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It's Time for Judicial Reform in Texas

By [John Cornyn](#)
Texas Lawyer
March 09, 2009

Texans are justly proud of our state. From its commitment to open government to its pro-growth economic policies that reward fiscal discipline, hard work and ingenuity, Texas is a model for the nation. But our system for selecting judges cries out for reform.

This debate is not new. How best to select judges is a question that dates back to early Texas history. Here's what it boils down to: the balance between maintaining public accountability and dispensing justice "without fear or favor," often termed judicial independence.

Partisan judicial elections are bad for the public and the judiciary. In recent and earlier elections, incumbent judges whose names, qualifications, experience and records largely are unknown to all but the most diligent of voters have been summarily swept from office. Does this serve the public interest? Not unless you believe in nearly random selection.

Ironically, when Texas was a one-party Democrat state, Republicans were at the forefront of calls for judicial selection reform. When the shoe was on the other foot and to be the Republican nominee was almost a guarantee of election, Democrats called for judicial selection reform. Was it self-interest or principle that sparked these calls? To pose the question suggests the answer.

Then there is fundraising. As the cost of political campaigns in Texas increases, particularly for those seeking statewide office, judicial candidates must spend more time raising funds from the narrow set of donors most interested in seeing them on the bench.

The demands of fundraising are especially corrosive for the judiciary. Campaigns for legislative or executive office typically are supported by a broad donor base with a wide variety of interests, making it less likely that the interests of one group will dominate to the disadvantage of the general public. Judicial elections, by contrast, are funded largely by the lawyers and other interest groups most likely to appear in court or be directly affected by judicial decisions.

My experience tells me that the overwhelming majority of Texas judges are ethical, learned and committed to faithfully interpreting the law. Still, it is difficult for even the most upstanding judge to avoid the inevitable appearance of impropriety when presiding over a matter involving a campaign donor.

Several Options

On March 3, the U.S. Supreme Court heard arguments in *Caperton v. A.T. Massey Coal Co.*, an appeal of a West Virginia Supreme Court of Appeals decision overturning a \$50 million jury verdict by a 3-2 vote. The CEO of the prevailing company recently had spent more than \$3 million to help elect Brent Benjamin, the justice who later cast the deciding vote overturning the verdict.

The U.S. Supreme Court will decide whether the West Virginia justice's refusal to recuse himself from the case created a "constitutionally unacceptable appearance of impropriety" under the high court's previous due-process rulings.

Admittedly, the West Virginia case is an extreme one. But the mere perception of favoritism is poisonous to our judiciary — and virtually inevitable when our system of selecting judges depends heavily on campaign contributions by repeat litigants. In no other branch of government is public confidence more important.

There has to be a better way to balance judicial accountability and independence. I believe the debate over judicial selection reform in Texas must begin anew — and it must end with a new system for selecting judges.

There are several options available. For example, federal judges are nominated by the president and confirmed by the U.S. Senate. Properly administered, this process provides some level of public accountability but without the fundraising taint. One of the questions frequently asked of presidential candidates is: What kind of judges will you appoint? This is an important question because federal judges serve for life and can only be removed from office by impeachment.

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Again, from experience, I can attest that the federal judicial selection process is not perfect. Some Texans may prefer that judges serve for limited duration rather than life tenure. Others accurately would point to the hyper-partisan and poisonous nature of recent judicial confirmation battles, which have discouraged well-qualified men and women from seeking an appointment.

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Others have suggested the use of so-called independent commissions to select judges, who are then subject to retention elections. Independence is a much sought and rarely satisfied component of this alternative, which also is controversial. As one sage put it: "You can't take politics out of politics." But even this method might be improved with appropriate checks and balances.

This much is clear to me: Our current system is deeply flawed. As Texas Supreme Court Chief Justice Wallace Jefferson has said in calling for a summit on judicial selection, "It is time to decide whether partisan election is the best means to ensure judicial competence."

A judge's job is to apply the law and, in the absence of a jury, to decide the facts of the case. This job description should not include advancing a personal or partisan agenda from the bench. When a judge brings a personal agenda or partisan commitments to the bench, the rule of law suffers, and invariably public confidence in our system of justice is undermined.

Let's strive for a new method of judicial selection in which all Texans can take pride.

U.S. Sen. John Cornyn, R-Texas, is a former Texas attorney general, Texas Supreme Court justice and Bexar County district judge. He wishes to thank Allyson Ho, a partner in Morgan, Lewis & Bockius in Houston and a member of the Texas Judicial Council, the policy-making body for the state judiciary, for her assistance.