TCCRI
Texas Conservative Coalition
Research Institute

GOVERNMENT REFORM TASK FORCE

FINAL REPORT
02.21

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I. Labor Law

Texas is a state that values voluntary participation in labor organizations. Indeed, the specific "Right to Organize" under Texas law provides that: "All persons engaged in any kind of labor may associate and form trade unions and other organizations to protect themselves in their personal labor in their respective employment."[i] Indeed, "[a] person's inherent right to work and to bargain freely with the person's employer, individually or collectively, for terms of the person's employment may not be denied or infringed by law or by any organization."[ii]

Despite this permissive and encouraging approach to organized labor, Texas prohibits *compelled* participation in organized labor. As a right to work state, Texas law provides that "[a] person may not be denied employment based on membership or non-membership in a labor union."[iii] Furthermore, any contract requiring membership in a labor union or to remain in a labor union is void.[iv] Right-to-work policies are primarily about the liberty of workers to join or not join organized labor, but the economic benefits of right-to-work laws are well-established.

A. Policy Recommendation: Prohibit "Release Time" in Public Employee Union Contracts

Article 3, Section 51 of the Texas Constitution prohibits "the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever[.]" Article 3, Section 52 further restricts the ability of "any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever[.]" Despite these provisions and the general prohibition on compelled support of labor unions, city contracts often include provisions supportive of union activity, subsidizing them both financially and operationally.

"Release time" (also called "association business leave") is a provision in public employee contracts that pays union officers for engaging in union activity, sometimes exclusively so. According to the Mackinac Center for Public Policy, release time costs federal taxpayers roughly $122 million annually.[v] State and local figures are more difficult to ascertain, but in Austin, the cost of release time for unionized police, firefighters, and emergency medical personnel in 2012 and 2013 was over $800,000.[vi] The Goldwater Institute estimates the total cost of release time nationally at all levels of government is $1 billion per year.[vii]

What activities are subsidized by release time pay? Mark Pulliam explains in *City Journal*:

> What exactly are union officers allowed to do on the taxpayers' nickel while on "release time"? Under the current union contract, the officers of AFA Local 975 can participate in negotiations, adjust grievances, attend dispute-resolution proceedings, attend union

> conferences and meetings, and even engage in partisan political activities related to "wages, rates of pay, hours of employment, or conditions of work" affecting members of the union. In other words, city officials have empowered officers of AFA Local 975 to lobby against the interests of the taxpayers—while being paid by the taxpayers.[viii]

Indeed, the contract between the City of Austin and the Austin Firefighters Association, Local 975 requires the city to pay for as much as 5,600 hours of release time each year. That is but one example. The Competitive Enterprise Institute published a report in 2015 highlighting several release time abuses in Texas.[ix] The San Antonio Fire Department granted over 4,200 hours of release time in 2012 and another 4,600+ hours in 2013, which cost taxpayers over $135,000 and $151,000, respectively.[x] San Antonio's Police Department granted even more release time, issuing over 7,900 hours in 2012 for a taxpayer cost of over $252,000.[xi]

Release time is not exclusively a Texas issue. Indeed, it was prohibited in Missouri as part of a larger legislative package on right to work and organized labor. The language in the Missouri bill reads as follows:

> Every labor agreement shall expressly prohibit labor organization representatives and public employees from accepting paid time, other than unused paid time off that was accrued by such public employees, by a public body for the purposes of conducting labor organization-related activities concerning collective bargaining, including, but not limited to, negotiations, bargaining meetings, meet and confer sessions, and any other collective bargaining-related activity, provided that every labor agreement may allow for paid time off for the purposes of grievance-handling, advisory committees, establishing a work calendar, and internal and external communication[.][xii]

Similar language in Texas would reinforce its intention to remain a right to work state where union membership and support are entirely voluntary. Such a statute would reinforce a 1979 opinion from the Texas Attorney General's office that took the position that release time is an illegal gift of public funds for a non-public purpose.[xiii] Yet, this practice continues. The subsidization of public sector unions should be expressly prohibited in Texas law.

II. Election Integrity & Civic Engagement

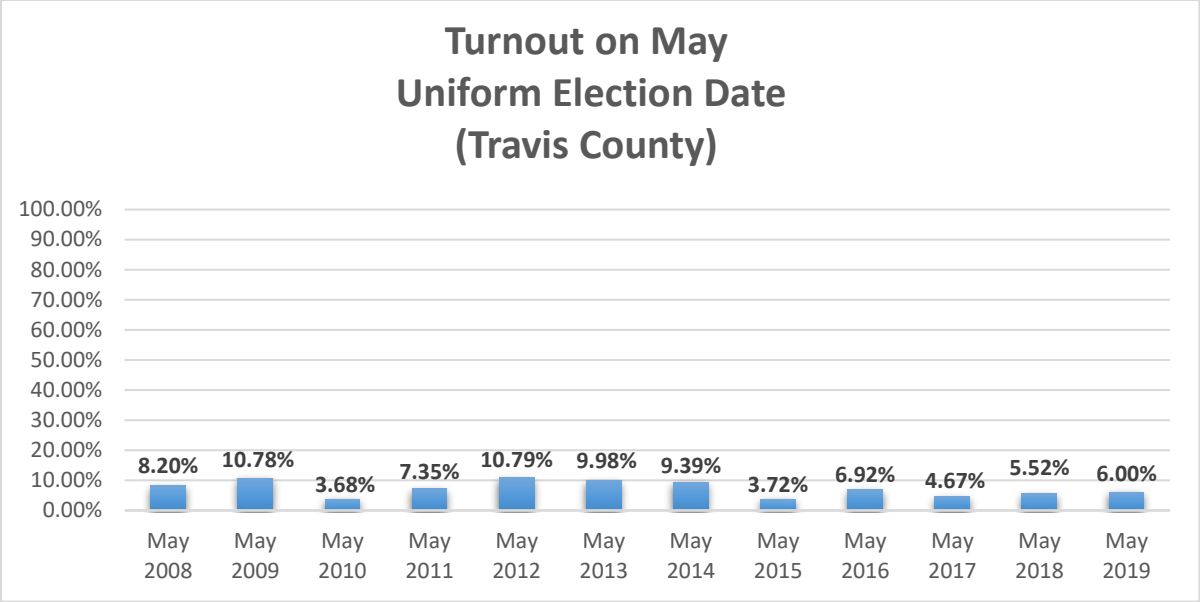
A. Hold all non-primary elections on the November uniform election date

Voting is the most important way a citizen can impact government. From ballot propositions and bond authorizations to the offices of local utility districts, the Governor, and everything in between, the people have a say in which levers government may pull, and who pulls them. But while a majority of registered voters turn out in November for high-profile elections like President of the United States, Governor, and other statewide offices in Texas, the absence of such big-ticket election items results in election turnout that rarely breaks double-digits.

The smaller elections matter, oftentimes a great deal more than the higher-profile elections. Consider that Humble, a city in Harris County with roughly 7,700 registered voters, elected its Mayor on a May 2019 ballot with only 7.35% of registered voters casting ballots.[xiv] Contrast that with the November 2018 ballot election for Mayor of Missouri City, another city in Harris County with 3,600 registered voters. Missouri City had turnout of nearly 56%, boosted no doubt by the United States Senate Race between Ted Cruz and Beto O'Rourke at the top of the ticket.[xv]

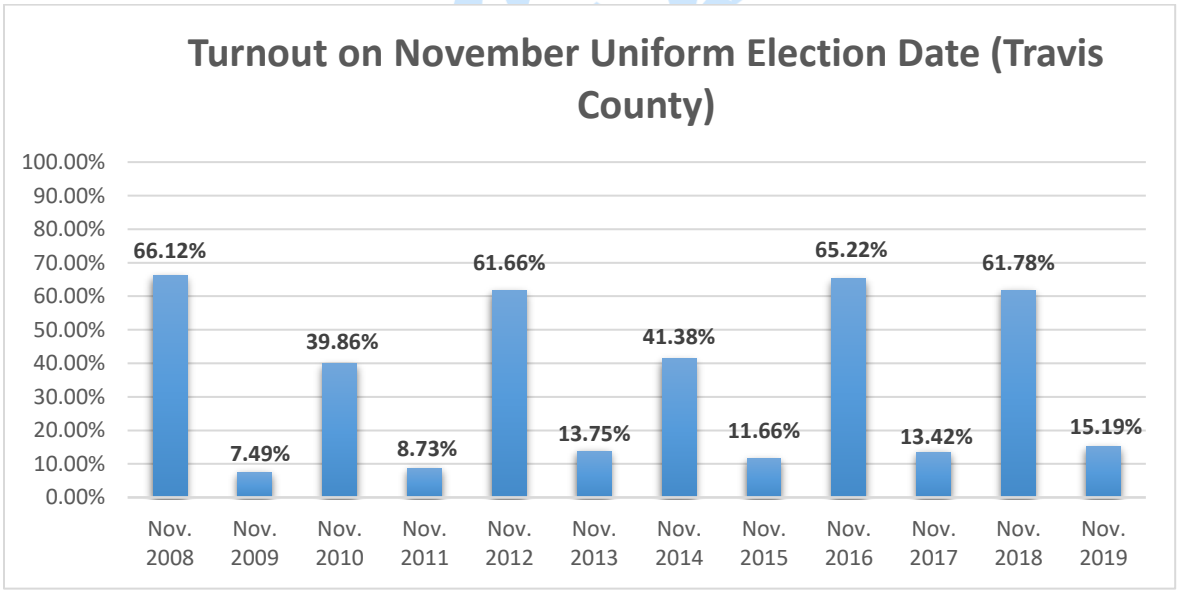
Consider also the local debt obligations created through bond elections. From May 2013 through November 2019, 1,445 local bond propositions totaling more than $106.3 billion have been placed on ballots for voter approval.[xvi] They range in importance and necessity. The smallest of these was a $125,000 wastewater bond for the city of Overton. The largest was $2.5 billion for drainage improvement in Harris County in August 2018. A variety of entities, including water districts, school districts, cities, counties, and community college districts, have this authority. Of the 1,445 local bond propositions during that time, voters approved 1,154 of them for a total debt approval of $91.3 billion.[xvii]

It is a plain truth that voter engagement and turnout is higher in November than it is in May. The following chart illustrates turnout on the May uniform election date, with Travis County voters as the example:



Immediately apparent is the fact that turnout in May broke double-digits only two times in the past decade. Indeed, average turnout in May elections over the decade highlighted in the above chart is 7.2% of registered voters.

Contrast the chart above with the chart below, which tracks registered voter turnout in November elections, again using Travis County at the example:



Two points are readily apparent from this chart. First, it is clear that in even-numbered years, major elections, such as presidential elections and statewide races in Texas, boost overall turnout. State Representatives and State Senators are also elected in even-numbered years. However, even in odd-numbered years, turnout in November elections is consistently higher than all elections held on the May

uniform election date. Indeed, *every single odd-numbered November election highlighted had turnout higher than the average of 7.2% produced by May election turnout*.

Encouraging strong turnout is a bipartisan goal. Indeed, the two major parties and smaller third parties all engage in voter registration and get-out-the-vote campaigns. The Democratic Party in Texas is engaged in the largest voter registration campaign in the state's history in the lead up to the 2020 election.[xviii] The Republican Party is engaged in similar efforts.[xix]

Aside from intra-party primary elections, all elections should be held on the uniform election date in November in order to maximize voter engagement. Several bills were filed and heard on this topic in the 86th Legislative Session. House Bill 365 (Cain), for example would have gone even further, by moving elections to November in even-numbered years. Glen Maxey, the Primary Director for the Texas Democratic Party, testified on the bill and stated the party's position that elections should be held when turnout is highest, essentially agreeing with the goal of HB 365 without formally supporting the bill.

There was opposition to HB 365. For example, Chris Davis of the Texas Association of Elections Administrators argued that moving all elections to November would cause long lines, but such an assertion presumes that the people who vote in both May and November are separate groups of people. That presumption does not withstand scrutiny, as it is highly likely that the voters who turn out in lower numbers in May are more dedicated voters than the general population and it follows that they also already turn out in November. There is also little reason to take seriously the argument that moving May elections to November will increase costs. The fact of the matter is, eliminating low turnout elections in May by moving them to higher turnout elections in November is far more likely to save money than it is to increase costs.

As Alan Vera of the Harris County Republican Party Ballot Security Committee explained in his testimony in favor of House Bill 365: "This is a common sense bill. It's time to end the insane practice of having 3% of the registered voters of a district select the board that governs the district and lay debt obligation on the other 97% of the registered voters."[xx]

People choose to vote or not vote for any number of reasons. It is not the government's business to try to increase turnout or to try to force people to vote. However, a policy of holding elections on dates when turnout and civic engagement is at its highest is good government. The more people weigh in on their city councils, school boards, utility boards, and local debt obligations, the more accountable government will be.

B. Require clarity and transparency in ballot propositions

Ballot propositions put voters in charge with direct participation in lawmaking. The requirements that must be met in order to put a proposition on a ballot vary from jurisdiction to jurisdiction, but they are common in that they empower voters to decide a matter directly.

Sometimes a local government will choose to place a proposition directly on the ballot. Other times, voters will petition for it against a majority of the local government's wishes. The former typically presents no issue. The latter situation can be problematic when the local government that opposes the proposition is put in charge of ballot language. This is a common problem, as explained in a 2016 *New York Times* piece titled "Why Are Many Ballot Measures So Confusingly Worded?":

> There is a whole industry devoted to writing misleading ballot measures and using misleading ads, comprised of think tanks, legislators, lobbyists and the public relations firms they hire. Money and political advantage drives much of what makes it onto the ballots.[xxi]

The piece continues:

> It's not easy for voters to deal with this situation. They have to be constantly vigilant about getting informed on the hidden details of ballot initiatives. There are nonprofit institutions monitoring the situation and using social media to get the word out about the reality of some measures, but political leaders also need to support the truth.[xxii]

This issue is present in Texas. Indeed, ballot language for local propositions has become predictably confusing, so much so that a cynic might suggest that it is done intentionally. Austin, alone, provides a wealth of examples in this regard. In one example, Austin's ballot language for a 2018 proposition on a city audit was accused of being "obviously political, obviously prejudiced, and misleading by the addition of language that is either unsupported by facts and irrelevant material."[xxiii] One critical attorney involved in a lawsuit against the city called it "bogus and illegal," and stated that "they are using the ballot language to argue against the audit." The *Texas Monitor* Reported:

> Rather than a question that reflected the language of [a] petition that got more than 33,000 signatures, "Shall a city ordinance be adopted requiring a comprehensive, independent, third-party audit of all city operations and budget," the council, at [Mayor] Adler's insistence, approved this:
>
> > "Without using the existing internal city auditor or existing independent external auditor, shall the city code be amended to require an efficiency study of the city's operational and fiscal performance performed by a third-party audit consultant, at an estimated cost of $1-$5 million."[xxiv]

A 2016 ballot proposition over repealing ridesharing regulations presents another example. In an article titled "Don't mess up your vote: Here's what Uber, Lyft ballot question means," reporters for the *Austin American-Statesman* explained that voters are "befuddled by the wording they see posted on the Travis County clerk's sample ballot. One of them, who told me her intention was to oppose Uber and Lyft, said she would have inadvertently voted the other way based on what she had read in the ballot language."[xxv] It is worth posting what voters encountered on the ballot:

> *PROPOSITION 1, CITY OF AUSTIN*
> *Shall the City Code be amended to repeal City Ordinance No. 20151217-075 relating to Transportation Network Companies; and replace with an ordinance that would repeal and prohibit required fingerprinting, repeal the requirement to identify the vehicle with a distinctive emblem, repeal the prohibition against loading and unloading passengers in a travel lane, and require other regulations for Transportation Network Companies?*
>
> - *For the Ordinance*
> - *Against the Ordinance*

As the *Statesman* reports, the obvious question asked immediately by most voters is "which ordinance exactly are you asking me about???"[xxvi]

Other examples in Austin abound. In a ballot proposition asking a question directly relating to revision of the city's land development code, the city removed a reference to CodeNext from the ballot language, which is the term that voters had associated with the proposition and campaigned against (and for). Instead, the language was as follows:

> Shall a city ordinance be adopted to require both a waiting period and subsequent voter approval period, a total of up to three years, before future comprehensive revisions of the city's land development code become effective?[xxvii]

House Bill 3376 (86R, Klick) and Senate Bill 323 (86R, Huffman), both filed in the 86th Legislative Session, were a direct response to this problem. They would have required a three judge panel to review ballot proposition language proposed by political subdivisions. A political subdivision would then be required to submit the ballot proposition language and a brief statement on the purpose of the proposition 123 days before the election. Within 45 days of receipt of the language and explanation, the panel would be required to either approve or disapprove of the language. If the panel disapproves of the language, it would be required to rewrite the language in a manner "that is clear and understandable to the average voter for use in the election." The political subdivision could then either proceed with the approved or revised language. If it chooses to not proceed with revised language written by the panel, it must submit revised ballot language for review again. This is a long overdue change in public policy and should be implemented for future generations of Texans.

III. Judicial Selection

The 86th Legislature enacted House Bill 3040, which created the Texas Commission on Judicial Selection (the "Commission") to study the methods by which judges in Texas are selected. The Commission released a report on December 30, 2020, in which it compared various ways of selecting judges and considered changes which would contribute to assembling a fair, impartial, qualified, competent, and stable judiciary. The Commission is divided[1] into three working groups, with each of the groups focused on one of the following topics: elections, appointments and confirmations, and citizen panels and judicial qualifications.[xxviii] numerous comments from interested parties were submitted to the Commission before it issued its report.

While every method of selecting judges that the Commission considered has its advantages and disadvantages, policymakers should be wary of altering the current system of selecting judges through partisan elections. Although several criticisms of this method are valid, partisan elections uphold the fundamental principle that Texans should determine the identity of people who interpret their laws. The best approach for the Legislature is to retain partisan elections and amend the law to mitigate the flaws of this method to the extent possible.

A. The current system of selecting judges in Texas

Judges in Texas fall primarily[2] into one of the following categories:

- Supreme Court; the highest state court for civil matters;
- Criminal Court of Appeals, the highest state court for criminal matters;
- Courts of Appeals,[3] which hear appeals from district courts;
- District courts, which are trial courts with general jurisdiction; and
- Statutory county courts, which are courts the Legislature has created to assist constitutional county courts with caseloads (the latter type of court is not discussed in this Task Force Report). The jurisdiction of statutory county courts varies depending on the statute which created a particular court, but generally have similar jurisdiction as constitutional county courts (which generally includes probate and juvenile matters and civil matters involving relatively small-dollar

[1] Technically, the Commission was abolished on January 2, 2021, in keeping with the provisions of HB 3040. However, because 11 of the Commission's 15 members have indicated that there could be benefits from extending the Commission's life in light of the Covid-19 pandemic, this Task Force Report refers to the Commission as though it still exists.

[2] This Task Force Report does not discuss types of judges and justices outside the scope of HB 3040, such as federal judges, constitutional county court judges, justices of the peace, and judges of municipal courts.

[3] These courts are referred to as "intermediate appellate courts" in this Task Force Report. The Supreme Court and the Criminal Court of Appeals are referred to as "high courts."

claims) and concurrent jurisdiction with district courts in civil matters involving amounts up to $250,000.

Judges in Texas are currently selected through partisan elections- elections in which their party affiliation is listed on ballots. In the case of a vacancy in the high courts, the intermediate appellate courts, or district courts, however, the governor has the power to appoint a replacement judge.[xxix] If the Legislature is in session, this appointment must be made with the advice and consent of at least two-thirds of the Senate present.[xxx] If the Legislature is not in session, then the judge takes office and serves until the Legislature is in session again, at which time he or she must be approved by a two-thirds vote of the Senate present. However, if a general election occurs between the governor appointing the judge and the Legislature being in session, whether the judge retains office will depend on the election result.[xxxi] A judge who is appointed when the Legislature is not in session and then wins re-election prior to the Legislature being in session is never subject to Senate approval. The following table illustrates the terms of office and qualifications for most types of judges in Texas.

Table 1: Judicial Qualifications and Terms of Office

Type of Judge	U.S. and Texas Resident	Additional Residency Requirements	Licensed to Practice Law in TX	Minimum Age*	Years in practice of law	Term of Office
Supreme Court	Required	-	Required	35 years	10 years	6 years
Court of Criminal Appeals	Required	-	Required	35 years	10 years	6 years
Court of Appeals	Required	-	Required	35 years	10 years	6 years
District Court	Required	Resides in district for his or her term and for the 2 preceding years	Required	25 years	4 years	4 years
Statutory County Court	Required	Resides in the county for the 2 years preceding his or her term	Required	25 years	4 years	4 years

*Generally, judges in Texas are subject to a mandatory retirement age of 75.[xxxii]

B. Concerns with the current system of selecting judges

As discussed further below, every system of selecting judges is imperfect in that it raises legitimate concerns about whether the people who would make excellent judges (or who already are serving as excellent judges) are being inadvertently eliminated from consideration. The current system of selecting judges in Texas by partisan elections poses a number of problems, including the following:

- Voters lack a strong grasp of the merits of candidates for judicial office. Ruling on cases is a technical skill that can be difficult to evaluate. In contrast, other elected officials can be more easily evaluated by voters on the grounds of whether the officials have advanced the voters' policy preferences. Because of the difficulty in evaluating judicial candidates, voters may elect incompetent or unqualified candidates to judicial office.

- Judges who have done an excellent job, or candidates who would do an excellent job, are often defeated because of little more than the political party with which they are affiliated. This flaw can be exacerbated in election cycles in which there is a popular candidate at the top of the ticket. There is even evidence to suggest that the last name or gender of a judge can influence voters. Particularly in the election "wave" years described, many judges can be voted out of office *en masse*, leading to a sudden loss of expertise and institutional knowledge that may take years to regain.

- Recruiting people who would make excellent judges, which may already be difficult due to the generally lower pay compared to private law practice, becomes even more difficult if judges realize that their career trajectory can be greatly or adversely altered simply because there may be election years in which their political party falls out of favor.

- Partisan elections require campaigning, and donors and supporters are often the attorneys who argue before judges. This dynamic creates a conflict of interest, or at least the appearance of one.

- Perhaps most fundamentally, judges differ from other elected officials in that their role is necessarily counter-majoritarian at times. Defending the rights of politically unpopular minorities is an important part of a judge's role; for example, defending a dissident's right to free speech or a violent criminal's right to a fair trial may be unpopular at times with voters. Judges selected by voters may be influenced, consciously or unconsciously, by whether their decisions will be politically popular.

The 2018 election cycle in Texas, which featured U.S. Senator Ted Cruz running against Robert "Beto" O'Rourke, is worth examining. On the eve of the election, Democrats held seats on just three of the state's 14 Courts of Appeals.[xxxiii] After the election, which saw record Democratic enthusiasm for O'Rourke (particularly in large urban areas) they held a majority on seven of those courts.[xxxiv] Democratic candidates defeated 19 Republican incumbents on those courts, with the lone Republican victor winning an uncontested race.[xxxv] From 2004 through 2016, election years resulted in an average of approximately 24 appellate and district court judges being defeated in their re-election bids. In 2018, that number spiked to 66.[xxxvi]

There is little doubt that many voters in Texas lack the knowledge to evaluate judicial candidates. An infamous example of this lack of knowledge was the 1976 election of Don Yarbrough to the Texas

Supreme Court. Yarbrough was a defendant in numerous civil lawsuits and was the focus of a disbarment proceeding, yet still won the Democratic primary against a widely-respected opponent. Because no Republican contested the position in the general election, he won election to the Supreme Court. The reason for his victory in the primary was apparently his last name; he shared a similar last name with longtime U.S. Senator Ralph Yarborough, and with Donald H. Yarborough, who had run for governor twice. Yarbrough was sworn into office in January 1977 but resigned in July of that year in the face of pending indictments. He later fled to Grenada but was arrested and sentenced to prison on bribery charges.[xxxvii]

While the Yarbrough case was almost 45 years ago, there are indications that the problem of voters' lack of knowledge is still present regarding Texas' judiciary. For example, between 2008 and 2016 an average of 100 percent of statewide, 94 percent of appeals court district, and 88 percent of county-level jurisdictions experienced partisan sweeps; that is, elections in which one political party wins all of the judicial races on the ballot in a given jurisdiction.[xxxviii] As one commentator has noted:

> Analysis of judicial elections [in Texas] between 2008 and 2016 reveals that a party's judicial candidates running in the same jurisdiction tend to receive shares of the popular vote that are extremely similar. The median difference in the vote share received by the majority party's candidates was 0.58 percent in statewide judicial races, 0.52 percent in court of appeals races, and 0.96 percent in county-level races in the 20 most populous counties. This limited variance underscores the reality that an overwhelming majority of voters are indirectly voting for a party's judicial candidates via their straight-ticket vote, often not even looking at the judicial races on their ballot.[xxxix]

There is evidence that voters, lacking any substantive knowledge of judicial candidates, use information such as candidates' ethnicity or sex in casting their ballots. The Democratic Party primary elections in Texas in March 2020 were eye-opening in one key respect: in the approximately 30 contests in which a man competed against a woman, the woman won every contest.[xl] Even more strikingly, one of these female victors was Madeleine Connor, an Austin attorney who has run for office three times as a Republican. Connor's history of filing frivolous lawsuits has led to her being classified as a "vexatious litigant" in the state court system. Because she faced no opposition in the general election, Connor is now a district court judge. The irony of a person with a history of filing lawsuits in bad faith now handing down decisions is stark.

Nathan Hecht, Chief Justice of the Texas Supreme Court of, reflected on the drawbacks of partisan elections of judges in his State of the Judiciary Address to the 86th Legislature in 2019:

> [P]artisan election is among the very worst methods of judicial selection. Voters understandably want accountability, and they should have it, but knowing almost nothing about judicial candidates, they end up throwing out very good judges who happen to be on the wrong side of races higher on the ballot. Partisan sweeps—they have gone both

> ways over the years, and whichever way they went, I protested—partisan sweeps are demoralizing to judges, disruptive to the legal system, and degrading to the administration of justice.[xli]

The Chief Justice noted the transformative effects of the election. Out of the 80 intermediate appellate judges after the election, 28 were newly-elected. At the appellate and district court levels, the state lost more than a combined 700 years of judicial experience.[xlii] This loss of experience can weaken the administration of justice in the state. Perhaps the group best suited to evaluating the importance of judicial experience are lawyers, who see firsthand the benefits of such experience and the drawbacks of the lack of it. A survey of the members of the Appellate Section of the State Bar of Texas (which consists of lawyers and judges) found that partisan elections ranked sixth out of seven choices for how to best select appellate judges.[xliii] Nonpartisan elections were the single most popular option. Surveys by the San Antonio and Austin Bar Associations also found that nonpartisan elections were the single most popular selection method.[xliv]

C. Possible methods of selection

A system for selecting judges has four components: (1) the minimum qualifications for judicial office; (2) how the judge is selected initially; (3) the period of time for which the judge serves; and (4) how the judge is re-selected (if at all). Each of these is discussed below.

1. Minimum qualifications

The current requirements for judicial office in Texas are discussed above in Section I. These requirements are straightforward, but one point deserves emphasis. There are undoubtedly many fine lawyers in Texas who are young and have only several years of experience in the legal profession. A portion of these lawyers could make excellent judges today. However, if a drawback of a certain method of selecting judges is that it will fail to eliminate unqualified candidates, that method of selection might be improved by increasing minimum experience qualifications. This conclusion flows from the fact that an attorney who has been in practice for a number of years has had more opportunities to display work product, gain reputation among colleagues, and learn from experience. In short, attorneys with more experience are more likely to be well-vetted by the legal profession.

2. Method of initially selecting judges

In the United States, there are five general ways judges can be initially selected: (1) partisan elections; (2) nonpartisan elections; (3) gubernatorial appointment, which may be subject to the consent of the state senate; (4) legislative appointment; and (5) a hybrid “Missouri Plan” method which combines elements of the foregoing methods. Several variations of the Missouri Plan option exist.

In partisan elections, candidates run for judicial office with their party affiliations displayed. In nonpartisan elections, no party affiliation is displayed. In the case of gubernatorial appointments, the governor appoints, but such appointment is sometimes subject to legislative confirmation. In the case of legislative appointments, the state legislature appoints judges, often with an advisory panel's assistance.

The Missouri system typically involves a governor appointing a candidate from a list of names drafted by an advisory panel. This list of potential candidates may be binding on the governor; if it is binding, the governor must select a name from the list. A majority of states (36) use an advisory panel for appointments to their high court, and in 29 of those 36, the panel's list is binding.[xlv] In 25 states, panels make recommendations for trial court judges.[xlvi]

Under the Missouri Plan method, state senate confirmation may be required for the judge to take office. Typically, a judge serves a term, but is subject to retention elections throughout the term. At least two proposals for Texas to adopt a Missouri Plan-style method of judicial selection have been offered in recent years. HB 4504 and the related House Joint Resolution 148 (86R, 2019) would have directed the governor to fill certain judicial vacancies (those in the high courts, intermediate appellate courts, and certain district courts, including those located in counties with a population of at least 500,000) by appointment, subject to confirmation by the senate. In this process, the senate would be advised by a board comprised of appointed lawyers and non-lawyers, who would rate the nominee as highly qualified, qualified, or unqualified based on his or her credentials, reputation, and experience. Judges would serve 12-year terms and be subject to nonpartisan retention elections in the fourth and eighth years of that term.

Texans for Lawsuit Reform (TLR) and the Texas Civil Justice League (TCJL) have submitted a joint proposal to the Commission which is similar to the arrangement envisioned by HB 4504 and HJR 148. The governor would nominate a candidate who would be evaluated and rated by a commission comprised of non-lawyer citizens, retired judges, and members of the House. The Senate would have to confirm the appointee by a majority vote. If confirmed, a judge would serve a 12-year term, subject to a nonpartisan ratification election. This ratification election would differ from a retention election in that it would be held much earlier- on the first general election date that is at least one year after the date of confirmation.

3. Period of time for which a judge serves

At the federal level, judges generally hold their office during "good behavior." This easy-to-satisfy standard translates to a lifetime appointment in many cases. Rather than embracing indefinite judicial terms contingent only on displaying good behavior, states often use a term of years for the duration of a judge's office. Determining a judge's term in office involves an inherent trade-off of accountability to voters and judicial independence. If judges' terms are short, they are more accountable to voters but less independent of political considerations, and vice versa if their terms are long.

4. Method of re-appointing a judge (if at all)

If a judge's office is for a term of years, the question of how the judge can be re-appointed (if at all) arises. Possible options include repeating the initial methods of appointment discussed above, or through nonpartisan or partisan retention elections. In a retention election, a judge appears on the ballot with no opposition and voters decide whether the judge should continue his or her term. If the judge wins the retention election, he or she continues to serve. If he or she loses, a vacancy is filled under applicable law.

5. Survey of methods used in other states

Texas' system of partisan elections of judges is an outlier among the states. Table 2 below details how the 50 states appoint judges at various levels in their respective judicial systems:

Table 2: Method of Judicial Selection in the 50 States

Court Level	Partisan Elections	Nonpartisan Elections	Retention Election after Initial Appointment	Life Tenure or Reappointment of some kind
Trial Court*	7	21	7	11
Intermediate Appellate Court**	6	11	14	11
High Court	6	15	17	12

*Four states use differing types of election for trial courts in different counties or judicial districts.

**Eight states do not have intermediate appellate courts.

Source: Judicial Selection Binder[xlvii]

D. Advantages and disadvantages of the various methods of selection

HB 3040 tasked the Texas Commission on Judicial Selection to study a variety of methods of selecting judges, including lifetime appointment and appointment for a term of years followed by a partisan election, a nonpartisan election, or a nonpartisan retention election. The Commission was also tasked with studying the use of a board which would nominate candidates for judicial office and/or assess their qualifications.

1. Partisan elections

The disadvantages of partisan elections are addressed in Section II above. The great and clear advantage of partisan election of judges is that voters control the identity of judges who hand down decisions affecting their lives. This advantage is consistent with the philosophy set forth in the opening sections of Article I of the state's constitution:

> Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government . . . All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

As conservatives have seen on the federal Supreme Court over the decades, relying on executive appointment of judges subject to confirmation by a legislative body has often yielded judges whose views do not align with the voters who elected that executive and legislative body. Republican presidents have appointed 16 of the last 20 Supreme Court justices, yet many of those appointees have espoused decidedly unconservative views. For example, Republican appointees out of the last 20 justices include Harry Blackmun, who authored the 1973 *Roe v. Wade* opinion, and Justice John Paul Stevens, who was widely-regarded as a reliable member of the liberal wing of the Court by the end of his tenure. Selecting judges through partisan elections, and using a term of years rather than lifetime appointment, makes it very unlikely that Texas courts would ever be so detached from a majority of voters.

In addition, judges in partisan elections must also run in primaries, which can make candidates better-vetted. Although many voters may not have the time or inclination to conduct thorough research on judicial candidates, opposing candidates do, and they have an obvious incentive in publicizing their opponents' shortcomings. By facing an opponent(s) in a primary election in addition to a general election, a candidate in a partisan election can be subjected to considerable scrutiny.

While in many cases the voting public may have little knowledge of judicial candidates relative to candidates for offices such as governor, that fact may actually argue in favor of partisan elections rather than against them. Party affiliation can convey important information to voters about a candidate's political philosophy. In the absence of party affiliation, voters may turn to a candidate's name, ethnicity, or gender. Furthermore, electing judges (whether through partisan or nonpartisan elections) can help ensure that judges reflect the norms and values of their respective districts.

2. Nonpartisan elections

Nonpartisan elections have the advantage of ensuring that a judicial candidate is not defeated simply because he or she is "down ballot" from a popular candidate of an opposing political party. Such elections, the thinking goes, would result in excellent judges retaining or winning their office despite any opposing political headwinds. A corollary to this advantage is that nonpartisan elections would likely result in a deeper candidate talent pool than partisan elections because Republican candidates would presumably have a chance of success in historically Democratic areas, and vice versa. Nonpartisan

elections offer these benefits while upholding the principle that voters should select the judges whose decisions affect their lives.

The disadvantage of nonpartisan elections is that voters, deprived of using the predictive power of party affiliations for determining a candidate's positions, might end up even more uninformed when casting votes for candidates for judicial office. In addition, Texas recently eliminated "straight ticket" voting; this change was enacted in 2017 by House Bill 25 (85R), although the change did not take effect until the November 2020 elections. Intuitively, this change should make it less likely for candidates to suffer defeat simply because they are down ballot from a popular candidate of an opposing political party, with the assumption being that some voters who would vote straight ticket if it were available will decline to vote in down ballot races, or will choose candidates from both parties on their ballots. Thus, eliminating straight ticket voting should weaken one of the advantages of nonpartisan elections (and one of the disadvantages of partisan elections). However, comparing results from the 2016 and 2020 elections suggests that the effects of straight ticket voting may be overstated. For example, in 2016, votes cast in the three elections for the position of associate justice of the Supreme Court gathered 97.75 percent, 97.70 percent, and 97.60 percent of the Texas votes for president that year.[xlviii] By comparison, in 2020, when straight ticket voting was no longer available in Texas, the number of votes cast for the three contested associate justice positions on the Texas Supreme Court were 98.36 percent, 98.30 percent, and 98.25 percent of the Texas votes cast for president that year.[xlix] Thus, counterintuitively, the elimination of straight ticket voting in Texas actually *increased* the percentage of voters casting votes for president who also voted for associate chief justices of the Supreme Court. Thus, it is uncertain whether the elimination of straight-ticket voting will yield a pool of better-informed voters.

3. Gubernatorial appointment

Allowing the governor to appoint judges likely increases analysis and vetting of a candidate's track record, particularly if the appointee is subject to confirmation by the senate. Whereas voters as a whole may be poorly-informed regarding candidates for judicial office, the governor has the resources to vet nominees and ensure that they have a track record which suggests they will make good judges. Non-elective methods of initially appointing judges also minimize campaign and fundraising demands on people interested in serving as judges, thereby expanding the pool of potential applicants. This method also provides judges with a measure of independence from voters, increasing their ability to make politically unpopular but correct decisions. Moreover, gubernatorial appointments free candidates from the need to raise campaign funds, which in turn reduces the conflicts of interest which can materialize when judges deal with attorneys who have contributed to their campaigns.

Although appointments by the governor removes judicial (initial) selection from voters, these judges must eventually stand for election if they wish to continue holding office. Interestingly, the governor's ability to appoint judges when there is a vacancy in a judicial office has led to a surprisingly high percentage of judges in the state being *initially* selected for office without direct voter input. According

to written comments to the Commission, 59 percent of Texas Supreme Court judges from 1945 to 2019 were initially appointed by the governor. Furthermore, according to the same source, 44 percent of intermediate appellate judges and 35 percent of district court judges serving as of September 1, 2018, were initially appointed by the governor.[I]

The drawback of gubernatorial appointment is that voters have no direct say in the appointment of judges. In addition, the ability of the governor in Texas to appoint judges without the consent of the Senate under certain circumstances may mean that the diversity of the state's population (including its political diversity) is not taken into account when the appointment is made.

4. Legislative appointments

Although not a popular method of appointing judges (only two states use this method[Ii]), legislative appointment is straightforward; as the name suggests, judges are simply appointed by a vote of the state legislature, although an advisory commission may be used. The advantages of this method are that it provides significant judicial independence and more balanced scrutiny of nominees than gubernatorial appointments (at least compared to gubernatorial nominees which are appointed without the consent of a legislative body). In the case of legislative appointment, a minority legislative party may have doubts about a nominee and can make those concerns public. In the case of gubernatorial appointment, by contrast, the governor will of course unequivocally support his or her nominee.

The key drawback of this method is that it is particularly detached from voters. Although voters do of course elect their legislators, it may be more difficult for voters to hold representatives accountable for a judicial appointment with which those voters disagree because responsibility for the appointment is much more diffuse than in the case of a gubernatorial appointment.

5. Missouri plan

As noted above, the Missouri Plan method of judicial selection is a hybrid of other methods. By taking elements of other methods, the Missouri Plan method hopes to mitigate the weaknesses of each. For example, retention elections allow voters to have a direct say in whether a judge continues his or her term. Gubernatorial appointment increases the likelihood that the candidate appointed to judicial office will be properly vetted. If senate confirmation is required, it lessens the chances of partisan appointments by the governor. A panel which nominates or makes recommendations to the governor or to the senate regarding nominees may dilute partisanship and lessens the chance of "cronyism" by allowing a broad cross-section of the state's voters a voice in nominating or evaluating judicial nominees.

Drawbacks of the Missouri Plan method include voters having no direct say in appointing the judges whose rulings affect their lives. Additionally, there is no guarantee that an advisory panel would be nonpartisan, because many or all of the members would be appointed by people who won partisan

elections. Furthermore, special interest groups (e.g., the State Bar) may end up wielding disproportionate influence on a panel. There is some evidence that lawyers wielding disproportionate influence over such panels can result may result in a liberal bias in the selection of judges.[4][lii] Interestingly, by a 62 percent to 31 percent margin, respondents to the survey of the Appellate Section of the State Bar of Texas favored a requirement that judicial candidates be first approved by a bipartisan panel; however, only 55 percent believed that a panel would be capable of evaluating a candidate without regard to political considerations.[liii] Finally, retention (or ratification) elections are likely to share a flaw with partisan and nonpartisan elections: the average voter will struggle to evaluate a candidate's track record due to lack of knowledge about the unique skill set of judges.

Underscoring the difficulty of weighing the various methods of judicial selection, the Commission could not reach consensus on a specific method of selecting judges. However, its December 2020 report included the following recommendations (the numbers below in parentheses show affirmative votes, negative votes, and abstentions, respectively):

- Rejecting Texas' current system of partisan elections for judges (8-7-0);
- Increasing the minimum qualifications of judges (12-1-2);
- Adopting rules to regulate the role of money in judicial elections (11-4-0);
- Rejecting the use of nonpartisan elections (8-6-1);
- Rejecting any requirement that all judges be initially appointed (14-0-1);
- Rejecting term limits for judges (14-0-1);
- Appointing judges who are then subject to retention elections (7-7-1); and
- Ensuring that any change to the status quo should not affect judges selected under the previous system (15-0-0).

E. Analysis

Texas should retain its system of selecting judges through partisan elections. Judges have the power to shape citizens' lives dramatically, and officials with such power should be directly accountable to, and selected by, voters. Texans agree with this idea; a 2014 Texas Tech survey found that, by a 58 percent to 35 percent margin, respondents favored appointing judges through partisan elections rather than by gubernatorial appointment and senate confirmation.[liv] Similarly, respondents preferred, by a 51 percent to 40 percent margin, partisan elections over appointment of judges by a state commission, subject to retention elections.[lv] Respondents also decidedly favored nonpartisan elections over non-election alternatives.[5] In short, respondents clearly believed judges should be selected by voters.

[4] It should be noted that this conclusion might not hold true in Texas, which has been more Republican-leaning than the average state in recent years.

[5] Respondents favored nonpartisan elections over partisan elections by a 58 percent to 36 percent margin; however, it is possible that "partisan" elections polled poorly due to negative connotations surrounding that word.

As with every method of selection, partisan election of judges has its flaws. Although these concerns cannot be fully eliminated, they can be mitigated. The goal of the Legislature should be to defend the principle that voters select judges, but mitigate the shortcomings of that approach. The present concerns with the partisan election of judges that were set forth earlier in this paper are stated again below in italics, but this time include a suggestion of how to mitigate those concerns:

F. Policy recommendations

To strengthen the state's judiciary, TCCRI recommends the following steps, some of which would require constitutional changes:

1. Policy Recommendation*:* Retain Texas' system of selecting judges through partisan elections.

2. Policy Recommendation: Increase the terms of district court judges from four years to six years; the terms of intermediate appellate judges from six years to eight years; and the terms of high court judges from six years to ten or 12 years.

3. Policy Recommendation: Increase the experience requirements for district judges from four years of practicing law to eight years, and from ten years to 15 years for intermediate appellate and high court judges.

4. Policy Recommendation: Require judges to submit a résumé, personal statement, and/or a completed standardized questionnaire to the Secretary of State which voters can view prior to voting. This change could easily be implemented by making Chapter 278 of the Election Code mandatory rather than permissive.

5. Policy Recommendation: Provide that all judges who serve at least one full judicial term are entitled to collect an annuity under the Judicial Retirement System.

IV. Criminal Justice

A. Reform expunction and nondisclosure laws

Nationwide, roughly 50,000 state and federal laws impose penalties or disadvantage convicted felons.[lvi] Approximately 70 million to 100 million people in the United States have a criminal record that subjects them to thousands of federal and state laws that impact their ability to engage in basic rights and privileges in areas such as housing and employment.[lvii] That amounts to *more than a quarter of all adults* in the country. In Texas, skim through the various chapters of the Occupations Code and you'll find that required criminal background checks on applicants are a common condition of licensure.[lviii] In fact, Chapter 53 of the Occupations Code is solely dedicated to laying out the "consequences of a criminal conviction" for a host of professions licensed under the Code.[lix] The intent of Chapter 53 is to "enhance opportunities for a person to obtain gainful employment" after the person has been convicted of an offense and has discharged the sentence for the offense.[lx] It works by restricting the authority of licensing entities to disqualify licensees or prospective licensees on the basis of criminal convictions to only those convictions that directly relate to the duties and responsibilities of the licensed occupation or certain convictions involving violent offenses.

Chapter 53 is a recognition that criminal records harm the ability to find and keep gainful employment, and it is a good attempt to help assist individuals whose convictions should not harm those employment opportunities. To a lesser degree, policies like "ban the box" laws, which prohibit employers from asking applicants if they have ever been convicted of a crime, attempt to address the same issue. However, "ban the box" laws have been shown in several studies to have the *opposite* of their intended effect because employers unable to inquire about criminal history will discriminate against certain populations that they suspect are more likely to have a criminal history. This effect was demonstrated in a 2018 study conducted by researchers at the University of Oregon and Texas A&M University, which found that employment rates for black and Hispanic men dropped following the passage of ban the box laws.[lxi]

The described efforts tend to focus on how to help people with criminal records find gainful employment, but an alternate approach is to help people with criminal convictions clear their records when they are eligible to do so. Roughly 90 percent of employers use criminal background checks to screen for criminal records.[lxii] TCCRI does not take issue with this practice. Indeed, the responsibility businesses have to customers and business partners often requires such prudence. However, existing laws allow individuals in many circumstances to clear or seal certain criminal records when statutory or court ordered conditions are met. Thus, instead of questioning the ability of employers to screen applicants, the focus should shift to those individuals with criminal records, many of whom are eligible to have their records expunged or have an order of nondisclosure granted. Often times they do not do so because the process is cumbersome and costly. Lowering the barriers to that relief for which they are entitled when they satisfy certain conditions should be a priority.

1. Eligibility and process for expunction

For individuals with certain types of convictions in their criminal record who have satisfied the terms of their sentence, there are two main avenues for shielding those records from disclosure: expunction and nondisclosure.

In Texas, there are several criteria under which a person has a right to expunction. A person who has been arrested for either a felony or a misdemeanor is entitled to have all records and files relating to the arrest expunged if the person is acquitted at trial, convicted and subsequently pardoned or formally found innocent, or if the statute of limitations for prosecution of the crime has passed.[lxiii] A person is also eligible for expunction if they have been arrested, but released without a final conviction and no charge pending and no court-ordered community supervision.[lxiv] The exception to this rule is for Class C misdemeanors, provided that no other crime arising out of the same incident has been charged since the arrest and certain waiting times have been fulfilled, or if the person completed court-ordered treatment or pretrial intervention program.[lxv] There are several acts that will prevent a record from being expunged, such as violation of community supervision[lxvi] or not appearing before the court after posting bail,[lxvii] to name two examples.

The procedure for record expunction is cumbersome. A person who has been acquitted of charges must provide notice to the state and request expunction from the presiding court within 30 days of the acquittal.[lxviii] The request for expunction must include the following information (or an explanation for why the information is not included):

(1) the petitioner's:
  (A) full name;
  (B) sex;
  (C) race;
  (D) date of birth;
  (E) driver's license number;
  (F) social security number; and
  (G) address at the time of the arrest;
(2) the offense charged against the petitioner;
(3) the date the offense charged against the petitioner was alleged to have been committed;
(4) the date the petitioner was arrested;
(5) the name of the county where the petitioner was arrested and if the arrest occurred in a municipality, the name of the municipality;
(6) the name of the agency that arrested the petitioner;
(7) the case number and court of offense; and
(8) together with the applicable physical or e-mail addresses, a list of all:
  (A) law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal

records, and other officials or agencies or other entities of this state or of any political subdivision of this state;
(B) central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction; and
(C) private entities that compile and disseminate for compensation criminal history record information that the petitioner has reason to believe have information related to records or files that are subject to expunction.[lxix]

Upon the request, the court is required to set a hearing on the matter of expunction no sooner than thirty days from the filing of the request. If the court finds that that the person is eligible, it is required to order the expunction.

For cases in which a person is convicted and subsequently granted relief or pardoned on the basis of actual innocence, the court is automatically required to enter an expunction order within 30 days, though the person is still required to provide the court with all of the same information as a person who was acquitted.

2. Eligibility and process for nondisclosure

Similar in practical effect to expunction, but substantively different in formality, are orders of nondisclosure (OND), which do not erase a criminal record, but shield it from public view. This makes a person free from disclosing certain criminal history in the job application and interview process. ONDs are governed under Subchapter E-1 of Chapter 411 of the Government Code and are generally available to individuals who have successfully completed deferred adjudication community supervision, which for purposes of an OND means that the following three conditions have been met:

1) The person entered a plea of guilty or nolo contendere;
2) The judge deferred further proceedings without entering an adjudication of guilt and placed the person under the supervision of the court or an officer under the supervision of the court; and
3) At the end of the period of supervision, the judge dismissed the proceedings and discharged the person.[lxx]

However, beyond having completed deferred adjudication community supervision, there are three requirements that must be met in order for the court to have the legal authority to issue an OND.

First, although deferred adjudication community supervision is available for a broad number of crimes, there are several crimes for which an OND is not available, and they permanently make a person ineligible for an OND, even if the crimes are unrelated. Those include:

- Offenses requiring registration as a sex offender[lxxi]
- Aggravated kidnapping;[lxxii]

- Murder;[lxxiii]
- Capital murder;[lxxiv]
- Human trafficking;[lxxv]
- Injury to a child, elderly individual, or disabled individual;[lxxvi]
- Abandoning or endangering a child;[lxxvii]
- Violating a court order relating to family violence, sexual assault or abuse, stalking or human trafficking;[lxxviii]
- Stalking;[lxxix] or
- Any other offense involving family violence.[lxxx]

Second, a person is ineligible for an order of nondisclosure if the court makes an affirmative finding that the offense for which disclosure is requested involves family violence.[lxxxi]

Third, a person is ineligible for an order of nondisclosure if they were convicted or placed on probation or deferred adjudication for another crime, except for fine-only traffic offenses, while already on probation or deferred adjudication for the crime for which an OND is sought.

If a person qualifies for an OND and wishes to obtain one, they are required to file a petition requesting it to the clerk of the court that sentenced them or placed them under community supervision or deferred adjudication. Several documents may be needed, including:

- A copy of the judgement in the case;
- A signed order or document showing that the judge reduced the time required or conditions ordered;
- A signed order showing that the person completed all requirements, paid all fines, costs, and restitutions;
- A discharge order;
- A discharge and dismissal order;
- A signed order or judgement reflecting any affirmative findings made by the judge.

Once an order of nondisclosure has been granted, the court clerk will send the order to the Department of Public Safety, which will have 10 business days to seal the criminal history information subject to the order and forward the order to other relevant agencies.

3. Policy Recommendation: Make Orders of Expunction and Nondisclosure Presumptive and Automatic

Whether a person is acquitted, exonerated, has satisfied the conditions of a sentence or pretrial intervention, or met the requisite waiting periods, the common theme is that they are either eligible for an expunction or order of nondisclosure, or not. That means that the Legislature has already decided

that the person should have the opportunity to remove the incident at issue from his or her record, or shield it from public view, yet the barriers to this process prevent or discourage many from doing so. Indeed, cumbersome paperwork and the additional costs of further legal assistance are substantial barriers for many to obtain this relief that is available to them.

Courts and officers of those courts interact with these individuals in an ongoing capacity. Building in a way of tracking eligibility for expunction or nondisclosure in anticipation of automatic relief if the court's conditions are met is within the ability of those courts. Instead of placing an additional burden on the individual already doing their best to comply, there should be an automated process for expunction or nondisclosure at the end of that individual's interactions with the court for a particular offense, so long as all of the conditions are requirements have been met. This could be as simple as a final hearing in which the court is required to evaluate whether or not the conditions for expunction or OND have been met. If so, it should assist the individual in acquiring the necessary documents and begin the process of moving forward with record relief.

This is admittedly a big-picture reform that will take detailed legislation, but the benefits of such a reform would be myriad. Knowing from the start of the process that record relief will happen so long as the individual stays on the right path should be expected to reduce recidivism and ultimately lessen the burden of the state's court system. Automating this process will also ensure that everyone eligible will take advantage of the relief available to them, which means greater opportunities to re-enter society as productive citizens.

B. State Jail Felonies

Note: The following section on State Jail Felonies and Probation is a shortened and modified version of a 2018 TCCRI white paper, which can be read here.

1. History and background

State jail felonies are the product of reforms to the Texas Penal Code enacted in 1993 by the 73rd Texas Legislature.[lxxxii] Senate Bill 532 (73R) and Senate Bill 1067 (73R) created the state jail system and state jail felonies in order to "alleviate overcrowding in prison and county jails."[lxxxiii] Under SB 1067, state jail confinement sentences of 180 days to 2 years (and up to $10,000 in fines) would be immediately suspended and defendants placed under community supervision for two to five years.[lxxxiv] If an offender took action resulting in revocation of community supervision, then the offender would serve the entire sentence in a state jail. The opportunity for immediate release with a mandatory jail sentence as punishment for violating the terms of that release was a classic carrot and stick approach.
Much has changed since 1993. As a 2015 Interim Report from the House Committee on Criminal Jurisprudence explains, the original intent of the state jail felony program "was to remove low-level criminals from contact with violent offenders as found in the prison system, reduce overcrowding in the

prison system, and emphasize treatment and rehabilitation with the goal of reducing recidivism rates for low-level offenders."[lxxxv] These goals were meant to be accomplished through work programs, rehabilitation, and educational opportunities.[lxxxvi]

The legislature subsequently modified the state jail program several times. Senate Bill 15 (74R) made community supervision for state jail felons with one prior conviction discretionary instead of mandatory.[lxxxvii] Two years later, Senate Bill 663 (75R) removed *all* mandatory community supervision, which allowed judges to sentence all state jail felons directly to state jail. Again, the Interim Report explains that "[t]hese changes resulted in the direct sentencing to state jails for the majority of state jail felonies."[lxxxviii] It was a hard shift away from community supervision.

Several additional reforms followed, most of which "demonstrated a small move back towards the original intention of state jails[.]"[lxxxix] However, state jail facilities are generally considered "less effective than state prisons in rehabilitation, too expensive, and are notorious for high recidivism rates."[xc] Thus, they are distinguishable from state prisons and county jails in the opposite way than what was intended.

2. Current offenses

There are five categories of felonies in Texas, ranging in seriousness from capital felonies down to state jail felonies.[xci] Over 55 crimes are specifically designated as state jail felony crimes in the Penal Code. Those crimes include a broad range of criminal activity including certain categories of fraud and theft,[xcii] criminally negligent homicide,[xciii] certain categories of insurance and Medicaid fraud,[xciv] a fourth prostitution conviction,[xcv] and certain forms of obscenity,[xcvi] to name a few. In addition to offenses specifically designated as a state jail felony, any offense designated as a felony in the Penal Code without specification is treated as a state jail felony.[xcvii]

Chapter 481 of the Health and Safety Code designates at least an additional 16 different state jail felonies. These include things like possession or delivery of controlled substances,[xcviii] possession of certain amounts of marijuana,[xcix] and possession or delivery of certain categories of drug paraphernalia.[c]

3. Penalties

An individual found guilty of a state jail felony "shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days."[ci] In addition to confinement, such an individual may be punished by a fine of up to $10,000.[cii] A state jail felony may be upgraded to a third degree felony if committed using a deadly weapon or if the individual was previously convicted of a crime relating to human trafficking, sexual abuse of children, or a variety of violent offenses, such as murder, sexual assault, or compelling prostitution, to name a few.[ciii] Additionally, if it is shown at trial that the defendant has previously been convicted of two state jail felonies, a subsequent conviction for a state jail felony "shall be punished for a felony of the third degree."[civ] Other repeat convictions may upgrade a state jail felony as high as a second degree felony.[cv]

Unlike other categories of felony, state jail felons are housed in specific state jails. They do not serve in the Texas Department of Criminal Justice or in a county jail and they are not eligible for parole. State jail felony sentences are served "day for day," meaning that in addition to no parole, there is no time served reduction for good time as there is in prison sentences for other levels of felony conviction. There is a program called the Diligent Participation Credit program, which allows time credit to state jail felons who diligently and successfully complete certain education, work, and substance abuse programs, but a state jail felon sentenced to state jail will typically serve the full sentence in a state jail.[cvi]

4. Penal Code § 12.44

Section 12.44 of the Penal Code is a considerable exception to the rule that state jail felons typically serve a full sentence in a state jail. Under Section 12.44, a state jail felon may be punished as though he or she has committed a misdemeanor. Section 12.44 has two subsections. Section 12.44(a) allows a court to punish a defendant convicted of a state jail felony as though that person committed a Class A misdemeanor "if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice."[cvii] Section 12.44(b) allows a prosecuting attorney to request that the court authorize prosecution of a state jail felony as a Class A misdemeanor.[cviii] Section 12.44(a) is heavily utilized and has undermined the purpose of the state jail felony in numerous ways.

Reducing a state jail felony conviction punishment (note that only the punishment is reduced; the conviction is still a state jail felony) to that of a Class A misdemeanor has several benefits for the convicted. First, a Class A misdemeanor is punishable by a fine of up to $4,000, a jail term of up to one year, or both, which is considerably lower than a state jail felony punishment. Furthermore, instead of being forced to serve a sentence "day for day," which is the case with a state jail felony, inmates may be awarded time for good conduct in accordance with a particular county's time credit policy. In practice, a state jail inmate may be released or let out on parole with only a fraction of the sentence actually served in a jail facility.

In the realm of criminal defense, a culture has grown up around Section 12.44. "For accused persons facing prosecution for certain low-level felony offenses," one criminal defense lawyer blog points out, "Texas Penal Code **Section 12.44 is like the Holy Grail of plea deals**. Clients continuously ask 'what is a 12.44(a)' . . . 'can I get a 12.44(a)' . . . and 'how does 12.44(a) work?' They ask the same questions about Section 12.44(b)."[cix] Another criminal defense blog shared an anecdote indicative of the culture around Section 12.44:

> But then I had this client who I was already representing on a Motion to Revoke and we had previously worked out an agreement by which he would spend 30 days in county jail, catch up on some fines and fees he owed as part of his felony probation, and his probation

> would be continued. . . . Since my client was going to be in county for 30 days, we arranged for his family to take care of his outstanding balance with the probation department.
> . . .
> I ask him "Did you tell your family not to pay your balance with probation?" and he says, "Yeah, I'm just going to do that thing where I get my offense reduced to a misdemeanor." I tell him, "You are here on [a motion to revoke] for a 3rd degree felony. You cannot get that reduced to a misdemeanor." I was frustrated because now **this is the fourth time I have had someone tell me that they are just going to "12.44(b)" their case**.[cx]

Essentially, Section 12.44 allows conviction and release. The accused accrue time served while awaiting disposition of their case, and often times they earn extra days towards a sentence through good time served. By the time the case reaches disposition, a felony conviction with misdemeanor sentence is an appealing option that allows quick release. This is a major contributor to the revolving door nature of state jail felonies.

5. The revolving door

While they were originally meant to emphasize treatment and rehabilitation, reduce overcrowding, and reduce recidivism rates for low-level offenders, state jails have become facilities that achieve very little in the way of those goals. In 2014, the population of individuals sentenced to state jails was 10,616.[cxi] Because state jails may also house prison transfer inmates, the population is much higher. In total, in 2013, state jails received 22,371 incoming offenders and released 22,601.[cxii] Only 118 of those offenders were released to community supervision.[cxiii] Indeed, "state jails are no longer the backup to community supervision, but are the primary response to state jail felonies with minimal rehabilitation opportunities and maximum sentences served."[cxiv] Inmates go in, they come out, and few of the original goals of the system are achieved.

Much of the revolving door is related to recidivism rates for state jail felons, which—despite reduction being one of the primary goals of state jail felonies—are actually *higher* than rates of inmates in the state penitentiary.[cxv]

The Legislative Budget Board has a Criminal Justice Data Analysis (CJDA) team that calculates recidivism rates for correctional populations. Recidivism is defined as "a return to criminal or delinquent activity after previous criminal or delinquent involvement."[cxvi] CJDA looks at data for individuals who were rearrested, adjudicated or re-adjudicated, convicted or reconvicted, and incarcerated or reincarcerated within three years of release from incarceration or within three years of the start of supervision.[cxvii] As the following table provided in the 2019 CJDA analysis shows, the state jail cohort is consistently the worst performer in terms of individuals being rearrested within three years of release or start of supervision:

REARREST RATES BY FISCAL YEAR OF RELEASE OR START OF SUPERVISION, FISCAL YEARS 2013 TO 2015

COHORT	PERCENTAGE REARRESTED WITHIN THREE YEARS 2013	2014	2015
Adult			
Felony Community Supervision	39.2%	38.3%	38.8%
Prison	46.4%	46.3%	45.4%
State Jail	62.7%	63.1%	62.8%
Substance Abuse Felony Punishment Facility	44.4%	44.3%	44.0%
In-prison Therapeutic Community	46.7%	45.0%	44.1%
Intermediate Sanction Facility	59.2%	58.5%	57.2%
Parole Supervision	44.2%	44.2%	42.8%

SOURCES: Legislative Budget Board; Texas Department of Public Safety; Texas Juvenile Justice Department.

Table Source: Legislative Budget Board (2019)[cxviii]

The state jail cohort also performs poorly in terms of incarceration or reincarceration within three years of release or start of supervision:

STATEWIDE CRIMINAL AND JUVENILE JUSTICE RECIDIVISM AND REVOCATION RATES

FIGURE 4
INCARCERATION OR REINCARCERATION RATES BY FISCAL YEAR OF RELEASE OR START OF SUPERVISION
FISCAL YEARS 2013 TO 2015

COHORT	PERCENTAGE INCARCERATED OR REINCARCERATED WITHIN THREE YEARS 2013	2014	2015
Adult			
Felony Community Supervision	29.2%	29.3%	28.3%
Prison	21.0%	21.0%	20.3%
State Jail	32.2%	31.9%	30.9%
Substance Abuse Felony Punishment Facility	45.4%	44.3%	44.3%
In-prison Therapeutic Community	21.3%	22.4%	22.8%
Intermediate Sanction Facility	39.4%	39.0%	39.5%
Parole Supervision	19.8%	21.0%	20.2%

SOURCES: Legislative Budget Board; Texas Department of Criminal Justice; Texas Juvenile Justice Department.

Table Source: Legislative Budget Board (2019)[cxix]

Given the original intent of state jail felonies, these levels of recidivism should not be acceptable. Furthermore, as state jail felonies have departed from things like community supervision and treatment—options that are available to worse felony offenders—the problem has been exacerbated.

6. Policy Recommendation: Repeal Penal Code § 12.44(a)

Section 12.44(a) is used regularly to secure a state jail felony conviction, but without the appropriate punishment. In punishing a felony crime as a misdemeanor and allowing time served awaiting disposition to count towards the sentence, Section 12.44(a) allows offenders to return to the streets quickly, often with little time served. That provides a strong incentive to plead guilty, accept the 12.44 deal, and move through the system. It is a major contributor to the high recidivism rates among state jail felons.

7. Policy Recommendation: Require Jurisdictions to Consolidate their State Jail Felony Cases into a Single Docket

Jurisdictions should consolidate their state jail felony cases into a single docket so that those cases are managed and resolved consistently, and so that the proper treatment and punishment may be sentenced.

8. Policy Recommendation: Enact a tiered system of sentencing for state jail felonies

Punishments for state jail felonies should emphasize early assessment and individualized treatment and rehabilitative services specific to the needs of the offender, and the opportunity to have a case dismissed if the terms of the pretrial intervention contract are met. There should be a focus on quickly determining the proper course of action in order to minimize pretrial detention and the accrual of time. A four-tier system could be devised, with the lower tiers providing incentive for rehabilitation and against recidivism, and the upper tiers providing punishment through mandatory sentencing and repeal of Section 12.44 of the Penal Code. The mandatory sentences for repeat offenses in the later tiers represent a more serious punishment than is currently in statute for state jail felonies. For example:

- First State Jail Felony Offense: A first-time offender would be eligible for a 12-month pretrial intervention program with terms set based on a comprehensive risk and needs assessment. Successful completion of a program would result in the case being dismissed and eligibility for an immediate non-disclosure and automatic expunction after a period of time without committing a new felony offense. This punishment makes clear that people make mistakes. Offenders will have to show a recognition of the mistake and a willingness to complete treatment and avoid recidivism. They are rewarded with a clean record. As a first-time offense, this option is preferable to § 12.44 of the Penal Code, which is currently widely used to plead guilty to a state jail felony in order to receive a misdemeanor punishment. Failure to complete the intervention program would result in jail time of up to 12 months.

- Second State Jail Felony Offense: A second offense would result in probation or 2-4 years in state jail. A drug and alcohol assessment would be mandatory, with up to 12 months of

treatment if required by the court. Successful completion of a program (if required) and completion of 50% of the sentence would result in early termination of the probation or state jail term. However, failure to complete mandatory treatment would result in the rest of the sentence being served in state jail.

- Third State Jail Felony Offense: A third offense would result in probation or 3-4 years in state jail. A drug and alcohol assessment would be mandatory, with up to 18 months of treatment if required by the court. Successful completion of a program (if required) and completion of 75% of sentence would result in early termination of the probation or state jail term. Failure to complete the probation terms would result in a mandatory state jail alternative.

- Fourth State Jail Felony Offense: A fourth offense would result in four years of probation or four years in state jail. The offender would submit to a comprehensive assessment and be required to complete the recommended treatment. As an alternative the offender could serve 4 years in State Jail. Individuals offending for a fourth time will not be allowed to continue cycling through the system. The state would force them to commit to long-term treatment or a long-term jail sentence. **This is a stricter punishment than is currently imposed on state jail felons**.

Reforming the state's approach to state jail felonies is an ambitious plan, but not one that presents insurmountable obstacles. This paper does not recommend decriminalizing certain activities. Nor does it recommend liberalizing punishments. Rather, it proposes a reformed approach to a system that does not work properly. State jail felonies, as currently constructed, do not serve their original purpose. While they have lengthy mandatory sentences, statutory loopholes to those sentences have rendered them relatively meaningless. The approach proposed herein recognizes that certain kinds of treatment and supervision work to reduce recidivism and help offenders re-enter society and become productive citizens. Where those interventions and treatment work to reduce recidivism and lower crime, the state and its residents' benefit. Where those forms of treatment do not work, and offenders pose a repeated or more dangerous threat, the punishments should be mandatory and more severe than they are now.

C. Civil Asset Forfeiture

1. Introduction and background

Central to the concepts of liberty and private property is the Fifth Amendment to the United States Constitution, which provides that there shall be no deprivation of "life, liberty, or property without due process of law[.]"[cxx] Similarly, the Texas Constitution protects "life, liberty, and property . . . except by the due course of the law of the land."[cxxi] The notion that the government may seize private property through civil asset forfeiture, often times without formally accusing the owner of a crime, poses a great danger to these concepts. Indeed, writing in a dissent from a decision by the Texas Supreme Court, Justice Don Willett described the practice of civil asset forfeiture as follows:

> A generation ago in America, asset forfeiture was limited to wresting ill-gotten gains from violent criminals. Today, it has a distinctive 'Alice in Wonderland' flavor, victimizing innocent citizens who've done nothing wrong. To some critics, 21st-century excesses are reminiscent of pre-Revolutionary America, when colonists chafed under the slights and indignities inflicted by King George III and Mother England—among them, "writs of assistance" that empowered government to invade homes and seize suspected contraband. Legal scholars have declared these writs "among the key grievances that triggered the American Revolution.[cxxii]

Indeed, while *criminal* asset forfeiture is considerably less objectionable because it requires due process through a criminal conviction before property if forfeited to the government, civil asset forfeiture does not have such protections. This has resulted in well-documented abuses, which is why the Republican Party of Texas, in its 2018 platform, has called "upon the Texas Legislature to abolish civil asset forfeiture and to ensure that private property only be forfeited upon a criminal conviction."[cxxiii] Similarly, the Texas Democratic party, in its 2018 platform, calls for "ensuring civil asset forfeiture only upon a criminal conviction."[cxxiv] Thus, reforming civil asset forfeiture reform is now a bipartisan issue.

Nevertheless, proponents of civil asset forfeiture argue that it is a necessary tool used to fight organized crime, cartels, and gangs. The Federal Bureau of Investigation describes asset forfeiture as a tool to punish criminals, deter illegal activity, disrupt criminal organizations, remove the tools of the trade from criminals, to return assets to victims, and to protect communities.[cxxv] The Institute for Justice explains law enforcement opposition is common and fierce:

> In 2015, 13 bills were introduced to reform civil forfeiture in Texas— one of the worst states in the country on this issue—but massive pushback from state and local law enforcement killed every one of them. Such opposition to change will likely intensify in the coming years.[cxxvi]

The 2015 prediction rang true, as a number of bills were filed in the 85th Legislative Session by strong leaders on both ends of the political spectrum (e.g., Senator Konni Burton (R), Representative Matt Schaefer (R), Senator Don Huffines (R), and Representative Senfronia Thompson (D)). This continued to be the case in 2017 and 2019.

2. The process of civil asset forfeiture

Civil and criminal asset forfeiture are powerful tools that allow law enforcement agencies to seize and appropriate property that was used in or connected with a crime. There are two kinds of "asset forfeiture" in Texas (and elsewhere in the United States). Criminal forfeiture involves property seized from a defendant convicted of a crime. In civil forfeiture cases, however, the government may seize property and assets based on suspicion of its involvement in criminal activity. Civil forfeiture proceedings are legal proceedings not against the alleged *criminal*, but against allegedly offending *property* involved in alleged criminal wrongdoing.

Chapter 59 of the Texas Code of Criminal Procedure governs civil asset forfeiture in Texas. Law enforcement officers in Texas may seize property if they have probable cause to believe that the property is "contraband." Contraband is defined as (1) any property used in the commission of or to facilitate a crime; (2) the proceeds of a crime; or (3) property derived from or purchased with the proceeds of a crime. The contraband can include any real or tangible property, including but not limited to real estate, vehicles, and money. The owner of the property does not have to be charged with a crime for the property to be considered contraband.

Once property is seized by law enforcement, the state has 30 days to file a forfeiture action (in other words, a lawsuit) against the property and to give notice to all persons who have an interest in the property. The state must prove by a "preponderance of the evidence" that the seized property is subject to forfeiture. This means that the state must show that it is "more probable than not" that the property is contraband (as defined). If property is deemed "contraband," then a person with an interest in the property (in other words, its owner) may still keep possession of it, *but only if he proves he is an "innocent owner" by a preponderance of the evidence*. This is a burdensome process that runs contrary to the presumption of innocence that defendants are entitled to in the U.S. criminal justice system.

3. Civil asset forfeiture abuse is well documented

While the publicly stated motivations behind civil asset forfeiture are well-intentioned, it is clear that the practice incentivizes abuse. Indeed, as Kevin D. Williamson of National Review explains in "Civil Asset Forfeiture: Where Due Process Goes to Die," civil asset forfeiture is "one of the most abused powers enjoyed by American government[.]"[cxxvii] When the U.S. Supreme Court declined to review a forfeiture case from Texas, *Leonard v. Texas*, Justice Clarence Thomas wrote a dissent that lays out the facially unjust results from such a process:

> This system — where police can seize property with limited judicial oversight and retain it for their own use — has led to egregious and well-chronicled abuses. According to one nationally publicized report, for example, police in the town of Tenaha, Texas, regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights. In one case, local officials threatened to file unsubstantiated felony charges against a Latino driver and his girlfriend and to place their children in foster care unless they signed a waiver. In another, they seized a black plant worker's car and all his property (including cash he planned to use for dental work), jailed him for a night, forced him to sign away his property, and then released him on the side of the road without a phone or money. He was forced to walk to a Wal-Mart, where he borrowed a stranger's phone to call his mother, who had to rent a car to pick him up. These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.[cxxviii]

The example of Tenaha, Texas is well known. Over the course of three years, more than $3 million in money and property was seized from hundreds of drivers who were never charged with a crime.[cxxix]

4. The "innocent owner" burden

In another example of civil asset forfeiture abuse in Texas, a used car salesman sold an automobile to a man arrested for drunk driving. The man was also in possession of cocaine. Local law enforcement began civil forfeiture proceedings against the truck, which the salesman had sold to the man on a line of credit. When asserting the "innocent owner" defense in Texas, as the salesman did, such a person has the burden of proving no knowledge of the crime that was committed. Justice Willett dissented from the Texas Supreme Court's decision not to review the case, and explained:

> The current Texas civil-forfeiture law, enacted in 1989, greatly expanded both the scope of forfeiture (now including most felonies and some misdemeanors) and the types of property that can be seized (now including homes, land, vehicles, etc.). The government's burden is slight while the citizen's burden is significant. Law enforcement can seize property it believes is "contraband," something it need only show by a preponderance of the evidence. If the property owner doesn't answer the State's forfeiture action, the State keeps the seized property. If the owner has the wherewithal to challenge the seizure, he can assert an "innocent owner" defense, which requires him to prove he "did not know or should not reasonably have known of the [allegedly criminal] act or omission."[cxxx]

5. Policy Recommendation: Shift the burden of proof in an "innocent owner" defense from the person alleging the defense, to the government.

While it makes sense in *criminal* asset forfeiture for the owner to prove innocence, that is because the defendant is the person who has been charged with a crime. Such is not the case in an innocent owner defense asserted by a person not alleged to be part of the crime, much less charged. That the burden is on the person alleging an innocent owner defense instead of law enforcement is part of the reason why Texas has earned a rating of "D+" from the Institute for Justice in its nationwide grades issued for civil asset forfeiture laws:

> Texas has terrible civil forfeiture laws, earning a D+. The standard of proof required to forfeit property in Texas is just preponderance of the evidence, and an innocent owner bears the burden of proving that she was not involved in any crimes associated with her property before she can get it back. In addition, law enforcement agencies enjoy a strong incentive to seize property. In cases where a default judgment is entered—as is the case in the majority of forfeiture actions—agencies retain up to 70 percent of forfeiture proceeds. In contested cases—those in which the property owner challenges the basis for the seizure—agencies retain up to 100 percent of proceeds.[cxxxi]

In the 85th Legislative Session, Senator Bob Hall filed Senate Bill 1714, which would have shifted the burden of proof in an innocent owner defense from the owner to the government, and imposed a clear and convincing standard of evidence for the government to prove the property is subject to seizure and forfeiture. Sixteen states and the district of Columbia require the government to prove that a person asserting innocent ownership was connected with the alleged crime.[cxxxii] Passage of such a bill in the 86th Legislative Session would make Texas the 17th. It would be a meaningful reform that would go a long way towards protecting private property and valuing due process.

6. Policy Recommendation: Abolish the Practice of Civil Asset Forfeiture in Texas

According to the Institute for Justice, fifteen states require a criminal conviction for "most or all" forfeiture cases. Since 2013, three states—North Carolina, New Mexico, and Nebraska—have abolished civil asset forfeiture entirely, allowing the forfeiture process only in criminal proceedings.[cxxxiii] Several attempts have been made in Texas to eliminate the practice entirely. In the 85th Legislative Session, Senator Konni Burton filed Senate Bill 380, which would have repealed the process of civil asset forfeiture. The following provisions were included in the bill:

- Specification of what property is subject to forfeiture and what is exempt;
- It provided that there is no property right in contraband and that contraband is subject to seizure;

- The bill required the conviction of a crime subject to forfeiture, including a sentence of community supervision or deferred adjudication, be obtained prior to forfeiture of the property;
- The bill raised the standard of proof required to "clear and convincing" evidence in most cases;
- It prohibited the forfeiture of homestead properties, motor vehicles valued at less than $10,000, and currency totaling less than $200;
- It set out the process by which property may be forfeited and provided safeguards for the taking of property with respect to which there was an innocent owner or an owner with a bona fide security interest in such property;
- It established procedures for a proportionality hearing to determine whether the forfeiture is unconstitutionally excessive in proportion to the alleged crime;
- It required that all forfeited property and currency be delivered to the county treasurer in the county in which the property was seized and that property be disposed of by public auction; currency and the proceeds of the auction are to be deposited into the general fund of the county;
- It required annual reporting on the number of forfeitures, the value of each category of property forfeited, and the total number of offenses underlying the forfeitures;
- It provided for the speedy return of property to its rightful owner when charges are dropped or the owner is acquitted, as well as when the court determines that an owner has a bona fide security interest;
- It provided for a substitution of assets if the state shows the defendant intentionally transferred, sold, or deposited the property with a third party to avoid the court's jurisdiction; and
- It allowed for the retention of a civil process in cases where the defendant cannot be put on trial; for example, if the individual is deceased or if the individual has absconded, the state must only prove by a preponderance of the evidence that the defendant is unavailable for trial.

Representative Senfronia Thompson filed an identical bill in the House during the 85th Legislative Session, and again in the 86th Legislative Session. Another attempt in the 87th Legislative Session should be given serious consideration.

Endnotes

[i] Tex. Labor Code § 101.001.

[ii] Tex. Labor Code § 101.003.

[iii] Tex. Labor Code § 101.052.

[iv] Tex. Labor Code § 101.053.

[v] Perry Chiaramonte, "Critics blast loophole that forces taxpayers to fund public sector union work," *Fox News* (Jan. 2017), https://www.foxnews.com/politics/critics-blast-loophole-that-forces-taxpayers-to-fund-public-sector-union-work.

[vi] Mark Pulliam, "Union Time, Taxpayer Dime," *City-Journal* (Nov. 2016), https://www.city-journal.org/html/union-time-taxpayer-dime-14857.html.

[vii] Jon Riches, "Public Money for Private Gain," *Goldwater Institute* (Oct. 2014), https://goldwaterinstitute.org/article/public-money-private-gain-legal-strategies-end-tax/

[viii] Mark Pulliam, "Union Time, Taxpayer Dime," *City-Journal* (Nov. 2016), https://www.city-journal.org/html/union-time-taxpayer-dime-14857.html.

[ix] Trey Kovacs, "A Remedy for the Lone Star State's Taxpayer Giveaway to Unions," *Competitive Enterprise Institute* (Jul. 2015), https://cei.org/sites/default/files/Trey%20Kovacs%20%20-%20A%20Remedy%20for%20Texas%20Taxpayer%20Giveaway%20to%20Unions.pdf

[x] *Ibid.*

[xi] *Ibid.*

[xii] House Bill 1413 (Taylor, Jered, 2018), https://legiscan.com/MO/text/HB1413/id/1798119.

[xiii] Op. Tex. Att'y Gen. No. MY-89 (1979).

[xiv] Harris County vote history, https://www.harrisvotes.com/HISTORY/20190504/cumulative/cumulative.pdf

[xv] Harris County vote history, https://www.harrisvotes.com/HISTORY/20181106/cumulative/cumulative.pdf

[xvi] Harris County vote history, https://comptroller.texas.gov/transparency/local/bond-elections/bond-results-all.php

[xvii] It is worth pointing out that, as a general matter, and perhaps unexpectedly, that bond propositions are more likely to fail when there is lower turnout, but that is not an argument against more engagement even though TCCRI takes the general position that much of this debt is unnecessary and should be defeated. Data collected from the Comptroller illustrates the success and failure rates of bond propositions held on different election dates:

Date	Number of Bond Elections ($ Total)	Approved (%)	Defeated (%)
May 11, 2013	123 ($5 Billion)	100 (81%)	23 (26%)
Nov. 5, 2013	119 ($5.1 Billion)	86 (72%)	33 (28%)
May 10, 2014	119 ($7.1 Billion)	94 (79%)	25 (21%)
Nov. 4, 2014	96 ($6.5 Billion)	85 (88%)	11 (12%)
May 9, 2015	123 ($5.5 Billion)	103 (84%)	20 (16%)
Nov. 3, 2015	111 ($10.3 Billion)	100 (90%)	11 (10%)
May 7, 2016	108 ($5 Billion)	82 (76%)	26 (24%)
Nov. 8, 2016	51 ($4.7 Billion)	41 (80%)	10 (20%)
May 6, 2017	98 ($8.2 Billion)	70 (71%)	28 (29%)
Nov. 7, 2017	122 ($11 Billion)	97 (80%)	25 (20%)
May 5, 2018	91 ($6.7 Billion)	62 (68%)	29 (32%)
Aug. 25, 2018	1 ($2.5 Billion)	1 (100%)	0 (0%)

Nov. 6, 2018	98 ($8.2 Billion)	88 (90%)	10 (10%)
May 4, 2019	92 ($11.2 Billion)	77 (84%)	15 (16%)
Nov. 5, 2019	93 ($9.3 Billion)	68 (73%)	25 (27%)

[xviii] Kendall Karson, "Texas Democrats launch largest voter registration campaign to hobble GOP's grip on the state," *ABC News* (Jan. 13, 2020), https://abcnews.go.com/Politics/texas-democrats-launch-largest-voter-registration-campaign-hobble/story?id=68150180

[xix] "Voter Registration," *Republican Party of Texas*, https://www.texasgop.org/register-vote/registration/

[xx] Public Testimony to House Bill 365 (86R, Cain).

[xxi] George Lakoff, "Why Are Many Ballot Measures So Confusing?" *The New York Times*, Why Are Many Ballot Measures So Confusingly Worded

[xxii] *Ibid.*

[xxiii] Mark Lisheron, "Attorney: City's Ballot Language on Independent Austin Audit 'Political,' Prejudiced." *The Texas Monitor* (Aug. 10, 2018), https://texasmonitor.org/attorney-citys-ballot-language-on-independent-austin-audit-political-prejudiced/

[xxiv] *Ibid.*

[xxv] Ben Wear, "Don't mess up your vote: Here's what Uber, Lyft ballot question means," *Austin American-Statesman* (Sep. 15, 2018), https://www.statesman.com/news/20160915/wear-dont-mess-up-your-vote-heres-what-uber-lyft-ballot-question-means.

[xxvi] *Ibid.*

[xxvii] Mark Lisheron, "Austin city being sued on ballot issues, misleading voters attorney claims," *The Texas Monitor* (Aug. 18, 2018), https://texasmonitor.org/austin-city-sued-ballot-issues-misleading-voters-claims/.

[xxviii] See "Texas Commission on judicial Selection: Working Groups," https://www.txcourts.gov/media/1445461/committee-assignments.pdf.

[xxix] Article V, Section 28, Texas Constitution.

[xxx] Article IV, Section 12(b), Texas Constitution.

[xxxi] See Article IV, Section 12(g), and Article V, Section 28(a), Texas Constitution.

[xxxii] Article V, Section 1-a(1), Texas Constitution (does not apply to statutory county court judges).

[xxxiii] Emma Platoff, "Texas Democrats' Biggest Win on Election Night May Have Been the Courts," *Texas Tribune* (November 8, 2018), https://www.texastribune.org/2018/11/08/texas-courts-appeals-2018-midterms-beto-orourke/

[xxxiv] *Ibid.*

[xxxv] *Ibid.*

[xxxvi] Texas Commission on Judicial Selection, "Judicial Selection Landscape," (January 9, 2020), https://www.txcourts.gov/media/1445450/judicial-selection-landscape-192020-002.pdf

[xxxvii] See Tarlton Law Library, "Justices of Texas, 1836-1986," https://tarltonapps.law.utexas.edu/justices/profile/view/120

[xxxviii] Mark P. Jones, "The Selection of Judges in Texas: Analysis of the Current System and of the Principal Reform Options," *Baker Institute for Public Policy* (January 2017), https://www.bakerinstitute.org/media/files/files/b38e1ecc/POLI-pub-TexasJudges-011317.pdf (p. 2)

[xxxix] *Ibid.*

[xl] Emma Platoff, "Democratic Male Judges May Be Headed for Extinction in Texas. The cause? Voters," *Texas Tribune* (March 9, 2020), https://www.texastribune.org/2020/03/09/women-beat-men-texas-democrat-judicial-primaries/.

[xli] Chief Justice Nathan Hecht, "The State of the Judiciary in Texas: An Address to the 86th Legislature," (February 6, 2019), https://www.txcourts.gov/media/1443500/soj2019.pdf

[xlii] *Ibid.*

[xliii] Appellate Section of the State Bar of Texas, "Texas Appellate Judicial Selection Survey," https://www.txcourts.gov/media/1447270/appellate-section-report-to-tcjs.pdf

[xliv] San Antonio Bar Association Judicial Selection Survey (September 22, 2020), https://www.txcourts.gov/media/1449986/2020922-saba-submission-to-public-hearing.pdf; Austin Bar Association Judicial Selection Survey (November 12, 2020), https://www.txcourts.gov/media/1450055/austin-bar-asscociation_final-report-to-tx-comm-on-judicial-selection.pdf

[xlv] Texas Commission on Judicial Selection, Citizen Panels and Judicial Qualifications Working Group, "Memorandum: Background on Judicial Qualifications & Use of Citizen Panels," (February 9, 2020), available at https://www.txcourts.gov/media/1446562/judicial-selection-commission-working-group-background-material-4823-6384-0435-v1.pdf

[xlvi] *Ibid.*

[xlvii] Judicial Selection Binder on the Commission's website (unattributed), https://www.txcourts.gov/media/1449558/judicialselectionbinder.pdf (PDF p. 27 of 42, et seq.).

[xlviii] See Texas Secretary of State, "Race Summary Report: 2016 General Election," https://elections.sos.state.tx.us/elchist319_state.htm

[xlix] See Texas Secretary of State, "Texas Election Results: November 2020," https://results.texas-election.com/races

[l] Robert Henneke, Texas Public Policy Foundation, Letter to the State Commission on Judicial Selection," September 9, 2020), https://www.txcourts.gov/media/1449736/tppf-letter-to-tx-judicial-selection-commission-9-9-20.pdf

[li] Texans for Lawsuit Reform, "Evaluating Judicial Selection in Texas," (2019), http://www.tlrfoundation.com/wp-content/uploads/2019/09/TLR-Foundation_JudicialSelection_FinalWebVersion_2019-09-17.pdf (p. 47)

[lii] See Brian T. Fitzpatrick, "The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges,"(2017), https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2017/11/09122943/The-Ideological-Consequences-of-Selection.pdf

[liii] See Appellate Section of the State Bar of Texas, "Texas Appellate Judicial Selection Survey," https://www.txcourts.gov/media/1447270/appellate-section-report-to-tcjs.pdf n.

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[lvii] See How to Get Around A Criminal Conviction, N.Y. TIMES, at A22 (Oct. 19, 2015)

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[lxiii] Code of Criminal procedure 55.01(a)(1)

[lxiv] CCP 55.01(a)(2)

[lxv] CCP 55.01(a)(2)(A)
[lxvi] CCP 42A.751
[lxvii] CCP 55.01(a-2)
[lxviii] CCP 55.02 Sec. 1
[lxix] CCP 55.02(b)
[lxx] Gov Code 411.0715
[lxxi] Chapter 62 code of crim pro
[lxxii] Section 20.04, Penal Code
[lxxiii] Penal code 19.02
[lxxiv] Penal code 19.03
[lxxv] Penal Code 20A.02 and 20A.03
[lxxvi] Penal code 22.04
[lxxvii] Penal code 22.041
[lxxviii] Penal code 25.07; 25.072
[lxxix] 42.072
[lxxx] 71.004.
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[lxxxii] "Facts at a Glance: Comparison of Punishment and Sentencing Provisions in the 1993 and 2003 Penal Codes," *Texas Legislative Council* (Feb. 2005), https://tlc.texas.gov/docs/policy/penalcode.pdf.
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[lxxxviii] "Interim Report to the 84th Legislature," *House Committee on Criminal Jurisprudence*, 47 (Jan. 2015), http://www.house.state.tx.us/_media/pdf/committees/reports/83interim/House-Committee-on-Criminal-Jurisprudence-interim-report.pdf.
[lxxxix] *Id*. at 48.
[xc] *Id*.
[xci] Tex. Penal Code § 12.04(a)(1)-(5).
[xcii] Tex. Penal Code § 30.02(c)(1), 30.04(d)(2); Tex. Penal Code § 31.03(e)(4), 31.04(e)(4), 31.07(b), 31.16(c)(4), 31.18(c)(1), 31.19(d)(1).
[xciii] Tex. Penal Code § 19.05.
[xciv] Tex. Penal Code § 35.02(c)(4), (d); Tex. Penal Code § 35A.02(b)(4).
[xcv] Tex. Penal Code § 43.02(c)(2).
[xcvi] Tex. Penal Code § 43.23(b).
[xcvii] Tex. Penal Code § 12.04(b).
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[xcix] Tex. Health & Safety Code § 481.121(b)(3).
[c] Tex. Health & Safety Code § 481.125(f).
[ci] Tex. Penal Code § 12.35(a).
[cii] Tex. Penal Code § 12.35(b).
[ciii] Tex. Penal Code § 12.35(c).

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