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Responses to Professor Carrington

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Editor's Note: The responses that follow are oral responses to the lecture that Professor Paul D. Carrington delivered at Southern Methodist University School of Law on March 30, 1999. Professor Carrington based his presentation on his article, Big Money in Texas Judicial Elections: The Sickness and Its Remedies, *which is published in the preceding pages.*

I.

*Nathan L. Hecht**

I heartily agree with Professor Carrington that appellate judges' terms of office should be lengthened—perhaps even tripled if we who now hold office were to be grandfathered in! And I agree with him that no perfect system of judicial selection and retention either exists or can be devised. I am reminded of the story a former Senator recently told of the preacher who was extolling the perfection of Jesus. Having made what he considered to be an indisputable case, the preacher put it to his audience whether anyone had ever heard of anyone as perfect as Jesus. Everybody, of course, sat quietly for the longest time, until an older fellow in the back struggled to his feet, raised his hand, and said, well, yes, he had heard of one. "You have?" the preacher asked incredulously. "How can that be? Who in the world could you possibly have heard of that was as perfect as Jesus?" The old man replied, "My wife's first husband." For the most part, the only system for selecting and retaining judges that even approaches perfection is one other than whatever is currently in place.

Aspiration for a better system is unending, but the problem of judicial selection and retention is defined so as to have no perfect solution. That is, there is no flawless process for vesting judicial power in humans so that they are, and constantly remain to everyone's satisfaction, as independent as they ought to be and as accountable as they ought to be. The tension between these two conflicting parameters has no one point of equilibrium. For this reason, the judicial selection and retention process in Texas, or anywhere else for that matter—Texas is not unique in this regard—cannot be "fixed," even if we could agree on what "fixed" means. That being the case, the physician's maxim, "First, do no harm," is especially important in considering changes in the process.

* Justice, Supreme Court of Texas. J.D., SMU School of Law, 1974; B.A., Yale University, 1971.

Professor Carrington suggests that it is beyond harm. I certainly do not agree with Professor Carrington's charge that the Texas judicial system appears to belong to the rich. Neither the identities of contributors to judicial campaigns, nor studies of the relationship between contributions and court decisions, support Professor Carrington's assertion. It is simply unfair to characterize Governor Bush's position as supporting a judiciary that belongs to the rich.

The electorate, for better or worse—it is, after all, their government—wants a direct say-so in judicial selection and retention. Now, I think a strong case can be made that merit appointment and retention elections satisfy that popular desire for a direct say-so more fully than Texas' partisan popular election system. But I do not expect the majority of our voters to be persuaded by that view anytime soon. So, given that fundamental change is unlikely, in treating the patient's ills (and there are many, as Professor Carrington has pointed out) it is important to do as little harm as possible.

Professor Carrington has done a service in analyzing the scholarly literature and all of the proposals that have been made to effectuate real, solid, meaningful reform in judicial selection and retention. But because the electorate in Texas appears determined to vote on judges in partisan, popular elections, the reforms crucial in this context, it seems to me, are, first, that voters have more information rather than less; and second, that they be protected from disinformation. Accomplishing these goals in a state as large and diverse as Texas is a very expensive proposition. When it falls to the candidates themselves to carry the message to the voters, as it does here, campaigns must raise a lot of money.

With very few exceptions—none that anyone has the temerity to suggest are indicative of the system as a whole—the money spent on judicial campaigns never affects a particular result in a particular case. True, the worry is always present, but severe criminal penalties make such a concern unlikely. The problems are almost entirely in appearance, although that is not to say that they should not be addressed. It is far more likely, as Professor Carrington notes, that campaign contributions are intended to, and do, shape a court's philosophy. There is nothing wrong with that, of course, as long as the court's philosophy is not shaped against the will of the people or in such a way that voters are deceived about a candidate by the amount of money spent by an opponent or by effective but misleading advertising campaigns. The potential problem, which has been a reality from time to time, is that advertising will be used to deceive the electorate into voteing for or against someone who was not as he or she was made to appear.

Not all of the criticism directed at the Texas judicial system or any other election system is intended to be as helpful as Professor Carrington's comments. Some critics have ulterior motives, which can rarely be satisfied by any amount of reform. That kind of criticism can be answered only by vigorously exposing the critics' ulterior bias and rebutting

the insinuations they make. Professor Carrington makes a very strong point in his comprehensive article that great effort is being made across the country in many jurisdictions, including Texas, to reaffirm public trust and confidence in the judiciary and to marshal forces against disinformation campaigns that suggest that contributions to judicial candidates are having more of an effect on the outcomes of elections than they should. I hope that this effort will gain strength.

Many of the reforms suggested today, which our Court is already looking at, would have a salutary effect, although for the most part they merely tinker around the edges of the system. For example, the recusal rule that the Court's study committee has recommended would be of some benefit. I do not think it likely that many judges will be recused by a rule that requires them not to sit in cases involving persons from whom they have received excessive contributions; rather, I think judges will not accept excessive contributions in order to avoid recusal. That result will not lessen very much the effect of contributions on races, but it may improve appearances. On the other hand, public funding for statewide campaigns cannot be very helpful unless it is substantial, which it is not likely to be. And I do not think the Bar should pay entirely for this effort by raising members' dues. It is, after all, the people's judiciary, not the Bar's judiciary. Finally, Professor Carrington suggests extending terms of the appellate courts, although longer terms conflict with the voters' interest in calling judges to account more often rather than less.

All of these ideas, and others that Professor Carrington has suggested, warrant attention, and our Court is committed to studying them and making changes that are both responsive to the people's interests in an accountable yet independent judiciary and will assure the judiciary the stability and dignity it requires to do its job.

II.

*Sharon Keller***

I am in total agreement with Professor Carrington and Justice Hecht about one thing. That is that our ultimate goal should be a judiciary that is reasonably independent, but reasonably accountable to the public. There are a couple of things, though, that I would like for us to keep in mind when we are talking about reforming the system of campaign finance. And the first is this, what is the problem that we are trying to fix? I think the speakers today, and the general public, agree that it is not an unqualified judiciary. That is not a problem. We have good judges in Texas. The problem instead seems to be, if there is one, a problem in the public's perception of the judiciary and of the courts. If the public doesn't trust the judges and the courts to treat them fairly, then, of course, there is a problem, and we need to do something about it.

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But here is what I want to talk about. I don't think there is a problem in the public's perception of the courts and the judiciary. If the public is dissatisfied in any way with the courts, I don't think it is the result of our campaign finance system, and I am not sure they are dissatisfied at all. Here is why I think that. A survey was conducted recently on public trust and confidence in the courts and it was conducted by the Office of Court Administration, the Supreme Court of Texas, and the State Bar of Texas. The results are significant and I think answer a lot of the questions that have been raised here today.

The results that seem to be most pertinent to the questions that we are discussing today are these. First, the survey asked whether people believe that campaign contributions to judges influence courtroom decisions. Something like eight-two or eighty-three percent of the people responding said that they believe that they did, either fairly significantly or very significantly. That makes it sound like there is a crisis in confidence in the courts. But listen to this, the survey also asked people if they were to appear in a Texas court, whether they thought they were going to be treated fairly, and I think seventy-three percent of the people answered that they did think they would be treated fairly. Only nineteen percent of the people surveyed thought they would not. And the third thing that I think is significant, maybe most significant, is that the survey asked which institutions or industries the public believed were honest and ethical. Of the seven groups that were included in the survey, the Texas Supreme Court came out on top. They were ranked first with seventy-seven percent of the public believing that they are honest and ethical. That is an astounding number when you think about it. And second to the Supreme Court of Texas were the courts of Texas in general. The survey also showed that a majority of people have a positive perception of the courts of Texas. A large majority, I think two-thirds, agreed that people who are elected as judges in Texas are generally highly qualified; and an even higher percentage, seventy percent, wanted to continue to elect judges.

So the survey seems to indicate that if there is some dissatisfaction with the courts in Texas, it is not because of a mistrust in judges or the courts. If the public perceives our courts to be fair, if they perceive our judges to be honest and ethical, and the survey shows that they do, then public perception of the courts is good, and if that is the problem we are trying to address, we need to pay attention to the results of this survey, because the perception is very good.

Now we do still have that first response that shows that a large percentage of the public believes that campaign contributions to judges affect courtroom decisions. That could in part be a general skepticism of the government. It could show that some people believe some judges are significantly affected—but not necessarily a majority of judges. I don't really know what to make of that statistic. But I do know this. Whatever it shows about what people believe about campaign financing in Texas, it shows that that belief does not translate into a mistrust of the courts or a

failure in confidence. The survey shows that undoubtedly. If the public trusts the judiciary to be fair and trusts them to be honest and ethical, then I think we should hesitate significantly before we institute new changes in the campaign finance system.

There are things that we could do to make the system better. If we had a perfect system, then I suppose the responses would have been 100 percent confidence in the courts instead of seventy odd. Longer terms might be a good solution that would allow the judiciary to retain accountability to the pubic, but nevertheless keep them from being out on the campaign trail all of the time. But I think, and this is my main point, that we should really hesitate to overhaul a system or make major changes in order to fix a problem without being sure that the problem exists. And I think that the evidence that we have shows that this particular problem does not exist. We have a qualified judiciary, we have a very high level of confidence in the courts, and that is the system that we have now. Justice Hecht talked about tinkering around the edges. I think that is the most that we should be doing. Our system is working. Let's fine tune it, by all means, but let's not overhaul it. Let's not throw it out.

III.

*Thomas R. Phillips****

I suspect that everyone here shares the vision offered by Professor Paul Carrington of an independent judiciary - of judges who serve only the law, not personal ambition, philosophical agenda or partisan advancement. And I suggest that most of us are grateful to Paul for his insights on the defects in the Texas judicial selection process. My differences with the professor are thus not over ends, and not even over means, but only over the priority to accord to various reform suggestions that we both endorse. If that makes for a dull response, at least it may have the virtue of being brief.

Professor Carrington sees the deficiencies in Texas judicial selection as being almost completely bound up with the appearance of impropriety, and perhaps the occasional reality of impropriety, that accompanies the private funding of modern judicial campaigns. He offers three ideas, which I indeed support, to alleviate this problem. Two of his suggestions—longer terms of office and publicly funded campaigns or voter education projects—would reduce the need for contributions. A third idea—disqualifying judges from presiding over cases involving large contributors—would hopefully increase public confidence in the fairness of an elected judicial system.

Adopting some or all of these proposals would not be a bad thing—it would in fact be good. But I submit that these reforms, singly or to-

*** Chief Justice, Supreme Court of Texas. J.D., Harvard Law School; B.A., Baylor University.

gether, will not come close to perfecting the Texas judicial selection system. Carrington's suggestions would still leave us with an elective process where judges cannot be seen as truly independent because they must affiliate with a political party to have any chance of being elected. His suggestions would still leave us with a system where over 200 district and appellate judges have been thrown out of office in the last decade because they ran on the "wrong" ticket. Yet at the same time, his suggestions would not change a system where most judicial elections are unopposed, so that most judges would return to office without any electoral scrutiny. At the same time, those judges who are opposed would still be subjected to one of the longest campaign seasons in America, with filing deadlines coming almost one year before their term of office commences. By all means, let's try Carrington's ideas, but let's not wait to do more.

The merit selection approach that Carrington sees as a last resort should, in my opinion, be our first option. I disagree with Justice Hecht that the chances for passage are remote. A constitutional amendment is never easy to pass in Texas, but merit selection schemes passed the Senate in 1995, and 1999, while a non-partisan election plan passed the House in 1997. The critical mass for reform has been achieved, with strong support for change among the press, the bar, and a wide array of citizen groups—all that remains is for these groups to agree on the best method for change.

Of course, I agree with Professor Carrington that merit selection is not perfect. The appointing authority must have appropriate incentive to select the best qualified judges, not simply those with the best political credentials. And there is some indication that supreme court retention elections are increasingly being contested by special interest groups of various persuasions. But overall, there is persuasive evidence that merit selection would improve our judiciary. No state that has adopted merit selection for any of its courts has ever abandoned the system. And only three high court justices in the entire country have been rejected in retention elections during this entire decade,[1] while nine Texas high court members have been defeated in open partisan elections during that same period.[2]

I submit that high-dollar retention contests would be a rarity, certainly in comparison with the routinely expensive contested partisan elections we now have. After all, organized opposition to sitting judges is likely to arise only when a significant segment of the community not only believes that the incumbent should be defeated, but that the appointing authority is likely to select a more favorable replacement. For this reason, most

1. Wyoming's Walter Urbigkit in 1992, Nebraska's David Lanphier in 1996, and Tennessee's Penny White in 1996.

2. Texas Supreme Court Justices Eugene Cook in 1992, Oscar Mauzy in 1992 and Rose Spector in 1998; Court of Criminal Appeals Judges David Berchelmann in 1990, Louis Sturns in 1990, Fortunato P. Benavides in 1992, Charles Campbell in 1994, Frank Maloney in 1996, and Charles Baird in 1998.

retention election battles, at least in the lower courts, center on the competency rather than the philosophy of the challenged judge.

More importantly, the retention election system preserves and indeed enhances the positive aspects of judicial elections. In a retention election, every judge is subject to popular scrutiny, not just those who happen to draw an opponent.[3] Those judges not wanted by the people are removed, while the others are retained. It is much easier for voters to evaluate whether an incumbent judge meets a passing grade than to weigh the relative merits (or demerits) of multiple candidates, who may or may not have any public record of performance.

Surely a new system is better than Professor Carrington's modest tinkering. For instance, his proposal for extended terms is unlikely to win Justice Department preclearance under Section 5 of the Voting Rights Act and even less likely to win voter approval through a constitutional amendment. Comprehensive public financing is an excellent theoretical proposition that enjoys almost no public support among Texans. Voter pamphlets, websites, and debates will help inform the discriminating voter, but will not eliminate the harsh reality that most voters cast a straight-ticket judicial vote and are likely to be dissuaded from doing so only by paid mass media advertisements. The disqualification proposal he champions is currently being considered by our court, and we will implement some form of it soon. But it will only deter the most flagrant abuses, not transform the entire election process.

Professor Carrington wisely recognizes that the current system puts Texas judges in an untenable situation. Raising money is uncomfortable for both the solicitor and the donor, but voters are unlikely to obtain enough information to cast an intelligent vote unless the candidates reach them through paid media. The Texas Supreme Court through its rulemaking authority, or the organized bar through its public information office, can make only the most marginal improvements to this situation. Fundamental change can come only through constitutional change proposed by the Legislature and adopted by the voters. The sooner that is done, the better.

3. In 1998, for example, only 100 of the 257 state district and appellate races were opposed, leaving 157 judges without an opponent. Only 80 judges, or less than a third, were opposed in the general election, where most votes are cast. Across Texas today, 19 of the 80 state intermediate appellate justices and 92 of our 396 state district judges have never had an opponent.