ARTICLE V

JUDICIAL DEPARTMENT

Sec. 1. JUDICIAL POWER; COURTS IN WHICH VESTED. The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

The Criminal District Court of Galveston and Harris Counties shall continue with the district jurisdiction and organization now existing by law until otherwise provided by law.

The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

History

The Texas judicial system reflects both Spanish and Anglo-American traditions. The state's earliest judicial system was of Spanish origin. When the colonists arrived in Texas, the legal system theoretically in force was the Roman civil law as modified by the Spanish. The key figure in that system was the alcalde, an official who had both administrative and judicial duties. The alcalde bore some resemblance to both the mayor and the justice of the peace in the Anglo-American system. In fact, however, there was no functioning court system in the undeveloped province of Texas. In 1822, before leaving for Mexico City to obtain confirmation of his authority to colonize, Stephen F. Austin introduced the first Anglo-American judicial institution by appointing a provisional justice of the peace, Josiah H. Bell, to administer justice among the colonists during Austin's absence.

While Austin was in Mexico City, the Mexican provisional governor established the rudiments of a Spanish legal system by dividing the colony into two districts and authorizing the election of an alcalde in each district. The Texans accepted this sytem; Austin's first justice of the peace, Bell, was elected as one of the alcaldes. Austin, upon his return from Mexico City, created a third alcalde district and promulgated a set of "Instructions and Regulations" for the alcaldes. The Texans modified the Spanish system by adding Anglo-American elements, however. In his 1824 Code, Austin created the quintessentially English offices of constable and sheriff, the former to be process servers for the alcaldes and the latter to serve process and execute decrees for Austin himself. (See Art. 1, "Civil Regulation," reproduced in Gracy, *Establishing Austin's Colony* (1970), pp. 75-82.) This was the beginning of a unique amalgamation of two quite different legal systems, both of which have left a mark on the present Texas judicial system. (See Gilmer, "Early Courts and Lawyers in Texas," 12 *Texas L. Rev.* 435, 438-40 (1934); see generally Wharton, "Early Judicial History of Texas," 12 *Texas L. Rev.* 315 (1934).) The Spanish influence on the Texas judicial system is ably described in Townes, "Sketch of the Development of the Judicial System of Texas," 2 *Southwestern Historical Quarterly* 29 (1898).

Under Austin's code, the alcaldes had jurisdiction of all criminal cases and all civil cases up to $200. In cases under $25, judgments of the alcaldes were final. The first appellate court was Austin himself. He was variously called "judge of the colony," "principal judge," or "superior judge." He had exclusive appellate jurisdiction (except in cases involving less than $25) and original jurisdiction of civil cases exceeding $200. His decision was final in all except capital cases, which were reviewable by Mexican authorities. (See "Civil Regulation," reproduced in

Gracy, *Establishing Austin's Colony* (1970), pp. 75-82.) This very quickly created more business than Austin could handle personally, so in 1826 he created a tribunal composed of any three of the alcaldes. They met three times annually at San Felipe as an appellate court. This system was permitted to continue even after formation of the Mexican State of Coahuila and Texas in 1824, because the "Constitutive Act of Federation" of that year provided that "the judicial power shall for the present be vested in the authorities by which it is now exercised in the State." (Laws and Decrees of the State of Coahuila and Texas, Decree No. 1, Sec. 10, 1 *Gammel's Laws*, p. 114.)

Austin's judicial system applied the Spanish civil law, rather than the English common law. It was a model of simplicity; it required only one category of judges. Sitting alone, those judges exercised original jurisdiction in all cases; in panels of three they exercised all appellate jurisdiction. This system survived until 1828; since then the history of the judicial system in Texas has been one of increasing complexity and proliferation.

The 1827 Constitution of the State of Coahuila and Texas continued the alcalde system but added numerous other provisions. It created a supreme tribunal composed of three "halls" of one or more magistrates each and gave the "third hall" authority to "decide the power of inferior judges." It provided that "the inferior courts of justice shall continue in the manner and form that shall be prescribed by law." (Laws and Decrees, arts. 194-96, 1 *Gammel's Laws,* p. 449.) It apparently was intended to deny the courts the kind of power they had in the common law system; all courts were directed to simply apply the laws without attempting to "interpret the same, or suspend their execution." (*Id.* art. 172, 1 *Gammel's Laws,* p. 447.) It did, however, recognize one Anglo-American institution, the jury. It instructed the state congress to establish jury trial in criminal cases and to introduce jury trial gradually in civil cases "as the advantages of this valuable institution become practically known." (*Id.* art. 192, 1 *Gammel's Laws,* p. 449.)

This judicial system did not please the Texans. At the Texas Convention of 1833 at San Felipe, Austin complained that the alcaldes were ignorant of the law, that the criminal laws under the Spanish system were too complex, that the 700-mile trip to the supreme tribunal (it sat only in Saltillo) prevented any effective method of appellate review, and that the congress had failed to implement the constitutional directive to provide for jury trial.

The government of the State of Coahuila and Texas attempted to meet some of these objections by a decree creating an entirely new judicial system for Texas. It would have made Texas a separate judicial district with its own superior court, which was to meet annually in each of three districts within Texas, and would have guaranteed jury trial. (*Id.* Decree No. 277, *Gammel's Laws,* p. 364.) But the decree came too late; the Texas Revolution intervened, and the Superior Judicial Court of Texas never met.

The court system created by the Constitution of the Republic in 1836 reflected a great deal of Anglo-American influence. It adapted from the United States Constitution the sentence "The judicial powers of the government shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." (Art. IV, Sec. 1.) Unlike the United States Constitution, however, it then went on to describe the court system in great detail. It provided for division of the Republic into three to eight districts, each containing an appointed district judge. (Art. V, Sec. 2.) The supreme court consisted of a chief justice and all of the district judges as associate judges. (Art. IV, Sec. 7.) It provided for a county court in each county and such justice courts as the congress

might establish. (Art. IV, Sec. 10.) It provided for the election of justices of the peace (JPs), sheriffs, and constables, and for the appointment of district attorneys and district clerks. (Art. V, Secs. 5, 6, 12.) This court system included many English offices that were unknown to the Spanish law (*e.g.*, justices of the peace, sheriffs, constables, justice courts, and county courts) and obviously provided the model for the present system that was established by the Constitution of 1876.

The Constitutions of 1845, 1861, 1866, 1869, and 1876 all provided for a supreme court, district courts, county courts (under the 1869 version the county court consisted of three or more justices of the peace and functioned primarily as a commissioners court), and justice courts. The commissioners court first made its appearance in the 1866 Constitution (Art. IV, Sec. 17), although a county board quite similar to the commissioners court apparently had governed the county since the days of the Republic. (See 3 *Interpretive Commentary*, p. 262.)

The court of appeals did not appear until 1876. The revival of the economy after Reconstruction had crowded the docket of the supreme court. The court of appeals was created to relieve the supreme court of all criminal appeals and all civil appeals from courts below the district level. (*Debates*, p. 422.)

The 1876 judiciary article was extensively revised by amendment in 1891. The amendment did not change provisions relating to the district, county, commissioners, and justice courts, but it completely restructured the appellate courts. The court of appeals became the court of criminal appeals, with criminal jurisdiction only. A new classification of intermediate appellate courts, the courts of civil appeals, was created. Again, the reason for creation of the new courts was to relieve overcrowding of the supreme court's dockets. Despite the transfer of all criminal jurisdiction and some civil cases to the court of appeals in 1876, the supreme court's docket remained overcrowded. The 1891 amendment therefore shifted even more civil jurisdiction away from the supreme court. (See Williams, "History of the Texas Judicial Machine and Its Growth," 5 *Texas L. Rev.* 174, 178-80 (1927).) The 1891 amendment also added to Section 1 of Article V a paragraph overruling decisions which had held that the legislature could not create types of courts other than those specified in the constitution. (See the *Explanation* following.)

The 1876 Constitution authorized the legislature to establish criminal district courts in cities containing at least 30,000 inhabitants and retained the existing Galveston and Harris County criminal district courts, which had been created by statute in 1870. These criminal courts in Galveston and Harris counties were created to handle large numbers of criminal cases generated by ships' crews along the coast. (See *Debates*, p. 422.)

Explanation

Section 1 names the courts that are to exercise the state's judicial power. The list, however, is neither accurate nor complete. The commissioners court, though included in the list, is not a functional part of the state judicial system. It is occasionally spoken of as a court, but its duties are administrative and legislative. (See, *e.g.*, *Welch v. Kent*, 153 S.W.2d 284 (Tex. Civ. App.—Beaumont 1941, *no writ*).) The attorney general has stated that a statute applicable to courts in general does not apply to a commissioners court. (Tex. Att'y Gen. Op. No. M-1030 (1971).) On the other hand, Section 1 omits many courts that unquestionably do exercise judicial power. These include municipal courts (every incorporated city is authorized to have at least one; see Tex. Rev. Civ. Stat. Ann. art. 1194 *et seq.*) and other statutory courts created pursuant to the last paragraph of Section 1. The latter includes criminal district courts, domestic relations courts, special juvenile

courts, and county courts at law. Within the general category of "county courts at law" are courts with a variety of names, including "county civil court at law," "county criminal court at law," "county court for criminal appeals," "probate court," and "county criminal court." (For a complete listing of all these courts, see Texas Civil Judicial Council, *Forty-Fifth Annual Report* (Austin, 1973), pp. ix-xi.) In general, the criminal district courts and domestic relations courts try cases that otherwise would go to the district courts, while the other courts listed handle cases that otherwise would be tried by the county court. Each statutory court's jurisdiction depends, however, on the language of the statute creating that particular court, so no completely accurate generalization can be made. The statutes name three other courts—probate, juvenile, and small claims. These actually are not separate courts, however, because their functions are performed by judges of other courts. The justice of the peace presides over the small claims court, the county judge or a district judge normally acts as the probate court, and the juvenile court usually is either the county judge or a district judge. In some cases, these functions are performed by statutory courts, *e.g.*, special juvenile courts or, in probate matters, county courts at law.

The second paragraph of Section 1 is no longer operative. It was effective only "until otherwise provided by law," and the law now provides otherwise. Galveston County has been removed from the district, the name of the court has been changed to the 174th District Court of Harris County, and it has been made a constitutional district court with civil as well as criminal jurisdiction. (Tex. Rev. Civ. Stat. Ann. art. 199—174.)

The "constitutional courts" are the supreme court, court of criminal appeals, courts of civil appeals, district courts, county courts, and justice courts. Until recently, the supreme court has been reluctant to permit creation of additional kinds of courts. Although the original Constitution of 1876 vested the judicial power in the named courts "and such other courts as may be established by law," the supreme court ruled in 1877 that the legislature could not create any courts other than those named. (Ex parte *Towles,* 48 Tex. 413 (1877).) This led to the 1891 amendment adding the third paragraph of the section, specifically authorizing the legislature to "establish such other courts as it may deem necessary. . . ." The courts complied with this provision only grudgingly; they permitted "legislative courts" but under the pretext that they were really constitutional courts, either district courts or county courts. (*Whitner v. Belknap,* 89 Tex. 273, 34 S.W. 594 (1896).) In 1950, however, the supreme court reconsidered the 1891 amendment and decided that it gives the legislature broad power to create new courts, or entirely new families of courts that do not fit the description of any constitutional court. (*Jordan v. Crudgington,* 149 Tex. 237, 231 S.W.2d 641 (1950).)

The phrase "conform the jurisdiction of the district and other inferior courts thereto" does not permit the legislature to withdraw jurisdiction granted constitutionally to a court, but it does allow the legislature to give statutory courts jurisdiction concurrent with that of constitutional courts. (*Reasonover v. Reasonover,* 122 Tex. 512, 58 S.W.2d 817 (1933).) This means, for example, that when the legislature creates a special court with only criminal jurisdiction the new court may exercise that jurisdiction, but the constitutional district court still has concurrent jurisdiction over criminal cases. (*Lord v. Clayton,* 163 Tex. 62, 352 S.W.2d 718 (1961).)

Comparative Analysis

Every state has some constitutional provision creating a judicial branch of government. All have a supreme court, or its equivalent, but only two states—

Texas and Oklahoma—have two courts of last resort (a supreme court and a court of criminal appeals).

The trend toward creation of intermediate appellate courts has accelerated in recent years; ten states have provided for such courts since 1956, and now about half of the states have them. In about six of these states, the constitution merely authorizes the legislature to create intermediate appellate courts.

About four-fifths of the states name trial courts in the constitution; about 12 of these provide for a single unified trial court, often with two or three levels. Most states authorize the legislature to create additional types of trial courts of limited jurisdiction.

The United States Constitution establishes only "one supreme court, and such inferior Courts as the Congress may from time to time ordain and establish." (Art. III, Sec. 1.) The *Model State Constitution* vests the judicial power in a supreme court, an appellate court, a general court, and such inferior courts of limited jurisdiction as may be established by law.

Author's Comment

The Texas court system is one of the most complex in the United States, if not the world. It has more than 2,000 judges—9 supreme court justices, five judges of the court of criminal appeals, 42 judges of courts of civil appeals, 227 district judges, 34 judges of special domestic relations and juvenile courts, 254 county judges, 70 judges of various types of county courts at law, approximately 934 justices of the peace, and approximately 1,000 municipal judges—far more than any other state. (See *Forty-Fifth Annual Report, supra*, pp. viii-xi.) Appellate jurisdiction is exercised by eight levels of courts: the supreme court, court of criminal appeals, courts of civil appeals, statutory county courts of appeals, district courts, criminal district courts, county courts, and county courts at law. There are eight different types of trial courts: district courts, criminal district courts (some of which have limited civil jurisdiction—see, *e.g.*, Tex. Rev. Civ. Stat. Ann. art. 1926-22), special juvenile courts, domestic relations courts, county courts, county courts at law, justice courts, and municipal courts.

Multiplicity of courts is not the only problem. In many instances, jurisdiction of the courts is spelled out in detail in the constitution. As a result, a mistake in choosing the proper court either initially or on appeal is often an error of constitutional dimension. For example, a misdemeanor conviction in a justice court is usually appealable to either the county court or a county court at law; but if the county happens to have a criminal district court, the constitution requires that the appeal go to that court, and an attempt to follow the normal appellate channel is unconstitutional. (Art. V, Sec. 16.)

In recent revisions of judiciary articles in other states, the trend has been toward unification and simplification of the court system. (See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, 1967), p. 82.) A major goal of these revisions has been the elimination of multiple layers of limited and specialized courts. The unified trial court system, in which virtually all original jurisdiction is placed in a single trial court of general jurisdiction, has been adopted by 12 states and in some modified form by 17 other states. (See Tate, "Relieving the Appellate Court Crisis, Containing the Law Explosion," 56 *Judicature* 228, 232 (1973).)

In the fragmented Texas court structure, a court's jurisdiction is often too limited to permit it to resolve fully the dispute before it. The county court, for example, has general probate jurisdiction but is prohibited from resolving disputes

over title to land. Many probate matters therefore must go to both the county and district courts before they can be fully resolved. The lack of uniformity in the jurisdictional patterns of the various courts makes effective court administration practically impossible. (See Guittard, "Court Reform, Texas Style," 21 *Sw.L.J.* 451 (1967).)

The second paragraph of Section 1, relating to specific criminal district courts, is obsolete and should be deleted. (See the preceding *Explanation.*)

The third paragraph, authorizing the legislature to create additional courts and conform the jurisdiction of other courts thereto, probably is also unnecessary, although the somewhat tangled history of that provision makes it difficult to predict with certainty how the supreme court would interpret its omission. The pre-1891 history suggests that a simple statement vesting judicial power in certain named courts "and such other courts as the legislature may create" would not be enough to authorize creation of additional courts. On the other hand, more recent history reveals a more generous attitude toward the legislature's power to create new courts and suggests that such a statement probably would be enough to authorize creation of "legislative courts." (See the preceding *History.*) This interpretation would be consistent with the interpretation that has been placed on the federal constitution, which vests the judicial power in "one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."

In other states, provisions vesting the judicial power in certain named courts, "and such other courts as may be provided by law," have been held sufficient to authorize the legislature to create additional types of courts. (See, *e.g., Gerlach v. Moore,* 243 Pa. 603, 90 A. 399 (1914); *State v. Kelly,* 2 Kan. 178, 43 p. 299 (1896).)

On the other hand, if the goal is to prevent the legislature from creating any courts other than those named in the constitution, the history indicates that this could be accomplished merely by vesting the state's judicial power in certain named courts. In the absence of a phrase mentioning "such other courts as the legislature may create," it seems unlikely that the Texas courts would permit them.

Sec. 1-a. RETIREMENT, CENSURE, REMOVAL AND COMPENSATION OF JUSTICES AND JUDGES; STATE JUDICIAL QUALIFICATIONS COMMISSION; PROCEDURE. (1) Subject to the further provisions of this Section, the Legislature shall provide for the retirement and compensation of Justices and Judges of the Appellate Courts and District and Criminal District Courts on account of length of service, age and disability, and for their reassignment to active duty where and when needed. The office of every such Justice and Judge shall become vacant when the incumbent reaches the age of seventy-five (75) years or such earlier age, not less than seventy (70) years, as the Legislature may prescribe; but, in the case of an incumbent whose term of office includes the effective date of this Amendment, this provision shall not prevent him from serving the remainder of said term nor be applicable to him before his period or periods of judicial service shall have reached a total of ten (10) years.

(2) There is hereby created the State Judicial Qualifications Commission, to consist of nine (9) members, to wit: (i) two (2) Justices of Courts of Civil Appeals; (ii) two (2) District Judges; (iii) two (2) members of the State Bar, who have respectively practiced as such for over ten (10) consecutive years next preceding their selection; (iiii) three (3) citizens, at least thirty (30) years of age, not licensed to practice law nor holding any salaried public office or employment; provided that no person shall be or remain a member of the Commission, who does not maintain physical residence within this State, or who resides in, or holds a judgeship within or for, the same Supreme Judicial District as another member of the Commission, or who shall have ceased to retain the qualifications above specified for his respective class of membership. Commissioners

of classes (i) and (ii) above shall be chosen by the Supreme Court with advice and consent of the Senate, those of class (iii) by the Board of Directors of the State Bar under regulations to be prescribed by the Supreme Court with advice and consent of the Senate, and those of class (iiii) by appointment of the Governor with advice and consent of the Senate.

(3) The regular term of office of Commissioners shall be six (6) years; but the initial members of each of classes (i), (ii) and (iii) shall respectively be chosen for terms of four (4) and six (6) years, and the initial members of class (iiii) for respective terms of two (2), four (4) and six (6) years. Interim vacancies shall be filled in the same manner as vacancies due to expiration of a full term, but only for the unexpired portion of the term in question. Commissioners may succeed themselves in office only if having served less than three (3) consecutive years.

(4) Commissioners shall receive no compensation for their services as such. The Legislature shall provide for the payment of the necessary expense for the operation of the Commission.

(5) The Commission may hold its meetings, hearings and other proceedings at such times and places as it shall determine but shall meet at Austin at least once each year. It shall annually select one of its members as Chairman. A quorum shall consist of five (5) members. Proceedings shall be by majority vote of those present, except that recommendations for retirement, censure, or removal of any person holding an office named in Paragraph A of Subsection (6) of this Section shall be by affirmative vote of at least five (5) members.

(6)A. Any Justice or Judge of the Appellate Courts and District and Criminal District Courts, any County Judge, and any Judge of a County Court at Law, a Court of Domestic Relations, a Juvenile Court, a Probate Court, or a Corporation or Municipal Court, and any Justice of the Peace, and any Judge or presiding officer of any special court created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice; or any person holding such office may be censured, in lieu of removal from office, under procedures provided for by the legislature.

B. Any person holding an office named in Paragraph A of this subsection who is eligible for retirement benefits under the laws of this state providing for judicial retirement may be involuntarily retired, and any person holding an office named in that paragraph who is not eligible for retirement benefits under such laws may be removed from office, for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature.

(7) The Commission shall keep itself informed as fully as may be of circumstances relating to the misconduct or disability of particular persons holding an office named in Paragraph A of Subsection (6) of this Section, receive complaints or reports, formal or informal, from any source in this behalf and make such preliminary investigations as it may determine. Its orders for the attendance or testimony of witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings in the District Court.

(8) After such investigation as it deems necessary, the Commission may in its discretion issue a private reprimand, or if the Commission determines that the situation merits such action, it may order a hearing to be held before it concerning the removal, or retirement of a person holding an office named in Paragraph A of Subsection (6) of this Section, or it may in its discretion request the Supreme Court to appoint an active or retired District Judge or Justice of a Court of Civil Appeals as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. If, after hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to the Supreme Court the removal, or retirement, as the case may be, of the person in question holding an office named in Paragraph A of Subsection (6) of this Section and shall thereupon file with the Clerk of the Supreme Court the entire record before the Commission.

(9) The Supreme Court shall review the record of the proceedings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence and shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary.

(10) All papers filed with and proceedings before the Commission or a Master shall be confidential, and the filing of papers with, and the giving of testimony before, the Commission, Master or the Supreme Court shall be privileged; provided that upon being filed in the Supreme Court the record loses its confidential character.

(11) The Supreme Court shall by rule provide for the procedure before the Commission, Masters and the Supreme Court. Such rule shall afford to any person holding an office named in Paragraph A of Subsection (6) of this Section, against whom a proceeding is instituted to cause his retirement or removal, due process of law for the procedure before the Commission, Masters and the Supreme Court in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law, regardless of whether or not the interest of the person holding an office named in Paragraph A of Subsection (6) of this Section in remaining in active status is considered to be a right or a privilege. Due process shall include the right to notice, counsel, hearing, confrontation of his accusers, and all such other incidents of due process as are ordinarily available in proceedings whether or not misfeasance is charged, upon proof of which a penalty may be imposed.

(12) No person holding an office named in paragraph A of Subsection (6) of this Section shall sit as a member of the Commission or Supreme Court in any proceeding involving his own retirement or removal.

(13) This Section 1-a is alternative to and cumulative of, the methods of removal of persons holding an office named in Paragraph A of Subsection (6) of this Section provided elsewhere in this Constitution.

History

The first version of Section 1-a, adopted in 1948, merely authorized the legislature to provide for the retirement of appellate and district judges and their compensation and reassignment to active duty. A constitutional authorization was considered necessary because of Section 51 of Article III, which prohibits the legislature from paying public monies to private individuals.

The decade of the 1960s was a period of increasing dissatisfaction nationally with existing methods of judicial discipline, removal, and retirement. Articles dealing with the censure and removal of judges abounded. (see, *e.g.*, Burke, "Judicial Discipline and Removal, the California Story," 48 *Judicature* 167 (1964); Calvert, "Judicial Retirement," 27 *Texas Bar Journal* 963 (1964); Frankel, "Judicial Discipline and Removal," 44 *Texas L. Rev.* 1117 (1966); Frankel, "Judicial Discipline and Removal, A Survey and Comparative Study," 48 *Judicature* 173 (1964).)

In 1960, California created a Commission on Judicial Qualifications. In 1964, the Texas Civil Judicial Council and the Board of Directors of the State Bar of Texas proposed an amendment modeled after the California plan. The amendment, adopted in 1965, retained the pension authorization of the 1948 amendment, fixed a mandatory retirement age of 75, created the Judicial Qualifications Commission, and established a method of disciplining judges. The Texas Supreme Court was authorized to censure, remove, or involuntarily retire a judge. The amendment's origins and purposes are explained by its chief draftsman in Garwood, "Involuntary Retirement and Removal of Appellate and District Judges," (27 *Texas Bar Journal* 947 (1964)).

Originally Section 1-a applied only to judges of the appellate, district, and criminal district courts. In 1970 the section was again amended to make it

applicable to all judges, including justices of the peace, municipal judges, county judges, and judges of statutory courts.

Explanation

Section 1-a deals with five distinct subjects. First, it fixes a mandatory retirement age of 75 for judges of appellate, district, and criminal district courts. The legislature is authorized to lower that figure to not less than 70 years but has not done so. The section contains a "grandfather clause" exempting incumbents from mandatory retirement. This clause cannot have any effect after November 19, 1975 (ten years after the effective date of the 1965 amendment). The section does not prevent a judge over the age of 72 from serving temporarily by special assignment. (*Werlein v. Calvert,* 460 S.W.2d 398 (Tex. 1970).)

Second, the section directs the legislature to provide for the "retirement and compensation" of judges. In this respect, Section 1-a is partially superseded by Section 67 of Article XVI, which authorizes "the system of retirement, disability, and survivors' benefits heretofore established in the constitution or by law for justices, judges, and commissioners of the appellate courts and judges of the district and criminal district courts." Unfortunately, Section 67, adopted in 1975, did not expressly repeal the retirement and compensation provisions of Section 1-a, so both must be consulted. In addition, since Section 67 purports to authorize benefits previously established by law, the pre-1975 statutes relating to retirement and compensation also must be consulted.

Both sections mention only the appellate, district, and criminal district courts. Many other judges, however, are eligible for retirement benefits under county retirement systems. These lower court judges are not subject to the mandatory retirement provisions of Section 1-a.

Even though commissioners of the court of criminal appeals were not listed among those eligible for benefits under the 1965 and 1970 amendments of Section 1-a, the statute continued to include them. (See Tex. Rev. Civ. Stat. Ann. art. 6228b(1).) The adoption of Section 67 apparently ratifies that inclusion.

The third subject addressed by Section 1-a is involuntary retirement of a disabled judge. The only ground is "disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature." The phrase has not been judicially construed. Since the supreme court is to review both the law and the facts in cases under Section 1-a, it is clear that the determination of disability is to be made by that court.

Here, as in the provision on retirement for age, the matter of retirement is tied to the availability of benefits. Involuntary retirement is the method of dealing with disability only if the judge is eligible for state judicial retirement benefits. If he is not, the problem can be dealt with only by removal from office. A judge who is involuntarily retired gets all the benefits he would have received if he had retired voluntarily.

The fourth subject in Section 1-a is removal of judges for misconduct. Here the sole ground is "willful or persistent conduct, which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice."

In its first ten years of operation, the Judicial Qualifications Commission only once recommended removal. The supreme court rejected the recommendation and instead censured the judge (In re *Brown,* 512 S.W.2d 317 (1974)). The court had difficulty defining the kind of conduct that would justify removal. The principal accusations against the judge were that he was excessively absent from his court (in part because he was working elsewhere for compensation as a

mediator or arbitrator), that he too readily found persons in contempt of court, that he injected himself into the affairs of the county attorney and district attorney, that he conducted two hearings with a defendant without notifying the defendant's attorney, that he authorized a surreptitious tape recording of a conversation between an accused and his attorney, and that he failed to include his own promissory note in his inventory of an estate of which he was independent executor. Six justices considered the conduct sufficient to warrant censure but not removal. Two justices were unable to see "any possible justification for finding Judge Brown unfit to hold his office" (At 325). On the other hand, one justice thought the judge should have been removed from office on the ground that misconduct had been "clearly established by the overwhelming preponderance of the evidence" (At 333). One of the justices voting with the majority expressed the opinion that a judge should not be removed from office for acts of misconduct antedating his re-election (At 325).

The Code of Judicial Conduct, drafted by the American Bar Association, apparently will be given some weight in evaluating alleged misconduct. When the *Brown* case was decided, the code was pending before the supreme court but had not yet been adopted in Texas. Nevertheless, both the majority and one of the dissenters cited its statement that "A judge should not act as an arbitrator or mediator." (Canon 5E, Code of Judicial Conduct, American Bar Association, 1972.) Since the code has now been adopted in Texas, one might expect the supreme court to rely upon it even more heavily in defining judicial misconduct.

The Judicial Qualifications Commission itself can neither retire nor remove a judge. It can privately reprimand or publicly censure a judge, but in most serious cases it can only recommend that the supreme court remove or retire the judge. It is not clear whether the supreme court may take such action in the absence of a recommendation from the commission.

A judge can be censured in lieu of removal. Section 1-a(9) gives the supreme court power to censure under the same procedures and circumstances as those provided for removal and involuntary retirement. This seems to be a direct grant of power to the supreme court, requiring no legislative implementation. Censure is also mentioned in two other places, however. Section 1-a(6)B provides that any judge "may be censured, in lieu of removal from office, under procedures provided for by the Legislature." Section 1-a(8) gives the commission power to "issue an order of public censure." It is not clear whether this means that (1) the supreme court's censure power must be exercised in accordance with the procedures provided by the legislature; (2) the commission must exercise its censure powers under procedures provided by the legislature; or (3) the legislature is authorized to provide censure procedures completely unrelated to the commission or the supreme court. The legislature apparently has accepted something similar to interpretation (2); it provided that the commission must hold a hearing before prescribing "procedures to be employed by the commission in the exercise of its power of censure. . . ." (Tex. Rev. Civ. Stat. Ann. art. 5966a(6A).) The commission has neither exercised the censure power nor prescribed procedures for doing so.

Finally, Section 1-a creates the Judicial Qualifications Commission. It prescribes in copious detail the qualifications, method of selection, and terms of commission members; the commission's meeting times and places; and safeguards for protection of judges in proceedings before both the commission and the supreme court.

The commission consists of nine members: two justices of courts of civil appeals, two district judges, two lawyers, and three laymen. The members receive

expenses but no salaries. The commission is essentially an investigatory body. It is directed to "keep itself informed as fully as may be of circumstances relating to the misconduct or disability of judges, to receive complaints and reports from any source, and make preliminary investigations." After investigating, the commission may issue a private reprimand, hold a hearing, or ask the supreme court to appoint a master to hold a hearing. A master must be an active or retired judge of a district court or court of civil appeals. The hearing, whether conducted by the commission or by a master, must adhere to rules prescribed by the Supreme court and must protect the judge's right to due process of law. All proceedings of the commission or a master are secret. After the hearing, the commission may issue a public order of censure or recommend more drastic action by the supreme court.

If the commission recommends removal or involuntary retirement, the record of proceedings before the commission (or a master) is filed with the supreme court. Upon filing, the record becomes public. The supreme court then reviews the record "on the law and the facts." It has power to take additional evidence itself. (It is not clear whether this evidence is to be taken in secret. Section 1-a(10) states that ". . . the giving of testimony before, the Commission, Master or the Supreme Court shall be privileged; . . ." but it goes on to state that "upon being filed in the Supreme Court the record loses its confidential character.") The supreme court may then reject the commission's recommendation, issue an order of public censure, or order the judge's removal or involuntary retirement. If it orders removal or retirement, the judge's office automatically becomes vacant.

When adopted, Section 1-a added another method of removal to the several methods already in the constitution. Section 2 of Article XV provides for impeachment of appellate and district judges. Section 6 of Article XV provides for removal of district judges by the supreme court upon petition by practicing lawyers. Section 8 of Article XV provides for removal of appellate and district judges by the governor upon address of the legislature. Section 24 of Article V provides for removal of county judges and justices of the peace by district judges.

One might expect that the earlier removal procedures would be superseded in practice by those of Section 1-a. The latter is the only removal method that provides for an investigative and enforcement mechanism, and the grounds for sanction under Section 1-a are broad enough to encompass virtually any ground that would support removal under one of the other sections. In the most noteworthy removal proceeding of recent years, however, the legislature chose to use the impeachment method rather than await action by the Judicial Qualifications Commission. (See H.S.R. 161, 64th Leg., 1975.) Many members of the legislature apparently consider the commission's methods too slow and too cautious. Because Section 1-a is "alternative to and cumulative of, the methods of removal . . . provided elsewhere in this Constitution," all of the earlier methods remain available.

Comparative Analysis

About 25 states have judicial qualifications commissions; apparently all but one of these is provided for constitutionally. (See American Judicature Society, *Judicial Discipline and Removal* (Chicago, 1969).) None of these constitutional provisions contains as much detail as the Texas provision. About five simply permit the legislature to provide the mechanics of removal. Most of the others specify a few basic elements of the removal plan, such as the grounds for removal.

All states provide some constitutional method of removal. About 46 states have an impeachment provision (applicable to judges). About 28 states provide for removal by address, a formal request by the state legislature asking the governor to

remove a judicial officer. Seven states utilize the recall, typically a petition for a new election filed by the electorate. Thirty-two states and the District of Columbia provide for a judicial body or commission to hear complaints; 14 of these jurisdictions have added this provision since 1968.

About 16 states provide for the temporary assignment of retired judges to active duty.

About half of the states have constitutional provisions for compulsory retirement, usually at the age of 70. In five states a judge who reaches age 70 is permitted to serve out his term before retiring. Four states provide a retirement age of 75.

All states provide some kind of pension system for judges. About three-fifths of these are retirement programs specifically for judges; in the other states, judges participate in general public employees retirement systems. (See Winters, *Judicial Retirement and Pension Plans,* rev. ed. (Chicago: American Judicature Society, 1968).)

The Constitution of the United States provides for impeachment of officers generally and states specifically that judges "shall hold their offices during good behavior."

The *Model State Constitution* provides for a retirement age of 70, appointment of retired judges to special judicial assignments, removal of appellate and general court judges by the supreme court, and impeachment of all judges.

Author's Comment

Section 1-a contains a great deal of statutory detail (particularly concerning the creation and operation of the Judicial Qualifications Commission) that could be removed from the constitution without loss. On the other hand, an argument can be made for retaining in the constitution some mention of the method for retirement and removal of judges; leaving the entire matter to the legislature might create a potential threat to the independence of the judiciary. This danger can be prevented, however, by a provision far simpler than present Section 1-a. (See, *e.g.,* American Bar Association, *Model State Judiciary Article,* sec. 6 (Chicago, 1962).) The detail of the 1965 amendment which created the present judicial discipline plan probably was politically useful; inclusion of many details undoubtedly helped to forestall opposition by quieting judges' apprehensions about the way the system might operate. Now, however, the system is firmly established and accepted, and that justification for great detail no longer exists. Details removed from Section 1-a generally would have to be provided for by new legislation, because the existing statute (Tex. Rev. Civ. Stat. Ann. art. 5966a) does not duplicate the provisions of Section 1-a.

Consideration should be given to making the mandatory retirement age applicable to all judges. The limited scope of the present provision (it applies only to types of judges who are covered by the state judicial retirement system) is politically understandable, but questionable for at least two reasons. First, many judges not covered by the state judicial retirement system do participate in other retirement systems. Second, the purpose of mandatory retirement is to maintain the competence of the judiciary, and there is no demonstrable correlation between competence and the availability or unavailability of retirement benefits.

Consideration also might be given to permitting the involuntary retirement of any disabled judge. Under the 1970 amendment a disabled judge who is not eligible for state judicial retirement cannot be "involuntarily retired"; he can only be "removed from office." (See the preceding *Explanation.*) Perhaps it was thought incongruous to speak of "retiring" a judge who was not eligible for retirement

benefits. Such a judge may very well be eligible for county retirement benefits, however; moreover, even if he is ineligible for any benefits, it still might be more appropriate to refer to him as "involuntarily retired" than "removed from office."

The authorization for compensation of retired judges probably was never necessary, and in any event Section 67 of Article XVI now authorizes a judicial retirement system along with other employee retirement systems. Section 67 operates in a rather obtuse way: it authorizes judicial retirement compensation by cross reference to previous constitutional and statutory enactments. For the sake of clarity, all of the retirement provisions of Section 1-a should be repealed and replaced by a simple statement in Section 67 authorizing a judicial retirement system as established by law.

Most state constitutions do not attempt, as Section 1-a does, to define misconduct and disability. The definitions of these terms, contained in Subsections (6A) and (6B) respectively, leave something to be desired in terms of both conciseness and clarity. They probably should be replaced with the terms "misconduct" and "disability," leaving definition to the supreme court, which has the responsibility of assigning meaning anyway.

The language in Subsection 1-a(11) requiring that the supreme court's procedural rules afford due process of law is gratuitous. Rules that failed to afford due process of law would be invalid under the federal constitution in any event. The draftsmen of the subsection apparently were concerned that a judge's interest in retaining his office might be held to be a privilege, rather than a right protected by the Due Process Clause. It is now clear, however, that a state may not deprive an official of his office without due process. (See, *e.g., Bond v. Floyd,* 385 U.S. 116 (1966).)

The major policy question presented by Section 1-a is whether this method of judicial discipline is the best available. There is no clear answer to that question. The formal removal and retirement provisions of Section 1-a have never been fully used; the supreme court has never removed or involuntarily retired a judge. That is probably not the best gauge of the section's effectiveness, however. The commission has a staff, receives complaints, makes investigations, and conducts hearings. A number of judges apparently have been induced by the commission to resign or retire rather than suffer the public exposure that results from the filing of a formal recommendation with the supreme court. At the end of 1972, the executive director of the commission reported that as a result of the commission's investigations, eight judges resigned, two underwent physical and psychiatric examinations, one disabled judge decided not to seek reelection, one was defeated while under investigation, one was fired by the city council, and two retired. (Pipkin, "How Do You Plead, Your Honor?" 7 *Trial Lawyers Forum* 14, 39 (1972).)

The commission plan generally is considered effective, workable, and not unduly expensive. (See, *e.g.,* The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, 1967), p. 71; Buckley, "The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct," 3 *U. San Fran. L. Rev.* 244 (1969); Calvert, "Judicial Retirement," 27 *Texas Bar Journal* 963 (1964); Frankel, "Judicial Discipline and Removal," 44 *Texas L. Rev.* 1117 (1966).)

If the judicial discipline plan of Section 1-a is retained, some of the other removal methods provided in the constitution should be deleted. Section 6 of Article XV (removal of district judges by the supreme court on petition by practicing lawyers), Section 8 of Article XV (removal of district and appellate judges by the governor upon address by the legislature),and Section 24 of Article V (removal of county judges and justices of the peace by district judges) have proven

to be ineffective or unsatisfactory methods of judicial discipline. Section 2 of Article XV provides for impeachment of various officials, including certain judges. As the preceding *Comparative Analysis* suggests, a number of states provide for impeachment of judges in addition to more specific removal provisions aimed exclusively at judges. The major difference between the two approaches is that impeachment is carried out entirely by the legislature (the house impeaches and the senate tries the case), while other methods involve the judiciary and/or the executive. An argument might be made that the impeachment method should be retained, at least for members of the supreme court, if the supreme court holds the ultimate power to discipline under the other method. The present impeachment provision is anachronistic, however, because it names the "courts of appeals," which has not existed for more than 80 years, and omits the court of criminal appeals and the courts of civil appeals. (See Art. XV, Sec. 2.)

Sec. 2. SUPREME COURT; JUSTICES; SECTIONS; ELIGIBILITY; ELECTION; VACANCIES. The Supreme Court shall consist of a Chief Justice and eight Associate Justices, any five of whom shall constitute a quorum, and the concurrence of five shall be necessary to a decision of a case; provided, that when the business of the court may require, the court may sit in sections as designated by the court to hear argument of causes and to consider applications for writs of error or other preliminary matters. No person shall be eligible to the office of Chief Justice or Associate Justice of the Supreme Court unless he be, at the time of his election, a citizen of the United States and of this state, and unless he shall have attained the age of thirty-five years, and shall have been a practicing lawyer, or a lawyer and judge of a court of record together at least ten years. Said Justices shall be elected (three of them each two years) by the qualified voters of the state at a general election; shall hold their offices six years, or until their successors are elected and qualified; and shall each receive such compensation as shall be provided by law. In case of a vacancy in the office of any Justice of the Supreme Court, the Governor shall fill the vacancy until the next general election for state officers, and at such general election the vacancy for the unexpired term shall be filled by election by the qualified voters of the state. The Justices of the Supreme Court who may be in office at the time this amendment takes effect shall continue in office until the expiration of their term of office under the present Constitution, and until their successors are elected and qualified. The Judges of the Commission of Appeals who may be in office at the time this amendment takes effect shall become Associate Justices of the Supreme Court and each shall continue in office as such Associate Justice of the Supreme Court until January 1st next preceding the expiration of the term to which he has been appointed and until his successor shall be elected and qualified.

History

The Texas Constitution has provided for a supreme court since the days of the Republic. Before 1876, the number of members changed frequently, ranging from three to five. The present constitution originally provided for a supreme court of only three members. This number almost immediately proved too small to handle the workload, and in 1879 the legislature created a three-member "commission of appeals" to assist the supreme court. The caseload continued to be unmanageable, however, and in 1891 the judiciary article was extensively amended, primarily in an attempt to reduce the backlog of cases in the supreme court. The court of criminal appeal replaced the court of appeals, and courts of civil appeals were created to further reduce the supreme court's workload in civil cases. Membership of the supreme court was continued at three, however, and that number again proved inadequate despite the drastic measures taken in 1891 to reduce the workload. In 1918 the legislature again created a "commission of appeals,"

this time with six members sitting in two sections of three judges each. The commissioners considered cases referred to them by the supreme court, heard arguments, wrote opinions, and sometimes sat en banc with the supreme court. But only the three supreme court justices had voting power, and all opinions by commissioners had to be approved by the supreme court. An amendment in 1945 made the commissioners associate justices of the Supreme Court, abolished the commission of appeals, and brought the court to its present membership of nine. (See Calvert, "The Judicial System of Texas," 361-362 S.W.2d (Texas cases, 1963), pp. 1-3; see also Sinclair, "The Supreme Court of Texas," 7 *Hous. L. Rev.* 20 (1969).)

The Constitution of the Republic provided for election of supreme court justices by congress. The succeeding constitutions and amendments alternated between popular election and appointment by the governor. Popular election of judges was one of the basic tenets of the populist movement, and the 1876 Constitution called for popular election of judges generally. That has been the method of judicial selection in Texas ever since with two notable exceptions: (1) vacancies on the district and appellate benches are filled by appointment of the governor; and (2) the charters of some home-rule cities provide for appointment of municipal judges.

The 1876 Constitution required a supreme court justice to be at least 30 years of age and to have at least seven years' combined experience as a lawyer and judge. The 1945 amendment raised those figures to 35 years of age and ten years' experience.

Tenure of supreme court justices has been as short as four years (under the Republic) and as long as ten years (under the 1866 Constitution); the present six-year term has been in effect since 1876.

Until 1945, salaries of supreme court justices were fixed in this Section 2; the 1945 amendment allowed the legislature to fix them. The authorization to sit in sections also was added by the 1945 amendment.

The article by Prof. T. C. Sinclair, cited previously, is an excellent study of the supreme court, including not only its history, but its personnel and methods of operation.

Explanation

This section is straightforward and has produced little litigation. It creates a nine-member supreme court; provides for the election, qualifications, compensation, and terms of the chief justice and eight associate justices; and directs the governor to fill vacancies by appointment. The last two sentences are merely transitional provisions for the 1945 amendment and no longer have any effect.

The section does not state how the chief justice is to be chosen. Presumably he could be selected by the members of the court themselves. (Indeed, that was the method by which the chief justice was selected under the 1869 Constitution, the only Texas Constitution that has spoken to the question.) Since 1876, however, the unchallenged practice has been to treat the office of chief justice as a distinct office. It is specifically identified on the ballot, and upon the death or resignation of the person selected for that office there is no chief justice until the vacancy is filled by appointment or election.

Section 2 provides not only for a quorum (five), but also that "the concurrence of five shall be necessary to a decision of a case." It also permits the court to sit in sections. The authorization to sit in sections is an exception to the quorum requirement; it may have been included to make sure the conversion from the commission of appeals system to the nine-member supreme court would not be taken as disapproval of the practice of working in smaller groups. It permits fewer

than five justices to hear arguments, consider writ applications, and consider other preliminary matters. This seems to cover anything less than the decision of a case; and since the latter requires five under the concurrence requirement, the requirement of a quorum of five seems to add nothing. The supreme court does not sit in sections, although it does use ad hoc groups of three justices to hear applications for writs of habeas corpus. (See Sinclair, *supra,* at 45.)

Comparative Analysis

About 15 state constitutions provide some form of merit system for the selection and retention of judges. Seven of these have been added in the 1970s. About a dozen states use some voluntary form of screening of judicial appointees. Several others have statutory provisions for merit selection. About half of the states select supreme court justices by popular election. Those states are about equally divided between partisan and nonpartisan elections.

The chief justice is popularly elected in nine states. The remaining states are fairly equally divided – the court chooses its own chief justice, he is appointed, or there is some provision for automatic accession by an associate justice.

Only five other state supreme courts have nine members. Nearly half the states have seven members, and another one-third have five.

Only one state has a term shorter than six years for justices of its court of last resort. About one-third have a six-year term. Five states provide for a life (or "to age 70") term. Ten states have ten-year terms, and ten have 12-year terms.

The Constitution of the United States specifies the term of office of judges to be "during good behavior." Selection is by presidential appointment with the advice and consent of the senate. No mention is made of the size of the court or the selection and term of the chief justice. The *Model State Constitution* provides for executive appointment of judges, or alternatively, for merit selection. The judges serve an initial term of seven years, and upon reappointment serve "during good behavior." Both the United States Constitution and the *Model* provide that judges' salaries, to be provided by law, are not to be diminished during their terms of office.

Author's Comment

No one is likely to argue that this section should be deleted entirely. Virtually all constitutions name at least one court, probably because that is the surest way to ensure the existence of a judicial branch of government, and the court chosen for that role is invariably the highest court of the jurisdiction.

Section 2 probably should be combined with Section 3, which defines the supreme court's jurisdiction and authorizes appointment of its clerk. The method of selecting the chief justice perhaps should be clarified, and the provisions relating to concurrence, quorum, and sections could be deleted. (See the preceding *Explanation.)*

Section 2 (and all of the other sections creating courts) could be greatly shortened and simplified by grouping all provisions relating to judicial selection, tenure, qualifications, compensation, and vacancies for all the courts into a single part of the judicial article. This would eliminate the need to repeat again and again such statements as "In the case of a vacancy in the office of any judge of the _____ court the governor shall fill the vacancy until the next general election for state officers, and at such general election the vacancy for the unexpired term shall be filled by election by the qualified voters. . . ." Similarly, all provisions for clerks of courts can be placed in one section instead of including such a provision in each section creating a court.

The most controversial question that arises in connection with appellate court

judges is the method of their selection. The principal alternatives are popular election, appointment by the governor, and the "Missouri plan," or "merit selection system," under which judges are appointed (usually by the governor) from a list of nominees suggested by a commission.

Popular election has been the usual method of judicial selection in Texas since 1876 and is still the predominant method nationally. (See Winters, "Selection of Judges – An Historical Introduction," 44 *Texas L. Rev.* 1081 (1966).) The United States, however, is virtually the only country in the world where judges are popularly elected. (See The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington, D.C.: Government Printing Office, (1967), p. 66.)

Popular selection is frequently criticized as an unwise and inefficient method of judicial selection. Some of the arguments against it may be summarized as follows:

(1) The electorate has little interest in judicial races and little knowledge upon which to base an intelligent decision. The likelihood that the most qualified candidate will win is therefore not great; a candidate's party affiliation, the familiarity of his name, or his talent for political campaigning is likely to be more important than his judicial ability.

(2) Campaigns for reelection are wasteful of judicial resources. Incumbent judges are rarely defeated (indeed, in the past they have usually been unopposed; see Sinclair, "The Supreme Court of Texas," 7 *Hous. L. Rev.* 20, 23 (1969)); but if they do have an opponent, they must spend a significant amount of time campaigning. One justice of the supreme court reportedly has stated that the court operates at a "7½ judge average capacity," because three of its places are up for election each two years and the court assigns no cases to a justice who is engaged in a campaign. (Sinclair, p.39.)

(3) The need for funds to finance a campaign is a potential threat to judicial integrity. Judicial campaigns, like other political contests, require expenditure of large sums for media advertising. Most of these funds are contributed by lawyers. It may be doubted whether any judge, no matter how scrupulously honest, can erase from his memory the fact that a certain lawyer did or did not contribute to his campaign.

Arguments in favor of popular election include the following:

(1) Election is the most democratic method of judicial selection. Judges, no less than executive officers and legislators, are public officials who make decisions affecting all citizens; therefore they should be answerable to the voters.

(2) Popular election of judges has produced reasonably good judges for nearly a century; in any event, shortcomings in the quality of judges are a minor problem compared with many of the other deficiencies of the court system. (See Burnett, "Observations of the Direct Election Method of Judicial Selection," 44 *Texas L. Rev.* 1098 (1966).) If an incompetent judge is elected, the problem now can be handled by the removal and involuntary retirement provisions of Section 1-a of Article V.

(3) Popular election is a lesser evil than any of the alternatives. Appointment of judges by the executive is likely to lead to political cronyism in judicial selection and may threaten the independence of the judiciary by making judges beholden to the executive who appointed them. Under the "Missouri" or "merit" plan, the selection process is likely to be dominated by the bar or some faction of the legal profession.

The debate over these points has raged for half a century, and it cannot be said that any consensus has been reached, either by the bar, the judiciary, or the commentators. One point relevant to this debate is the fact that all vacancies in judicial office in Texas are filled by appointment, either by the governor (in the case of the district and appellate courts) or by the commissioners court or city governing

board. In the past, at least, this has meant that most judges initially were selected not by popular election but by political appointment. (See Henderson and Sinclair, "The Selection of Judges in Texas," 5 *Hous. L. Rev.* 430 (1968).) There are indications, however, that this pattern may be changing. Five of the nine supreme court justices sitting in 1975 reached the court initially through open election, rather than by appointment. At least one reason for this change is the improvement of judicial retirement benefits in recent years and the establishment of a mandatory retirement age. In the past, judges often stayed on the bench until they died; that created a vacancy, requiring the appointment of a successor. Now a judge is more likely to retire voluntarily at the end of a term; that creates no vacancy, so there is no appointment and his successor is chosen through the regular popular election process.

Another development that may be relevant is the recent improvement in judges' salaries in Texas. For 1976, the legislature established annual salaries of $46,100 for the chief justice of the supreme court and the presiding judge of the court of criminal appeals and $45,600 for the other members of those courts; $40,500 for the chief justices of the courts of civil appeals and $40,000 for the other members of those courts; and $31,000 for district judges. In addition, counties are permitted to supplement the salaries of district judges and justices of the courts of civil appeals so long as the combined state and county earnings of those judges are at least $1,000 less than the total salaries of judges of the next highest level of courts. (See Tex., Legislature, Senate, SB12, 64th Leg., Reg. Sess. 1975.) By contrast, in 1953 supreme court justices were paid $12,000 a year and district judges $7,000. The likelihood that an incumbent judge will be unopposed may well decline as the salary of the office rises.

A possible modification of the present system of popular election would be nonpartisan election. Under this system, judges are elected without regard to party affiliation. Typically, judicial elections are conducted at the same time as primary and general elections for other officials, but judicial races are listed on separate ballots. If one candidate gets an absolute majority of the votes at the primary election, he is declared elected; if not, the names of the two candidates with the most votes go on a special judicial ballot submitted at the general election. (See, *e.g.*, Okla. Const. Art. VII, Sec. 3.)

Nonpartisan election reduces the danger that a good judge may be swept out of office by straight-ticket voters whose decisions are based on their attitudes toward the candidates at the top of the ticket, not their views on the judicial race. On the other hand, nonpartisan election sometimes is criticized on the ground that it is even more likely than partisan election to produce an unqualified judge. The argument is that in partison elections each party has some responsibility to recruit good candidates, or at least disassociate itself from candidates who are clearly not qualified, while in nonpartisan elections there is no preliminary screening of candidates. (See, *e.g.*, Note, "Analysis of Method of Judicial Selection and Tenure," 6 *Suffolk U. L. Rev.* 955 (1972).)

The method most frequently urged as an alternative to popular election is the "Missouri" or "merit" plan. Under this system, a nominating commission (consisting of laymen, lawyers, and judges in proportions that vary widely from state to state) screens potential candidates for a vacant judgeship and then submits a list to the governor. The governor must either appoint one of those nominees or ask the commission to submit additional names. A judge so appointed holds office until the next general election; the voters then are asked to decide whether the judge should be retained in office. If their answer is "yes," the judge serves a full term; if it is "no," the judgeship automatically becomes vacant and is filled by the nominating commission and governor in the manner described above. At the end of each full

term, voters again are given the choice of retaining or removing the judge from office. (See, *e.g.*, American Bar Association, *Model State Judicial Article,* secs. 5, 6.)

The "Missouri" plan works essentially the same in the case of trial courts, except that regional nominating commissions are sometimes created to screen and propose candidates for trial court appointments. Some states have adopted the "Missouri" or "merit" plan for appellate judges but retained popular election of trial judges – Montana is an example – perhaps on the theory that voters are more likely to be able to make intelligent electoral choices in races involving local candidates.

Sec. 3. JURISDICTION OF SUPREME COURT; WRITS; SESSIONS; CLERK. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide.

History

The 1836 Constitution simply gave the supreme court "appellate jurisdiction only." Since then, many limitations have been placed upon the supreme court's jurisdiction. Most of these undoubtedly were prompted by the heavy caseload that plagued the supreme court throughout most of the nineteenth century. (See the *History* of Sec. 2.) These repeated attempts to reduce the supreme court's workload by limiting its jurisdiction naturally introduced a great deal of detail into the section.

The 1845 and 1861 Constitutions permitted the legislature to restrict appeals from criminal convictions and interlocutory (*i.e.*, nonfinal) orders. (Art. IV, Sec. 3.) The 1866 Constitution permitted the legislature to restrict criminal appeals only in misdemeanor cases, thus restoring the supreme court's constitutional jurisdiction in felony appeals. (Art. IV, Sec. 3.)

The 1869 Constitution attempted an entirely new solution to the continuing problem of criminal appeals; it simply prohibited them unless a supreme court judge, after reviewing the record, believed the trial court had erred. (Art. V, Sec. 3.) This limitation proved unsatisfactory and was removed by amendment in 1873.

The 1876 Constitution created a separate "court of appeals" to handle all criminal appeals and some civil appeals. It gave the supreme court jurisdiction only of civil cases in which the district courts had original or appellate jurisdiction. Since