills vacancies in judicial office until the next election.

(For additional background information, see House Research Organization Session Focus Report Number 75-9, *Judicial Selection: Options for Choosing Judges in Texas*, March 10, 1997.)

DIGEST: CSHJR 69 would require the judges of the Supreme Court, the Court of Criminal Appeals and the 14 courts of appeals to run in nonpartisan judicial elections. The nonpartisan elections would be part of the general election ballot.

All vacancies for any appellate judgeships would be filled by the governor in the manner currently provided by the Constitution for appointments, except that in making appointments the governor would be required to fill vacancies with persons who fairly reflected the geographic distribution and ethnic and racial composition of the population of the district served by the judge. The Senate in confirming appointments also would be required to ensure that the judge appointed by the governor fairly reflected the geographic distribution and ethnic and racial composition of the population served by the judge.

All judicial offices filled by appointment would serve an initial term ending on January 1 of the first odd-numbered year that began more than 18 months after the judge or justice took the oath of office. All judges or justices would thereafter continue to serve six-year terms of office as provided under current law.

CSHJR 69 would take effect January 1, 1998, if approved by the voters on November 4, 1997. The ballot proposal would read: "The constitutional amendment providing for the method of selection for certain justices and judges."

SUPPORTERS SAY:

CSHJR 69 and its enabling legislation, HB 1175 by Thompson, would provide a system of nonpartisan election for appellate judges. The constitutional amendment would establish a procedure for filling vacancies on appellate courts.

Many judicial races are too often decided more by party strength than by individual merit. Shifting tides of party fortune, not judicial performance, have caused the defeat of almost 10 percent of the state judiciary in the last two years. Because judges are barred from stating positions on specific issues, factors like party affiliation or campaign advertising have gained undeserved importance in judicial elections.

Data from the State Office of Court Administration show the current makeup of the Texas judiciary is evenly balanced between Republicans and Democrats for locally elected judges, but not statewide judicial offices. The 396 sitting district judges include 199 Republicans, 193 Democrats and four recently appointed judges who have not run in a partisan election. Among the 14 courts of appeals, there are 38 Republicans and 40 Democrats, as well as two recently appointed judges who have not yet run. However, for statewide offices, Republicans hold seven of the nine seats on the Texas Supreme Court and six of the nine on the Court of Criminal Appeals. In the November 1996 judicial elections, the Republican candidates won by nearly the same margin in all seven statewide judicial races suggesting that many voters looked more at party affiliation than at the particular qualifications of each candidate. Only a few years ago, the situation was reversed, with judges appointed to vacancies by Republican governors routinely defeated

and qualified GOP judicial candidates unable to gain election solely due to their party affiliation.

Nonpartisan election of appellate judges. Nonpartisan elections would allow citizens the same level of participation in the judicial selection process as under the current election system. But nonpartisan elections would offer an additional benefit: voters could choose among candidates without being swayed by party affiliation. Nonpartisan elections would also require voters to make a decision based on the qualifications of judicial candidates, rather than according to a straight-party ticket. Nonpartisan elections would help prevent party sweeps, where many qualified judges are voted out of office solely on the basis of party affiliation. Nonpartisan elections for appellate judges are used in 13 states and work well at eliminating partisanship from a nonpartisan office.

Party affiliation should not be used as a clue to a judge's philosophy because it would be unethical for a judge to decide a case based on partisan grounds. Additionally, party affiliation does not necessarily give voters information about how the judge would rule in certain cases. Many judges that lose elections running under one party may try again under the other party. Some of these party-switching judges have been elected based solely on their ability to choose which party the voters of the district will favor in the next election.

While campaign finance would still be a part of a nonpartisan election system, judicial candidates would not receive money from parties and all contributions could, therefore, be more easily traced. Simplifying the contribution process would make it easier to determine if a judge should be recused from a case because of campaign contributions from litigants or lawyers appearing before the court. Additionally, if campaign finance were the most significant problem in judicial elections, that problem could be remedied by strengthening the Judicial Campaign Fairness Act, enacted as SB 94 by Ellis in 1995. By lowering the contribution and expenditure limits, campaign finance could become less of a force in judicial elections without radically changing the election process.

Appointments considering diversity. Many critics of the current judicial selection system claim that the judiciary does not represent the

geographic, ethnic or racial composition of the population served. Because appellate judges are elected in an at-large system, it is difficult for small populations of the district to influence such elections. In appellate judicial elections, the districts served by the judges are very large. The 18 justices on the Supreme Court and Court of Criminal Appeals are elected statewide. The judges on the 14 courts of appeals are elected from only 13 districts. (The Houston area has two courts covering roughly the same district). With such large areas from which appellate judges are elected, the areas that have the greatest population or the predominate racial or ethnic majority of the district will often decide the election. Less heavily populated geographic areas and racial and ethnic minorities are usually unable to change the outcome of an election.

In most cases, a judge appointed to an appellate court usually wins in a subsequent election. Because of the strong bond between appointment and success in subsequent elections, it is imperative that appointments attempt to promote diversity in the judiciary. The requirement that the governor and the Senate consider the diversity of the judiciary would in no way force a quota on the governor in selecting judges nor give the Senate any more power to block a nomination than it currently has now. What it would do is place in the Constitution a requirement that the governor and the Senate consider the population of the district served with a judicial appointment.

Diversity on the bench benefits the judiciary. The more diverse opinions that are expressed in appellate courts, where cases are decided by three or more judges, the greater the opportunity for the best opinion to be rendered. Litigants would also feel a closer connection to the judges that serve them because those judges would have been chosen to represent them.

Establishing a single member district judiciary would distance judges from the population that they serve. Those who come before a judge should have the right to vote in an election for that judge, but single-member districts would allow judges to be elected from a district smaller than the judge's jurisdiction.

Initial two year term of appointed judges. CSHJR 69, like every other judicial selection proposal offered this session, would make the initial appointive term of a judge about two years. This change has been widely

recommended by nearly all proponents of changes in the method of selecting judges. The purpose of such a change would be two-fold: to allow voters to quickly determine if a judge who has been appointed and confirmed is the judge that they would like to see serve in that office and to ensure that the judge would have adequate time to settle into the office and establish a record to be judged by the voters. Providing for a shorter time, as is allowed under current law, can force newly appointed judges to jump into a campaign season before having the opportunity to actually devote themselves to their job first. Extending the period any longer would allow appointed judges to serve without review by the voters for too long.

District judge elections. By limiting nonpartisan elections to only appellate judgeships, CSHJR 69 would avoid the problems encountered in trying to legislate the conduct of local elections. District judges serve the entire county or counties in which the district sits. Because some populous counties have experienced problems with minority vote dilution, several proposals have recommended breaking up elections in the most populous counties into subdistricts. No agreement has been reached on exactly how those counties should be subdivided. Without such a plan, that proposal should not go forward. However, stopping the reform of appellate judicial elections simply because a consensus cannot be reached regarding district judges would be the legislative equivalent of throwing the baby out with the bathwater. There is no reason to put off the reform of appellate court elections until decision is reached on changing district court elections.

OPPONENTS SAY:

The current system of electing judges should not be changed because it allows the most direct citizen participation in the process. However, if the system were to be modified, the new system should be applied to all state judges, not just appellate court judges.

Nonpartisan elections. Establishing a system of nonpartisan elections would create a greater reliance on campaign contributions and would make it more difficult for voters to make an informed choice of a judicial candidate. Texas has elected judges for nearly 150 years, but no one really complained until judges actually started to face opponents and be defeated because of the two-party election system. Those judges who were turned out of office by increasing strength of different parties in the districts they

served have hoped to propose a system where party affiliation would not matter and judges could run on name recognition alone.

The problem with such a system is that name recognition campaigns would increase the pressure to raise funds. Because there would be no party affiliation attached to the candidate, candidates would have to increase advertising to get the name recognition to win an election. Such a campaign could be much more costly than one in which the judge could partially rely on affiliation with a party to carry a certain number of votes to the judge. Additionally, because the candidate would run without party affiliation, parties would not financially support candidates as they might under the current system. Such a shift would force judicial candidates to accept even more campaign contributions from the lawyers and litigants who may appear before them. Name recognition elections could also increase the influence of incumbency, making it harder for new judicial candidates to unseat an incumbent.

Nonpartisan campaigns could also increase voter apathy. Voters who must choose among candidates without a party affiliation are likely to simply not vote for any candidate in an election contest. Most voters do not take the time to learn the issues and positions of many offices and rely on party affiliation or name recognition to choose such offices. Judicial candidates are even harder to make a decision on because they are prohibited from saying how they would vote on a particular issue. CSHB 1175, the enabling legislation to CSHJR 69, would place the selection of appellate judges at the bottom of ballot, below elections for county and precinct offices such as county surveyor and public weigher. Many voters may decide to not cast a vote for such important statewide offices simply because they would be relegated to the bottom of the ballot.

Appointments considering diversity. The Constitution should not used to create a system that would force the governor and the Senate to appoint and confirm judges based on anything other than the judge's qualifications for office. Requiring appointments to reflect the geographic, ethnic and racial diversity of the district served by the judge would simply be a way to impose a quota system to increase diversity on the bench.

One way to create such diversity without requiring the governor and the Senate to appoint a diverse judiciary would be to allow single member districts for judicial elections. Single member districts would permit judges to be selected from smaller populations, thereby increasing the diversity of the judiciary.

District judge elections. Any plan that seeks to modify judicial elections in Texas should address the entire state judiciary and not just the appellate courts. District judges are the judges with whom most litigants come into contact. They are the primary trial judges of the Texas court system and collectively disposed of more than 696,000 cases in fiscal 1996. District judges can also more acutely face the problems of campaign finance and partisan turnover. District judges are more susceptible to the appearance of impropriety for accepting campaign contributions from lawyers and litigants who practice before them because, in most cases, the entire conduct of the case is before the judge. In appellate courts, most of the discussion, deliberation and decisions of the court are done outside of the courtroom; judges only see the litigants at oral arguments.

District judges, especially in the more populous counties, are also more susceptible to partisan swings in an election. In Harris County, for example, voters must decide 59 district court races every four years. While many elections are held in the off-years, it is virtually impossible for the average voter to keep up with the record of nearly 60 district court candidates. Unless districts are subdivided, such voters must rely on partisan affiliation in order to make any sort of informed decision. Otherwise, they would be dependent on familiar names or a high-dollar advertising blitz to decide among hundreds of candidates in an open, non-partisan election.

OTHER OPPONENTS SAY:

A judicial selection system other than the proposal presented in CSHJR 69 should be used to select judges in Texas. Other options for change include a retention election system, an appointive system, or a combination of election, appointment and retention.

The proposed nonpartisan election system fails to address one of the most important concerns in changing the method of selecting judges: the influence of money on judicial campaigns. The current system has undermined public respect for the judiciary and created an appearance of

impropriety and conflict of interest. The system has been the subject of numerous criticisms in recent years, most notably an exposé by the CBS television program *60 Minutes* called "Justice for Sale," which examined the use of political contributions to members of the Texas Supreme Court by attorneys who had cases pending before the court. One of the most telling examples of the problem is that, under the current system, it is perfectly legal — though unethical — for an attorney to go into a judge's chambers during a recess in a trial and give the judge a campaign contribution. Such a system is in direct conflict with the need for judges to remain impartial arbiters of the laws of the state.

As long as judges are chosen by partisan or even nonpartisan election, campaign contributions will be an essential part of such election systems. However, almost the only people who contribute to judicial campaigns are those with a stake in the judicial system. But making contributions is perceived as inappropriate. One solution would be to establish a system of selecting judges that minimizes the need to run a campaign and allows judges to stand on their qualifications. Additionally, eliminating a long and arduous campaign process would allow judges to spend more time in court doing their job and less time on the campaign trail.

Alternative options for selecting judges that Texas should consider include:

- **Retention elections —** Retention elections allow voters to give a simple yes or no answer as to whether a judge should continue in office for another term. Judges face no opponent but stand on their record on the bench. Retention elections for appellate judges are used in 17 states. Judges subject to retention elections may be appointed, selected by a merit commission or elected. Most of the states that have abandoned partisan elections for appellate judges have adopted a retention election system.

- **Appointment —** Appointment, either by the governor or by a commission that appoints or nominates judges for appointment, is used in 11 states. Appointment selection is most often used to fill vacancies of judges in a retention election system as well.

- **Combination plans —** Plans proposed by the Commission on Judicial Efficiency would combine elections with retention elections. Only one state, New Mexico, currently has such a hybrid. In the elective portion of the system, voters could be allowed to choose candidate on a partisan or nonpartisan basis. The retention part would allow voters to retain the judge previously selected without forcing that judge to run in another expensive and time-consuming campaign.

- **Senate confirmation —** One recommendation from the Commission on Judicial Efficiency would require that no judge could assume office until confirmed by a two-thirds majority of the Senate. The Senate would be empowered to call itself into session to consider such appointments. Such a confirmation process, according to its proponents, would strengthen the role of the Senate in the confirmation process and help to ensure that the appointee indeed fairly represented the composition of the district because that appointee would have to confirmed by the diverse membership of the Senate.

NOTES:

The original version of HJR 69, and its enabling legislation HB 1175, would have provided for:

- appointment followed by nonpartisan retention elections of all appellate judges;
- gubernatorial appointment of appellate judges with regular Senate confirmation;
- appointments taking into consideration the geographic distribution and ethnic and racial composition of the district served;
- initial two-year terms for appellate judges, followed by nonpartisan retention elections every six years thereafter;
- initial nonpartisan elections alternating thereafter with retention elections of state district judges;
- in counties of more than one million residents, the nonpartisan election of district judges to take place in county commissioners court precincts and subsequent retention elections of those judges districtwide; and
- creation of eight new district courts, one in Bexar County, one in Harris County, three in Tarrant County and three in Dallas County.

The companion legislation, SJR 23 by Ellis and its enabling legislation, SB 409 by Ellis, both reported favorably as substituted by the Senate Jurisprudence Committee, would provide for a nearly identical plan to the original versions of HB 1175 and HJR 69.

SJR 25 by Duncan and its enabling legislation, SB 621 by Duncan, both reported favorably the Senate Jurisprudence Committee but withdrawn from the Senate intent calendar, would provide for:

- gubernatorial appointment of appellate judges with regular Senate confirmation;
- appointments taking into consideration the geographic distribution and ethnic and racial composition of the district served;
- initial two-year terms for appointed appellate judges, followed by partisan elections for the judge's first term, then retention elections thereafter; and
- no change in district judge elections.

The companion legislation to the Duncan bills, HJR 75 by Goodman and its enabling legislation, HB 1352 by Goodman, are currently pending in the House Judicial Affairs Committee. HB 1352 failed to receive an affirmative vote by the committee.

SJR 26 by Gallegos and its enabling legislation SB 628 by Gallegos, both reported favorably by the Senate Jurisprudence Committee but withdrawn from the Senate intent calendar, would provide for:

- gubernatorial appointment of appellate judges with regular Senate confirmation;
- appointments taking into consideration the geographic distribution and ethnic and racial composition of the district served;
- initial two-year terms for appointed appellate judges, followed by nonpartisan retention elections thereafter;
- initial nonpartisan elections alternating thereafter with retention elections of state district judges;
- in Harris County, the nonpartisan election of district judges from state representative districts and the subsequent retention elections districtwide; and

- creation of eight new district courts, one in Bexar County, one in Harris County, three in Tarrant County and three in Dallas County.

The 74th Legislature in 1995 established the Texas Commission on Judicial Efficiency to study the issues of funding parity, staff diversity, information technology and judicial selection. The Judicial Selection Task Force as charged with determining how Texas could improve its system of selecting judges. The commission was unable to recommend one plan for selecting judges but recommended two alternative plans. One plan was based on judicial selection legislation proposed by Senator Rodney Ellis and then-representative Robert Duncan. A second plan, the appoint-elect-retain plan (AER), was developed by the Judicial Selection Task Force of the commission.

The modified Ellis-Duncan plan recommended by the commission would provide for:

- gubernatorial appointment of appellate judge vacancies that take judicial diversity into consideration;
- Senate confirmation of appointments;
- nonpartisan retention elections of appellate judges after service of two years and every six years thereafter;
- initial nonpartisan elections alternating thereafter with retention elections of state district, statutory county, and probate county courts;
- in Dallas, Tarrant and Bexar counties, initial district judge elections in county commissioner precincts alternating thereafter with countywide retention elections; and
- in Harris County, initial district judge elections in smaller geographic regions than county commissioner precincts, alternating thereafter with county-wide retention elections.

The Judicial Selection Task Force's AER plan also recommended by the commission would provide for:

- gubernatorial nominations for all state judicial vacancies;

- confirmation of appointments by two-thirds vote of Senate, which would be empowered to meet year-round to consider judicial appointments;
- open, contested, but nonpartisan initial election of appointees approximately one year after assuming office;
- retention elections thereafter;
- temporary early retirement incentives to accelerate the pace at which appointments could be used to help ensure a diverse judiciary.