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Paul D. Carrington

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# BIG MONEY IN TEXAS JUDICIAL ELECTIONS: THE SICKNESS AND ITS REMEDIES

*Paul D. Carrington\**

A chief justice of another state not long ago declared that there is no method of selecting and retaining judges that is worth a damn.<sup>1</sup> He is not the first to express that wisdom.<sup>2</sup> A familiar dilemma is found in the tension between the competing needs for judicial independence and for democratic accountability. While there may be no good method of selecting and retaining judges, there is a worst method, and Texas is among the states to find it. The worst method is one where judges qualify for their jobs by raising very large sums of money from lawyers, litigants, and special interest groups, and retain their offices only by continuing to raise such funds.

## I. THE DILEMMA OF INDEPENDENCE AND ACCOUNTABILITY

I have spent much of my professional life working with federal judges who exercise much power over their fellow citizens and who enjoy the independence of life tenure in their employment. I yield only to some of them in my admiration for that august group, but cannot quite share the feeling of William Howard Taft, who while President of the United States explained his longing to return to the bench. "I love judges and I love courts. They are my ideals. They typify on earth what we shall meet hereafter in heaven under a just God."<sup>3</sup> True, I remember Sarah Tilghman Hughes as an ornament to both the state and federal bench in Dallas, and she might have met President Taft's description. She seemed to me wise, courageous, and kind, and if heaven is full of her sort as I

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\* Chadwick Professor of Law, Duke University; Reporter, Task Force on State Courts of Citizens for Independent Courts, and member of Planning Committee, American Bar Association Conferences on Judicial Independence and Accountability. This article served as the basis for the Roy Ray Lecture presented at the Southern Methodist University School of Law on March 30, 1999. Some of the thoughts expressed here are more fully developed in PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999).

1. THE ROSCOE POUND FOUNDATION, *PRESERVING THE INDEPENDENCE OF THE JUDICIARY* 15 (1998).

2. See, e.g. Roger Traynor, *Who Can Best Judge the Judges?*, 53 VA. L. REV. 1266 (1967).

3. *Speech to Pocatello Chamber of Commerce*, NEW YORK EVENING POST, October 6, 1911.

remember her, it is indeed a good place. I salute her memory. But wish as I might, I cannot ascribe a full quota of those merits to every federal judge.

Although dubious about President Taft's appraisal, I can say that the federal judges with whom I have worked are admirably independent in the important sense that they are all but invulnerable to either bribery or intimidation in any form. If and when federal district judges fail in their duty to administer the law with courtesy and dispatch, it is for want of moral courage, judgment, or intellect, not because of extrinsic pressures brought to bear upon them. And when the Supreme Court of the United States makes mistakes, as often it does, and sometimes pretty terrible ones at that,<sup>4</sup> it is never because the moral and political judgment of the Justices has been overridden by the hope of reward or the fear of punishment. We can be sure they have done their best.

This is no small boast. Francis Lieber rightly observed that while the ancients could not create an independent judiciary, we are unable to adequately appreciate the one we have.<sup>5</sup> In a world in which the intimidation and bribery of judges is rampant from one continent to the next, it seems almost wistful of the United Nations to declare, as it has,<sup>6</sup> that it is a basic human right to have one's case decided by a judge who is not subject to bribery or intimidation. Pity the Russians and Ukrainians! Pity the Chinese! Pity the Nigerians and the Congolese! Pity our neighbors in much of Latin America!

But there can be too much judicial independence. An excess is most obvious and most painful when judges are not even adequately accountable to one another, i.e., when there is an absence of internal accountability. As a youth, I read about the infamous Judge Roy Bean of Langtry, Texas.<sup>7</sup> When a regular patron of the bar owned and managed by Judge Bean got drunk and shot a Chinese railroad worker, Judge Bean read the Texas statute and concluded that it failed to specify the killing of a Chinese person as a crime and acquitted his friend. Judge Bean was accus-

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4. For examples and discussion, see Paul D. Carrington, *Restoring the Vitality of State and Local Politics: Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 419-53 (1999).

5. See 1 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 363 (Theodore Woolsey ed., 2d ed., 1875).

6. In 1948, the UN promulgated its Universal Declaration of Human Rights; Article X provided that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him." G. A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. doc. A/810 (1948). This was sweepingly elaborated in 1985 in its statement of Basic Principles on the Independence of the Judiciary. See UNITED NATIONS, SEVENTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, U.N. DOC. A/Res/40/146 (1985), reprinted in CHERIF BASSIOUNI: *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF THE UNITED NATIONS NORMS AND STANDARDS* 245-48 (1994).

7. See generally, RUEL McDANIEL, *VINEGARROON, THE SAGA OF JUDGE ROY BEAN: "LAW WEST OF THE PECOS"* (1936); EVERETT LLOYD, *LAW WEST OF THE PECOS: THE STORY OF ROY BEAN* (1936).

tomed to imposing stiff fines, and he even imposed fines on corpses found in his venue amounting to whatever sums could be found on them. The fines, when paid, went straight to his pocket. When Governor Hogg suggested that the money belonged to the state of Texas, Judge Bean told the Governor to take care of matters in Austin and to leave him in charge of matters in Langtry. Judge Bean, it can be said, was independent of the law, but not of bribery or of intimidation. A system permitting the degree of independence he enjoyed is, to borrow Lon Fuller's metaphor, a legal system only in the Pickwickian sense that a void contract is one kind of contract.<sup>8</sup>

Even when judges are accountable to one another, there is still the problem of their accountability to the people of a self-governing republic. While admiring the law-abiding independence of the federal judiciary, I am still true to my agrarian heritage. Like many others who can remember when Dallas County was mostly a cotton patch, I believe language in the Declaration of Independence that I memorized and recited in school about the right of the people to self-government. I believe in the need for the right to jury trial as a restraint on the power of judges to rule our lives. Thus, with the antifederalists of the eighteenth century, the Jacksonians and Populists of the nineteenth, and many of the Progressives of the early decades of this century, I am mistrustful of public officers commissioned for life. I am especially doubtful when they treat opaque legal texts as their commissions to reorganize the social order according to their lights as members of an elite ruling class. In expressing this rustic sentiment, I side with Thomas Jefferson,<sup>9</sup> Andrew Jackson,<sup>10</sup> Abraham Lincoln,<sup>11</sup> Theodore Roosevelt,<sup>12</sup> and Franklin Roosevelt,<sup>13</sup> each of whom confronted arrogant federal judges who were inattentive to our rights as citizens to govern ourselves. This sentiment is still very widely shared in the United States and explains the massive resistance to state constitutional reforms designed to immunize judiciaries from political accountability.

Indeed, since 1840, over two hundred constitutional conventions in various states and in foreign countries have conferred constitutional status on judiciaries, but none has conferred as much independence on judges exercising that power as the United States Constitution.<sup>14</sup> In that one salient respect, our federal constitution has been rejected as a model for

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8. See LON FULLER, *THE MORALITY OF LAW* 39 (1964).

9. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 *LAW & CONTEMP. PROBS.* 79, 88 & n.56 (1999).

10. See MARQUIS JAMES, *LIFE OF ANDREW JACKSON* 260-64 (1938) (discussing Jackson's refusal to comply with a habeas corpus order in the case of Louis Louaillier for which he was later held in contempt of court); see also WILLIAM GRAHAM SUMNER, *ANDREW JACKSON* 227 & n.4 (1889) (discussing Jackson's refusal to take executive action in support of a Supreme Court judgment favoring Cherokees).

11. See 4 CARL SANDBURG, *ABRAHAM LINCOLN: THE WAR YEARS* 279-81 (1939).

12. See Carrington, *supra* note 9, at 94 & nn.106-112.

13. See *id.* at 95 & n.113.

14. A recent compilation is *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbert H. Flantz eds., 1999).

others. Most state constitutions make judges accountable to the electorate. Judges in most American states, like those in Texas, have to stand for office, and each is allowed, as I recall one judge demanding, "to run on his own demerits." Meanwhile, however, since the time of Roscoe Pound and John Henry Wigmore, many American lawyers have been pointing to massive, seemingly insoluble problems with judicial elections and urging various alternatives optimistically denoted as "merit selection."<sup>15</sup> Most of the problems with judicial elections are associated with threats to the independence of the judiciary, and thus to the integrity of our law. In whatever form, elections tend to empower persons or groups outside the judiciary to reward or to intimidate judges for their decisions, and thus to bend the administration of the law.

## II. THE ADVENT OF BIG MONEY

It has been said that money is the mother's milk of American politics. Fundraising was not, however, a salient feature of contested elections in the nineteenth century when Texas and other states opted to elect judges. A genuine crisis is presented when an election is for a judicial office and the sums spent are so large as to dwarf the fifty or hundred dollar contributions that most citizens might consider making to express support for a candidate or an idea.

Forty-four years ago, I participated in a judicial campaign in Dallas. There was a sense shared by many Dallas lawyers that one of the judges in the old courthouse needed to be replaced. Members of the Dallas Junior Bar identified a suitable candidate to oppose him. We put up a few billboards, pasted fliers on telephone poles, and passed out small handbills. Our successful campaign cost a few thousand dollars. There were no contributions of size. My contribution was to paste a few posters on utility poles. To be sure, such an election left much to be desired. Voters had little information and scant interest, in part because no issues were presented for public debate. While statewide campaigns were at that time more expensive than the one in which I was engaged, there was little cause for concern that anyone was buying our courts.

All that has changed dramatically in the last two decades, *especially with respect to statewide races*. Beginning in California,<sup>16</sup> but in state after state, the amount of money being spent on statewide judicial campaigns has increased exponentially. Judicial campaign expenditures have been

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15. See generally MICHAEL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* (1990); HARRY STUMPF & JOHN CULVER, *THE POLITICS OF STATE COURTS* (1992); Maura Ann Schoshinski, *Towards an Independent, Fair and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 *GEO. J. LEGAL ETHICS* 839 (1994); Kyle D. Cheek, *The Bench, The Bar, and the Political Economy of Justice, Texas Supreme Court Elections, 1980-1994* at 18-25 (1996) (unpublished Ph.D. dissertation, University of Texas (Dallas)) (on file with author).

16. For a brief account of the developments in California in the 1970s and 1980s, see Carrington, *supra* note 9, at 81-87 (1999).

doubling every biennium in several states, including Texas.<sup>17</sup> It has become increasingly evident that whole judiciaries can be bought by those with money to spend. Megabuck campaigns are insidiously destructive of the trust of citizens in their legal institutions.

Judges who raise large campaign funds are not on that that account corrupt. Many, I have no doubt, often decide cases contrary to the contentions of their benefactors. On the other hand, it is scarcely possible to believe that campaign contributions have no bearing on the outcomes of cases. Polling data in Texas and other states<sup>18</sup> confirm that most citizens believe that contributors are getting something for their money. Even if judges are never influenced to favor their contributors in contested cases, those who exercise political responsibility as state Supreme Court Justices do, will in their decisions reflect the ideological and political perspectives of their constituents.

There are at least two causes of this malign modern development. First, Americans have become legal realists and expect judges in state supreme courts to make many decisions laden with social and political significance, i.e., decisions in which self-governing citizens demand a say. This has made high court judgeships increasingly visible to those seeking to use their money to shape the ideology of the state government. Indeed, for some with money to spend for that purpose, judicial elections may be the best buy because the electorate may be especially ill-informed and apathetic about the issues presented in judicial elections.

Second, technological developments have made a huge difference in the effectiveness of campaign expenditures. The political advertisement inserted into commercial television programming during a ball game or a soap opera is a powerful tool, all but obsolescing such homely political tools as billboards, handbills, word of mouth, and even traditional public speaking on radio or television by the candidates themselves. Expert consultants using focus groups can craft advertisements, that for a half minute, occupy all the senses of the casual viewer attracted to the screen by high-priced entertainment. The experts have mastered the art and skill of transmitting disinformation by this means and are especially adept at directing negative or hostile sentiments toward political adversaries. If well done, such advertisements "melt down."<sup>19</sup> That is a technical phrase employed by social scientists to describe the process by which we forget the source of disinformation and come to believe that it came to us from a legitimate newscast, perhaps from Walter Cronkite himself. Because of the low level of voter interest in judicial campaigns, judicial candidates are especially vulnerable to blitzkrieg by insidious spot advertising on

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17. *Id.* at 106 & nn.188-190; see also ABA, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, PART TWO 89-107 (1998).

18. For a review of the Texas polling data, see SUPREME COURT OF TEXAS, JUDICIAL CAMPAIGN FINANCE STUDY COMMITTEE, REPORT AND RECOMMENDATIONS (February 23, 1999 at 6-10) <<http://www.supreme.courts.state.tx.us/rules/campaign.htm>>.

19. The process is explained and illuminated in KATHLEEN HALL JAMIESON, DIRTY POLITICS 123-35 (1992).

commercial television. Such an attack can be effectively resisted, if at all, only by a counterattack employing the same weaponry. But air-time on commercial television is very expensive, and so are the consultants and focus groups. Moreover, they require planning; an effective television campaign therefore requires substantial front-end financing.

For these reasons, it would be imprudent, even foolish, for a person serious about trying to win or hold an elective office on a state supreme court to enter the campaign without a large supply of cash. Even in a state of average size like Alabama, a six-year term on the Supreme Court now costs a couple of million dollars,<sup>20</sup> and the price is rising. Several multiples of that sum have been spent in Texas and California.<sup>21</sup> Election campaigns conducted by television advertising are arms races, and there are no operative strategic arms limitations. Unless there is a saturation point not yet visible, it appears that we are headed to a time when Justices of the Supreme Court of Texas will need to raise a couple of million dollars a year from lawyers, litigants, and interest groups if they are serious about keeping their seats on the court.

Some citizens and even some judges seem to view this development without concern. I suppose some share an idea that was advanced by that notable Dallas oil billionaire and political philosopher, the late H. L. Hunt, who, in his single published work, *Alpaca*,<sup>22</sup> rhapsodized about the virtues of a society in which citizens cast multiple votes in proportion to their wealth. With the help of modern technology, we have come a long way toward fulfilling Hunt's dream with respect to the political roles of some of our highest state courts. The legal system in Texas, whatever the reality, appears to belong to rich folks or groups. We are told that the celebrated Governor of Texas applauds the present system of electing judges and will resist change; if that is so, it would indicate that he shares the political philosophy of H. L. Hunt, a fact that should be called to the attention of voters in the coming presidential campaign.

The long-term consequences of subjecting our courts to the control of monied interests are dismal to contemplate. Over time, few rich folks or groups will benefit from the resulting disaffection and distrust of fellow citizens. Capitalism and the market economy depend on political stability. Political stability in turn depends on the perceptions of the people that the law is *their* law, made by *their* representatives for *their* benefit and administered without fear or favor. Those connections were well understood in this country in the eighteenth and nineteenth centuries, if not by H. L. Hunt and his fellow travelers. When de Tocqueville spoke of American lawyers and judges as aristocrats,<sup>23</sup> he was speaking not of their elevated status, but of their political responsibility for mediating be-

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20. See Mark Hansen, *A Run for the Bench*, 84 A.B.A. J. 68, 70 (1998).

21. See *id.*

22. Published in 1960.

23. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 297 (Henry Reeve trans., New York, 1841).

tween diverse groups by preventing those with wealth and power from overbearing those without. That stabilizing function cannot be effectively performed by courts that appear to be controlled by monied interests.

### III. PRESCRIPTIONS

What can be done to reverse the trend toward megabuck judicial campaigns? There are no magic solutions. Whatever we do, we will still be left with a defective method of selecting and retaining judges. The best we can hope for is to maintain a judiciary that is reasonably independent yet reasonably accountable to the people of the state, and not a cause for alienation and mistrust by those whose cases must be judged.

To that modest end, I endorse the following proposals. First, Texas should substantially tighten and reinforce the rules requiring judges to disqualify themselves from sitting on cases involving the rights or interests of persons or groups who have made large campaign contributions to candidates for judicial office. Thus, I endorse the recommendations published this year by the Judicial Campaign Finance Study Committee appointed by the Supreme Court of Texas.<sup>24</sup> Second, Texas should provide limited public funding to facilitate statewide judicial campaigns on the condition that candidates receiving assistance accept appropriate restraints on campaign spending and methods. Thus, I support the public funding provisions in a bill proposed for enactment by the Texas legislature by Representative Gallego.<sup>25</sup> Third, Texas should substantially increase the length of the terms of its elected judges.

#### A. DISQUALIFICATION RULES

The Texas Judicial Campaign Fairness Act of 1995<sup>26</sup> was a useful response to the problem of which I speak, but not an adequate one. The Act limits contributions to judicial campaigns, limits the times within which campaign contributions may be received, and imposes elaborate disclosure requirements on the campaigns of judicial candidates. The major inadequacies of that legislation are that it fails to reach direct spending on judicial elections by political organizations and other interest groups, and that its provisions are enforceable only by civil and criminal sanctions imposed on violators rather than by requiring the recusal of judges receiving illegal support.

The American Bar Association Code of Judicial Conduct has been adopted in major part by the Texas Supreme Court as the law of this state.<sup>27</sup> An ABA Task Force on Lawyers' Political Contributions released a report in July 1998 recommending seven reforms of that code bearing

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24. See Supreme Court of Texas, *supra* note 18.

25. Tex. H.B. 10, 76th Leg. R.S. (1999).

26. See Acts effective June 16, 1995, 74th Leg. R.S., ch. 763, § 1 (effective Sept. 1, 1997, 75th Leg., ch. 479 §§ 1-3, codified as TEX. ELEC. CODE § 253.151-253.176 (Vernon 1998)).

27. See TEX. GOV'T CODE ANN. title 2, sub. G, app. B (Vernon 1998).



on campaign contributions by lawyers.<sup>28</sup> Some of these, such as limits on campaign contributions, were previously enacted in the Texas legislation of 1995. But the ABA Task Force also recommended the disqualification of a judge in a case involving a party or counsel who exceeded the limit on contributions and restraints on the appointment by judges of lawyers who exceed the contribution limits. These are not presently features of Texas law. Some members of that Task Force, including Tom Phillips, the Chief Justice of Texas, recommended three additional reforms: (1) a rule preventing a judge from retaining unspent campaign funds as a war chest for future campaigns; (2) a rule forbidding a political party or action group from circumnavigating contribution limits by actively supporting the judge through campaign expenditures; and (3) a rule requiring disqualification of the judge even if the judge was unaware of the excessive contribution.

A Study Committee appointed by the Supreme Court of Texas has now also tackled the problem. It wisely recommends that the Texas Supreme Court use its rulemaking power to prohibit a judge from sitting on cases involving parties who have contributed to the judge in violation of the 1995 Act.<sup>29</sup> In accordance with the recommendations of the ABA group, the Study Committee proposes to enhance the disclosure requirements, and recommends legislation to impose those requirements on "direct expenditures" by persons or organizations seeking to influence the outcome of judicial elections.<sup>30</sup> Therefore a judge may also be disqualified from sitting on a case involving a party who has contributed substantially to a group or organization engaged in direct spending, i.e. spending moneys that are not contributed to a campaign and subjected to the control of the candidate. The Study Committee's recommendations should be adopted.

I suggest two possible addenda. Professor Roy Schotland, the reporter for the ABA group, has called attention to the need to limit post-election fundraising. This would seem to be necessary to prevent the accumulation of war chests.<sup>31</sup> Also, the Public Citizen Litigation Group has noted that it is important to aggregate the contributions of lawyers and their clients, so that if a lawyer and his clients in a particular case contribute more than the limit to a judge's campaign, or spend directly more than that amount, the judge would be disqualified from sitting on their case. While the Report speaks to the need to aggregate the contributions of colleagues and relatives, it could be more explicit in aggregating the contributions of parties with those of their lawyers. This problem is complicated by the fact that the Campaign Fairness Act imposes different limits on law firm contributions from those imposed on individual lawyers. I am not persuaded that law firms, any more than corporations or labor unions, should be allowed to make political contributions.

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28. See ABA Task Force Report, *supra* note 17.

29. See ABA Task Force Report, *supra* note 17, at 18-29.

30. See ABA Task Force Report, *supra* note 17, at 15-17.

31. See Letter of Roy Schotland to the Justices of the Supreme Court of Texas, March 5, 1999.

Sweeping disqualification rules will go far to correct the problem, but not far enough. They will function best in regard to trial courts. There are individuals and interest groups or associations willing to spend large sums to influence the election of judges to the supreme court of a state where they do not appear as parties. For example, it appears that millions were spent in Tennessee in recent years to secure a state supreme court that could be expected to reapportion legislative and Congressional districts to assure maximum success for the spenders' partisan interests. A disqualification rule would have had no effect there. Nor will disqualification rules discourage a labor union, a state medical association, or an association of trial lawyers from raising large sums from their members, even those who will not themselves be participants in cases having high political salience.

### B. PUBLIC FINANCE: THE VOTERS' GUIDE

Because the disqualification rules are an insufficient response to the crisis, some public funding of judicial campaigns is needed. The Texas Study Committee expressed opposition to this idea, but gave no reason for that opposition. The Committee applauded the efforts of the State Bar to provide a voters' guide to judicial candidacies, but stopped short of recommending that public funds be used to make those efforts effective.

Public funding of elections was necessitated by the decision of the Supreme Court of the United States in *Buckley v. Valeo*, decided in 1976.<sup>32</sup> The Court constitutionalized the right of candidates, citizens, and interest groups to spend money to influence the outcome of elections, but upheld restraints imposed as conditions on the receipt of public financial support. Public funding is a familiar feature of presidential election law,<sup>33</sup> two states have recently adopted public funding of campaigns for legislative and executive offices,<sup>34</sup> referenda in two other states have followed suit,<sup>35</sup> and Roper polls show that two voters out of three favor public funding, while only one in four oppose it.<sup>36</sup> Wisconsin presently funds judicial candidacies.<sup>37</sup> Texas should take a modest first step in that direction, as Mr. Gallego has proposed. I do not suggest that Texas give money directly to candidates to spend as they please (although Wisconsin now does so), but that funds be provided to a judicial election commis-

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32. See *Buckley v. Valeo*, 424 U. S. 1 (1976).

33. See Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-442 (1994).

34. See ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (West Supp. 1997); VT. STAT. ANN. tit. 17, §§ 2851-2856 (Michie Supp. 1997). See generally Michael E. Campion, *The Maine Clean Election Act: The Future of Campaign Finance Reform*, 61 FORDHAM L. REV. 2391 (1998).

35. See Bruce Lambert, *After Guiliani's Success with Campaign Finance Referendum, a New Battle Looms*, N.Y. TIMES, Nov. 6, 1998, at B1; *The Voice of the Voters*, BOSTON GLOBE, November 8, 1998, at D6; *State Lottery Stays, Cockfighting Goes*, ARIZ. REPUBLIC, Nov. 4, 1998.

36. See, e.g., 1996 Roper Center Public Opinion Online #0270818, Question 027.

37. See ABA Task Force Report, *supra* note 17, at 112; see also Final Report of the Commission of Judicial Elections and Ethics, 83 MARQ. L. REV. 81 (1999).

sion to use to give Texas voters the best opportunity to make informed choices among judicial candidates.

First, I envision with Mr. Gallego<sup>38</sup> that the state would publish and distribute to each registered voter a voter's guide containing information about candidates for statewide judicial office. Such guides have long been provided in several states;<sup>39</sup> in fact, the Texas Bar initiated such a document in the 1998 election, but it was not widely distributed.<sup>40</sup> A good voter guide contains biographical information, photographs, and personal statements. They sometimes also include the results of bar polls or other disinterested evaluations.<sup>41</sup> They could be expanded to include endorsements by groups that play by rules limiting expenditures on "issue advocacy" advertising not controlled by the candidates themselves. Candidates that do not agree to conform to rules established by the legislature would be listed in the guide, but without their personal statements. As Roy Schotland has proposed, the distribution of such guides could and should be partially funded by the federal government through a limited franking privilege allowing each state's commission to use the post office for one distribution without a postage charge.

Second, I propose that the judicial election commission stage a public debate at which the candidates for each statewide judicial office would be invited to appear, make a personal statement, and comment on their differences. Of course, judicial candidates could not speak to issues arising in litigation, but they could discuss the role of courts, speak to their respective qualifications, and manifest their relative awareness of issues of judicial administration. This debate could be recorded on audio and video tapes made available at no cost, or at nominal cost, to radio and television stations agreeing to air them unedited and without charge to the candidates. The tapes could also be provided to individual voters or to neighborhood, church, or interest groups. Candidates participating in this presentation or publishing their personal statements in the voters' guide would be required to forego the use of costly spot advertising on commercial television.

Third, I suggest that the judicial election commission be supplied with some funds to be used as needed to buy television advertising to counteract scurrilous campaigning by judicial candidates or "issue-advocacy" groups who refuse to abide by reasonable restraints on campaign methods. It would be the hope and expectation that these funds would not be used, and that their availability would have a prophylactic effect on abusive and destructive campaign methods. This function was performed in

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38. See Subchapter E of his bill, cited in note 25, at Sec. 259.131 et seq.

39. See Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy*, 2 J. L. & POL. 57, 127-28 (1985).

40. See Study Committee Report, *supra* note 18, at 39.

41. See, e.g., Tennessee Judicial Evaluation Commission, *Tennessee Appellate Judges Evaluation Report* (1998). See generally Susan Keilitz & Judith W. McBride, *Judicial Performance Evaluation Comes of Age*, 16 STATE CT. J. 4 (1992).

1998 in Georgia by the state bar association.<sup>42</sup>

I limit my proposals, as does Mr. Gallego, to statewide campaigns for judicial office. A case can be made for similar funding for local judicial elections, especially those conducted in large metropolitan districts. I do not urge such a measure at this time for two reasons. The first is the cost. The second is a lesser need. While lower courts are also political institutions, the political content of their work is less than that of the highest state courts. Hence, they are much less attractive targets for groups seeking to buy the state's judiciary with megabuck advertising campaigns, and, for them, the proposed changes in the disqualification rules will be much more effective. If we can secure the independence of the highest courts from the system of rewards and punishments associated with high-priced electronic campaigns, we will have achieved most of the goal. Also, it is possible that we may learn from funding statewide elections, techniques that are equally or even more useful in conducting local elections.

The Texas Study Commission would leave it to the State Bar to bear full responsibility for the voters' guide. Imaginably, the State Bar could not only distribute a guide, but also conduct a debate, and rebut costly spot television advertising in judicial campaigns. Thus, the bar in Georgia in 1998 managed by threat of public rebuttal to deter a judicial candidate from misrepresenting the record of an incumbent member of the state supreme court.<sup>43</sup> Such an initiative could be funded with a modest increase in bar dues. Or perhaps the lawyers participating in the recent tobacco settlement would like to endow such a program.

### C. LIMITED TERMS

I believe that no state elects judges for shorter terms than Texas, four years for trial judges<sup>44</sup> and six years for appellate judges,<sup>45</sup> as established by the state constitution. Those terms were set in the nineteenth century when it was assumed that the only way to remove judges not suited to judicial office was to defeat them in the next election.

In contemporary circumstances, those terms are much too short. Judges serving short terms may be perpetually engaged in fundraising, and the funds must come from lawyers and litigants appearing before them. The promise of reward and the threat of punishment at the polls must therefore be a constant presence in many Texas courtrooms. The exceptions are those judges who have seats made safe by the configurations of partisan politics.

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42. See Jonathan Ringel, *Campaign Attack Tests New Rules*, FULTON COUNTY DAILY REP., June 19, 1998 at 1-2.

43. See Jeanne Cummings, *Candidates Learn to Defuse Outside Groups' Attack Ads*, WALL ST. J., July 20, 1998 at A20.

44. See TEX. CONST. art. V, §§ 7, 15.

45. See *id.* §§ 2, 4, 6.

Texas, like many other states, has created a State Commission on Judicial Conduct having responsibility for auditing the performance of judges.<sup>46</sup> I cannot evaluate the performance of the Texas Commission, but I believe that in some other states such commissions have been very effective in weeding out serious problems of judicial misconduct such as drunkenness, sexual harassment, abuse of parties or witnesses, and corruption. If the Texas Commission is not fully effective, it can be made so. As a result, it is not necessary to make trial judges stand for election so often. Their terms could be doubled or even tripled in length. As a consequence, the need for fundraising would be greatly reduced. Instead, a judicial term would contain many years in which fundraising would be a remote concern for judges and for the parties appearing before them.

The case for lengthening the terms of the appellate judges is even stronger than for trial judges because of the greater expense of their campaigns. Doubling the length of the terms of the members of the two high courts and the courts of appeals would halve the problem of expensive campaigns without making any fundamental changes in the democratic accountability of the courts. It is also a consideration that churning the membership of appellate courts destabilizes the law; the rotation of judges through the highest court of a state can disable the institution from functioning as a court of law.<sup>47</sup> Moreover, the problem of judicial discipline is even less a problem in a multi-judge court; seldom is there an urgent need to remove a judge from such a court.

For the latter reasons, New York<sup>48</sup> and the District of Columbia,<sup>49</sup> for examples, provide much longer terms for members of their highest courts. Even with twelve-year terms for the Supreme Court of Texas, the voters would be electing one or two Justices each biennium, not counting the vacancies to be filled. Texas should reconsider short judicial terms as needless threats to judicial independence.

If mild reforms such as those I have proposed are not forthcoming, then more radical proposals must be considered. It would then be time to review the various merit selection schemes that have in the past failed to find favor in Texas. In the alternative, if trial judges must stand for reelection every four years, it should be only a retention election, i.e., one in which they are not opposed by a rival candidate. The retention election might be a satisfactory solution for trial courts, but recent experience in other states suggests that it is not satisfactory for highest courts, because judge sitting on such courts are sitting ducks for electronic blitzkriegs, in part because they have no adversary to attack. If the retention election is introduced, it would still be necessary to impose rigorous disclosure requirements on those spending to influence the outcome of the elections,

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46. *See id.* § 1-A.

47. *See* Cheek, *supra* note 15, at 1140157 (giving many examples of fluctuations in Texas tort law resulting from changes in the personnel of the Supreme Court).

48. N.Y. CONST. art. VI, § 2 (McKinney 1983).

49. D. C. CODE ANN. § 431 (1981).

and to disqualify judges from sitting on cases involving those who spend large sums to support or oppose their retention.

By one means or another, the legislature, the Supreme Court of Texas, the State Bar of Texas, and the people of Texas, must not rest until the problem of megabuck judicial campaigns has been effectively addressed. The solutions devised will be imperfect, and will cause other problems, some of them unforeseen, and will in time perhaps be condemned as “not worth a damn.” But it is the nature of legal institutions to be imperfect and needful of perpetual reform. As Felix Frankfurter once observed, great laws governing judicial institutions, unlike great poems, are not written for all time.

