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Texas NAACP Addresses Important Issues to Facilitate the Discussion Regarding Proposed Changes for Selecting Members of Texas' Judiciary In the Aftermath of the George Floyd Tragedy

Author: Texas State Conference of NAACP Branches for Testimony of Gary L. Bledsoe to the Texas Commission on Judicial Selection

I. INTRODUCTION

We must begin the discussion by noting our National Celebration now taking place regarding the effective adoption of the 19th Amendment to the United States Constitution 100 years ago that provided the right to vote for white women and the 55th anniversary of the passage of the Voting Rights Act.

A statewide discussion has ensued since the 2018 elections regarding the need to reform Texas' judiciary. Sadly, it appears that the election of multiple African-American women to judicial positions in Harris County, as well as the shrinking percentage of white voters below the 50% margin (especially in the larger counties in Texas) has motivated this sudden call for reform. That is, the issues proposed by those calling for reform are mere pretexts given the absence of factual support for the stated concerns and/or the fact that several of the issues have been in existence for years if not decades while white males occupied judicial positions without this same call for reform being made.

The NAACP believes that the 2018 election actually served to strengthen our Government, our Court system, the entire community's access to fair and equal justice, and provide hope and confidence in the court system not previously found throughout the

citizenry within the State of Texas (witness the call for criminal justice reform and the horrendous racial disparity in the numbers of persons incarcerated and suffering negative outcomes from the criminal and judicial systems). These events should be properly understood and placed into the context of ensuring that we wish to have widespread support and faith in our judges and in our court system not merely based upon the laws that exist, but also in the manner in which they are implemented and by whom they are considered and ruled upon.

As evidence of our concerns, the Texas NAACP has followed closely the issue of the propriety of actions of State Bar President Larry McDougal, State Bar Director Steve Fischer and their supporters in reference to comments made by them and other lawyers as well as actions to uphold those comments such as removing African-American female lawyers from various Facebook Groups because they had the audacity to raise professional objections to race-based and gender-based comments from these two State Bar leaders. Looking at the level of support among lawyers for McDougal and Fischer, despite their discriminatory comments, it gives us further and serious pause regarding the breadth of the absence of concern for the presence of discriminatory animus in our judicial system. One African-American lawyer spoke during the State Bar Board of Director meeting who described a number of incidents where he had been openly demeaned by Judges in open court in front of juries, being called "Boy", "Sonny" and other such disparaging descriptors.

We note that in looking at the Report for the Texans for Lawsuit Reform, that of 45 judges appointed to serve on the Texas Supreme Court since 1945, only one was African-American even though one of every 8 Texans is African-American. The same chart shows that only 2 of 76 Judges who have served during that time were African-American, again showing there is a problem with the system. The trial courts have had similar numbers during this time period, but in recent years at the District Court level Texas has seen racial and gender diversity on the bench increasing.

> "Many doubt the justice of our country, and with good reason. Black people see the repeated violation of their rights without an urgent and adequate response from American institutions."
>
> - *President George W. Bush*

> "When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. . . It is obvious today that America

> has defaulted on the promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked 'insufficient funds.'"
>
> - *The Reverend Dr. Martin Luther King, Jr.*

II. DEFINING THE ISSUE

"The continuing ability of the courts to function, then, depends upon public acceptance of their institutional legitimacy, without it, the courts can and will be ignored or obliterated." "Justice in Jeopardy," Report of the American Bar Association Commission on the 21st Century Judiciary." The report further says that the "importance of public confidence in the courts is difficult to overstate. The ability of the courts to serve their purpose in a constitutional democratic republic turns on the public's acceptance and support." Justice in Jeopardy p. 14. After noting the increasing percentages of African-Americans and Latinos in this country, the report goes on to discuss the importance of support from those groups. "Yet among people of color in this country, African-Americans in particular, such confidence is dramatically lower than among the population as a whole. A 2001 survey conducted by the Justice at Stake Campaign revealed that 85% of African-Americans believe that 'there are two systems of justice—one for the rich and powerful, and one for everyone else.' Also, while a majority of whites believe that judges are fair and impartial, a majority of African-Americans (55%) believe that judges are not fair and impartial. Moreover, only 43% of African-Americans, as opposed to 67% of whites, believe that the judges are committed to the public interest." It also noted a 1999 national survey that indicated that only 18% of African-Americans believe that Judges are generally honest and fair in deciding cases and 70 percent of African-Americans believe that African-Americans were treated worse than whites by the court system. The Honorable Anna Blackburne-Rigsby recently published an article in the Howard Law Journal where she noted that in one survey, 83 percent of white judges believed blacks were treated fairly in the justice system, while only 18 percent of black judges agreed. The Honorable Anna Blackburne-Rigsby, "Black Women Judges: The Historical Journey of Black Women in the Nation's Highest Courts", Vol. 53, No. 3, Howard Law Journal 645 (2010). This is clear evidence of the divide that has been internationally manifested in the reactions of society at large to the facts surrounding the murder of George Floyd. If there is such a clear racial divide among the judges like it is within the Texas State Bar, we must clearly recognize that there is a major problem within our system.

Bryan Stevenson, Executive Director of the Equal Justice Initiative in Alabama, told the ABA Commission that Appellate Courts should include persons of color as well as the local

trial courts, and if necessary there should be electoral reform to ensure this. Importantly, the United States Supreme Court has held that the Voting Rights Act also applies to the judiciary.

III. DIVERSITY

Former Supreme Court Justice Sandra Day O'Connor has described diversity in its proper context when justice is our true objective in our court system that must be supported by truth. In talking about the late Justice Thurgood Marshall, the first African-American to serve on the Supreme Court, she stated:

> "Although all of us come to the Court with our own personal experiences, Justice Marshall brought a special perspective… at oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of truth."

Blackburne-Rigsby at p. 650. The judiciary benefits from such diversity as clearly evidenced by the words of Justice O'Connor.

One of the pioneers of the movement was Judge George W. Crockett, Jr, who made it plain and simple about what the role should be for black judges who are elevated to such roles, opining that black judges are to be "the conscience of the judiciary' to make it work as democratically for the have-nots as it does for the haves." William K. Stevens, Black Judges Becoming a Force in U.S. Justice, New York Times, February 19, 1975. Of course when Judge Crockett noted this there was only one African-American Judge in Texas to our knowledge, and that was Judge Alice Bonner who had just been elected in Harris County. The numbers of Black Judges, however, has continued to be low statewide, and it seems clear that this consciousness that Judge Crockett discussed has not been embraced by many in the establishment/majority.

The ABA noted that such diversity was one of 8 essential components for the judiciary in the 21st Century. Principle 7 indicated that the judicial system should be racially diverse and be reflective of the society it serves. This means of course that racial, ethnic and gender diversity among many are essential to having a proper system. As the ABA noted, "we are becoming a more and more diverse people. Our judiciary and the judicial system (including judges, clerks, staff, lawyers and juries) should reflect the diversity of the society in which we live. If they do not, the legitimacy of the courts and the judicial system will be called into question with increasing frequency."

Therein lies part of the value evidenced by the candidacies of those African-American judicial candidates from 2018, referred to as the "Houston 19." At the urgency of a professor at the Thurgood Marshall School of Law, I attended their victory celebration and what I saw was illuminating. I saw many regular people who were as enthused as they might have been over having supported a victorious candidate for the Presidency. When I walked around and visited with people it was clear that these individuals, unlike the criticism of other voters, actually knew the candidates and secondly there was already observed a new-found confidence in the judicial system due to the presence of diversity and professionalism. As our Bar debates what will happen with it in the future in reference to racially sensitive matters, the 17 members of the Houston 19 who won have already brought cultural competency to the Harris County Court System with their more than 200 years of legal experience along with those same type of life experiences that Justice Thurgood Marshall brought to the Supreme Court that Justice Sandra Day O'Connor acknowledged and lauded as critically important to the work of the Court.

Two members of the Houston 19 sought to integrate our Appellate Court system but were unsuccessful. The behavior of the police officers during the George Floyd murder, while knowing that they were being filmed, puts this discussion in stark perspective of life and death; at least for African-Americans. African-Americans know and have been reporting that these kinds of unjustified fatal interactions with police have been occurring for generations, but there has been a great deal of apathy and disbelief. However, with the videotape evidence, the world can now see and be unable to credibly deny what African-Americans have experienced for too long. However, videotape is not the only remedy or answer as we as a society must have a serious dialogue to change the culture in our State and we cannot do that without a diverse judiciary formed by a from a democratically community-focused process that will enable all people to have confidence in our system. See *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723 (S.D. Miss. Aug. 4, 2020).

Years ago I was sitting with a Texas Governor asking for a reprieve for an innocent person facing a death sentence, I told the Governor all of the clear evidence in the record showing the innocence and how even some members of the court system had attested to this innocence, but the Governor responded that if they took the action I was requesting this would undermine faith in our system. It is this kind of blind faith in a system that has not come to terms with its systemic racial discrimination that we must guard against. The system is not great, fair and just only because we say it is and muffle or isolate dissent. It can only be fair and just if it is indeed fair and just for all of the citizenry.

IV. RECOMMENDATIONS

1. We oppose an appointive judiciary. The most essential qualifications for fair and just judges for all include matters that could not and would not be considered by Governors of either party for appointment. Judicial candidates from the communities within which the judge will preside will understand, relate to and have evidenced concern for their community as a whole without regard to political party, race, or any other dividing factors that the community will have observed are not the characteristics that that Governors will either look for or have been able to observe over an extended period of time; like the home community. For example, when we look at the National level the President has delegated the authority to put together Supreme Court lists to a private and exclusive organization. That very possibly could happen in Texas. We are naïve if we think that appointments will minimize politics. In fact they will enhance politics as Governors will seek to ensure strength to their political friends through the appointment system. A Missouri Plan type retention election is completely inadequate to allay this type of problem because it requires a majority vote to remove the Judge and very possibly then the same Governor would appoint the replacement. Potential Judges who are connected with their home communities are not likely to see the light of day in this type of appointment process. This is true for Appellate Courts as well. The appointive system creates a Club of Exclusivity that empowers the haves and disenfranchises the have-nots. Minority voters don't trust Governors of either party to use this system in their best interest, Daniel Becker and Malia Reddick, Judicial Selection Reform: Examples from Six States, American Judicature Society.
2. If there are changes to be made these changes should focus on limitations on campaign contributions or doing something new like directing funding from lawyers and law firms to a fund that will help promote the general candidacies of judicial candidates or remove the names of the donors from the size of the donation as well as the recipient of the donation; due to the undeniable appearance of bias regardless of the actual presence of bias or not. Money can be a major source of concern and we should recognize that. A second change might be to change the experience requirement for the district court judges from 4 to 6 years. See Anthony Champagne, "Judicial Reform in Texas: A Look Back After Two Decades", 2006, Volume 43 Issue 2: The Journal of the American Judges Association, University of Nebraska Lincoln; Paul D. Carrington, Big Money in Texas Judicial Elections: The Sickness and Its Remedies, Volume 52

SMU Law Review 264;[1] *see also Apache Corporation v. Cathryn Davis*, No. 19-0419 (Texas Supreme Court), Respondent, Cathryn Davis', Supplemental Memorandum in Opposition to Apache Corporation for Review (On Petition for Review from the Court of Appeal for the Fourteenth District of Texas, Houston, No. 14-17-00306-CV.

3. Diversity in the court system is a must and should be ensured at all costs, including consideration of electoral reform at the Appellate Court level to ensure minority participation. However, it should be noted that such different perspectives may only rarely change the outcome of a case because judges are "bound to follow the law, not our personal ideological preferences in decision making." Harry T. Edwards, 29 Yale Law and Policy Review 325 (2002). See also, "Racial Diversity on the Bench: Beyond Role Models and Public Confidence", Sherrilyn A. Ifill. However, I would submit that having individuals who are trusted by various groups will provide for much greater acceptance of the decision and associated confidence in the integrity of the system. See also the Brennan Center, Judicial Diversity: A Resource Page.
4. Require Bias Training for all Judges and have the training designed by Historically Black Colleges and Universities in Texas. Because of problematic experiences with court staff such as bailiffs and clerks, it is suggested that the training include all support staff as well.
5. Actively enforce the Canons regarding bias that would address the types of incidents described at the recent State Bar Board of Directors Meeting;
6. Commission a detailed and comprehensive study of the civil and criminal justice systems that would have substantial representation from traditional and recognized minority advocacy groups, and legal reform groups from both sides of the political spectrum. Recently the New England Journal of Medicine provided an opportunity for African-American Doctors to address problems in our healthcare system, and this is the type of initiative we should undertake. *See* Black Doctors push for anti-bias training in medicine to combat health inequality, CNBC Health and Science by Bertha Coombs, published 6/19/20 and updated 6/22/20; *see also* "Racial Diversity on the Bench: Beyond Role Models and Public Confidence", Sherrilyn A. Ifill.
7. Partisan elections, hopefully with some campaign finance reforms such as education of the citizenry regarding all candidates through public funding from campaign

[1] However, again, the pretextual nature of the concern rears its head given that the concern regarding qualifications was not raised until 17 African-American females were elected that met the legal qualifications as set out in State law. There is no real need for raising the bar on qualifications established by those calling for reform.

contributions, should be continued. Partisan elections are important because in down ballot and low file races such as judicial ones, the party affiliation informs the citizen about various beliefs or some of the philosophy of the candidate.

V. CONCLUSION

Michelle Obama says it best:

> "Race and racism is a reality that so many of us grow up learning to just deal with. But if we ever hope to move past it, it can't just be on people of color to deal with it. It's up to all of us – Black, white, everyone – no matter how well-meaning we think we might be, to do the honest, uncomfortable work of rooting it out. It starts with self-examination and listening to those whose lives are different from our own. It ends with justice, compassion, and empathy that manifests in our lives and on our streets."
>
> - *Michelle Obama*

APPENDIX

1. "A wealthy Panhandle financier wants to change the way Texas selects judges", Emma Platoff, The Texas Tribune, February 24, 2020

2. "Big Money in Texas Judicial Elections: The Sickness and Its Remedies", Paul D. Carrington, Volume 52 SMU Law Review 264

3. "Black Doctors push for anti-bias training in medicine to combat health inequality", CNBC Health and Science by Bertha Coombs, published 6/19/20, updated 6/22/20

4. "Black Women Judges: The Historical Journey of Black Women in the Nation's Highest Courts", The Honorable Anna Blackburne-Rigsby Vol. 53, No. 3, Howard Law Journal 645 (2010).

5. "Campaign donations and the judiciary don't mix [Editorial]", The Editorial Board, HoustonChronicle.com, published April 28, 2019, updated May 10, 2019

6. "Court Review: Volume 43, Issue 2 – Judicial Reform in Texas: A Look Back After Two Decades" Champagne, Anthony, (2006). Court Review: The Journal of the American Judges Association. 210. https://digitalcommons.unl.edu/ajacourtreview/210

7. "The Cycle of Judicial Elections: Texas as a Case Study", Anthony Champagne and Kyle Cheek, 29 Fordham Urb. L.J. 907 (2002). Available at: https://ir.lawnet.fordham.edu/ulj/vol29/iss3/7

8. "Donations to Judicial Campaigns Spur Ethics Worries", Maurice Chammah, The Texas Tribune, March 26, 2013

9. "Evaluating Judicial Selection in Texas: A Comparative Study of State Judicial Selection Methods" Texas for Lawsuit Reform Foundation

10. "Free to Judge: The Corrupting Influence of Money in State Courts", Michael Kang and Joanna Shepherd

11. *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723 (S.D. Miss. Aug. 4, 2020)

12. "Judicial Selection Reform: Examples from Six States", Daniel Becker and Malia Reddick, American Judicature Society

13. "Justice for Sale? Campaign Contributions and Judicial Decisionmaking", Damon M. Cann, Sage Publications, Inc., State Politics & Policy Quarterly , Fall, 2007, Vol. 7, No. 3 (Fall, 2007), pp. 281- 297

14. "Justice in Jeopardy," Report of the American Bar Association Commission on the 21st Century Judiciary."

15. "My State – Summaries Of Selected Studies", Justice For Sale, FRONTLINE, PBS

16. "Partisan Judicial Elections and the Distorting Influence of Campaign Cash", Billy Corriher, Center for American Progress, October 25, 2012

17. Texas Judicial Ethics Opinions – 1975 to Present

18. Community Minded Changes Made by Houston 19

19. *Apache Corporation v. Cathryn Davis*, No. 19-0419 (Texas Supreme Court), Respondent, Cathryn Davis', Supplemental Memorandum in Opposition to Apache Corporation for Review (On Petition for Review from the Court of Appeal for the Fourteenth District of Texas, Houston, No. 14-17-00306-CV.

Speaking statistically, this GOP donor wants to convince you that money buys justice in Texas

> After losing a case at the all-Republican Texas Supreme Court, millionaire Salem Abraham set out to mathematically test the idea that campaign contributions influence the elected justices. Now he wants to change the system.

BY **EMMA PLATOFF** FEB. 24, 2020 2 PM

Salem Abraham believes he understands the mathematical proclivities of the Texas Supreme Court: If you are a billion-dollar company represented by one of nine elite law firms, you are 5.4 times more likely to win some or all of what you seek from the justices. David Bowser for The Texas Tribune

CANADIAN — To tell Salem Abraham his mathematical insights are wrong is to speak fighting words. Numerical analysis is the organizing principle of his life, the way he multiplied his millions, the way he understands the world and himself. He used math to lay out his apple orchard, teach his kids to parallel park and earn the red Chicago Mercantile Exchange trading jacket hanging in his office.

So naturally it was to math that the Texas Panhandle multimillionaire turned in 2017 after losing a high-stakes oil and gas dispute at the Texas Supreme Court. After persuading a jury and an appeals court that he was right, Abraham had figured the odds of the state's highest court snatching back his victory were about 8%.

Yet all nine justices agreed to throw out the judgment he had won against oil giant BP America, basing their decision on one key clause in the disputed lease.

For Abraham, losing was more curious than it was ruinous. What he found inexplicable was that his numbers had failed him.

"For me, the problem is not losing a bet," he said in an interview. "It's mis-figuring the odds."

Scrutinizing his formula, he divined one major factor he had initially excluded when assessing his chances at the state's highest civil court. Texas is one of just six states where all judges are elected on partisan ballots, and justices' campaigns are largely funded by the white-shoe lawyers and law firms who appear before them. Good-government advocates have long argued that campaign contributions may influence rulings. Every living Texas Supreme Court chief justice has called for reforming the system, if for no other reason than to shed the appearance of impropriety.

Abraham's attorneys were John and Joe Lovell of Amarillo, and another Panhandle firm whose partners include a longtime state lawmaker. His foes were represented by, among others, two elite Texas firms, Thompson & Knight and Locke Lord, whose political action committees and attorneys gave at least $213,950 to the all-Republican high court justices during the gestation of the case.

An odds man by trade, and a wealthy Republican donor in his personal life, Abraham understands that political contributions are business decisions, bets.

Had the law firms' campaign contributions skewed the odds in his case? He wanted to know.

So he set a pair of data mavens at his firm — guys who helped Abraham strategize in the oil and gas business and suss out price changes in the futures market — to the task. They scoured a decade of high court rulings, cross-referencing outcomes with campaign contributions.

Based on their work, Abraham now believes he understands the mathematical proclivities of the Texas Supreme Court: If you are a billion-dollar company represented by one of nine elite law firms, you are 5.4 times more likely to win some or all of what you seek from the justices.

The biggest advantage, Abraham's team found, is that certain high-powered firms — the ones pouring money into Supreme Court campaign coffers — are simply more likely to get their cases heard at the discretionary court. And once they're in the door, they are more likely to win.

Abraham is hardly the first to draw a statistical link between campaign contributions and court decisions. The Texas Supreme Court, whether dominated by Republicans or Democrats, has fended off such suspicions for decades.

But Abraham believes numbers speak volumes, and his team's statistical findings have persuaded him to join the former judges and good-government types calling for change. As a wealthy Republican donor, he figures his voice will carry a bit. His timing is good: A new legislative commission will spend this year studying the issue. Abraham has already met with the governor more than once. This week, he published his data with great fanfare, and a documentary is set for release later this year.

His numbers, he knows, may not explain every nuance, but they're a window into a problem. Now he just has to make people look.

In math he trusts

When he was an undergraduate finance student at Notre Dame, Abraham said, professors tried to tell him his mathematical theories about the markets — he thought he could make a fortune betting on futures — would never work. Three decades later, his ideas pour the fuel into his private jet.

He got interested in trading toward the end of college and realized he could return home to Canadian to marry his high school sweetheart, Ruth Ann, and still make a living running numbers.

For decades he has been a professional oddity in his dry Panhandle hometown of about 3,100 people, a financier in a town of ranchers and oil workers, where school class size fluctuates with oil prices. To the elite firms in New York and Chicago, Abraham and his team of non-Ivy League data guys have been an object of curiosity. On some days, his firm, on Main Street above the town's only steakhouse, reportedly represented a full 1% or more of the daily trading volume on the Chicago Mercantile Exchange.

Math, he believes, is far more reliable than emotions, and he's applied his odds-based approach to everything in his life. When planting an orchard — Canadian, Abraham boasts, is the sparse panhandle's "oasis" — he relied on 100 years of weather data to predict individual fruit trees' likelihood of survival and used the Pythagorean theorem to ensure a neat layout.

Trim and blue-eyed at 53, Abraham still bounds up stairs with the energy of a younger man, but he's begun to pull back his investment portfolio as he and his wife prepare to send their youngest kids off to college. (He has tried working up a mathematical theory to explain elite college admissions, based on the sample size of his eight high-achieving children, but to his chagrin, there's simply no sense to it.)

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Over decades in Canadian, he has learned a little something about politics, both small-town and big-time. When his grandfather was growing up, Old Lady Simpson, who owned the only pool in town, decreed "no Syrians or Mexicans" were allowed in, excluding his family of Lebanese merchants. Now Abraham owns the pool.

His grandfather, Malouf Abraham ("Oofie" to everyone who knew him), was one of three Republicans in the Texas House in 1967.

Over time, Abraham has come to understand politics as just another game of odds. He was an early supporter of Texans for Lawsuit Reform, a tort reform lobbying group whose political action committee is among the biggest players in state races, and he has given $55,500 to Gov. Greg Abbott, making him the type of contributor who can get a meeting.

He hasn't been a stranger to the court system. In 2012, after he was asked to leave a political event, he sued a conservative news site for defamation, claiming its writeup had mischaracterized the incident.

His best lesson in politics was self-taught. Abraham served for more than a decade on the Canadian ISD school board — basically a requirement, he said, when your kids constitute 1% of the school district. He wanted to send his eight kids to fancy universities, but most looked for four years of a foreign language. Canadian schools only offered three.

In 2007, he flew down to the state capital to talk to lawmakers about education in rural districts. He spent, he figures, $50,000 during that legislative session on private flights and lodging and whatnot. And he had to beg for meetings.

So the next year, he drew up a new theory. He decided to give about half that sum, roughly $25,000, in $1,000 and $2,000 increments to select lawmakers — education committee members, leadership.

The next year, the interesting doors were all open to him. It made him want to take a double-long hot shower when he got home to Canadian. But he had

learned a little more about how money changes the odds in Austin.

Almost a decade later, he became convinced that money had the power to shift the odds at the high court, too.

Well No. 11

Around 2011, Abraham, who also dabbles in oil and gas, began sniffing around a lease covering 2,113 acres in Hemphill and Lipscomb counties.

BP had taken gas from the land for about a decade, but the wells were drying out. Under the terms of its lease, BP would lose its rights once all the wells were dead. One well had been plugged in 2009, and the other two were lagging. Abraham saw an opportunity.

If he could get in with the property owners on the front end and secure what's called a top lease — like being next on the dance card — he could drill new wells once BP moved out.

Only BP was in no hurry to move. The oil giant was all but set up with a different company, Mewbourne, interested in drilling new wells on the land, but those

partners were hesitant to move forward after Abraham secured the top leases, court records show. BP asked Abraham to surrender his top leases, and he did not. With legal action looking likely, BP didn't drill.

In 2012, the No. 10 well was plugged, and the final one, No. 11, was barely producing. BP shut it in that June. Its right to the land now hung by one slim string: a shut-in royalty clause, which allowed BP to keep paying landowners for the rights even if it wasn't pumping. Writing those checks could keep the lease alive, but only if the No. 11 well was still technically capable of production in paying quantities.

Abraham did not think the well was capable, so he sued in August 2012, asking a Panhandle judge to declare BP's lease dead and his own kicking. That's how they came to be at the Lipscomb County courthouse — where turkeys, which outnumber people in the town, are often seen on the steps — one morning in 2013. It's about as far from Austin, and its politics, as you can get; Canadian is closer to five state capitals than it is to Austin, and Lipscomb County is yet farther north.

As Abraham tells it (an attorney for BP declined to comment on the record for this story) the parties and their attorneys were milling around in the courtroom about an hour before jury selection was supposed to start. With time to kill, Abraham had a question for the BP team: They wouldn't buy him lunch to settle; they were that confident that they'd win the case, he recalled. Why?

According to Abraham's telling, a BP attorney acknowledged: We're going to lose at the trial court, and again at the court of appeals. But we're going to win at the Texas Supreme Court.

Of all the reasons that might have explained the lawyer's confidence — for instance, that the conservative high court would have a more exacting approach than a Panhandle jury — Abraham zeroed in on three: The lawyer was stupid, he was arrogant, or he knew something Abraham didn't know.

What Abraham did know, characteristically, were the odds. The Texas Supreme Court hears only about 10% of the cases appealed for its review. Of those cases, the high court overrules the lower court in about 80%.

Multiply those, and Abraham figured there was just an 8% chance of losing at the Texas Supreme Court if the case ever got there. That left him with a 92% chance of winning. Abraham figured those odds were all he needed to know.

Only the BP lawyer turned out to be right. Abraham won at trial and then at the court of appeals. But when the Texas Supreme Court agreed to hear the case, Abraham began to think that maybe the BP attorney had known something he didn't. Because the court overturns more verdicts than it affirms, Abraham figured his odds of prevailing had dropped from a 92% chance down to more like 20%.

In April 2017, the Texas Supreme Court came down against him unanimously, its decision hanging on one question put to the jury. They'd been asked if the No. 11 well was "incapable of producing in paying quantities" on June 13, 2012, and decided "yes."

The justices accepted a BP argument that the question that won the case for Abraham focused on the wrong day. Asked a similar question about an earlier period, the jury had answered "no."

Justice Paul Green wrote that the key date was June 4, the day that "gas was last sold or used." The jury question that originally won the case for Abraham, Green wrote, "did not track the clear language of the lease."

To some, it was an example of a pro-producer court going out of its way to hand BP a victory. To others, the high court was chastising a couple of trial lawyers for failing to carefully read their lease. The Texas Land & Mineral Owners Association said the court had erred. The Texas Oil and Gas Association sided with BP.

To Abraham, the ruling was dead wrong, and he didn't shy away from saying so. He immediately thought back to the prediction made by the BP big-shot in the little courthouse in Lipscomb County.

Abraham asked the court to reconsider his case, soliciting friend-of-the-court briefs from anyone he could, including state lawmakers and billionaire oil magnate T. Boone Pickens, a personal friend.

While the rehearing motion was pending, Abraham opened his mailbox to find a routine campaign fundraising solicitation from Jeff Brown, then a Texas Supreme Court justice. Abraham knows he is on a number of GOP donor mailing lists. Nevertheless, it rubbed him the wrong way.

He didn't touch the return envelope. A month later, the decision came down against him: The court would not reconsider.

Abraham, who learned oil and gas law at Oofie's knee, still believes he was right in the courtroom. He became convinced that he'd lost outside it.

"I can play politics," Abraham said. "I didn't know we were playing politics."

The "favorite nine"

It wasn't sour grapes, Abraham insists, so much as it was curiosity. That fall, he directed a pair of his employees to analyze money and politics on the Texas Supreme Court.

It wasn't much of a mathematical challenge. "We're used to millions of data points," Abraham said. "This is like first grade."

Texas Supreme Court hopefuls raise hundreds of thousands of dollars for their statewide bids. Abraham and his team wanted to know where that money came from, and they began compiling lists of judges' campaign contributions.

The answer: lawyers, law firms and lobbyists. Using media reports and public disclosures, Abraham's data team sussed out a group of major law firms they would come to call the "favorite nine." Along with their attorneys, those firms — Baker Botts, Locke Lord, Haynes and Boone, Vinson & Elkins, Jackson Walker, Thompson & Knight, Norton Rose Fulbright, Bracewell, and Hunton Andrews Kurth — had donated more than $3 million to Texas Supreme Court justices from 2006 to 2016. During that same time span, the justices had raised a total of about $20 million.

While a colleague tackled contribution data, Larry Smith culled Texas Supreme Court cases. He trimmed away off-point cases — pro se cases and writs of mandamus — to derive a list of more than 7,000 cases over the same decade that

seemed representative of the court's behavior in upholding or reversing lower court rulings.

Then the spreadsheets were combined.

Any Tom, Dick or Harry had an 11% chance of getting his case heard at the high court over the period they examined. But petitioners represented by one of the favorite nine law firms, Abraham's team found, had a 38.6% chance of getting the high court to consider their case. And if Tom or Dick, represented by a favorite nine firm, also happened to be attached to a company worth at least $1 billion, his chance of getting his case heard was even higher: 52.7%.

The biggest challenge tends to be getting through the door. Any petitioner who gets the Supreme Court to hear his or her case has a 78.8% chance of winning at least some reversal, the team found; the discretionary court is more likely to take cases that require correction. For parties represented by a favorite nine firm, that rate climbed to 84.4%; for billion-dollar clients with a favorite nine firm, it was 89.6%.

Multiply those together, and an average petitioner's chance of winning at the court becomes 1 to a wealthy favorite's 5.4.

Looking at his math now, Abraham believes BP always had a better shot — 52.7%, not 10% — at getting before the justices and even better odds of winning — 89.6%, not 80% — once it did. His initial calculation, he figured, had been wrong.

It's like that moment at the poker table, Abraham said: If you don't know who the sucker is, it's you.

Abraham would be the first to agree that correlation does not always equal causation — but in this case, he believes the link is too strong to show anything other than an exchange of cash for judgments.

"Either they gave money, so they got rulings, or they got rulings, so they gave money," he said. "Which caused which? They're both equally bad."

Many attorneys and judges reject Abraham's suggestion that the money affects the rulings, pointing out that his conclusion rejects other explanations. To them, it's simple: The best attorneys get the best results. The big companies hire the best attorneys. Top law firms give to top judges because, well, that's just how it works.

Texas Supreme Court Justice Brett Busby, who was appointed to the court in 2019, said an analysis of contributions and case outcomes excludes "important factors like the quality of counsel and the strength of their arguments on the law and the facts."

"I base my decision on those arguments," Busby said.

Texas Supreme Court Chief Justice Nathan Hecht, who has long advocated for changing how Texas picks its judges, declined an interview request.

"I don't think any lawyer or law firm believes that because he or she donates money to a judicial candidate, that they're going to be treated any better in that courtroom," said Jonathan Neerman, a partner at Jackson Walker who leads the

firm's political action committee. "I understand the analysis may show that correlation, but I think it's much more to do with the attorneys and the quality of advocacy than any donations made to judges."

"I have not seen nor do I believe there is any connection between political contributions to members of the Texas Supreme Court and results," said Ben Mesches, a partner in Haynes and Boone's Appellate Practice Group. "Our firm's track record results from a deep bench of talented, experienced Texas Supreme Court advocates."

Representatives from Thompson Knight, Locke Lord and the other law firms did not return requests for comment.

Another objection: The high court hears cases that present new and unresolved legal issues. Companies or individuals whose cases present novel challenges seek out the best representation they can find.

Other attorneys cite Abraham's oversimplifications, or omissions. To call any fraction of a "reversal" a victory for the petitioner is a generalization, but in some cases could even be misleading. Attorneys for the state of Texas — who lack a wealthy firm's political action committee — also get more of their petitions granted than the average party.

"If you were to go behind the numbers, my guess is that you will find very competent lawyers representing the clients who prevail," said Wallace Jefferson, a former Texas Supreme Court chief justice who is among the leaders in calling for reform to the system.

Abraham acknowledges his data is imperfect. But to him, the statistics are too stark to be coincidental, or explained away by any of those factors.

Abraham is not the first to mark this pattern.

In the late 1980s, an infamous "60 Minutes" segment called "Justice for Sale" found that the Texas Supreme Court — then dominated by Democrats — seemed bent heavily toward its contributors, many of them plaintiffs' attorneys.

"Pay to Play," a 2001 study by the watchdog group Texans for Public Justice, found that justices were almost four times more likely to hear cases brought by contributors than cases brought by non-contributors. Justices accepted 9% of petitions filed by lawyers who had not contributed but as many as 74% from one top-donating law firm.

Just as important as impartiality is the appearance of impartiality. Here's one more number: 83% of Texans, according to a state government study conducted in 1998, felt that campaign contributions to judges have a "very significant" or "somewhat significant" influence on those judges' courtroom decisions.

Abraham's "study does reveal a flaw in the system, which is that, whether proved or not, the fact that our system permits lawyers and firms to contribute to campaigns undermines the public's faith in a fair and impartial system of justice," Jefferson said.

Showing his work

For two years, the revelations stayed mostly in Canadian. But lately Abraham has started sharing his data more widely. He published a website this week — texansforcashfreecourts.com — that includes his findings and methodology. He plans to roll out a "cash-free courts" pledge for lawmakers and judicial candidates. A documentary of his findings is set to follow later this year.

He's also started telling the story of his case publicly. He told it at a committee hearing at the Capitol last year as lawmakers debated judicial selection. He told it again last fall at an Austin lobbyist luncheon, where he sat on a panel alongside two Republican judges. He talked until black-clad waiters started to distribute the dessert, baby apple crumbles in little Mason jars.

"I would tell medium-sized and small-business owners, and I would tell workers coming to Texas: Be careful. Don't end up at the Texas Supreme Court. Good luck if you're there," he told a room of lobbyists, lawyers, lawmakers and judges. "I wouldn't sue anybody richer than me in Texas."

Beside him onstage, Busby, a justice on the court, had figured his lips into a tight horizontal line, not a smile but rather a practiced sort of non-frown. His head tilted politely in Abraham's direction.

"I'm a bit of a rebel, I apologize," Abraham said to uncomfortable laughs, his own among them.

Abraham would've liked to share his numbers earlier. But he has always been a Republican, and for a while he was willing to stay in line. He said Republican leaders "at the highest level" asked him to sit on his findings, assuring him that a push on judicial selection would come during the 2019 session of the Texas Legislature. They warned that his figures would embarrass Republican judges ahead of an election. Abraham, a donor, has met with the governor on the matter more than once. Abbott himself quietly pushed for a judicial selection reform bill in 2019, but it died, as versions have for decades, because politically the issue is all but impossible.

The 2019 session came and passed without any major changes, though lawmakers did create a new commission to study judicial selection.

The inside route did not work, so now Abraham is taking the outside path. It's not a partisan problem, he believes, but a problem with the Texas Constitution. The documentary, which one of his sons produced, includes undercover film from the Texas Supreme Court Historical Society's annual John Hemphill dinner, when lawyers from the favorite nine firms mingle with justices over catering.

As part of his efforts, Abraham has also devised a bit of a sting routine.

On a chilly winter day in Canadian, he performed it for a Texas Tribune reporter, dialing up the reelection campaign headquarters of Hecht, the chief justice of the Texas Supreme Court.

"I was looking to give a donation," he said, identifying himself and spelling the name of his company. "What if I have a case coming up before the Supreme Court? Is that a problem or not?"

"No, typically it's not. Some people have asked me that before, and I've checked with Chief Hecht every time and he says it's not a problem," a campaign staffer

said. “I can double-check with him if you’d like, but that shouldn’t be a problem.”

Justin Dudley, a consultant for Hecht’s campaign, said in a statement that “we make every effort to not solicit or accept a contribution from any parties [with] a pending case in front of the court.”

On the panel in November, Busby, who had not seen Abraham's analysis, rejected the suggestion that donations influence the court.

“I personally approach every case by deciding a case on the law and the record … not who the parties are and who gave money,” he said.

Still, he acknowledged, “you can’t argue with the statistics.”

Carla Astudillo contributed reporting.

Disclosure: BP America, Texans for Lawsuit Reform, the Texas Oil and Gas Association, Haynes & Boone, Vinson & Elkins, Jackson Walker, Fulbright & Jaworski, and Bracewell LLP have been financial supporters of The Texas Tribune, a nonprofit, nonpartisan news organization that is funded in part by donations from members, foundations and corporate sponsors. Financial supporters play no role in the Tribune's journalism. Find a complete list of them here.

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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.[1] He is not the first to express that wisdom.[2] 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."[3] 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

* 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,[4] 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.[5] 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,[6] 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.[7] 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-

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.[8]

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,[9] Andrew Jackson,[10] Abraham Lincoln,[11] Theodore Roosevelt,[12] and Franklin Roosevelt,[13] 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.[14] 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."[15] 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,[16] but in state after state, the amount of money being spent on statewide judicial campaigns has increased exponentially. Judicial campaign expenditures have been

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.[17] 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[18] 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."[19] 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

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,[20] and the price is rising. Several multiples of that sum have been spent in Texas and California.[21] 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*,[22] 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,[23] he was speaking not of their elevated status, but of their political responsibility for mediating be-

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.[24] 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.[25] 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[26] 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.[27] An ABA Task Force on Lawyers' Political Contributions released a report in July 1998 recommending seven reforms of that code bearing

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, subt. G, app. B (Vernon 1998).

on campaign contributions by lawyers.[28] 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.[29] 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.[30] 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.[31] 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.[32] 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,[33] two states have recently adopted public funding of campaigns for legislative and executive offices,[34] referenda in two other states have followed suit,[35] and Roper polls show that two voters out of three favor public funding, while only one in four oppose it.[36] Wisconsin presently funds judicial candidacies.[37] 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-

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[38] 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;[39] in fact, the Texas Bar initiated such a document in the 1998 election, but it was not widely distributed.[40] A good voter guide contains biographical information, photographs, and personal statements. They sometimes also include the results of bar polls or other disinterested evaluations.[41] 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

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 Emporer'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.[42]

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.[43] 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[44] and six years for appellate judges,[45] 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.[46] 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.[47] 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[48] and the District of Columbia,[49] 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,

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.

HEALTH AND SCIENCE

Black doctors push for anti-bias training in medicine to combat health inequality

PUBLISHED FRI, JUN 19 2020•8:31 AM EDT | UPDATED MON, JUN 22 2020•10:37 AM EDT

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KEY POINTS

Black doctors are calling for the nation's health system to take action to reduce racial inequity in medical care for African Americans.

Advocates want training on systemic racial bias in health care to be part of physician education.

The twin crises of Covid-19 and the George Floyd anti-police protests have raised the stakes for the nation's health-care system to address racial disparities in treatment.

VIDEO 09:05

Pandemic highlights inequities in U.S. health care

George Floyd's last words, "I can't breathe," have become a rallying cry during the weeks of protests against police violence.

Doctors writing in the New England Journal of Medicine use those words as a refrain to lay out how systemic racism has negatively impacted the health of African Americans and how this is the moment to change it.

"We are still speaking very much in the canon and I guess tradition that journals like that value — and yet we're saying it in a way they're not used to us saying these types of things," said Dr. Rhea Boyd, a pediatrician at the Palo Alto Medical Foundation clinic and co-author of "Stolen Breaths," published in the journal.

She and her colleagues are calling on health-care systems to take the lead advocating against police brutality, to diversify their work forces to better reflect their patient population, and to

incorporate addressing racial health disparities as part of clinicians' training.

"I think the moment and the unrest allowed us to do that," said Boyd, who has written and lectured about the impact of police violence and racial inequity on the health of African Americans. "We can use words like that, and we can be very direct,"

Police violence and Covid

Major medical organizations, including the American Medical Association, the American Academy of Pediatrics and the American College of Physicians, have backed some of the same prescriptions Boyd and her colleagues outlined in the journal. They all condemned police violence following the death of George Floyd when a Minneapolis police officer applied his knee the African American man's neck for about eight minutes.

"We really wanted to take the stand at this moment in time, but we already had a policy regarding these issues," said Dr. Patrice Harris, the first Black woman to serve as president of the AMA, who focused on addressing social disparities in health care during her tenure. "Covid has laid bare a lot of that again."

Dr. Patrice Harris
Shannon Stapleton | REUTERS

The coronavirus pandemic has caused disproportionate illness and death in the African American community. Blacks account for 22% of U.S. deaths from Covid-19, while making up 12.5% of the population, according to the Centers for Disease Control and Prevention. Those national numbers are based on incomplete data, because only 45% of cases reported to the CDC through May 30 included racial identification of coronavirus victims.

"It's absolutely devastating," said Boyd, adding that she has come to think of it in the words of a Princeton University professor who calls it, "The Black Plague. We allowed this to be a Black plague in this country. That weighs heavily on my conscience."

The CDC says underlying health conditions make patients 12 times more likely to die from coronavirus, yet even after accounting for a higher prevalence for poverty, diabetes and insurance coverage, coronavirus death rates for African Americans are higher according to a study this month from MIT.

"We have many good hard-working health-care providers go to work every day intending to do their best for all of their patients, but yet they're producing a pattern of care that appears to be discriminatory. We need to fix that, and it can be fixed," said professor David Williams, of the Harvard T.H. Chan School of Public Health, whose research has focused on systemic racial bias in health care.

"Addressing the implicit biases begins by recognizing that it could be me — that I could be prejudiced'," Williams said. "I like to tell my students that I think of myself as a prejudiced person because I think of myself as normal human being. ... It's about how human beings process all of the cognitive information that we face every day."

Addressing physician biases

African American health-care leaders say the medical system has to begin by confronting

ingrained biases within the medical profession and changing the way clinicians are trained.

"We need to start in the medical school. There need to be lectures on social determinants of health, lectures and training and study on implicit bias," said Harris, recalling her own course material when she trained to be a doctor. "When you learn about burns and rashes and skin diseases, they are described in white patients."

Part of the reason may be the continuing lack of diversity among U.S. clinicians when it comes to African Americans and Latinos. More than half of U.S. practicing physicians are White, 17% are Asian, nearly 6% Hispanic and just 5% are Black, according to 2018 data from the Association of American Medical Colleges.

A doctor holds up a mask that reads "Black Lives Matter" during a rally against the

killing of George Floyd, Foley Square on May 29, 2020 in New York.
Kevin Mazur | Getty Images

Research has shown that for patients of color this lack of diversity can translate into less-responsive care. Black patients are generally undertreated for pain than are White patients, according to a 2016 study that found White medical students and residents believed the Black body was "biologically different — and in many cases, stronger — than the White body," and in some cases believe that Blacks have a higher tolerance for pain.

When it comes to cancer treatment, systemic racial issues can lead to higher mortality. More than 15 academic papers examining residential segregation found that living in segregated Black communities is associated with later-stage diagnosis of breast and lung cancers, and lower survival rates.

"I like to believe that people in health-care have made a choice to dedicate their lives to make a difference. So are we really making a difference, if there is a great injustice that is impacting millions of people?" asked Tosan Boyo, chief operating officer of Zuckerberg San Francisco General Hospital.

Boyo says the combination of the heavy toll the

coronavirus crisis has had on people of color and the social unrest over police violence have raised the stakes for health-care leaders to address the issues that lead to racial disparities in health.

"If we approached health equity the way we do other major diseases, with a unified standard as to what we are prioritizing, how we are understanding the problem ... and how we resolve it, I think we'll make a lot of progress," said Boyo.

Registering patients to vote

The National Medical Association, the largest organization of African American doctors, has decried police use of excessive force as a public-health issue and has called for anti-bias training for all U.S. law enforcement agencies.

Now, the organization is going a step further with its activism, pushing its members to register patients to vote in this year's election. They're rolling out the effort with the nonpartisan VotER project, which was launched by health-care and social-work professionals to push for greater funding for public health.

"Black doctors have always been politically active, but there's never been more of a need,"

said Dr. Oliver Brooks, NMA president. "We have to have a leadership that represents our interests, and it's just became painfully obvious based on everything that has happened."

A turning point

The care industry has been focused on addressing social determinants of health like affordable housing and racial disparities over the last several years, but advocates say the social unrest in the streets has galvanized the discussion.

Individual doctors have protested along with demonstrators, often taking a knee outside the same facilities where they care for patients with coronavirus.

"That gives me hope that you have a diversity of voices, saying this is not OK, the status quo is not OK," said Harris.

Health-care corporations have responded with pledges of financial support to address racial inequity. Health insurer Anthem committed $50 million to social justice groups over the next five years, UnitedHealth Group and Johnson & Johnson each pledged $10 million, while Humana committed $11.5 million.

"It'll be documented, who was doing what at this period of time, and they have enough sense to know which side to speak for. This is a turning point," Brooks said.

Boyd is trying not to let her hopes get ahead of her.

"If past is prologue, people are going to say a lot of things, but they're going to do a lot less," she said. At the same time, she feels "energized and encouraged, and honestly loved ... by the civil unrest that has happened."

She says hearing people speak so passionately about racial health inequities beyond health-care circles has been inspiring. She's hopeful the momentum won't let up.

Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts

THE HON. ANNA BLACKBURNE-RIGSBY*

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Judge Blackburne-Rigsby acknowledges with gratitude the assistance of her research assistant, Precious Boone, Esq., a graduate of Cornell Law School. Judge Blackburne-Rigsby also acknowledges the assistance of Dr. Gregory Parks, her former law clerk, and Sandi Boyd, Howard University School of Law, and David Hodges, American University Law School, her former law student judicial interns. Judge Blackburne-Rigsby would like to especially acknowledge the research of Professor J. Clay Smith of Howard University School of Law. Judge Blackburne-Rigsby was a student of Professor J. Clay Smith's during her tenure at the law school. His research into the often overlooked lives of black legal pioneers has proven to be invaluable to this article and to the legal community as a whole.

INTRODUCTION

President Obama's recent nomination of Justice Sonia Sotomayor to the United States Supreme Court sparked much commentary regarding the value of appointing judges from diverse backgrounds to serve on the nation's courts. To what extent does a qualified and diverse judiciary foster public confidence in the courts, grant decision-making power to formerly disenfranchised populations, and ensure judicial impartiality for all? Does diversity have particular importance at the appellate level because judges sit as a panel, hearing and discussing cases as a group in a collegial atmosphere? Have there been

particular historical milestones that have advanced the establishment of a diverse judiciary and served as the critical steps in the journey of black women to the nation's highest courts?

This Article will explore the implications of diversity in the context of collegial decision-making in the appellate courts. This Article also will examine the historical journey of black women to the nation's highest courts. Particular focus will be paid to black women judges who have served and are serving in state and federal appellate courts. What diverse experience or perspective, if any, do black women appellate judges bring to the collegial atmosphere of appellate courts? What impact, if any, do the perspectives and experiences of black women appellate judges have on the overall judicial decision-making process? Has that impact changed in any way in the last thirty years as the number of black women judges at the appellate level has increased?

In 1975, when President Ford appointed Judge Julia Cooper Mack to the District of Columbia Court of Appeals, she stood alone as the only black woman appellate judge in the country. Although she had several contemporary examples of black women judges, including Judge Jane Bolin, the first black woman judge, and Judge Constance Baker Motley, the first federally appointed black woman judge, Judge Mack had no black women who modeled what it meant to be an appellate level judge.

Appellate judges serve a different function than trial judges, where a single judge hears and decides a case. At the appellate level, judges hear cases as a panel and discuss the cases in conferences. As Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit describes it, "[appellate] judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result, [they] are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[1] In such a collegial atmosphere, it is especially important to have diverse perspectives and viewpoints, if, as Judge Edwards put it, judges are to ever "get the law right."

Because Judge Mack did not have black women appellate judges who preceded her, she built upon the legacy and example of pioneer-

1. Judge Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003). Judge Edwards is a black male judge who was appointed to the United States Court of Appeals for the District of Columbia Circuit in 1980. He served as Chief Judge from 1994 to 2001, and assumed senior status in 2005.

ing black judges and pioneering women judges that came before her. By becoming the first black woman judge in an appellate court, she not only forged the way for the more than thirty black women who now serve on state and federal appellate benches,[2] but she brought her unique perspective to the appellate collegial decision making process. The opening line of one of Judge Mack's concurring opinions exemplifies what black women judges have to offer our nation's highest courts. Judge Mack wrote, "I find it necessary to say, in my own words, what is and is not at issue here."[3] This statement embodies what black women judges bring to the appellate courts: their legal acumen and skill in applying the law to the facts of each case.

The goal of this Article is to give voice to that perspective by looking at the historical journey of black women judges to state and federal appellate courts. Part I of the Article will examine the benefits of diversity and why it is particularly important to strive for diversity on appellate courts. Part II looks historically at the first black judges (who were men), and the first women judges (who were white) who laid the groundwork for black women to sit on state and federal appellate courts. I focus on the historical period from Reconstruction to the present, and note several historical milestones that intersected with the appearance of the first black judges and the first women judges, and ultimately opened the doors to the first black women appellate judges. Part III of this Article takes a more detailed look into the lives of these first black judges and first women judges who broke judicial barriers. Part IV profiles some noteworthy black women judges who have served or are currently serving on appellate courts. It explores their different perspectives by sampling their experiences and backgrounds. Finally, I will conclude by offering my own experience both as a black woman appellate judge and as the daughter in the first mother-daughter judicial pair in the nation.

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2. There is not one source that compiles the figures for all black women judges on state courts. The figures used in this article were gathered from sources that track black judges in state courts and women judges in state courts. The primary sources used in this article for black women judges serving on state courts were data compiled by the American Judicature Society's publication, "Diversity of the Bench," available at http://judicialselection.us/judicial_selection/bench_diversity/index.cfm?state=. The figures were confirmed and updated through telephone calls placed to various appellate courts. Appendix A contains a list of the black women currently serving on state intermediate courts and state supreme courts as of October 2009. The figures for black women judges serving in federal courts were readily available at the Federal Judicial Center's "Biographical Directory of Federal Judges," http://www.fjc.gov/public/home.nsf/hisj). Appendix B lists black women judges serving on federal appellate courts.

3. *In re* R.M.G., 454 A.2d 776, 794 (D.C. 1982) (Mack, J., concurring).

I. BENEFITS TO HAVING A DIVERSE APPELLATE JUDICIARY

In 2003, the American Bar Association (ABA) issued a report containing several "enduring principles" that should be emphasized in the judiciary of the twenty-first century. Principal Seven states that "[t]he judicial system should be racially diverse and reflective of the society it serves."[4] The report explains that "[g]iven the need for promoting public confidence in the judiciary within segments of the community that have become increasingly suspicious of the courts, efforts to diversify the bench may fairly be regarded as . . . one germane to promoting public confidence."[5] The report suggests that the lack of confidence in the courts can be addressed at least in part by increasing the diversity of the judiciary.

The legal community generally recognizes three benefits to diversity: 1) Diversity fosters public confidence in the courts, 2) gives decision-making power to formally disenfranchised populations, and 3) promotes equal justice for all citizens.[6]

Fostering public confidence in the courts is very important. One survey showed that eighty-three percent of white judges believed that blacks are treated fairly in the justice system, while only eighteen percent of black judges agreed.[7] Diversity in the courts also gives decision-making power to formally disenfranchised populations. It is no surprise that as soon as women gained the right to vote and hold office through the passage of the Nineteenth Amendment in 1920, Florence Ellinwood Allen decided to run for a position on the Court of Common Pleas in Ohio. A woman's publication reported that Judge Allen "was finally argued into becoming a candidate for the office after the women were enfranchised for she saw in her candidacy an opportunity

4. JUSTICE IN JEOPARDY: REPORT OF THE AM. BAR ASS'N. COMM'N ON THE 21ST CENTURY JUDICIARY 11 (2003), http://www.abanet.org/judind/jeopardy/pdf/report.pdf.

5. *Id.*

6. Malia Reddick, Michael J. Nelson, & Rachel Paine Caufield, *Election vs. Selection: Racial and Gender Diversity on State Courts*, 48 A.B.A. JUDGES J. 28, 28 (2009).

7. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 436 (2000) (citing KEVIN L. LYLES, THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 21, 237 (1997)). If judges, who preside over cases in our nation's courts, lack confidence in the courts to treat blacks fairly, how much more do the individuals who encounter the judicial system lack confidence in it? In the 1970s, George Crockett Jr., a black judge in Detroit, noted that the lack of confidence in the courts may be due to the dearth of blacks at many stages of law enforcement—from the police and prosecutors, to juries and, ultimately, judges. *See* George W. Crockett, Jr., *Commentary: Black Judges and the Black Judicial Experience*, 19 WAYNE L. REV. 61, 61-62 (1972).

to do much good, from a woman's point of view."[8] Almost every woman's organization in Cleveland endorsed Judge Allen.[9] When she was elected, she won "by the largest popular vote ever given to a candidate for the bench in that county."[10] The electorate, newly composed of women, placed her in this position because they wanted her to represent their interest in the third branch of government. Finally, diversity in the courts also promotes equal justice for all because judges bring their backgrounds and life experiences to bear when applying the facts to the applicable law to render decisions in a given case. Increasing diversity among judges does not guarantee that cases will be decided differently, but instead means that the legal discourse will be more varied in determining "how our laws affect the daily realities of people's lives."[11] As University of Maryland School of Law Professor Sherrilyn A. Ifill explains, "[T]he effect of racial diversity on judicial decision-making should not be measured solely by looking at case outcomes in discrimination cases."[12] She argued that "the value of diversity should be measured by its effect on the deliberative process. Even if black and white judges reach the same outcomes, we should value racial diversity if it brings alternative perspectives and analysis to the process and enriches the legal decision-making."[13]

As the United States Supreme Court articulated in *Grutter v. Bollinger*,[14] having a "critical mass" of members from underrepresented groups is not based on "any belief that minorit[ies] [ ] always (or even consistently) express some characteristic minority viewpoint on any issue."[15] Instead, having a critical mass, or "meaningful representation"[16] is important because "[j]ust as growing up in a particular re-

8. Edith E. Moriarty, *Woman Elected Judge*, WOMAN CITIZEN, July 1921, *available at* http://www.law.stanford.edu/library/womenslegalhistory/articles/moriarty.htm.

9. *Id.*

10. *Id.*

11. This was taken from President Obama's May 1, 2009 speech at a White House press briefing regarding how he would select his nominee to fill the seat vacated by United States Supreme Court Justice David Souter. The full quote said, "I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a casebook; it is also about how our laws affect the daily realities of people's lives." Jesse Lee, *The President's Remarks on Justice Souter*, THE WHITE HOUSE BLOG, http://www.whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter (May 1, 2009, 4:23 PM).

12. Ifill, *supra* note 7, at 455.

13. *Id.*

14. 539 U.S. 306 (2003) (ruling that race can be taken into account in law school admissions because having a "critical mass" of members from underrepresented groups is a compelling state interest).

15. *Id*. at 333 (internal quotation marks omitted).

16. *Id*. at 318.

gion or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[17] Arguably this is what President Obama meant when he remarked that he "view[s] the quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes."[18] I do not understand President Obama to mean by the quality of "empathy"—nor do I personally believe—that judges should decide cases based on how they "feel." Rather judges should apply legal precedent and analyze legal issues within the context of the law and the facts and circumstances of the particular case before the court on issues that affect every aspect of society.

This is why diversity is especially important on the appellate bench where judges hear and decide cases as part of a panel. As Judge Frank Coffin, a former Chief Judge of the United States Court of Appeals for the First Circuit explains:

> The whole idea behind appellate courts is that a collection of different minds is better able to perceive error and to guide the development of the law than is one mind. So the sometimes uncomfortable fact that others are not clones of oneself is to be cherished, not regretted.[19]

The collective and collegial nature of the appellate court is particularly enriched by diversity. As Sandra Day O'Connor, the first woman Justice on the United States Supreme Court noted about her interactions with Justice Thurgood Marshall, the first black Justice on the Court:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective.
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> . . .
>
> At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[20]

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17. *Id.* at 333.

18. Lee, *supra* note 11.

19. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 220 (1994).

20. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

Therefore, the importance of diverse state and federal appellate courts cannot be overstated, due to the collegial nature of the appellate courts. Black women judges in particular bring the diversity of their different perspectives and backgrounds to the decision-making process of appellate courts. The legal discourse that is vital to appellate decision-making is enriched against the backdrop of the diverse personal and professional backgrounds and perspectives brought to bear by the black women judges on an appellate court.

II. PLACING THE FIRST BLACK MALE JUDGES AND FIRST WHITE WOMEN JUDGES INTO HISTORICAL CONTEXT

Diversity on the bench has not always been as valued as it is today. Nearly 165 years ago, all of our nation's courts were presided over by white male judges. However, during critical points in American history, the first black male judges and white women judges began appearing, paving the way ultimately for the first black women judges. Interestingly, these judicial firsts arose out of social and historical conditions that created an environment conducive to major changes in the composition of the judiciary. For example, although the first black judge, Macon Bolling Allen, became a judge in 1847 during slavery, he did so in the social context of the North—in Boston—where blacks were not enslaved. Similarly, he benefited from the abolitionist sentiment that existed in the North. Judge Allen studied the law under an anti-slavery lawyer,[21] who also sponsored Judge Allen for admission to the courts of Maine.[22] Judge Allen was appointed to his judgeship by members of the Whig Party, which had a strong abolitionist element.[23] The first black judge, therefore, appeared during a growing abolitionist movement that sought to establish that blacks were equal to whites in every area, including in their ability to serve as judges. Similarly, the first woman judge, Judge Esther Mae Hobart McQuigg Slack Morris, emerged out of the Women's Suffrage Movement. The

21. Lloyd Duhaime, *Allen Macon 1816-1894*, DUHAMINE.ORG, Nov. 25, 2008, http://duhaime.org/LegalResources/LawMuseum/LawArticle-467/Allen-Macon-18161894.aspx.

22. J. CLAY SMITH JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, 93 (1993).

23. The Whig party existed from 1834-1854. By 1848, the party had split into the "conscious" (anti-slavery) and the "cotton" (pro-slavery) Whigs. After the 1852 presidential election, most Southern Whigs joined the Democratic Party and most Northern Whigs joined the newly formed Republican Party. Whig Party: Definitions from Answers.com, http://www.answers.com/topic/whig-party (last visited Dec. 1, 2009) (citing to Columbia Encyclopedia).

other "first" black judges and "first" women judges also appeared during critical points in America's history. This section will explore these historical intersections.

A. Reconstruction: 1865-1877

Reconstruction is the period during the aftermath of the American Civil War between the pro-slavery South and the anti-slalvery North, from 1865 to 1877. It is marked by several significant pieces of legislation that extended political, economic, and educational rights to blacks after the legal end to slavery. Reconstruction began with the passage of the Thirteenth Amendment in 1865, which formally ended slavery and gave Congress powers to enact enforcement legislation.[24] Also in 1865, the Bureau of Refugees, Freedmen, and Abandoned Lands ("Freedmen's Bureau") was established to supervise all relief and educational activities relating to freedmen and refugees.[25] The Freedmen's Bureau also assumed custody of confiscated lands in the former Confederate States.[26] The Bureau maintained records, including agreements between freedmen laborers and planters,[27] and reports concerning its programs in the states.[28]

Subsequently, the Fourteenth Amendment of 1868 gave blacks equal rights under the law, and the Fifteenth Amendment of 1870 extended voting rights to black men.[29] The Republican-led Congress also enacted the Civil Rights Act of 1875, which declared that all public places should be open to all, regardless of color, and established criminal penalties, fines and established the right to Supreme Court review for violations of the act.[30] The Reconstruction period was conducive to producing the first black judges because black men had acquired the right to vote and could elect their own political and judicial representatives. South Carolina in particular, where blacks made up more than sixty percent of the population, had a large black voting

24. Donna A. Barnes & Catherine Connolly, *Repression, the Judicial System, and Political Opportunities for Civil Rights Advocacy During Reconstruction*, 40 Soc. Q. 327, 333 (1999).

25. Comm. on House Admin. of the U.S. House of Rep., Black Americans in Congress 1870-2007, 21 (2008) [hereinafter Black Americans in Congress].

26. Significant Dates on Black Land Loss and Land Acquisition, http://www.federationsoutherncoop.com/landloss.htm (last visited Nov. 30, 2009).

27. Black Americans in Congress, *supra* note 25, at 21; Records Relating to Freedmen's Labor, http://freedmensbureau.com/labor.htm (last visited Nov. 30, 2009).

28. The Freedman's Bureau Online, http://freedmensbureau.com/ (last visited Nov. 30, 2009).

29. Black Americans in Congress, *supra* note 25, at 21-22.

30. The Civil Rights Bill passed in 1866 guaranteed blacks the right to enter contracts and purchase, sell, and lease property.

population.[31] In 1870, the very same year that black men obtained the right to vote, Jonathan Jasper Wright, the first black man elected to a state high court, was elected to the South Carolina Supreme Court.

B. End of Reconstruction: 1877

However, this twelve year period of black progress and federal support of issues designed to increase political, educational and economic rights for blacks did not last long. A critical turning point was the disputed 1876 presidential election between the Democratic candidate Samuel Tildon (from New York) and the Republican candidate Rutherford B. Hayes (from Ohio). The election tallies in Florida, Louisiana, and South Carolina were questioned. Congress appointed an election commission composed of five members of the United States House of Representatives, five members from the United States Senate, and five Supreme Court Justices. Hayes won but a compromise was agreed upon behind the scenes. This was known as the Compromise of 1877: Hayes, a northerner, would be recognized by the South if the federal government agreed to no longer intervene in Southern affairs and remove the Federal troops from the South.[32] This Compromise of 1877 marked the beginning of the rapid end of the Reconstruction Era. Several Supreme Court decisions began to legally dismantle the political, economic, and educational gains made by blacks during the Reconstruction era.[33] Jim Crow laws[34] sprang up to reinforce segregation in all spheres of life. White violence against blacks in the form of lynching increased dramatically. Blacks were effectively blocked from voting through grandfather clauses,[35] literacy

31. More than sixty percent of South Carolina's population was black. BLACK AMERICANS IN CONGRESS, *supra* note 25, at 26.

32. Significant Dates on Black Land Loss and Land Acquisition, http://www.federationsoutherncoop.com/landloss.htm (last visited Nov. 30, 2009).

33. The rights gained by the Fourteenth Amendment were limited by *In re Slaughter-House Cases*, 83 U.S. 36 (1872); the voting rights of the Fifteenth Amendment were limited by *United States v. Cruikshank*, 92 U.S. 542 (1875) and *United States v. Reese*, 92 U.S. 214 (1875); and the federal Ku Klux Klan Acts that protected blacks from hate crimes, were limited by *United States v. Harris*, 106 U.S. 629 (1883). *See* BLACK AMERICANS IN CONGRESS, *supra* note 25, at 41.

34. Jim Crow was "a system of segregation in the South that was enforced by legal and extralegal means," which included laws against interracial marriage and the sanctioning of white-only and colored-only facilities. BLACK AMERICANS IN CONGRESS, *supra* note 25, at 154.

35. A "grandfather clause" was a provision that exempted descendants of men who voted prior to 1866 from voting restrictions such as literacy tests and poll taxes. It resulted in illiterate and poor whites being allowed to vote, but blacks, whose ancestors were slaves prior to 1866, being disenfranchised.

tests,[36] and poll taxes.[37] The federal court's failure to enforce the Reconstruction civil rights amendments and legislation stripped blacks of legal avenues to assert their rights. The *Plessy v. Ferguson*[38] case, which upheld the doctrine of "separate but equal," was a prime example of the Supreme Court's disposition towards civil rights. This greatly affected the appointment and election of blacks as judges in the courts.

The same year Reconstruction ended, in 1877, Jonathan Jasper Wright was forced to resign from the South Carolina Supreme Court. White Southern opponents lodged accusations against Justice Wright that he accepted bribes in exchange for favorable opinions.[39] There would not be another black person to serve on the South Carolina Supreme Court for over a hundred years.[40] As such, the end of Reconstruction marked a long pause in the judicial firsts of black judges. The next "black judicial first" would not occur until more than sixty years after Reconstruction ended, with the appointment of Judge Jane Bolin, the first black woman judge, to the New York Family Court in 1939, and it would happen in the North, not in the South.

C. The Women's Suffrage Movement: 1800-1920

The Women's Suffrage Movement, which advocated for voting rights for women, provided the social and historical foundation to produce a judicial first for women. The struggle for political, economic and educational equality began in the early 1800s, marked by a growth of women's charitable and volunteer organizations,[41] increased educational opportunities with schools for girls and the first coeducational

36. A "literacy test" was a test given to potential voters as a qualification for voting. Many blacks after slavery were illiterate and unable to pass the test. White potential voters were exempt from the literacy test due to the grandfather clause.

37. A "poll tax" was a tax required as a qualification for voting. Poor blacks were unable to pay the tax, but poor whites were exempted from the tax due to the grandfather clause.

38. 163 U.S. 537, 552 (1896). *Plessy* upheld a legal doctrine, referred to as "separate but equal," that justified segregation of the races. Under this doctrine, separate services, facilities, and public accommodations were allowed as long as the quality of those services, facilities, and public accommodations remained equal.

39. Later scholarship reveals that these accusations were false. *See* R.H. Woody, *Jonathan Jasper Wright, Associate Justice of the Supreme Court of South Carolina, 1870-77*, 18 J. NEGRO HIST. 114 (1933).

40. Justice Ernest Finney, Jr. was elected to the court in 1985 and became Chief Justice in 1996. Kevin Chappell, *Record Number of Black Chief Justices: Six Jurists Head D.C. and State Supreme Courts*, EBONY, Oct. 1997, at 122, 124, *available at* http://findarticles.com/p/articles/mi_m1077/is_n12_v52/ai_19836394/.

41. Michael Goldberg, *Breaking New Ground: 1800-1848*, *in* NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES 179 (Nancy F. Cott ed., 2000).

college (Oberlin College in Ohio in 1833[42]), the passage of the first Married Woman's Property Act, which gave women very limited property rights, largely in connection with slaves,[43] and the first women's rights convention at Seneca Falls, New York in 1848.[44] The West was a particularly fertile area for women's rights, due to a need to increase the number of women in the Western frontier states. In 1870, Wyoming passed the Female Suffrage Act and became the first state to allow women the right to vote and hold public office, partly in hopes of attracting more families to its territory.[45] Wyoming immediately took advantage of this newly passed Act by appointing the nation's first woman judge, Esther Mae Hobart McQuigg Slack Morris, to a fill a vacancy for the Justice of the Peace in 1870.

D. World War I: 1914-1918 (America entered the war in 1917)

The end of the First World War intersected with the ongoing Women's Suffrage movement to facilitate another judicial first for women. World War I offered many opportunities for women to leave their homes and enter the work force, because many men were being drafted into the war. Suffrage leaders urged women to support the war by taking whatever war work they could. More than 400,000 women joined the workforce during World War I.[46] Suffrage leaders hoped that women's active involvement in the war effort might help bring about woman's goals for equality.[47] Women also formed and joined labor unions.[48] When the war ended and men came home, women were not ready to give up the independence they had gained during the war. They became more vocal about obtaining equal rights and particularly the right to vote. In 1918, suffrage leaders asked

42. E. Susan Barber, *One Hundred Years Toward Suffrage: An Overview*, NAT'L AM. WOMEN SUFFRAGE ASS'N COLLECTION, http://memory.loc.gov/ammem/naw/nawstime.html (last visited Nov. 30, 2009).

43. *Id.*

44. Goldberg, *supra* note 41, at 179.

45. Marcy Lynn Karin, Barbara Babcock & Erika Wayne, *Esther Morris and Her Equality State: From Council Bill 70 to Life on the Bench*, Women's Legal History Biography Project, Feb. 28, 2003 at 21, 22 n.91, *available at* http://www.law.stanford.edu/library/womenslegalhistory/papers0203/MorrisE-Karin03.pdf (A later version of this article was published at 46 AM. J. LEGAL HIST. 300 (2004)).

46. GLENDA RILEY, 2 INVENTING THE AMERICAN WOMAN: AN INCLUSIVE HISTORY 346 (3d ed. 2000).

47. *Id.* at 343. A similar agenda was advanced for blacks. It was hoped that by joining the war efforts, blacks would be recognized more as equals. *See* BLACK AMERICANS IN CONGRESS, *supra* note 25, at 173-74 ("Black Americans furthered their claim for racial equality at home by their contributions on European battlefields and on the home front filling industrial jobs.").

48. *Id.* at 346.

Jeannette Rankin, the first woman elected to Congress[49] to present the "Anthony" Amendment to Congress, which later became the Nineteenth Amendment of the United States Constitution. It was ratified in 1920 and gave women the right to vote. Women's involvement during the war and national recognition of women's right to vote created the perfect environment from which the first woman appellate judge would arise. With women voting nationally for the first time in 1920, Florence Ellinwood Allen was elected judge of the Court of Common Pleas in Ohio and two years later, in 1922, she became the first woman to win a seat on the Ohio Supreme Court. She later also became the first woman to be appointed to the federal bench in 1934, when President Franklin Roosevelt appointed her to the Sixth Circuit of the United States Court of Appeals, where she eventually served as chief judge.

E. Great Migration: 1910-1930

During the Great Migration, which lasted from 1910 to 1930, an estimated 1.6 million blacks migrated from the South to the North, Midwest and West to escape racism and find greater economic opportunities in industrial cities.[50] The influx of blacks to Northern cities resulted in the first elections of blacks to Congress since the end of Reconstruction.[51] In New York City, Jane Matilda Bolin became the first black woman judge when she was appointed to New York City's Domestic Relations Court in 1939. Judge Jane Bolin did not migrate from the South. Her family descended from a long line of free blacks that settled in Duchess County in New York. However, the influx of blacks and the diversity of New York in the 1930s, as a result of the Great Migration, may have attracted Judge Jane Bolin to New York City and away from her father's successful law practice in upstate New York. She said,

> When I am asked why I ever left such a beautiful town as Poughkeepsie I am forced to answer: "Yes, it is physically beautiful, but I hate fascism whether it is practiced by Germans, Japanese, or by

49. Congresswoman Rankin was elected from Montana, a state where women could vote and run for office.

50. The fledging cotton market in the South and the reduction of white workers in the North due to reduction in European immigration and military conscription resulted in an influx of blacks to the North in search of job opportunities. BLACK AMERICANS IN CONGRESS, *supra* note 25, at 174.

51. Oscar De Priest of Illinois was elected to the U.S. House of Representatives from a Chicago district in 1928. *Id.* at 236.

> Americans and Poughkeepsie is fascist to the extent of deluding itself that there is superiority among human beings by reason solely of color or race or religion."[52]

A city like New York, where the mayor, Fiorello LaGuardia openly endorsed black politicians such as Adam Clayton Powell, was more amenable to providing legal and judicial opportunity to a black woman. Mayor Fiorello LaGuardia also appointed Jane Bolin to her judgeship on the New York Domestic Relations Court.

F. World War II: 1939-1945 (America entered the war in 1941)

The social and historical backdrop of World War II also may have precipitated a judicial first for blacks. "During World War II, the [United States] Army had become the nation's largest minority employer."[53] Prior to World War II, the War department had a policy of segregated service. President Roosevelt felt pressure from black leaders to end this practice. During World War II, President Roosevelt responded to complaints about discrimination against African Americans by issuing Executive Order 8802 in June 1941, directing that Blacks be accepted into job-training programs in defense plants, forbidding discrimination by defense contractors, and establishing a Fair Employment Practices Commission.[54] He appointed William H. Hastie, who was dean of Howard University School of Law at the time, as a civilian aide to the Secretary of War. When President Truman assumed the presidency after President Roosevelt unexpectedly died while in office, Truman appointed William Hastie to the United States Court of Appeals for the Third Circuit in 1950, making Judge Hastie the first black judge appointed to a federal appeals court.

G. Civil Rights Movement: 1954-1965

When President Truman issued Executive Order 9808 in 1946, establishing a commission to strengthen and safeguard the civil rights of the blacks, he ushered in a new era for civil rights. Many cases were coming before various state courts and the federal courts regarding the unequal treatment of blacks. Ultimately, in the landmark Su-

52. Metropolitan Black Bar Association, The New York City Law Department Honors Judge Jane Bolin Women's History Month 2006, http://www.mbbany.org/j_bolin_nylaw.htm (last visited Oct. 14, 2009) (on file with author) [hereinafter Jane Bolin Article].

53. Exec. Order No. 9,981: Desegregation of the Armed Forces (1948), http://www.our documents.gov/doc.php?flash=old&doc=84 [hereinafter *Desegregation of the Armed Forces*].

54. *Id.*

preme Court case of *Brown v. Board of Education of Topeka*,[55] the Court overruled *Plessy v. Ferguson*[56] and held that separate was inherently unequal. Blacks began to assert their right to equal treatment through staging boycotts, sit-ins, marches and other forms of protest. It is against the backdrop of the *Brown* case and the Civil Rights Movement that black women judges started to gain more judicial opportunities. President Lyndon B. Johnson appointed Constance Baker Motley, a well-known civil rights lawyer, to the United States District Court for the Southern District of New York in 1966, two years after he signed into law the Civil Rights Act of 1964. Judge Motley worked for the NAACP Legal Defense Fund from 1946 to 1965 and credited her training as a civil rights lawyer as one of the keys to her success. She appreciated her time at the NAACP Legal Defense Fund because it allowed her to "get in on the ground floor of the civil rights revolution."[57] She explained:

> Because we were a small staff and it was not very fashionable in those days to be working in civil rights, I got an opportunity that few lawyers graduating from Columbia Law School with me would ever have—and that was actually to try major cases, take appeals to the courts of appeals, and argue cases in the United States Supreme Court.[58]

H. Feminist Movement: 1960-1980

As the Civil Rights Era reached its climax, the Feminist Movement was beginning to see some additional gains as well. In 1963, Congress passed the Equal Pay Act, which prohibited discrimination in payment of wages based on sex. Congress also passed the Equal Rights Amendment in 1972, but the amendment did not gain the support of enough states, and therefore was never ratified.[59] At this intersection of the Civil Rights and Feminist movements, we see the first appointment of black women judges to both state and federal appellate level courts. In 1975, President Ford appointed Judge Julia Cooper Mack to the District of Columbia Court of Appeals.[60] She

55. 347 U.S. 483, 495 (1954).
56. 163 U.S. 537, 552 (1896).
57. LINN WASHINGTON, BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH 135 (1994).
58. *Id.* at 135.
59. RILEY, *supra* note 46, at 537-38.
60. The District of Columbia Court of Appeals, as the highest court for the District of Columbia, is the equivalent of a state supreme court.

became the first black woman to sit on a state appellate level court. Four years later, President Carter appointed Amalya Kearse to the United States Court of Appeals for the Second Circuit. President Carter's intentions regarding the federal judiciary were clear. He stated:

> I am determined to nominate judges of the highest quality; our Federal judiciary must be selected on the basis of merit. I am also determined to increase the low representation on the Federal bench of women, Blacks, Hispanics, and other minorities. These goals are within our reach, if we work together cooperatively and recognize the importance our country places in the selection of these new judges.[61]

During his four year term from 1977 to 1981, President Carter would go on to appoint thirty-seven black judges and forty women judges to the federal bench, seven of which were black women judges.[62] However, Amalya Kearse was his only black woman appointee to a federal appellate court.

I. Political Conservatism: 1980-1992

Presidents Ronald Reagan and George H.W. Bush succeeded President Carter; however, they did not embrace or adopt President Carter's idea of a diverse judiciary. Instead, the Reagan Administration's twelve-year period of political conservatism was marked by a backlash against affirmative action and presidential appointments of cabinet members opposed to civil rights.[63] Although Presidents Reagan and Bush did not appoint any black women judges to the federal appellate bench from 1980 to 1992, President Reagan appointed Judge Judith Ann Wilson Rogers to the District of Columbia Court of Appeals in 1983.[64] President Bush also appointed Judge Annice M. Wagner to the same court in 1990. It should be noted, however, that under the District of Columbia Court of Appeals judicial selection process, a

61. The State of the Union Annual Message to the Congress (Jan. 25, 1979), http://www.presidency.ucsb.edu/ws/index.php?pid=32735&st=black&st1=judiciary [hereinafter State of the Union].

62. Those women are: Norma Holloway Johnson, Amalya Lyle Kearse, Mary Johnson Lowe, Consuelo Bland Marshall, Gabrielle Anne Kirk McDonald, Anna Katherine Johnston Diggs Taylor, Anne Elise Thompson.

63. LEE COKORINOS, THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE 20-21 (2003).

64. District of Columbia local judges are appointed by the President of the United States.

Judicial Nomination Commission composed of seven members,[65] recommends three names to the President for each judicial vacancy.[66] It is not clear whether these Presidents would have selected black women to serve on the District of Columbia's highest court under a different process.

Around the county, other intermediate and state high courts were also bucking the federal trend by appointing or electing black women judges to their intermediate and state high courts. For example, Judge Joan Bernard Armstrong serving in the Louisiana Fourth Circuit Court of Appeal, was elected in 1984. Justice Juanita Kidd Stout was appointed to the Pennsylvania Supreme Court in 1988.[67] Similarly, Chief Justice Leah Ward Sears, who recently retired, was appointed to the Georgia Supreme Court in 1992. Despite the dearth of appellate appointments at the federal level, the number of black women appellate judges serving at the state level steadily increased.

J. Clinton and Bush Administrations: 1992-2008

The federal appellate judiciary experienced an unprecedented increase in the number of black women judges during the Clinton Administration and the G.W. Bush Administration, to a slightly lesser degree. In 1993, President Clinton promised that he was "committed to giving the American people a federal judiciary marked by excellence, by diversity, and by a concern for the personal security and civil rights of all Americans."[68] President Clinton went on to make good on this promise by appointing sixty-one blacks and 106 women to the federal courts during his eight-year term. Three of these appointments were of black women judges to the federal appellate courts:

65. "The JNC is composed of seven members—two appointed by the Mayor of the District of Columbia; two by the Board of Governors of the District of Columbia Bar (Unified), one by the Council of the District of Columbia, one by the President of the United States, and one judicial member appointed by the Chief Judge of the United States District Court for the District of Columbia." Judicial Nomination Commission Mission, http://jnc.dc.gov/jnc/cwp/view,a,3,q,494574,jncNav_GID,1482,jncNav,—31322—.asp.

66. D.C. Code § 1-204.33 (2007). For an example of how this nomination process can affect the pool of nominees, see Joseph D. Whitaker & Eugene L. Meyer, *Moving up to the Bench: D.C. Legal System Sees Racial Revolution*, WASH. POST, Apr. 15, 1976, at A1.

67. Brenna Sanchez, *Juanita Kidd Stout*, *in* 24 CONTEMPORARY BLACK BIOGRAPHY: PROFILES FROM THE INTERNATIONAL BLACK COMMUNITY 161 (Shirelle Phelps ed., 2000). Judge Stout was the first black woman outside the District of Columbia to be appointed to a state's highest court.

68. Clinton's Nomination for the United States District Court Judges (Oct. 22, 1993), http://www.presidency.ucsb.edu/ws/?pid=46003.

Johnnie B. Rawlinson (9th Cir.), Judith Ann Wilson Rogers (D.C. Cir.), and Ann Claire Williams (7th Cir.).[69]

The G.W. Bush Administration recognized that diversity was important, but stressed that qualifications were most important. In a 2008 speech, President G.W. Bush stated, "[I promised we] would search from a diverse array of candidates and nominate those who met the highest standards of competence. . ." His press secretary also stated, "The President operates on the basis of qualifications. And the President believes that in the course of those qualifications, it is healthy to have in all his appointments a group of people who are broadly representative of the country. But the first criteria is and always [sic] be qualifications."[70] President G.W. Bush appointed fewer black and women judges than President Clinton, having appointed twenty-three black and seventy-one women judges to federal courts, of which only eight were black women.[71] However, this is substantially more than his Republican predecessors, perhaps indicating broad public acceptance of the notion that a diverse judiciary is important to the fair administration of justice. Two of G.W. Bush's appointments were black women appellate judges: Janice Rogers Brown (D.C. Cir.) and Allyson Kay Duncan (4th Cir.).[72]

III. PROFILES OF THE FIRST BLACK JUDGES AND THE FIRST WOMEN JUDGES

The preceding historical overview helps to contextualize the first black male judges and the first white women judges in the social environments from which they emerged. Being the first black judge or the first woman judge, however, carries with it both benefits and burdens. Former Indiana Supreme Court Justice Myra Consetta Selby acknowledged the burden of being the first black woman to sit on the Indiana Supreme Court when she said: "It is always an achievement for there to be a first . . . the barriers can be broken down only when people feel

69. Federal Judges Biographical Database, http://www.fjc.gov/public/home.nsf/hisj (last visited Oct. 13, 2009) [hereinafter Federal Judges Database]. This website contains all past and present federal judges and allows users to create a list of judges categorized for race, sex, and nominating president. A search for black women federal judges nominated by President Clinton returned these results.

70. Transcript of May 9, 2001 White House Press Briefing by Ari Fleischer, http://www.presidency.ucsb.edu/ws/index.php?pid=47522 (last visited Oct. 13, 2009).

71. The eight black women federal judges were, Janice Rogers Brown, Vanessa Lynne Bryant, Marcia G. Cooke, Allyson Kay Duncan, Julie A. Robinson, Mary Stenson Scriven, Sandra L. Townes, Susan Davis Wigenton.

72. Federal Judges Database, *supra* note 69.

comfortable with things they are unaccustomed to. The first is probably the least enviable position, but it is very important."[73] This section tells the "very important" story of the first black judges and the first women judges in the federal and state courts.

A. Genesis

The story of the first black judge begins during slavery. Macon Bolling Allen, the nation's first black lawyer and the first black judge, was born in Indiana, and moved to Maine in 1835 to study law.[74] After being admitted to the Maine Bar in 1844, he left for Boston where he was admitted to practice in the municipal court of Boston. His admission to the Boston Bar was talked about in the press, and it is not clear whether the "talk" was solicitous or sarcastic. One newspaper report said:

> Mr. Allen is 29 years of age—is a native of Indiana, and his color and physiognomy bespeak a mingled Indian and African extraction, in about equal proportions. He is of medium height and size, and passably good looking. He is indeed a better looking man than two or three White members of the Boston Bar, and it is hardly possible that he can be a worse lawyer than at least six of them, whom we could name.[75]

While Macon Bolling Allen gained the attention of the Boston populous at the time, he did not gain their business. In 1845, he wrote a letter stating:

> The prospect of my securing an adequate support . . . is certainly not so good as could be desired. Owing to the peculiar custom of the New England people, and especially Boston people, to sustain those chiefly who are of family and fortune, or who have been long established, this is not regarded as the best place for me who can boast none of the requisite appendages . . . . It has been frequently suggested to me that New York, where people greatly differ from our own in this particular I have noted, and with a colored population who themselves, it is reasonable to suppose, have sufficient business which they would give him . . . [could] employ a colored lawyer . . . better than . . . Boston.[76]

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73. Suzanne McBride, *Female Justice Marks Another First*, INDIANAPOLIS NEWS, Feb. 1995, at 13.

74. Duhaime, *supra* note 21.

75. SMITH, *supra* note 22, at 94-95.

76. *Id.* at 95 (citing Letter from Macon B. Allen to John Jay (Nov. 26, 1845), *in* BLACK ABOLITIONIST PAPERS, 1830-1865, at 32 (G.E. Carter & C.P. Ripley eds., 1981)).

After being appointed twice as Justice of the Peace, Macon Bolling Allen decided to leave Boston for South Carolina in 1868.[77]

South Carolina boasts of having the first black lawyer to hold a high state court judicial post. Jonathan Jasper Wright was very popular due to his political presence as a state senator. He was described by a local paper as a "very intelligent, well-spoken colored lawyer."[78] The state senate nominated Jonathan Jasper Wright to fill an unexpired term on the South Carolina Supreme Court in 1869, and the following year the legislature elected him to a six-year term. Justice Wright was forced to step down in 1877, the same year that the Reconstruction Era ended.[79] Justice Wright requested that the legislature try him so that he could have an opportunity to "be cleared of the scandalous imputation sought to be put upon [him],"[80] but the legislature refused.[81] It would be more than one hundred years after Justice Wright's death before his reputation would be restored. In 1997, the South Carolina Supreme Court justices unveiled a portrait of Justice Wright in his honor.[82]

Justice Wright's resignation and subsequent replacement by a white Justice,[83] was symbolic of the overall effect after the end of the Reconstruction Era. The withdrawal of federal troops marked the return of Southern government control to the white southerners and the prompt re-disenfranchisement of African-Americans. The end of the Reconstruction Era also marked the beginning of a long period of absence of blacks in the judiciary.

B. The First Woman Judge

The same year Justice Wright was elected as the first black judge of a state high court, a significant first was taking place for women. In 1870, well before women had the right to vote nationally, Esther Mae Hobart McQuigg Slack Morris became the first woman judge in the country. She was appointed Justice of the Peace in a small town in Wyoming. The then-territory of Wyoming was eager to attract more

77. *Id.* at 215; Duhaime, *supra* note 21; SMITH, *supra* note 22, at 209.
78. *Id.* at 216.
79. *Id.* at 217; Woody, *supra* note 39, at 123-24.
80. Woody, *supra* note 39, at 129 (quoting the Report of the Joint Investigating Committee on Public Frauds).
81. SMITH, *supra* note 22, at 217.
82. South Carolina African American History Calendar, Justice Jonathan Jasper Wright, http://scafricanamerican.com/honorees/view/2002/12/ (last visited Dec. 1, 2009).
83. Justice Wright was succeeded by a white judge, A.C. Haskell, who was chairman of the Democratic executive committee. Woody, *supra* note 39, at 127.

women settlers, so it passed a bill giving women the right to vote and hold public office.[84] In protest, the then-Justice of the Peace stepped down from his position, and the governor of the territory appointed the first woman judge to fill the office.[85]

Although she served for less than a year, Judge Morris earned a reputation during her tenure. She was six feet tall, weighed 180 pounds and was described as "mannish."[86] Her speech from the bench was more "candid than diplomatic"[87] and her "powers of conversation, though blunt and often cutting, would have given her a conspicuous position anywhere."[88] She had never attended law school or practiced law.[89] She gave two of her sons clerk positions in her chambers, although they also had no formal legal education.[90] They had the responsibility of writing her opinions and researching the law.[91] Her chambers were in her own log cabin home.[92] However, bringing the courtroom to her home had its consequences. Her husband, who opposed her appointment, openly protested her appointment in her court, and she was forced to hold him in contempt. He failed to pay his fine and she jailed him.[93]

She became known as the "mother of women's suffrage" after her son referred to her that way in his Cheyenne newspaper.[94] However, recent scholarship suggests otherwise. When she was asked about the issue of women's suffrage, Morris allegedly replied that women would do well to leave the matter in the hands of men.[95] She believed more in the gradual and cooperative approach to women's rights. She stated that "women can do nothing without the help of men," and believed that the "elevation of women" should come, but not at the cost of the "downfall of men."[96]

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84. Karin et al., *supra* note 45, at 20-21.
85. *Id.* at 26-27.
86. *Id.* at 32.
87. *Id.*
88. *Id.* at 32 n.138.
89. *Id.* at 35.
90. *Id.* at 32, 35.
91. *Id.* at 31, 35 n.154.
92. *Id.* at 31.
93. *Id.* at 39.
94. History.com, First Woman Judge Dies in Wyoming—History.com This Day in History—4/2/1902, http://www.history.com/this-day-in-history/first-woman-judge-dies-in-wyoming (last visited Nov. 18, 2009).
95. *Id.*
96. Karin et al., *supra* note 45, at 50.

Her tenure as a judge came to a quick end. Although she sought re-election when her term expired eight and a half months later, neither political party would nominate her, making her ineligible.[97] Judge Morris's predecessor, who had stepped down in protest of women being given the right to vote and hold office, ended up being re-elected to the office. Upon leaving office, Judge Morris remarked that her tenure as judge was "a test of woman's ability to hold public office, and I feel that my work has been satisfactory."[98]

The next "first" for women would not come until fifty years later in 1922, after the ratification of the Nineteenth Amendment, granting women the right to vote. Florence Ellinwood Allen holds the distinction of being the first woman elected to a state supreme court. She was elected to the Ohio Supreme Court in 1922. She subsequently became the first woman appointed to a United States Court of Appeals when President Franklin D. Roosevelt appointed her to serve on the Sixth Circuit in 1934.

Judge Allen had strong political ties, one of which was with Eleanor Roosevelt. It was thought that she would be appointed to fill a vacant Supreme Court seat in 1937. However, Franklin Roosevelt appointed Hugo black, instead.[99] President Truman also considered Judge Allen for a Supreme Court nomination, but declined due to the negative reactions of the other justices.[100] According to Justice Ruth Bader Ginsburg, in an address she gave before the National Association of Women Judges, "[t]he justices feared that a woman's presence would inhibit their conference deliberations where, with shirt collars open and shoes off, they decided the legal issues of the day."[101] The first woman Justice on the Supreme Court, Sandra Day O'Connor, would not be appointed until 1981.

C. The Emergence of Black Women Judges

More than sixty years after the end of Reconstruction, in 1939, this nation saw its first black woman judge. Jane Matilda Bolin came

97. *Id.* at 43.
98. *Id.* at 43-44.
99. John A. Russ IV, *Florence Ellinwood Allen*, Women's Legal History Biography Project, 1997, http://www.law.stanford.edu/library/womenslegalhistory/papers/AllenF-russ97.pdf.
100. *Id.*
101. Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 283 (1995). This article is based on an address presented by Justice Ginsburg at the Annual Conference of the National Association of Women Judges in Atlanta, Georgia on October 7, 1995.

from a family of lawyers. Her father was a single parent and raised Jane and her brother, while successfully operating his own law firm in Poughkeepsie, New York.[102] Her brother also practiced law.[103] Proud of this family tradition, she never changed her name, even after she married, and also gave the Bolin family name to her son, Yorke Bolin Mizelle.[104] A career counselor advised Jane Bolin to consider teaching rather than practicing law, because "no Black woman would ever make it as a lawyer."[105] Her father also assumed she would be a teacher.[106] She remembered him telling her, "I don't like you becoming a lawyer because lawyers have to hear such dirty things sometimes and a woman should not have to hear some of the things a lawyer has to hear."[107] He finally relented and told her to "make application to the finest law school admitting women."[108] Little did he know that at the time of their conversation, she had already been accepted at Yale Law School.[109]

Jane Matilda Bolin became the first black woman to graduate from Yale Law School in 1931.[110] The next year, in 1932, she became the first black woman to be admitted to the New York State Bar.[111] She began her legal career working as a clerk for her father's law firm.[112] She married a local white attorney in 1933, and moved to New York City where they started a practice together.[113] In 1937,[114]

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102. SMITH, *supra* note 22, at 405.
103. *Id.*
104. *Id.* at 406.
105. Jane Bolin Article, *supra* note 52.
106. *Id.*
107. *Id.*
108. *Id.*
109. Jasmin K. Williams, *Jane Matilda Bolin—A Woman of Firsts*, N.Y. POST, Feb. 9, 2007, at 82, *available at* http://www.nypost.com/p/classroom_extra/jane_matilda_bolin_woman_of_firsts_CTubVIATyWTl1i3JtpQg4H.
110. SMITH, *supra* note 22, at 405.
111. Jane Bolin Article, *supra* note 52.
112. Williams, *supra* note 109.
113. Michel Canaan, 07/22/1939—Jane Bolin Becomes the First Black Woman to Serve as a U.S. Judge, BLACK HISTORY, May 1, 2009, http://www.blackhistory.com/cgi-bin/blog.cgi?blog_id=133098&cid=54&reading=.
114. In 1937, the same year she was appointed Assistant Corporation Counsel, Judge Bolin was elected as the First Vice President of the New York Branch of the NAACP. Judge Bolin remained committed to the local branch of the NAACP, even after she was elected to the NAACP's national executive committee in 1943. Judge Bolin believed that the NAACP's national office did not value the commitment of the branches. She particularly resisted the prevailing practice that "the branches should raise money for the national organization and do whatever work they are asked to do by the national organization but are arrogantly overstepping their bounds if they make suggestions or protests to the national office." She sharply and openly criticized the National Office by writing a letter of resignation that later leaked to the black press. Due to her beliefs, she was eventually removed from the executive committee. Judge

she applied for a position in the New York City Law Department, was hired on the spot, and became the first black woman to be hired as an Assistant Corporation Counsel.[115] She clearly remembers the day she interviewed for the position and the racism she faced:

> I was interviewed by the First Assistant Corporation Counsel who was from the south of the United States. He was making short shrift of me by telling me there were no vacancies when the Corporation Counsel himself, Mr. Paul Windels, just happened to come in the office. He treated me very cordially, and said that he knew that I was interested in the position on his staff. Thereupon, his assistant interrupted to say "but we have no line for her in the budget." And Mr. Windels said, "but we do." And he shook my hand and said, "I welcome you to my staff."[116]

She undoubtedly had many more experiences like this, which probably helped formulate her ideas about racial and gender equality. When Mayor Fiorello LaGuardia of New York City appointed Jane Bolin to serve as a judge on New York's Domestic Relations Court in 1939, he first consulted her husband.[117] When asked about what she thought about this, she sarcastically replied, "I can understand now and subsequently I could understand why he did that—was because he wanted to know the character of the man who was my husband. I can't think of any other reason, can you?"[118] In a speech about women's rights she said,

> I am always impatient with those who say "You women have come a long way." Since I am no gradualist, I think to myself that 150 years is too long a time to come a "long way" in that those gains we have made were never graciously and generously granted. We have had to fight every inch of the way—in the face of sometimes insufferable humiliations.[119]

When her husband died in 1943, two years after the birth of their son, Judge Bolin, like her father, became a single parent while still maintaining her legal career. Regarding the balance between family

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Bolin was later offered another position in the organization, but she declined it and left the NAACP entirely in 1950. *See* Jacqueline A. McLeod, *Persona Non-Grata: Judge Jane Matilda Bolin and the NAACP, 1930-1950*, AFRO-AMERICANS IN N.Y. LIFE & HISTORY, Jan. 1, 2005, *available at* http://www.thefreelibrary.com/Persona non-grata: Judge Jane Matilda Bolin and the NAACP, 1930-1950-a0128705133.

115. Canaan, *supra* note 113; *First Negro Woman Gets City Law Post; Jane Bolin, an Honor Student at Wellesley, Appointed Assistant Corporation Counsel*, N.Y. TIMES, Apr. 8, 1937, at 3.

116. Jane Bolin Article, *supra* note 52.

117. Williams, *supra* note 109.

118. Jane Bolin Article, *supra* note 52.

119. *Id.*

and her career as a judge, she stated, "I don't think I short-changed anybody but myself . . . . I didn't get all the sleep I needed, and I didn't get to travel as much as I would have liked, because I felt my first obligation was to my child."[120]

If Judge Bolin's first obligation was to her child, her second obligation was to the children of New York City. She said of her career, "I've always done the kind of work that I like. Families and children are so important to our society, and to dedicate your life to trying to improve their lives is completely satisfying."[121] Judge Bolin served on the family court for forty years, having her appointment renewed three more times by the subsequent mayors. In 1979, after reaching age seventy, the mandatory retirement age, Judge Bolin reluctantly resigned from her appointment. It was the same year the first black woman judge, Judge Amalya Lyle Kearse, was appointed to a federal appellate court.

Judge Constance Baker Motley was appointed to the United States District Court for the Southern District of New York in 1966 by President Lyndon B. Johnson. She was the first black woman to be appointed to a federal court.[122] She became the chief judge of that court in 1982 and a senior judge in 1986. The majority of her legal career, from 1946 to 1965, was spent working for the NAACP's Legal Defense Fund.

Judge Motley was born in 1921, in New Haven, Connecticut. She was the ninth of twelve children. Her parents were immigrants from the Caribbean island of Nevis. Her father worked as a chef for several Yale University student organizations. She was very active throughout high school. When she was fifteen, she was President of the New Haven NAACP youth council. She was also the secretary for the local NAACP adult council. After she graduated from high school, her family did not have enough money to send her to school, so she became a domestic worker. When she was 18, she gave a speech at a local black social center. The sponsor of the center, a white man, heard this speech and offered to pay for her to go to college. She remembered, "[h]e said he would be glad to pay for my college education and asked me what I wanted to do. I told him I wanted to study

120. Canaan, *supra* note 113.

121. Williams, *supra* note 109.

122. Prior to her appointment to the bench, she was the first woman to be a Manhattan Borough President (1965-66) and the first black woman elected to serve in the New York State Senate (1964-65).

law. He said he didn't know much about women and law, but if that's what I wanted he'd pay for it."[123]

Judge Motley knew she wanted to be a lawyer very early in her life. She recalled in a 1992 interview:

> I guess what sparked my interest in the law when I was growing up more than anything else was the 1938 Lloyd Gaines case[124]. . . . [T]he U.S. Supreme Court ruled that Missouri could not send Blacks to out-of-state law schools in order to prevent them from attending the all-white University of Missouri Law School. It was a major decision. . . . [T]hat was my first encounter with the idea that the Supreme Court could be instrumental in changing the status of Black Americans, and so that really sparked my interest in pursuing the law.[125]

Judge Motley's exposure to black lawyers and judges also influenced her decision to pursue law. She said, "[g]rowing up in New Haven I was aware that Black people could become lawyers and judges."[126] She recalled two black lawyers who practiced in New Haven. She also knew of black women lawyers, and was aware of Judge Jane Bolin's appointment in New York. She said of these influences, "they were role models for me."[127]

She began her studies at Fisk, and then transferred to New York University after her fist year. She graduated from New York University in 1943 with a bachelor's degree in economics. In 1944, she enrolled at Columbia University Law School and graduated in 1946. While interviewing during her third year, she was slighted by a small midtown firm. She had heard they were hiring recent graduates, but when she came for the interview, "a balding middle-aged white man appeared at a door leading to the reception room and closed the door quickly. The receptionist didn't invite me to sit down. We both knew the interview was over before it began."[128]

She immediately turned her sights to another lead. A black classmate told her that there was a law clerk vacancy at the NAACP's Legal Defense and Educational Fund.[129] She went for the interview and was hired on the spot by Thurgood Marshall.[130] She recalled, "[h]e

123. WASHINGTON, *supra* note 57, at 136.
124. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
125. WASHINGTON, *supra* note 57, at 135.
126. *Id.*
127. *Id.*
128. *Id.* at 136.
129. *Id.* at 136-37.
130. *Id.* at 137.

told me he admired black women who had the courage to enter the legal profession."[131] During her tenure at the NAACP, which lasted from 1946 to 1965, she worked on several important Civil Rights cases, and she worked with several key black attorneys, including Charles Hamilton Houston, who was the dean of Howard University School of Law at the time.

President Johnson nominated her to serve as a federal judge, making her the first black woman judge appointed to the federal bench. She remembers, "I did encounter a few instances of what you might call sexism and racism within the system."[132] She was never appointed to any committee by the chief judge of the court of appeals.[133] Shortly after her appointment to the federal bench, she attended a school for new federal judges. All the new judges were introduced and all their achievements and accomplishments were related to the audience. When the chairman, who was a judge, introduced Judge Motley, he said that she had served on the boards of the United Church Women and YMCA.[134] He did not mention her position as a New York State Senator, her election as the President of the Borough of Manhattan, or her many accomplishments with the NAACP. In her defense, a former United States Supreme Court Justice, Tom Clark, took the microphone and said, "Just wait a minute, Mr. Chairman. I would like to say something about Mrs. Motley."[135] He went on to relay that she had argued many cases before the Supreme Court.

On another occasion, one party asked that Judge Motley recuse herself in a Title VII discrimination case against women. The case involved discrimination against women in a Wall Street firm. She said, "The firm's lawyers asked me to recuse myself because I had been discriminated against. I refused. Fortunately, when it got to the court of appeals I was saved from reversal."[136]

When President Johnson submitted her name for a seat on the United States Court of Appeals for the Second Circuit the opposition was so great that Johnson had to withdraw her name. Judge Motley

131. *Id.*
132. *Id.* at 130.
133. *Id.*
134. *Id.* at 129.
135. *Id.*
136. *Id.* at 143.

said: "This opposition was largely based on my being a woman." Judge Motley opined,

> The opposition was great because I was a woman, I can only guess, since Thurgood had been there and he was Black too. But Lombard and others on the Second Circuit didn't want any women in this milieu. . . . Their attitude pure and simple, was that a woman had no business being there.[137]

Judge Motley died in 2005 at the age of eighty-four. In a tribute to her life and work, the *New York Times* described her as a "tall, gracious and stately woman whose oft-stated goal was as simple as it was sometimes elusive: dignity for all people."[138]

D. First Black Woman Judge of a State Appellate Court

The first black woman judge of a state high court was Judge Julia Cooper Mack, a Howard University School of Law alumnus, who served on the District of Columbia Court of Appeals.[139] She was appointed by President Ford in 1975. In his article about Judge Mack, Professor Derrick Bell, who worked with Judge Mack at the United States Department of Justice, called her "the conscious of the court."[140] Judge Inez Smith Reid, who served with Judge Mack on the District of Columbia Court of Appeals, described Judge Mack in the following way: "Judge Mack's characteristic independence is reflected in the first sentence of her concurrence: 'In joining the disposition . . . , I find it necessary to say in my own words what is, and is not, in issue here.' "[141]

Judge Julia Cooper Mack was born in Fayetteville, North Carolina in 1920, but her story begins long before that with her unique family history. On her father's side, her ancestors had always been successful, free blacks. One of her ancestors fought in the Revolutionary War. Another of her ancestors, John Sinclair Leary, studied law at Howard University and was the second black lawyer to be admitted to

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137. *Id.* at 124-25.

138. Douglas Martin, *Constance Baker Motley, 84, Civil Rights Trailblazer, Lawmaker and Judge Dies*, N.Y. TIMES, Sept. 29, 2005, at B10.

139. Although the District of Columbia is not a state, the District of Columbia Court of Appeals is considered a "state" court and is the highest court for the District of Columbia.

140. Derrick Bell, *A Gift of Unrequited Justice*, 40 HOW. L.J. 305, 305 (1997). This essay was submitted as part of a Howard University School of Law symposium in honor of Judge Julia Cooper Mack. For other essays and articles about Judge Mack, see Symposium, *Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack*, 40 HOW. L.J. 291 (1997).

141. Inez Smith Reid, *The Remarkable Legacy and Legal Journey of the Honorable Julia Cooper Mack*, 8 D.C. L. REV. 303, 349 (2004).

the North Carolina Bar in 1872.[142] Judge Mack's father was a pharmacist and pharmaceutical chemist, and owned several drug stores.[143] Her mother was a public school teacher.[144] Judge Mack grew up hearing the stories of her family history, and undoubtedly drew pride and strength from these stories.

She graduated from Hampton in 1940, and she taught school before moving, several years later in 1946, to Washington D.C. to work as an admissions clerk at Howard University. While working at Howard University, she was influenced and encouraged to attend law school by several people, including Dr. James Madison Nabrit, Jr., who was a professor at the law school, and George Johnson, who was the dean of the law school at the time.[145] They helped her win a scholarship to help pay for school, and Dr. Nabrit allowed her to work part-time in his office.[146]

She became the first black woman attorney for the Department of Justice as well as the first black woman to represent the federal government in argument before the Supreme Court.[147] In 1968, she joined the General Counsel's staff at the Equal Employment Opportunity Commission (EEOC). She gained a lot of recognition in this position. One of her colleagues commented, "Julia Cooper is one of the most brilliant attorneys and skilled administrators I have ever known. She deserves a lion's share of credit for most of the General Counsel's major achievements. She is warm and friendly, a delightful person to have in a position of authority."[148]

E. First Black Woman Judge of a Federal Appellate Court

The District of Columbia's legal system would not be alone in the judicial "racial revolution" described by the *Washington Post* upon Judge Mack's nomination to the District of Columbia Court of Appeals. The federal courts would also experience an unprecedented number of appointments of black judges under President Jimmy Carter who promised to "increase the low representation on the Federal bench of women, [B]lacks, Hispanics, and other minorities."[149]

142. *Id.* at 307; SMITH, *supra* note 22, at 202.
143. *Id.* at 312.
144. *Id.*
145. Bell, *supra* note 140, at 309.
146. Reid, *supra* note 141, at 317.
147. Bell, *supra* note 140, at 309.
148. Reid, *supra* note 141, at 324.
149. State of the Union, *supra* note 61.

President Carter appointed Amalya Kearse to the United States Court of Appeals for the Second Circuit in 1979, making her the first black woman to sit on a federal appeals court. At forty-two, she was one of the youngest persons to sit on the Second Circuit.[150]

The *New York Times* described her as a "person of apparent contradictions."[151] The article went on to say:

> She loves physical activity, yet has chosen the contemplative path. Strangers are struck by her reserved demeanor, but those who know her well speak of her warmth. She is enthusiastic about her avocations and is a tournament bridge player, yet her work weeks stretch to 100 hours, leaving her little time for diversion.
>
> Her nomination is a result, in part, of President Carter's desire to have more blacks and women on the Federal bench; yet Miss Kearse is not particularly identified with championing women's causes or those of blacks.[152]

Judge Amalya Kearse was born in 1937, in Vauxhall, New Jersey. Her father was a postmaster, and her mother practiced medicine & later became an antipoverty official. Judge Kearse told the *New York Times*, "My father always wanted to be a lawyer. The Depression had a lot to do with why he didn't. I got a lot of encouragement."[153] She attended Wellesley College and majored in philosophy. There, she took a course in international law, which sparked her interest in pursuing a legal career. She said, "I decided I wanted to be a litigator. I can trace that back to a course in international law at Wellesley. There was a moot court, and I found that very enjoyable."[154]

In 1959, she attended University of Michigan Law School and graduated in 1962 near the top of her class. While in law school, she was a research assistant for one of her professors, John Reed, who spoke very highly of her. He said, "Her research for me was of uniformly high quality and met or exceeded all my expectations. She did excellent academic work, yet maintained a very full life including many kinds of activities." Professor Reed was speaking of the fact that Judge Kearse was very athletic. He remembered, "She was always the best player on the court" when he invited her to join tennis games with himself and other faculty.[155]

150. Tom Goldstein, *Amalya Lyle Kearse*, N.Y. TIMES, June 25, 1979, at B2.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

Professor Reed was not alone in his praise for Judge Kearse's mental and athletic abilities. After she graduated, she became a trial lawyer at Hughes, Hubbard & Reed, in New York. In 1969, she became the first female partner of a major Wall Street firm, and at thirty-two, one of the youngest.[156] A senior partner at the firm said, "She became a partner, not because she is a black, but because she is just so damned good—no question about it." Another colleague who worked with Judge Kearse on a case that went to the Supreme Court said, "I don't know of an appointment that I have been so enthusiastic about in quite some time." Judge Kearse played on the firm's softball and basketball teams and was described as "agile." She even played tennis with the New York City Mayor David Dinkins, but stopped because she thought she might have to hear an appeal involving the city.[157]

In addition to professors and colleagues, Presidents were also impressed by Judge Kearse. Presidents Reagan, Bush Sr. and Clinton considered Judge Kearse for the Supreme Court. In 1993, the *Wall Street Journal* wrote an article about her because she was "the lawyers' favorite" for the Supreme Court. The article stated:

> Judge Kearse has won the support of liberals and conservatives because she doesn't fit conventional definitions. She is seen by Republicans as a cautious judge who is well-versed on securities issues, and Democrats note that she isn't afraid to take their side on social issues.[158]

Other people have also spoken out about her being a great choice for the Supreme Court. One of her colleagues who felt that she had served with "extraordinary distinction" went so far as to write an editorial in the *New York Times* stating that, "what is needed is an appointment that can unify the country in the assurance that the next Supreme Court nominee is a person of unquestioned excellence. Judge Kearse is that person."[159] Yale Kamisar, a professor at the University of Michigan, stated in the American Bar Association Journal:

156. Lee Katterman, *Amalya Lyle Kearse: Judge's Robe Cloaks an Individual of Many Talents*, Apr. 1999, http://www.drda.umich.edu/news/michigangreats/kearse.html.

157. Jonathan M. Moses, *Judge Kearse is Colleagues' Pick as Next Supreme Court Justice*, WALL ST. J., June 14, 1993, at B5.

158. *Id.*

159. Jon O. Newman, Op-Ed., *A Replacement for Thomas*, N.Y. TIMES, Oct. 10, 1991, at A27.

> There are a lot of outstanding persons I would like to see on the Court. Amalya Kearse is unique because she's the only person whose name is on the lists of both Republicans and Democrats.
>
> She's not really political. She was one of the first black women in a Wall Street firm. She's very bright, open-minded, and judicious."[160]

A *New York Times* article said that Judge Kearse was "viewed coolly by some women's groups, who do not embrace her as a feminist."[161] However, in the 1980s she was one of eight candidates put forward by the National Women's Political Caucus for consideration by President Reagan for possible replacement of Justice Potter Stewart.[162] As far as her allegiance to "black issues," the *New Republic*, explained: "Black groups . . . have failed to rally behind Amalya Kearse of New York because they understand that the reclusive former corporate lawyer is unlikely to be a crusader for the civil rights establishment."[163]

Judge Kearse was never nominated to the United States Supreme Court. She remained on the United States Court of Appeals for the Second Circuit and assumed senior status in 2002.

IV. PROFILES OF TODAY'S BLACK WOMEN APPELLATE JUDGES

Several black women appellate judges have followed in the footsteps of Julia Cooper Mack and Amalya Kearse in the thirty years since these first black women were appointed to appellate level courts. In the federal appellate courts, President Carter appointed one black woman judge to the Federal Courts of Appeals, Amalya Kearse (2nd Cir).[164] President Clinton appointed three black women judges to the federal appellate courts: Johnnie B. Rawlinson (9th Cir.), Judith Ann Wilson Rogers (D.C. Cir.), and Ann Claire Williams (7th Cir.).[165] President George W. Bush appointed two black women to federal appellate courts, Janice Rogers Brown (D.C. Cir.) and Allyson Kay Duncan (4th Cir.).[166] Currently, there are five black women judges

160. Paul Marcotte, *Whom Would You Pick?*, 72 A.B.A. L.J. 34, 36 (1986).
161. Gwen Ifill, *Clinton's Style Means a Slow Process in Picking a Supreme Court Nominee*, N.Y. TIMES, May 5, 1994, at B10.
162. Ellen Dennis French, *Amalya Lyle Kearse*, *in* 12 CONTEMPORARY BLACK BIOGRAPHY: PROFILES FROM THE INTERNATIONAL BLACK COMMUNITY 103 (Shirelle Phelps ed., 1996).
163. *The Final Two*, THE NEW REPUBLIC, May 23, 1994, at 9.
164. Federal Judges Database, *supra* note 69.
165. *Id.*
166. *Id.*

actively sitting on the federal appellate bench, representing a mere three percent of federal appellate judges.[167]

In the intermediate appellate level state courts and state high courts, even more progress is evident.[168] There are currently six black woman judges sitting on state high courts, which include Chief Justice Peggy A. Quince of Florida, Justice Bernette Joshua Johnson of Louisiana, Justice Patricia Timmons-Goodson of North Carolina, and three judges on the District of Columbia Court of Appeals: Judge Inez Smith Reid, Judge Anna Blackburne-Rigsby[169] and Judge Phyllis D. Thompson. Black women judges represent less than two percent of judges on state courts of last resort.[170]

More black women judges are achieving the rank of Chief Judge. In 2009, Leah Ward Sears ended her term as Chief Justice of the Georgia Supreme Court. The District of Columbia Court of Appeals has had two black women chief judges, beginning with Judith Ann Wilson Rogers in 1988[171] and Annice Wagner in 1994.[172] The Louisiana Fourth Circuit Court of Appeals is headed by Chief Justice Joan Bernard Armstrong. The Georgia Court of Appeals also has a black woman chief judge, Chief Judge Yvette Miller. The Missouri Court of Appeals for the Eastern District has a black woman serving as chief judge, Chief Judge Nannette A. Baker.

Currently, black women judges represent approximately two percent of the state appellate judiciary.[173] Out of approximately 319 state high court positions, six are filled with black women judges. Out of approximately 969 state intermediate appellate court positions, twenty-seven are filled with black women. Thirty-six states do not have any black women judges at the appellate level. California has

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167. *Id.* As of October 2009, the database showed that there are 159 current active United States Court of Appeals judges.

168. Although the National Association of Women Judges keeps statistics on women judges and the American Bar Association has statistics on black judges in state courts, statistics on black woman judges in state courts was difficult to locate. The number of black women judges on state appellate courts was gathered from a publication by the American Judicature Society ("AJS"), *Diversity of the Bench*, AJS, http://judicialselection.us/judicial_selection/bench_diversity/index.cfm?state= (last visited Dec. 15, 2009). The figures in the AJS publication were based on the American Bar Association's Directory of Minority Judges of the United States, 4th ed. (2008).

169. The author.

170. There are 319 seats on state courts of last resort. *See Diversity of the Bench*, *supra* note 168.

171. Federal Judges Database, *supra* note 69.

172. Carrie Golus, *Annice Wagner*, *in* 22 CONTEMPORARY BLACK BIOGRAPHY: PROFILES FROM THE INTERNATIONAL BLACK COMMUNITY 183 (Shirelle Phelps ed., 1999).

173. *See* Appendix C.

had four black women judges but has not had a black women judge since 2007.

While the number of black women judges at the appellate level has increased from thirty-five years ago, the numbers still remain low if the goal is to have a diverse and representative judiciary. Black women judges bring to the appellate bench the depth of their experiences and backgrounds. To see just how diverse these experiences and backgrounds can be, the next section will explore a few of the black women judges who have served and are currently serving on state and federal appellate courts.

A. Chief Justice Peggy Quince

The Honorable Peggy A. Quince is the first black woman appointed to the Florida Supreme Court, where she has served as Chief Justice since 2008. She was appointed to the Florida Supreme Court in 1998 by then-Governor-elect Jeb Bush and Governor Lawton Chiles. Prior to this appointment, Chief Justice Quince accepted an appointment as a hearing officer in Washington, D.C. (1975), entered private practice in Norfolk, Virginia (1977), opened a law office in Bradenton, Florida (1978), and became an Assistant Attorney General in the Criminal Division of the Attorney General's Office (1980-1993), before she became the first black woman to be appointed to Florida's Second District Court of Appeal in 1993.[174]

When Justice Quince was invested as a Supreme Court Justice, she reserved seats for children from her hometown because she wanted them to see the heights that they could achieve.[175] She continues to focus on children now that she is Chief Justice of her court. In an interview with the *St. Petersburg Times*, Chief Justice Quince was asked what area she planned to emphasize during her administration. She stated, "One thing of real interest to me right now concerns our young people who are aging out of foster care. We have a large number of them every year, and many of them are really not prepared to be on their own. We need to explore whatever methods we can find to really address the kind of issues they need to know about when they go out on their own."[176]

174. 2006 Margaret Brent Awards, Peggy A. Quince, http://www.abanet.org/women/bios/quince.pdf (last visited Dec. 15, 2009).

175. *Id.*

176. Jennifer Liberto, *Turnover Doesn't Bother Chief Justice*, ST. PETERSBURG TIMES, June 26, 2008.

Chief Justice Quince has experienced some challenges. She recalls that prior to being a judge, her career as a lawyer had been spent as a criminal lawyer and an appellate lawyer.[177] Most of her other colleagues had civil backgrounds. She also did not have experience as a trial court judge. She worried that her non-traditional path to the appellate bench would be a barrier.[178] However, she realized that criminal law contains many aspects that translate into other areas. Her colleagues seemed to agree that her background lends itself well to being a Florida Supreme Court Justice as shown when they unanimously elected Justice Quince to lead their court as Chief Justice.[179] Another challenge Justice Quince faces is battling with the legislature. For example, when the court ruled that a state statute was unconstitutional, the judges were labeled as "activist judges" who legislate from the bench.

Chief Justice Quince believes she has made the right choice in her decision to pursue the law and become a judge.[180] She was inspired to pursue a legal career by the events of the 1960s and 1970s, including the Kent State killings, college sit-ins and the Vietnam War. Back then—and even after she became a lawyer—Chief Justice Quince did not know any black lawyers or judges. Today, most know Chief Justice Quince as the first black woman to head the Florida Supreme Court or any branch of state government.[181] She feels that having black women judges at the appellate level makes a difference. She says, "Just your mere presence makes people stop and listen. Your colleagues may not agree and your perspective may not make a difference in the particular case at issue, but it opens the minds of your colleges to different perspectives."[182] Chief Justice Quince is proud that she is able to say that she "was at the table and brought a perspective to the table that would not otherwise have had a voice."[183]

177. The biographical information in this section is based primarily on the author's telephone interview with Chief Justice Peggy Quince (Dec. 8, 2009).
178. Interview with Peggy Quince, Chief Justice, Florida Supreme Court (Dec. 8, 2009).
179. *History Making Week for Black Americans*, JACKSONVILLE FREE PRESS, Mar. 20, 2008, at 1.
180. Interview with Peggy Quince, *supra* note 178.
181. *History Making Week for Black Americans*, *supra* note 179, at 1.
182. Interview with Chief Justice Peggy Quince, *supra* note 178.
183. *Id.*

B. Honorable Judge Ann Claire Williams

The Honorable Anne Claire Williams was appointed to the United States Court of Appeals for the Seventh Circuit by President Clinton in 1999. She became the first black judge ever appointed to the Seventh Circuit. Prior to her appointment to a federal appeals court, Judge Williams clerked for the Honorable Robert A. Sprecher at the United States Court of Appeals, Seventh Circuit (1975),[184] worked as an Assistant United States Attorney in Chicago, Illinois (1976-1985), became the Deputy Chief of the Criminal Receiving and Appellate Division of the US Attorney's Office (1980-1983),[185] led the Organized Crime Drug Enforcement Task Force as Chief of the Northern Central Region (1983-1985), and was appointed to the United States District Court for the Northern District of Illinois by President Ronald Reagan (1985-1999).

Judge Williams has contributed much to the international legal community. In 2002 and 2003, she led delegations to Ghana to train its judiciary in areas such as judicial ethics, case management, and alternative dispute resolution.[186] In 2007, she led a delegation in Liberia for Lawyers without Borders where she taught advocacy skills to Liberian magistrate judges, prosecutors, and defense attorneys.[187] She has also served as a member of training delegations to the International Criminal Tribunal for Rwanda in Arusha, Tanzania, and the Tribunal for the former Yugoslavia at the Hague, where she taught trial and appellate advocacy courses to prosecutors.[188]

C. Chief Judge Nannette Baker

The Honorable Nannette Baker is Chief Judge of the Missouri Court of Appeals for the Eastern District. She was appointed to the Missouri Court of Appeals in 2004, and was retained by election in 2006. She became a circuit judge in St. Louis in 1999. Prior to becoming a judge, she worked in private practice and served as a law clerk

184. She was one of the first two black law clerks in that court. Avon Center for Women and Justice at Cornell Law School, Hon. Ann Claire Williams, http://www.lawschool.cornell.edu/womenandjustice/aboutus/whoweare/steering/index.cfm (last visited Feb. 25, 2010) (follow "Hon. Ann Claire Williams" hyperlink).

185. Judge Williams was the first black woman to serve as supervisor in that office. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

for the Honorable Judge Odell Horton[189] at the United States District Court for the Western District of Tennessee. Before pursuing a legal career, Chief Judge Baker was a journalist for thirteen years.[190] She believes that this prior career "bring[s] the strength of understanding what ordinary people are looking for or what they want from the courts."[191] She also wants to use her former media connections to help the public better understand the role of the appellate courts.[192] She said, "I think it is very important for people to know how we make decisions and what our job entails and to learn more about the third branch of government."[193]

Chief Judge Baker is called a "consensus-builder" by her colleague on the court, Judge Mary Hoff.[194] Chief Judge Baker is not always certain about how a case should turn out, and admits that "sometimes, during the decision-making process, there is more pondering."[195] But she says, "that's what makes the job fun, trying to figure out what the right answer is, in accordance of the law and the facts of the case."[196]

Chief Judge Baker is an example and proponent of diversity. She is the first black woman to preside over a Missouri state court. She understands that she is an inspiration to the black community. She said, "To the African-American community, it's a positive sign that you see African-Americans in leadership of the court."[197] She wants to use her position as chief judge and chair of the judicial commissions that select trial judges, to encourage more diverse candidates to apply for judgeships. She explained, "I probably am a little more sensitive to diversity needs than someone who's not a black woman." Yet, she keeps a balanced view of diversity and realizes that it encompasses more than race and gender and extends to having a variety of legal

189. Judge Odell Horton was the first black federal judge appointed in Tennessee since Reconstruction.

190. Nannette Baker: The Judge Is a Vol, May 18, 2009, http://alumnus.tennessee.edu/2009/05/nanette-baker-the-judge-is-a-vol.

191. William Stage, *Q&A with Judge Nannette Baker*, ST. CHARLES COUNTY BUS. REC., Sept. 3, 2007.

192. Charles Emerick & Kelly Wiese, *A First for Appellate leaders in Missouri*, ST. CHARLES COUNTY BUS. REC., July 1, 2008.

193. Stage, *supra* note 191.

194. Scott Lauck, *Is Mo.'s Groundbreaking System for Choosing Judges Under Attack?*, MISSOURI LAWYERS WEEKLY, Jul. 30, 2007.

195. Stage, *supra* note 191.

196. *Id.*

197. Emerick & Wiese, *supra* note 192. Chief Judge Baker was also referring to the recent appointment of another black judge, Judge Thomas Newton as Chief Judge of the Missouri Court of Appeals Western District. *Id.*

experience.[198] For Chief Judge Baker, she does not see her status as a black woman having a negative effect on her role as a judge. She believes that "once you put the black robe on, lawyers give you a level of respect regardless of your race or gender."[199]

D. Honorable Chief Justice Leah Ward Sears (Ret.)

The Honorable Leah Ward Sears recently retired from her position as Chief Justice of the Georgia Supreme Court. When then-Governor Zell Miller appointed Chief Justice Sears, she became the first woman and the youngest person ever to become a Georgia Supreme Court Justice. In 2005, she became Chief Justice of the court, making her the first black woman Chief Justice of a state high court outside the District of Columbia. Prior to becoming a Georgia Supreme Court Judge, Chief Justice Sears worked as a trial lawyer in private practice (1980-1985). She became a part-time judge in the Atlanta City Traffic Court in 1982, and became a full time judge in the same court in 1985. She then became a judge on the Superior Court of Fulton County (1988-1992). She currently practices as a Partner at Schiff Hardin, LLP, in Atlanta, Georgia.

Chief Justice Sears was also the first woman to win a contested statewide election in Georgia. She notes that her accomplishments as a chief judge and as a black woman have really impacted people of her father's generation. She stated, "[H]e was shocked at the opportunity that was breaking forth for his daughter. I think, racially, he was surprised. He would really be floored that Barack Obama was elected president. But he would have been equally floored at the progress of this state, not because of my qualifications, but because the people of this state could accept somebody like me as their chief justice."[200] Even United States Supreme Court Justice Clarence Thomas, who attended her investiture as Chief Judge of the Georgia Supreme Court remarked, "I never thought in my lifetime I would be able to witness a black woman as a chief justice of the state of Georgia's Supreme Court."[201]

198. Emerick & Wiese, *supra* note 192.

199. Nannette Baker: The Judge Is a Vol, *supra* note 190.

200. Chief Justice Leah Ward Sears, *First Person Leah Ward Sears, Chief Justice of the Georgia Supreme Court*, THE ATLANTA JOURNAL—CONSTITUTION, June 21, 2009, at E.1.

201. Krissah Thompson, *Supreme Court Prospect has Unlikely Ally*, WASH. POST, May 10, 2009.

She has a special concern for families and children involved in the court system. In an address she gave in 2008, Justice Sears stated, "As a judge, I am often frustrated that I must work within a [judicial] system designed only to pick up the pieces after families have fallen apart or failed to come together at the detriment of their children."[202] After retiring from the Georgia Supreme Court, she returned to private practice as a partner at Schiff Hardin, LLP, in Atlanta, Georgia.

E. Honorable Judge Annice Wagner

The Honorable Annice Wagner is a senior judge on the District of Columbia Court of Appeals. In 1994 she was appointed Chief Judge of the District of Columbia Court of Appeals. In an interview with *Ebony Magazine*, Chief Judge Wagner stated, "As chief justice you have an opportunity, working with bench and bar, to improve the court's approach to administering justice . . . . As we become a more diverse society, fairness and access to justice will become even more important issues. An African-American chief judge is in a unique position to address these issues."[203] Chief Judge Wagner began her career as a lawyer for Houston & Gardner (1964-1973), then became the General Counsel for the National Capital Housing Authority (1973-1975), making her the first woman to serve in this position. She was People's Counsel for the District of Columbia from 1975-1977 before beginning her judicial career as an Associate Judge in the Superior Court of the District of Columbia (1977-1990). She became a senior judge in 2005.

F. Honorable Judge Judith Ann Wilson Rogers

The Honorable Judith Ann Wilson Rogers is a judge on the United States Court of Appeals for the District of Columbia. She was appointed by President Clinton in 1994, making her the first black woman appointed to that court. She began her legal career in public service. After graduating from Harvard Law School in 1965,[204] she clerked at the Juvenile Court of the District of Columbia. She then worked as an Assistant United States Attorney for the District of Columbia (1965-1968), as a Staff Attorney for the San Francisco Neigh-

202. Address by Justice Leah Ward Sears '76, Mar. 14, 2008, http://www.cornell.edu/video/index.cfm?VideoID=246.

203. Kevin Chappell, *Record Number of Black Chief Justices*, EBONY, Oct. 1997, at 122.

204. Judge Ann Wilson Rogers was the first black woman to graduate from Harvard Law School.

borhood Legal Assistance Foundation (1968-1969), as a trial attorney in the Criminal Division of the United States Department of Justice (1969-1971), and then as General Counsel to the Congressional Commission on the Organization of the District Government (1971-1972). She worked in the Office of the Mayor of the District of Columbia, first as the Legislative Program Coordinator for the Office of the Assistant to the Mayor-Commissioner, then as the Special Assistant for Legislation (1972-1979). Prior to becoming a judge, Judge Rogers also worked as Assistant City Administrator for Intergovernmental Relations and served as a Corporation Counsel for the District of Columbia (1979-1983). President Ronald Reagan appointed Judge Rogers to the District of Columbia Court of Appeals in 1983 where she served as the first black woman Chief Judge of that court from 1988 to 1994, before accepting her nomination to the District of Columbia Circuit Court in 1994.

G. Honorable Judge Inez Smith Reid

The Honorable Inez Smith Reid is an Associate Judge on the District of Columbia Court of Appeals. She was appointed by President Clinton in 1995. She faced several challenges in her legal career because she was both a woman and a minority. One of the biggest obstacles Judge Reid faced in her legal career was coping with a male dominated law school.[205] Judge Reid attended Yale Law school from 1959 until 1962. She also earned her LLB from Yale Law School in 1962. At law school, there were never more than four women in her class and even fewer minorities. For Judge Reid, the male orientation was very noticeable. First, women law students could not stay in the law school dorms, but were farmed out to the university dorms. Women law students were also "relegated to a separate lounge" that was located in the basement. Additionally, there was a course that women could not enroll in because it was held off-campus at a men's club that would not allow women to enter. Judge Reid especially remembers one professor who took great pleasure in starting the class by addressing the "gentlemen" of the class, while looking directly at her.[206]

205. The biographical information in this section is based primarily on the author's interview with Judge Inez Smith Reid. *See infra* note 206. The Historical Society of the District of Columbia Circuit is interviewing Judge Reid for inclusion in its Oral History Project.

206. Interview with Judge Inez Smith Reid, Associate Judge on the District of Columbia Court of Appeals (Jan. 13, 2010).

Judge Reid remarked that "these obstacles made me more determined to get an education."[207]

Judge Reid faced another obstacle when she tried to enter the legal job market. In her third year of law school, the Associate Dean called Judge Reid and her twin brother George Bundy Smith[208] into his office. The Dean explained that they probably would not find employment at firms like their other classmates. He suggested that they broaden their job search, so Judge Reid interviewed for government jobs. At one interview, she was turned away because the judge took male clerks one year and female clerks the alternate year. The year Judge Reid interviewed was the "male year," and so she was not offered a job. At another job interview, she was told that the job would be given to a male graduate at Howard University School of Law because "he needed the job more because he would have to support a family."

Judge Reid received a grant from the Ford Foundation (supplemented by the Congolese government) to help establish a law library in the Congo (Leopoldville, now Kinshasa) and to serve as a Lecturer in Criminal Law at l'Ecole Nationale de Droit et d'Administration. When she returned to the United States, she decided to pursue a career in education. She started studying for her doctorate at Columbia University in 1965 while she was an Assistant Professor of African Studies and Political Science at the State University of New York at New Paltz, New York. She taught political science at Hunter College in New York City before serving as an Instructor and Associate Professor at Brooklyn College, beginning in 1966. She took a position as an Associate Professor of Political Science at Barnard College, Columbia University in 1971.

In 1976, she turned her attention to pursuing a legal career. She went into government service and became General Counsel for the New York State Executive Department in the Division for Youth (1976-1977), Deputy General Counsel for the United States Depart of Health, Education and Welfare (1977-1979), Inspector General of the Environmental Protection Agency (1979-1981), Chief of the Legislation and Opinion Section of the Corporation Counsel of the District of Columbia (1981-1982), Deputy Corporation Counsel in the Legal Counsel Division (1982-1983), and Corporation Counsel for the Dis-

207. *Id.*

208. Judge Inez Smith Reid's twin brother was an Associate Judge of the New York Court of Appeals from 1992 to 2006. Currently, he is a Partner at Chadbourne & Park, LLP.

trict of Columbia (1983-1985). She returned to academia in 1985 as Visiting Professor of Law, University of West Virginia, before entering private practice of law in 1986.

Judge Reid's mentors include the first black woman federal judge, Judge Constance Baker Motley, and the first black woman judge of a state high court, Judge Julia Cooper Mack. Judge Reid worked for Judge Mack during her summer internships at the NAACP Legal Defense and Education and Educational Fund in 1962, 1963, and 1964. Judge Reid said that Judge Motley "was very dedicated to the concepts of justice and equality." When Judge Reid was appointed to the District of Columbia Court of Appeals, she joined Judge Annice Wagner on the bench, who was her former high school classmate. Judge Reid remembered that Judge Wagner "tendered very valuable advice to me when I joined the bench." Judge Reid was also mentored by Judge Mack, who "took it upon herself to become a good mentor to me." In tribute to Judge Mack, Judge Reid published a law review article chronicling Judge Mack's life and legacy.[209]

H. Honorable Judge L. Pricilla Hall

The Honorable L. Priscilla Hall was appointed Associate Justice of the Appellate Division, Second Department, of the New York State Supreme Court by Governor David Patterson[210] in 2009. She began her legal career after graduating from Columbia University School of Law as a corporate attorney for General Electric. She then began her career in public service by becoming Assistant District Attorney in New York County (1974-1979), Inspector General of the New York City department of Employment (1979-1982), Assistant Attorney General, for the New York State Department of Law (1982), and returning as Inspector General of the New York City Human Resources Administration (1982-1986). She commenced her judicial career in 1986 after being appointed judge to New York City Criminal Court (1986-1990). She went on to serve as acting justice to the New York State Supreme Court in Kings County (1990) and as a judge in the New York State Court of Claims (1990-1994). She was then elected Justice of the Second Judicial District of the New York State Supreme Court (1994-2008) and finally appointed as the Administrative Judge

209. *See* Inez Smith Reid, *The Remarkable Legacy and Legal Journey of the Honorable Julia Cooper Mack*, 8 UDC/DCSL L. REV. 303, 349 (2004).

210. David Patterson is the first black governor of New York. Raymond Hernandez & Jeff Zeleny, *Paterson Says He Will Run, Rejecting Call From Obama*, N.Y. TIMES, Sept. 20, 2009.

of the Kings County Supreme Court in the criminal division (2008-2009).

I. Judge Mary McDade

The Honorable Mary McDade was elected to the Illinois Appellate Court, Third District, in 2002. She became the first black woman elected to the Appellate Court outside of Cook County. Judge McDade began her legal career later in life. She started law school in 1981 at age forty-one and she later described her law school years as "probably the most grueling regimen I have ever undertaken."[211] After graduating from law school, she clerked for Judge Michael Mihm (1984-1986), at the United States District Court for the Central District of Illinois, in Peoria, Illinois. She then joined Quinn, Johnston, Henderson & Pretorius (1986-2000), where she became a partner in 1991.

Judge McDade was inspired by the accomplishments and activism of her family "who were in the civil rights vanguard when it was life-threatening to be involved and active."[212] Her father was a doctor, and he became the first black faculty member hired at the University of Michigan. He was always outspoken about civil rights, and he later became the first black mayor of Ann Arbor, Michigan. Her mother, who had earned a master's degree, was very active in the NAACP, serving as president of the Ann Arbor Chapter. Following her parents' example, Judge McDade helped found the University of Michigan chapter of the NAACP in 1960 and was active with the Young Democrats. When she decided to pursue a legal career at the age of forty-one, she was active in her community and was the first black person to be elected to the Peoria Board of Education and the first woman to chair the Eureka College Board of Trustees.

Judge McDade encountered several challenges during her campaign for the Illinois Appellate Court. She recalled, "The prospect of running for office is daunting because of the potential for enormous expenditure of money and, perhaps even more, because unscrupulous office-seekers and their supporters are often wholly unfettered by either truth or decency."[213] Another challenge she encountered during

211. *An Interview with Judge Mary McDade*, THE PEORIA WOMAN, Mar. 2002, *available at* http://www.peoriamagazines.com/tpw/2002/mar/interview-judge-mary-mcdade (last visited Feb. 25, 2010).
212. *Id.*
213. *Id.*

her campaign was that of an uninformed electorate. She was surprised that "many people had never even heard of the appellate court and . . . had no concept of its role in our system of justice."[214] She hopes that "women, as relative newcomers to the field, [will] have the vision and ability to raise the standard for political campaigning" and that "we can find a way to remedy the lack of knowledge about the appellate court."[215] Looking back on her decision to pursue a career in the law, Judge McDade said, "While I have sometimes lamented the stress and begrudged the hours taken from other things which were important to me, I have never had any serious regrets."

CONCLUSION

This historical review of black women judges leads me to reflect on my own judicial experiences and my own personal role model. I stand proudly as a daughter of a judge, Judge Laura D. Blackburne and together my mother and I formed the first sitting mother-daughter judicial team in the country.[216] Like many of the black women mentioned in this Article, my mother is a true public servant. She began her career as a teacher, and then worked in various positions in New York City government, including Assistant to the Mayor John V. Lindsay, before deciding to return to school to study law. She graduated from law school the same year I graduated from high school. Certainly, her choice to pursue her dream of attending law school influenced my decision to enter law school, pursue a legal career, as well as a judicial career and ultimately serve on the District of Columbia Court of Appeals. After law school, my mother headed the Institute for Mediation and Conflict Resolution in New York City. She was then appointed by Mayor David N. Dinkins as Chair of the New York City Housing Authority, the largest public housing authority in the nation. In 1995, she was elected to the New York City Civil Court and in 1999 she was elected to the New York State Supreme Court. One of my proudest moments was when my mother helped to administer my judicial oath when I first became a trial judge on the District of Columbia Superior Court in 2000. She retired in 2006, the same year I was appointed by President Bush to serve on the District of Columbia

214. *Id.*

215. *Id.*

216. *Swearing In Marks First Mother-Daughter Judicial Team Appointed in U.S.*, JET, Sept. 25, 2000, at 4.

Court of Appeals. It was almost as if she symbolically passed the mantle of judicial service on to me.

On the District of Columbia Court of Appeals, I am currently one of three black women judges, and we all bring very different professional backgrounds, life experiences, and judicial voices to the table. Judge Inez Smith Reid graduated from Yale Law School in the 1960s at a time when very few women were attending law school. She worked in private practice, in state and federal government agencies, and in academia before becoming a District of Columbia Court of Appeals Judge. Judge Phyllis Thompson, on the other hand, earned a Master's degree in Religion in the 70s before pursuing a career in the law and graduating from law school in the early 1980s. She worked in private practice and obtained the distinction of being the first black women partner at her law firm, Covington & Burling, LLP, before becoming a Judge on the District of Columbia Court of Appeals. Finally, I completed law school in the late 1980s. I worked in private practice at a large law firm, Hogan and Hartson, LLP, and in local government for the District of Columbia Office of the Corporation Councsel, before beginning a judicial career at the relatively young age of thirty-five. I served as a Magistrate Judge on the Superior Court of the District of Columbia for five years and as a trial judge on the District of Columbia Superior Court for six years before being appointed to serve on the District of Columbia Court of Appeals. Our varied experiences illustrate the necessity of having a "critical mass" of black women on our nation's state and federal appellate courts so that no single black woman feels "isolated or like [a] spokesperson[ ] for [her] race [and gender]."[217]

On this historical journey of black women judges to the nation's highest courts, I have made more observations than conclusions. I have noted that black women judges came to the "judicial" table much later than black men (by more than eighty years) and also much later than white women (by almost sixty years). I have seen that being both black and female brings an important additional voice to the deliberative process, but that voice is varied because there is no singular "black woman" perspective.

I have also observed that the court on which I serve has in many ways achieved the type of diversity to which groups such as the Amer-

217. Grutter v. Bollinger, 539 U.S. 306, 318-19 (2003) (referring to the testimony of the Dean of the University of Michigan Law School, Jeffrey Lehman, explaining why obtaining a critical mass of minority students was important to the school educational mission).

ican Bar Association aspire. I sit on a court where one-third of the judges are black women, in a jurisdiction (the District of Columbia) where approximately one-third of the population is comprised of black women.[218] And I have observed that while there have been significant advances in increasing the diversity of judges serving on state and federal courts, appellate courts in other states have not yet met this goal of a diverse judiciary. In the United States, where approximately 8.2% of the population is comprised of black women,[219] there are still many states and federal jurisdictions that have no black women sitting on the state appellate courts or the federal appellate courts within those states. There are thirty-seven states that do not have any black women judges serving on their intermediate appellate courts or their state high courts. Further, out of the thirteen federal appellate courts, only four currently have black women judges.

Finally, I have noticed that while state and federal organizations track the numbers of black judges as a group, or women judges as a group, few, if any, track the numbers related specifically to black women judges at the intersection of race and gender. This makes it difficult to isolate the numbers of black women judges, which in turn makes it difficult to advocate for steady increases in this subset of judges. I have not yet determined what these observations actually mean. Perhaps, as is my judicial habit, with more deliberation and research, I will be able to form a more precise theory or quantify to a more exacting degree, the value of diversity on our nation's state and federal appellate courts. But for now, I am proud to be a part of the historical legacy and proud to continue on the journey of black women judges on the nation's state and federal courts, optimistic that this journey will continue to enrich the legal discourse and the administration of justice.

218. In 2008, the percentage of black women in the District of Columbia was 29.9%. Interview with Joy Phillips, Associate Director, State Data Center for the D.C. Office of Planning, in Wash., D.C.

219. In 2007, there were 20,629,000 black women living in the United States, representing 8.2% of the population. Interview with Research Librarian, D.C. Public Library, in Wash., D.C. *See also* U.S. Census Bureau, Population Estimates, http://www.census.gov/popest/national/asrh/NC-EST2008-asrh.html (last visited on Feb. 25, 2010) (follow "Annual Estimates of the Black or African American Alone Resident Population by Sex and Age: Excel or CSV" hyperlink).

APPENDIX A:

Black Women Appellate Judges Currently Serving on State Courts

(includes intermediate appellate state courts and state supreme courts as of October 2009)

	Name	Court	Year Appointed or Elected	Notes
1	Peggy Ann Quince	Florida Supreme Court	1999	First African-American woman to sit on the state's highest court; became Chief Judge in 2008
2	Patricia Timmons-Goodson	North Carolina Supreme Court	2006	First African-American woman to sit and the third woman elected to serve on North Carolina's highest court.
3	Bernette Joshua Johnson	Louisiana Supreme Court	1994	ABA Comm'n on Racial and Ethnic Diversity in the Profession will honor her with a Spirit of Excellence Award in 2010; first African-American woman to serve on the Louisiana Supreme Court.
4	Anna Blackburne-Rigsby	District of Columbia Court of Appeals	2006	First mother-daughter judicial pair in the country (Justice Laura D. Blackburne).
5	Phyllis D. Thompson	District of Columbia Court of Appeals	2006	First black woman partner at Covington & Burling, LLP.
6	Inez Smith Reid	District of Columbia Court of Appeals	1995	
7	Sylvia Rita Cooks	Louisiana Court of Appeal, Third Circuit	1992	First black person to serve as a law clerk for the Louisiana Supreme Court.
8	Joan Bernard Armstrong	Louisiana Court of Appeal, Fourth Circuit	1984	Chief Justice since 2003 (first to serve as chief judge); first black woman judge in her court.

	Name	Court	Year Appointed or Elected	Notes
9	Felicia Toney Williams	Louisiana Court of Appeal, Second Circuit	1993	Served as Associate Justice of Louisiana Supreme Court *Pro Tem* from September 1, 1994 through December 28, 1994.
10	Terri Love	Louisiana Court of Appeal, Fourth Circuit	2000	
11	Nikki Ann Clark	Florida Court of Appeals First District	2009	First black and the first woman to serve on Florida's Second Judicial Circuit in Tallahassee.
12	Carole Y. Taylor	Florida Court of Appeals, Fourth District	1998	
13	Karen Fort Hood	Michigan Court of Appeals First District	2002	First black woman to serve on this court.
14	Cynthia Diane Stevens	Michigan Court of Appeals First District	2008	
15	Nathalie Hudson	Minnesota Court of Appeals	2002	
16	Wilhelmina Wright	Minnesota Court of Appeals	2002	
17	Lisa White Hardwick	Missouri Court of Appeals Western District	2001	
18	Nanette Baker	Missouri Court of Appeals Eastern District	2004	Chief Judge; the first black woman to preside over a Missouri state court.
19	Cheryl Lynn Allen	Pennsylvania Superior Court	2007	
20	L. Pricilla Hall	New York Supreme Court, Second Appellate Division	2009	

	Name	Court	Year Appointed or Elected	Notes
21	Cheryl Chambers	New York Supreme Court, Second Appellate Division	2008	
22	Wanda G. Bryant	North Carolina Court of Appeals	2001	
23	Cheri Beasley	North Carolina Court of Appeals	2009	First black woman to win election to statewide office in North Carolina without first being appointed by a governor.
24	Judge Paulette Sapp-Peterson	New Jearsey Appellate Division	2006	First black woman judge to be elevated to the appellate division.
25	Shelvin Louise Marie Hall	Illinois Appellate Court, First District	1999	
26	Bertina E. Lampkin	Illinois Appellate Court, First District, 1st Division	2009	
27	Joy Virginia Cunningham	Illinois Appellate Court, First District, 2nd Division	2006	Elected President of the Chicago Bar Association (2004-05), where she became the first black woman to lead the nation's largest municipal Bar Association.
28	Sharon Johnson Coleman	Illinois Appellate Court, First District, 3rd Division	2008	
29	Mary McDade	Illinois Appeallate Court, Third District	2000	First black woman elected to the Appellate Court outside of Cook County.

	Name	Court	Year Appointed or Elected	Notes
30	Denise Clayton	Kentucky Court of Appeals, Fourth Appellate District, Second Division	2007	First black woman appointed to the Kentucky Court of Appeals.
31	Patricia Blackmon	Ohio Court of Appeal, Eighth Appellate District	1996	First black woman elected to any Court of Appeals for the State of Ohio.
32	Melody Stewart	Ohio Court of Appeal, Eighth Appellate District	2006	
33	M. Yvette Miller	Georgia Court of Appeals	1999	First African-American woman to serve as Chief Judge of the Court of Appeals of Georgia in 2008.

APPENDIX B:

Black Women Appellate Judges Currently Serving on Federal Courts (as of October 2009)

	Name	Court	Year Appointed	Notes
1	Judith Ann Wilson Rogers	United States Court of Appeals, D.C. Circuit	1994	First black woman to sit on the Second Circuit.
2	Ann Claire Williams	United States Court of Appeals, 7th Circuit	1999	First black judge on the Seventh Circuit, first black woman judge appointed to the U.S. District Court for the Northern District of Illinois.
3	Johnnie B. Rawlinson	United States Court of Appeals, 9th Circuit	2000	First black woman to sit on the Ninth Circuit.
4	Allyson Kay Duncan	United States Court of Appeals, 4th Circuit	2003	First black woman judge on the Fourth Circuit; First black president of the North Carolina Bar Association (2003).
5	Janice Rogers Brown	United States Court of Appeals, D.C. Circuit	2005	First black woman judge on the California Supreme Court.

Circuits with no Black Women Judges: 9

1st Circuit
2nd Circuit
3rd Circuit
5th Circuit
6th Circuit
8th Circuit
10th Circuit
11th Circuit
Federal Circuit

APPENDIX C:

Black Women Judges Currently Serving on Intermediate Appellate State Courts and State High Courts (as of October 2009)

Total on State Supreme Courts (courts of last resort): 6
Total State Supreme Court Seats: 319
Percentage: less than 2% (1.880%)

Numbers by States:

Florida (1)
Louisiana (1)
North Carolina (1)
District of Columbia (3)

Total on State High Courts: 33
Total State Supreme Courts and Courts of Appeals Seats: 1291
Percentage: 2.6% (2.556%)

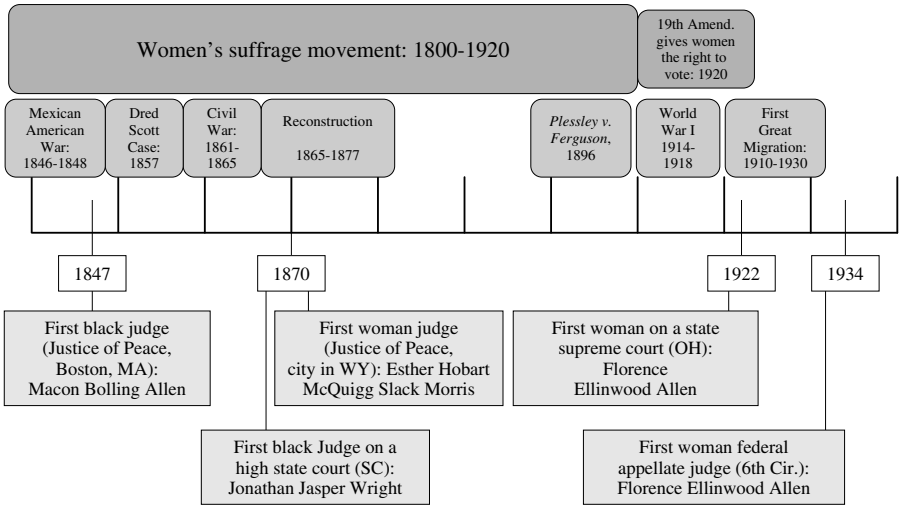
District of Columbia	3	Minnesota	2
Florida	3	Missouri	2
Georgia	2	New Jersey	1
Illinois	5	New York	2
Louisiana	4	North Carolina	3
Kentucky	1	Ohio	2
Michigan	2	Pennsylvania	1

States with no Black Women Judges on State High Courts: 37

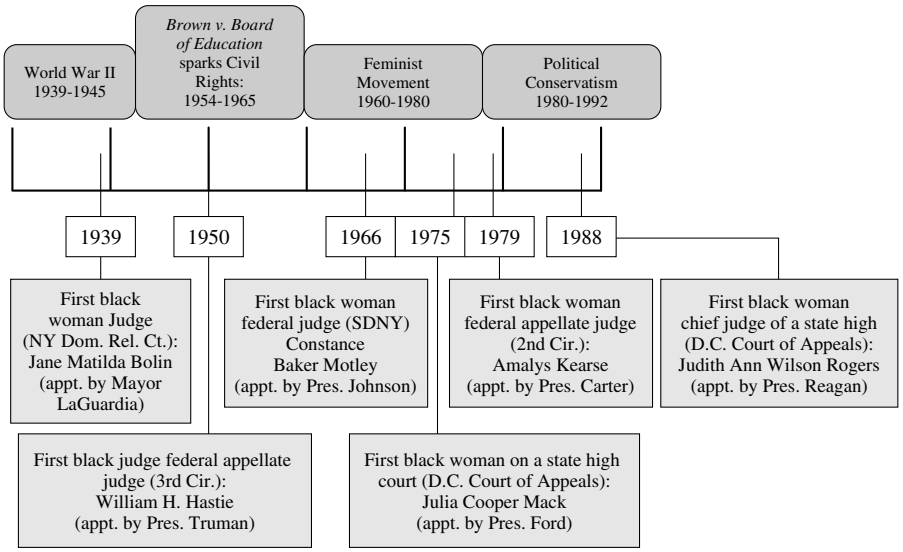
Alabama	Connecticut	Iowa
Alaska	Delaware	Kansas
Arizona	Hawaii	Maine
Arkansas	Idaho	Maryland
California	Indiana	Massachusetts
Colorado		
Mississippi	Oklahoma	Utah
New Mexico	Oregon	Vermont
Montana	Rhode Island	Virginia
Nebraska	South Carolina	Washington
Nevada	South Dakota	West Virginia
New Hampshire	Tennessee	Wisconsin
North Dakota	Texas	Wyoming

APPENDIX D:

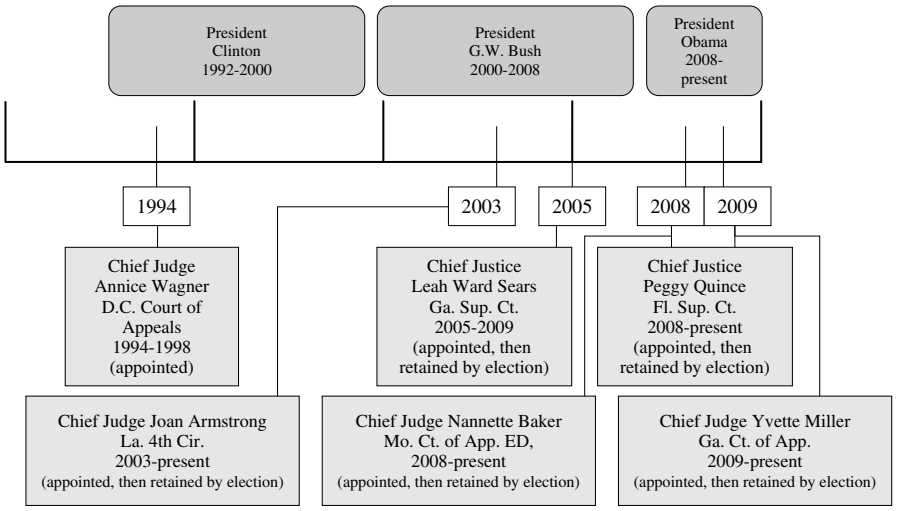
Timeline of the Historical Journey of Black Women to the Nation's Highest Courts: 1840-1940



Timeline of the Historical Journey of Black Women to the Nation's Highest Courts: 1940-1990



Timeline of the Historical Journey of Black Women to the Nation's Highest Courts: 1990-2010



OPINION // EDITORIALS

Campaign donations and the judiciary don't mix [Editorial]

The Editorial Board

April 28, 2019 | Updated: May 10, 2019 4:41 p.m.

CURRENTLY READING
Campaign donations and the judiciary don't mix [Editorial]

stock court judge lawsuit law suit scales of justice law lawyer (Photo: Flickr/Scott*)
Photo: Contributed Photo / ST

We've been asking around about how Texas selects its judges and the responses have been surprisingly uniform. *Dumb. Stupid. The worst.* Just about anyone with a role in the judicial system in Texas thinks we can do better when it comes to how we pick our local and statewide judges.

It's not that Texas' approach is all that unusual. Most states elect at least some of their judges, and even today, after experience shows how partisan fervor can upend the judiciary, Texas is one of 11 states whose judges run in partisan elections. That means, judicial candidates first run in political primaries and then appear on the ballot in November as their party's choice for the seat. But as we wrote Sunday in the first of our three-part series on Texas' messed-up judicial selection, that's screwy. Why would we ask judges to be above political considerations when they issue decisions but then require them to campaign as partisans every time their name goes on a ballot?

Besides, as Harris County's own experience has shown, when politics shift in a county like ours, voters can end up tossing all the judges of one party or another out of office, no matter how good a job they've done. That's what happened in 2018. Every single Republican lost his or her race — whether they were as qualified as their challengers or not.

Judicial reform: A three-part series.

Part one: Partisan elections are the wrong way to choose judges. Texas should keep the election, lose the partisan labels.

Part two: Campaign cash undermines integrity of judicial elections. Elections, partisan or not, still cost money. Public financing, or stricter limits on who can donate, are essential to restoring integrity to judicial selection process.

Part three: Texas Legislature should act now. Short-sighted political gain, by both parties, has stalled previous efforts of judicial reform. Lawmakers have a chance this session to effect change. They should take it.

Some states have seen these same problems and done away with elections altogether. Judges are appointed instead. We made the case Sunday that the better idea is to keep the elections but drop the party labels. Voters have the right to select judges and to own the responsibility of electing a competent judiciary through nonpartisan contests.

But getting rid of partisan elections is not enough to fix our judicial selection problem. There's another problem that is just as serious. Elections are expensive, and anyone who

participates needs a lot of money to make it work. Judges are no exception. Problem is, the people with the most interest in the outcomes of the elections are the same ones spending the most to assert influence. Who are they? The same lawyers and others who find themselves most often in front of the judges.

That can become a recipe for corruption.

In the '80s and '90s, spending on judicial campaigns skyrocketed as civil defense attorneys, plaintiff's lawyers, doctors, insurance companies, and other well-funded interests poured money into races to try elect judges more favorable to their claims. The 1988 Texas Supreme Court elections had 12 candidates vying for six seats and raising $12 million, according to the National Center for State Courts. Over a five-year period starting in 1992, the winning candidates raised over $9 million, with almost half of that money coming from parties linked to cases before the court.

State and national attention, highlighted by appearances on "60 Minutes" and "Frontline," questioned if justice was for sale in Texas. This led to the 1995 Judicial Campaign Fairness Act, which limited contribution amounts for judicial races. The legislation curbed spending somewhat, but experts have concluded that the bigger factor in slowing donations was the emerging dominance of the Republican Party, which led to races being less competitive.

So, while record-breaking spending went away, it doesn't mean big money left these races. In 2018, the six candidates vying for three seats on the Texas Supreme Court raised $2.6 million, most of that still coming from lawyers and lobbyists. At the local level, money still pours in from lawyers and law firms who expect to be in front of the recipients once they are on the bench. Combined 2018 fundraising by candidates for the 1st Court of Appeals and 14th Court of Appeals, both based in Houston, topped $2.8 million.

Judges should never be put in the position of depending on donations from people who already have or are expecting to have business before the court. Nor should lawyers feel

pressure to donate. It's a system ripe with conflicts of interests and it should — and can be — reformed.

There is more than one way to accomplish that. Stricter limits on who can donate and how much would help. But we propose a public funding option for candidates who choose to opt-in, freeing them from having to solicit donations and shielding the courts from the impression that they are corrupt.

A recent study out of North Carolina not only seems to confirm that money has an impact in judicial decisions, it also bolsters the case for public financing. It found that after the state switched to a public funding model in 2002, judges who took public money were 60 percent less likely to rule in favor of donors who had contributed to their previous campaigns.

Public financing isn't cheap, even in states such as North Carolina where public funds are only available to Supreme Court and courts of appeals campaigns. But it's a cost worth covering. After three election cycles, North Carolina's fund — supported by an optional $3 donation on the state's income tax form and a $50 surcharge on lawyers' yearly fees to the State Bar — had spent $1.2 million on voter guides and almost $2 million on campaigns.

Texas has all the authority it needs put stricter caps on donations in judicial races or to publicly finance the campaigns. In a 2015 decision in the case of Williams-Yulee v. Florida Bar, the U.S. Supreme Court found that states have a compelling reason in restricting money in judicial elections.

"Judges are not politicians, even when they come to the bench by way of the ballot," Chief Justice John Roberts wrote. "A state may assure its people that judges will apply the law without fear or favor — and without having personally asked anyone for money."

We couldn't have said it any better. Judges are not ordinary politicians, and Texas should stop making them act like they are every time run for election.

2006

Court Review: Volume 43, Issue 2 – Judicial Reform in Texas: A Look Back After Two Decades

Anthony Champagne

Judicial Reform in Texas:
A Look Back After Two Decades

Anthony Champagne

One of the most frequently quoted comments on judicial reform is the late New Jersey Chief Justice Arthur T. Vanderbilt's remark, "Judicial reform is not for the short-winded."[1] Vanderbilt's remark illustrates a key point about judicial selection reform. Reforms do not occur simply because someone or some group in a state decides that change in the system of selection is desirable; rather, it is necessary for key interest groups in the judicial politics of a state to reach a sufficient political consensus that change can occur. A variety of factors may lead to such a consensus on the need for reform. In Oklahoma, for example, judicial reform came about as a result of a major scandal in the state's judiciary.[2] But in some states, consensus for change among key stakeholders is difficult.[3] Key interest groups can have competing objectives, making judicial reform impossible. At other times, political conditions—the political environment of a state—lessen the chances of reform.

This article will focus on Texas's judicial reform experiences for the past two decades. Texas has been a bellwether state in heralding a new era in judicial elections. It was the first state where widespread problems developed in judicial elections in the 1980s. There was judicial scandal, supreme court elections become a battleground for plaintiffs and business interests, there were huge sums spent in Supreme Court races, there was intense competition between the political parties for control of the state judiciary, and there were increasing demands from minorities for greater representation on the bench.[4]

In trial court elections, beginning in the early 1980s, first in Dallas County and later spreading to other counties, most notably Harris County where Houston is located, there was a pattern of partisan sweeps in judicial elections where large numbers of judges were defeated for reelection simply because they had a different party affiliation from the popular candidate at the top of the ticket. In Dallas County, Republicans swept the trial court elections to such a degree that many of the remaining Democratic judges changed their party affiliation to the Republican Party in a bid for political survival.[5]

At first Texas seemed an anomaly with its expensive, highly partisan judicial elections. It did not take long, however, for other states to follow. The Texas judicial experience was actually a harbinger of things to come in other state judicial elections.

With the rise of this new level of competition in judicial elections, there was a major push to change the system of selection in Texas. However, just as in many other states where judicial elections have become highly competitive, the system of selection has not changed.[6] On the surface, Texas seemed to have all the components that one might think necessary for change: Intensely partisan and expensive judicial elections; a major judicial scandal; widespread negative publicity about the state's judiciary; and an active reform movement led by a well-known major figure. Still, the system did not change.

As in Texas, in states where judicial elections have become expensive and competitive, judicial reform efforts have developed. As a general matter, reform efforts in recent years have proven ineffective in changing the system of judicial selection. The Texas experience offers a lesson in the difficulties of judicial selection changes. What happened in Texas suggests the importance and the enormous difficulty in developing a political coalition among key interests in a state that can bring about change in the system of judicial selection. This article will explore what went wrong with the judicial reform movement in Texas. In the process, it will offer a blueprint of what can go wrong with a reform effort and explain why in Texas, and many other states, judicial reform efforts have failed. However, this article will also suggest that opportunities are now developing in Texas for a new reform effort—opportunities caused primarily by changing state demographics, which are quickly altering the state's political climate.

I. A BRIEF BACKGROUND OF JUDICIAL ELECTIONS IN TEXAS

In Texas, like other states, judicial elections were once low-key, inexpensive, sleepy affairs. Judges were only rarely defeated and generally did not have opposition.[7] One description of this old era in judicial politics noted:

Footnotes

1. Professor Roy Schotland of Georgetown University, for example, at a panel on *Judicial Elections and Campaign Finance Reform*, quoted Chief Justice Vanderbilt's remarks with the following preface: "[Y]ou have probably all heard [this quote] a thousand times…." Symposium, *Judicial Elections and Campaign Finance Reform* 33 **U. Tol. L. Rev.** 335, 340 (2002).
2. Phillip Simpson, *The Modernization and Reform of the Oklahoma Judiciary*, 3 **Oklahoma Politics** 1 (1994).
3. *See, e.g.*, the case studies of judicial reform efforts found in **Anthony Champagne & Judith Haydel (eds.), Judicial Reform in the States** (1993).
4. *See generally*, **Kyle Cheek & Anthony Champagne, Judicial Politics in Texas** (2005).
5. A discussion of partisan sweeps in Dallas and Harris counties as well as a discussion of party switching by judges is found in Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 **Sw. L.J.** 53, 71-80 (1986).
6. **Cheek & Champagne**, *supra* note 4, at 117.
7. Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 **Fordham Urban L.J.** 907, 910 (2002).

> At election time, sitting justices almost never drew opposition. Some justices resigned before the end of their terms, enabling their replacements to be named by the governor and to run as incumbents. In the event that an open seat was actually contested, the decisive factor in the race was the State Bar poll, which was the key to newspaper endorsements and the support of courthouse politicians.[8]

Things began to change in Texas judicial politics in the late 1970s. First, in 1976 an unknown lawyer ran for the Texas Supreme Court against a highly respected incumbent who had won the State Bar poll by a 90% margin. That unknown lawyer won even though a State Bar grievance committee had filed a disbarment suit against him alleging 53 violations—another 20 more allegations were later added. However, the lawyer had a famous Texas name, Yarbrough, which probably led voters to confuse him with another Yarbrough who had twice run a strong race for governor or with the long-time U.S. senator from Texas, Ralph Yarborough. Although Justice Yarbrough served only a few months before criminal charges and the threat of legislative removal led to his resignation,[9] the case provided a lesson: Name identification could elect nearly anyone to the bench in Texas. In 1978, a little known plaintiffs' lawyer named Robert Campbell successfully ran against an incumbent judge for the Texas Supreme Court. There was speculation that Campbell benefited from University of Texas running back Earl Campbell winning the Heisman Trophy the previous fall.[10]

A recognizable name could put someone on the bench in Texas. However, it was also possible to use advertising to create name identification.[11] That, of course, meant there was a need for campaign funds. Texas became a battleground between members of the civil bar, plaintiffs' attorneys and defense lawyers who realized that campaign funds could buy the name recognition for the judicial candidates who reflected their points of view.[12] And, once these opposing segments of the bar got into the battle for control of the Texas bench, they discovered they could not simply depart the battleground; else the opposing side would be victorious in the election.[13] Like warfare, once the fighting between the opposing sides of the bar started, it was nearly impossible for either to stop.

Another thing that was making it impossible to go back to the old style of judicial campaigns was that Texas was developing a viable two-party system. In 1978, Texas elected its first Republican governor since Reconstruction. With the election of a Republican governor, appointments to vacant seats on major trial courts and the appellate courts were in his hands, and, with relatively few exceptions, he insisted that his judicial appointees agree to run in subsequent elections as Republicans.[14] It was also the case that the election of a Republican governor heralded the emergence of a viable Republican Party in the state. The state quickly moved from a one-party Democratic state to a competitive two-party state before becoming largely a one-party Republican state.[15] That meant candidates for judicial offices had opposition, not just in their base, which had been the Democratic Party primary where opposition was often minimal and more easily controlled, but in the general election. Candidates for judicial office had to have money, often for media buys for television, which was not only an expensive form of campaigning, but a necessary one in a large, urban, and competitive state.

Big-money judicial campaigns quickly led to problems in Texas.

Where does really big money in judicial campaigns originate? It tends to come from economic interests that have a stake in judicial decisions.[16] As a result, candidates for judicial office tended to increasingly reflect one or the other of the opposing economic interests funding them.

Big-money judicial campaigns quickly led to problems in Texas. One was the claim that judges were biased in favor of their campaign contributors.[17] As a result, there was criticism about the new and very substantial role of money in judicial campaigns.[18] Another problem with big money in judicial campaigns was the risk of scandal caused by an unhealthy relationship between judges and their contributors.[19] One highly publicized example of that unhealthy relationship can be found in the case of *Manges v. Guerra*:[20] In *Manges*, a jury found Clinton Manges, acting as the manager of mineral leases on 70,000 acres of the Guerra family's land, violated his obligations to the Guerras. Manges was removed from his manager's position and the Guerras were awarded $382,000 in actual damages and $500,000 in exemplary damages.[21] Ultimately the case was taken to the Texas Supreme Court by Manges, who hired a well-known San Antonio plaintiff's lawyer to represent him.[22] The case was assigned to a justice who had received substantial campaign contributions from both Manges and his lawyer. Initially the justice proposed an opinion that supported Manges, but that opinion was rejected and so the justice tried again. Two justices eventually recused themselves—one

8. Paul Burka, *Heads, We Win, Tails, You Lose*, Texas Monthly, May 1987, at 138-139.
9. Champagne & Cheek, *supra* note 7 at 911.
10. *Id.* at n.25.
11. *Id.* at 911.
12. Cheek & Champagne, *supra* note 4, at 37-51.
13. Big money remained in Texas Supreme Court elections even after state elections moved into the Republican column. *Id.* at 50.
14. James Brian McCall, In the Shadow of John Connally: An Examination of Gubernatorial Power in Texas 66-68 (2006) (unpublished Ph.D. dissertation, University of Texas at Dallas) (on file with author).
15. *Id.*; *see also* Champagne, *supra* note 5, at 67-80.
16. Champagne, *supra* note 5, at 84-90.
17. *See, e.g.*, Richard Woodbury, *Is Texas Justice for Sale?,* Time, Jan. 11, 1988, at 74; Mary Flood, *Justice Still for Sale? Clock Is Ticking on the Answer*, Wall St. J., June 24, 1998, at T1.
18. *See, e.g.*, Pete Slover, *Group Alleges Supreme Court Favors Donors*, Dallas Morning News, Apr. 25, 2001, at 23A.
19. Cheek & Champagne, *supra* note 4, at 172-176.
20. 673 S.W.2d 180 (Tex. 1984).
21. Champagne & Cheek, *supra* note 7, at 912.
22. *Id.*

[T]here seemed all the components of a successful reform movement.

because he had been sued by Manges over a campaign statement he had made, and the other because he had received $100,000 in campaign money from Manges and his lawyer.

With those recusals, the vote was 4-3 for Manges and for reversal of the lower court. The chief justice ruled that five votes were required for reversal. At that point, the justice who had recused himself due to the campaign contribution decided to vote in favor of reversal.[23] The attorney for the Guerras filed a motion for rehearing and asked that three justices, including the justice who had changed his vote from recusal to reversal, recuse themselves due to receiving significant campaign money from Manges and his attorney.[24] The justices did not recuse themselves.

The following year, a justice (one of the three whose recusal had been requested) told a different litigant (a litigant who also was a potential campaign contributor) that his case was a tough one and that if he did not win it, he would win the next.[25] The justice then discussed the court's deliberations and told the litigant that he would see what could be done back in Austin.[26] In 1985, at the request of the attorney in the Manges case, the justice attempted to transfer two cases from one court of appeals to another.[27] These matters, plus other misbehavior by the justice, led to his public reprimand by the State Commission on Judicial Conduct.[28] Another justice (also one of the three whose recusal had been requested) was swept into the scandal because two of his briefing attorneys had accepted a weekend trip to Las Vegas from a member of the same plaintiffs' firm that had represented Clinton Manges.[29] He had also solicited funds to prosecute a suit against a former briefing attorney who had testified before a House Committee in a manner unfavorable to the justice.[30] For these actions, the justice received a public admonishment by the State Commission on Judicial Conduct.[31]

At roughly the same time, the Texas Supreme Court refused to review an $11 billion judgment against Texaco.[32] From 1984 until early 1987, more than $355,000 was contributed to the then-justices on the Texas Supreme Court by lawyers representing Pennzoil and, although lawyers for Texaco also contributed, they gave far less.[33]

Not only was there scandal, but it was highly publicized scandal. On December 6, 1987, the national television program *60 Minutes* featured a story about the Texas Supreme Court that was titled, "Is Justice for Sale?"[34] The program explored the relationship between large campaign contributions and judicial decisions in Texas. It was a devastating portrayal of what can go wrong in the new politics of judicial selection.

Texas Supreme Court Chief Justice John Hill proposed merit selection of judges as an alternative to the current system of partisan election of judges.[35] He proposed himself as the leader of a movement for judicial reform.[36] Hill was a highly visible figure in Texas politics, far more than most state supreme court justices. He had been a successful lawyer in Texas, a former Texas Attorney General (a statewide elective office), and the Democratic candidate for governor of Texas in 1978. To get that nomination for governor, he had defeated the incumbent governor in the Democratic primary.[37]

Thus, there seemed all the components of a successful reform movement: There was a new politics of judicial elections in Texas where there were competitive, expensive races; these races involved major battles between competing economic interests, most clearly the business community and the plaintiffs' bar; there was highly publicized scandal with strong overtones of systemic corruption in a system that depended on money from lawyers and litigants who appeared before the courts; and there was a visible leader of a movement pushing for reform of the system by offering a well-established solution to the problem—merit selection of judges. Success seemed just around the corner.

II. TEXAS JUDICIAL SELECTION REFORM IN THE 1980S: POLITICS, INFLUENCE, AND THE PUBLIC'S PREDILECTIONS

Texas's judicial reform movement was to die a slow death for a variety of reasons, mostly reflecting political conditions in the state and an inability to develop enough of a coalition of competing interests to change the system. Yet, the demise of the reform movement is instructive, not only for future reform efforts in Texas, but also for reform movements in other states.

The first notable problem with judicial reform in Texas was the problem of Chief Justice John Hill taking the leadership role in the movement. There was immense opposition to his reform efforts from within the court and unprecedented intra-court conflict emerged.[38] Fifteen months after Hill proposed

23. *Id.*
24. Motion for Recusal of Justice C.L. Ray, *Manges v. Guerra*, 673 S.W.2d 180 (Tex.1983) (No. C-771); Motion for Recusal of Justices Ted Z. Robertson and William W. Kilgarlin, *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1983) (No. C-771).
25. Champagne & Cheek, *supra* note 7, at 912.
26. *Id.*
27. *Id.* at 913.
28. State Commission on Judicial Conduct, *Findings, Conclusions and Public Reprimand Relating to Certain Activities of Justice C.L. Ray of the Supreme Court of Texas* (1987).
29. Champagne & Cheek, *supra* note 7, at n.34.
30. *Id.*
31. State Commission on Judicial Conduct, *Findings, Conclusions and Public Admonishment Relating to Certain Activities of Justice William Kilgarlin of the Supreme Court of Texas* (1987).
32. Champagne & Cheek, *supra* note 7, at 913.
33. *Id.* at n.35.
34. *60 Minutes: Is Justice for Sale?* (CBS television broadcast, Dec. 6, 1987).
35. Champagne & Cheek, *supra* note 7, at 913.
36. *Id.*
37. For a discussion of Chief Justice Hill and his earlier effort to become governor of Texas, *see* McCall, *supra* note 14, at 53, 58-60.
38. Champagne & Cheek, *supra* note 7, at 913.

[M]ajor political opposition [was] developing to prevent merit selection in Texas.

merit selection and only half-way through his six-year term as chief justice, Hill resigned.[39] His replacement in 1988 was Tom Phillips, a Republican and a Houston trial-court judge. Phillips was also a supporter of judicial selection reform.[40] Judicial selection reform seemed to be in the air when Chief Justice Hill used the ceremony on January 4, 1988 that installed Phillips as his successor as a forum to argue for merit selection. The fires of opposition roared quickly in response: Justice Robert Campbell resigned January 6, 1988, explaining that, among other activities, he was going to actively campaign against merit selection.[41]

The turmoil on the Texas Supreme Court surrounding Hill's efforts turned out to be a small molehill compared to the major political opposition developing to prevent merit selection in Texas. Texas was evolving into a true two-party state after a century plus of almost complete Democratic Party dominance. The two parties found themselves in rare agreement on one issue: They were adamant in their support for partisan election of judges.[42]

It was not only the political parties, however, that were involved in the fight over judicial selection. Two key segments of the bar—the plaintiffs' bar and the defense bar—used the partisan election system to forward their objectives of controlling the bench. By 1980, the election of Texas Supreme Court justices (which has only civil jurisdiction; the Texas Court of Criminal Appeals is the highest court in the state for criminal matters) had become a battleground for plaintiffs' attorneys and defense lawyers, each trying to elect judicial candidates favorable to their perspective.[43]

Supreme court races were getting increasingly expensive.[44] Initially, competition between plaintiff-bar-backed and defense-bar-backed judicial candidates occurred in the Democratic primary because the Republican Party was so weak in the state. However, in 1988, several strong Republican candidates for the Texas Supreme Court moved campaign contributions to record levels.[45] Increasingly, the tendency was for defense interests to back Republican candidates and plaintiffs' lawyers to back Democratic candidates.[46] In 1994 there was an effort by a plaintiff-backed candidate to defeat a pro-defense Democratic justice in the Democratic primary. Total expenditures in that primary came to $4,490,000 which made it one of the most expensive judicial races in history.[47] When the pro-defense Democratic justice won what was one of the most vicious judicial campaigns in Texas history, the Republican candidate for the justice's seat withdrew, giving the pro-defense Democrat an easy electoral victory. It seemed clear the Republican was only in the race to compete against the Democratic nominee if the plaintiff-backed candidate won the primary.[48] Plaintiffs and business interests were fighting it out in partisan judicial elections and, at least at that time, were reluctant to change the battleground, though the plaintiffs' bar seemed to have more at stake in maintaining partisan elections than did business interests.

When Chief Justice John Hill was proposing merit selection in Texas in the late 1980s, the plaintiffs' bar was a powerful force in Texas Democratic politics. They were opposed to a change in the method of judicial selection.[49] Their campaign contributions had placed several pro-plaintiff justices on the Texas Supreme Court in the 1980s, and the result was that several key judicial decisions had been favorable to plaintiffs.[50] While the Republican Party was growing in the state, Democrats were still winning major judicial offices, and many of those Democrats had the backing of the plaintiffs' bar. The plaintiffs' bar could use its campaign contributions to back candidates sympathetic to plaintiffs. Although not all Democrats in Texas were pro-plaintiff, the plaintiffs' bar backed Democrats who were far more likely to be sympathetic to the plaintiffs' views than were Republicans.[51] With Texas electing in 1978 its first Republican governor since Reconstruction (Dallas oilman Bill Clements was the Republican who defeated John Hill for the governorship, by 18,000 votes), it seemed much more desirable for plaintiffs' lawyers to use the partisan election system to elect the type of judges they wanted than to use a merit selection system where the governor who would be appointing judges might well be a Republican or, given the history of Texas politics, a conservative Democrat.[52]

Additionally, the demographics of Texas were changing. Texas's Latino population was growing at a dramatic pace, and Texas's African-American population was increasingly concentrated in the state's urban centers, most notably Dallas and Houston. With Latino population growth and African-American population concentration came political power in Texas politics.[53] These two groups had an important voice in whether there would be change in the way Texas selected its judges. The problem for the judicial reformers was that neither Latino nor African-American interest groups wanted merit selection. Instead, they were interested in increasing the numbers of Latinos and African-Americans on the bench. As a method of achieving that objective, Latino and African-American interest groups wanted to continue to elect judges, but they wanted the districts to be smaller than currently

39. *Id.* at 913-914.
40. CHEEK & CHAMPAGNE, *supra* note 4, at 173.
41. Champagne & Cheek, *supra* note 7, at 914.
42. Franklin S. Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 502, 520 (1988).
43. CHEEK & CHAMPAGNE, *supra* note 4, at 37-54.
44. *Id.*
45. *Id.*
46. *Id.*
47. Champagne & Cheek, *supra* note 7, at 915.
48. *Id.* at 916.
49. Anthony Champagne, *Judicial Selection in Texas: Democracy's Deadlock*, in TEXAS POLITICS: A READER 96 (2d ed., Anthony Champagne & Edward J. Harpham eds., 1998).
50. *Id.*
51. *Id.*
52. *Id.*; *see also* McCall, *supra* note 14.
53. CHEEK & CHAMPAGNE, *supra* note 4, at 146-159.

existed. Given the numbers of trial judges in urban counties and given that all trial judges were elected countywide, the goal of these groups became the election of trial judges from districts considerably smaller than the county.[54] The problem for these interests was that to elect African-American judges, a different subdistrict had to be drawn compared to the subdistricts that had to be drawn to elect Latino judges. Nevertheless, although African-American interests and Latino interests would compete over which subdistrict boundaries were appropriate, neither group offered the politically necessary support for merit selection.

The other problem that Chief Justice Hill and the reform movement faced was the opposition of numerous incumbent judges. The incumbent judges had been elected by a partisan election system, and they were generally happy with that system—especially if their political party was dominant within their jurisdiction. A lot of opposition to reform came from judges who were secure in their positions, saw no need to change, and saw a change in the system of selection as a threat to their survival on the bench.[55]

Finally, another problem with the movement for merit selection in Texas was that voters like to vote for judges. True, the voters might not know the judicial candidates for whom they were voting, but they did not like the idea of giving up their decision-making powers to any blue-ribbon commission that presented names from which a governor must make a selection.[56] Indeed, then-Justice Franklin Spears, a vocal opponent of merit selection of judges, noted that a non-binding referendum issue appeared on the March 1988 Democratic primary ballot asking whether, "Texans shall maintain their right to select judges by a direct vote of the people rather than change to an appointment process created by the legislature." Eighty-six percent of those voting on the issue cast their ballot in favor of elective judges.[57] A 1987 statewide poll found that 65% of those polled thought the elective judge system was "working all right as it is."[58] Still another poll found that 60% of those polled favored the elective system over an appointive system.[59] Spears also cited a 1986 state bar poll where more lawyers disfavored a merit selection system than favored it for major trial courts: 50% to 43%. Additionally, more lawyers disfavored a merit selection system than favored it for appellate courts: 49% to 45%.[60] One can certainly quarrel with some of the language in the referendum and polling questions, but Spears seemed to have a point. Texans probably did favor voting for judges. Indeed, there is a long-standing practice in Texas for voting for a great number of officials. At the statewide level, for example, not only are nine Texas Supreme Court justices elected, but the nine Texas Court of Criminal Appeals judges are as well. Additionally, the three members of the Railroad Commission of Texas are elected statewide, as is the governor, the lt. governor, the comptroller, the commissioner of the General Land Office, and the commissioner of agriculture.[61]

[T]he judicial reform effort simply could not gain traction . . . .

III. TEXAS JUDICIAL SELECTION REFORM ACTIVITIES IN THE 1990S

In spite of former Chief Justice Hill's best efforts, the judicial reform effort simply could not gain traction in the face of opposition from the political parties, the trial lawyers, African-American and Latino interest groups, incumbent judges, and a state political culture that favored election of large numbers of officials, including state judges. However, the politics of the state were changing dramatically, money was heavily involved in judicial elections, and the Clinton Department of Justice was suggesting that they would refuse to approve the creation of any more courts in Texas on the grounds that the current system discriminated against minorities. In 1994, judicial reform gained new life because the state's lt. governor, Bob Bullock, a Democrat and one of the most powerful and effective politicians in the state's history, created a committee to explore the possibilities of developing a judicial reform proposal.[62]

The committee was designed to give key interests a voice in developing the proposal. Three Democratic state senators and three Republican state senators were appointed. One of the Democratic state senators was an African-American with close ties to civil-rights groups in Houston that advocated greater representation of African-Americans on the bench. One of the Democratic state senators was a Latino who had close ties to civil-rights groups in San Antonio that advocated greater representation of Latinos on the bench. Four other members of the committee were judges—one Republican and three Democrats. Three of the judges were Texas Supreme Court justices, and one was the presiding judge of the Court of Criminal Appeals. The Republican justice was Chief Justice Tom Phillips, the chief justice who replaced John Hill on the bench and who was himself a strong advocate of a retention system for selecting judges rather than the partisan election system. The president of the Texas Trial Lawyers Association, the major plaintiffs' attorney organization in the state, regularly attended the meetings. Another participant was a public relations specialist who was a close friend of Lt. Governor Bullock and who represented business interests in political and legislative matters. No public or consumer representatives were on the committee, no lower-court judges, and no mem-

54. Champagne, *supra* note 49, at 97-98.
55. *Id.* at 98.
56. The loss of the right to vote for judges is, of course, a concern of voters nationwide. Former Texas Supreme Court Chief Justice Tom Phillips, writing about judicial elections, noted that a poll published in 2002 "shows clearly that voters cherish their franchise and in elected states they generally prefer to retain it by a two to one margin." Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 140 (2003).
57. Spears, *supra* note 42, at 519.
58. *Id.*
59. *Id.* at 520.
60. *Id.*
61. *Statewide Elected Officials*, Texas Secretary of State, http://www.sos.state.tx.us/elections/voter/elected.shtml.
62. Champagne, *supra* note 49, at 99-100.

bers of the Texas House of Representatives. Notably, John Hill was not invited to attend the meetings. Bullock claimed that Hill had wanted to be on the committee, but because Hill had become such a political lightning rod, it was impossible for him to be asked to serve. At least one state senator, the chief justice, and the business representative were strong supporters of merit selection.[63]

It quickly became clear that there were no easy solutions to judicial selection issues in the state that could accommodate all the competing interests. Some sort of compromise had to be developed. Minorities were willing to support modifications of the appellate courts in exchange for greater representation of minorities on trial courts. While minorities believed it would be possible to draw smaller districts within counties that would increase minority representation on the bench, they knew that appellate court districts were so vast that small districts for appellate courts would still be so large that minorities would not benefit. Business interests saw an opportunity. They were willing to support greater minority representation on the trial court bench in exchange for an appointive system such as merit selection for the appellate courts. Plaintiffs' lawyers saw their influence on appellate courts weakening. It would not make much difference to their interests whether Republican governors appointed pro-business judges to the appellate bench or whether voters elected them. Smaller trial courts, however, opened up the possibility that at least some pro-plaintiff trial judges could continue to be elected.[64]

Creating a compromise was difficult, however, because minorities and plaintiffs' lawyers had long fought merit selection; they were fearful that such a system would not benefit their interests. Republicans and judges, on the other hand, were uncomfortable with the idea of small districts. Eventually, however, the committee agreed on a compromise where appellate judges would be appointed by the governor; trial judges in urban areas would be elected from county commissioners' precincts. After serving for a time, they would run countywide in retention elections. Later, they would have to be reelected from county commissioners' precincts. In order to depoliticize the judiciary, judges were to be elected in nonpartisan elections, which would protect judges from the party sweeps that had occurred in recent elections in urban counties where large numbers of trial court judges were swept out of office simply because their party affiliation was an unpopular one during a particular election.[65]

Although it was a complicated scheme, the compromise, on its face, seemed to have something for everyone. Business got an appointive appellate judiciary. Minorities and plaintiffs' lawyers got smaller trial court districts, which would allow for the election of more minorities and some plaintiff-oriented judges. Judges were protected from party sweeps.[66]

The problem, of course, was in the details of the compromise. Although African-Americans were very supportive of the compromise, Latinos were not. At that time, Harris (where Houston is located) and Dallas counties were the two largest counties in Texas and elected a total of 96 of the 386 district court judges in Texas. These counties were so large, and so many judges were elected in each metropolitan area, they were the most important in any plan that would increase minority representation on the bench. Since every county in Texas is divided into four county commissioners' precincts, under the compromise, one-fourth of Harris and Dallas County trial judges would be elected from each precinct. However, Harris and Dallas County both had three white county commissioners and one African-American county commissioner. Latinos did not believe such a compromise would promote the election of more Latino judges; instead, they thought districts much smaller than a county commissioner's precinct were needed to elect Latino judges.[67]

The problem, of course, was in the details . . . .

The political parties also opposed the compromise. Nonpartisan elections would protect the interests of incumbent judges from party sweeps, but nonpartisan elections weakened the political parties. Additionally, an appointive system reduced the number of elective judges and therefore reduced the importance of the political parties. Then-Governor George W. Bush would have benefited from the compromise because of his power to appoint appellate judges; however, he opposed the compromise as well, probably because he did not want to oppose the Republican Party.[68]

Lt. Governor Bullock backed his committee's recommendations, and the compromise was turned into legislation that passed the Texas Senate, probably because Bullock had such sway over the state senate that any legislation that he endorsed had a high probability of success in that body. However, things did not go so well in the Texas House. Democratic Speaker Pete Laney did not give priority to judicial selection reform. Additionally, the opposition of the parties and of Governor Bush emboldened critics of the compromise. Moreover, Latino house members tried to amend the compromise. Instead of electing district judges by county commissioners' precincts in urban areas, they proposed that the judges be elected from state representative districts. Of course, that proposal increased the chance that Latino judges would be elected in urban counties, but it also reduced the number of African-American judges who were likely to be elected. The modified proposal also proved unacceptable to business interests and to Republicans who could not approve of even smaller constituencies for judges than commissioners' precincts. In the face of the various opposition constituencies, the compromise plan failed.[69]

Although the compromise effort led by Lt. Governor Bullock failed, it was not a total failure. Significantly, Bullock's judicial reform bill did pass the state senate. It was the first

63. *Id.* at 100.
64. *Id.* at 100-102.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

[T]he compromise effort . . . was not a total failure . . . .

time a judicial selection reform proposal survived that far in the legislative process. Of course, in Texas a judicial selection reform proposal would still have a long way to go, since it is likely that most changes in the judicial selection system would not only have to pass the legislature, but would have to be submitted to the voters in the form of a constitutional amendment.

Buoyed by the passage of the proposed bill in the Senate, in 1996-97 the Texas Supreme Court created task forces to develop proposals for improving the Texas judiciary. One of the task forces was assigned to examine the issue of judicial selection, but, even though the task force expressed concerns over the current system for selecting judges, the members were unable to agree upon an alternative judicial selection system.[70] Chief Justice Phillips tried to push the issue of judicial selection reform in his State of the Judiciary address where he criticized the partisanship of judicial elections, the role of money in judicial races, and the lack of minority representation on the bench.[71]

Prospects for reform, however, seemed slim as the 1997 legislative session began to draw to a conclusion. In the senate, there was a proposal that provided for appointment of appellate judges and the election of district judges in nonpartisan elections. Both appellate and trial judges would then run in retention elections, although trial judges would run in regular nonpartisan elections after two retention elections. In counties larger than one million, district judges would be elected from county commissioners' precincts. Another senate proposal provided for the appointment, election, and retention of appellate judges and eliminated straight party voting for appellate and district judges. Appellate judges would have to run in partisan elections following the expiration of their appointed terms and then would be subject to retention elections.[72]

Of these two proposals, the first bill was sponsored by an African-American Democrat from Houston. He did not have enough support from non-minority legislators to pass the bill. The second bill was proposed by a white Republican from West Texas. Minorities threatened to oppose that plan on the grounds that it did not increase the likelihood of minority representation on the bench.

After considerable posturing by the sponsors of the two bills, a compromise bill was designed where appellate judges would be appointed. District judges would also be appointed, but the districts would be county commissioners' precincts. The appointed judges would then run against opponents in the next primary elections, but all candidates would run in all primaries, which created a nonpartisan primary election. If a candidate did not receive 50% of the vote, there would be a runoff in the general election. The winner would serve for four years and would then run in a nonpartisan retention election. Much like Lt. Governor Bullock's committee's compromise, however, this proposal did not resolve the concerns of Latinos, who continued to believe that smaller judicial districts were needed to elect Latino judges. Incumbent trial judges were also concerned about the plan since it would affect their districts and also dramatically change the process by which judges were elected. [73]

IV. TEXAS JUDICIAL SELECTION REFORM ACTIVITIES IN THE NEW MILLENNIUM

In the 2003 legislative session, another major effort was made to change the system of judicial selection in Texas. The West Texas Republican senator who had pushed so hard for judicial selection reform in the 1996-97 session tried again with a bill that would have appellate and district judges appointed by the governor with the consent of the Texas Senate. After appointment, the judges would run for office in retention elections. One of the strongest supporters of the bill was Chief Justice Tom Phillips, a long-standing advocate of judicial selection reform. And, just as had occurred when Lt. Governor Bob Bullock took an interest in judicial selection reform, the bill cleared the senate, only to die in the house.[74]

The bill did have bipartisan support, however, including significant Republican support. A Republican group, "Make Texas Proud," was formed to support the bill, and membership in the organization included former Republican Governor Bill Clements, former Republican National Co-chairwoman Anne Armstrong, and three former state party chairs. Possibly this strengthened Republican support had something to do with Chief Justice Phillips's efforts to show that demographic changes in urban counties would shortly bring a Democratic resurgence to those areas. In contrast, this forecasted demographic change may have been what prompted important Democrats to oppose judicial selection reform. The Mexican American Legal Defense and Education Fund also opposed the reform. Most important, many Republican leaders, including the leadership of the state Republican Party, were opposed to changing the system of judicial selection in the state. Politics, of course, often relates to the here and now, not to future demographic changes. The Texas Republican Party mounted a mighty effort against the bill.[75]

In its effort to kill the judicial selection reform bill, the Texas Republican Party attacked one of their own, Chief Justice Tom Phillips, the first Republican chief justice of the Texas Supreme Court since Reconstruction and the first Republican Texas Supreme Court justice to win election to the state supreme court since Reconstruction. Texas Republican Party Chairwoman Susan Weddington claimed the bill was Chief Justice Phillips's idea and that he was the one "very out front on this." [76] The Texas Republican Party's website contained a petition that visitors could sign "to protect Texans' right to elect their judges!"[77] The state Republican Party sent out an e-mail to party members urging them to contact law-

70. *Id.* at 102.
71. *Id.*
72. *Id.*
73. *Id.* at 103.
74. CHEEK & CHAMPAGNE, *supra* note 4, at 103-105.
75. *Id.*
76. *Id.* at 104.
77. *Id.*

makers to oppose the bill.[78] Supporters in the house were lobbying colleagues, and Chief Justice Phillips, along with Associate Justices Craig Enoch and Harriet O"Neill, were seeking the support of house members. The bill was about to be voted out of the House Judicial Affairs Committee with majority support when staff members for the new Republican Speaker told the chairman of the committee to pull the bill from consideration. Although the Democratic Party also opposed the bill, it was the opposition of the state Republican Party that had the real impact.[79]

Not long thereafter, Chief Justice Tom Phillips retired from the bench, to be replaced by a chief justice, Wallace Jefferson, who is much less supportive of judicial selection reform than his predecessor.[80] Perhaps the most effective and respected advocate of selection reform in the state was no longer in a strong position to advocate change—and his harshest critics had been the leaders of the political party in which Chief Justice Phillips had been a pioneer. Judicial selection reform had again been defeated, this time with seemingly a fatal blow by the Texas Republican Party.

What a difference one election can make! In the November, 2006 elections, 42 Democrats opposed 42 Republicans in Dallas County judicial elections—the county that was at one time the core of the Republican Party in the state.[81] All 42 Democrats won, leaving only 17 Republican judges in Dallas County who either were unopposed or were not up for election in the cycle.[82] Immediately, speculation began as to whether the 17 Republicans would change their party affiliation in order to keep their positions, something a number of Democratic judges did in the early 1980s when the county moved from the Democratic to the Republican column.[83] There had been hints of a voting shift in Dallas County since at least 2002 when a Democrat won a position as a county trial judge. Then in 2004, three Democratic judicial candidates won elections as did a Democratic candidate for county sheriff. But 2006 was a Democratic sweep with all 42 Democratic judicial candidates elected, a Democratic district attorney elected, and a Democratic county judge (the equivalent of a county executive).[84] Some of the Democratic candidates won simply by riding the wave of Democratic voting and raised little money, had no campaign Web site, did not appear at campaign events, and did not respond to candidate questionnaires.[85] Interestingly, some of the Democratic judges who were elected had been defeated years ago in the Republican electoral sweeps of the 1980s when Republican judges rapidly gained control of the courthouse.[86]

What a difference one election can make!

The movement to the Democrats was part of a demographic shift in Dallas County that had long been predicted by some.[87] As the minority population in Dallas County increased, so did the percentage of voters who selected Democratic candidates until finally there was a shift in the power of the political parties. Demographic trends suggest that Harris County, where Houston is located, should not, according to these demographic projections, be very far behind.[88] Harris County is the most populous county in the state with the largest number of judges. Further into the future, the growth of the Latino population in the state can be expected to eventually shift statewide elections into the Democratic column.[89]

Even though the greatest opposition to judicial reform in Texas has been the Texas Republican Party and a center of opposition has been Dallas County Republicans—most notably Dallas County judges, there is talk in Republican circles that it is time to reconsider their opposition to change in partisan election of judges.[90] As Charles Sartain, the lawyer who represents the Dallas County Republican Party was quoted as saying, "[t]he Republicans in Harris and Dallas thought things were just fine the way they were. Since the election I am speaking to more Republicans who favor a different method and want to figure out how to sell it to the Legislature."[91]

At least for the time being, both the Texas Republican Party and the Texas Democratic Party remain opposed to merit selection. When a Republican state senator and a Republican state representative announced in the aftermath of the election that they would introduce merit selection legislation in the legislature, the state Republican Party stated that it was standing on principle and continued to support partisan elec-

78. *Id.* at 104-105.
79. *Id.*
80. Chief Justice Wallace Jefferson, as part of his election bid in 2006, responded to a question posed by the League of Women Voters of Texas: "What method of selecting judges and justices best ensures an independent judiciary?" The caution in his response is notable:

> We currently have an independent judiciary. Whether elections "ensure" and independent judiciary is a complex question. Because much of the public is unfamiliar with judicial candidates—particularly in large counties and at the State level—the judiciary is largely selected by partisan affiliation, which has the effect of sweeping qualified judges out of office when political winds shift. An appointment/retention system, emphasizing merit, may be a remedy. This is a matter the Legislature should explore.

League of Women Voters of Texas, *Voters Guide 2006 General Election Edition*, http://www.lwvtexas.org/VG%20General%202006-9-25-06.pdf
81. Miriam Rozen, Mark Donald, & Mary Alice Robbins, *Dems Take Big D*, TEXAS LAWYER, Nov. 13, 2006, at 1.
82. *Id.* at 17, 19.
83. *Id.* at 19.
84. Gromer Jeffers Jr., *Democratic Trend Forecast*, DALLAS MORNING NEWS, Nov. 9, 2006, at 1, 18A.
85. Michael Grabell, *Democrats Short on Courtroom Recognition*, DALLAS MORNING NEWS, Nov. 9, 2006, at 18A.
86. *Id.*
87. *Id.*; *see also* Anthony Champagne, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections,* 43 S. TEX. L. REV. 9, 26-30 (2001).
88. Champagne, *supra* note 87, at 30.
89. *Id.* at 28-30.
90. Rozen, Donald, & Robbins, *supra* note 81 at 20.
91. *Id.*

[T]he judicial reform movement has taken on new life . . . .

tion of judges. The state Democratic Party announced it continued to support the voters' right to choose judges.

On the other hand, the Texas Association of Defense Counsel announced that it had historically supported the concept of retention elections for appellate judges, and the Texas Trial Lawyers Association announced that it was open to considering the idea.[92] No doubt it will take more time for key interest groups to calculate the costs and benefits of taking a new position on merit selection—the strength and breadth of the demographic shift in voting in Texas needs to be assessed, especially since some argument is also being made that this shift is largely due to unhappiness with President Bush.[93] Moreover, the voting shift has so far been limited to one large county in the state.

V. CONCLUSION

There is little doubt that the judicial reform movement has taken on new life now that a base of the Republican Party has been swept out of office. John Hill, wrote in the *Texas Lawyer* that Texas should have merit selection because, "Partisanship is a cancer on the judiciary. Lawyers should take all possible steps to remove it. There is no Republican or Democratic justice."[94]

It is looking like judicial elections are becoming competitive again in Texas. This advent of competitiveness in judicial elections in the state offers an opportunity for reformers and a challenge. If it is possible to change the system of selection while the parties are competitive in the state where no party has an advantage and both parties are at risk, it seems possible that change in the system of selection can occur as a way of reducing electoral uncertainty on the bench. However, if the demographic changes in the state lead to rapid political changes so that the Democratic Party sees a rapid emergence as the dominant party in Texas, it will be much harder to change the system of selection. If the Democrats are dominant in the state's judicial elections, they will likely become, as the Republican Party did before them, the major obstacle to judicial reform. The interests that support the Democratic Party, most notably plaintiffs' lawyers, African-Americans, and Latinos, will have an interest in insuring the continuation of partisan elected judges when those judges are Democrats.

Nevertheless, as John Hill has stated in reference to judicial selection reform, "Maybe this is the time that lightning's going to strike."[95] Hill may be right. There are moments when policy proposals are timed to fit with the political needs of a state. This may be the moment. It is a cusp of a great demographic change that promises to create increased political competitiveness and immense political turmoil. If this period of great competitiveness is a consistent and relatively lengthy period where no key interests see an immediate forthcoming political advantage, the opportunity exists to build a political coalition that can bring about a change in judicial selection systems. The problem with the last great opportunity for change—the late 1980s—when John Hill first proposed judicial selection reform was essentially threefold:

(1) the changes in Texas judicial politics were unprecedented so there was no sense of how lasting or dramatic the changes might be;
(2) there was inconsistency in the changes occurring in the state's judiciary—Republicans, for example, had a political advantage with Ronald Reagan at the top of the ticket in 1980 and 1984, but Democrats had an advantage with Democratic Senator Lloyd Bentsen at the top of the ticket in 1982; and
(3) the changes in Texas judicial politics were quite rapid. The first Republican to win a Texas Supreme Court seat won in 1988 and by 1994, Democrats could no longer win a contested Texas Supreme Court race.

Thus, with the previous great opportunity to change Texas judicial selection, it was difficult to understand what was happening without the benefit of hindsight, and some elections (most notably 1982) obscured the pattern of what was occurring in Texas judicial politics. Then, when the changes did occur, and Texas moved to being largely a one-party Republican state, the changes occurred rapidly. Now Texans should know what can happen in state judicial politics. The dramatic changes in Texas in the 1980s and early 1990s began with major Republican victories in judicial elections in Dallas County and spread from there. There is a historical pattern for what is happening now that did not exist in the earlier era. If those changes remain clear—so there are no confusing signals about what is happening such as occurred in the 1982 election—and if those changes are slow enough for key interest groups to be unable to identify a political advantage in remaining with the existing system of selection, the changes Hill first spoke about in 1986 may well occur.

92. Mary Alice Robbins, *Legislators Propose Post-Election Judicial Merit-Selection Bills*, TEXAS LAWYER, November 20, 2006, at 4.
93. A *Dallas Morning News* editorial claimed, "Some Dallas County Republicans blamed the national party—and specifically President Bush's travails—for depressing their local turnout." Editorial, *Inside the Blue Wave*, DALLAS MORNING NEWS, November 9, 2006, at 28A.
94. John L. Hill, Jr., *It's Time to Eliminate Partisan Election of Judges,* TEXAS LAWYER, Nov. 6, 2006, at 29. John Hill died of a heart ailment on July 9, 2007.
95. Robbins, *supra* note 92.

The Texas system offers valuable lessons for other states considering changing their system of judicial selection. This is not simply a case study of the failure and prospects for judicial reform in one state. The Texas case tells us that change in a system of selection really is not for the "short-winded." It can be a difficult and time-consuming process of putting together a coalition of key interest groups that begin to see political advantages in alternatives to the present system of judicial selection and that see disadvantages in remaining with that system. The Texas reform movement shows the need for a lengthy and persistent political battle to build that political coalition. Most importantly, the Texas efforts at judicial reform show the importance of changes in the state political environment in creating changes in the state's judicial politics.

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Fordham Urban Law Journal

Volume 29 | Number 3 Article 7

2002

The Cycle of Judicial Elections: Texas as a Case Study

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THE CYCLE OF JUDICIAL ELECTIONS: TEXAS AS A CASE STUDY

*Anthony Champagne and Kyle Cheek**

I. INTRODUCTION

A. Background on Judicial Elections

Unlike the federal model of judicial selection, the model for the selection of state judges has undergone significant change throughout American history.[1] Until the mid-1800s, state judicial selection generally adhered to the federal model, emphasizing the appointment of judges. Typically, judges were selected by gubernatorial appointment coupled with confirmation by a special commission or the legislature; in some cases, judges were appointed directly by the state legislature.[2] The emergence of Jacksonian egalitarian democratic ideals in the nineteenth century brought about a growing belief that judges, like other public officials, should be accountable to the voting public.[3] As that ideal gained acceptance among reformers, states began moving away from legislative and gubernatorial appointment and toward the selection of judges by popular election. In 1832, Mississippi became the first state to provide for the selection of its judges by popular election. New York followed in 1846. For the next sixty-five years, every new state to enter the Union provided for some or all of its judges to be chosen by popular election.[4]

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1. See MARY L. VOLCANSEK & JACQUELINE L. LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES (1988) for a full treatment of judicial selection practices in the United States.

2. PHILLIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 3 (1980).

3. Burton M. Atkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. B. J. 152 (1976).

> The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process in America. It was spearheaded by reformers who contended that the concept of an elitist judiciary . . . did not square with the ideology of a government under popular control.

Id.

4. DUBOIS, *supra* note 2.

When popular judicial election began in Mississippi and New York, judges typically ran on partisan ballots, campaigning alongside their fellow party candidates. In the latter part of the nineteenth century, however, Progressive reformers grew increasingly concerned with the influence of party bosses, who often gave judicial nominations to the party faithful, instead of the most qualified candidates.[5] To quell judicial selection by party leaders, reformers pressed for nonpartisan judicial elections.[6] In the closing decades of the 1800s, the legal profession also responded to the extraordinary influence of parties over judicial selection. Lawyers began organizing bar associations largely to promote judicial selection based on qualifications rather than party patronage.[7]

In the mid-twentieth century, reformers began advocating the "Missouri Plan," which removed the initial selection of judges from popular control but retained the Jacksonian ideal of electoral accountability.[8] Under this plan, judges are appointed by a governor from a list prepared by a judicial nominating committee. The judges appointed under this plan then run in periodic, uncontested "retention" elections where voters are allowed to determine whether the judge remains in office.[9]

Contested elections, however, have not been eliminated. Thirty-nine states still select some judges through popular election, and eleven states select their supreme court justices in partisan elections.[10] In spite of the Missouri Plan's initial popularity, the wave of reform that accompanied its early years has waned. Judicial elections are now the norm and their weaknesses require wholesale reform. A clear understanding of judicial elections will shed light on how to improve the process of selecting judges. This Article focuses on Texas, whose history often foreshadows the experience of other states.

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5. *Id.* at 4.

6. *Id.*

7. *Id.*

8. RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 7-9 (1969).

9. *Id.*

10. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION METHODS IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2000), *available at* http://www.ajs.org; Roy Schotland, *Personal Views*, 34 LOY. L.A. L. REV. 1361, 1362, 1365 (2001).

B. The Case of Texas

In its first five years of statehood, Texas was a microcosm of the early national experience with state judicial selection. Initially, judges were appointed by the governor and approved by the Texas senate.[11] Then, in 1850, the influence of Jacksonian Democracy led to the adoption of judicial selection by popular election.[12] Under Reconstruction, Texas returned to the gubernatorial appointment of judges.[13] However, largely in response to abuses of the gubernatorial appointment power during Reconstruction, Texas included a provision in its current constitution, adopted in 1876, for the selection of judges by popular election.[14] While the Texas constitution does not require that judicial candidates run on partisan ballots, Texas election law encourages judicial candidates to run as party nominees.[15]

Although Texan judicial elections are conducted by partisan ballot, the first 100 years of judicial elections reflected the dominance of one party in Texas. Judicial races were seldom contested, and when a contested race was run, incumbent judges were typically secure.[16] One study of judicial selection in Texas found that from 1952 through 1962, death, resignation, or retirement was more likely to end judicial tenure than electoral defeat.[17] During the era of one-party politics, contested elections seldom occurred in the general election. Instead, challengers were more likely to appear in the Democratic primary. Texas' provision for gubernatorial appointments to fill mid-term vacancies also became an important means of ascending the bench. Mid-term resignation was common among judges, allowing the governor to name a replacement.[18] Judges initially appointed by the governor then enjoyed the benefit

11. Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 55 (1986).

12. *Id.*

13. *Id.*

14. TEX. CONST. art. V, § 7.

15. Susan Douglass, *Selection and Discipline of State Judges in Texas*, 14 HOUS. L. REV. 672, 674 -75 (1977).

16. Bancroft Henderson & T.C. Sinclair, *The Selection of Judges in Texas*, 5 HOUS. L. REV. 430, 430-98 (1968).

17. Only 5% of all trial judges and 7% of appellate judges suffered electoral defeat between 1952 and 1962, while retirement or resignation accounted for 41% of all changes in judicial office during that time. *Id.* at 441.

18. "Of all judges who served during the period 1940-1962, a total of 66 percent were appointed. Just how meaningful appointments were is shown by reference to the period 1952-1962 for which primary election statistics were available. In the first election following appointment, 86.2 percent of the judges were unopposed and only 4 percent were defeated." *Id.* at 442.

of incumbency when facing election for the first time. This arrangement was so common in the first 100 years of the 1876 constitution that one study concluded that the Texas judicial selection system was primarily appointive.[19]

Only in the 1970s, with a newly emerged two-party political landscape, did meaningful contests for judicial election begin to occur. Starting with district court races in urban areas, Republican candidates began breaking the century-long Democratic stranglehold.[20] As competitive partisan contests became more common, campaigns standardized, with perhaps the most important developments being the new role of parties and the escalating cost of judicial races.

II. CHANGE FROM OLD JUDICIAL POLITICS TO THE NEW PLAINTIFF-DEFENSE WARS

As in other states that elect judges,[21] judicial elections in Texas were not always contested.[22] Traditionally, Texas justices, like most elected officials in the state, were conservative Democrats. One journalist aptly described the pre-1978 supreme court as follows:

> [J]ustices' names seldom appeared in the press and were known only to the legal community. Most justices had been judges in the lower courts; a few had served in the Legislature. At election time, sitting justices almost never drew opposition. Some justices resigned before the end of their terms, enabling their replacements to be named by the governor and to run as incumbents. In the event that an open seat was actually contested, the decisive factor in the race was the State Bar poll, which was the key to newspaper endorsements and the support of courthouse politicians.

In effect, the legal and political establishment begat generations of justices who reflected the assumption of their progenitors that preservation of a "good bidness climate" is the highest aim of government. Part of that climate was a legal system in which oil com-

19. *Id.*

20. Champagne, *supra* note 11, at 53-117.

21. Election is a common method for selecting judges in the United States. Thirty-nine states have some judicial elections. Of the nation's 1243 state appellate judges, 47% are appointed for their initial terms, 40% face partisan elections, and 13% face nonpartisan elections. Of the nation's 8489 general jurisdiction state trial judges, 24% are appointed for initial terms, 43% face partisan elections, and 33% face nonpartisan elections. Schotland, *supra* note 10.

22. Roy Schotland, *Statement of Roy A. Schotland before the Joint Select Committee on the Judiciary of the Texas Legislature Austin, Texas, March 25, 1988*, 72 JUDICATURE 154 (1988).

panies, hospitals, insurers, and other enterprises didn't have to live in constant fear of lawsuits.[23]

Judicial elections were sleepy, low-key affairs that resulted in the election of pro-civil defense Democratic judges. This did not change until the late 1970s. At that time, a remarkable event in the history of the Texas judiciary occurred: an unknown lawyer named Don Yarbrough ran for the Texas Supreme Court and won. Not only was Yarbrough an unknown, but numerous ethical complaints had been filed against him, and he ran against a highly respected incumbent who had won the state bar poll by a 90% margin. Yarbrough served only a few months before criminal charges and the threat of legislative removal led to his resignation.

How did he win the election? Yarbrough was a well-known political name in Texas, and voters probably confused him with either the long-time U.S. senator, Ralph Yarborough, or with another Don Yarbrough, who had twice run for governor.[24] Regardless, this episode proved that literally anyone could be elected to the Texas Supreme Court, if they had a popular name.[25]

Name identification might occur naturally, as with Yarbrough, but it can also be bought. Around the same time Yarbrough lucked into his judgeship, plaintiffs' lawyers began pouring significant amounts of money into Texas Supreme Court campaigns in an attempt to elect justices with pro-plaintiff philosophies. For example, in 1982, a good election year for Democrats because popular Democratic Senator Lloyd Bentsen headed the ticket, a highly successful San Antonio plaintiffs' lawyer and one of his wealthiest and most litigious clients, Clinton Manges, poured $350,000 into three supreme court races; two of their candidates were elected.[26]

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23. Paul Burka, *Heads, We Win, Tails, You Lose*, TEX. MONTHLY, May 1987, at 138, 139.

24. *Id.*; Champagne, *supra* note 11, at 101. Prior to Yarbrough's election in 1976, a state bar grievance committee had filed a disbarment suit against him alleging fifty-three violations. Later, twenty more allegations were added. Tape recordings of Yarbrough's plans to murder and mutilate enemies did not result in indictments, but Yarbrough was indicted and convicted for aggravated perjury in reference to a forged automobile title. Yarbrough eventually resigned from the court and gave up his law license in 1977. This extraordinary story is told in Paul Holder, *That's Yarbrough—Spelled with One "O": A Study of Judicial Misbehavior in Texas*, *in* PRAC. TEX. POL. 447-53 (Eugene Jones et al eds., 1980).

25. A similar situation occurred in 1978, when a little known plaintiffs' lawyer named Robert Campbell made his try for the Texas Supreme Court, running against an incumbent judge. The previous fall, University of Texas running back Earl Campbell had won the Heisman Trophy. Burka, *supra* note 23, at 139.

26. Ken Case, *Blind Justice*, TEX. MONTHLY, May 1987, at 136, 138.

By 1983, justices with significant backing from the plaintiffs' bar gained a majority on the Texas Supreme Court.[27] With the election of a pro-plaintiffs' court, Texas tort law began moving in the plaintiffs' direction—a move that would damage the court's reputation. In *Manges v. Guerra*, for example, a jury found that Clinton Manges, acting as the manager of mineral leases on 70,000 acres of the Guerra family's land, had violated his obligations to the Guerras. The jury relieved Manges of his manager position and awarded the Guerras $382,000 in actual damages and $500,000 in exemplary damages.[28] The intermediate appellate court upheld the verdict, and appeal was taken to the Texas Supreme Court.[29] Manges hired Pat Maloney, Sr. to represent him before the supreme court.

The case was assigned to Justice C.L. Ray, who had received substantial campaign contributions from Manges and Maloney. Ray initially proposed an opinion supporting Manges. When the court rejected that opinion, Ray tried again. Two justices eventually recused themselves, one having been sued by Manges over a campaign statement he had made, and the other having received $100,000 in campaign money from Manges and Maloney. With those recusals, the vote was 4-3 for Manges and for reversal of the lower court. Then, the chief justice ruled that five votes were required for reversal. Justice Robertson, one of the justices who had recused himself, immediately changed his recusal to a vote in favor of reversal.[30] The attorney for the Guerras filed a motion for a rehearing and asked that Justices Kilgarlin, Robertson and Ray recuse themselves.[31] All three justices had received significant campaign money from Manges and Maloney. This was only the beginning of a major supreme court scandal.

In 1984, Justice Ray told a litigant that his case was a tough one and that if he did not win that case, he would win the next.[32] Justice Ray then discussed the court's deliberations and told the litigant he would see what could be done back in Austin.

27. TEXANS FOR PUB. JUSTICE, PAYOLA JUSTICE: HOW TEXAS SUPREME COURT JUSTICES RAISE MONEY FROM COURT LITIGANTS (1998), http://www.tpj.org/reports/payola/intro.html.

28. Manges v. Guerra, 673 S.W.2d 180 (Tex. 1984).

29. *Id.* at 181.

30. *Id.* at 185.

31. Motion for Recusal of Justice C.L. Ray, Manges v. Guerra, 673 S.W.2d 180 (Tex. 1983) (No. C-771); Motion for Recusal of Justices Ted Z. Robertson and William W. Kilgarlin, Manges v. Guerra, 673 S.W.2d 180 (Tex. 1983) (No. C-771).

32. Eugene H. Methvin, *Justice for Sale*, READER'S DIG., May, 1998, at 131.

Additionally, in 1985, at the request of Pat Maloney, Sr., Justice Ray attempted to transfer two cases from one court of appeals to another. Those scandals ultimately led to a public reprimand of Justice Ray[33] and the public admonition of Ray and another justice, William Kilgarlin.[34]

The prestige and integrity of the court continued to crumble. Around the same time as the Justice Ray incidents, the court refused to review an $11 billion judgment against Texaco, as large campaign contributions flowed into the court's campaign coffers from both Texaco lawyers and the plaintiff and plaintiffs' attorneys.[35]

Confronted with a crisis on the court, in 1986 Chief Justice John Hill proposed merit selection of judges in Texas and offered himself as the leader of a movement for judicial reform.[36] Rebellion against Hill's leadership ensued, as did unprecedented intra-court conflict.[37] Fifteen months after proposing merit selection, and only

33. STATE COMM'N ON JUDICIAL CONDUCT, FINDINGS, CONCLUSIONS AND PUBLIC REPRIMAND RELATING TO CERTAIN ACTIVITIES OF JUSTICE C.L. RAY OF THE SUPREME COURT OF TEXAS (1987). Ray was disciplined for apparent favoritism in the transfer of cases, for the improper receipt of air transportation, for the receipt and consideration of ex parte communication, for the improper solicitation of funds, for the ex parte disclosure of confidential information to a litigant, and for the initiation of an ex parte private communication. Sadly, the timing of the release of the findings was terrible, occurring when Ray was caring for his terminally ill daughter. Robert Elder, Jr., *Sanctions Spark More Feuding*, TEX. LAW., June 15, 1987, at 17.

34. STATE COMM'N ON JUDICIAL CONDUCT, FINDINGS, CONCLUSION AND PUBLIC ADMONISHMENT RELATING TO CERTAIN ACTIVITIES OF JUSTICE WILLIAM KILGARLIN OF THE SUPREME COURT OF TEXAS (1987). Two of Justice Kilgarlin's briefing attorneys had accepted a weekend trip to San Antonio from Pat Maloney, Jr., a member of a well-known plaintiffs' firm. Kilgarlin was admonished to "make certain in the future that all staff working under him be required to observe the standards of fidelity and diligence that apply to him." Kilgarlin was also "admonished that solicitation of funds by a judge to prosecute a suit against a former attorney who had testified before the House Committee is violative of the Code of Judicial Conduct." Interestingly, Justice Kilgarlin blamed the sanction on the civil defense bar. Robert Elder wrote, "Kilgarlin placed the blame for the sanctions on Larry Thompson, who in 1985 formed the Supreme Court Justice Committee. Thompson has said the group was set up to counter the success of the plaintiffs' bar. . . .Kilgarlin called the pro-defense committee '19 lawyers who hate my guts' and said 'one of the expressed purposes of that group was to create a scandal involving me.'" Elder Jr., *supra* note 33, at 15.

35. "Lawyers representing Pennzoil contributed, from 1984 to early this year, more than $355,000 to the nine Supreme Court justices sitting today. . . .Lawyers representing Texaco have also been contributors, but they have given far less." Thomas Petzinger, Jr. & Caleb Solomon, *Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, WALL ST. J., Nov. 4, 1987, at 1.

36. Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 152 (1988).

37. *Id.* at 151-52.

half-way through his six year term, Hill resigned from the court. His replacement, appointed by a Republican governor, was Tom Phillips, a Houston trial judge and a Republican. When Hill used Phillips' swearing-in ceremony to plead for merit selection of judges, Justice Robert Campbell resigned, supposedly to campaign against Hill's reforms.[38]

The result of the scandal and Hill's reform movement was not only unprecedented conflict within the Texas Supreme Court, but also an opening wedge for Republican penetration. By 1988, it was time for a counter-attack by civil defense forces. For the 1988 elections, two-thirds of the Court's seats were vacant. Associate Justice Ted Z. Robertson chose to run against Phillips for the position of chief justice.[39] Justice Kilgarlin, admonished by the State Commission on Judicial Conduct, was challenged by Nathan Hecht, a Republican.[40] Democratic incumbent Raul Gonzalez was challenged by Republican Charles Ben Howell.[41] A new appointee to the court, Republican Barbara Culver, was challenged by Democrat Jack Hightower. New appointee Republican Eugene Cook was challenged by Democrat Karl Bayer. Finally, there was a battle over an open seat between Democrat Lloyd Doggett and Republican Paul Murphy.[42] It was the political equivalent of war between plaintiffs' and civil defense interests.[43]

The twelve major candidates for the Texas Supreme Court raised a total of $10,092,955.[44] A political action committee funded by trial lawyers raised another $1.4 million for television commercials and "get-out-the-vote" campaigns. Several of the races were clearly split between candidates funded by plaintiffs' lawyers and candidates funded by civil defense interests. That was especially true of the race for chief justice where incumbent Phillips raised slightly over $1 million and Robertson raised nearly $1.9 million. Other heavily funded races between plaintiff- and civil defense-backed candidates included the Kilgarlin-Hecht race where Kilgarlin raised over $2 million to Hecht's $650,000 and the Doggett-

38. *Id.* at 158.

39. Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 CRIM. L. & SOC. CHANGE 91, 95 (1992).

40. *Id.* at 98.

41. *Id.* at 97.

42. *Id.*

43. *Id.* at 95.

44. *Id.* at 99.

Murphy race, where Doggett raised about $660,000 to Murphy's $438,000.[45]

Angered by the pro-plaintiff tinge of the court's decisions, the Texas Medical Association was heavily involved in the 1988 supreme court elections. Its political action committee gave over $181,000 in direct contributions and encouraged individual doctors to give at least $250,000 more.[46]

The great advantage of the Republican candidates was that they could campaign against the plaintiff-backed candidates as reformers bringing integrity back to the court. Indeed, Chief Justice Phillips headed a bipartisan "clean slate" of candidates who were opposed to incumbent Democrats backed by trial lawyers.[47] The "reform" platform, together with financial backing of civil defense interests and increasing Republican Party strength, led to the defeat of all the plaintiff-backed incumbents. The only pro-plaintiff justice elected was Lloyd Doggett, a non-incumbent who had run for an open seat. Democrat Raul Gonzalez won, but he was backed by civil defense interests against a largely unfunded Republican. Democrat Hightower, a moderate, defeated an incumbent Republican who had angered the Medical Association by opposing medical malpractice caps. Republicans Phillips, Hecht and Cook won, with Phillips and Hecht defeating the most heavily funded plaintiff-backed Democrats. The result was the beginning of the Republican domination of the court.[48] Another effect was that civil defense interests learned that they could beat heavily funded plaintiff-backed candidates such as Kilgarlin and Robertson in head-on battles. The election of 1988 was the beginning of the end of the pro-plaintiff court of the 1980s.

The last gasp of the plaintiff-civil defense wars came in 1994 when pro-civil defense Democratic Justice Raul Gonzalez was up for reelection. Gonzalez was challenged in the Democratic primary by Rene Haas, a trial lawyer financed by trial lawyers, in one of the most vicious judicial campaigns in Texas history. Trial lawyers made a clear effort to defeat a conservative Democrat who strongly supported civil defense interests.[49] The primary campaign turned into the most expensive judicial race in history. Candidate

45. *Id.* at 97.
46. *Id.* at 99.
47. *Id.* at 94-96.
48. *Id.* at 96-99.
49. Walt Borges, *Gonzalez-Haas Fight Pushes Others Aside*, TEX. LAW., Mar. 14, 1994, at 1.

expenditures totaled $4,490,000.[50] Gonzalez won the run-off primary against Haas, causing the Republican candidate to withdraw from the race, and effectively giving the office to Gonzalez.

After the Gonzalez-Haas race, trial lawyers no longer mounted serious campaigns for the Texas Supreme Court because, no matter how much they spent, their candidates lost. Some trial lawyer contributions went to lower courts that seemed vulnerable to plaintiff-backed campaigns, but the big battle over the Texas Supreme Court was over.[51]

Great plaintiff-defense battles for judicial positions are not unique to Texas. Similar fights have occurred in other states such as Alabama[52] and Ohio.[53] Indeed, some of the most common conflicts in judicial elections are between plaintiff and civil defense interests.

A. Party Competition

Political parties play an important role in judicial elections. Whether elections are partisan, nonpartisan, or retention elections, political parties provide workers and funding. In fact, according to the September 2000 campaign reports for the Alabama chief justice race, the largest donor to the Democratic candidate for chief justice was the Democratic Party.[54] The party label provides a signifi-

50. The Haas-Gonzalez primary election just barely holds the record for judicial campaign expenditure. Roy Schotland, *Financing Judicial Elections, 2000: Change and Challenge* 2001 L. REV. M.S.U.-D.C. L. 1, 14 (forthcoming 2001).

51. The 1994 San Antonio Court of Appeals race was one of the earliest examples of trial lawyers contributing substantially to court of appeals races. In that race, five plaintiffs' firms kept the court from becoming Republican while Democrats were badly beaten in other parts of the state. The five firms contributed over $366,000 directly and through their PACs, and they raised another $254,000 from other personal injury lawyers. Those five firms contributed nearly 37% of the Democratic candidates' total funds. All four Democratic incumbents for the San Antonio court of appeals won, in contrast to the defeat of ten of the eleven Democratic incumbents running for other courts of appeals in the state. Democrats running for the San Antonio Court of Appeals raised twice as much money as the average candidate in a Texas appellate race in 1994. Mark Ballard & Amy Boardman, *5 Firms Swung 4th Court Races*, TEX. LAW., Mar. 20, 1995, at 1.

52. Alabama has been described as "a battleground between businesses and those who sue them." That battle, one scholar wrote, "is often fought in elections for the Supreme Court of Alabama." Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656-57 (1999).

53. Catherine Candisky, *High Court Races, Once Dignified, Now Down, Dirty*, COLUMBUS DISPATCH, Nov. 1, 2000, at 1A.

54. Stan Bailey, *Moore's War Chest Doubles Yates*, BIRMINGHAM NEWS, Sept. 26, 2000. A spokesman for the Alabama Citizens for a Sound Economy, a pro-business organization, claims that trial lawyers will give about 2 million dollars to the State Democratic Executive Committee and about 1 million of that sum will go to judges.

cant political asset for candidates in low visibility judicial races. Further, the party label is a crucial source of information for voters. As Professor Philip Dubois wrote:

> [V]oters' reliance on the partisan label choices is, in a very real sense, a rational act. This is no less true in judicial elections. . . . Thus, research has repeatedly demonstrated that where the partisan cue is available, judicial voters will rely upon it. The availability of the party label both prompts voters to exercise a choice, thereby increasing the percentage of the eligible electorate participating in the election, and results in the expression in the aggregate of the voters' preferences for the direction of judicial policy.[55]

The party label provides insight into the attitudes and values of judges and hints at how they will decide questions of public policy. One recent analysis of 140 articles discussing the link between party affiliation and performance on the bench confirmed that "party is a dependable measure of ideology on modern American courts."[56] Nationally, party affiliation is not a uniform indicator of judicial ideology. In a study of workers' compensation appeals decided by the Wisconsin Supreme Court over a ten year period, David Adamany found some correlation between the justices' party affiliation and their votes with respect to claimants, but the correlation was less than that found in Michigan.[57] Adamany believes that differences in the partisanship of judicial campaigns, and thus differences in the states' political cultures, explain the discrepancies in the correlations.[58] Another study of partisan voting in eight state courts reaches the following conclusions: "Where judges are selected in highly partisan circumstances and depend upon a highly partisan constituency for continuance in office, they may act in ways which will cultivate support for that constituency, that is, exhibit partisan voting tendencies in their judicial decision-making."[59]

See also Stan Bailey, *Bench Hopefuls Get Lawyers' Donations*, BIRMINGHAM NEWS, Oct. 6, 2000.

55. Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31, 44 (1986).

56. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999).

57. David W. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57 (1969).

58. *Id.*

59. DUBOIS, *supra* note 2, at 148.

Of course, while partisan voting has its value, there is a downside. Highly qualified judicial candidates can be defeated simply because they bear the wrong party label.[60] After Republican straight ticket voting led to the defeat of nineteen Democratic judges in Harris County, Houston, Texas and Republican victories in forty-one of forty-two contested judicial races, one law school dean commented, "[I]f Bozo the Clown had been running as a Republican against any Democrat, he would have had a chance."[61]

Parties expect extreme loyalty from their judicial nominees. In the 1970s, for example, when the Supreme Court of Michigan decided a state redistricting case in favor of the Republican Party, the Democratic chief justice was denied nomination for the 1976 election.[62] The state bar, however, rallied to support him, and he won re-election as an independent.[63]

Texas judges have long been expected to tow the party line. Two Republican judges on an intermediate appellate court were recently rebuked by delegates at the Republican State Convention because of their decision to overturn a sodomy conviction, which angered religious conservatives in the party.[64] Although the judges were Republicans, the delegates opposed their re-election and placed language in the party platform attacking "activist judges who use their power to usurp the will of the people."[65]

Philip Dubois' highly regarded 1980 book, *From Ballot to Bench*, is the classic defense of partisan elections and heralds the importance of party affiliation as an indication of judges' values. Dubois excluded the South from his analysis because, at the time, the Republican Party was insignificant in most Southern states and a study of party competition there would have been futile. In recent years, however, the Republican Party has shown such growth in the South that partisanship has become especially important in the study of Southern judicial elections.

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60. Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411 (2001).

61. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 780 (1995).

62. Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 196 (1996).

63. *Id.*

64. Julie Mason, *Bizarre Double Standard Permeates State GOP Convention*, HOUS. CHRON., June 25, 2000, at A32.

65. Right-Wing Attacks on Judicial Independence in the States in 2000, Right Wing Watch Online (People for the American Way), Sept. 25, 2000, *at* www.pfaw.org.

Voters can best use party affiliation as a predictor of the attitudes and values of judges in appellate court elections. It is in appellate courts that major policy questions are decided, not in trial courts, where more routine legal issues are handled.

Texas, like many Southern states, was once a one-party state. Real electoral competition in judicial races was found only in Democratic primaries, and there was little competition in those primaries when a candidate had the political advantage of incumbency.[66] In 1978, however, Bill Clements, the first Republican elected governor since the end of Reconstruction, was elected. He began appointing Republicans to open and new judicial seats, giving Republicans the advantage of incumbency.[67] The Republican Party began to rapidly gain strength, possibly due to Ronald Reagan's enormous popularity. In 1984 in particular, Ronald Reagan was so popular in Texas that he garnered nearly 64% of the two-party vote for President. His strength affected races far down the ballot, including those for the major trial courts in Texas. That year, Democrats challenged four Republican incumbents; all four Republican incumbents won. In contrast, there were sixteen races where Democratic incumbents were challenged by Republicans, and only three of the Democratic incumbents won.[68] A Democratic nominee was no longer guaranteed election. Indeed, in some counties (initially Dallas), the Republican Party gained such strength in the early 1980s that there was a massive movement of trial court judges from the Democratic to the Republican Party.[69] Soon, the only Democrat who could win election to Dallas County

66. Of the seventeen states with partisan judicial elections, five are Southern. Until twenty to thirty years ago all five were one-party Democratic states. The states with partisan judicial elections are Alabama, Arkansas, Illinois, Indiana, Kansas, Louisiana, Missouri, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Texas and West Virginia. Michigan, Ohio, and Idaho, however, should be added to that list. While these three states have a non-partisan ballot, judicial candidates run as partisan candidates. The five Southern states on this list that were once one-party Democratic states are Alabama, Arkansas, Louisiana, North Carolina, and Texas. Champagne, *supra* note 60, at 1415 n.16.

67. Many of those early Republican appointees were defeated in their first bid for reelection after being appointed by Governor Clements. In 1982, a strong Democratic year in Texas, every one of the twenty-three incumbent judges who was defeated was a Clements appointee facing his first election after appointment. Champagne, *supra* note 11, at 66.

68. L. Douglas Kiel, Carole Funk & Anthony Champagne, *Two-Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290, 291 (1994).

69. Champagne, *supra* note 11 at 79.

trial courts was Ron Chapman, a judge who shared the same name as the most popular radio disk jockey in the area.[70]

The Republican onslaught in statewide elections mounted more slowly but was just as overwhelming. None of the eighteen judges elected statewide in Texas is a Democrat, and in the 2000 elections, no Democrat ran for any of the three open seats on the Texas Supreme Court. There are, of course, some counties and regions in Texas—the Rio Grande Valley, for example—where Democrats are successful. However, the move from one-party Democratic dominance to substantial one-party Republican dominance was rapid, taking less then twenty years.

B. Interest Group Politics

Interest groups play a significant role in judicial elections. They provide potential judges with the funding needed to reach voters and assist candidates in mobilizing voters. Interest groups also provide voters with important cues about the attitudes and values of judicial candidates in states where the parties are not heavily involved in judicial elections. For example, in a recent superior court race in California, one candidate obtained the endorsements of the Sacramento County Deputy Sheriff's Association and the Sacramento Police Officers' Association.[71] If a voter did not know that the candidate had been a police officer and a prosecutor, such endorsements would provide a hint that the candidate was pro-law enforcement.

Interest group involvement in judicial elections has changed in several ways. Interest groups are increasingly national in scope, and the number of groups and the amount of money they contribute have vastly increased. In 1968, there were 10,300 interest groups; in 1988, 20,600.[72] During World War II there were 500 registered lobbyists in Washington; today there are 25,000.[73] The number of political action committees registered with the federal government grew from 608 in 1974 to about 4000 in 1994.[74] As judicial races become increasingly competitive, campaign costs rise

70. Anthony Champagne & Greg Thielemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271, 272 (1991).

71. Gary Delsohn, *Spending, Integrity Hot Issues in Judge Race*, SACRAMENTO BEE, Sept. 10, 2000, at B1.

72. G. Calvin MacKenzie, *The Revolution Nobody Wanted*, N.Y. TIMES (Literary Supplement), Oct. 13, 2000, at 12.

73. *Id.*

74. JEFFREY M. BERRY, THE INTEREST GROUP SOCIETY 22, 24 (Longman 1997) (1989); MacKenzie, *supra* note 72.

dramatically. Judicial candidates now need the substantial resources of interest groups to win elections.

For some analysts, interest group involvement in judicial politics is more than unhealthy; it challenges the appearance of judicial impartiality. Some analysts go further and suggest that judges are becoming "captives" of influential interest groups.[75]

In Texas, as elsewhere,[76] most interest group involvement in judicial races involves economic as opposed to ideological interests. Traditionally, the main interest groups in judicial elections are the competing plaintiff and civil defense segments of the bar. In states where unions are powerful, unions will often align with plaintiffs' lawyers in backing pro-plaintiff judicial candidates.[77] In Texas, plaintiffs' lawyers provide the main support for plaintiff-oriented judges due to the comparative weakness of unions. Civil defense lawyers and firms are aligned with business and professional interests. One of the main reasons for the success of Republicans and moderate-to-conservative Democrats in the 1988 Texas Supreme Court elections was the strong involvement of the Texas Medical Association (TMA). Not only did the TMA contribute substantial sums of money to its slate of candidates, but it also encouraged individual doctors to contribute money. The Association created a grass-roots campaign through which Texas physicians actively campaigned for the TMA slate.[78]

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75. NORTHEAST OHIO AM. FRIENDS SERV. COMM., OHIO SUPREME COURT JUSTICE FOR SALE (2000), www.afsc.net; *see also* TEXANS FOR PUB. JUSTICE, *supra* note 27.

76. One recent study of judicial elections in Pennsylvania strongly suggests that economic interests overwhelmingly dominate financial contributions to judicial races. Of the $3,129,783 contributed by PACs and law firms to thirty-five Pennsylvania supreme court candidates from 1979 to 1997, only eighteen contributing groups were labeled "ideological," and they contributed only $25,053. In contrast, groups categorized as "business" groups gave $2.5 million and consisted of 290 PACs and law firms. Four hundred labor PACs gave about $527,000. James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 JUDICATURE 10, 17 (2000).

77. One newspaper article described the political battle lines in judicial elections as follows:

> This ugly transformation of judicial politics has come as some of the nation's most divisive disputes have come before the courts. State Supreme Courts now decide the future of school funding; policies affecting guns, tobacco and the environment; and the rules that make it easy, or difficult, to sue corporations and doctors for damages. With such enormous stakes, the battle lines are stark: Trial lawyers and unions seek judges who will side with individuals and embrace new legal theories. Businesses want judges who'll protect them and the status quo.

Campaign Contributions Corrupt Judicial Races, USA TODAY, Sept. 1, 2000, at 16A.

78. Champagne, *supra* note 39, at 99.

One study of seven Texas Supreme Court Justices' campaign contributions provided a good indication of the campaign contributions of interest groups with economic concerns. That study found that the political action committees and executives of fifty corporations contributed 15% of the money raised by the seven justices. The study also found that the family of the head of a major tort reform group gave $60,000 to the justices and that 9% of the justices' money came from the political action committees of thirty trade groups, including the Texas Society of CPAs, the Texas Medical Association, the Texas Association of Realtors, the Texas Association of Defense Counsel, and the Texas Restaurant Association.[79]

In 1995, the TMA's involvement in Texas Supreme Court races created a major ethical issue for the court. Dr. Bernard Bradley had a large malpractice judgment awarded against him which the TMA found grossly unfair. Dr. Bradley became the catalystic factor needed to encourage physicians to actively participate in judicial races and back TMA-endorsed candidates. The Texas Medical Association produced a videotape about the Bradley case and used it to encourage doctors to back its candidates for the court. Ultimately, the Bradley case came before the Texas Supreme Court and one of the issues considered was whether justices who appeared in the videotape and who were endorsed by the TMA should recuse themselves from hearing the case. One justice, who did not appear in the videotape, recused himself in disgust over the inappropriateness of the TMA's deep involvement in the judicial election and its emphasis on reversing the verdict against Dr. Bradley.[80] His protest, however, was to no avail. The remaining eight justices participated in the decision and reversed the Bradley ver-

79. TEXANS FOR PUB. JUSTICE, *supra* note 27.

80. Justice Bob Gammage recused himself. He wrote:

> The problem is the perception created by a nineteen-minute video produced by TEX-PAC, the political action committee of the Texas Medical Association. A parody of Star Wars entitled Court Wars III, the video was intended to garner support for TEX-PAC's favored candidates for the Texas Supreme Court in the 1992 general election. By analogizing the Texas Trial Lawyer's Association to Darth Vader's evil empire and a "bipartisan coalition of medicine, business, agriculture and industry" to the champions of "fairness, impartiality and reform," the video sought to persuade viewers that the election of certain candidates to the Texas Supreme Court was important in their professional and personal lives. The video urged physicians not only to contribute money, but also to "conduct grass roots efforts . . . from . . . slate cards to office displays, voter information materials and handouts, to sample letters to communicate with your patients, colleagues and friends, to signature-styled newspaper ads. . . .

dict. One even wrote a reply to the justice's recusal in which he tried to justify the participation of those justices who had appeared in the videotape.[81]

Texas has had more than its share of troublesome cases where interest groups have appeared to compromise the independence of judges. For example, in Houston, Texas, victims' rights groups have frequently aligned with prosecuting attorneys to elect judges who are tough on crime. Thus, judges, well aware that their political futures may hang on their image as law and order judges, sometimes appear to pander to the crime control interests. One judge, for example, taped a picture of Judge Roy Bean's hanging saloon on the front of his bench, superimposed his image over Judge Bean's, and referred to the high court judges as "liberal bastards" and "idiots."[82]

> In an effort to drive home the importance of the Court races, the video goes beyond general statements to focus on the consequences of one particular medical malpractice case. Pointing to this case, the narrator alleges that "[a]n unjust legal system that punishes the innocent, along with the guilty, still flourishes in Texas, and medicine will always be a prime target." The defendant doctor is described as being "faced with bankruptcy, all for coming to the rescue of a patient in desperate need of his help." This "tragic situation" is called "a classic exercise in Texas justice where no good deed goes unpunished." Although a similar situation could "happen anytime in any place," the doctor is not without hope, as "[he] has a Supreme Court he can appeal to, if we prevail in November. Without that, he would have no chance, and his career would be ruined as a practicing physician. . . ."
>
> I believe that (1) where a person or entity has sought to engender support, financial or otherwise, for a judicial candidate or group of candidates, and (2) where that effort is made through a medium which is intended to be widely circulated, and (3) where that effort ties the success of the person's or entity's chosen candidate or candidates to the probable result in a pending or impending case, a judge should recuse from participation in that case. . . ."

Rogers v. Bradley, 909 S.W.2d 872, 873-74 (Tex. 1995).

81. Justice Craig Enoch wrote:

> . . . I am not critical of those who raise money for and campaign on behalf of judicial candidates. Those parties should be commended for their involvement in the political process. The vice lies rather in the Texas judicial selection system, which places intolerable tensions between the process by which judges are chosen and the obligations they must discharge once in office. . . . To establish recusal as proper under the facts of this case would seriously jeopardize their ability to perform the duties of their office. For candidates and their supporters alike, the fine line of conducting a campaign which draws public interest and attention without eroding public confidence in judicial neutrality is hard to hew.

Id. at 884.

82. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 813 (1995).

C. The Role of Money

Judicial elections, especially competitive ones, require a great deal of money. The 1980 judicial campaign was the first million dollar campaign in Texas and was primarily self-funded by individual judicial candidates.[83] In 1984, Texas had its first million-dollar campaign that was not self-funded, and for several years afterward, million-dollar campaigns were fairly commonplace.[84] Table 1[85] provides data on campaign contributions in competitive Texas Supreme Court races from 1980 to 1998. It shows that on average, candidates needed considerably more than $1 million to win election from 1984 to 1996. Indeed, even the average campaign treasury of Democratic and Republican candidates generally totaled more than $1 million during that time.

Campaign expenses generally dropped for most candidates in the 1996 election cycle, and further dropped in 1998. In the 2000 elections,[86] no Democrat opposed any of the three incumbent Republicans running in Texas Supreme Court elections. One incumbent spent less than $100,000 on her campaign. She had no primary opponent and her only opponent in the general election was a Libertarian candidate who spent nothing. Another incumbent spent nearly $320,000. He had token opposition in the Republican primary and opposition in the general election from a Libertarian and a Green Party candidate, both of whom spent nothing. The third Republican incumbent was the first Latino to run for the Texas Supreme Court in a Republican primary. Perhaps due to the uncertainty inherent in being the first Latino, he spent nearly $800,000. His primary opponent spent less than

83. The wealthy candidate in the 1980 campaign was Will Garwood. He had been appointed to the Texas Supreme Court by Republican Governor Bill Clements and ran as the Republican nominee against C.L. Ray, a Democrat and intermediate appellate judge who received substantial trial lawyer backing.

84. John Hill, a former Texas secretary of state, former attorney general, and unsuccessful Democratic candidate for the governorship in 1978 (defeated by Republican Bill Clements), successfully ran for the chief justiceship in 1984 with a campaign treasury of over $1.4 million. His Republican opponent, John Bates, was not well known and had only about $12,000 in contributions. Bates was able, however, to garner about 46% of the vote, probably because he ran as a Republican with Ronald Reagan at the top of the ticket. Champagne, *supra* note 11, at 91.

85. Kyle Cheek & Anthony Champagne, *Money in Texas Supreme Court elections: 1980-1998*, 84 JUDICATURE 20, 22 (July/Aug. 2000) (The data in this article has been readjusted from 1998 to 2001 dollars).

86. Expenditures reported for the 2000 election are in 2000 dollars (unadjusted for inflation). Schotland, *supra* note 50, at 30.

$5,000, and a Libertarian general election opponent spent nothing.[87]

As the days of real competition in statewide races came to an end, so did the days of big money Texas Supreme Court elections. Still, substantial campaign funds remain, perhaps because of occasional competition in Republican primaries. Further, the mere existence of campaign funds wards off opposition and provides protection for the incumbent against surprise electoral attack. In Texas, an incumbent Republican running for re-election for the supreme court has many potential donors who are more than willing to give to the candidate viewed as an obvious winner.

In the 1980s, plaintiff-oriented Democrats running for the Texas Supreme Court received their funding predominantly from trial lawyers. Today, civil defense-oriented judges get their money from civil defense interests. One study of campaign funding for seven civil defense-oriented justices from 1994 to 1997 found that 42% of the $9.2 million raised by these justices came from parties and lawyers with cases before the court, or who were at least "closely linked" to such cases. Political action committees and executives of fifty corporations gave another 15%, and 9% of the money came from thirty trade groups. The sources of the remaining funds were not identified.[88] Clearly, substantial funds come from those with interests in the outcome of litigation before the court.

Negative publicity for the court (related to the large amount of campaign money raised for supreme court elections; the Texaco-Pennzoil case; the campaign contributions associated with that case; and the scandal involving Justice C.L. Ray) has led to major campaign fund-raising reform. Reform came in the form of the 1995 Judicial Campaign Finance Act,[89] which sets up contribution limits for judicial candidates. The limits are quite generous and vary from one court level to another. For the Texas Supreme Court, campaign contributions are limited to $5,000 from an individual per election.[90] One may argue that the law has been effective in that single lawyers or small groups of lawyers no longer provide almost all of a judicial candidate's funding, as was occasionally true in the 1980s. Such funding, however, came from a handful of wealthy plaintiffs' lawyers, supporting Democratic can-

87. Gonzales won the primary by a huge margin of 59%. Still, his primary victory margin was less than the other incumbent Republican who had a primary opponent.

88. TEXANS FOR PUB. JUSTICE, *supra* note 27.

89. *Id.*

90. TEX. ELEC. CODE § 253.155 (1999)

didates. As Texas became Republican that funding dried up. Now the money comes from large civil defense firms, businesses, and trade groups, where funding is more dispersed.

Occasionally, substantial sums are still spent on lower court races. For example, in 2000, an incumbent Democrat on the first court of appeals spent nearly $681,000 and lost the general election. In Harris County (Houston), one trial court election saw over $918,000 spent despite no opposition in the general election. All the money was spent in the Republican primary and primary runoff election, the incumbent Republican spending $633,000 of that sum.[91] In other words, as campaign funds and spending drop for Texas Supreme Court races, some appellate and trial court races are getting more expensive.

III. THE CONTINUING (AND LARGELY IGNORED) PROBLEMS

A. The Name Game

Judicial campaigns can be expensive and hard fought, but they remain low-visibility races where voters are often unfamiliar with the candidates. Unfamiliarity makes a party label all the more important. If a contested office has low visibility, voters will often use the party affiliations of the candidates as a cue to the candidates' values and vote accordingly.

Of course, in party primaries all candidates for an office have the same party affiliation, so party label is not a voting cue. And in general elections, some voters will rely more on name recognition than party label in casting their ballots.[92] One reason yard signs are commonly used by judicial candidates is that they are an inexpensive advertising mechanism. Of course, the yard sign rarely states more than the candidate's name and potential office, but it helps make the judicial candidate's name a familiar one.

Perhaps the most famous instance of name familiarity (and voter name confusion) was the election of Don Yarbrough to the Texas Supreme Court.[93] But there have been numerous other instances of name familiarity assisting candidates. In recent years, a number of judges were elected with names that have considerable appeal to

91. Schotland, *supra* note 50, at 30.

92. Texas political strategist George Christian said the following with respect to the name identification issue: "People don't pay much attention to Supreme Court races. All they pay attention to in Supreme Court races is a name." Virginia Ellis, *Familiar Names, Big Money Win High Court Races*, DALLAS TIMES HERALD, May 5, 1986, at 8A.

93. *Supra* text accompanying notes 24-25.

Texas voters, such as Sam Houston Clinton, Ira Sam Houston, John Marshall, and Sam Bass. Former Texas Supreme Court Chief Justice Joe Greenhill believes that he gained votes in Dallas because of the well-known Greenhill School, though he had no connection with it. Former Chief Justice Robert Calvert believes that he benefited from having the same name as the long-time state comptroller, whose name appeared on all state warrants. He also thinks that he benefited from an advertising campaign for Calvert's Whiskey that was in use during one of his election campaigns. The newspaper ad campaign read "Switch to Calvert."[94]

One study of Dallas County voters' recognition of the names of Texan political figures found high recognition for U.S. Senator Lloyd Bentsen and Dallas Mayor Annette Strauss. Texas Supreme Court Justice Raul Gonzalez had moderately high name recognition, as did a trial court judge involved in a case with such a high profile that it became the subject of a movie.[95] Another trial court judge, with moderately high name recognition, was the subject of a nationwide controversy over remarks he made about gay murder victims. But one trial court judge, Ron Chapman, had name recognition almost as high as Senator Bentsen's and Mayor Strauss'. When voters were asked to recall the "public office" that Ron Chapman held, the overwhelming response was "disk jockey." Judge Ron Chapman shared the same name as the most popular radio personality in Dallas County. The voter recognition that he got from that name probably explained why Chapman was the last Democrat in Dallas County to win election to trial court.[96]

Selection based on name recognition is a potential problem in judicial races because judicial candidates have low visibility and are not near the top of the ticket. Some states are enhancing voter awareness of judicial candidates by providing voter information pamphlets containing basic background information on the candidates. Indeed, studies have found that voters tend to use voter information pamphlets as their main source of information about judicial candidates.[97] Texas, however, provides no voter information pamphlets to its voters despite efforts to pass legislation re-

94. Champagne, *supra* note 11 at 100-102.

95. Anthony Champagne & Greg Thielemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271, 272 (1991) (Judge Larry Baraka, a Republican who ran unopposed for a second term in 1988, figured prominently in publicity about the release of Randall Dale Adams. The movie "The Thin Blue Line" is about Adams.).

96. *Id.* at 274

97. Thomas R. Phillips, State of the Judiciary 77th Legislature (Feb. 13, 2001), app. E, http://www.tomphillips.com. The appendix is a report by Charles H. Sheldon and

quiring it to do so. Cost is the concern. Two years ago, when it became clear that cost considerations would prevent voter information pamphlets in Texas, legislation was passed to provide candidate information over the Internet, since Internet pamphlets would be essentially cost-free. That legislation, however, was vetoed by then Governor George W. Bush, who indicated that he did not believe the government should provide candidate information to voters.[98]

B. Minority Representation

Only about 8% of Texas judges are Latino, and less than 3% are African-American.[99] In contrast, 12% of Texas' population is African-American and 29% is Latino.[100] These low numbers invite several interpretations. One is that white voters dominate counties and larger judicial districts and vote against minority judicial candidates. Civil rights organizations representing Latino and African-Americans have argued that in order for minorities to get elected to office, smaller judicial districts must be cut so that minority voters may comprise a majority.[101] Alternatively, it is argued that minority candidates, like minority voters, tend to be Democrats at a time when Republicans increasingly win Texan judicial races. Thus, it is party affiliation, not race or ethnicity, that prevents mi-

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Nicholas P. Lovrich entitled *Preliminary Report on Judicial Voters in King and Spokane County 1996 Judicial Elections.*

98. Steve Brewer & Kathy Walt, *Bush Vetoes Public-Defense Bill, Oks Health-Care Fee Negotiations*, HOUSTON CHRON., June 22, 1999, § 1, at 1. A little-noticed bill passed the Texas legislature that could have greatly affect name-game judicial politics. The bill required that candidates for the two statewide elected courts, the Texas Supreme Court and the Court of Criminal Appeals (the highest court in Texas for criminal cases), submit the signatures of 500 registered voters with at least 100 signatures coming from each of five senatorial districts along with a $3,000 filing fee to get a candidate's name on the party primary election ballot. The bill's sponsor hoped that this would require people to have rather broad support in order to run for the state's two highest courts. Thus, a candidate could not run because, in the words of the bill's sponsor, "they have a happy name." Mary Alice Robbins, *Special Report: Legislative Review 2001*, TEX. LAW., June 4, 2001, at 19. However, the bill was vetoed by Governor Rick Perry.

99. Thomas R. Phillips, State of the Judiciary 76th Legislature, March 29, 1999, http://www.altonline.com/clients/chief/state.htm.

100. BENJAMIN GINSBERG ET AL., WE THE PEOPLE: AN INTRODUCTION TO AMERICAN POLITICS 808 (3d ed., Texas ed. 2001).

101. The president of an African-American bar organization in Dallas County, for example, claimed that countywide judicial elections impede the ability of African-Americans to get elected to judgeships. Christy Hoppe & Lori Stahl, *New Plan for Electing State's Judges Sought Democrats, Minorities Who are Upset with Ruling Vow to Fashion Strategy*, DALLAS MORNING NEWS, Jan. 20, 1994, at 23A.

norities from being elected to judgeships.[102] It is also argued that there are few minority judges because there are few minority lawyers (with the exception of justices of the peace and county judges, Texas judges must be lawyers).[103]

Low minority representation has elicited federal litigation, but in 1993 the Fifth Circuit held that party affiliation, not minority status, explained the low number of minority judicial candidates.[104] As a result, civil rights lawyers failed in their efforts to reduce the size of Texas judicial districts.

IV. THE FAILURE OF JUDICIAL REFORM

For fifty years reformers have discussed the need to change the way Texas selects its judges, but little has changed. Many interests play a part in the selection of judges, and thus far it has been impossible to put together a coalition of interests strong enough to spark change. The political parties, for example, have a strong interest in the way judges are selected since judicial offices are offices that party activists seek, and are only available under a party label. A nonpartisan system of selecting judges, such as a merit selection or appointive system, would reduce the political parties' role in the process. Given its current dominance, the Texas Republican Party is not going to give up or reduce its role in selecting judges.[105]

Incumbent judges are also interested in the selection of judges, and they too are satisfied with the present system. After all, it got them into office. An alternative system may not work so well. Incumbents know they can succeed in a partisan election system, but success is less clear under an alternative.[106]

Civil rights groups argue that to elect more minority judges you must have smaller districts. But this would reduce Republican Party strength and is therefore resisted. The Republican Party suc-

102. Bob Driegert, chairman of the Dallas County Republican Party, argued that minorities win judicial elections when they run as Republicans. He also argued that countywide elections are beneficial to the Republican Party in Dallas County since the Republican Party is the majority party there. With countywide elections, the Republicans can win all offices; with smaller districts, Republicans, he argued, cannot sweep county elections. The issue of countywide vs. smaller judicial districts, he argued, is "more of a partisan issue than a minority-equity issue." *Id.* at 27A.

103. League of United Latin Am. Citizens Council v. Clements, 999 F.2d 831, 865-66 (5th Cir. 1993).

104. *Id.* at 859.

105. Anthony Champagne, *Judicial Selection in Texas: Democracy's Deadlock*, *in* TEXAS POLITICS: A READER 88, 95-96, 101 (Anthony Champagne & Edward J. Harpham eds., 2d ed. 1998).

106. *Id.* at 98.

ceeds county-wide, but will have greater difficulty securing smaller, minority districts. Among minority interests, there is dispute over how small judicial districts should be. African-American leaders would prefer to elect judges in places like Harris (Houston) and Dallas Counties in county commissioners precincts, which would create an African-American dominated district in 25% of the county. But such division does nothing for Latino interests, which would need considerably smaller districts to constitute a majority.[107] The business community has felt uncomfortable with very small districts, fearing that they will lead to the election of pro-plaintiff judges in some areas.[108]

Similarly, there is concern that a move to an appointive system would vastly increase the power of the governor. Not only is a strong governor contrary to Texas political tradition, but a strong governor today will increase the power of a conservative, Republican chief executive. Therefore a change to an appointive system will not sit well with many Democrats and trial lawyers.[109]

The number and diversity of interests concerned with judicial selection has prevented change. A change inducing coalition must be especially strong, because most changes will require a constitutional amendment. An amendment requires strong legislative support, as well as sufficient popular support to carry a majority in a state-wide election. It is unlikely, therefore, that the Texas system of judicial selection will change. There has been major scandal; civil rights litigation; turnover in the power of the political parties; outrageous special interest contributions; resignation of supreme court justices (including the chief justice); and one reform proposal after another; yet change has not occurred, and, it seems reasonable to conclude, is unlikely to occur. Like the Judicial Campaign Finance Act—the only major reform in the selection of Texas judges—change must come from within the current system of partisan election.

V. TEXAS JUDICIAL POLITICS NOW AND ITS LESSONS FOR JUDICIAL ELECTIONS ELSEWHERE

A. The Effects of New Judicial Politics

One of the chief criticisms leveled against the popular election of judges is that the integrity of courts suffers when judicial candi-

107. *Id.* at 97-98, 101, 103.
108. *Id.* at 99.
109. *Id.* at 95-96.

dates are forced to engage in campaign politics.[110] That criticism predates the American experience with judicial selection. Edmund Burke offered the following observation on an elected judiciary in his commentary on the French Revolution:

> [E]lective, temporary, local judges . . . exercising their dependent functions in a narrow society, must be the worst of all tribunals. In them it will be vain to look for any appearance of justice towards strangers, towards the obnoxious rich, towards the minority of routed parties, towards all those who in the election have supported unsuccessful candidates. It will be impossible to keep the new tribunals clear of the worst spirit of faction.[111]

The experience with elected state judiciaries has not been as dire as Burke predicted. However, the chief concerns remain the same in Texas as elsewhere: elected judges are overly responsive to electoral pressures;[112] they do not administer justice impartially; and public confidence in the judiciary's legitimacy suffers as a result. The integrity of the courts is heightened when judges are perceived as impartial and not beholden to interests whose cases they may be called upon to hear.[113]

Given the potential for electoral politics to create the appearance of undue influence on judicial decisions, it is not surprising that one of the chief effects of the new judicial politics in Texas has been heightened media attention with respect to the state judiciary. As judicial elections have become high profile, media coverage has also increased, and scrutiny has become more intense.[114] On December 6, 1987, that scrutiny landed Texas' judicial elections in the national spotlight. Texas was shaken when the national television

110. See WATSON & DOWNING, *supra* note 8, for a discussion of the concerns that led to the initial popularity of the Missouri Plan.

111. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 223 (Anchor Books ed., 1973) (1790).

112. Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 427-46 (discussing evidence indicating that elected state supreme court justices may be more likely to rule in favor of the death penalty when facing an upcoming election).

113. When presented with survey results showing that in Texas 83% of the public, 79% of lawyers, and 48% of judges think that campaign contributions affect judicial decisions, U.S. Supreme Court Justice Anthony Kennedy said, "This is serious because the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral." Pete Slover, *Lawsuit Challenges Texas' System of Electing Judges,* DALLAS MORNING NEWS, Apr. 4, 2000, at 21A.

114. *E.g.*, Mary Flood, *Justice Still for Sale? Clock Is Ticking on the Answer*, WALL ST. J., June 24, 1998, at T1; Richard Woodbury, *Is Texas Justice for Sale?,* TIME, Jan. 11, 1988, at 74.

news program *60 Minutes* featured the Texas Supreme Court in a story titled "Is Justice for Sale?" The program questioned whether Texas judges were being exposed to undue influence by deep pocket interests contributing heavily to candidates friendly to their views. Current Chief Justice Tom Phillips concedes that the story "had a tremendous impact on Texas judicial politics,"[115] while his predecessor, John Hill, has argued that the "news reports only reflect a growing belief among many citizens of Texas that [the] state's legal system no longer dispenses evenhanded justice."[116]

Eleven years after *60 Minutes* brought Texas' judicial politics to national attention, Texas was again cast into the national spotlight. On November 10, 1998, two days before election Tuesday, *60 Minutes* revisited judicial selection in Texas and concluded that the judicial politics of 1987 were still pervasive. All that had changed, according to the story, was the primary source of campaign contributions.[117] Where trial lawyers had contributed the lion's share of money to judicial candidates in the 1980s, defense interests had become the primary contributors by 1998. Former Chief Justice John Hill, who had resigned from the Texas Supreme Court in 1987 to pursue judicial selection reform, defended the Texas judiciary in the second *60 Minutes* story. He conceded, however, that efforts at judicial selection reform since the first story were insufficient and that further reforms were needed. Current Chief Justice Tom Phillips, an advocate of replacing partisan judicial elections with a merit appointment-type system, also concedes that, although some reform has occurred, "much more needs to be done."[118] In his first State of the Judiciary Address following the *60 Minutes* story, he renewed his call for judicial selection reform, noting that "[t]he current judicial selection system has long since outlived its usefulness."[119]

In the years between *60 Minutes* stories, government watchdog groups began focusing on the electoral politics pervasive in Texas' judicial races. They most often pointed to the appearance of compromised fairness raised by a system that requires judges to campaign with funds donated by interests with cases before the state's courts. Early efforts focused on the sources of contributions to

115. *Id.*

116. John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Selection,* 40 BAYLOR L. REV. 339, 342 (1988).

117. Flood, *supra* note 114.

118. *Id.*

119. Thomas R. Phillips, State of the Judiciary Address, 76th Leg. (1999), http://www.tomphillips.com/state76.htm.

Texas Supreme Court candidates,[120] showing that high court races in the 1980s and early 1990s tended to pit plaintiff and civil defense-backed candidates against one another. Since then, Texans for Public Justice has issued two reports probing the link between the decisions of Texan Supreme Court justices and the donors contributing to their campaigns.[121] The first report to examine the link between donations and court decisions, *Payola Justice*, concluded that

> while the faces and ideologies of the justices and their paymasters has changed[,] justices continue to take enormous amounts of money from litigants who bring cases before the court. The fact that the parties who finance the justices' campaigns repeatedly reappear on the court's docket documents the extent to which justice is still for sale in the Texas Supreme Court.[122]

In a later report,[123] Texans for Public Justice examined the correlation between donations and the acceptance of cases for review by the Texas Supreme Court. Although charges of a direct connection were tempered,[124] the report emphasized a higher case acceptance rate for law firms that contributed heavily to the campaigns of the high court justices, suggesting that campaign donations at least provide an entrée to the court's docket.[125] Chief Justice Tom Phillips responded, however, that the report failed to prove that campaign

120. TEXANS FOR PUB. JUSTICE, CHECKS AND IMBALANCES: HOW TEXAS COURT JUSTICES RAISED $11 MILLION (2000), http://www.tpj.org/reports/checks/toc.html.

121. TEXANS FOR PUB. JUSTICE, *supra* note 27; TEXANS FOR PUB. JUSTICE, PAY TO PLAY (2001) [herinafter TEXANS FOR PUB. JUSTICE, PAY TO PLAY], *available at* http://www.tpj.org/reports/paytoplay/index.htm.

122. TEXANS FOR PUB. JUSTICE, *supra* note 27.

123. TEXANS FOR PUB. JUSTICE, PAY TO PLAY, *supra* note 121.

124. Although the study conceded the difficulties of determining a cause and effect relationship between campaign donations and judicial decisions, the director of Texans for Public Justice argued that "[t]he appearance that there is a cause-and-effect is undeniable. Money seems to get you in the front door." Pete Slover, *Group Alleges Supreme Court Favors Donors*, DALLAS MORNING NEWS, Apr. 25, 2001, at 23A. However, see Roy Schotland, Kyle Cheek & Anthony Champagne, *Estimating the Relationship Between Campaign Donations and Judicial Decisions* (unpublished manuscript, on file with the Fordham Urban Law Journal), for a discussion of the methodological difficulties associated with attempts to establish a causal relationship between campaign donations and judicial decisions. Schotland, Cheek, and Champagne conclude that it is not only extremely difficult to isolate a causal relationship between donations and decisions, but that such an approach to the analysis of judicial campaign finance obscures the more important question of how much influence campaign finance exerts on electoral success in judicial elections.

125. TEXANS FOR PUB. JUSTICE, PAY TO PLAY, *supra* note 121, found that petitions for review from large contributors were 7.5 times as likely to be accepted as those from non-contributors.

donations had any effect on the acceptance of cases for review, noting that large donor firms likely handle more cases of the types the Supreme Court deems worth resolving.[126]

Perhaps more important than the links between campaign donations and Texas court decisions is the simple fact that Texas judicial selection remains at the center of media attention. The first *60 Minutes* story, rather than prompting serious reform, seems to only encourage harsher more constant criticisms of Texas courts. Reluctance to reform judicial elections, combined with the perception of bias created by the present judicial campaign finance system, increases the likelihood that Texas' process for selecting judges will remain the focus of attention.

B. Perception of the Courts

The new judicial politics in Texas—replete with scandal, the embarrassing election of an unqualified supreme court justice, the appearance of impropriety raised by large campaign contributions, and the attention of the national media and interest groups—might be expected to have eroded public confidence in the courts. Largely in response to these concerns, Texas' Office of Court Administration commissioned a survey of the Texas public as well as of the Texas legal profession to determine public perception of the Texas judiciary.[127] The results were generally positive, although they reveal concern about the fairness of the Texas judicial system.

Over 50% of respondents expressed either a somewhat positive or very positive overall impression of the Texas judiciary.[128] Sixty-nine percent of respondents believe that Texas' courts in general are somewhat or very honest and ethical,[129] while 77% believe the

126. Citing another rationale for the high acceptance rate of large-donor firms, Chief Justice Phillips said, "Considering the amounts of money they charge, I'd be surprised if they didn't get good results." Slover, *supra* note 113, at 28A.

127. SUPREME COURT OF TEX., TEX. OFFICE OF COURT ADMIN. & STATE BAR OF TEX., PUBLIC TRUST & CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS: SUMMARY REPORT (1998), *available at* http://www.courts.state.tx.us/public info. The survey questioned 1215 adult Texans about their impressions of the state's courts. Several of the survey questions focused on the overall perception of Texas courts and whether race, gender, or socio-economic status plays any role in the treatment of litigants in court. The survey also asked respondents whether campaign contributions influence court decisions as well as what method of judicial selection most Texans prefer. The sample size of 1215 adults is sufficient to ensure, with 95% confidence, that the sample results are within 2.8% of the true percentage that would be determined by surveying the entire population of Texans.

128. *Id.* at 4.

129. *Id.* at 5.

same of the Texas Supreme Court.[130] Seventy-three percent of respondents believe that "judges and court personnel are courteous and respectful to the public."[131] The same percentage believe that they would be treated fairly "if they had a case pending in a Texas court."[132]

Despite a positive overall impression of the Texas courts, the survey reveals concern about court fairness in four general areas: gender, race, socio-economic status, and judicial campaign finance. With respect to gender, only 50% of respondents agreed that men and women are treated alike in Texas courts, while 62% believed that there are too few female judges in Texas. Texans expressed even greater concern about fairness with regard to race. Only 41% reported that "the courts treat all people alike regardless of race," and 55% believe that there are too few minority judges.[133]

Texans' greatest concern, however, is the influence of money in Texas courts: both the effects of socio-economic status on fairness and court access and the effects of campaign contributions on judicial decisions. Only 21% of Texans agree that "the courts treat poor and wealthy people alike," while 69% do not believe that court costs and fees are affordable.[134] Texans' concern about the effects of campaign contributions on judicial decisions is even greater. When asked whether judges in Texas are influenced by campaign donations, 83% agreed that campaign contributions influence judicial decisions.[135]

Texans seem generally to hold the state's courts in high regard, but are dissatisfied with court composition and distrust the role of money in the judicial process. In spite of Texans' overall belief that race, gender, socio-economic status and campaign finance are all problematic issues for Texas' court system, an overwhelming majority of Texans expressed a desire to retain the current elective method of judicial selection.[136] This reluctance to embrace wholesale reform of the state's judicial selection method strongly suggests that the only realistic way to reform Texas elections is within the context of the current election system.

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130. *Id.*
131. *Id.* at 4.
132. *Id.* at 5.
133. *Id.* at 6.
134. *Id.* at 8.
135. *Id.* at 6.
136. Seventy percent of survey respondents "believed that judges should be elected by the people" while only 20% preferred gubernatorial appointment with retention elections. *Id.* at 8.

In a survey designed to gauge the legal profession's view of Texas courts, judges and lawyers expressed moderately consistent opinions about the courts and judicial selection. Both tend to have a positive view of the Texas courts,[137] but both also reported some degree of inequity based on race, gender, or socio-economic status. Fifty-one percent of judges do not believe that Texas courts are racially biased[138] and 56% did not report gender bias.[139] However, only 42% of responding judges reported equal treatment of the poor and wealthy.[140] Among lawyers, 42% reported the courts to be free of racial bias[141] while 37% reported no gender bias.[142] However, only 19% of lawyers feel that the poor and wealthy are treated equally in Texas' courts.[143]

The opinions of judges and lawyers tend to diverge with regard to judicial campaign finance. Judges are nearly evenly split over the influence of campaign donations on court decisions, with 48% reporting at least some donation influence.[144] In contrast, nearly 80% of lawyers believe that campaign contributions have at least some influence on judges.[145] Judges and lawyers tend to agree, however, in their preferred judicial selection method. Fifty-two percent of judges and 42% of lawyers indicated a preference for judicial election, albeit on a nonpartisan basis.[146] In contrast, there was equal, though substantially weaker, support among judges for partisan elections and gubernatorial appointment systems, each preferred by only 21% of responding judges.[147] Among attorneys, gubernatorial appointment with retention elections ranked a close second as the preferred method of judicial selection at 35%,[148] while partisan election was supported by only 11%.[149] Both judges

137. Eighty-five percent of judges and 63% of lawyers held either a somewhat or very high impression of the Texas courts. SUPREME COURT OF TEX., STATE BAR OF TEX. & TEX. OFFICE OF COURT ADMIN., THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE: A SURVEY OF JUDGES, COURT PERSONNEL, AND ATTORNEYS 2 (1999), *available at* http://www.courts.state.tx.us/publicinfo.

138. *Id.* at 4.

139. *Id.*

140. *Id.*

141. *Id.* at 5.

142. *Id.*

143. *Id.*

144. Judges in local trial courts, minority judges, and rural judges were more likely to indicate that campaign donations have at least some influence on decisions. *Id.*

145. *Id.*

146. *Id.* at 6.

147. *Id.*

148. *Id.*

149. *Id.*

and attorneys agree that judicial selection ranks as one of the most important issues facing Texas' court system, with judges ranking judicial selection as the feature they would most like to change about the Texas courts.[150] One could conclude that limited reform efforts would find support, since both judges and Texans seem concerned. Clearly, though, Texans are not ready to give up judicial elections, and any reforms that occur will have to take place within the context of a popularly elected judiciary.

VI. TEXAS JUDICIAL POLITICS NOW AND ITS LESSONS FOR JUDICIAL ELECTIONS ELSEWHERE

Since the advent of its new judicial politics, Texas has been a bellwether for emerging trends in other states with elected judiciaries. In just over two decades, the Texas experience has completed a full cycle of change. It went from staid, one-party affairs dominated by initial appointment to the bench, to an era of true two-party competition in judicial contests. Then it moved back in the direction of one-party dominance. The course of judicial election politics in Texas has produced valuable lessons for other states.

The most telling lesson from Texas' recent experience with judicial selection is that those interests most affected by court decisions are willing to exert a great deal of influence to attempt to shape the composition of state courts. It is at best misguided to argue that deep pocket interests are attempting to buy decisions from individual judges. It is, however, equally naïve to suggest that those who stand to lose the most in the courtroom will stand idly by, acquiescent to the philosophical makeup of the courts.

In states with elective modes of judicial selection, campaign finance is the easiest way to influence court composition. As long as the perception exists that money buys electoral advantage, deep pocket interests will donate heavily to their favored candidates. And even in the absence of real competition in a judicial race, there will be those who will continue to contribute, if for no other reason than to show their support for one judicial philosophy over another. On the other hand, as long as judges are elected, they will feel compelled to accept campaign contributions, even from those who have interests before their court. For judicial candidates who face no real competition in an election, a large campaign treasury may indicate to future challengers that they face a formidable task. Even in an electoral environment dominated by one political party,

150. *Id.* at 8.

a large campaign war chest may serve to stave off primary challengers. This is true whether those challengers pose a real threat or are simply viewed as an inconvenience to the incumbent.

Money, though it clouds judicial integrity, is not the fundamental problem in judicial elections. Money enters judicial politics because of name-familiarity. Judicial races are typically low-profile affairs, and candidates for the bench seldom enjoy much name recognition among voters.[151] To make themselves known, judicial candidates must spend money. In local trial court elections in densely populated urban areas, this may still entail garnering recognition among tens of thousands of potential voters. In statewide elections, the problem is magnified. Without other effective means of garnering votes, judicial candidates face little choice but to raise large amounts in campaign contributions and then to spend money on name-recognition.

Party affiliation, of course, provides a critical cue for many voters.[152] Even in the absence of party labels on general election ballots, candidates may enjoy partisan identification from their party's primary election.[153] When judicial candidates are removed from nomination via party primary, parties may still prove invaluable to a candidate's campaign through substantial campaign funding. In states with real two-party competition, party affiliation may focus independent voters.[154] In non-partisan races, substantial funding is even more important, as judicial candidates have no party name on which to rely.[155] In one-party states, non-partisan elections present the opportunity for opposing economic interests to wage expensive campaigns to secure the election of their favored candidates, since no candidate is guaranteed electoral victory on the basis of party alone. Expensive judicial races, even if only a symptom of a deeper problem, are not likely to fade from the judicial landscape without broad, serious campaign finance reform.

Texas' expensive judicial races exemplify the deep institutional damage that can result from money's influence. When fierce bat-

151. Champagne & Thielemann, *supra* note 95, at 271-76.

152. DUBOIS, *supra* note 2.

153. Kathleen L. Barber, *Ohio Judicial Elections: Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762, 762-789 (1971).

154. For a discussion of the importance of money in securing the votes of those not guided by party labels, see Kyle Cheek, The Bench, the Bar and the Political Economy of Justice: Texas Supreme Court Races, 1980-1994 (1996) (unpublished dissertation in The University of Texas at Dallas Library).

155. California provides a good example. In three 1986 non-partisan, uncontested retention elections for the Supreme Court, the record amount of $11,400,000 in 1986 dollars was spent. Schotland, *supra* note 50, at 13 n.55.

tles are waged between opposing interests to influence court composition, the public is likely to stop believing courts are impartial. Rather, it will likely think that judges are beholden to the interests that won them election. In extreme cases, the new judicial politics may result not just in the appearance of impropriety, but in real judicial misconduct. While episodes like the public discipline of two Texas Supreme Court justices are infrequent, their existence only adds to the public sense that the electoral selection system renders justice to those able to gain influence by contributing to judges' campaigns.

Because judicial reform invariably impacts some interests adversely, the prospect of meaningful changes in bench ascension is fraught with formidable problems. In fact, an important lesson from the Texas experience is that reform is best pursued in incremental steps. Wholesale reform efforts pose major threats to established interests, but incremental reform will temper the severity of that threat, making reform easier to accomplish. Even in the wake of scandal and national scrutiny of the Texas judiciary in the late 1980s, wholesale reform efforts were never a serious prospect.[156] However, the same circumstances that led to calls for wholesale reform in Texas were the basis for later incremental changes in judicial campaign finance.

A final lesson that should be taken from Texas' experience with judicial selection is that voters can be profoundly committed to selecting their judges in popular elections. Despite criticisms of popular judicial elections in Texas; national attention on perceived improprieties; public mistrust of judicial campaign finance; and low voter knowledge of judicial candidates, Texans still hold fast to voting for judges. This, coupled with the other difficulties of reform, makes it unlikely that Texas will abandon its elective process for selecting judges. It also serves to heighten the importance of incremental reform efforts.

In short, Texas' history of judicial elections vividly illustrates many of the oft-repeated criticisms of the popular selection of judges. Perhaps more importantly, Texas' experience with judicial selection offers important lessons to other states on how to deal with the difficulties inherent in judicial elections. Certainly, no other state wants to experience with its courts what Texas did in the 1980s. However, close attention to the Texas experience pro-

156. Champagne, *supra* note 36, at 146-59.

vides, at the very least, an outline for other states to consider as they find themselves entering the new era of judicial election politics.

Judicial Donations Raise Questions of Partiality

> Texas Supreme Court justices are elected by voters, and the campaign contributions they receive from law firms with an interest in their decisions have caused some to worry that justice is for sale.

BY **MAURICE CHAMMAH**, THE MARSHALL PROJECT MARCH 26, 2013 6 AM

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Bidness as Usual: Supreme Court Graphic by Tamir Kalifa and Bob Daemmrich

BIDNESS AS USUAL

This is one in a series of occasional stories about ethics and transparency in Texas government.

Tom Phillips, a former chief justice on the Texas Supreme Court, has a strong opinion of the state's judicial elections. "Of the ways you can elect judges," he said, "Texas has one of the worst systems."

In 1988, when he ran for the state's highest court, he voluntarily capped individual donations to his campaign at $5,000. Today, his law firm — which regularly represents clients before the state Supreme Court — routinely donates tens of thousands of dollars to the campaigns of the justices who preside over those cases.

Texas is one of 22 states with judicial elections, which often involve large donations from law firms, special interests and individuals who might have a stake in particular court cases.

It's an arrangement that raises questions about impartiality, and has long prompted calls for change from lawyers, lawmakers and even judges themselves. The latest came last month, when state Rep. Richard Peña Raymond, a Laredo attorney, filed House Bill 129 to require judges to recuse themselves in cases where they have received $2,500 or more from a party or law firm arguing before them.

"The public wants to hold the judiciary in higher esteem than other parts of government," he said.

Several former Texas Supreme Court justices agree the system is in need of reform, but say they have never let campaign contributions affect their rulings.

Others argue that law firms often have more insight than the general public into who is best qualified to serve, so it makes sense for them to donate to judicial campaigns.

"The one group of people who knows who's qualified is lawyers.," said Justice Debra Lehrmann, who has been on the court since 2010. "People who are not qualified cannot raise the money it takes."

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Defenders of elections for judges say the alternative — having elected officials appoint judges — would be worse because it would put the process behind closed doors.

“Voters insist they want the right to elect their judges,” said Supreme Court Justice Don Willett, who has served since 2005. “Ask them to name one, and they'll likely come up blank. But they want a voice, even as they say that judicial fundraising raises appearance concerns.”

A case that illustrates those concerns is one that former Chief Justice Phillips, now an Austin-based attorney for the law firm Baker Botts, helped argue before his former colleagues.

In 2001, 71-year-old Leonel Garza died of a heart attack after taking the anti-inflammatory drug Vioxx for 25 days. His family sued the drug manufacturer Merck & Co. in what was one of numerous wrongful death lawsuits filed around the country. A district court and a San Antonio appeals court agreed with the family, awarding them nearly $7.75 million in damages.

Merck — which was represented by Baker Botts — appealed to the state Supreme Court, arguing that Garza had a history of heart problems and that there was no proof that the company’s drug caused the heart attack. In August 2011, the court sided with the company.

In the 10 years preceding the decision, justices who sided with Merck in the 7-0 vote received at least $85,000 combined in campaign contributions from the Baker Botts political action committee. Justice Nathan Hecht, who wrote the court’s opinion in the case, received $20,000. Chief Justice Wallace Jefferson received $12,750.

Andrew Baker, a managing partner at Baker Botts, said the firm is “confident that the court resolves all of its cases on its conclusions about the law and the facts, and not on any improper bases.”

As long as the state requires judges to compete in partisan elections, he said, "our partners who voluntarily contribute to our political action committee understand that judicial candidates need sufficient campaign funds to inform the voters about who they are and why they should serve."

Ethics experts who have studied judicial contributions say they are less worried that companies and law firms are pressuring judges to vote a particular way in specific cases. Their bigger concern is that the current system gives a leg up to candidates who might have an ideological bias against plaintiffs.

"I try to draw a distinction between buying a vote and buying a judge with a particular viewpoint," said Billy Corriher, a legal analyst with the left-leaning Center for American Progress who authored a report last year on campaign contributions in judicial elections.

In the years after the Texas Constitution of 1876 established judicial elections instead of appointments, elections were "conducted quietly and were rarely contested or remarkable," Seana Willing, executive director of the State Commission on Judicial Conduct, wrote in a 2010 article in the *South Texas Law Review*.

That changed under the tenure of Bill Clements, the first Republican Texas governor in more than a century, who appointed members of his own party to fill vacant seats on the court throughout the 1980s. Plaintiffs' attorneys had to spend large sums of money to re-elect Democrats.

In 1987, *60 Minutes* ran a special on the Texas Supreme Court called "Justice for Sale," which focused on the court's dismissal of an appeal by Texaco in the company's losing contract case against Pennzoil. According to a report in *Time*, Pennzoil's attorney and his firm contributed a combined $248,000 to members of the court for their campaigns between 1980 and 1987, while Texaco's attorney and his firm donated a combined $190,000.

In the 1994 Democratic primary between Rene Haas and Raul Gonzalez, the two candidates together spent nearly $4.5 million campaigning. The following year, the Texas Legislature responded by passing the Judicial Campaign Fairness Act, which limited contributions to justices to $5,000 for individuals and $30,000 for law firms.

That measure may have curbed spending, but researchers found it didn't curb influence. Madhavi McCall, a political science professor at San Diego State University, conducted a study of the relationship between judicial decisions and campaign contributions in 530 Texas Supreme Court cases between January 1994 and June 1997. "In every instance," she said, "the probability of a party garnering votes increases if the party contributed to a given justice's campaign."

Questions around judicial elections have surfaced at the national level, not just in Texas. In 2009, the U.S. Supreme Court ruled in favor of Hugh Caperton, a mining company president who argued that his 3-2 loss to A.T. Massey Coal

Company before the West Virginia Supreme Court was unfair because Massey's chief executive had spent $3 million to elect a sympathetic justice to the court. Since that ruling, reform advocates have worried that the focus on such an extreme case will mean more subtle forms of influence won't get the proper attention.

Defenders of the elective system say that the alternative — a system of nominations like the one used for the U.S. Supreme Court — is far more prone to partisan influence. Michael DeBow, a professor at the Cumberland School of Law at Samford University in Alabama who has studied the merits of various systems for selecting judges, said the same law firms that currently donate would continue to dominate the selection process in a secretive game of "inside baseball."

"My gut feeling is, better the devil you know," DeBow said.

Scott Brister, who served on the state's high court from 2003 to 2009, said allowing judicial candidates to affiliate with political parties gives voters at least some sense of whom they're voting for. But others say it steers the candidates dangerously close to telling voters — and law firms with money to spend — how they would rule once elected.

State Sen. Dan Patrick, R-Houston, has filed Senate Bill 103, which would bar voters from automatically voting for judges affiliated with a party through "straight ticket" voting, requiring them to instead mark each judicial candidate separately. State Sen. Robert Duncan, R-Lubbock, has filed Senate Joint Resolution 34, which would preserve partisan judicial elections, but subject each elected judge to a nonpartisan "retention election," meaning a simple yes or no vote by the public on whether they should remain in office.

"Every suggested reform has strengths and weaknesses, and I confess that I haven't cracked the code on the perfect replacement," Willett said. "But I've endured firsthand the myriad drawbacks to our current system, and they are plentiful."

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Judicial Selection In Texas

A Comparative Study of State Judicial Selection Methods

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FOREWORD

A young Abraham Lincoln, commenting on the recent passing of the last surviving Founding Father, James Madison, urged his audience to "let reverence for the laws … become the political reason of the Nation." He observed that all should agree that to violate the law "is to trample on the blood of his father," and that only "reverence for the constitution and laws" will preserve our political institutions and "retain the attachment of the people."[1]

Lincoln knew that the law is the bedrock of a free society. Our judges are the guardians of the rule of law. If they do not apply the law in a competent, efficient, and impartial manner, trust in the rule of law will erode and society will fray. Therefore, our system for selecting and retaining judges should be based on merit and should encourage stability, experience, and professionalism in our judiciary.

The 86th Legislature created a special commission to study judicial selection, ensuring that the 87th Legislature in 2021 will consider judicial selection in Texas. The purpose of this paper is to discuss Texas's current system of electing judges, to provide a summary of various judicial selection systems in other states, and to offer a compendium of research materials on this topic. Our intent is for this paper to assist the public debate and legislative consideration of how judges will be chosen in Texas in the future. There is no perfect system of selecting judges, no system in another state that Texas should adopt whole. But there is much to be learned by reflecting on our state's experience in judicial elections and in the study of other states' systems, which will help Texans develop a system with unique attributes that can become a model for the nation.

While it is not the purpose of this paper to make specific proposals for establishing a new system of judicial selection in Texas, we do believe that our current system of partisan election of judges does not place merit at the forefront of the selection process. How can it? Unquestionably, most voters—even the most diligent and informed ones—do not know the qualifications (or lack thereof) of all the judicial candidates listed on our ballots. This is especially true in our metropolitan counties, where the ballots list dozens of judicial positions. And even in our rural counties, voters are asked to make choices about candidates for our two statewide appellate courts and our fourteen intermediate appellate courts with little or no knowledge of the candidates for those offices.

The clearest manifestation of the ill consequences of the partisan election of judges is periodic partisan sweeps, in which nonjudicial top-of-the-ballot dynamics cause all judicial positions to be determined on a purely partisan basis, *without regard to* the qualifications of the candidates. A presidential race, U.S. Senate race, or gubernatorial race may be the main determinant of judicial races lower on the ballot. These sweeps impact both political parties equally, depending on the election year. For example, in the 2010 election, only Republican judicial candidates won in many Texas counties. In 2018, the opposite occurred and only Democratic judicial candidates won in many counties. These sweeps are devastating to the stability and efficacy of our judicial system when good and experienced judges are swept out of office for no meritorious reason. Nathan Hecht, Chief Justice of the Supreme Court of Texas, described this vividly in his State of the Judiciary Address to the 86th Legislature:

> No method of judicial selection is perfect…. Still, partisan 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. Even worse, when partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty. Make no mistake: a judicial selection system that continues to sow the political wind will reap the whirlwind.[2]

And there is this: judges in Texas are forced to be politicians in seeking election to what decidedly should not be political offices. They are not representatives of the people in the same way as are elected officials of the executive and legislative branches. A state legislator is to represent the interests and views of her constituents, consistent with her own conscience. A judge is to apply the law objectively, reasonably, and fairly—therefore, impartiality, personal integrity, and knowledge of and experience in the law should be the deciding factors in whether a person becomes and remains a judge. A judicial selection system should make qualifications, rather than personal political views or partisan affiliation, the paramount factor in choosing and retaining judges.

Over the past twenty-five years, Texas has led the way in restoring fairness to our civil justice system. We now have the opportunity to lead the way in establishing a stable, consistent, fair, highly qualified, and professional judiciary, keeping it accountable to the people, while also increasing integrity by removing it from the shifting winds of popular sentiment, electoral politics, and the need to raise campaign funds, all with the knowledge that the truest constituency of a judge is the law itself.

Hugh Rice Kelly and David Haug
Directors
Texans for Lawsuit Reform Foundation

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PART I: INTRODUCTION

Movements to change Texas's judicial selection system have been undertaken for decades.[3] In 1946, following a five-year study of the state's judicial system, the Texas Civil Judicial Council proposed amending the Texas Constitution to allow for gubernatorial appointment of judges followed by unopposed retention elections.[4] Similar proposals were suggested in 1953, in 1971 by Chief Justice Calvert and the Task Force for Court Improvement, and in 1986 by Chief Justice John Hill and the Committee of 100.[5] None of these movements succeeded.

Nonetheless, calls for change continued. Senators Robert Duncan (R-Lubbock) and Rodney Ellis (D-Houston) led a bipartisan effort to pass judicial selection reform through the Texas Legislature.[6] In 1999, a bill was proposed providing for gubernatorial appointment of judges with senate confirmation and unopposed retention elections, which passed the Senate but stalled in the House.[7] In 2001, the two senators proposed the same plan to apply only to Texas's two highest courts: Supreme Court of Texas and Court of Criminal Appeals of Texas.[8] Senator Ellis filed the same proposal to apply to all Texas courts in the 2003 and 2005 legislative sessions.[9] Chief Justice Tom Phillips advocated for change during and after his tenure on the Supreme Court.[10] None of these efforts succeeded, either.

In the last ten years, calls for reform by state leaders, at least five former Supreme Court justices, leaders of the State Bar of Texas, academic commentators, and public policy groups have continued.[11] In 2013, former Supreme Court Chief Justice Wallace Jefferson noted that Republican and Democrat chief justices have been calling on the Texas Legislature for the last thirty years to change the way judges come to the bench in Texas and voiced his belief that the system is "broken" and should be changed.[12]

In November 2018, Texas voters swept dozens of incumbent judges from office, apparently based solely on the judges' affiliation with a particular political party. Texas has eighty intermediate appellate court judges. Forty-five of these judgeships were on the 2018 ballot, with a contested election occurring in thirty-two of the forty-five seats.[13] The candidate nominated by the Democratic Party won thirty-one of the thirty-two contested elections,[14] including in districts where Republican candidates had dominated for years. Every incumbent Republican intermediate appellate court and trial court judge on the ballot in Harris County (Houston) was defeated.[15] When all the new judges took office on January 1, 2019, about one-third of Texas's 254 constitutional county judges were new and one-fourth of Texas's district court, statutory county court, and justice court judges were, too.[16] In total, 443 judges were new to the bench in Texas when they assumed office in January 2019.[17] On the appellate and district courts, the Texas judiciary lost seven centuries of judicial experience in a single day.[18]

The November 2018 sweep of judicial offices was hardly unprecedented. In 1994, for example, Republicans won in forty-one of forty-two contested appellate court races in Texas.[19] A 2017 analysis of elections held between 2008 and 2016 found dramatic sweeps to be the rule, not the exception. Focusing on Texas's twenty most-populous counties, the study found that within any given jurisdiction where one or more judgeships was up for election (be that jurisdiction a county, an appellate district, or statewide), all judicial races

within that jurisdiction were won by candidates from the same party approximately ninety-four percent of the time.[20]

Election results also show that the popularity of candidates at the top of the ballot (not the judicial candidates' qualifications for office) greatly influences judicial elections down ballot.[21] For example, when popular Democrat incumbent Lloyd Bentsen ran for reelection to the U.S. Senate in 1982, mostly Democratic judicial candidates prevailed.[22] When Republican Ronald Reagan ran for reelection as president in 1984, Republican judicial candidates were more frequently elected.[23] The 2018 sweep by Democrats appears to have been related in large part to the U.S. senatorial race between Republican Senator Ted Cruz and Democratic challenger Beto O'Rourke.[24] Even though Cruz won the race, O'Rourke was more popular in the large urban counties and the Democratic judicial candidates swept those counties.

The election cycle itself appears to be a deciding factor in judicial election outcomes in some counties. For instance, Republican judicial candidates garnered the majority of votes cast in Harris County (Texas's most populous county) in the 2010 and 2014 general elections—gubernatorial election years when voter participation was modest.[25] Democratic judicial candidates, on the other hand, gathered the majority of votes in most races in the 2012 and 2016 general elections—presidential election years in which a larger numbers of voters participated.[26] The back-and-forth pattern—wholly unrelated to the qualifications of any of the judicial candidates—changed in 2018, when candidates fielded by the Democratic Party swept judicial races in Harris County, even though it was a gubernatorial election year.[27]

History proves that these partisan swings will continue to happen in Texas, sometimes sweeping in Republican judicial candidates and sometimes sweeping in Democrats, undermining the stability of the judiciary, discouraging many qualified lawyers from seeking judicial office, and diminishing the development of an experienced and professional judicial branch.

In response to the most recent upheaval in the Texas judiciary, the Texas Legislature passed a bill during the 2019 legislative session establishing the Texas Commission on Judicial Selection to study and review the method by which appellate court judges and trial court judges having county-wide jurisdiction are selected for office in Texas.[28] The Commission must submit its findings to the Governor and Legislature no later than December 31, 2020,[29] so that the Legislature may consider its recommendations during the next legislative session, which begins on January 12, 2021.

This paper provides in Part II an overview of Texas's judiciary, the method used in Texas for selecting and removing judges, and other information concerning Texas's judiciary. In Part III, the paper summarizes the various judicial selection systems used in other states, which fall into two general categories of selection by election and selection by appointment. The Missouri Plan, which is a method using appointment and retention elections, is used in numerous states and discussed in detail.

Part IV provides a method for evaluating the various judicial selection methods. The major methods currently in use—partisan election, nonpartisan election, gubernatorial appointment, legislative appointment, and the Missouri Plan—are evaluated to determine how likely each is to yield judges who are competent, fair, independent, and accountable.

PART II: THE TEXAS JUDICIARY

In evaluating whether Texas's method of selecting judges can be improved, it is necessary to understand the current method of judicial selection and how it operates in practice. Texas is one of *only six states* that select all of the judges in their judicial branch via partisan elections.[30] However, while the Texas Constitution expressly provides that Texas's judges are to be elected to office,[31] the constitution also allows interim court vacancies to be filled through appointment by the Governor or county officials,[32] as opposed to interim elections generally used to fill vacancies in other branches of Texas government.[33] The frequency with which interim judicial appointments occur, when combined with the low percentages of contested elections involving those who have been appointed, suggest that it is a misconception to think Texas has a purely elective judicial selection system.

Election of Texas Judges

The current Texas Constitution mandates that Texas judges are to be selected for office by general election.[34] Texas, however, has not always elected its judges. During the Republic era, from 1836 to 1846, the Texas Legislature appointed appellate judges, but not trial judges.[35] When Texas became a state in 1846, its new constitution provided for gubernatorial appointment of judges with the concurrence of the Senate.[36] Four years after that, in response to sweeping judicial selection changes across the county, Texas adopted a partisan election-based method for selecting judges.[37] Then, in 1861, when Texas joined the Confederacy, its new constitution returned to the selection of judges by gubernatorial appointment with Senate approval,[38] and the 1869 Reconstruction constitution continued this system.[39] In 1876, Texas adopted its current constitution, which provides for election-based judicial selection.[40]

The requirement to stand for election applies to all judges whose office is created under Article V of the Texas Constitution: justices on the Supreme Court of Texas, judges on the Court of Criminal Appeals of Texas, justices on the fourteen intermediate appellate courts, judges on the district courts, statutory county courts and statutory probate courts, constitutional county court judges, and justices of the peace.[41]

Nearly every state in the Union has tried partisan elections for selecting judges at some point in the past 150 years.[42] However, most of the other states have since adopted some other judicial selection system.[43] Texas is one of only a few states to continue to select all of its constitutional judges through partisan elections.[44] Aside from small changes to the Texas judicial selection system since its rebirth in 1876, the fundamental features of the system have remained unchanged for more than 140 years.

Texas has a total of eighteen judges on its two high courts: nine each on the Supreme Court (which has jurisdiction over civil matters) and the Court of Criminal Appeals (which has jurisdiction over criminal matters), who are elected to six-year terms.[45] The elections for these offices are staggered so that three judges from each court are scheduled for election in each biennial general election.[46]

Texas has fourteen intermediate courts of appeals.[47] The eighty justices of these courts of appeals are also elected to six-year terms.[48] Intermediate appellate court elections are staggered, but somewhat unevenly. About half of these positions are filled in one election

cycle (2018, 2024, 2030, etc.) and about one-fourth of the positions are filled in the two intervening election cycles (2020, 2022, 2026, 2028, etc.).[49]

At the trial court level, Texas has 1,794 Article V judges serving on 472 district courts, 254 constitutional county courts, 247 statutory county courts, 18 statutory probate courts, and 803 justice courts, all of whom are elected for four-year terms, such that about half of the trial judges serving full terms are up for election every two years.[50] However, in any given biennial general election, more than half the total number of the trial court judges will be on the ballot because a significant portion of Texas judges are initially appointed to fill vacancies and must stand for reelection in the next general election, rather than serving out the remainder of the departing judge's term.

Initial Appointment of Judges

While all Texas judges ultimately stand for election, judges can initially be selected for judicial office either by general election or appointment to fill a vacant position.[51] Interim vacancies arise when the preceding judge vacates her seat prior to completing her term, whether due to death, illness, retirement, resignation, or appointment to another office. The Governor is authorized to appoint individuals to fill interim vacancies on the Supreme Court, Court of Criminal Appeals, the intermediate courts of appeals, and district courts.[52] When vacancies occur in county-level courts—including statutory county courts (also called "county courts at law"), probate courts, constitutional county courts, and justice courts—the Commissioners Court in that county is entitled to appoint the replacement.[53] As the following table shows, thirty-one percent of Texas's Article V judges (excluding justices of the peace) as of September 1, 2018 first came to the bench via an interim appointment.

INITIAL SELECTION OF CURRENT JUDGES[54] (AS OF SEPTEMBER 1, 2018)

Court	Judges in Office	Number Initially Appointed	Number Initially Elected
Supreme Court	9	7 (78%)	2 (22%)
Court of Criminal Appeals	9	1 (11%)	8 (89%)
Intermediate Courts of Appeals	79	44 (56%)	35 (44%)
District Courts	452	158 (35%)	294 (65%)
County Courts	516	120 (24%)	396 (76%)
TOTAL	**1065**	**330 (31%)**	**735 (69%)**

An individual appointed to fill a court vacancy is entitled to remain on the bench until the next general election.[55] For example, if a court of appeals justice resigns in 2019 during the first year of a six-year term of office, the Governor's appointee to fill the vacancy would be entitled to maintain that office only until the next general election in 2020. The winner

of the 2020 election would then be entitled to maintain the office for the remaining four years of the vacated six-year term, after which the seat would again be up for election in 2024. The winner of the 2024 election would then be entitled to hold the office for a full six-year term.

The percentage of judges who were initially appointed to office varies by the type of court. For example, seven of the nine Supreme Court justices were initially appointed to their positions, whereas only one of the Court of Criminal Appeals judges was initially

INITIAL SELECTION OF SUPREME COURT JUSTICES, 1945 TO 2019[59]

Justice	Selection Date	Appointed	Elected
Hart, James P.	1947	X	
Garwood,W. St. John	1948	X	
Hickman, J.E.	1948	X	
Harvey, R.H.	1949	X	
Griffin, Meade F.	1949	X	
Calvert, Robert W.	1950		X
Smith, Clyde E.	1950	X	
Wilson, Will	1951		X
Culver, Frank P.	1953		X
Walker, Ruel C.	1954	X	
McCall, Abner V.	1956	X	
Norvell, James R.	1957		X
Greenhill, Joe R.	1957	X	
Hamilton, Robert W.	1959		X
Calvert, Robert W.	1961		X
Steakley, Zollie	1961	X	
Pope, Jack	1965		X
Reavley, Thomas M.	1968	X	
McGee, Sears	1969		X
Daniel, Price	1971	X	
Denton, James G.	1971		X
Phillips, Hawthorne	1972	X	
Greenhill, Joe R.	1972	X	
Johnson, Sam	1973		X
Doughty, Ross E.	1975	X	
Yarbrough, Don	1977		X
Chadick, T.C.	1977	X	
Barrow, Charles W.	1977	X	
Campbell, Robert M.	1978		X
Garwood, William L.	1979	X	
Spears, Franklin S.	1979		X
Ray, C.L.	1980		X
Wallace, James P.	1981		X
Robertson, Ted Z.	1982	X	
Sondock, Ruby K.	1982	X	
Pope, Andrew "Jack"	1982	X	
Kilgarlin, William W.	1983		X
Gonzalez, Raul A.	1984	X	
Hill, John L.	1985		X
Mauzy, Oscar H.	1987		X
Culver, Barbara	1988	X	
Cook, Eugene A.	1988	X	
Hightower, Jack	1988		X
Phillips, Thomas R.	1988	X	
Doggett, Lloyd	1989		X
Hecht, Nathan L.	1989		X
Gammage, Bob	1991		X
Cornyn, John	1991		X
Spector, Rose	1993		X
Enoch, Craig T.	1993		X
Baker, James A.	1995	X	
Owen, Priscilla R.	1995		X
Abbott, Greg	1996	X	
Hankinson, Deborah	1997	X	
Gonzales, Alberto	1999	X	
O'Neill, Harriet	1999		X
Rodriguez, Xavier	2001	X	
Jefferson, Wallace	2001	X	
Schneider, Michael	2002	X	
Smith, Steven W.	2002		X
Wainwright, Dale	2002		X
Brister, Scott A.	2003	X	
Jefferson, Wallace	2004	X	
Medina, David M.	2004	X	
Green, Paul W.	2005		X
Johnson, Phil	2005	X	
Willett, Don R.	2005	X	
Guzman, Eva M.	2009	X	
Lehrmann, Debra H.	2010	X	
Boyd, Jeffrey S.	2012	X	
Devine, John	2013		X
Hecht, Nathan L.	2013	X	
Brown, Jeffrey V.	2013	X	
Blacklock, James D.	2018	X	
Busby, J. Brett	2019	X	
Bland, Jane	2019	X	

appointed.[56] Additionally, as of September 1, 2018, fifty-six percent of intermediate appellate court justices were initially appointed to the bench by the Governor, as were thirty-five percent of Texas district court judges.[57] While such initially appointed judges soon face election, the election may or may not be contested. These statistics have led some commentators to conclude that, beneath its elective veneer, Texas's judicial selection mechanisms are, in fact, often appointive in nature.[58] The preceding chart summarizes the initial selection process of Texas Supreme Court justices from 1945 to 2019. Over the seventy-two-year period, forty-five of seventy-six justices—fifty-nine percent—were initially appointed to the office.

Qualifications for Judicial Office

To be qualified for election or appointment, a candidate for judicial office must satisfy certain requirements set out in the Texas Constitution and the Texas Government Code. All Texas judges must be citizens of the United States and reside in the state of Texas, and apart from constitutional county courts and justice courts, which are discussed below, must be licensed to practice law in Texas.[60] Judges on the two high courts and the intermediate appellate courts must also be at least thirty-five years old and must have been a practicing lawyer or judge of a court of record for at least ten years prior to taking office.[61]

Texas trial court judges must satisfy similar, but less strict, qualification standards. A district court judge need only be twenty-five years old and have at least four years of experience as a practicing lawyer or judge of a Texas court.[62] Additionally, a district judge must reside in the district to which elected while serving in that office.[63] Similarly, a county court at law judge must have at least four years of experience and must also have resided in the county where the court is located for at least two years before taking the bench.[64]

The only requirement for a constitutional county court judge is that the person is "well informed in the law of the State."[65] The Texas Constitution does not set out qualifications for justices of the peace, and so the generally applicable qualifications statute applies to these judges.[66] Thus, a justice of the peace must be a United States citizen who has resided in the state and district for which election is sought for at least twelve months. A justice of the peace must be at least eighteen years of age, not mentally incapacitated, and not a felon.[67]

The constitutional and statutory minimum qualifications for judicial office in Texas are somewhat similar to the standards imposed by other states.[68] Most, but not all, require a judicial candidate to be a resident of the state and to have a certain number of years in practice (typically between five and ten) before becoming eligible to serve as an appellate judge.[69] For trial court candidates, experience as a practicing lawyer is likewise required, but the requisite number of years is usually reduced.[70]

Notably, certain criteria are not mandatory qualifications for becoming a judge in Texas or other states. For example, no state requires that its judges have any specific type of legal experience—such as litigation or appellate experience—or to be certified or specialized in any particular field.[71] Additionally, almost no states require that their high court and appellate judges have previous judicial experience.[72] New York and New Jersey, however, require that appointments to their intermediate courts of appeals must come from their existing pool of trial court judges.[73]

Although not mandated, many Texas judges nonetheless do have prior judicial experience.[74] As of September 1, 2018, twenty-seven percent of the judges on Texas's intermediate

courts of appeal served on a lower court immediately prior to taking their seat and eleven percent of district court judges had previously served on a lower court.[75]

Seeking Election to Judicial Office

A qualified candidate seeking election to a Texas court must win a plurality of votes in the general election for the judicial office.[76] In seeking to have his or her name put on the ballot for a general election, there are two paths a candidate can pursue. First, a candidate can seek the nomination of a political party.[77] In Texas judicial elections, the overwhelming majority of candidates choose this route.[78] Second, a candidate can campaign as an independent and obtain a spot on the general election ballot without first seeking a political party nomination.[79]

Candidates seeking the nomination of the Republican or Democratic Party must run for nomination in the party's primary election.[80] To be listed as a candidate on a party's primary ballot, a candidate must first file an application to be placed on the ballot.[81] Certain judicial candidates must also file a petition signed by qualified voters supporting the candidate's placement on the ballot.[82] A candidate for the Supreme Court or Court of Criminal Appeals, for example, must obtain at least fifty signatures from qualified voters in each of the fourteen courts of appeals districts.[83] Judicial candidates seeking a seat on an intermediate court of appeals, district court, or county court at law that includes a county with a population exceeding certain thresholds (of 1.0 or 1.5 million) must obtain at least 250 petition signatures.[84] Candidates seeking judicial positions in less populated areas, however, may need to obtain as few as fifty signatures.[85] Additionally, judicial candidates seeking a party nomination may be required to pay that party a filing fee, ranging from $2,500 for statewide judicial office to $1,500 for small-county trial court positions.[86] However, candidates for positions on certain intermediate courts of appeals and trial courts can avoid these filing fees by submitting petition signatures.[87]

To obtain the Republican or Democratic Party nomination for the general election, a judicial candidate must receive a majority of the total votes cast in the primary election.[88] In the event no candidate receives a majority of the initial primary votes cast, the two candidates who received the most votes must participate in a runoff primary election.[89] The candidate who obtains a majority of the votes cast—either in the primary election or the runoff election—is the party's nominee for the judicial office in the general election.[90]

A judicial candidate running as an independent must file both a declaration of intent to run as an independent candidate and an application for a place on the general election ballot, which application includes the candidate's name, occupation, date of birth, residence, office sought, and a sworn representation that the candidate satisfies the requirements for that office.[91] Additionally, an independent candidate must file a petition supporting her placement on the ballot, signed by qualified voters who did not vote in any party primary election that nominated a candidate for the same race.[92] When seeking a statewide judicial position, an independent candidate must obtain a number of signatures equal to one percent of the total vote received by all candidates for governor in the most recent gubernatorial general election.[93] For other judicial positions, the independent candidate must obtain between twenty-five and 500 signatures, depending on the total vote for governor cast in that district or county in the most recent gubernatorial general election.[94]

Campaign Contributions and Expenditures

One feature that distinguishes judicial elections from other elections in Texas is the regulation of campaign contributions and expenditures. In general, Texas law does not limit the amount of money a candidate for state office may accept in campaign contributions or spend on campaigning. However, concerns regarding unlimited fundraising in judicial campaigns have received significant attention from the media, government officials, citizens, and interest groups. In the 1980s in particular, Texas was the focus of national media reports questioning whether large judicial campaign contributions from a small number of lawyers jeopardized judicial independence.[95] The perception that contributions to judicial campaigns result in preferential treatment for contributors persists today.[96]

In an effort to control the perceived problems related to unlimited contributions to candidates for Texas's Supreme Court, Court of Criminal Appeals, intermediate appellate courts, district courts, and statutory county courts, the Texas Legislature enacted the Judicial Campaign Fairness Act in 1995.[97] As initially enacted, the statute capped contributions to a judicial candidate and restricted independent expenditures made in support of a judicial candidate.[98] It also provided for voluntary compliance by judicial candidates with expenditure limits.[99] The statute was amended in 2019 to repeal the restrictions on independent expenditures and the voluntary compliance provisions.[100] Limitations on independent expenditures have been held to be unconstitutional[101] and the voluntary expenditure limits were meaningless given that the tight contribution limits effectively prevent most judicial candidates from raising sufficient funds to reach the expenditure limits.

After the 2019 amendments, the Judicial Campaign Fairness Act still limits contributions to judicial candidates.[102] These limits vary depending on the particular office sought and, in some cases, the population of the area served by the court.[103] In addition to limiting the total amount of campaign contributions, the law limits the amount of contributions a candidate can receive from specific sources, such as individuals, law firms, and political action committees.[104]

For example, a judge on the Supreme Court or Court of Criminal Appeals may accept a maximum of $5,000 in an election from an individual, a maximum of $25,000 from a political action committee (PAC), and a maximum of $300,000 in total from all contributing PACs during the election.[105] A person running for a trial court bench in a district having a population of less than 250,000 can accept only $1,000 from an individual, $5,000 from a PAC, and $15,000 in total from all PACs.[106]

The contribution limits of the Judicial Campaign Fairness Act apply to a single election cycle.[107] Thus, a candidate can raise up to the statutory limits for each primary election, runoff election, and general election.[108] However, the primary and general elections are considered to be one election for the purposes of calculating contribution limits under the law, if the candidate is unopposed in these elections.[109]

In addition to limiting the amount of contributions judicial candidates can accept, the Judicial Campaign Fairness Act also establishes limits on when a candidate can accept contributions.[110] In general, a judicial candidate is prohibited from accepting contributions when not involved in a campaign. Specifically, a candidate cannot accept a contribution more than 210 days prior to the deadline for filing an application for a place on the ballot.[111]

Additionally, a judicial candidate cannot accept a contribution 120 days after the date of the election in which the candidate last appeared on the ballot.[117]

Restrictions on Judicial Campaign Speech

Another significant difference between judicial elections and other elections in Texas is the restriction on certain types of statements that a judicial candidate can make in the context of a campaign. Since the 1920s, candidates for judicial office in Texas and elsewhere have been prohibited from making statements that could impugn the public perception of the candidate's willingness to faithfully and impartially perform his judicial duties.[113] However, over the past thirty years, such restrictions have been challenged as constitutionally impermissible infringements on a judicial candidate's First Amendment rights.

In 2002, the United States Supreme Court, in *Republican Party of Minnesota v. White*, struck down a restriction that prohibited Minnesota candidates for judicial office from announcing their views on disputed legal and political issues.[114] As one court later noted, the United States Supreme Court's decision raised more questions than it answered about the constitutionality of restrictions on judicial campaign speech.[115] Today, a significant amount of uncertainty continues to surround the permissible scope of restrictions on judicial candidate speech.

Both nationwide and in Texas, past and present restrictions on judicial campaign speech are traceable to the efforts of the American Bar Association ("ABA"). Beginning with its 1924 Canons of Judicial Ethics, and continuing with its 1972 successor, the Code of Judicial Conduct, such model legislation was adopted by most states (including Texas, in 1964), and served as a guide to judicial campaign speech for nearly fifty years.[116]

Two of the most of the significant provisions of the model ABA Code were its restrictions upon judicial candidates: (1) making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office (the "Pledges or Promises Clause"); and (2) announcing their views on disputed legal or political issues (the "Announce Clause").[117]

Beginning in the 1980s, candidates for judicial office nationwide began challenging these restrictions on judicial speech as violating their First Amendment rights.[118] The challenges culminated in the United States Supreme Court's decision in *Republican Party of Minnesota v. White,* which addressed the constitutionality of Minnesota's Announce Clause, which was based upon the 1972 ABA Model Code.[119] At the time, Texas also employed similar campaign speech restrictions.[120] The question presented in *White* was whether the First Amendment allowed the Minnesota Supreme Court to prohibit judicial candidates from announcing their views on disputed legal and political issues.[121] The Court concluded that the Announce Clause was not narrowly tailored to serve a compelling state interest and therefore violated the First Amendment.[122]

In reaching its conclusion, the majority in *White* ruled that the clause's overall prohibition on announcing views on disputed legal and political issues extended beyond promising to decide a specific issue in a particular way.[123] It concluded that the Announce Clause restriction would prohibit a judicial candidate from stating his views on any specific legal question within the province of the court for which he was running.[124]

Applying strict scrutiny, the Court next questioned whether Minnesota had a compelling interest to justify the Announce Clause.[125] The state's alleged interests were to preserve the impartiality, as well as the appearance of impartiality, of its judiciary. The Court then considered three meanings of "impartiality": (1) the lack of bias for or against a litigant; (2) the lack of preconception in favor of or against a particular view; and (3) open-mindedness.[127] The Court concluded that the Announce Clause was not narrowly tailored to serve the first interest because it did not restrict speech for or against particular *parties,* but rather speech for or against particular *issues*.[128] It further concluded that the second definition was not a compelling interest because proof that a judge lacked preconceived views on legal issues would be evidence of lack of qualification, not lack of bias.[129] And it dismissed the third definition as under-inclusive, given that judges were permitted to express their views on legal issues at all times other than during campaigns.[130] Based on these conclusions, the *White* court concluded that the Announce Clause was constitutionally unsound. [131]

Since *White*, courts and commentators have struggled to determine whether limitations on judicial campaign speech can withstand strict scrutiny.[132] In expanding the range of permissible judicial campaign speech, *White* "dramatically changed the landscape for judicial ethics as it relates to judicial campaigns."[133]

Texas responded to *White* by amending the Texas Code of Judicial Conduct.[134] The 2002 amendments replaced the problematic "Announce Clause"—derived from the 1972 ABA Model Code—with the current Canon 5, which provides that a judge or judicial candidate shall not

- make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;
- knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or
- make a public comment about a pending or impending proceeding that may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case.[135]

Entitled "Refraining From Inappropriate Political Activity," Texas's Canon 5(3) further provides that if a judge enters into an election contest for a nonjudicial office, he is required to resign from the bench. Canon 5(2) likewise bars a judge or candidate from endorsing another candidate for public office. While all such current Texas restrictions have been modified to comply with *White*, the constitutionality of these revised restrictions on judicial campaign speech has not yet been fully tested.

Judicial Reelection

Texas does not impose term limits on judges. However, the Texas Constitution provides that the seats of high court, intermediate appellate, and district court judges "shall become vacant" on the expiration of the term during which the incumbent reaches seventy-five years of age.[136] Thus, Texas judges are not automatically turned out of office upon reach-

ing seventy-five years of age but are instead barred from running for reelection or being appointed to another judicial position.[137]

As of September 2018, the justices on the Texas Supreme Court had served on the court, on average, for nine years. One justice had been on the court for over twenty-nine years, while two had been on the court for less than five.[138] The justices of the intermediate courts of appeals had served on their courts for an average of nine years, with the range of experience spread fairly evenly between one and twenty-four years on the bench. The average years of experience for Texas district court judges was approximately nine years.[139]

Judicial Incumbent Challenges

While every Texas judge who seeks to retain his office must eventually face election, in many races an incumbent judge is reelected without opposition.[140] In the 2018 general election, there were a combined total of 308 races for seats on the Supreme Court, Court of Criminal Appeals, intermediate appellate courts, and district courts.[141] An incumbent judge ran for reelection in seventy-eight percent of those races. Of these 240 incumbents running for reelection in the general election, twenty-eight percent had an opponent,[142] as demonstrated in the chart[143] below.

2018 JUDICIAL GENERAL ELECTION

Races	Number	% of Total
All Races	308	100%
Contested Races	99	32%
Open Seats	68	22%
Incumbents	240	78%
Challenged Incumbents	68	28%
Defeated Incumbents	56	82%

The percentage of incumbent challenges in Supreme Court and Court of Criminal Appeals races is significantly higher than the percentage in the intermediate courts of appeals and the district courts.[144] In the 2018 general election, for example, all five incumbent-held seats on the ballot for the two high courts were contested. In the intermediate courts of appeals, incumbents held thirty-seven of the seats on the ballot in 2018 (out of a total of forty-five), and sixty-eight percent of those incumbents faced a contested race.[145] At the district court level, 198 seats were held by incumbents (out of a total of 257), but just nineteen percent of those incumbents faced opposition in the 2018 general election.[146]

These November 2018 Texas judicial election results were, simultaneously, both typical and atypical. That is, in 2018, as in prior elections, a number of incumbent judges faced no opponent in either the primary or general elections. Of those incumbents who did draw an opponent, 2018 was similar to other election years in which judicial election outcomes were determined by a partisan wave. Aside from Texas's highest courts, the great majority of challengers in 2018 were successful in unseating incumbent judges. As demonstrated in

the following three charts, fully sixty-seven percent of incumbent appellate judges—and ninety-five percent of district court incumbents—facing contested elections were defeated in 2018.[147]

2018 HIGH COURT GENERAL ELECTIONS

Races	Number	% of Total
All Races	6	100%
Contested Races	6	100%
Open Seats	1	17%
Incumbents	5	83%
Challenged Incumbents	5	100%
Defeated Incumbents	0	0%

2018 COURTS OF APPEALS GENERAL ELECTIONS

Races	Number	% of Total
All Races	45	100%
Contested Races	32	71%
Open Seats	8	18%
Incumbents	37	82%
Challenged Incumbents	25	68%
Defeated Incumbents	20	80%

2018 DISTRICT COURT GENERAL ELECTIONS

Races	Number	% of Total
All Races	257	100%
Contested Races	61	24%
Open Seats	59	23%
Incumbents	198	77%
Challenged Incumbents	38	19%
Defeated Incumbents	36	95%

Incumbent challenges in the 2018 Republican and Democratic *primary* elections were relatively few in number.[148] In Republican primary elections, ten of the 175 incumbents (roughly six percent) were challenged by an opponent.[149] These primary challenges were most frequent in the context of Republican high court incumbents, twenty-five percent of

whom faced a same-party primary opponent. The percentage of Republican incumbents challenged in intermediate appellate primary races was zero, and the percentage in district court primary races was six percent.[150]

In the 2018 Democratic primary elections, eleven of the sixty-nine incumbents (sixteen percent) were challenged by an opponent.[151] Among the small handful of Democratic appellate incumbents, there were no primary challenges.[152] At the district court level, roughly eighteen percent of Democratic incumbents faced challenges in the primary.[153]

Removal of Texas Judges from Office

A Texas judge may be removed from office through a variety of mechanisms. First, an Article V judge may be removed from office by the Judicial Conduct Commission for "willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."[154] In lieu of removal from office, a judge may be disciplined, censured, or suspended from office for any of the foregoing reasons and may be suspended upon being indicted by a state or federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct.[155]

Second, a judge on the Supreme Court, a court of appeals, or a district court may be removed from office through impeachment by the Texas House of Representatives and conviction on the vote of two-thirds of the Texas Senate.[156]

Third, a district court judge "who is incompetent to discharge the duties of his office, or who shall be guilty of partiality, or oppression, or other official misconduct, or whose habits and conduct are such as to render him unfit to hold such office, or who shall negligently fail to perform his duties as judge; or who shall fail to execute in a reasonable measure the business in his courts, may be removed by the [Texas] Supreme Court."[157] The constitution provides that this process may be based upon "the oaths … of not less than ten lawyers, practicing in the courts held by such judge, and licensed to practice in the Supreme Court."[158] But, strictly speaking, the constitutional provision does not state that the Supreme Court may proceed to remove a judge *only* if ten attorneys provide sworn testimony of the judge's incompetence or misconduct. It can be read to allow removal by the Supreme Court on its own initiative and without the participation of ten or more lawyers.

Fourth, the constitution provides that the judges of the Supreme Court, court of appeals, and district courts "shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for wilful neglect of duty, incompetence, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment."[159] It is not entirely clear how this method differs from impeachment, except that it requires a two-thirds vote in both houses rather than a two-thirds vote only in the Senate.[160]

This constitutional "removal by address" process is addressed in Chapter 665 of the Texas Government Code. By statute, the process applies to judges on the Supreme Court, Court of Criminal Appeals, a court of appeals, or a district court (including a criminal district court).[161] The statute appears to expand the grounds for removal from those provided in

the constitution by adding "breach of trust" to the list.[162] The Government Code states that "incompetency" means: "(1) gross ignorance of official duties; (2) gross carelessness in the discharge of official duties; or (3) inability or unfitness to discharge promptly and properly official duties because of a serious physical or mental defect that did not exist at the time of the officer's election."[163]

Fifth, "[i]n addition to the other procedures provided by law for removal of public officers, the governor who appoints an officer may remove the officer with the advice and consent of two-thirds of the members of the Senate present."[164] If the Legislature is not in session when the Governor desires to remove an officer, the Governor must call a special session of the Senate (not, apparently, of the entire Legislature) for consideration of the proposed removal.[165] The session may not exceed two days in duration.[166]

Sixth, in unusual circumstances, a judge may be removed through a *quo warranto* action. A *quo warranto* action may be pursued and lead to removal from office if "a person usurps, intrudes into, or unlawfully holds … an office … [or] a public officer does an act or allows an act that by law causes a forfeiture of his office."[167] *Quo warranto* is an action that may be pursued in district court by the Attorney General, or by a county or district attorney of the proper county.[168]

Seventh, the Texas Constitution provides that an Article V judicial office automatically becomes vacant on the expiration of the term during which the incumbent reaches the age of seventy-five years or such earlier age (not less than seventy years) as the Legislature prescribes by statute, unless the judge reaches the age of seventy-five years during the first four years of a six-year term, in which case the office becomes vacant on December 31 of the fourth year of the judge's term.[169]

Finally, although it is not, strictly speaking, a form of removal from office, the voters can refuse to reelect a judge under the current selection system in Texas.

PART III: JUDICIAL SELECTION PROCEDURES AMONG THE STATES

While there are two basic methods for selecting judges—election or appointment—those two conceptual methods have numerous subcategories, with the specific details of each varying greatly among the states. Academic scholarship on this topic often divides judicial selection systems into five different models: partisan election, nonpartisan election, gubernatorial appointment, legislative appointment, and the hybrid Missouri Plan appointment model.[170]

The election model of judicial selection breaks down into two subcategories: partisan elections, in which candidates seek election after nomination by a political party, and nonpartisan elections, in which judges run for election without reference to party labels.[171]

In systems that appoint judges for a term—i.e., either life or a fixed number of years—the appointments may be made by either the governor or the legislature. In rare instances, judges are appointed by the judiciary, but with such infrequency as to be excluded from the five general categories discussed in this paper.[172] In the simplest terms, the distinguishing feature of the purely appointive models is that those judges never face any type of popular election, whether partisan, nonpartisan, or retention.

Finally, the Missouri Plan method for judicial selection typically involves nomination of a candidate by a judicial nominating committee[173] and appointment by the governor, followed by a retention election that is usually uncontested and nonpartisan in which voters decide whether the judge should continue to hold office or the governor should appoint a new person for that office.[174]

These basic judicial selection models can also be further distinguished by taking into account other features, including the type and composition of commissions used to screen and nominate potential judicial candidates, senate or legislative confirmation of gubernatorial appointments, lifetime versus limited terms of appointment, and differing forms of election or reappointment after the initial selection of a judge.[175]

Historic Trends in Judicial Selection

The current diversity of state judicial selection models developed over the past 200 years through a series of shifts between the five general selection models, as well as incremental refinements upon those basic models. Initially, as of 1790, all of the original American states selected their judges either by gubernatorial or legislative appointment, with most states appointing judges for life terms during good behavior.[176] The first major shift, often attributed to the rise of Jacksonian Democracy, started in the 1830s when states increasingly began to replace their appointive systems with partisan elections for judicial office.[177] By the 1860s, partisan election was the most commonly used method of judicial selection.[178] However, with the coming of the twentieth century, states increasingly adopted nonpartisan elections to replace partisan elections.[179] Subsequently, many states again shifted direction in mid-century, in favor of the Missouri Plan.[180]

Among the evolution of judicial selection procedures, there were several pronounced trends. Appointment was the dominant method of selecting justices until the 1850s when partisan election surpassed it to become the leading method.[181] Since the 1840s, legislative judicial appointment has declined at roughly the same rate as appointment by the governor

has increased.[182] However, for the past sixty years, the total number of states that appoint their supreme court judges has remained constant.[183]

Judicial selection by partisan election was first adopted in Georgia in 1812.[184] By the Civil War, partisan election had become the predominant form of judicial selection.[185] Indeed, up until the 1950s, every state that entered the Union after 1850 had an elected judiciary.[186] In the 1920s, however, selection by partisan election began to steadily decline in prominence,[187] caused in part by the rise of nonpartisan elections to select judges. Since their initial widespread adoption as part of the Progressive reforms of the 1920s, nonpartisan elections have continued to be used with greater frequency, while the popularity of partisan judicial elections has continued to wane.[188]

A second factor in the decline of partisan elections was the advent of the Missouri Plan. First adopted by Missouri in 1940, this model[189] was adopted by over twenty states within the next three decades. Since the 1990s, however, the number of states using this model has essentially remained static.[191]

In sum, a historical overview of changes in judicial selection methods reveals two unmistakable trends. First, most states have tried and rejected judicial selection by partisan election.[192] Of the thirty-nine states that at one time selected all of their judges by partisan election, only six states—Texas, Alabama, Illinois, Louisiana, North Carolina, and Pennsylvania—still do so today.[193] Second, almost all states that once legislatively appointed their judges have now abandoned that model.[194] Of the seventeen states that once selected judges by legislative appointment, only two—South Carolina and Virginia—continue to do so today.[195]

Current Methods of State Judicial Selection[196]

The primary focus of this paper will be on the methodology used to select judges for their first full term of office, rather than on methods used to fill the remainder of the term of a departing judge, a distinction applying only to elective states. Save for the handful of states that appoint judges to what is essentially a life term, the remaining states utilize a wide variety of approaches to retain or reject incumbent judges who later seek additional terms. In the interest of clarity, this paper largely excludes analysis of the various systems applicable to incumbents seeking additional terms.[197]

At the high court level, only six states—including Texas—currently select judges for first full terms by partisan election.[198] Another fifteen states select high court judges for first full terms by nonpartisan election.[199] Of the twelve states that appoint their high-court judges to first full terms, ten do so by gubernatorial appointment, and the other two do so by legislative appointment.[200] The remaining seventeen states select high court judges for first terms via the Missouri Plan.[201]

Nine states do not have intermediate appellate courts.[202] Of the remaining forty-one states, only six—including Texas—currently select intermediate appellate judges for first full terms by partisan elections.[203] Twelve states employ nonpartisan elections. Eight states appoint their appellate judges to first full terms: five by gubernatorial appointment, two by legislative appointment, and one through appointment by the state supreme court.[205] The remaining fifteen states select appellate judges for first terms pursuant to Missouri Plan appointment.[206]

SUMMARY OF JUDICIAL SELECTION METHODS IN THE STATES[207]

State High Courts. For state high courts (called "supreme courts" in 48 of the 50 states), the breakdown of selection systems is as follows:

- **Six states have partisan elections** (AL, IL, LA, NC, PA, TX). All judges in both Illinois and Pennsylvania run in uncontested retention elections for additional terms after winning a first term through a contested partisan election.
- **Fifteen states have nonpartisan elections** (AR, GA, ID, KY, MI, MN, MS, MT, NV, ND, OH, OR, WA, WI, WV). Ohio and Michigan have nonpartisan general elections, but political parties are involved with the nomination of candidates, who frequently run with party endorsements.
- **Seventeen states utilize the Missouri Plan, i.e., gubernatorial appointment followed by uncontested retention election** (AK, AZ, CA, CO, FL, IN, IA, KS, MD, MO, NE, NM, OK, SD, TN, UT, WY): All judges in New Mexico are initially appointed from a commission list, face a contested partisan election for a full term, and then run in contested retention elections for additional terms.
- **The remaining twelve states utilize either gubernatorial or legislative appointment for a set term (set number of years or for life)** (CT, DE, HI, MA, ME, NH, NJ, NY, RI, SC, VA, VT). Other than those few states utilizing life terms, incumbent judges may seek reappointment at conclusion of initial term.

Intermediate Appellate Courts. Only 41 of the 50 states have intermediate appellate courts. The breakdown of selection systems for intermediate appellate courts is as follows:

- **Six states have partisan elections** (AL, IL, LA, NC, PA, TX). *See* note above on Illinois and Pennsylvania.
- **Twelve states have nonpartisan elections** (AR, GA, ID, KY, MI, MN, MS, NV, OH, OR, WA, WI). *See* note above on Michigan and Ohio.
- **Fifteen states utilize the Missouri Plan, i.e., gubernatorial appointment followed by uncontested retention election** (AK, AZ, CA, CO, FL, IN, IA, KS, MO, MD, NE, NM, OK, TN, UT).
- **Eight states utilize either gubernatorial, legislative or judicial appointment for a set term (set number of years or for life)** (CT, HA, MS, ND, NJ, NY, SC, VA). Note that in North Dakota, appellate judges are appointed by state supreme court, while in New Jersey appellate judges are selected by state supreme court from trial judges appointed by governor.
- **The remaining nine states do not have intermediate appellate courts** (DE, ME, MT, NH, RI, SD, VT, WV, WY). Limited appellate courts were established fairly recently in North Dakota (1987) and Nevada (2014).

Trial Courts. The breakdown of selection systems for trial courts of general jurisdiction is as follows:

- **Eight states have partisan elections for all trial courts** (AL, IL, LA, NC, NY, PA, TN, TX). *See* note concerning New Mexico, below.
- **Twenty states have nonpartisan elections for all trial courts** (AR, CA, FL, GA, ID, KY, MD, MI, MN, MS, MT, NV, ND, OH, OK, OR, SD, WA, WI, WV).
- **Seven states utilize the Missouri Plan for all trial courts** (AK, CO, IA, NE, NM, UT, WY). All judges in New Mexico are initially appointed from a commission list, face a contested partisan election for a full term, and then run in contested retention elections for additional terms.
- **Eleven states utilize either gubernatorial or legislative appointment for a set term (set number of years or for life)** (CT, DE, HA, MA, ME, NH, NJ, RI, SC, VA, VT).
- **Four states use two differing models—Missouri-Plan appointment in certain counties or judicial districts (most often highly urbanized), and partisan or nonpartisan elections in all others—for their trial courts** (AZ, IN, KS, MO).

At the trial court level, thirty-two out of fifty states select trial judges by some form of election.[208] Of these, eight do so by partisan election (in nonvacancy scenarios),[209] twenty do so by nonpartisan election (in nonvacancy scenarios),[210] and four conduct trial-level elections only within certain counties or districts, while otherwise adhering to the Missouri Plan.[211] This leaves seven states that exclusively use the Missouri Plan.[212] Of the eleven remaining states that appoint trial judges to first full terms, nine do so by gubernatorial appointment, and two do so by legislative appointment.[213]

The preceding table summarizes the methods of judicial selection employed by states to select judges at the high court level, intermediate appellate court level, and trial court level.

As shown, there are a finite number of basic judicial selection models among the fifty states. However, as actually practiced among the fifty states, variances in the details of each selection model produce a diverse set of judicial selection methods, which can also vary among the levels of courts within one state, or occasionally among trial courts located within different areas of the same state. Moreover, states utilizing partisan or nonpartisan election systems may use one set of procedures to fill interim judicial vacancies, while employing an entirely different methodology to select judges for a first full term.

The appendix includes a table setting out how each of the fifty states has chosen to mix and match the variables set forth above, in both "vacancy" and "first term" scenarios.

Current Variations of Judicial Selection by Gubernatorial Appointment There are ten states that extensively (although not exclusively) utilize gubernatorial appointment without an accompanying retention election to appoint judges to full terms. Again, this "first full term" qualifier is important to bear in mind because nearly all states utilize some variant of gubernatorial appointment when filling interim vacancies.[215] Unlike in elective states, distinctions between interim vacancies and first full terms are irrelevant under the gubernatorial and legislative appointment models, as all vacancies are filled by full-term appointments.

The ten states utilizing gubernatorial appointments for first full-term judgeships are Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. The procedural differences among these gubernatorial appointment states are found in the term of judicial office, the use of nominating commissions, and the requirement for confirmation of the governor's appointee, whether by the state Senate, both houses of the Legislature, or by a panel.

In a majority of states utilizing gubernatorial appointment to fill a judicial seat for a full first term, the term is limited to a certain number of years. The terms range from six years in Vermont to fourteen years for the New York Court of Appeals. Only three states—Massachusetts, New Hampshire and Rhode Island—appoint judges for what is essentially a life term (barring misbehavior) until age seventy.[216] In New Jersey, a judge is first appointed to an initial seven-year term, after which he may be reappointed to a second term lasting until the age of seventy, assuming good behavior.[217]

Next, all states employing the gubernatorial appointment model also use nominating commissions in some fashion, with those commissions that issue binding recommendations slightly outnumbering the states utilizing nonbinding commissions. Nominating commissions are widely used across a variety of judicial selection models and serve to create a list of qualified judicial candidates from which the governor may choose, although where

a commission's recommendation is nonbinding in nature, the governor is free to request that additional candidates be supplied.[218]

Finally, some form of "confirmation" of a gubernatorial judicial appointment is required in all ten of the states discussed in this section. Most frequently, confirmation is performed by the state Senate or the entire Legislature. In Massachusetts and New Hampshire, confirmation authority lies with a governmental panel.

Current Variations of Judicial Selection by Legislative Appointment South Carolina and Virginia are the only states that still use legislative appointments.[219] South Carolina uses a nominating commission to create a list of qualified candidates for a judicial opening from which the state's General Assembly must select a candidate by majority vote.[220] In Virginia, the names of candidates are submitted by General Assembly members to House and Senate committees that determine whether the individual is qualified for the judgeship sought.[221] Following the committees' determination of qualification, the House of Delegates and the Senate fill the vacant judgeship.[222]

Current Variations of Judicial Selection by Partisan Election Texas is among the six states—along with Alabama, Illinois, Louisiana, North Carolina, and Pennsylvania—that select all judges for first full terms using partisan election.[223] There are a number of states, including Indiana, New York, and Tennessee, that make exclusive (or nearly exclusive) use of partisan elections for selecting judges solely at the trial level.

One interesting variance among these six states is the length of the term of office. At the high court level, Illinois, Louisiana, and Pennsylvania elect their justices for ten-year terms. Texas has the shortest terms of office: six years for appellate judges and four years for trial judges.

Current Variations of Judicial Selection by Nonpartisan Election A nonpartisan election model is one that generally prohibits political parties from nominating candidates for judicial office, and excludes party labels from candidates' listings on the ballot.[224] Those states that select their judges via nonpartisan election include Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, Ohio, Oregon, Washington, West Virginia, and Wisconsin. However, two states—Michigan and Ohio—are unique in that they use a partisan primary (Ohio) or caucus (Michigan) to select the candidates who will later run in the nonpartisan election.[225]

These nonpartisan-election model states utilize relatively uniform procedures, other than the length of the term for judicial office. Supreme court justices are elected to full terms between six and twelve years, with six or eight-year terms being the most prevalent. All other lower court judges are elected to terms ranging from four to eight years. Each of these states allows its governor to appoint judges to fill interim vacancies, often with the assistance of a judicial nominating commission, whether binding or nonbinding.

Two states in this group have unique judicial selection provisions. In Montana, if an incumbent is unopposed in a nonpartisan election, the judge must win a retention election to retain office.[226] In Nevada, voters have the option of selecting "none of these candidates" in statewide judicial races.[227]

Finally, there are a number of states—including California, Florida, Oklahoma, and South Dakota—that utilize nonpartisan elections only for their trial-level courts, while employing a different model for their appellate courts.[228]

Current Variations of Judicial Selection by Missouri-Plan Appointment The Missouri Plan involves an initial gubernatorial appointment from candidates supplied by a judicial nominating commission, subsequently followed by a retention election. States that employ a form of the Missouri Plan model to select judges at all levels include Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming. There are also numerous other states, such as Maryland, which selectively depart from the Missouri Plan as to certain courts (most often at the trial level). The Missouri Plan is uniformly applied in both the interim vacancy and first term scenarios, making any distinctions between interim vacancies and full first terms irrelevant.

The appointment stage begins whenever a judicial vacancy occurs. At that point, a nominating commission prepares a list of candidates qualified to fill the vacancy. Such listing is binding in all of the aforementioned states, except Maryland. The governor then appoints a person from that list to fill the vacancy. In most states that follow this method, there is no legislative oversight of the appointment process. In Maryland and Utah, however, the governor's appointment is subject to senate confirmation.

At this point in the process, the operation of the Missouri Plan is often identical to that of the gubernatorial appointment model, with the two models differing only when the newly appointed judge's initial term has concluded. At that point, a judge seated via the gubernatorial appointment model will (if not in a life-term state) face *reappointment* no earlier than four years later, but not reelection. A judge appointed pursuant to the Missouri Plan will face a *retention election* after an initial term of between one to three years on the bench.[229] If the judge wins the election, the judge is entitled to hold office for a full term.[230] Among the Missouri Plan states, full terms for supreme court seats range from six to twelve years, for intermediate courts of appeals six to eight years, and for trial courts six to fifteen years. At the end of each full term, a judge then faces another retention election. If the judge loses a retention election, the seat becomes vacant, and the selection process starts over again.

Finally, there are numerous states that apply the Missouri Plan in their higher courts but utilize alternate methods at the trial court level. These states include Arizona, California, Florida, Indiana, Kansas, Oklahoma, South Dakota, and Tennessee.[231]

Justice O'Connor Judicial Selection Plan Both before and after serving on the United States Supreme Court, Justice Sandra Day O'Connor was an outspoken opponent of contested judicial elections.[232] Following her 2006 retirement from the bench, O'Connor began to work closely with the Denver-based Institute for the Advancement of the American Legal System. Her collaboration with the Institute resulted in the 2014 publication of the O'Connor Judicial Selection Plan ("O'Connor Plan").[233] O'Connor stated that she was "distressed to see persistent efforts in some states to politicize the bench and the role of our judges" and described the plan as a step toward "developing systems that prioritize the qualifications and impartiality of judges, while still building in tools for accountability through an informed election process."[234] The O'Connor Plan notes that "[w]e do not offer it as perfect; no selection system is."[235]

The O'Connor Plan adopts the primary elements of the Missouri Plan—including gubernatorial appointment, judicial nominating committees, and no-opponent retention elections—while nonetheless suggesting numerous modifications intended to improve upon the Missouri Plan. Only three states—Alaska, Colorado, and Utah—are already fully compliant with all four elements of the O'Connor Plan.[236]

As to the first element, judicial nominating commissions, some of the plan's notable features include requirements that commissions be constitutionally authorized (rather than created via revocable executive orders), that commission members be appointed by multiple authorities and represent a broad range of societal interests, and that a majority of commission members be nonlawyers.[237]

The O'Connor Plan's second element limits the number of nominees presented to the governor by the nominating committee and bars the governor from departing from the committee's list.[238] Moreover, in order to prevent judicial seats from going unfilled for political purposes, the plan provides for a default appointment mechanism, in the event the governor fails to take prompt action.[239]

The plan's third element involves a method for extensive judicial performance evaluation, whereby freestanding, statutorily created commissions (populated in large part by nonlawyers) would evaluate sitting judges based on criteria focusing on sound decision-making processes, rather than the outcome of any particular case.[240] Such evaluations would then be regularly disseminated to assist voters in connection with the plan's final element: retention elections.[241] Seeking to strike a balance between judicial independence and accountability, the plan stresses that retention elections should represent a yes/no referendum on an incumbent judge's performance rendered on the basis of the data made available to the voting public via the evaluation process and be conducted without fundraising, political efforts, or speech-making by the incumbent.[242]

Use of Nominating Commissions in State Judicial Selection

The broad majority of states use one or more judicial nominating commissions in some manner when selecting judges.[243] Some authorities place the total number of states employing such commissions at thirty-six and others at thirty-eight, a disparity reflecting the myriad forms and roles such commissions assume.[244] Texas is among the minority of states that does not utilize a nominating commission in their judicial selection system. Among those majority states that do employ commissions, there are numerous differences concerning the number and composition of commissions, their methods of selecting members, and requirements regarding the commissions' geographic and political makeup. However, certain generalizations may be made regarding these commissions.

Nominating commissions generally find, screen, evaluate, and nominate candidates for appointment to judicial office. In states that employ the Missouri Plan, commissions typically submit a list of potential nominees to the governor for each vacancy, and the governor usually must appoint one of those nominees.[245] However, in a significant number of states, the judicial commission's recommendation is nonbinding, and the governor is not required to choose from among the offered list of candidates.[246] Even among states that elect judges, nominating commissions are often used in filling interim vacancies.[247] Finally, several states, such as Alabama, Arizona, Indiana, Kansas, and Missouri, use nominating commissions to

select judges only in certain counties or districts—usually urban—while not utilizing them in less-populated areas.[248]

There is also a great degree of disparity among the states regarding how judicial nominating commissions are established: some by executive order, some by statute, and others by constitutional amendment.[249] While some states utilize a single nominating commission for all of their courts, other states have created multiple county-level commissions to supply trial court nominees in each of the counties.[250] Moreover, a state may choose to utilize a nominating commission for one level of courts, but not another.[251] Minnesota, for example, utilizes a commission for its trial courts, but not its appellate courts.[252]

Nominating Commissions Among the States

Missouri Plan States A significant number of states—including Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming—utilize one or more judicial nominating commissions in conjunction with the Missouri Plan, wherein the initial gubernatorial appointment is followed by a retention election.[253] In fact, use of judicial nominating commissions is essentially synonymous with the Missouri Plan, subject only to the caveat that two of these states—California and Maryland—employ commissions whose candidate lists are not binding on their respective governors.

Gubernatorial Appointment States In a number of primarily eastern states—including Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont—at least some judges are appointed (for either life, or a term of years) by the Governor, almost always from a list provided by a judicial nominating commission and usually subject to confirmation by the Legislature or Senate.[254] In at least some of these appointive states—including Massachusetts, Maine, and New Jersey—the list of nominees submitted to the Governor is not binding, and he or she may appoint someone not considered by the commission.[255] In appointing justices to Massachusetts's highest court, however, the governor forgoes the assistance of any formal nominating commission.

What these states have in common with Missouri Plan states is the involvement of judicial nominating commissions. One notable difference, however, is that in gubernatorial appointment states, the commissions tend to be established via executive order, rather than by statute.[256] The major difference between gubernatorial-appointment and Missouri Plan states is that the appointed judges do not stand for retention elections in the gubernatorial-appointment states.

Traditional Election States Among the states that exclusively utilize elections (whether partisan or nonpartisan) to select judges for their first full terms, there is obviously no role for judicial nominating committees. Nonetheless—and excluding the Missouri Plan states—a sizeable number of states that otherwise select judges via popular election use a combination of nominating commissions and gubernatorial appointments when filling interim vacancies for at least some courts. These states include Alabama, Florida, Georgia, Idaho, Kentucky, Minnesota, Mississippi,

Montana, Nevada, New York, North Dakota, West Virginia and Wisconsin.[257] In several of these states, senate or legislative confirmation may also be required.[258] And in several of these elective states—including Georgia, Mississippi, and Wisconsin—the list of nominees submitted to the governor is not binding, and he or she may appoint someone not considered by the commission.[259] In North Dakota, the Governor may likewise choose not to appoint from the commission's list, but then must either request a new list or call a special election to fill the vacancy.[260] While these nominating committees are rare among those six states that exclusively elect full-term justices via partisan elections (the group that includes Texas), Alabama does make use of nominating commissions on a limited basis at the county level.

Legislative Appointment States South Carolina and Virginia are unique in that they select judges by legislative appointment.[261] In South Carolina, the General Assembly appoints judges from nominees submitted by its Judicial Merit Selection Commission,[262] a ten-member committee selected by legislative leaders and having at least six members chosen from the General Assembly.[263]

In Virginia, the names of candidates are submitted by General Assembly members to the House and Senate Committees for Courts of Justice, and these committees determine whether each individual is qualified for the judgeship sought.[264] Following the committees' determination of qualification, the House of Delegates and the Senate then vote separately, and the candidate receiving the most votes in each house is elected to the vacant judgeship or new seat.[265]

Number of Nominating Commissions Per State Of those states that use some form of nominating commission, more than one-half use only a single commission.[266] Of those remaining states utilizing multiple commissions, the total number of nominating commissions ranges from a low of three in Arizona to fifty-seven in Kentucky and 114 in Iowa.[267]

Of the states that use nominating commissions at least partly on the basis of executive order, only Maryland and New York use more than one commission.[268] Many single-commission states are largely rural or relatively small, including Alaska, Connecticut, Delaware, Hawaii, Idaho, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.[269]

Among those states utilizing multiple nominating commissions, a given commission's jurisdiction typically covers an appellate or trial court district. One relatively common structure utilizes one statewide commission for supreme and intermediate appellate courts and a second set of local commissions—one for each of a state's judicial districts—to handle trial courts. States that have adopted this structure include Colorado, Iowa, Kentucky, Maryland, New Mexico, and Utah.[270] A similar arrangement, used by Florida and Nebraska, involves separate nominating commissions for each intermediate appellate district, in addition to those for trial court districts.[271]

Number of Commissioners It is difficult to generalize concerning the number of commissioners that serve on nominating commissions among the states, especially given that in certain states, such as Indiana, appellate level nominating commissions may differ in size from trial-level commissions.[272] Most often, commission membership ranges between seven

to nine members.[273] The remaining commissions range from as few as five members in Alabama to as many as twenty-one in Massachusetts.[274]

The above numbers represent only those "full time" commissioners expected to participate in all committee decisions. However, a few states utilize alternate structures in which a core group of commissioners is supplemented by additional members from the district or circuit in which a particular vacancy occurs. Minnesota, for example, has a forty-nine member commission, but only nine at-large members uniformly participate in meetings and deliberations on every vacancy.[275] Four additional members of the commission are selected from each of the state's ten judicial districts, with each four-member bloc participating only when a vacancy occurs within its specific district.[276]

Selection of Commissioners Among those states that utilize judicial nominating commissions, differing methods of selecting commission members have developed. The most prevalent method involves a hybrid system, in that the attorney members are either appointed or elected by the state bar association, and the nonattorney members are gubernatorially appointed, with the state supreme court chief justice often serving as the *ex officio* chair. Both attorney and nonattorney members may also be confirmed by the Legislature or Senate. Examples of states utilizing this method for at least some commissions include Alaska, Idaho, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, Nevada, and Wyoming.[277]

Other states provide for the selection of at least some commission members by appointment but disperse that appointive power among various state officials. In Colorado, attorney members of its nominating commission are appointed by majority action of the governor, the attorney general, and the chief justice, with the governor retaining power to appoint all other members.[278] In Connecticut, Hawaii, New Mexico, and New York, the selection process includes appointment of some commissioners by certain members of those states' legislatures.[279] These appointing authorities may include the president of the senate, the speaker of the house, and the majority and minority leaders of either or both houses.[280] Commissions in Hawaii, New Mexico, and New York also have additional members appointed by their chief justices.[281]

Elsewhere, nearly all members of other states' commissions (save for *ex officio* positions) are appointed by the governor, but such autonomy is often restrained by requirements that at least some appointments be made from nominees submitted by various groups. In Florida, the governor must select four attorney members from lists provided by the State Bar's Board of Governors.[282] The Governor of Rhode Island must choose five of nine commission members from lists of nominees provided by the minority leaders of both houses, as well as by the Speaker of the House and the President of the Senate.[283] In Utah, the Governor must select two members from a list of nominees provided by the State Bar.[284]

Finally, in South Carolina—where the state's General Assembly jointly selects South Carolina's judges—the Legislature not only participates in selecting members for the state's judicial nominating committee but wholly controls the process. Its ten-member Judicial Merit Selection Commission is composed of five members appointed by the Speaker of the House, three by the Chairman of the Senate Judiciary Committee, and two by the President Pro Tempore of the Senate.[285] Moreover, six of these appointees must be members of the General Assembly.[286]

Composition of Commissions

Attorney and Lay Members Statutes and constitutional provisions authorizing nominating commissions typically require that the commissions include both attorney and nonattorney members.[287] States often require that at least one judge serves on a commission as well.

The most common membership structure involves one judge (usually the chief justice of the state's supreme court, or his or her designee) and an equal number of attorney members and nonattorneys drawn from the general public. Examples of states employing this structure include Alaska, Indiana, Missouri, Nebraska, Nevada, and Wyoming.[288] Certain nominating commissions in other states—including Arizona, Colorado, Kentucky, and Montana—use commissions with a single judge and an unequal number of attorneys and nonattorneys, with the nonattorneys in the majority.[289] New Mexico and South Dakota also draw commissioners from the state bar and the general public in unequal numbers, but the commissions in those states also include more than one judge.[290] In other states, the nominating commissions do not include any judges at all. Those states include Connecticut, New Hampshire, Oklahoma, and Rhode Island.[291]

Partisanship Many states have adopted provisions concerning the political activities or affiliations of nominating commission members.[292] Some states, such as Connecticut, provide that commission members may not hold an official position in a political party.[293] Other states—including Alaska, Arizona, and Hawaii—require that the selection of commission members and/or the nomination of commission candidates be done on a nonpartisan basis.[294]

Other states have adopted specific requirements regarding the representation of political parties among members of nominating commissions, so as to ensure that the two major parties are represented either equally or by a majority of no more than one member. These states include Arizona, Colorado, Connecticut, Delaware, Idaho, Nebraska, New Mexico, New York, South Dakota, and Utah.[295] In fact, New Mexico requires the appointment of additional commission members if necessary to provide political balance on the state's commissions.[296] A small number of other states—including Kentucky and Oklahoma—require that nonattorney commissioners be split equally along party lines, but do not impose a similar requirement for attorney members.[297] Finally, in Vermont, where its House and Senate each select three of their members to serve on its Judicial Nominations Board, the three members of each group cannot all be from the same party.[298]

Gender, Race, and Ethnicity A number of states have provisions seeking to ensure that the makeup of their nominating commissions reflects the diversity of their population. In some states, such as Arizona, this consists of no more than a generalized statutory directive that "[t]he makeup of the committee shall, to the extent feasible, reflect the diversity of the population of the state."[299] Other states, such as

Florida, specifically reference gender, race and/or ethnicity in urging the appointment of diverse commissions.[300]

Finally, the statutes of some states provide that a specific number of women or racial or ethnic minorities must be appointed to their nominating commissions. In Indiana, the statute governing the Lake County nominating commission states that one of the four attorney members, as well as one of the four nonattorney public members, must be a "minority individual," statutorily defined as black or Hispanic.[301] In addition, each group of four commissioners must include two men and two women.[302] Similarly, the membership of Iowa's nominating commissions may not include more than a simple majority of either gender.[303]

In the absence of clear evidence of discrimination, however, numerous lower courts have ruled that specific requirements concerning the composition of nominating commissions are constitutionally suspect.[304] In fact, in 1996 a federal district court issued a preliminary injunction preventing enforcement of the Lake County race and gender requirements as applied to attorney members of the commission.[305] Similarly, Florida formerly required that one-third of the seats on its judicial nominating commissions be filled by women or members of racial or ethnic minority groups.[306] However, in 1995 a federal district court found this statute to be unconstitutional in violation of the Fourteenth Amendment right to equal protection and entered a permanent injunction barring enforcement of the requirement.[307] Florida's current statute now merely directs the Governor to seek to ensure that the membership of the state's commissions reflects the state's diversity "to the extent possible."[308]

Geography The commission structure adopted by many states requires that commission membership correspond to the geographic layout of those states. As with race and gender, some states simply encourage broad geographical representation in general terms, while others have adopted more specific requirements. For example, Alaska requires only that appointments to its Judicial Council be made with "due consideration to area representation," and Montana mandates that commission members be selected from different geographical areas of the state.[309] In the states utilizing multiple judicial nominating commissions, geographic diversity is often a nonissue, given that their membership is usually drawn from the same district or county over which that specific commission has jurisdiction.[310] Most commonly, the controlling rules for statewide commissions require that members must be appointed from each of that state's congressional districts (as in Colorado) or its appellate districts (as in Indiana).[311] Elsewhere, as in Arizona, both the attorney and the nonattorney sections of the Appellate Commission cannot include more than two residents of any one county.[312] In Hawaii, at least one member of its Judicial Selection Commission must live outside the Honolulu area.[313]

Practice Area In a few states, membership criteria for certain nominating commissions include the practice areas of its attorney members. New Mexico, for example, requires that four of the attorney members on its Commissions be chosen so that all aspects of the "civil and criminal prosecution and defense" bars are represented.[314]

Similarly, in Alabama, the four attorney members of the Tuscaloosa County Commission are to be selected from each of four groups: plaintiffs' civil practice, defense civil practice, domestic relations, and criminal defense.[315] Relatedly, some states stipulate that no more than two of the attorney-members of their commission can be from the same law firm.[316]

Industry, Business, or Profession Another membership requirement adopted in connection with certain state nominating commissions involves diversity of representation of businesses and industries among their nonlawyer members. For example, the four nonattorney members of Montana's Commission must each represent different industries, businesses, or professions.[317] Similarly, the membership of the advisory council that serves as a nominating commission for the housing courts of the New York City civil court system must include three members drawn from the real estate industry and three from tenants' organizations.[318]

Restrictions on Holding Public Office and on Nominations States that use nominating commissions typically forbid members from holding other public office while serving on a commission, though such restrictions exclude those justices who often serve as the *ex officio* heads of such commissions. These states include, among others, Alaska, Missouri, and New York.[319] In Florida, this restriction only bars commissioners from holding judicial office, but no other public office.[320]

Another common restriction prevents commissions from appointing their own members to fill vacant judicial seats. In a small number of states, such as Iowa, this restriction applies only to the nomination of current commission members.[321] More commonly, however, states extend this restriction through a specified period of time following the end of a commissioner's service. Such ineligibility period between departing the commission and regaining eligibility to fill a vacancy can last as long as five years, as in Oklahoma.[322] The most common restrictive period is one year, which has been adopted by numerous states including Arizona, New York, and Rhode Island.[323]

Commissioner Terms Almost all states impose a term of office on commission members, but in a few states, including Georgia, Massachusetts, and Minnesota, the commission members serve at the pleasure of the Governor.[324] Relatedly, in Maryland, the commissioners' terms are co-extensive with that of the Governor.[325] Otherwise, term lengths range from two years to six years, with the caveat that states with multiple commissions may utilize differing term lengths.[326] Terms of four and six years appear to be most widely utilized.[327]

Recruiting Judicial Candidates A majority of states utilizing judicial nominating committees have provisions that allow or encourage commission members to seek out qualified individuals to apply to fill vacant judicial seats, or to otherwise stand for consideration by the commission.[328] For example, the rules governing Hawaii's selection commission provide that commissioners "may actively seek out and encourage qualified individuals to apply for judicial office."[329] In New Mexico, this directive is mandatory and commissioners are instructed to "actively solicit" applications from qualified lawyers.[330]

Directing commissioners to solicit applications is intended to encourage recruitment of qualified persons who might not otherwise apply for judicial vacancies, so that those

appointed as judges might more accurately "reflect the diversity of the community they will serve."[331] In Missouri, the Appellate Judicial Commission is specifically instructed not to limit itself to persons suggested by others and those candidates seeking to serve, but to also tender nominations from other qualified persons.[332] Similarly, Nebraska characterizes the recruitment of qualified applicants as one of the "most important" parts of a commissioner's duties, because of a general reluctance among potential candidates "to make the sacrifice which is sometimes necessary in accepting judicial office."[333]

Retention of Judges In Missouri Plan states, judges at the end of a term typically must run in an unopposed election in which the electorate votes for or against their retention in office.[334] In addition to their role in soliciting, evaluating, and nominating candidates for judicial office, the nominating commissions of a few states also evaluate judges seeking retention.

In Alaska, the Judicial Council evaluates judges nearing the end of their term and publishes a pamphlet containing information about each judge.[335] This information must include a statement regarding any suspensions, public censures, or reprimands.[336] At its discretion, the Council may also recommend for or against the retention of any judge.[337]

A number of other states, including Arizona, Colorado, Missouri, New Mexico, and Utah, have established freestanding commissions that also evaluate judges in connection with retention, but which are distinct entities.[338] While such performance evaluation entities are in certain respects similar to judicial nominating commissions, they (unlike Alaska's Judicial Council) are separate, independent organizations whose functions are limited to evaluation of incumbents with the primary purpose of educating the voting public, rather than the nomination of judges.

Finally, in some states other commissions wield binding power concerning the retention of judges. In Hawaii, the decision to renew or reject an incumbent judge lies solely with its Judicial Selection Commission.[339] Connecticut judges also do not face retention elections, but instead may be reappointed by the Governor at the end of each term.[340] That state's Judicial Selection Commission evaluates incumbent judges, and its refusal to recommend an incumbent bars reappointment.[341] Similarly, if South Carolina's Judicial Merit Selection Commission deems an incumbent unqualified, that judge may not be submitted to the General Assembly for reelection.[342]

PART IV: EVALUATION OF SELECTION MODELS

A Method to Evaluate Selection Models

The true measure of the efficacy of a particular judicial selection model is the degree to which it advances the purpose of the judicial branch in our government. This measure includes an evaluation of whether the *result* of selection is a judiciary with qualities likely to satisfy the duties of the office. It also includes an evaluation of whether the *process* of selection contributes to or detracts from the fulfillment of the judiciary's purpose. Consequently, an understanding of the role of the judiciary in our state and the functions judges perform is a prerequisite to a meaningful evaluation of judicial selection.

Consistent with the general form of American government, the Texas judiciary stands as a separate branch of government with powers and duties distinct from the other branches.[343] The principal role of the judiciary is to provide a neutral forum for the resolution of disputes that promotes the rule of law in the state. The principal role of a judge is to hear the specific disputes between parties and apply the law to resolve those disputes. In civil matters, judges serve as neutral arbiters of private disputes. In criminal matters, judges ensure that the state impartially and dispassionately administers justice.

The judiciary also functions as a check on governmental abuse of power. In the words of Alexander Hamilton, judges are "the bulwarks of a limited Constitution against legislative encroachments."[344] In fulfilling this purpose, courts act as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[345] In this role, unlike the executive and legislative branches, the judiciary is not a constituency-driven, political arm of government.[346] Instead, judges are called on to fulfill their duties with intellectual honesty and dedication to the enforcement of the rule of law, regardless of popular sentiment.[347]

The judiciary also plays a role in shaping the law. It is the legislature's function to decide matters of public policy by enacting statutes and judges' function to apply those statutes to the facts of a particular case without interposing their own policy judgments.[348] By adopting the common law of England, however, the Texas Legislature has allowed the judiciary to share the law-making role to a limited degree through the development of the common law in connection with the resolution of individual civil disputes.[349] Texas courts have long held the view that the Texas Supreme Court has the sole authority to abrogate or modify the existing common law and that trial courts and intermediate courts of appeals must follow established precedent.

To fulfill these functions, judges need certain characteristics. First, judges need to be competent to properly resolve disputes, appropriately check governmental abuse of power, and reasonably shape the law. A variety of features make a judge capable of performing these tasks, including knowledge of the law, experience, decisiveness, temperance, patience, and thoughtfulness.

Second, a judge must be impartial. A fair judge seeks to reach a legally sound result in every case. She is evenhanded and does not act with preference or prejudice to the parties appearing in court, nor to advance her own or another's business, political, social, religious,

or other interest. A judge must also ensure that court proceedings are conducted with procedural fairness and adherence to the relevant rules of procedure.

Third, a judge must be independent of extraneous pressures and influences.[351] Sometimes judges are called on to make decisions involving divisive political and social issues. Other times the law requires a judge to make a decision that is contrary to a belief strongly held by a majority of the public. A judge's faithful performance of her duty requires the freedom to make the right decision even if it is currently unpopular.[352] Without independence, a judge may feel compelled to follow the views of supporters or special interests, without regard to what the law requires. In doing so, a judge abdicates judicial responsibility and relegates the rule of law to the whims of public opinion. Individuals who hold the dominant view on an issue decided by the court may dislike judicial independence when a judge's decision goes against their view. This short-sighted dissatisfaction is likely to change, however, when they find their view to be in the minority in the next matter requiring judicial review.

A final consideration of judicial selection systems is accountability. It is possible with any system that a judge who is not competent, fair, or independent attains office. Or a judge, while in office, may become incompetent or unfair. Thus, the selection process needs mechanisms to compel judges to conform to their expected function or to remove them from office if they do not. The wrong kind, or wrong degree, of accountability, however, can undermine judicial independence. For example, if a judge could be removed from office for any one decision, the judge may not have the independence necessary to fulfill her duties.

In addition to producing judges who are competent, fair, and independent, the process of selecting judges should reassure the public that the judges selected in fact have those characteristics. Public confidence in the judiciary is critical to the orderly resolution of disputes.[353] If the public does not trust that courts are neutral forums for the competent and fair dispensation of justice, the public may adopt other, less socially desirable means to resolve disputes. The public need not always agree with the results of court decisions but must believe in the integrity of the system and that judicial decisions were made competently and equitably, regardless of results.

The best method of selecting judges has been the subject of debate since the founding of the United States.[354] Many methods exist and most states have hybrid systems in which judges are chosen by different methods depending on the level of court.[355] Some states have different methods for filling interim vacancies than for full terms of office. Scholars and commentators have long debated which of these methods creates judiciaries with the greatest competence, independence, and accountability. As discussed in the following sections, measuring judicial selection methods by evaluating both the result and selection process sufficiently distinguishes the quality of the various systems relative to each other.

Evaluating Partisan Elections

Most states have selected judges through partisan elections at some point in their histories,[356] but most have since moved from partisan judicial elections to a different selection system for at least some of their judges.[357] Six states, including Texas, currently use partisan elections to select appellate judges and ten states use them to select trial court judges.[358] Many Texas leaders contend that changing our judicial selection process is necessary and long overdue.[359]

Partisan elections have been widely criticized as a method for selecting judges,[360] with many commentators concluding that they are ineffective for selecting judges based on competence and experience.[361] Those commentators have observed that voters are generally unable to discern the best qualified candidate, and instead cast their ballots based on factors such as party affiliation and name appeal that are poor substitutes for experience and competence.[362] Some commentators assert that "as much as 80% of the electorate is completely unfamiliar with its candidates for judicial office."[363]

Competence The effectiveness of partisan elections to select competent judges turns on two primary factors: voter access to information related to judicial competence and voter consideration of candidate competence when casting ballots. The consensus among various studies, surveys, and commentaries is that voters generally do not evaluate actual judicial competence and instead decide between candidates based on factors not indicative of judicial quality.[364] As one newspaper columnist stated:

> Rather than providing voter oversight and guaranteeing minimum quality, partisan elections shelter—sometimes foster—incompetence as distinguished judges of the minority party are swept out, often to be replaced by inferior candidates of the political majority.[365]

While competence is often difficult to measure,[366] a survey of Texas lawyers shows that lawyers have historically perceived some deficiencies in judicial quality. Although somewhat dated, the survey revealed that only thirty-six percent of attorneys believed that Texas courts follow the law in deciding cases.[367] Thirty-one percent of the lawyers surveyed believed Texas judges write quality opinions, and thirty-seven percent believed Texas judges are appropriately attentive to evidence and arguments.[368] Finally, eighty-nine percent of lawyers surveyed did not think that elected judges are generally more highly qualified than appointed judges.[369]

Voters may consult a variety of sources of information concerning judicial candidates, but much of that information is not necessarily related to the candidates' suitability to fulfill the duties of office. For example, candidates may discuss their qualifications for office through their campaigns. Judicial candidates frequently discuss their legal experience, education, judgment, ability to analyze complex legal issues, peer awards, and other indicia of their competence. These communications occur in a variety of forums and formats, including speeches, websites, print, radio and television advertisements, and conversations with individual voters.

Voters may also measure an incumbent judge's competence by studying the judge's decisions and written opinions. Most state court decisions are public records available for review. Additionally, all Texas appellate courts have websites that allow the public to search opinions of the court.[370] Thus, if a voter is willing to do the work, he could review all of a particular judge's opinions in evaluating the judge's competence. Along with the voter's perception of the merits of these decisions, the voter can learn how many times the judge has been reversed on appeal. However, it is unlikely that the average voter would take the time to parse lengthy, written appellate opinions or be able to glean information about the competence of a judge by doing so.[371]

Bar polls also provide voters with information regarding a candidate's competence.[372] The State Bar of Texas sends ballots to all members of the bar, allowing attorneys to express their preferences on candidates for judicial office.[373] The State Bar Association publishes the results of the poll,[374] which are frequently included in campaign materials by candidates who received the highest number of votes for a particular race. Bar polls, however, may not be accurate, objective, and detached evaluations of judicial competence. First, few lawyers submit ballots, so poll results cannot be considered as representative of the state's lawyers. For example, at a time when there were nearly 99,000 active members of the State Bar of Texas,[375] an average of 4,415 attorneys, or 4.5% of the bar, cast ballots for the three statewide Texas Supreme Court races listed in the 2018 Judicial Poll.[376] Bar polls also may fail to provide significant information regarding judicial competence. Most lawyers do not have direct experience with many judicial candidates and base their vote on the general reputation of the candidates or their general reaction (whether positive or negative) to court decisions affecting them personally.

Voters may also obtain information about a candidate from endorsements the candidate has received. Judicial candidates strive to receive endorsements from a variety of groups to increase visibility and interest with voters, and there are numerous examples during each election cycle of television and online videos. For example, a 2010 candidate for the Texas Supreme Court ran an ad that exclaimed: "Hey, friends. I have some earth-shattering news for you. First of all, this campaign is now Chuck Norris approved."[377]

Further, many newspapers endorse judicial candidates in voter guides circulated to the papers' readership, often with discussion of the candidates' qualifications for office. Additionally, political parties and some interest groups endorse candidates and encourage their members to vote for the endorsed candidate. There has been little academic study regarding whether newspapers and interest groups engage in substantive evaluations of judicial competence or measuring the impact of endorsements on voter decision-making.

While some information about the competence of judicial candidates may be available, most commentators conclude that voters usually cast ballots based on party label or other factors unrelated to judicial competence.[378] Moreover, studies show that there is often a significant drop-off in the number of votes between more high-profile political races and judicial races.[379] Because many voters are unable to cast an informed vote in judicial elections, many do not vote in those races. As a result, contested judicial races may be decided by a small percentage of the electorate who may, or may not, have a rational basis for their vote.[380]

Overall, studies suggest that voters are not aware of candidate competence in many judicial races, and, therefore, must be casting their votes on the basis of other factors.[381] The general lack of public awareness of candidates indicates that judicial campaigns do not necessarily inform the general public about the candidates.[382] Similarly, endorsements by newspapers and interest groups are apparently not raising public awareness of judicial elections.[383]

Because voters are generally not aware of the candidates' competence, they look to other cues in casting their votes.[384] The primary deciding factor in partisan judicial elections is party label.[385] Most voters are predisposed to vote by party affiliation when they have little information about the qualifications of the candidates. In fact, many commentators claim that a candidate's party affiliation has been an important factor for success in Texas judicial elections.[386]

Urban areas in Texas have experienced alternating party sweeps in which judicial candidates from one party were uniformly elected to office based on party affiliation and later voted out of office for the same reason.[387] Moreover, the popularity of the candidates at the top of the ballot often becomes a deciding factor in a judicial election.[388] When Democrat Lloyd Bentsen ran for reelection to the Senate in 1982, Democratic judges fared well.[389] When Republican Ronald Reagan ran for reelection as President in 1984, Republican judicial candidates were more frequently elected.[390] In 1994, Republicans in Harris County (Houston) won in forty-one of forty-two contested county-wide judicial races.[391] In 2018, Democrats won in thirty-one of thirty-two contested courts of appeals races, in a partisan sweep that was impacted by the U.S. senatorial race between Republican Senator Ted Cruz and Democrat challenger Beto O'Rourke.[392]

The 2018 general election in Texas also demonstrated that party affiliation affects voter decision-making. In that election, six statewide judicial races featured both Republican and Democratic candidates.[393] If voters were basing their decision on judicial competence and not party label, one might expect members of both parties to win elections. At least, varying margins of victory might be expected in different races. However, in the statewide races—three for the Texas Supreme Court and three for the Court of Criminal Appeals—the prevailing candidates (all Republicans) won their races with nearly identical margins of victory.[394]

Texas and Alabama are the only two states that currently[395] conduct partisan judicial elections with the option of casting a straight-ticket vote.[396] Consequently, Texas is considered an "outlier" by some commentators.[397] Straight-ticket voting has historically compounded the problems of partisan voting by setting the stage for huge sweeps in judicial elections.[398] In addition to the 2018 general election, between 2008 and 2016, an average of 100 percent of statewide courts, ninety-four percent of appellate courts, and eighty-eight percent of county-level jurisdictions experienced partisan sweeps.[399] While straight-ticket voting may limit drop-off in judicial elections more than other methods, commentators contend that straight-ticket voting exacerbates the problem of having voters who are unfamiliar with the candidates and their qualifications decide judicial races.[400] Moreover, straight-ticket partisan elections that result in sweeps create upheaval within the judiciary, which negatively impacts the judicial system.[401] Straight-ticket voting appears to be an ineffective, if not harmful, method to ensure competent judges are selected by voters.[402] Starting in 2020, Texas will no longer allow one-lever straight-ticket voting. The exact impact on judicial elections is uncertain.

When party affiliation is not available as a decisional tool, as in party primary elections, voters rely on other cues, including incumbency, name familiarity, or ethnic and religious affiliation.[403] When these cues are not available, voters cast ballots based on arbitrary factors such as ballot placement, gender, and name appeal.[404] One name-appeal study found, for example, that candidates whose nicknames appeared on the ballot had a seventy-nine percent advantage over candidates without nicknames.[405] Studies also show that ethnic associations with a candidate's name affect voter decision-making.[406] This is particularly true in races in which voters had little specific knowledge about the candidates.[407]

Perhaps the most famous Texas example demonstrating the importance of name appeal in judicial elections is the case of Don Yarbrough. Yarbrough ran for a spot on the Texas Supreme Court in the 1976 Democratic primary against a highly respected incumbent.[408]

His name was purportedly confused with those of the well-known gubernatorial candidate Don Yarbrough or the long-time Texas Senator Ralph Yarborough.[409] At the time of election, Yarbrough had been sued at least fifteen times, and two weeks before the general election, was the subject of a disbarment suit alleging various legal violations and professional misconduct.[410] Despite a great deal of media attention to this race, a survey revealed that seventy-five percent of voters were unaware of the candidate's controversies.[411]

While no commentator seriously disputes that voters primarily focus on party label in partisan judicial elections instead of candidate competence, some contend that party-based voting is nevertheless a rational basis for electing judges.[412] Some commentators argue that partisan elections provide voters with more information, choice, and transparency than nonpartisan elections or the Missouri Plan selection model.[413] Having information about the political ideology of judicial candidates tells voters important and relevant information and allows them to choose the candidates they believe will be the best judges based on the criteria they believe are important.[414] Thus, voting by party label may be a meaningful way for some voters to express their general preferences on the resolution of public policy issues addressed by the courts.

Additionally, party-based voting may also have a direct effect on judicial decision-making. Because incumbent judges must face reelection to continue holding office, judges who want to continue on the bench may, when deciding cases before the court, consider the potential reaction of key political supporters and those segments of the electorate they hope will secure their reelection.[415] Consequently, partisan elections can "prospectively influence judicial behavior as judges anticipate the expectations and reactions of their constituencies."[416]

To many, this explanation of party-based voting is an indictment of partisan elections rather than a justification.[417] However, advocates of partisan elections conclude that the selection of judges involves choices among different political values, and, thus, that judicial qualification in some respects is a measure of whether the candidate's political values are consistent with the voting majority's political values.[418]

It is clear, though, that party affiliation is not indicative of competence for judicial service. Whether a judicial candidate is Republican or Democrat or holds a particular view on a political issue does not necessarily correspond to whether the candidate has sufficient legal knowledge and experience to competently fulfill the duties of a judge. Selecting judges solely based on party label or political values will likely produce both competent and incompetent judges unless a screening mechanism ensures that all candidates are sufficiently competent to fulfill the functions of judicial office.

Further, Texas imposes fairly low minimum qualifications on candidates seeking judicial office. For example, judges must be of a certain age and must have been licensed to practice law between four and ten years, depending on the office sought.[419] Having legal experience is a component of judicial competence, but a certain number of years of practice alone may not be indicative of competence for office. Texas also requires candidates for certain judicial offices to obtain signatures of support to be entitled to a place on a primary ballot.[420] This petition requirement only serves to demonstrate some degree of popular support or organizational effort, but not a degree of competence for office. These low standards imposed to screen candidates for Texas judicial office do little to ensure that Texas judges

meet minimum standards of competence. Ultimately, there is nothing in the Texas judicial selection system to prevent an incompetent candidate with an appealing name from winning a primary election and then winning the general election on the basis of his party label. Further, an incompetent candidate could sweep into office on the basis of straight-ticket voting with minimal voter awareness of his qualifications or those of the opposing candidates.[421] As former Texas Supreme Court Chief Justice Wallace Jefferson noted, "[t]hese votes are not based upon the merits of the judge but on partisan affiliation and if not party affiliation, it's the sound of your name."[422]

Another problem with party-label voting is that no screening mechanism exists in Texas to ensure that a judicial candidate actually shares the values associated with the political label she adopts. Texas's open primaries allow any candidate to seek the nomination of the dominant political party without regard to whether the candidate's beliefs are consistent with the party's beliefs. It also allows judges to switch parties to follow the ebb and flow of party dominance. For example, in the early 1980s, many incumbent Democratic judges changed political parties to become incumbent Republican judges.[423] This practice has continued.[324] Consequently, the one feature of partisan elections that its defenders celebrate—that the popular majority can shape judicial policy by selecting like-minded judges as reflected by their party affiliation—is not necessarily effective.

Overall, partisan elections appear to be poor mechanisms for selecting judges based on competence, and most states have completely rejected this model.[425]

Fairness One of the main criticisms of partisan judicial elections is that the practice of campaigning compromises the impartiality of the courts and creates incentives for unfairness.[426] The most commonly cited sources of these problems include the potential quid pro quo effect of campaign contributions, the constituency-creating effect of an increasingly politicized electorate, and the undue influence of political parties and special interest groups.[427]

Campaign fundraising and politics have been part of Texas's judicial election landscape for over 140 years. Thus, it is fair to ask what has changed to now suggest that fundraising and campaigning are problematic. The answer may be that such aspects of the system have always been problematic. However, these problems are magnified with each passing decade as judicial elections have become more expensive, more contentious, more issue-driven, and more impacted by special interests and the dynamics of top-of-the-ballot races.[428]

This reality creates two fundamental impediments to judicial fairness. First, the increasingly high cost of running a campaign generates a dangerous dependence on campaign contributors.[429] The constant need for campaign funds may compel some judges to consider their supporters' and potential supporters' interests instead of the merits of a case when performing their judicial duties.[430] Certainly, campaign contributions often become a convenient source of complaints against judges' objectivity. Second, issue-based campaigns have the tendency to create constituencies among voters, who may then expect judges to apply their preferred views when deciding cases.[431] Consequently, judges may feel pressured to follow the voting majority's preferences instead of the law. Finally, in seeking to advance their agendas, interest groups have become both important sources of campaign funds and influential players in shaping public opinion in judicial campaigns.[432]

This analysis is not intended to suggest that Texas judges are unfair. Rather, it suggests that modern partisan elections create systemic incentives for unfairness that require fortitude to resist—fortitude that honest and conscientious judges demonstrate every day. However, it is inevitable that not all judges will be able to resist the pressures associated with seeking and maintaining judicial office. Further, partisan elections create the appearance to the public that such systemic unfairness exists.[433] Former Chief Justice Wallace Jefferson touched on the issue of public perception in his 2009 State of the Judiciary address, noting the "corrosive influence of money in judicial elections."[434]

In 1999, in an effort to measure perceptions about the fairness of the Texas judiciary, the Texas Supreme Court, the State Bar of Texas, and the Texas Office of Court Administration jointly commissioned a survey of judges, court staff, and lawyers.[435] One goal of the survey was to measure the perceived influence campaign contributions have on judicial decision-making.[436] Although now dated, the results of the survey revealed that lawyers who make contributions and the judges who accept them believed that contributions to judicial campaigns influence judicial decisions.[437]

The study reported that ninety-nine percent of the attorneys surveyed believed that campaign contributions have some effect on judicial decision-making.[438] Forty-two percent believed contributions have a fairly significant influence, and thirty-seven percent believed contributions have a very significant influence.[439] The study also showed that eighty-one percent of court personnel believed that campaign contributions have at least some influence on judicial decision-making.[440] The most disturbing result of the survey, however, was that eighty-six percent of Texas judges believed that campaign contributions have at least some influence on judicial decision-making.[441]

Contributions to judicial campaigns by parties with matters pending in court create a public impression that "modern justice may be going to the highest bidder."[442] This perception has been repeatedly shown in various public opinion surveys.[443] A national survey found that eighty-one percent of respondents believed that judicial decisions are influenced by political considerations, and seventy-eight percent believed that elected judges are influenced by having to raise campaign funds.[444] Likewise, eighty-eight percent of Pennsylvanians, ninety percent of Ohioans, and seventy-six percent of Washingtonians believed that political contributions influenced judicial decisions.[445]

Fierce campaign battles waged by opposing interests to influence the composition of a court also may impact the public's perception that courts are impartial. Instead, parties who come before the court and the public, in general, may believe that judges are beholden to the interests that campaigned on their behalf. Moreover, decisions made by judges in cases that affect their political supporters may be viewed as repayment for political support, even when the cases are correctly decided under the law.[446]

As the cost of judicial elections inevitably increases, candidates need to raise ever more money to fund their campaigns. It is unavoidable that if judicial candidates are required to raise money to become judges, they will be forced to seek money from individuals and groups who are interested in the courts' activities. Some contributors may have an honest civic interest in creating fair and competent courts. Others may be interested in electing judges who will decide cases in ways that advance their interests. As long as contributions are necessary to win judicial elections, the incentives for unfairness caused by campaign

contributions—and attendant public perceptions that undermine public trust in the judiciary—will remain.

Interest group involvement in judicial campaigns adds fuel to the fire of politicized judicial elections and exacerbates the problems that issue-based campaigns create for a judicial system based on fairness and impartiality. By definition, interest groups assert influence to achieve their political goals. In the 1990s, interest groups throughout the country became active in judicial elections to shape the social, political, business, and environmental issues decided by the courts.[447] As a result, supreme court elections in many states became increasingly contested and similar to other, nonjudicial elections.[448]

There has also been a consistent trend of increased spending by interest groups in judicial elections since the U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission*.[449] That decision barred restrictions on independent spending by corporations and unions.[450] In the 2015–2016 election cycle, outside spending in state supreme court races by interest groups—not including political parties—hit a record $27.8 million, which was more than $10 million higher than the previous 2011-2012 election cycle.[451] Because judicial offices are important and interest group involvement in judicial campaigns is constitutionally protected, it is safe to assume that interest group spending is here to stay and will continue to increase.

Independence The optimal amount of judicial independence in the American form of government has been thoroughly debated but never resolved.[452] During the formative years of the federal government, the dominant view considered judicial independence necessary to check potential abuses of government power and to "secure a steady, upright, and impartial administration of the laws" in the midst of mercurial popular opinion.[453] Others were concerned, however, that unrestricted judicial independence could undermine representative democracy and allow unprincipled judicial decisions.[454]

The modern debate over judicial independence focuses on two main concerns—institutional independence and decisional independence.[455] Institutional independence focuses on the ability of courts to perform the judiciary's functions without fear of retribution by the other branches of government or the population at large.[456] Decisional independence is generally considered to mean the ability to decide cases on their merits without external influences impairing judicial impartiality.[457]

One of the principal purposes of the judiciary is to protect individuals from encroachments upon their rights by one of the other branches of government or the majority of the electorate.[458] According to this view, judges are expected to make decisions that may be unpopular with the executive or legislative branches or the popular majority.[459] Judges who are subject to reprisals for their decisions may be less likely to fulfill this judicial function.[460]

Partisan elections are not well-suited to fostering institutional independence from the electorate. Periodic voter approval directly threatens judges' willingness to make unpopular decisions.[461] When faced with a case involving a divisive political issue, such as the death penalty, gun control, education, or immigration, an elected judge may be reluctant to adopt the legally required result in light of a potentially negative public response,[462] or otherwise behave with "perfect equanimity."[463] This chilling effect on the neutral application of the law may be heightened when the judge is required to make such a decision shortly before an election.

The desired result of decisional independence is the impartial adjudication of disputes without preference for any party, attorney, or other interest. Consequently, decisional independence is intrinsically related to fairness. Judges influenced by interests unrelated to the merits of the case are more likely to produce unfair decisions.[464] As with institutional independence, different judicial selection methods will impair decisional independence in different ways. Regardless of selection method, however, the impairment of decisional independence stems from the creation of incentives for unfairness. In the case of partisan elections, judges typically raise campaign funds from lawyers and other parties who have an interest in the business of the court. Additionally, successful candidates often require the support of various political interests, including political and social activists, political parties, and interest groups. In some circumstances, judges may campaign on certain issues to garner public support, creating another form of political constituency. Judges who aspire to be reelected may be inclined to consider the interests of their contributors, supporters, and constituencies when making decisions that relate to certain issues. These incentives for unfairness directly undermine a judge's decisional independence in a partisan-election system.[465]

Accountability Advocates of judicial selection by partisan election primarily cite accountability as the chief benefit of electing judges. Their assertion raises two questions: whether partisan elections effectively hold judges accountable for failing to perform their duties, and whether other, less problematic, mechanisms are available to provide accountability.

Partisan elections hold bad judges accountable only if the voting public is aware that they are bad judges. But voters are generally uninformed about the qualifications of candidates for judicial office.[466] Voters may have access to some information about the competence of candidates, but the amount of information is limited and voters rarely consider that which is available.[467] Just as voters are generally not able to compare the competence of candidates in an open election, they are often unable to determine whether an incumbent judge has competently performed his duties.[468] This inability is exacerbated by issue-based campaign advertisements, which frequently highlight a single issue, decision, or category of decisions. Thus, partisan elections do not effectively ensure that only bad judges are removed from office and qualified judges are retained in office.

Moreover, there are other mechanisms that can be used to address judges who fail to competently perform their duties, engage in misconduct, or extend the law in a manner beyond their authority to do so. First, legal remedies available to parties, such as appeals and writs of mandamus, provide a means to correct wrongly decided cases. Additionally, institutions such as the Judicial Conduct Commission have authority to address judicial misconduct.[469] However, the Commission typically prosecutes willful violations of the Texas Code of Judicial Conduct, as opposed to basic incompetence or inability to perform the duties of office by accurately applying the law.[470] "Wrong" decisions by a judge are not misconduct, even if those decisions appear to fly in the face of the evidence or appear to be based upon perjured testimony, and even if the judge misapplies the law.[471] Appeal may be the only remedy for such a situation, or there may be no remedy.[472] However, when judges extend the law in an unpopular way, the legislature is empowered to modify the law consistent with the will of the popular majority.

Defenders of judicial elections contend, however, that the real value of partisan elections lies in the transfer of some decision-making power from government officials to voters.[473] Voters have the power to choose the candidates they believe will be the best judges based on the criteria that matters to them.[474] They can then hold judges accountable at reelection time.[475] Based on a comparison of reelection rates of state supreme court justices and other statewide races, incumbent justices were reelected at the lowest rate, suggesting that partisan elections may provide an institutional mechanism to promote accountability.[476]

However, competent, well-qualified judges may be arbitrarily removed from office during partisan elections sweeps in Texas.[477] The benefit of accountability in judicial selection by election is severely diluted when the same mechanism serves to destroy accountability in that there is no reward—through reelection—for judges who competently and fairly perform their duties of office. When factors unrelated to judicial competence or qualification, such as a high-profile senate race or partisan backlash to a presidency, dictate the outcome of elections and serve to sweep good judges out of office, then partisan elections serve as the antithesis of accountability. "[T]he truth is that this notion of accountability doesn't work because the voters don't know the judges and they can't be expected to know the judges."[478]

Evaluating Nonpartisan Elections

Nonpartisan elections were designed to remove the influences of party affiliation from judicial elections and, thus, promote greater voter consideration of candidate qualifications.[479] Supporters argue that nonpartisan elections remove political considerations while ensuring the same judicial accountability as partisan elections.[480] Many commentators conclude, however, that nonpartisan elections have all of the problems of partisan elections, but none of the promised benefits.[481]

A nonpartisan election is one in which, if a primary is held, it is not for the purpose of selecting the candidate chosen from each political party. Instead, the top two candidates, regardless of party, advance to the general election. At both the primary and general elections, candidates are listed on the ballot without designating any party affiliation.[482] While a number of states use nonpartisan elections to select judges for all courts, many states use nonpartisan elections only at the lower court level.[483]

Notably, nonpartisan elections may have an inherent element of partisanship. For example, North Carolina's Supreme Court elections are nonpartisan, but party affiliation is often obvious throughout the campaign process. Courts of appeal elections in North Carolina are similarly nonpartisan, but candidates are required to submit party affiliations or note that they are unaffiliated, to appear on the ballot.[484]

Two additional states have a nonpartisan electoral process that includes partisan elements. In Michigan, candidates for the Supreme Court are nominated at party conventions, but no partisan affiliation is listed by their names on the ballot.[485] Judges of the Michigan appellate courts and circuit courts are selected in nonpartisan elections and are not nominated at conventions.[486] In Ohio, candidates for both the Supreme Court and courts of appeals are chosen in partisan primary elections, but no party affiliation is listed with the candidates' names on the general election ballot.[487]

This section of the paper evaluates nonpartisan elections as a method of electing judges to full terms of office. This section does not include an evaluation of nonpartisan retention elections, which are discussed in other sections of the paper.

Competence For the same reasons that apply to partisan elections, most voters in nonpartisan elections are not equipped to evaluate judicial competence. Nonpartisan elections provide voters with no additional information about the candidates and exclude a piece of potentially valuable information—party affiliation.[488] Consequently, voters are even less informed about judicial races than in partisan-election states.

In all elections, those voters who are uninformed generally look to cues to make their selections.[489] By removing party labels, voters in nonpartisan elections rely on other information for guidance.[490] Studies show that the two most frequently used bases for voting in nonpartisan elections are incumbency and name recognition.[491] When these cues are absent, voters in nonpartisan elections tend to rely on name appeal, ethnic and religious associations with candidate names, gender, nickname, and ballot position.[492] As discussed in connection with partisan elections, these factors, other than incumbency, have no bearing on a candidate's competence.

Incumbency has the potential to provide some information to voters in evaluating judicial competence. In theory, a voter focused on incumbency instead of party affiliation may be more inclined to study whether the incumbent judge has performed his judicial duties to the voters' satisfaction. In general, however, nonpartisan judicial elections are usually less salient to voters and, consequently, voters are less likely to investigate a candidate's competence.[493]

Further, nonpartisan elections are not well suited to allow voters to impact judicial policy by voting for candidates based on perceptions of their political values. Voters in partisan elections can vote based on party label, which may allow some degree of indirect influence over judicial policy.[494]

Fairness Nonpartisan elections do not necessarily reduce a candidate's need to seek campaign funds or minimize the increasing politicization of elections and influence of interest groups. In fact, some commentators suggest that nonpartisan elections increase the cost of elections and politicization of campaigns.[495]

The need to raise money in nonpartisan elections is likely no less than the need in partisan elections.[496] Some contend that candidates are required to spend even more money to generate name recognition because they cannot rely on party-label voting.[497] For example, in the 2000 elections, four of the states that set campaign spending records selected judges through nonpartisan elections.[498]

Without the fundraising and campaign support that comes with running under a party label, candidates more frequently seek campaign contributions from attorneys and parties with matters before the court.[499] Consequently, many believe that attorneys, who may contribute the majority of campaign funds, have greater influence over courts in nonpartisan election states.[500] Others contend that nonpartisan elections also increase the influence of special interest groups.[501]

Moreover, nonpartisan elections have the potential of concentrating influence in a smaller group of significant contributors. Although designed to reduce the influence of

politics in judicial elections, commentators continue to observe the trend of nonpartisan elections becoming increasingly politicized.[502] Judicial elections in Oregon provide a good example of this trend. Oregon initially selected judges by partisan elections.[503] In 1930, six of the seven Oregon Supreme Court justices were Republicans allegedly elected as part of "powerful and undemocratic political machines."[504] In 1931, the Legislature replaced partisan elections with nonpartisan elections, requiring that candidates' names be printed on the ballot without any party designation.[505] Judicial campaigns between the 1930s and 1950s in Oregon were largely apolitical.[506] Candidates campaigned on their legal backgrounds and history of public service, and election results were largely influenced by bar poll results.[507]

Then in the 1970s, judicial candidates in Oregon started to discuss political issues beyond the legal background and experience of themselves and their opponents. In 1970, an incumbent justice was defeated for the first time since 1932.[508] The challenger ran a "law and order" campaign and suggested that the incumbent was soft on crime.[509] Oregon judicial elections became more politicized in the 1990s as the volume of issue-based rhetoric in judicial campaigns increased and became more specific. In an example of issue-based campaigning in 1998, a judicial candidate claimed he would be tough on crime, and based on his conservative legal background, would bring a business perspective to the court.[510] During his campaign, the candidate criticized the Supreme Court for a decision that freed a death row inmate on constitutional grounds.[511] The candidate also had the public and sometimes televised support of interest groups such as Crime Victims United, Oregon Homeowners Association, Oregon Family Farm Association, and Oregon Association of Small Business.[512]

Other states that employ nonpartisan elections to select judges have also seen an increase in issue-based campaigns that frequently focus on divisive political and social issues or on a single controversial decision of an incumbent.[513] Several issue-based advertisements in Michigan focused on candidates' views on crime and punishment.[514] An attack ad against three Michigan judges criticized Republican allegiance to "big corporations and insurance companies," which both commented on the candidates' purported views and signaled their party affiliation.[515] Some candidates expressed their belief in "family values" and commented on other social issues.[516]

In short, the trend in nonpartisan campaigns and elections has tracked that of partisan elections. Despite the absence of party labels on the ballot, these elections have become ever more politicized and costly, and subject to the same troublesome dynamics as partisan elections.

Independence Commentators also recognize that nonpartisan elections may not be better suited than partisan elections to ensure institutional or decisional independence.[517] Judges under this system are equally subject to periodic voter approval, which is likely to threaten judicial willingness to make unpopular decisions.[518]

On the other hand, judges selected in nonpartisan elections are equally independent of other branches of government as those selected in partisan elections. Moreover, the challenges to decisional independence associated with partisan elections apply equally to nonpartisan elections. Judges in both systems are subject to decision-influencing pressures from interests unrelated to the merits of the cases they adjudicate.

Commentators differ on the relative campaign costs in partisan and nonpartisan judicial elections. Some commentators assert that nonpartisan elections are preferable to partisan elections, in part because they do not generally attract as much funding, with one commentator noting that between the years of 2000 and 2009, campaign fundraising was three times greater in states with partisan elections than in nonpartisan elections.[519] Lower campaign fundraising figures may equate to less influence by interest groups and lawyers who contribute to judicial campaigns.[520] In contrast, it is argued that candidates in nonpartisan elections may have a need to raise even more money than candidates in partisan elections to generate name recognition in the absence of party affiliation or party-label cues listed on the ballot.[521] Further, some argue that in states with nonpartisan election systems, interest groups and other organizations can more easily shape voter perception of a judicial candidate by publicizing specific or isolated rulings.[522]

Accountability As compared to an appointive system, a nonpartisan election system offers more direct accountability to the public since it allows voters to reject incumbent judges or judicial candidates. However, some commentators assert that nonpartisan elections are arguably less able than partisan elections to provide meaningful accountability.[523] Because nonpartisan elections are designed to eliminate expressions of a candidate's party affiliation, they are less capable of allowing voters to indirectly shape judicial policy by party-based voting.[524]

As previously discussed, even nonpartisan elections may have distinct elements of partisanship.[525] If party affiliation is obvious throughout the campaign process, then nonpartisan elections may offer the same level of accountability that partisan elections do. If candidates are nominated at a party convention in states like Michigan, this same reasoning may hold true.[526] However, this type of accountability is more to ideological interests and the candidate's political party than to the electorate at large. No commentators dispute that an elective model, whether it be partisan, nonpartisan, or retention,[527] offers more direct accountability to voters who actually take part in judicial elections.

Evaluating Gubernatorial Appointment

Executive appointment has been a standard method of selecting judges for more than two hundred years.[528] At the time of the founding of the country, the federal government and all of the states selected their judges via either executive or legislative appointment or a combination of the two.[529] Moreover, the results of appointive selection are widespread because nearly every state that elects judges also provides for gubernatorial appointment to fill interim vacancies on the bench.[530] In some states that select the judiciary through elections, judges often step down before the end of their terms to provide the governor's office with an appointment opportunity.[531] Consequently, many state judges serving today in elective jurisdictions first came to office via gubernatorial appointment. For example, although Minnesota, North Dakota, and Georgia utilize nonpartisan elections, all of their current high court justices were initially appointed to the bench to fill interim vacancies.[532] Many Texas Supreme Court justices were initially appointed to the bench.[533]

No commentators have suggested that judges appointed by a governor are categorically less fair or less trusted by the public. Indeed, some contend that appointed judges are

far preferable in those categories.[534] Other commentators assert that appointed judges are substantially more independent from pressure to acquiesce to the majority will, particularly when deciding difficult cases involving politically divisive issues. There is also general agreement that appointment for a *limited* term allows for a degree of accountability. Finally, courts with appointed judges generally enjoy more public trust and confidence, precisely because these judges are not subject to the incentives for—and perceptions of—unfairness that are generated by an election process.[535]

Currently, six states—California, Maine, Maryland, Massachusetts, New Hampshire, and New Jersey—select judges for their highest courts through a gubernatorial appointment process wherein the governor makes the initial selection of nominees, and a committee may be used to assist the governor during the initial screening process in a nonbinding fashion. Although California makes use of retention elections (thereby making it fall within the Missouri Plan model), California's Governor does the front-end vetting of judicial candidates and creates a list of nominees for appointment to the courts of appeal and Supreme Court, after which a state bar commission reviews the Governor's choices, and a three-member panel votes to confirm them.[536] The commission reviews candidates after the Governor has nominated them and, at the end of twelve-year terms, California judges stand for retention elections to keep their seats.[537]

In Maine, the Governor chooses nominees but also establishes by executive order a fourteen-member judicial selection committee to "advise [him] about matters related to judicial appointments and recommend candidates to fill vacancies."[538] When a judicial vacancy occurs, the Governor nominates a candidate to fill the vacancy and the Legislature's joint standing committee on the judiciary recommends by majority vote that the nominee be confirmed or denied, after which time the committee's recommendation is reviewed by the Senate and becomes final unless two-thirds of the Senate votes to override the recommendation.[539]

In Maryland, the state constitution grants the Governor the sole power to choose judicial nominees, subject to majority confirmation by the state Senate. However, since the 1970s, Maryland governors have issued executive orders establishing an appellate court judicial nominating commission to supply nonbinding vetting and recommendations regarding potential nominees.[540] The Commission submits a list of three potential nominees, and the Governor may request additional candidates.[541]

Since the 1970s, the governors of Massachusetts have issued executive orders establishing the creation of formal judicial nominating commissions, which vet potential candidates and supply the Governor with nonbinding lists of potential nominees for all vacancies on the trial and appellate court level.[542] As for appointments to Massachusetts's Supreme Judicial Court, however, the Governor is guided only by the informal advice of the State Bar's Committee on Judicial Appointments, although gubernatorial appointees to all courts are subject to confirmation by the state's Governor's Council.[543] The movement away from utilizing the commission for the high court apparently was due to the Governor's Council's concerns that the commission was usurping its constitutionally authorized role in the selection process.[544]

New Jersey has two appellate courts—the Supreme Court and the Appellate Division of the Superior Court—and three trial courts: the Superior Court, the Tax Court, and the Municipal Court.[545] The Governor chooses all judges in New Jersey (with nonbinding assistance from a judicial advisory panel created by executive order) with the approval of the Senate.[546] Judges in New Jersey stand for reappointment after seven years in office, and once reappointed, they serve until the age of seventy.[547]

The New Jersey model of gubernatorial appointment has two interesting features. The first is the practice of senatorial courtesy, whereby senators have veto-like powers over judicial appointees from their home districts.[548] As a professional courtesy, other senators will not proceed with confirmation of a judicial candidate unless the senator from the candidate's home district has approved.[549] In 1994, the rules of reappointment changed so that the Senate Judiciary Committee could proceed with the reappointment of a judge without receiving approval of the home senator.[550] The second interesting feature is that New Jersey judgeships also have a tradition of political balance. Governors, regardless of their party affiliation, have generally followed a policy of replacing outgoing judges with someone of the same party.[551] On the Supreme Court, the traditional balance is three Democrats and three Republicans, with the Chief Justice belonging to the party of the appointing governor.[552]

As previously discussed, many states employ gubernatorial appointment to fill interim vacancies. This section of the paper, however, evaluates judicial selection by gubernatorial appointment for full terms of office, not interim vacancies.

Competence Studies measuring the relative competence of appointed judges typically include the screening effect of nominating commissions, since most gubernatorial-appointment states use a judicial nominating commission in some fashion to assist the governor. Consequently, there is little data to evaluate the competence of judges appointed without the involvement of a formal nominating commission. However, most commentators agree that appointment of judges by the executive branch involves a much more thorough review of the background and record of candidates than a partisan-election system, where voters often choose candidates on the basis of party label alone. Implicit in the conclusions of commentators who support gubernatorial appointment is the concept that voters should be able to trust their highest-elected state official to act as their representative in screening and appointing qualified judicial candidates to these positions.

One obvious advantage of appointive models of judicial selection is the amount of information that potential appointees can be required to disclose regarding their qualifications and personal history. The gubernatorial-appointment states often publish standardized application forms to be completed by potential nominees and submitted either to the governor's office or to that state's judicial nominating committee. These applications delve deeply into a potential appointee's education, prior legal experience, prior judicial experience, health, finances, conduct, publications, awards, references, public and community service, and potential conflicts of interest.[553] While certain states employ a universal application form applicable to all judgeships, others utilize differing applications specific to the type of court involved. Some states, like Connecticut, require the submission of multiple documents, including an application for judicial appointment; a financial affida-

vit stating annual income and expenses, as well as net assets and liabilities; and numerous other accompanying documents, including a resume, a medical release authorizing disclosure by a personal physician, a general release permitting review of all professional grievances filed, and copies of last-filed state tax returns.[554] In New York, a party seeking judicial appointment to certain courts must submit no less than three applications: the first to the Governor's Screening Board[555] and two additional applications—one short and one long—to the Commission on Judicial Nomination.[556]

Governors may also consider a variety of political factors in appointing judges.[557] This aspect of the appointment process may be exacerbated by the increasing politicization of the judiciary.[558] Consequently, some commentators assert that appointments may be based on political considerations in addition to the candidate's competence or experience.[559] Governors, as elected officials, may consider the input of interest groups, campaign contributors, and the public when appointing judges. Governors might also consider the wishes of the Legislature or local governments.

The question of what characteristics ensure judicial competence would likely never be answered to everyone's satisfaction.[560] Nevertheless, judges are professionals with some standard elements in their job descriptions, which vary depending on their jurisdiction and level of court.[561] Judges must resolve disputes in all types of cases—family law cases, criminal cases, tort cases, to name only a few—and move those cases along expeditiously within the parameters of the overarching state justice system.[562] In contrast to lawyers tasked with zealously representing their clients, judges should be a societal model of impartiality.[563] Assessing these characteristics is undeniably easier in an appointive system requiring prospective judges to fully disclose their background, experience, and record. Notably, some states that elect judges—including Texas—require an extensive application, criminal background check, and a medical exam or attestation of good health from candidates applying for appointment to interim judicial vacancies.[564] Consequently, commentators assert that one of the main reasons to support the appointment of judges is that governors are able to make judicial selections after a more thorough study of the background and record of candidates, in contrast to the very limited information available to voters.[565]

Fairness Any system of selecting judges that involves a limited term of office may generate allegiances between the selector and the judge.[566] In that sense, both electing and appointing judges contain incentives for unfairness, although the nature of the specific incentives may differ.

Studies concerning the relationship between appointment and judicial fairness usually include the effect of nominating commissions. While the political realities of appointment suggest that appointed judges may also have incentives for unfairness, this is likely to a much lesser degree than elected judges. The incorporation of a nominating commission as part of a gubernatorial appointment system has the potential of reducing the pressure on judges to consider external influences in decision-making.

It also may be likely that elected judges will have a greater number of potentially influential relationships than appointed judges. For example, an elected judge is likely to have many contributors and political supporters. This has the effect of increasing the number of sources of influence, but at the same time may dilute the power of any one influencer.

With an appointed judge, however, these external influences may be more concentrated in fewer people with proportionately greater individual influence. Some commentators therefore assert that appointing judges arguably exchanges one set of incentives for unfairness for another.[567]

Regardless, many commentators assert that the best way to ensure unbiased and fair rulings by judges is by establishing gubernatorial appointment, assisted in some fashion by a judicial nominating commission, as the standard method of judicial selection.[568] There are many more states that have chosen an appointment process instead of partisan elections to select judges.[569]

Independence Proponents of judicial appointment contend it is the best system to promote an independent judiciary.[570] An appointed judge would not be directly dependent on the prevailing popular opinion as an elected judge. Granting "life" tenure—as a small number of states do—would arguably maximize independence, but may minimize accountability.[571] Conversely, an appointed judge with a limited term of office is subject to the indirect control of the public. If confirmation is a feature of the appointment process, the judge may be dependent on the legislative branch of government to some degree and may be dependent on the governor for future reappointment.[572] However, the independence of appointed judges is arguably greater than a judge forced to participate in campaign-driven political elections.[573]

Commentators generally conclude that appointing judges for longer terms is the best method of improving independence from popular opinion and other branches of government.[574] Similarly, the use of a nominating commission may increase the likelihood of selecting a more independent judiciary, depending on the role of the commission in the process.[575] The appropriate length for judicial terms is a matter of opinion. Although life tenure, or tenure to age seventy, mirrors the federal model, most states judges are appointed to relatively short terms by comparison.[576] Longer terms permit judges to focus efforts on their judicial duties and may reduce the influence of political forces within the judicial selection process. Further, lengthy terms provide the public with a greater opportunity to assess the record of a particular judge.

Accountability While appointed judges are not subject to direct public accountability, voters still have a degree of control over the judiciary through their influence on the governor.[577] While this influence may not create the same degree of accountability as direct election of judges, in that the public's dissatisfaction with any particular judicial appointment may not be so great as to determine the outcome of a subsequent gubernatorial election, the electorate arguably will pay attention to the overall quality of judges appointed by a sitting governor. Further, the appointment of a controversial or unqualified judge is likely to draw more attention and public input through an appointment process than an elective process. Voters will be more knowledgeable about gubernatorial races and will vote in greater numbers than in judicial races, and a governor who makes bad judicial appointments can be held accountable at the ballot box. Also, voters can hold a governor accountable at election time for any judicial appointments that are not reflective of the representational responsibility of the executive branch.[578]

Insulating judges from the ugly politics of judicial elections and putting them in office through an appointment process also serves to improve the public's trust and confidence in the judiciary.[579] As discussed earlier, the general public, lawyers, and even judges believe that campaign contributions may improperly affect judicial decision-making.[580] This perception has the potential to create mistrust in the legitimacy of the judiciary and specific decisions, particularly if the winning side in a case was a contributor to the judge's campaign. Appointed judges have no need to state their personal values or describe themselves as "tough on crime" or "pro-business" or "social justice warriors" to curry favor with the voting public. Consequently, the public is likely to have greater confidence that an appointed judge would be a neutral arbiter of the law. Some contend, however, that judges will apply their own values in every case and that elections at least allow some public awareness of what values a judge might bring into court.[581]

Some commentators assert that judges who are appointed by governors reflect the political preferences of the electorate better than any other system.[582] In particular, it has been asserted that a commission system, wherein the commission has binding control over which judge is appointed, does not represent the citizenry, especially if the commission is primarily composed of lawyers[583] because the lawyers' interests and ideology are not reflective of the broader public.[584]

Legislative Confirmation The value of requiring some type of legislative confirmation of gubernatorial nominees has long been recognized. Foremost among the advantages of requiring confirmation is that the legislative branch serves as a check on the appointing authority.[585] The possibility that a governor would select a candidate based solely on local prejudices, personal or political connection, or public popularity diminishes if the candidate must be approved by a representative body.[586] Moreover, the mere possibility that a judicial nominee will be publicly rejected in a confirmation vote provides governors with an obvious incentive to put forth qualified candidates, if only to avoid damage to their own prestige. In other words, the appointing authority would be unlikely to risk the political fallout that could follow the nomination of candidates who possessed "the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."[587] For these reasons, requiring confirmation of gubernatorial appointees is generally viewed as enhancing the judicial selection process.

Evaluating Legislative Appointment

There are only two states—South Carolina and Virginia—whose legislatures are responsible for selecting judges.[588] Because this system is not a prevalent one, our discussion of it will be limited.

In South Carolina, the Legislature has selected judges throughout its history. In the 1990s, the system's detractors argued that it promoted "inbreeding" because many of the Supreme Court and circuit court judges had served in the Legislature before taking the bench.[589] Detractors also noted that there was no objective body to evaluate the qualifications of judicial candidates, and thus the Legislature lacked external guidance in casting votes.[590] South Carolina voters approved a constitutional amendment in 1996 that created a judicial merit selection commission.[591] The commission considers the qualifications and

candidates and submits the names of up to three nominees to the General Assembly, which must elect one of the nominees.[592]

In Virginia, the judicial selection process begins when a vacancy occurs or when a new judgeship is created by the General Assembly.[593] The names of candidates are submitted by General Assembly members to the House and Senate Committees for Courts of Justice.[594] These committees then determine whether or not each individual is qualified for the judgeship sought.[595] The committee hearings are open to the public and the public is given an opportunity to appear before the committees.[596] Following the committees' determination of qualification, a report listing qualified candidates is made to each house. The two houses then vote separately, and the candidate receiving the most votes in each house is elected to the vacant judgeship or new seat.[597] Incumbent judges standing for election to a subsequent term must go through the same process. This legislative "election" does not require action by the Governor. However, during months when the Legislature is not in session, the Governor has the power to fill judicial vacancies that occur in the appellate courts and the circuit courts, and the circuit courts can appoint district judges to fill those vacancies.[598] These pro tempore appointees are subject to legislative election at the next session of the General Assembly following the appointment.[599]

Competence In the same way that governors may be likely to consider a variety of political factors in appointing judges, so may legislatures.[600] Similarly, this aspect of the appointment process is also likely exacerbated by the increasing politicization of the judiciary.[601] Consequently, many commentators conclude that legislative appointments are often based on political considerations in addition to the candidate's competence or experience.[602]

Fairness If the judiciary is composed primarily of former legislators, both the actual and perceived separation of the different branches of government could be questioned. The incentives for unfairness may be greater, but perhaps to a lesser degree than elected judges.

Both South Carolina and Virginia employ committees in different ways to attenuate the influence of the selectors during the selection process.[603] However, as in Virginia where members of the Legislature submit names of candidates, the potential exists for allegiances between legislators and their chosen candidates.[604]

Independence Proponents of judicial appointment contend it is better than an elective system to ensure an independent judiciary.[605] An appointed judge would not be as directly dependent on popular opinion as an elected judge. The most obvious concern relating to independence would be decisional independence in cases involving a difficult or divisive political issue involving the members of the legislature, or the pertinent committee thereof, charged with selecting judges. However, state judicial canons of conduct governing conflicts and recusal serve to mitigate this concern.

Accountability Appointed judges are not subject to direct voter accountability. However, voters will have some degree of control over the judiciary through their elected officials in the legislature.[606] The appointment of certain judicial candidates by the legislature might draw more attention and public input through an appointment process than an elective process if the nominated candidate were controversial. In the same way, voters can hold their elected officials accountable at the ballot box for disfavored or unqualified judicial appointments made.[607]

Evaluating the Missouri Plan

The American Judicature Society, organized in 1913, adopted judicial selection reform as one of its founding objectives and offered a series of proposals for ensuring that experts, rather than voters, would be responsible for selecting judges.[608] While the society's initial proposals called for the appointment of judges by an elected chief justice, over time the preferred reform became what is still called "merit selection."[609] The merit-selection system—referred to as the Missouri Plan—employs a bipartisan commission to screen and nominate judicial candidates to the governor for appointment. After nomination and appointment, the judges are then subject to a retention election or some other means of confirmation by legislative or popular endorsement. Merit selection was endorsed by the American Bar Association in 1937, prompting several bar associations to study and propose merit selection in their own jurisdictions.[610]

No two states have adopted merit selection in quite the same way. Some states use senate confirmation after appointment based on commission nominations. Some states use retention elections, and some do not. Some nominating commissions are populated by lawyers while others focus on broader public representation. As discussed, the methods of selecting nominating commission members also vary greatly.

Judicial nominating commissions are an integral part of the Missouri Plan.[611] Commissions typically submit a list of nominees to the governor for each vacancy, and the governor usually must appoint one of those nominees.[612] The commissions were established by executive order in some states and by constitutional amendment or statute in others, and the governor may or may not be bound to select an appointee from the list of nominees.[613] Finally, several states with different selection systems for different courts use nominating commissions to select appellate court judges but elections to choose at least some trial court judges.[614]

The use of judicial nominating commissions has become a prevalent feature of the selection of judges in the United States. Even states that elect judges may employ commissions to assist the governor in filling interim vacancies on the bench.[615] Among the states, thirty-nine jurisdictions use one or more judicial nominating commissions in some manner.[616]

Many commentators, including Justice Sandra Day O'Connor, conclude that the merit selection of judges has many advantages. The most noted advantage is the removal of partisan politics from the selection of judges. By eliminating the many unseemly influences inherent in a partisan election system, merit selection frees judges to render impartial decisions without any appearance of impropriety, resulting in enhanced public trust and confidence.[617]

The most common criticism of the Missouri Plan is that it deprives the public of the right to vote for judges and the concomitant accountability to the electorate. Proponents of merit selection respond that judicial elections may not provide true accountability when political parties influence the selection process and the voting public has very few cues other than partisan labels upon which to base their vote.[618]

By the time of the fiftieth anniversary of Missouri's adoption of merit selection, thirty-three states and the District of Columbia were using merit selection for at least some

courts. Today, thirty-nine states use some version of this model by utilizing judicial nominating commissions in some form or fashion.[619] The focus of this section of the paper is on the Missouri Plan, with an emphasis on the integral role of nominating commissions.

Competence It is asserted that the selection of judges through nominating commissions will result in a more qualified and competent judiciary. The Governor of Massachusetts previously asserted that the highest quality judges can be identified through a nonpartisan, nonpolitical nominating commission.[620] Similar statements support the establishment of commissions in other states.[621]

Proponents of the commission system claim that it leads to a more qualified judiciary because of the direct involvement of attorney commissioners, although, as noted below, excessive attorney involvement (sometimes to the point of "capture" by some attorneys) also is the primary criticism of commissions. A typical commission includes both attorney members and those drawn from the general public.[622] It is argued that attorney members are "best equipped to evaluate the qualifications of potential judges."[623] Attorneys may be able to contribute an understanding of legal experience and competence, as well as insights regarding particular candidates and judicial qualities. In addition to this particularized knowledge, attorneys usually have a strong professional interest in the selection process.[624]

Finally, many nominating commissions actively solicit potential candidates for judicial office, which arguably results in a larger pool of qualified individuals from which to draw. The perception exists that qualified individuals might not otherwise be considered by the appointing authority.[625] It follows that a search for a larger number of qualified applicants may be facilitated by the efforts of multiple commissions.

Any assessment of judicial qualities is complicated by the intangible nature of those qualities, which makes them difficult to quantitatively measure.[626] Among the qualities identified and investigated by nominating commissions are temperament, sobriety, health, professional reputation, patience, impartiality, and courteousness.[627] As one commentator noted, these qualities are "vague and imprecise."[628] Even though these characteristics may serve to reveal the intrinsic and individual qualities of judges, they cannot always objectively be proven.[629]

Commentators also note that many judges must, at some point in their careers, participate in an election.[630] Consequently, some scholars argue that pitting the qualifications of elected judges against commission-nominated judges sets up a false dichotomy.[631] Many judges who are elected were originally nominated and appointed through a merit-based system and there are respected jurists who came to the bench via election.

Fairness One advantage of the Missouri Plan is the elimination of campaign funding. The need for campaign funding in elections, the increased politicization of judicial elections, and the various restrictions implemented by states on campaign conduct create numerous problems for judicial candidates, as discussed in earlier sections of this paper.[632]

Several commentators also assert that appointment may actually increase diversity on the bench[633] since it focuses more on qualifications than on political alliances, thus permitting nontraditional candidates for the bench to stand on their own achievements.[634] However, some scholars assert that the Missouri Plan, with its emphasis on selection of judicial nominees by a commission, does not screen well for ideology and therefore does

not represent the electorate through representational democracy as well as gubernatorial or legislative appointment.[635] This is attributed to the fact that commissions are generally composed primarily of lawyers or other "experts" who have different interests or ideology than the public at large.[636]

Independence One of the most common justifications for the use of nominating commissions is that judges selected through such commissions will be more independent than elected judges. This independence stems from partisan balance on the commission and freedom from political pressure from the electorate or other appointive authority.

The use of nominating commissions represents "an attempt to reduce or eliminate the influence of partisan politics in the selection of judges."[637] Many states with nominating commissions have adopted provisions demonstrating that the reduction of partisan influence is a common goal of commission systems.[638] Some states forbid commission members from holding any official position in a political party, and others provide that members must be selected on a nonpartisan basis, that commissions should nominate candidates for judicial office without regard to political affiliation, or both.[639] Moreover, several states have adopted specific requirements regarding the representation of political parties on commissions.[640] Several states also require commission members to take an oath of office disavowing any partisan influence in the nomination process.[641]

Another aspect of judicial independence that may arise from the use of nominating commissions is independence from the governor or other appointing authority. One commentator asserted that the historical purpose of commissions has been to constrain the governor's choice in appointing judges.[642] Another observer remarked that merit selection is intended to "deprive the executive of the opportunity to make judicial appointments solely on the basis of his political motivations."[643] Without the check of a nominating commission or legislative consent, the appointing authority could use judicial appointment as a reward for personal or political considerations.[644]

While these studies support the claim that nominating commissions enhance the independence of the judiciary, others reach contrary conclusions. Some commentators believe appointment systems tend to replace electoral politics with a "somewhat subterranean" set of state bar politics.[645] Even proponents of appointment selection recognize the risk of lawyer control—the rule of capture—inherent in nominating commission members selected, at least in part, by state bar associations.[646]

In sum, these findings and assertions suggest that the use of nominating commissions likely results in the selection of a more independent judiciary, depending on the composition of the commission. A commission structure incorporating features adopted by states that report nonpartisan results from their nominating commissions and avoiding undesirable features of commissions in other states would maximize the ability of a particular commission to contribute to a judiciary independent of both partisan politics and the appointing authority. Equalizing as nearly as possible the partisan balance of the commission and adopting a method of selecting commission members that does not rely too heavily on the ultimate appointing authority or on attorneys are examples of how to achieve these goals.

Accountability Proponents of nominating commissions assert that commissions increase both public participation in the judicial selection process and trust in the justice system as

a whole. Almost all commissions include members drawn from the general public, often in numbers substantially equal to the number of attorney members on the commission.[647] Moreover, the creation of a dialogue between commissions and the public is supposed to facilitate confidence in the selection process and in the judiciary. Commissions may be required to inform the public concerning vacancies, to conduct public hearings, and to solicit information from the public through news releases and other communications.[648] Nominating commissions provide a method for more meaningful public participation in the process because commission members drawn from the general public are a common feature of commissions, and those members have access to large amounts of information about judicial candidates' qualifications that average voters would not be able to obtain.[649]

The Use and Effect of Retention Elections Under the Missouri Plan, an appointed judge must stand for a retention election after an initial appointment and often at the end of a term of office to allow voters to decide whether the judge should remain in office for another full term.[650] Retention elections are usually conducted on a nonpartisan, unopposed basis.[651] Such elections are the result of a practical compromise between the goals of judicial independence and public accountability.[652] The use of a selection system combining initial appointment from candidates nominated by a commission and retention elections is intended to select quality judges, maintain their independence by insulating them from political influence, and provide public accountability through a mechanism for removal.[653]

Commentators assert that retention elections may be subject to some of the same criticisms directed at partisan and nonpartisan judicial elections.[654] First, voters have no greater information about judges running for retention than they do about candidates in nonpartisan elections because of a lack of party cues on which to base their vote.[655] Moreover, because a judge has no opponent in a retention election, voters have no ability to compare and contrast candidates.[656] Because voter interest in retention elections is usually low, nearly all judges on the ballot receive the same numbers of votes for retention, and judges are rarely voted out of office.[657] For these reasons, critics contend that retention elections may produce very little actual accountability. Finally, retention elections could manifest the same problems as partisan elections by becoming issue-based or serving as a vehicle for an ambush opposition campaign, which could force judges to raise money to retain their seats.[658]

However, in an appointive judicial selection system, retention elections are still a sound method for building in some measure of accountability to the voting public. Retention elections allow voters to decide whether an incumbent judge should remain in office for another term. Six states—Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming—utilize retention elections for all levels of their courts.[659] Another ten states—Arizona, California, Florida, Indiana, Kansas, Maryland, Missouri, Oklahoma, South Dakota, and Tennessee—use retention elections for their appellate courts.[660] Given the consistent use of retention elections by other states and by the generally nonpartisan and low-profile nature of such elections, the overall potential for eroding fairness, trust, and independence is considerably lower than with partisan elections.

The O'Connor Variant As previously discussed, former United States Supreme Court Justice Sandra Day O'Connor helped create the O'Connor Judicial Selection Plan, which is a variation of the Missouri Plan.[661] An element of the plan involves a method for judicial perfor-

mance evaluation, yielding information to be disseminated to voters to use when deciding whether to retain a judge in office.[662] In this way, the O'Connor Plan seeks to balance judicial independence against accountability. By giving voters relevant and impartial information upon which to base the retention decision, the plan attempts to create a better accountability model. At the same time, the O'Connor Plan stresses that retention elections should be conducted without fundraising or political efforts by the incumbent judge, thus preventing the judge from being exposed to influences that naturally tend to reduce judicial independence, or at least the appearance of independence.

PART V: CONCLUSION

One of the most frequently quoted comments about judicial selection reform is still apt: "Judicial reform is not for the short-winded."[663] This has proven true in Texas, as the debate over the best method for selecting Texas's judges began when Texas gained its independence in 1836 and continues to this day.

Texas is among a small minority of states that employs partisan elections to select all of its judges. As numerous studies conclude, however, Texas voters have very little information about the judicial candidates listed on election ballots. As a consequence, Texas voters make decisions that are largely uninformed about the qualifications of the candidates. Indeed, their decisions are largely based on information having nothing to do with qualifications, like the candidate's name, party affiliation, or ballot position. As demonstrated repeatedly in Texas, the partisan-election system results in judicial sweeps and upheaval in the courts, which in turn impact the fair and efficient administration of justice.

Many state leaders, former Texas Supreme Court chief justices, and respected scholars have voiced their strong opinions that the partisan election model of selecting judges in Texas should be changed to a merit-based selection system. This paper does not advocate for any specific selection model, but the inescapable conclusion drawn from the data and scholarly research summarized herein is that a partisan election system suffers from significant and incurable flaws. Thus, while judicial selection reform may be difficult to achieve, creating a system that protects the professionalism of judges and the stability of the court system should be a high priority for the people of Texas and their representatives.[664]

ENDNOTES

1 Abraham Lincoln, The Perpetuations of Our Political Institutions, *available at* http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm (last visited Aug. 15, 2019).

2 Nathan L. Hecht, The State of the Judiciary in Texas: An Address to the 86th Texas Legislature (Feb. 6, 2019), *available at* http://www.txcourts.gov/media/1443500/soj2019.pdf (last visited Aug. 15, 2019).

3 Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?,* 23 Fla. St. U. L. Rev. 1, 2 (1995) (noting "[t]he debate over selection and tenure of judges has been ongoing since shortly after the founding of our nation.").

4 *See* John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 Baylor L. Rev. 339, 350 (1988).

5 *Id.* at 351-56.

6 Daniel Becker & Malia Reddick, *Judicial Selection Reform: Examples From Six States,* Am. Judicature Soc'y, 5-6 (2003), *available at* http://www.judicialselection.com/uploads/Documents/jsreform_1185395742450.pdf (last visited Aug. 15, 2019).

7 *Id.* at 8.

8 Tex. S.B. 129, 77th Leg. R.S. (2001).

9 Tex. S.B. 794, 78th Leg. R.S. (2003); Tex. S.B. 553, 79th Leg. R.S. (2005).

10 Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas As a Case Study*, 29 Fordham Urb. L. J. 907, 932-34 (2002).

11 *See* Mark P. Jones, *The Selection of Judges in Texas: Analysis of the Current System and of The Principal Reform Options,* Baker Inst. for Pub. Pol'y (2017), *available at* https://www.bakerinstitute.org/media/files/files/b38e1ecc/POLI-pub-TexasJudges-011317.pdf (last visited Aug. 15, 2019).

12 *See* Andrew Cohen, *"A Broken System": Texas's Former Chief Justice Condemns Judicial Elections*, The Atlantic (Oct. 28, 2013), *available at* https://www.theatlantic.com/national/archive/2013/10/a-broken-system-texass-former-chief-justice-condemns-judicial-elections/280654/ (last visited Aug. 15, 2019).

13 *See* Appendix.

14 *See Id.*

15 *See* Zach Despart, *Emmett ousted as Democrats rout GOP in Harris County races,* Houston Chronicle (Nov. 6, 2018), *available at* https://www.houstonchronicle.com/news/houston-texas/houston/article/Emmett-threatened-by-Democratic-rout-in-Harris-13369367.php (last visited Aug. 15, 2019).

16 Hecht, State of the Judiciary Address, *supra* note 2.

17 *Id.*

18 *Id.*

19 *See* Anthony Champagne, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections,* 43 S. Tex. L. Rev. 11 (2001).

20 *See* Jones, *The Selection of Judges in Texas, supra* note 11.

21 *See* Champagne, *Coming to a Judicial Election Near You, supra* note 19, at 11.

22 *Id.*

23 *Id.*

24 *See* Tex. Sec'y of State, *1992-Present Election History: 2018 General Election, available at* https://elections.sos.state.tx.us/elchist331_state.htm (last visited Aug. 15, 2019).

25 *See* Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 02, 2010, *available at* https://harrisvotes.com/HISTORY/101102/cumulative/cumulative.pdf (last visited Aug. 15, 2019) (approximately 799,000 people voted in Harris County in the general election); Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 04, 2014, *available at* https://harrisvotes.com/HISTORY/20141104/cumulative/cumulative.pdf (last visited Aug. 15, 2019) (approximately 688,000 people voted cast in Harris County in the general election).

26 *See* Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 06, 2012, *available at* https://harrisvotes.com/HISTORY/20121106/cumulative/cumulative.pdf (last visited Aug. 15, 2019) (just over 1.2 million people voted in Harris County in the general election); Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 08, 2016, *available at* https://harrisvotes.com/HISTORY/20161108/cumulative/cumulative.pdf (last visited Aug. 15, 2019) (almost 1.35 million people voted in Harris County in the general election).

27 *See* Cumulative Report—Official—Harris County, Texas—General and Special Elections Live—November 06, 2018, *available at* https://harrisvotes.com/HISTORY/20181106/cumulative/cumulative.pdf (last visited Aug. 15, 2019). The 2018 election cycle produced unusually high voter participation throughout Texas, including in Harris County. *See Id.* (over 1.22 million people voted in Harris County in the 2018 general election, similar to voter participation in the 2012 and 2016 general elections).

28 Tex. H.B. 3040, 86th Leg. R.S. (2019).

29 *Id.*

30 Brennan Ctr. for Justice, *Judicial Selection: An Interactive Map, available at* http://judicialselectionmap.brennancenter.org/?court=-Supreme (last visited Aug. 15, 2019). We distinguish here between Texas's Article V judges—those judicial officers who hold judgeships created under Article V of the Texas Constitution (the Supreme Court, Court of Criminal Appeals, intermediate courts of appeals, district courts, county courts at law, and probate courts)—and: (1) municipal court judges, whose offices are created by municipal charters and ordinances, and (2) administrative law judges, who are part of the executive branch of government.

31 Tex. Const. art. V, §§ 2, 4, 6, 7, 15, 18.

32 Tex. Const. art. V, § 28.

33 *See, e.g.,* TEX. CONST. art III, § 13 (legislators); TEX. ELEC. CODE § 202.002.
34 TEX. CONST. art. V, §§ 2, 4, 6, 7, 15, 18, 30.
35 Hill, *Taking Texas Judges Out of Politics, supra* note 4 at 344.
36 TEX. CONST. of 1845, art. IV, § 5.
37 TEX. CONST. of 1845, amend. 1, 2.
38 TEX. CONST. of 1861, art. IV, § 5.
39 TEX. CONST. of 1869, art. V, §§ 2, 6, 19.
40 TEX. CONST. art. V, §§ 2, 4, 6, 7, 15, 18.
41 TEX. CONST. art. V, §§ 1 (vesting judicial power in courts), 2(c) (supreme court justices), 4(a) (court of criminal appeals judges), 6(b) (court of appeals justices), 7 (district judges), 15 (county judges), 18 (justices of the peace), 30 (judges serving on any court created by the Legislature having county-wide jurisdiction, which covers the county courts at law and probate courts). Municipal court judges and administrative law judges in Texas are not Article V judges and are either appointed or employed.
42 *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176 (1980) (discussing evolution of selection process).
43 *See* NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges, available at* http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Aug. 15, 2019) (listing information on each state's current method for selecting judges compiled by the National Center for State Courts).
44 *Id.*
45 TEX. CONST. art. V, §§ 2, 4. The constitution refers to the judges serving on the supreme court as "justices," judges serving on the court of criminal appeals as "judges," judges serving on the intermediate courts of appeals as "justices," and judges serving on the various trial courts as "judges." Generally, this paper will use "judge" or "judges" to refer to all of these judicial officers.
46 TEX. CONST. art. V, § 2(c); BALLOTPEDIA, Texas Court of Criminal Appeals, *available at* https://ballotpedia.org/Texas_Court_of_Criminal_Appeals (last visited Aug. 15, 2019). If an interim appointment is made to either court, more than three of these justices or judges may be on the ballot in the next election cycle.
47 TEX. GOV'T CODE § 22.201(a).
48 TEX. CONST. art. V, § 6.
49 BALLOTPEDIA, *Texas intermediate appellate court elections, 2018, available at* https://ballotpedia.org/Texas_intermediate_appellate_court_elections,_2018 (last visited Aug. 15, 2019).
50 TEX. CONST. art. V, §§ 7, 15. *See* TEX. JUD. BRANCH, *Court Structure of Texas (2019), available at* http://www.txcourts.gov/media/1443399/court-structure-chart-jan-2019.pdf (last visited Aug. 15, 2019).
51 TEX. CONST. art. V, § 28(a).
52 *See Id.*
53 TEX. CONST. art. V, § 28(b); TEX. GOV'T CODE § 25.0009; TEX. LOC. GOV'T CODE § 87.041. There are also specific rules regarding the selection of judges in multi-county statutory county courts and multi-county statutory probate courts. *See* TEX. GOV'T CODE §§ 25.2603, 25.2653.
54 See TEX. JUD. BRANCH, *Profile of Appellate and Trial Judges* (2018), available at http://www.txcourts.gov/media/1442352/judge-profile-sept-18.pdf (last visited Aug. 15, 2019). This source, which is published annually on September 1, has not yet been updated to reflect the fact that all current sitting judges on the Texas Court of Criminal Appeals were elected.
55 TEX. CONST. art. V, § 28(a),(b); TEX. GOV'T CODE § 25.0009; TEX. LOC. GOV'T CODE § 87.041.
56 *See* TEX. JUD. BRANCH, *Profile of Appellate and Trial Judges, supra* note 54. Of the currently serving justices on the Texas Supreme Court, Chief Justice Nathan Hecht and Justices Paul Green and John Devine were initially elected, while Justices Eva Guzman, Debra Lehrmann, Jeffrey Boyd, Jeffrey Brown, James Blacklock, and Brett Busby were initially appointed. *See* TEX. JUD. BRANCH, *Supreme Court, About the Court, available at* https://www.txcourts.gov/supreme/about-the-court/ (last visited Aug. 15, 2019) .
57 *See* TEX. JUD. BRANCH, *Profile of Appellate and Trial Judges, supra* note 54. The data was current as of Sept. 1, 2018. *See supra* note 54.
58 *See* Anthony Champagne & Kyle Cheek, *Judicial Politics in Texas: Partisanship, Money and Politics in State Courts* 93-95 (David A. Schultz, ed., 2005); *see also* Billy Monroe, *Partisan Elections in Texas: Best Choice or Reform Failure*, 21 TEX. HISP. J.L. & POL'Y 1, 13 (2015); Hill, *Taking Texas Judges Out of Politics, supra* note 4, at 347.
59 TEX. JUD. BRANCH, Court History: *Justices Since 1945* (2019), available at http://www.txcourts.gov/supreme/about-the-court/court-history.aspx (last visited Aug. 15, 2019).
60 TEX. CONST. art. V, §§ 2(b), 4(a), 6(a), 7; TEX. GOV'T CODE § 25.0014.
61 TEX. CONST. art. V, §§ 2(b), 6(a).
62 TEX. CONST. art. V, § 7; TEX. GOV'T CODE § 24.001.
63 TEX. CONST. art. V, § 7.
64 TEX. GOV'T CODE § 25.0014.
65 TEX. CONST. art. V, § 15.
66 *See* TEX. ELEC. CODE § 141.001(a).
67 *See Id.*
68 *See* NAT'L CTR. FOR ST. CTS., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
69 *See Id.*
70 *See Id.*

71 *See Id.*
72 *See Id.*
73 *See Id.*
74 *See* Tex. Jud. Branch, *Profile of Appellate and Trial Judges, supra* note 54.
75 *See Id.*
76 Tex. Const. art. V, §§ 2, 4, 7, 15, 18; Tex. Elec. Code § 2.001.
77 Tex. Elec. Code § 172.001 *et seq.*
78 *See* Tex. Sec'y of State, *1992-Present Election History: 2018 General Election, supra* note 24.
79 Tex. Elec. Code § 142.001 *et seq.*
80 *Id.* § 172.001 *et seq.*
81 *Id.* § 172.021.
82 *See Id.*
83 *Id.* § 172.021(g).
84 *Id.* § 172.021(e).
85 *Id.* § 172.025.
86 *Id.* § 172.024.
87 *Id.* § 172.021(b).
88 *Id.* § 172.003.
89 *Id.* § 172.004.
90 *Id.* § 172.003.
91 *Id.* §§ 142.002, 142.004.
92 *Id.* §§ 142.004, 142.008.
93 *Id.* § 142.007.
94 *Id.*
95 *See* Champagne & Cheek, *The Cycle of Judicial Elections, supra* note 10, at 931-32.
96 *See, e.g.,* Wallace B. Jefferson, *My View: Reform the Partisan System,* 79 Tex. B.J. 90 (Feb. 2016); Trevor Brown, *Money Talks While Democracy Walks: The Constitutionality of the Texas Ethics Commission Enforcing the Judicial Campaign Fairness Act in the Face of* McCutcheon v. FEC, 16 Tex. Tech Admin. L.J. 395, 403 (2015); Seana Willing, *Post-Caperton Recusal Reform In Texas: Is It Needed?,* 51 S. Tex. L. Rev. 1143, 1160-62 (2010).
97 Tex. Elec. Code § 253.151, *et seq.* (as added by S.B. 94, Acts 1995 74th Leg., ch. 763).
98 *Id.* §§ 253.155 - 253.1611.
99 *Id.* §§ 253.164 - 253.166.
100 *See* Tex. H.B. 3233, § 17, 86th Leg. R.S. (2019).
101 *See Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010) (holding that limiting independent expenditures on political campaigns by groups such as corporations, labor unions, or other collective entities violates the First Amendment because limitations constitute a prior restraint on speech); *Buckley v. Valeo,* 424 U.S. 1 (1976) (holding that governmental restriction of independent expenditures in campaigns, the limitation on expenditures by candidates from their own personal or family resources, and the limitation on total campaign expenditures, violate the First Amendment).
102 Tex. Elec. Code §§ 253.155 - 253.1611.
103 *Id.*
104 *Id.*
105 *Id.* §§ 253.155, 253.157.
106 *Id.*
107 *Id.* § 253.1621.
108 Tex. Ethics Comm'n Op. No. 302 (1996).
109 Tex. Elec. Code § 253.1621.
110 *Id.* § 253.153.
111 *Id.* § 253.153(a).
112 *Id.*
113 Julie Schuering Shuetz, Comment, *Judicial Campaign Speech Restrictions in Light of* Republican Party of Minnesota v. White, 24 N. Ill. U. L. Rev. 295, 300-01 (2004).
114 *Republican Party of Minn. v. White,* 536 U.S. 765, 788 (2002).
115 *N.D. Fam. Alliance, Inc. v. Bader,* 361 F. Supp. 2d 1021, 1035 (D. N.D. 2005).
116 Peter Gregory Juetten, Note, *Should They Stay or Should They Go: The Implications of* Republican Party of Minnesota. v. White *on Restrictions of Speech During Judicial Election Campaigns,* 56 Ark. L. Rev. 677, 680-81 (2003); Angela Allen, Note and Comment: *The Judicial Election Gag Is Removed – Now Should Texas Remove Its Gag and Respond,* 10 Tex. Wesleyan L. Rev. 201, 212-13 (2003).
117 Model Code of Jud. Conduct, Canon 7B(1)(c) (Am. Bar Ass'n. 1972).
118 *See, e.g., Berger v. Supreme Court of Ohio,* 598 F. Supp. 69 (S.D. Ohio 1984).
119 *See White,* 536 U.S. at 768.
120 *See* Allen, *The Judicial Election Gag is Removed, supra* note 116, at 213.
121 *See White,* 536 U.S. at 768.

122 *Id.* at 776-77, 788.
123 *Id.* at 770.
124 *Id.*
125 *Id.* at 775.
126 *Id.* at 775.
127 *Id.* at 775-78.
128 *Id.* at 776.
129 *Id.* at 777-78.
130 *Id.* at 779-80.
131 *Id.* at 788.
132 *See* David M. O'Brien, *State Court Elections and Judicial Independence,* 31 J.L. & Pol. 417, 427 (2016); Jacintha M. Webster, Note: *An Impossible Balance: Judicial Elections and The Constitution,* 9 Alb. Gov't L. Rev. 384, 395-96 (2016).
133 *Bader,* 361 F. Supp. 2d at 1035-36.
134 *See* Tex. Sup. Ct. Misc. Doc. No. 02-9167 (Aug. 22, 2002) (order approving amendments to the Texas Code of Judicial Conduct), *available at* http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/02/02916700.pdf (last visited Aug. 15, 2019).
135 Tex. Code of Jud. Conduct, Canon 5(1)(iii) (citing Canon 3B(10)).
136 Tex. Const. art. V, § 1-a(1).
137 Darren Goldman, *Mandatory Retirement: A Comprehensive Analysis Exploring Key Differences Between Trial & Appellate Level Judges* 4-5 (2009), *available at* http://socialaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system/05goldman-paper.pdf?sfvrsn=6 (last visited Aug. 15, 2019).
138 *See* Tex. Jud. Branch, *Profile of Appellate and Trial Judges, supra* note 54. The data was current as of Sept. 1, 2018. *See supra* note 54.
139 *See Id.*
140 *See* Tex. Sec'y of State, *1992-Present Election History: 2018 General Election, supra* note 24.
141 *Id.*
142 *Id.*
143 *Id.*; In addition, a number of constitutional county court judges, statutory county court judges, and justices of the peace also were also defeated in the 2018 election. *See Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *See* Tex. Sec'y of State, *1992-Present Election History: 2018 Democratic Party Primary Election, available at* https://elections.sos.state.tx.us/elchist324_state.htm (last visited Aug. 15, 2019); Tex. Sec'y of State, 1992-Present Election History: 2018 Republican Party Primary Election, *available at* https://elections.sos.state.tx.us/elchist325_state.htm (last visited Aug. 15, 2019).
149 Tex. Sec'y of State, *1992-Present Election History: 2018 Republican Party Primary Election, supra* note 148.
150 *Id.*
151 Tex. Sec'y of State, *1992-Present Election History: 2018 Democratic Party Primary Election, supra* note 148.
152 *Id.*
153 *Id.*
154 Tex. Const. art. XV, § 1-a(6).
155 *Id.* The wording of the constitution is ambiguous. It might be read to require suspension upon indictment for a felony or being charged with official misconduct, but being indicted or charged with these criminal acts does not result in the automatic removal from office.
156 Tex. Const. art. XV, §§ 1-4. Read strictly, Article XV may not provide for the impeachment of judges serving on the court of criminal appeals, but it does provide that the legislature "shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution." *Id.* § 7. Chapter 665 of the Texas Government Code governs impeachment, which applies to any "state officer," which reaches the judges on the court of criminal appeals. *See* Tex. Gov. Code § 665.002(1).
157 Tex. Const. art. XV, § 6.
158 *Id.*
159 Tex. Const. art. XV, § 8.
160 *See Id.*
161 Tex. Gov. Code § 665.051. Article XV, § 7 of the constitution provides that the legislature "shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution," which allows the addition of judges on the court of criminal appeals to the process for removal.
162 *See Id.* § 665.052(a)(5). Adding a ground for removal to the list is constitutionally questionable.
163 *See Id.* § 665.052(b).
164 Tex. Const. art. XV, § 9. The constitution does not differentiate between state officials who are appointed and never stand for election, such as a commissioner on the Public Utility Commission, and an official who is appointed subject to being elected in the

next election cycle, like a justice on the Texas Supreme Court. As such, it appears that an appointed judge is subject to removal by the governor until she assumes the office pursuant to an election.

165 *See Id.*

166 *See Id.*

167 Tex. Civ. Prac. & Rem. Code §§ 66.001, 66.003. For example, in April 2019, a newly elected county court at law judge in Harris County forfeited his office by declaring that he would be a candidate for the Texas Supreme Court, in violation of the Texas Constitution. *See* Washington Post, *A newly elected county judge resigned abruptly. Just one problem: It was an accident.* April 4, 2019, *available at* https://www.texastribune.org/2019/04/04/harris-county-civil-court-judge-william-mcleod-accidentally-resigns/. (last visited Sep. 12, 2019).

168 Tex. Civ. Prac. & Rem. Code § 66.002.

169 Tex. Const. art. V, § 1-a(1).

170 The terms "Missouri Plan" and "merit-based system" are commonly used as interchangeable synonyms with respect to the appointment/retention-election model. Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial Selection: Accountability Challenges to Merit-Based Reform,* 75 Alb. L. Rev. 1799, 1801 (2012). In the interest of clarity, however, the term "merit based" is not so used herein, as judicial nominating commissions (presumably tasked with supplying qualified candidates) are also used in conjunction with other judicial selection models.

171 *See* Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30.

172 *See Id.*

173 *See* infra, Part III.

174 *See Id.*

175 *See Id.*; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.

176 The Federalist Soc'y, *Judicial Selection White Papers: The Case for Judicial Appointments,* 33 U. Tol. L. Rev. 353, 356-57, 359-60 (2002).

177 *See Id.* at 358.

178 *See Id.*

179 Rachel Paine Caulfield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions,* 34 Fordham Urb. L. J. 163, 168-69 (2007).

180 *See Id.* at 170-71.

181 *Id.* at 166-68.

182 F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts,* 33 J. Legal Stud. 431, 440, tbl. 1, 458, tbl. 2 (2004).

183 *Id.*; *see also* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.

184 Caulfield, *How the Pickers Pick, supra* note 179, at 167.

185 *See Id.* at 167-68.

186 *See Id.* at 168.

187 *See Id.* at 168-69; Hanssen, *Learning About Judicial Independence, supra* note 182 at 458, tbl. 2.

188 Hanssen, *Learning About Judicial Independence, supra* note 182, at 440, tbl. 1, 458, tbl. 2.

189 This model and its variations are often described by commentators as "The Missouri Model" or "Merit Selection."

190 Caulfield, *How the Pickers Pick, supra* note 179 at 170-71; Hanssen, *Learning About Judicial Independence, supra* note 182, at 458, tbl. 2.

191 Am. Judicature Soc'y, *Chronology of Successful and Unsuccessful Merit Selection Ballot Measures, available at* http://www.judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf (last visited Aug. 15, 2019).

192 Hanssen, *Learning About Judicial Independence, supra* note 182, at 443, tbl. 1, 458, tbl. 2.

193 *Id.*; Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30.

194 *See Id.*

195 *See Id.*

196 The following discussion of the judicial selection models utilized by the various states is supported by the data tables provided in this part of the paper and their underlying source data. Because of the mix-and-match approach taken by the states in utilizing the basic selection models, the discussion in this part of the paper focuses only on representative examples of the various selection models and does not attempt to exhaustively discuss those states that have adopted multiple methodologies.

197 A state-by-state analysis of the varying methods used by the states in the additional-term context is set out at Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30.

198 *See Id.* (AL, IL, LA, NC, PA, TX). Note that while the Brennan Center's interactive map is an invaluable resource, its methodologies depart slightly from those used in this paper. Thus, although the Brennan Center utilizes an additional "hybrid" category for four states, this paper categorizes three of those states (California, Maryland, and New Mexico) in the Missouri Plan appointment category, and the final "hybrid" state (Hawaii) in the gubernatorial appointment category. Additionally, in tallying which states utilize a particular model, the Brennan Center figures have been recalculated to exclude the District of Columbia.

199 *See Id.* (AR, GA, ID, KY, MI, MN, MS, MT, NV, ND, OH, OR, WA, WI, WV).

200 *See Id.* (CT, DE, HI, MA, ME, NH, NJ, NY, RI, SC, VA, VT).

201 *See Id.* (AK, AZ, CA, CO, FL, IN, IA, KS, MD, MO, NE, NM, OK, SD, TN, UT, WY); *White*, 536 U.S. at 790-91 (O'Connor, J., concurring)(citations omitted).

202 *See Id.* (DE, ME, MT, NH, RI, SD, VT, WV, WY).
203 *See Id.* (AL, IL, LA, NC, PA, TX).
204 *See Id.* (AR, GA, ID, KY, MI, MN, MS, NV, OH, OR, WA, WI).
205 *See Id.* (CT, HI, MS, ND, NJ, NY, SC, VA).
206 *See Id.* (AK, AZ, CA, CO, FL, IN, IA, KS, MO, MD, NE, NM, OK, TN, UT).
207 This table was created in reliance upon data set forth in Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43; and Ballotpedia, *Judicial Selection in the States, available at* https://ballotpedia.org/Judicial_selection_in_the_states (last visited Aug. 15, 2019). In seeking to authoritatively set forth the judicial selection procedures applicable to over 140 courts located in fifty states, these three websites occasionally provide conflicting answers, either through human error or subsequent amendment of the applicable law. The accuracy of this table is necessarily subject to the accuracy of the underlying source data utilized by such websites. *See also* Brennan Ctr, *Judicial Selection: An Interactive Map, supra* note 30.
208 *See Id.*
209 *See Id.* (AL, IL, LA, NC, NY, PA, TN, TX).
210 *See Id.* (AR, CA, FL, GA, ID, KY, MD, MI, MN, MS, MT, NV, ND, OH, OK, OR, SD, WA, WI, WV).
211 *See Id.* (AZ, IN, KS, MO).
212 *See Id.* (AK, CO, IA, NE, NM, UT, WY).
213 *See Id.* (CT, DE, HI, MA, ME, NH, NJ, RI, SC, VA, VT).
215 *See* Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30.
216 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
217 N.J. Const. art. VI, § VI.
218 *See* Brennan Ctr., *Judicial Selection: A Glossary of Terms, available at* https://www.brennancenter.org/rethinking-judicial-selection/glossary (last visited Aug. 15, 2019).
219 Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, available at* http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state (last visited Aug. 15, 2019).
220 *See* Nat'l Ctr. for St. Cts., *Judicial Selection in the States: South Carolina, available at* http://www.judicialselection.us/judicial_selection/index.cfm?state=SC (last visited Aug. 15, 2019).
221 Commonwealth of Va. Div. of Legis. Servs., *Judicial Selection Overview, available at* http://dls.virginia.gov/judicial.html (last visited Aug. 15, 2019).
222 *See Id.*
223 *See supra* note 30 (excluding Texas's justice courts and municipal courts from the analysis in this paper).
224 *See, e.g.,* Idaho Code § 34-905; Brennan Ctr., *Judicial Selection: A Glossary of Terms, supra* note 218.
225 *See* Chris W. Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections,* The Federalist Soc'y (March 2012) at 3, *available at* https://fedsoc.org/commentary/publications/a-survey-of-empirical-evidence-concerning-judicial-elections (last visited Aug. 15, 2019).
226 Mont. Const. art. VII, § 8.
227 Nev. Rev. Stat. § 293.269.
228 *See* Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
229 *See Id.*
230 *See Id.*
231 *See Id.*
232 *See White*, 536 U.S. at 792 (O'Connor, J. concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").
233 *See* Sandra Day O'Connor, *The O'Connor Judicial Selection Plan,* Inst. for the Advancement of the Am. Legal Sys. (June 2014), *available at* https://iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf (last visited Aug. 15, 2019).
234 *Id.*
235 *Id.* at 8.
236 *See Id.* at 9.
237 *See Id.* at 5.
238 *See Id.* at 6.
239 *See Id.*
240 *See Id.* at 7.
241 *See Id.* at 7-8.
242 *See Id.* at 8.
243 Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219.; *see also* Inst. for the Advancement of the Am. Legal Sys., *States With Judicial Nominating Commissions, available at* https://iaals.du.edu/projects/oconnor-judicial-selection-plan#tab=judicial-nominating-commission (last visited Aug. 15, 2019).
244 *See Id.*
245 Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219; Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30.

246 *See Id.*
247 *See Id.*; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
248 *See Id.*
249 *See Id.*; Am. Judicature Soc'y, *Judicial Merit Selection: Current Status,* tbl. 1 (Characteristics of Merit Selection Plans: Scope of The Plans) (2011), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (last visited Aug. 15, 2019).
250 *See Id.*
251 *See Id.*
252 *See Id.*
253 *See* Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219.
254 *See Id.*
255 *See Id.*
256 *See* Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 249, at tbl. 1.
257 *See Id.*
258 *See Id.*
259 *See Id.*
260 Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219.
261 *See Id.*; Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30.
262 *See Id.*
263 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219.
264 Commonwealth of Va. Div. of Legis. Servs., *Judicial Selection Overview, available at* http://dls.virginia.gov/judicial.html (last visited Aug. 15, 2019).
265 *See Id.*
266 *See* Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 223, at tbl. 1.
267 *See Id.*
268 *See Id.*
269 *See Id.*
270 *See Id.*; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219.
271 *See Id.*
272 *See* Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 249, at tbl. 1.
273 *See Id.*
274 *See Id.*
275 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219.
276 *See Id.*
277 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219; Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 249, at tbls. 2 (Composition of Nominating Commission), 3 (Rules Governing Submission of List of Nominees).
278 *See Id.*
279 *See Id.*
280 *See Id.*
281 *See Id.*
282 *See* Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 249, at tbl. 2.
283 *See Id.*; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219.
284 *See Id.*
285 *See Id.*
286 *See Id.*
287 *See Id.*; Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 249, at tbl. 1.
288 *See Id.*
289 *See Id.*
290 *See Id.*
291 *See Id.*
292 *See* Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 249, at tbl. 5 (Nominating Commission Procedures).
293 *See* Conn. Gen. Stat. § 51-44a.
294 Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges,* 11 Cornell J. L. & Pub. Pol'y 273, Appendix (State Judicial Selection Laws) at 314 (2002).
295 *See Id.*
296 N.M. Const. art. VI, § 35.
297 Ky. Const. § 118; Okla. Const. art. VII-B, § 3.
298 Vt. Stat. tit. 4, § 601.
299 Ariz. Const. art. VI, §§ 36, 41.

300 Fla. Stat. § 43.291.
301 Ind. Code §§ 21-13-1-6, 33-33-45-28.
302 *See Id.*
303 Iowa Code §§ 46.1, 46.3.
304 Anisa A. Somani, *The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?,* 54 Wm. & Mary L. Rev. 1451, 1475 (2013).
305 *Back v. Carter,* 933 F. Supp. 738 (N.D. Ind. 1996). Despite the injunction, the Indiana statute has not been repealed or amended. *See* Ind. Code § 33-33-45-28.
306 *See Mallory v. Harkness,* 895 F. Supp. 1556, 1559 (S.D. Fla. 1995), *aff'd,* 109 F.3d 771 (11th Cir. 1997).
307 *Id.* at 1559, 1560-61, 1564.
308 Fla. Stat. § 43.291(4).
309 Alaska Const. art. IV, § 8; Mont. Code § 3-1-1001.
310 *See, e.g.,* Minn. Stat. § 480B.01(2)(d),(e) (requiring that four representatives of the relevant judicial district serve on the Commission on Judicial Selection in connection with vacancies in that district).
311 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Judicial Nominating Commissions, supra* note 219.
312 Ariz. Const. art. VI, § 36.
313 Haw. Const. art. VI, § 4.
314 N.M. Const. art. VI, § 35.
315 Ala. Const. amend. 741.
316 R.I. Gen. Laws § 8-16.1-2.
317 Mont. Code § 3-1-1001.
318 N.Y. City Civ. Ct. Act § 110(g).
319 Alaska Const. art. IV, § 8; Mo. Const. art. V, § 25(d); N.Y. Const. art. VI, § 2(d)(1).
320 Fla. Stat. § 43.291.
321 Iowa Code § 46.14(2).
322 Okla. Const. art. VII-B, § 3(f).
323 Ariz. Const. art. VI, §§ 36, 41; N.Y. Const. art. VI, § 2 (d)(1); R.I. Gen. Laws § 8-16.1-2.
324 *See* Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 249, at tbl. 2.
325 *See* Md. Executive Order 01.01.2015.09.
326 *See* Am. Judicature Soc'y, *Judicial Merit Selection: Current Status, supra* note 249 at tbl. 2.
327 *See Id.*
328 *See Id.* at tbl. 5.
329 Haw. Jud. Selection Comm'n R. 7(A).
330 N.M. Const. art. VI, § 35.
331 Ariz. Uniform Rules of Proc. for Comm'ns on App. and Trial Ct. Appointments, Rule 5(a), *available at* https://www.azcourts.gov/Portals/75/Rules/UniformRulesofProcedure-2016.pdf (last visited Aug. 15, 2019).
332 Mo. Sup. Ct. R. 10.27.
333 Neb. Jud. Branch, *Judicial Nominating Commissioner's Manual, available at* https://supremecourt.nebraska.gov/judicial-nominating-commissioners-manual (last visited Aug. 15, 2019).
334 Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
335 Alaska Stat. §§ 15.58.050, 22.05.100, 22.07.060, 22.10.150, 22.15.195.
336 *See Id.*
337 *See Id.*
338 Inst. for the Advancement of the Am. Legal Sys., *Judicial Performance Evaluation in the States, available at* https://iaals.du.edu/judicial-performance-evaluation-states (last visited Aug. 15, 2019).
339 Haw. Const. art. 6, § 3.
340 Conn. Gen. Stat. § 51-44a(e).
341 *See Id.*
342 S.C. Code § 2-19-80(C)(1).
343 *See* Tex. Const. art. II, § 1.
344 The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
345 *Id.* at 466.
346 Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence,* 38 Willamette L. Rev. 367, 387 (2002); *Republican Party of Minn. v. White,* 536 U.S. 765, 803 (2002) (Stevens, J., dissenting).
347 *See* Tex. Code Jud. Conduct, Preamble, *reprinted in* Tex. Gov't Code, tit. 2, subtit. G app. B.
348 *Barrett v. Indiana,* 229 U.S. 26, 30 (1913); *Fitzgerald v. Adv. Spine Fixation Sys., Inc.,* 996 S.W.2d 864, 866 (Tex. 1999).
349 *See* Tex. Civ. Prac. & Rem. Code § 5.001.
350 *See Swilley v. McCain,* 374 S.W.2d 871, 875 (Tex. 1964).
351 *See* Tex. Const. art. V, § 11.
352 *See* Luke Bierman, *Beyond Merit Selection,* 29 Fordham Urb. L. J. 851, 853 (2002).

353 Nat'l Ctr. for St. Cts., *Public Trust and Confidence Resource Guide, available at* https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide.aspx (last visited Aug. 15, 2019).
354 Webster, *Selection and Retention of Judges, supra* note 3, at 2 (noting "the debate over selection and tenure of judges has been ongoing since shortly after the founding of our nation").
355 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
356 *See* Alicia Bannon, *Rethinking Judicial Selection in State Courts,* Brennan Ctr. for Justice, 2016, at 18, *available at* https://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts (last visited Aug. 15, 2019).
357 Webster, *Selection and Retention of Judges, supra* note 3, at 2.
358 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 5.
359 *See* Hecht, State of the Judiciary Address, *supra* note 2.
360 *See, e.g.,* Jones, *The Selection of Judges in Texas, supra* note 11, at 21.
361 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 20-21.
362 Charles G. Geyh, *Why Judicial Elections Stink,* 64 Ohio St. L.J. 43, 52 (2003).
363 *Id.* at 54.
364 *See* Webster, *Selection and Retention of Judges?, supra* note 3, at 18; Anthony Champagne, *The Selection and Retention of Judges in Texas,* 40 Sw. L.J. 53, 95 (1986); Orrin W. Johnson & Laura J. Urbis, *Judicial Selection in Texas: A Gathering Storm?,* 23 Tex. Tech. L. Rev. 525, 543-44 (1992).
365 *Partisan Elections Almost Guarantee Some Poor Judges,* Houston Chron., Jul. 27, 2001, at A34.
366 *See* Champagne, *The Selection and Retention of Judges in Texas, supra* note 364, at 104.
367 *See The Courts and the Legal Profession in Texas-The Insider's Perspective,* at 50 (May 1999) (survey jointly conducted by the Supreme Court of Texas, State Bar of Texas, and the Texas Office of Court Administration), *available at* https://www.worldcat.org/title/courts-and-the-legal-profession-in-texas-the-insiders-perspective-a-survey-of-judges-court-personnel-and-attorneys-a-joint-project/oclc/41604066 (last visited Aug. 15, 2019).
368 *Id.*
369 *Id.*
370 *See* Tex. Jud. Online, http://www.courts.state.tx.us/appcourt.asp (last visited Aug. 15, 2019).
371 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 225.
372 *See* Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection,* 77 Judicature 300, 302 (1994).
373 *See* State Bar of Tex., 2018 Judicial Poll, Final Vote Summary – February 6, 2018, *available at* https://www.texasbar.com/AM/Template.cfm?Section=Search&Template=/CM/ContentDisplay.cfm&ContentID=39261 (last visited Aug. 15, 2019).
374 *Id.*
375 State Bar of Tex. 2015-2016 Attorney Statistical Profile, *available at* https://texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=32670 (last visited Aug. 15, 2019).
376 *See* State Bar of Tex., 2018 Judicial Poll, Final Vote Summary – February 6, 2018, *supra* note 373.
377 *See* Ben Philpott, *In Texas, a Never-Ending Battle Over Judicial Elections,* Tex. Tribune, Mar. 30, 2012, https://www.texastribune.org/2012/03/30/never-ending-battle-over-judicial-elections/ (last visited Sep. 12, 2019). Chuck Norris is a martial arts champion and an actor who is known for playing the title role in Walker, Texas Ranger, a television drama that aired from 1993 until 2001. *See* Wikipedia, Chuck Norris, https://en.wikipedia.org/wiki/Chuck_Norris (last visited Sep. 12, 2019).
378 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 2, 21.
379 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 8-9.
380 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 20-22.
381 *See* Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* 67 (1980).
382 *Id.*
383 *Id.*
384 *See, e.g.,* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 13; Webster, *Selection and Retention of Judges: Is There One "Best" Method?, supra* note 3, at 18.
385 *See* Webster, *Selection and Retention of Judges, supra* note 3, at 18.
386 *See* Champagne, *Coming to a Judicial Election Near You, supra* note 19, at 11.
387 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 2, 13.
388 *See* Champagne, *Coming to a Judicial Election Near You, supra* note 19, at 11.
389 *Id.*
390 *Id.*
391 *Id.*; Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases,* 75 B.U. L. Rev. 759, 780 (1995).
392 *See* Tex. Sec'y of State, *1992-Present Election History: 2018 General Election, supra* note 24.
393 *See Id.*
394 *See Id.*
395 In 2017, Texas Gov. Greg Abbott signed into law House Bill 25, which removes the straight-ticket option from Texas ballots after September 2020; *see* Tex. Elec. Code §§ 31.012, 122.001(a), 129.023(c); *see also* Jolie McCullough, *Gov. Abbott signs bill to eliminate straight-ticket voting beginning in 2020,* Tex. Tribune, Jun. 1, 2017, https://www.texastribune.org/2017/06/01/

texas-gov-greg-abbott-signs-bill-eliminate-straight-ticket-voting/ (last visited Sep. 12, 2019). No data exists yet showing the actual effect of this change on Texas judicial elections.

396 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 2, 4.
397 *Id.* at 4.
398 *See Id.*
399 *See Id.* at 2, 13.
400 *See Id.* at 21.
401 *See* Hecht, State of the Judiciary Address, *supra* note 2.
402 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 21.
403 Dubois, *From Ballot to Bench, supra* note 352, at 245.
404 *See Id.*; Champagne, *The Selection and Retention of Judges in Texas, supra* note 335, at 100-03.
405 *See Id.* at 101.
406 *See Id.* at 102.
407 *See Id.*
408 *See Id.*; Hill, *Taking Texas Judges Out of Politics:, supra* note 4, at 351.
409 *See Id.*
410 *See Id.*
411 *See Id.*
412 *See* Chris W. Bonneau, *The Case for Partisan Judicial Elections,* The Federalist Soc'y (January 2018) at 5, *available at* https://fedsoc.org/commentary/publications/the-case-for-partisan-judicial-elections-1 (last visited Aug. 15, 2019).
413 *See Id.*
414 *See Id.* at 5-6.
415 *See* Bannon, *Rethinking Judicial Selection in State Courts, supra* note 356, at 12-13; Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 7-8.
416 Dubois, *From Ballot to Bench, supra* note 352, at 148.
417 *See, e.g,* Bannon, *Rethinking Judicial Selection in State Courts, supra* note 356, at 13.
418 *See, e.g.,* Bonneau, *The Case for Partisan Judicial Elections, supra* note 412, at 5.
419 Tex. Const. art. V, §§ 2(b), 4(a), 6(b), 7.
420 *See* Tex. Elec. Code § 172.021.
421 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 13.
422 *See* Cohen, *A Broken System, supra* note 12, at 6 (Wallace Jefferson interview).
423 Champagne, *Coming to a Judicial Election Near You, supra* note 19, at 26.
424 *See, e.g.,* Steven Kreytak, *Only Republican Judge No More: Julie Kocurek Is Now a Democrat,* Austin Am. Statesman, Jun. 7, 2006.
425 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
426 *See* Jones, *The Selection of Judges in Texas, supra* note 11, at 20; Bannon, *Rethinking Judicial Selection in State Courts, supra* note 356, at 6.
427 *See* Bannon, *Rethinking Judicial Selection in State Courts, supra* note 356, at 6-10, 12-13.
428 *Id.* at 7; Champagne, *The Selection and Retention of Judges, supra* note 335, at 84-90.
429 *Id.*
430 *Id.*
431 *Id.*
432 *Id.*
433 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 4.
434 Wallace B. Jefferson, The State of the Judiciary in Texas: An Address to the 81st Texas Legislature (Feb. 11, 2009), *available at* https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2009.pdf (last visited Aug. 15, 2019).
435 *See The Courts and the Legal Profession in Texas-The Insider's Perspective, supra* note 367, at 19 (May 1999).
436 *Id.* at 5.
437 *Id.* at 34-56.
438 *Id.* at 54.
439 *Id.*
440 *Id.* at 36.
441 *Id.* at 19.
442 Mark Hansen, *The High Cost of Judging,* Am. B. Ass'n J., Sept. 1991, at 45.
443 Anthony Champagne, *Interest Groups and Judicial Elections,* 34 Loy. L.A. L. Rev. 1391, 1408 (2001).
444 *See Id.* at 1408.
445 *See Id.*
446 *See Id.*
447 *See* De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence, supra* note 346, at 367-68. Interest groups have been active in Texas elections for at least forty years. *See* Champagne, *Interest Groups and Judicial Elections, supra* note 443, at 1394-97. In the 1980s, the plaintiffs' bar was active in Texas Supreme Court elections by providing significant campaign contributions to like-minded candidates. *See* Champagne & Cheek, *The Cycle of Judicial Elections, supra* note 10, at

911. In the last half of the 1980s, interest groups opposing the plaintiffs' bar joined the fray by backing candidates who were aligned with their interests and by providing campaign contributions. *Id.*

448 De Muniz, *Politicizing State Judicial Elections, supra* note 346, at 368.

449 *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010).

450 *See Id.*

451 *See* Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Election: Who Pays for Judicial Races?,* Brennan Ctr. for Justice (2016) at 7, *available at* https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf (last visited Aug. 15, 2019).

452 Webster, *Selection and Retention of Judges, supra* note 3, at 3.

453 *See, e.g.,* The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

454 *See, e.g.,* Thomas Jefferson, Autobiography, in 1 The Writings of Thomas Jefferson 1, 121 (Andrew A. Lipscomb ed., 1903), quoted in Webster, *Selection and Retention of Judges, supra* note 3, at 1–2.

455 Dubois, *From Ballot to Bench, supra* note 353, at 20-21; Webster, *Selection and Retention of Judges, supra* note 3, at 4.

456 Dubois, *From Ballot to Bench, supra* note 353, at 20-21.

457 *Id.* at 20.

458 Webster, *Selection and Retention of Judges, supra* note 3, at 7.

459 *See Id.*

460 *See Id.*

461 *See Id.* at 8.

462 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 7-8.

463 Thomas R. Phillips, *The Merits of Merit Selection,* 32 Harv. J.L. & Pub. Pol'y 67, 87 (2009).

464 *See* Joanna Shepherd, *Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions,* Am. Const. Soc'y 9 (2013), *available at* https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/JusticeAtRisk_Nov2013.pdf (last visited Aug. 15, 2019).

465 *Id.*

466 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 7-8.

467 *Id.*

468 *Id.*

469 Tex. Const. art. V, § 1-a(2).

470 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 8.

471 *See* State Comm'n on Jud. Conduct, *Frequently Asked Questions, available at* http://www.scjc.texas.gov/faqs/ (last visited Aug. 15, 2019).

472 *Id.*

473 *See* Bonneau, *The Case for Partisan Judicial Elections, supra* note 412, at 5.

474 *Id.*

475 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 11.

476 *Id.*

477 *See supra* Part III.

478 Cohen, *A Broken System, supra* note 12, at 6 (Wallace Jefferson interview).

479 Dubois, *From Ballot to Bench, supra* note 352, at 79.

480 Webster, *Selection and Retention of Judges, supra* note 3, at 25.

481 Bonneau, *The Case for Partisan Judicial Elections, supra* note 412, at 5-6; Webster, *Selection and Retention of Judges, supra* note 3, at 26.

482 *See* Ballotpedia, *Nonpartisan Election of Judges, available at* https://ballotpedia.org/Nonpartisan_election_of_judges (last visited Aug. 15, 2019).

483 *Id.*

484 General Assembly of North Carolina, Session Law 2015-292: House Bill 8, Oct. 29, 2015.

485 *See* Ballotpedia, *Nonpartisan Election of Judges, supra* note 482.

486 *Id.*

487 *Id.*

488 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 13.

489 *Id.*

490 *Id.*

491 Dubois, *From Ballot to Bench, supra* note 352, at 80.

492 *Id.*

493 *See, e.g.,* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 12-13*; see also* Chris W. Bonneau & Eric Loepp, *Getting things straight: The effects of ballot design and electoral structure on voter participation,* Univ. of Pittsburgh, Dept. of Pol. Science Electoral Studies 34, 119-130 at 121-22 (discussing ballot roll-off and effect of straight-ticket voting option on partisan and nonpartisan races) *available at* https://www.polisci.pitt.edu/sites/default/files/Electoral%20Studies%20Article.pdf (last visited Aug. 15, 2019).

494 *See* Bonneau, *The Case for Partisan Judicial Elections, supra* note 412, at 5.

495 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 12; Webster, *Selection and Retention of Judges, supra* note 3, at 26-27.
496 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 12; Champagne, *Tort Reform and Judicial Selection, supra* note 414, at 1493.
497 Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 12.
498 Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections,* 39 Willamette L. Rev. 1397, 1408 (2003).
499 *Id.*; Champagne & Cheek, *The Cycle of Judicial Elections*, *supra* note 10, at 916.
500 *See* Elizabeth A. Larkin, *Tort Reform and Judicial Selection,* 79 Denv. U. L. Rev. 65, 83 (2001).
501 Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell,* 28 Cumb. L. Rev. 215, 226 (1997-98).
502 Champagne, *Tort Reform and Judicial Selection, supra* note 414, at 1491.
503 De Muniz, *Politicizing State Judicial Elections, supra* note 346, at 366.
504 *Id.*
505 *Id.* at 377.
506 *Id.* at 377-79.
507 *Id.*
508 *Id.* at 380-81.
509 *Id.* at 381.
510 *Id.*
511 *Id.*
512 *Id.* at 385.
513 *See* Anthony Champagne, *Television Ads in Judicial Campaigns,* 35 Ind. L. Rev. 669, 678 (2002).
514 *Id.*
515 *Id.* at 678-79.
516 *See Id.* at 679; Champagne, *Coming to a Judicial Election Near You, supra* note 19, at 16.
517 *See, e.g.,* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 13.
518 *Id.*
519 Shepherd, *Justice At Risk, supra* note 464, at 5-6.
520 *Id.*
521 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 12.
522 *See* Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections,* 2009 Wis. L. Rev. 21, 33-35 (2009).
523 *Id.* at 39-40.
524 *See* Bonneau, *A Survey of Empirical Evidence Concerning Judicial Elections, supra* note 342, at 12-13.
525 Chris W. Bonneau & Damon M. Cann, *Voters' Verdicts: Citizens, Campaigns, and Institutions in State Supreme Court Elections* 57-68 (2015), *available at* http://www.jstor.org/stable/j.ctt15hvzft.7. (last visited Sep. 12, 2019).
526 *See* Ballotpedia, *Nonpartisan Election of Judges, supra* note 482.
527 *See supra* Part IV (discussion of retention elections).
528 *See* Webster, *Selection and Retention of Judges, supra* note 3, at 13.
529 Brian T. Fitzpatrick, *The Case for Political Appointment of Judges,* The Fed. Soc'y (April 2018) at 4, *available at* https://fedsoc.org/commentary/publications/the-case-for-political-appointment-of-judges (last visited Aug. 15, 2019).
530 Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
531 Bannon, *Rethinking Judicial Selection in State Courts, supra* note 356, at 25.
532 Minn. Jud. Branch, http://www.mncourts.gov/SupremeCourt.aspx (last visited Sep. 12, 2019); N.D. Sup. Ct., http://ndcourts.gov/Court/COURT.htm (last visited Sep. 12, 2019); Sup. Ct. of Ga., http://www.gasupreme.us/court-information/biographies/ (last visited Sep. 12, 2019).
533 *See supra* Part II (Initial Appointment Chart).
534 Fitzpatrick, *The Case for Political Appointment of Judges, supra* note 529, at 5.
535 *Id.*
536 *See* Brennan Ctr. For Justice, *Judicial Selection: A Look at California, available at* https://www.brennancenter.org/analysis/judicial-selection-look-california (last visited Aug. 15, 2019).
537 *Id.*
538 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
539 *Id.*
540 *See* https://ballotpedia.org/Article_IV,_Maryland_Constitution; *see* https://governor.maryland.gov/wp-content/uploads/2015/02/EO0101201509.pdf (last visited Aug. 15, 2019).
541 *Id.*
542 *See* Martin W. Healy, *A Guide To The Massachusetts Judicial Selection Process: The Making of a Judge* (3rd ed., 2015), *available at* https://www.massbar.org/docs/default-source/advocacy/mjsp-3-ed.pdf?sfvrsn=2 (last visited Aug. 15, 2019); Mass. Exec. Order 558 (Feb. 5, 2015), *available at* https://www.mass.gov/files/documents/2016/09/rv/eo-558.pdf (last visited Aug. 15, 2019).
543 *Id.*

544 *See* Peter Vickery, *Choosing Judges In Massachusetts: The Governor's Council and Judicial Nominating Commission Then and Now* (Nov. 27, 2018), *available at* https://masslandlords.net/choosing-judges-in-massachusetts-the-governors-council-and-judicial-nominating-commission-then-and-now (last visited Aug. 15, 2019).

545 *See* Nat'l Ctr. for St. Cts., *Judicial Selection in the States: New Jersey, available at* http://www.judicialselection.us/judicial_selection/index.cfm?state=NJ (last visited Aug. 27, 2019).

546 *Id.*

547 *Id.*

548 *Id.*

549 *Id.*

550 *Id.*

551 *Id.*

552 *Id.*

553 *See, e.g.*, Vt. Jud., *Application For Candidates For Supreme Court Justice, available at* https://www.vermontjudiciary.org/sites/default/files/documents/Justice%20Candidates%20Application-October-2016_0.pdf (last visited Aug. 15, 2019).

554 *See* Conn. Off. of Governmental Accountability, Jud. Selection Comm'n: *Applications, available at* https://www.ct.gov/jsc/cwp/view.asp?a=3250&Q=499482&jscNav=%7C (last visited Aug. 15, 2019).

555 *See* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/JudicialAppointmentQuestionnaire_2017.pdf (last visited Aug. 15, 2019).

556 *See* State of N.Y. Comm'n on Jud. Nomination, http://www.nysegov.com/cjn/assets/documents/Brochure%2005.13.15.pdf (last visited Aug. 15, 2019).

557 *See* Webster, *Selection and Retention of Judges, supra* note 3, at 17-19.

558 *Id.*

559 *Id.*

560 *See* Bierman, *Beyond Merit Selection, supra* note 352, at 867; *see also* Stephen Choi, Mitu Gulati, & Eric Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary,* 26 J.L. Econ. & Org. 290 (2008), *available at* http://www.ericposner.com/professionals_or_politicians.pdf (last visited Aug. 15, 2019).

561 *See* Bierman, *Beyond Merit Selection, supra* note 352, at 867.

562 *Id.*

563 *Id.*

564 *See* Off. of Governor Greg Abbott, https://gov.texas.gov/uploads/files/organization/appointments/Abbott_Judicial_Questionnaire.pdf; https://gov.texas.gov/uploads/files/organization/appointments/conductrelease.pdf (last visited Sep 12, 2019).

565 *See* Bierman, *Beyond Merit Selection, supra* note 352, at 868-69.

566 The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

567 *See* Jed H. Shugerman, *The People's Courts* 4 (2012).

568 *See* Bierman, *Beyond Merit Selection, supra* note 352, at 867.

569 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.

570 *See* Webster, *Selection and Retention of Judges, supra* note 3, at 14.

571 *See* Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System,* 34 Fordham Urb. L. J. 125, 133-35, 139-40 (2007).

572 *See* Bannon, *Rethinking Judicial Selection in State Courts, supra* note 356, at 20-21.

573 *See* Bierman, *Beyond Merit Selection, supra* note 352, at 867.

574 *See* Fitzpatrick, *The Case for Political Appointment of Judges, supra* note 529, at 5; Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System, supra* note 571, at 133.

575 *See* discussion of O'Connor Plan, *supra* Part III.

576 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.

577 Webster, *Selection and Retention of Judges, supra* note 3, at 14.

578 *See* Mathew Schneider, *Options for an Independent Judiciary in Michigan: Why Merit Selection of State Court Judges Lacks Merit,* 56 Wayne L. Rev. 609 (2010).

579 *See* Fitzpatrick, *The Case for Political Appointment of Judges, supra* note 529, at 5.

580 *See* Nat'l Ctr. for St. Cts., *Public Trust and Confidence Resources Guide, supra* note 353.

581 *See* Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges,* 70 Vand. L. Rev. 1729, 1729-40 (2017).

582 *See* Fitzpatrick, *The Case for Political Appointment of Judges, supra* note 529, at 5-6.

583 *See Id.*

584 *See* Fitzpatrick, *The Ideological Consequences of Selection, supra* note 581, at 1732-48.

585 *See* The Federalist No. 76 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

586 *See Id.*

587 *Id.*

588 *See Id.*

589 *See* Nat'l Ctr. for St. Cts., *Judicial Selection in the States: South Carolina, available at* http://www.judicialselection.us/judicial_selection/index.cfm?state=SC (last visited Aug. 15, 2019).
590 *See Id.*
591 *See Id.*
592 *See Id.*
593 Commonwealth of Va. Div. of Legis. Servs., *Judicial Selection Overview, available at* http://dls.virginia.gov/judicial.html (last visited Aug. 15, 2019).
594 *See Id.*
595 *See Id.*
596 *See Id.*
597 *See Id.*
598 *See Id.*
599 *See Id.*
600 *See* Webster, *Selection and Retention of Judges, supra* note 3, at 17-19.
601 *See Id.*
602 *See Id.*
603 *See* Nat'l Ctr. for St. Cts., *Judicial Selection in the States: South Carolina, supra* note 589; Commonwealth of Va. Div. of Legis. Servs., *Judicial Selection Overview, supra* note 577.
604 *See Id.*
605 *See* Webster, *Selection and Retention of Judges, supra* note 3, at 14.
606 *See Id.*
607 *See* Schneider, *Options for an Independent Judiciary in Michigan: Why Merit Selection of State Court Judges Lacks Merit, supra* note 578, at 631.
608 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
609 *Id.*
610 *See* Bierman, *Beyond Merit Selection, supra* note 352, at 854-56.
611 Allan Ashman & James J. Alfini, *The Key to Judicial Merit Selection: The Nominating Process,* 22 Am. Judicature Soc'y (1974).
612 *See* Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43.
613 *Id.*
614 *See Id.*
615 *See Id.*
616 *Id.*
617 *See Id.*
618 *See Id.*
619 *Id.*
620 Mass. Exec. Order 470.
621 *See, e.g.,* N.H. Exec. Order 2005-2; N.Y. Governor's Exec. Order 10.1 (1997).
622 *See supra* Part IV (judicial nomination commissions).
623 Symposium, *The Case for Judicial Appointments,* 33 U. Tol. L. Rev. 353, 362 (2002).
624 *See* James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards,* 106 Dick. L. Rev. 683, 724 (2002).
625 *See supra* Part IV (judicial nominating commissions).
626 *See* Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States,* 32 U. Miami L. Rev. 509, 523-24 (1978).
627 *See supra* Part IV (judicial nominating commissions).
628 *See* Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States, supra* note 626, at 522-23.
629 *Id.* at 528.
630 *See* Bierman, *Beyond Merit Selection, supra* note 352, at 859.
631 *See* Bannon, *Rethinking Judicial Selection in State Courts, supra* note 356, at 25.
632 *See* Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?,* 52 Ariz. L. Rev. 207, 217 (2010).
633 *See* Bierman, *Beyond Merit Selection, supra* note 352, at 855.
634 *See Id.*
635 *See* Fitzpatrick, *The Case for Political Appointment of Judges, supra* note 529, at 5-6.
636 *Id.*
637 Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature,* 106 Dick. L. Rev. 729, 732 (2002).
638 *See supra* Part IV (judicial nominating commissions).
639 *Id.*
640 *Id.*
641 *Id.*
642 *See* Steven Scott Stevens, *Who Judges the Judges?,* 69 Fla. B.J. 12, 15 (Jan. 1995).
643 *See* Norman L. Greene, *Perspectives on Judicial Selection,* 56 Mercer L. Rev. 949, 963 (2005).

644 Symposium, *The Case for Judicial Appointments,* 33 U. TOL. L. REV. 353, 369 (2002).
645 Richard A. Watson & Rondal G. Downing, *The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan,* at 258 (John Wiley & Sons, Inc. 1969).
646 *See* Fitzpatrick, *The Case for Political Appointment of Judges, supra* note 529, at 6.
647 *See supra* Part IV (judicial nominating commissions).
648 *See Id.*
649 *See Id.*
650 *See supra* Part IV (retention elections).
651 *See* Webster, *Selection and Retention of Judges, supra* note 3, at 14.
652 *See Id.*
653 *See Id.*
654 *See Id.*
655 *See Id.*
656 *See Id.*
657 *See Id.*
658 Webster, *Selection and Retention of Judges, supra* note 3, at 36.
659 BALLOTPEDIA, *Retention Elections, available at* https://ballotpedia.org/Retention_election (last visited Aug. 15, 2019).
660 *Id.*
661 *See* O'Connor, *The O'Connor Judicial Selection Plan, supra* note 233.
662 *See Id.* at 7-8.
663 *See* Anthony Champagne, *Judicial Reform in Texas: A Look Back After Two Decades,* J. OF AM. JUDGES ASSOC., Vol. 43, Iss. 2 at 68 (quoting late New Jersey Chief Justice Arthur Vanderbilt), *available at* http://digitalcommons.unl.edu/ajacourtreview/210 (last visited Aug. 15, 2019).
664 *See* Phillips, *The Merits of Merit Selection, supra* note 463, at 96.

APPENDIX TABLE 1

Election Cycles for "Places" on Texas Appellate Courts & Results of 2018 General Election for Texas Appellate Courts

TEXAS SUPREME COURT

ELECTION CYCLES BY "PLACE" ON COURT				2018 GENERAL ELECTION			
Place	Six – Year Election Cycle			Incumbent Party	Contested Election?	Incumbent Seeking Reelection?	Winning Party
	2018, 2024 etc.	2020, 2026 etc.	2022, 2028 etc.				
Chief Justice		X					
Place 2	X			R	Yes	Yes	R
Place 3			X				
Place 4	X			R	Yes	Yes	R
Place 5			X				
Place 6	X			R	Yes	Yes	R
Place 7		X					
Place 8		X					
Place 9			X				
TOTALS	**3**	**3**	**3**	**3R**	**3 of 3**	**3 of 3**	**3R**

TEXAS COURT OF CRIMINAL APPEALS

ELECTION CYCLES BY "PLACE" ON COURT				2018 GENERAL ELECTION			
Place	Six – Year Election Cycle			Incumbent Party	Contested Election?	Incumbent Seeking Reelection?	Winning Party
	2018, 2024 etc.	2020, 2026 etc.	2022, 2028 etc.				
Presiding Judge	X			R	Yes	Yes	R
Place 2			X				
Place 3		X					
Place 4		X					
Place 5			X				
Place 6			X				
Place 7	X			R	Yes	Yes	R
Place 8	X			R	Yes	No	R
Place 9		X					
TOTALS	**3**	**3**	**3**	**3R**	**3 of 3**	**2 of 3**	**3R**

INTERMEDIATE APPELLATE COURTS

ELECTION CYCLES BY "PLACE" ON COURT					2018 GENERAL ELECTION			
Court (City)	Place	Six – Year Election Cycle			Incumbent Party	Contested Election?	Incumbent Seeking Reelection?	Winning Party
		2018, 2024 etc.	2020, 2026 etc.	2022, 2028 etc.				
First (Houston)	Chief			X				
	2	X			R	Yes	Yes	D
	3		X					
	4			X				
	5		X					
	6	X			R	Yes	Yes	D
	7	X			D[1]	Yes	No	D
	8	X			R	Yes	Yes	D
	9	X			R	Yes	Yes	D
Second (Fort Worth)	Chief	X			R	No	Yes	R
	2		X					
	3			X				
	4	X			R	No	Yes	R
	5	X			R	Yes	No	R
	6	X			R	No	Yes	R
	7		X					
Third (Austin)	Chief		X					
	2	X			R	Yes	Yes	D
	3	X			R	Yes	Yes	D
	4			X				
	5	X			R	Yes	Yes	D
	6	X			R	Yes	Yes	D
Fourth (San Antonio)	Chief		X					
	2	X			R	Yes	Yes	D
	3	X			D	Yes	Yes	D
	4	X			D	Yes	Yes	D
	5	X			R	Yes	No	D
	6			X				
	7	X			D	Yes	Yes	D
Fifth (Dallas)	Chief	X			R	Yes	Yes	D
	2	X			R	Yes	Yes	D
	3		X					
	4			X				
	5	X			R	Yes	Yes	D
	6		X					
	7			X				
	8		X					
	9	X			R	Yes	Yes	D
	10	X			R	Yes	Yes	D
	11	X			R	Yes	No	D
	12	X			R	Yes	No	D
	13	X			R	Yes	Yes	D
Sixth (Texarkana)	Chief			X				
	2	X			R	No	No	R
	3		X					

1 Justice Terry Jennings was elected as a Republican in 2000, 2006, and 2012. He switched to the Democratic Party in October of 2016 and did not run for reelection in 2018.

INTERMEDIATE APPELLATE COURTS (CONTINUED)

ELECTION CYCLES BY "PLACE" ON COURT					2018 GENERAL ELECTION			
Court (City)	Place	Six – Year Election Cycle			Incumbent Party	Contested Election?	Incumbent Seeking Reelection?	Winning Party
		2018, 2024 etc.	2020, 2026 etc.	2022, 2028 etc.				
Seventh (Amarillo)	Chief		X					
	2	X			R	No	Yes	R
	3	X			R	No	Yes	R
	4			X				
Eight (El Paso)	Chief		X					
	2	X			D	No	Yes	D
	3	X			D	No	Yes	D
Ninth (Beaumont)	Chief		X					
	2			X				
	3	X			R	No	Yes	R
	4	X			R	No	Yes	R
Tenth (Waco)	Chief	X			R	No	Yes	R
	2		X					
	3			X				
Eleventh (Dallas)	Chief	X			R	No	Yes	R
	2		X					
	3			X				
Twelfth (Tyler)	Chief		X					
	2			X				
	3	X			R	No	Yes	R
Thirteenth (Corpus, Christi & Edinburg)	Chief	X			D	Yes	No	D
	2	X			D	Yes	Yes	D
	3			X				
	4	X			D	Yes	No	D
	5	X			D	Yes	Yes	D
	6		X					
Fourteenth (Houston)	Chief		X					
	2			X				
	3	X			R	Yes	Yes	D
	4	X			R	Yes	Yes	D
	5	X			R	Yes	Yes	D
	6	X			R	Yes	Yes	D
	7		X					
	8	X			R	Yes	Yes	D
	9			X				
TOTALS	**80**	**45**	**19**	**16**	**10D & 35R**	**32 (Ds won 31)**	**37 (20 lost)**	**33D & 12R**

APPENDIX TABLE 2

Judicial Selection Models in the United States

CURRENT JUDICIAL SELECTION MODELS BY STATE[2]			
	High Court	**Intermediate Appellate Court**	**Trial Court**
Alabama	**Interim Vacancy:** Gubernatorial appointment until next election. **Full Term:** Partisan election, 6-year term.	SAME.	**IN CERTAIN COUNTIES (8 of 67) Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, until next election. **Full Term:** Partisan election, 6-year term. **IN ALL OTHER COUNTIES Interim Vacancy:** Gubernatorial appointment until next election. **Full Term:** Partisan election, 6-year term.
Alaska	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 3 years hence. If successful, 10-year term.	SAME, save for 8-year term.	SAME, save for 6-year term.
Arizona	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. If successful, 6-year term.	SAME.	**IN CERTAIN COUNTIES (Pop. Over 250,000 Or Choosing To Opt In) Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. **Full Term:** Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. If successful, 4-year term. **IN ALL OTHER COUNTIES Interim Vacancy:** Gubernatorial appointment until next election, for remainder of term. **Full Term:** Nonpartisan election for 4-year term.

2 This table was created in reliance upon data set forth in Brennan Ctr., *Judicial Selection: Interactive Map, supra* note 30; Nat'l Ctr. for St. Cts., *Methods of Judicial Selection: Selection of Judges, supra* note 43; and Ballotpedia, *Judicial Selection In The States, supra* note 213.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
Arkansas	**Interim Vacancy:** Gubernatorial appointment, until next election. **Full Term:** Nonpartisan election, 8-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.
California	Gubernatorial appointment after nonbinding vetting by state bar, with majority confirmation by commission on judicial appointments, until retention election at least 1 year hence. If successful, 12-year term.	SAME.	**Interim Vacancy:** Gubernatorial appointment until next election. **Full term:** Nonpartisan election, with 6-year term.
Colorado	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. If successful, 10-year term.	SAME, save for 8-year term.	SAME, save for 6-year term.
Connecticut	Gubernatorial appointment from list provided by judicial nominating commission. Subject to majority confirmation by Legislature. 8-year term.	SAME.	SAME.
Delaware	Gubernatorial appointment from list provided by judicial nominating commission, subject to majority confirmation by Senate. 12-year term.	N/A	SAME.
Florida	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 6-year term.	SAME.	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, until next relevant election. **Full Term:** Nonpartisan election, with 6-year term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
Georgia	**Interim Vacancy:** Gubernatorial appointment, after nonbinding vetting by judicial nominating commission, until next election. **Full Term:** Nonpartisan election, 6-year term.	SAME.	SAME, save for 4-year term.
Hawaii	Gubernatorial appointment from list provided by judicial nominating commission, subject to majority confirmation by Senate. 10-year term.	SAME.	SAME.
Idaho	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, for remainder of term. **Full Term:** Nonpartisan election, 6-year term.	SAME.	SAME, save for 4-year term.
Illinois	**Interim Vacancy:** Appointed by state Supreme Court, until next relevant election. **Full Term:** Partisan election, 10-year term.	SAME.	SAME, save for 6-year term.
Indiana	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. If successful, 10-year term.	SAME.	**IN CERTAIN COUNTIES (Allen, Lake, and St. Joseph)** Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 2 years hence. **IN ALL OTHER COUNTIES** Interim Vacancy: Gubernatorial appointment until next election. Full term: Partisan election, with 6-year term.
Iowa	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 8-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
Kansas	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 6-year term.	Gubernatorial appointment with majority Senate confirmation, until retention election at least 1 year hence. If successful, 4-year term.	**IN DISTRICTS ADOPTING COMMISSION-BASED SYSTEM (17 of 31)** Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 4-year term. **IN ALL OTHER DISTRICTS Interim Vacancy**: Gubernatorial appointment until next election. **Full term:** Partisan election, with 4-year term.
Kentucky	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, until next election. **Full Term:** Nonpartisan election, 8-year term.	SAME.	SAME.
Louisiana	**Interim Vacancy:** Supreme Court appointment until special election, with interim appointee barred from running. **Full Term:** Partisan election, 10-year term.	SAME.	SAME, save for 6-year term.
Maine	Gubernatorial appointment, after nonbinding vetting by judicial nominating commission. Nominee is then subject to review by joint legislative committee. Committee's recommendation may be overridden by Senate, but only by 2/3 majority. 7-year term.	N/A	SAME.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
Maryland	Gubernatorial appointment after nonbinding vetting by judicial nominating commission, with majority Senate confirmation, until retention election at least 1 year hence. If successful, 10-year term.	SAME.	Gubernatorial appointment after nonbinding vetting by judicial nominating commission, until nonpartisan election at least 1 year hence. If successful, 15-year term.
Massachusetts	Gubernatorial appointment, with confirmation by majority vote of Governor's Council. Life term.	SAME, save for nonbinding vetting by judicial nominating council, prior to gubernatorial appointment.	SAME, save for nonbinding vetting by judicial nominating council, prior to gubernatorial appointment.
Michigan	**Interim Vacancy:** Gubernatorial appointment, until next election. **Full Term:** Nonpartisan election, 8-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.
Minnesota	**Interim Vacancy**: Gubernatorial appointment, until next election. **Full Term:** Nonpartisan election, 6-year term.	SAME.	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, until next election. **Full Term:** Nonpartisan election, 6-year term.
Mississippi	**Interim Vacancy:** Gubernatorial appointment, after nonbinding vetting by judicial nominating commission, until next election OR remainder of term if less than 4 years. **Full Term:** Nonpartisan election, 8-year term.	SAME.	**Interim Vacancy:** Gubernatorial appointment, after nonbinding vetting by judicial nominating commission, until next election. **Full Term:** Nonpartisan election, 4-year term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
Missouri	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 12-year term.	SAME.	**IN CERTAIN DISTRICTS (City of St. Louis, Jackson County, Or Choosing to Opt In):** Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 6-year term. I**N ALL OTHER COUNTIES Interim Vacancy:** Gubernatorial appointment until next election. **Full Term:** Partisan election, with 6-year term.
Montana	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, with majority Senate confirmation, until next election. **Full Term:** Nonpartisan election, 8-year term.	N/A	SAME, save for 6-year term.
Nebraska	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 3 years hence. If successful, 6-year term.	SAME.	SAME.
Nevada	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, until next election. **Full Term:** Nonpartisan election, 6-year term.	SAME.	SAME.
New Hampshire	Gubernatorial appointment after nonbinding recommendation by judicial nominating commission, with confirmation by majority vote of Executive Council. Life term.	N/A	SAME.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
New Jersey	Gubernatorial appointment after nonbinding vetting by judicial advisory panel and state bar board, subject to majority confirmation by Senate. 7-year term.	Chief justice of state Supreme Court appoints a gubernatorially-appointed trial judge to serve on the superior court's appellate division. 7-year term.	SAME as Supreme Court.
New Mexico	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, until next election. **Full Term:** Gubernatorial appointment from list provided by judicial nominating commission, until next election. If successful in partisan election, remainder of 8-year term.	SAME.	SAME, save for 6-year term.
New York	Gubernatorial appointment from list provided by judicial nominating commission, subject to majority confirmation by Senate. 14-year term.	Gubernatorial appointment from list of sitting trial judges provided by judicial nominating commission. 5-year term or remainder of trial court term, whichever is shorter.	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, subject to majority confirmation by Senate, until next election. **Full Term:** Partisan election, 14-year term.
North Carolina	**Interim Vacancy:** Gubernatorial appointment until next election, for remainder of term. **Full Term:** Partisan election, 8-year term.	SAME.	SAME.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
North Dakota	**Interim Vacancy:** Governor may call special election OR appoint candidate from list provided by judicial nominating commission, until next election at least 2 years hence, for remainder of term. **Full Term:** Nonpartisan election, 10-year term.	Appointed by state Supreme Court.	**Interim Vacancy:** Governor may call special election OR appoint candidate from list provided by judicial nominating commission, until next election at least 2 years hence, for remainder of term. **Full Term:** Nonpartisan election, 6-year term.
Ohio	**Interim Vacancy:** Gubernatorial appointment, until next election, for remainder of term. **Full Term:** Nonpartisan election, 6-year term.	SAME.	SAME.
Oklahoma	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 6-year term.	SAME.	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, for remainder of term. **Full Term:** Nonpartisan election, 4-year term.
Oregon	**Interim Vacancy:** Gubernatorial appointment, until next election. **Full Term:** Nonpartisan election, 6-year term.	SAME.	SAME.
Pennsylvania	**Interim Vacancy:** Gubernatorial appointment subject to 2/3 Senate confirmation, until next election. **Full Term:** Partisan election, 10-year term.	SAME.	SAME.
Rhode Island	Gubernatorial appointment from list provided by judicial nominating commission. Subject to majority confirmation by entire Legislature. Life term.	N/A	Gubernatorial appointment from list provided by judicial nominating commission. Subject to majority confirmation by Senate. Life term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
South Carolina	**Interim Vacancy:** Legislative appointment from list provided by judicial nominating committee, OR gubernatorial appointment for vacancies shorter than 1 year, and all for remainder of term. **Full Term:** Legislative appointment from list provided by judicial nominating committee. 10-year term.	**Interim Vacancy:** SAME. **Full Term:** SAME, save for 6-year term.	**Interim Vacancy:** SAME. **Full Term:** SAME, save for 6-year term.
South Dakota	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 3 years hence. If successful, 8-year term.	N/A	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, for remainder of term. **Full Term:** Nonpartisan election, 8-year term.
Tennessee	Gubernatorial appointment from list provided by judicial nominating commission, with majority legislative confirmation, until retention election at least 30 days hence. If successful, 8-year term (full term) or remainder of term (interim vacancy).	SAME.	**Interim Vacancy:** Gubernatorial appointment from list provided by Trial Court Vacancy Commission, for remainder of unexpired term. **Full Term:** Partisan election, with 8-year term.
Texas	**Interim Vacancy:** Gubernatorial appointment, with majority Senate confirmation, until next election. **Full Term:** Partisan election, 6-year term.	SAME.	SAME, save for 4-year term.
Utah	Gubernatorial appointment from list provided by judicial nominating commission, with majority Senate confirmation, until retention election at least 3 years hence. If successful, 10-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.

CURRENT JUDICIAL SELECTION MODELS BY STATE (CONTINUED)

	High Court	Intermediate Appellate Court	Trial Court
Vermont	Gubernatorial appointment from list provided by judicial nominating commission, with majority Senate confirmation. 6-year term.	N/A	SAME.
Virginia	When in session, legislative appointment, 12-year term. When out of session, gubernatorial appointment until next session.	SAME, save for 8-year term.	SAME, save for 8-year term.
Washington	**Interim Vacancy:** Gubernatorial appointment, until next election, for remainder of term. **Full Term:** Nonpartisan election, 6-year term.	SAME.	SAME, save for 4-year term.
West Virginia	**Interim Vacancy:** Gubernatorial appointment from list provided by judicial nominating commission, until next election. **Full Term:** Nonpartisan election, 12-year term.	N/A	SAME, save for 8-year term.
Wisconsin	**Interim Vacancy:** Gubernatorial appointment, after nonbinding vetting by judicial nominating commission, until next relevant election. **Full Term:** Nonpartisan election, 10-year term.	SAME, save for 6-year term.	SAME, save for 6-year term.
Wyoming	Gubernatorial appointment from list provided by judicial nominating commission, until retention election at least 1 year hence. If successful, 8-year term.	N/A	SAME, save for 6-year term.

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To Participants in the University of Texas Law & Economics Seminar:

Thank you for taking the time to engage with our work. I'm attaching drafts of two chapters that are part of a book project with my co-author, Michael Kang. I also provide a synopsis of the book, which we're planning to title something along the lines of *Free to Judge: The Corrupting Influence of Money in State Courts*. The first chapter traces the history of judicial elections and explains why the recent proliferation of campaign finance has created a crisis for our state courts. The second chapter contains our data and empirical analysis (which is the main substance of the book), the findings from which inform the best approaches to reform.

The project is still very much ongoing and would benefit greatly from your feedback. I look forward to our discussion.

Sincerely,
Joanna Shepherd

Free to Judge:
The Corrupting Influence of Money in State Courts

By Michael Kang and Joanna Shepherd

Synopsis

Money buys things. This is a big benefit to people with money to spend in elections. They can spend money to elect and re-elect lawmakers who promote their preferences in government. And in a system like ours that elects state judges, they can spend money to elect and re-elect judges who decide cases the way they want. But this should greatly trouble those of us who believe that money should not dictate the application of justice. This book is about how and why money affects judicial decisions. And what can be done to stop it.

A growing body of literature, including several studies by us, has established a robust relationship between judicial decisions by elected judges and the campaign contributions received from a wide range of donors: business groups, political parties, left- and right-leaning interest groups, among others. Elected judges demonstrably lean toward the interests and preferences of their campaign donors across all types of cases.

More difficult to establish empirically is whether this relationship between campaign money and judicial decisions results from the selection of judges that are elected in the first place or from the outright biasing of judges. That is, judicial candidates who are already predisposed to vote in favor of particular donors' interests are likely to draw campaign funding from those donors and, by virtue of those resources, are more likely to win elections. When these candidates take the bench, their predispositions will lead them to naturally decide cases in a way that favors their donors. Alternatively, once elected, sitting judges might favor their respective donors' preferences in their judicial decisions with the next election in mind. Even judges who are not predisposed to vote in favor of a particular donor's interests might still, whether consciously or subconsciously, vote in their favor so as to curry future financial support from those donors.

We unravel this methodological puzzle by analyzing the voting of lame duck judges facing mandatory retirement. These judges raised money and were elected just like all the other judges, but once in their final term, they no longer have the possibility of re-election. We find that, for most judges, campaign money is associated with judges' voting in the direction of donors' interests. However, for lame duck judges, there is no meaningful relationship between campaign money and judges' votes. We conduct a series of robustness checks to empirically rule out several of the likeliest counter-explanations for why lame ducks defy the usual relationship between votes and money. Regardless of the way we analyze the data, lame duck judges vote differently than their non-retiring counterparts. Our results indicate that, when the possibility of re-election is removed and

judges are liberated from the pressures of campaign fundraising, they become free to judge without the bias that usually accompanies campaign money.

We argue from our findings that existing criticism of judicial elections should be aimed less at judicial elections in general, and more at the specific problem of judicial *re-election.* Re-election concerns inject bias into judicial outcomes, so the best way to eliminate the problem is to remove the re-election pressures on sitting judges. This can be accomplished either by granting permanent tenure to state supreme court justices, as three states already do, or by limiting judges to a single, lengthy term in office.

Chapter 2: Judicial Elections Then and Now

Choosing judges by election is an almost uniquely American practice. In the United States, 9 out of 10 state judges must win election to retain their seats on the bench. Virtually no other country requires judicial candidates to win votes or campaign for office. Judges are typically chosen by appointment, often with a long process of training and secure tenure. In France, for instance, judicial candidates are generally picked through an intense process that begins with competitive examinations for admission to a specialized program where as few as 5 percent of test takers are selected for admission.[1] Once admitted, judicial candidates receive training and take another set of competitive examinations to become apprentice judges. They then undergo a 31-month course of study before receiving their initial posting as what we would consider a judge. This long process of selection and training is intended to ensure the highest quality of judicial performance and insulate judges from the political process.

Although not all countries have the same system for judicial selection as France, most countries likewise shield judicial candidates and judges from electoral pressures. Only two other countries use any sort of election to select or retain judges. Switzerland uses elections to pick low-level local judges only. Japan uses a highly structured system of judicial selection similar to France's system, with competitive examinations and selection by merit-based appointment. However, Japanese Supreme Court justices must be periodically re-elected to keep their position, though retention is so routine that one scholar described the Japanese Supreme Court as "among the most autonomous constitutional or highest regular courts in the industrial world." [2]

Thus, the American system of judicial elections to select and retain judges is an international anomaly. Mitchel Lasser, a scholar of comparative judicial selection, explains that "[t]he rest of the world is stunned and amazed at what we do, and vaguely aghast. They think the idea that judges with absolutely no judge-specific educational training are running political campaigns is both insane and characteristically American."[3]

In this Chapter, we provide a brief introduction to judicial elections in the United States. First, we describe the evolution of the methods of judicial selection and retention, from the emergence of judicial elections during the nineteenth century to the wide range of partisan elections, nonpartisan elections, and variants of appointment and merit plans seen today. Second, we describe the increasing politicization of judicial campaigns in recent years and the growing importance of campaign contributions to candidates. Third, we

[1] See generally Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (2009).
[2] John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust in Law in Japan: A Turning Point* (Daniel Foote ed., 2007)
[3] See Adam Liptak, *Rendering Justice, With One Eye on Re-election,* N.Y. Times, A1 (May 25, 2008).

explain that the rapid growth in campaign spending has ignited new worry about the influence of money on judges. However, most of the criticism and calls for reform have been aimed at the specific type of judicial election, and proposed reforms would simply replace one type of election for another. In contrast, we argue that the threats to judicial impartiality may have less to do with the type of elections in which judges are selected, and more to do with the pressures facing judges that must run for re-election.

A Brief History of Judicial Elections

Today, there is significant variation in the methods that states use to select and retain their judges. However, the appointment of state judges originally resembled that of the federal judiciary. At the Founding, all state judges were initially appointed to the bench by the state legislature or governor. It was not until the 1840s, and the Jacksonian era of championing popular democracy, that concerns about political influence on the judiciary led to the adoption of judicial elections in many states. Although all states entering the Union before 1845 had an appointed judiciary, each state that entered between 1846 and 1959 adopted judicial elections.[4]

Ironically from today's perspective, state constitutional conventions of the time debating judicial selection believed that elective systems would produce more independent judges than appointive systems because only popular elections could "insulate the judiciary . . . from the branches that it was supposed to restrain."[5] They believed that elections would ensure that judges represented the voters and would preserve the public good. As a delegate to the Kentucky convention in 1849 explained, a judge "is to look somewhere for his bread, and that is to come from the people. He is to look somewhere for approbation, and that is to come from the people."[6] State after state established an elective judiciary after long, cautious debate in constitutional conventions. The convention delegates believed they were transforming judicial selection to ensure more impartial judges and improve the quality of the bench. As an Illinois convention delegate explained, "if only the federal judiciary had been made elective . . . the people 'would have chosen judges, instead of broken-down politicians.'"[7]

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[4] Larry C. Berkson updated by Rachel Caufield, *Judicial Selection in the United States: A Special Report,* Am. Judicature Soc'y (2004), http://judicialselection.us/uploads/documents/Berkson_1196091951709.pdf

[5] See Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 205 (1993).

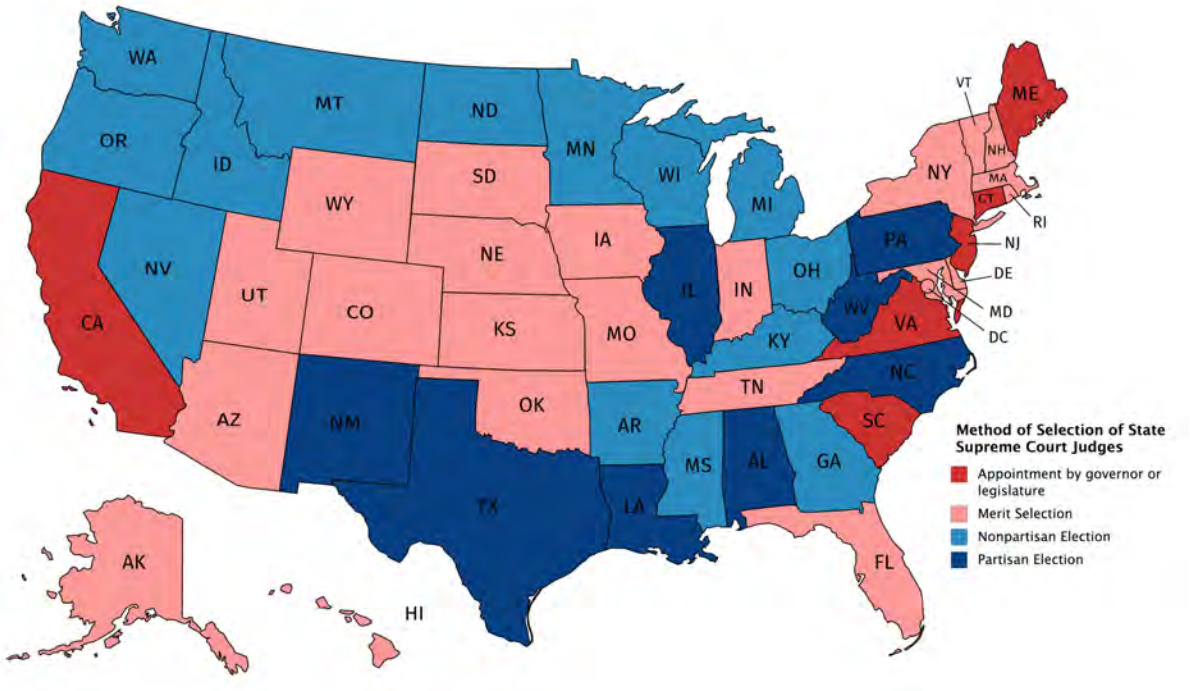
[6] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Kentucky* 273 (Frankfort, A.G. Hodges & Co. 1849) (statement of Francis M. Bristow).

[7] Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 190, 195 (1993). (quoting constitutional debates of 1847, at 462 (Arthur Charles Cole ed., 1919 (statement of David Davis)).

Unfortunately, none of those early Jacksonian supporters of judicial elections anticipated the rise of money in elections and the corrosive effect that money would have on the bench. The same could be said of the Progressive Era reformers who condemned partisan elections in the early 1900s because of their distrust of political party involvement in judicial elections. Rather than do away with elections altogether, these reformers advocated replacing partisan elections with other types of elections in which political parties ostensibly play a smaller role. For example, by 1927, twelve states had switched from partisan elections, which reveal judges' party affiliations on the ballot, to nonpartisan elections. Other states moved to a merit selection plan under which the governor appoints judges from a list of qualified candidates prepared by a bipartisan commission, but the judges must run in unopposed retention elections to keep their seats. By 1980, twenty-one states and the District of Columbia had adopted merit selection for selecting some or all of their judges.

This long historical evolution has led to many variations of judicial selection for the states' highest courts. Today, fourteen states choose their state supreme court justices by nonpartisan election and eight do so by partisan judicial election. In twenty-eight states, the governor or legislature appoints judges to the state supreme court, with twenty-two of those states using a form of merit selection. Figure 1 reports the methods the states currently use to select state supreme court justices.

Figure 1: Method of Selection of State Supreme Court Justices



Just as the states originally modeled their selection of supreme court justices on the federal system, they also borrowed the federal judiciary's provision of permanent tenure for high court judges. Of the twenty-three states that established a high court by 1820, only four did not originally grant their judges life tenure.[8] However, at the same time that the states considered shifting from appointments to elections for selecting judges, they also reconsidered the desirability of permanent tenure. At the state constitutional conventions, may delegates argued that requiring judges to face voters in re-elections would give them strong incentives to continue to represent the wishes of the citizens. A delegate to the Massachusetts Convention asserted that "if the judges were made elective, and they were found to yield to their private political opinions, and carry out their judgments and decisions against their duty, . . . I believe those judges would be hurled from their seats by the people more readily than if they had been guilty of a higher degree of corruption in any other direction; because, I believe the quality which the people most require in a judge is independence."[9] In the same convention, another delegate argued that "if you provide that [judges] shall come before the people for re-election, they will take care that their opinions reflect justice and right, because they cannot stand upon any other basis."[10]

Seventeen of the nineteen states that had originally granted permanent tenure to supreme court justices moved instead to limited terms in the mid- to late-1800s. Only two states, Massachusetts and New Hampshire, opted to retain permanent tenure for supreme court justices; they were joined by Rhode Island in 1842. The states enacting limited terms adopted a range of retention methods that were sometimes only tangentially related to the methods they chose to select judges. As a result, the states today display a hodgepodge of selection and retention method combinations. Five states currently use partisan elections for retention, fourteen states use nonpartisan elections, nineteen states use unopposed retention elections, and nine states rely on reappointment by the governor, legislature, or a judicial nominating commission. Figure 2 displays the current retention methods used in the states for state supreme court justices.

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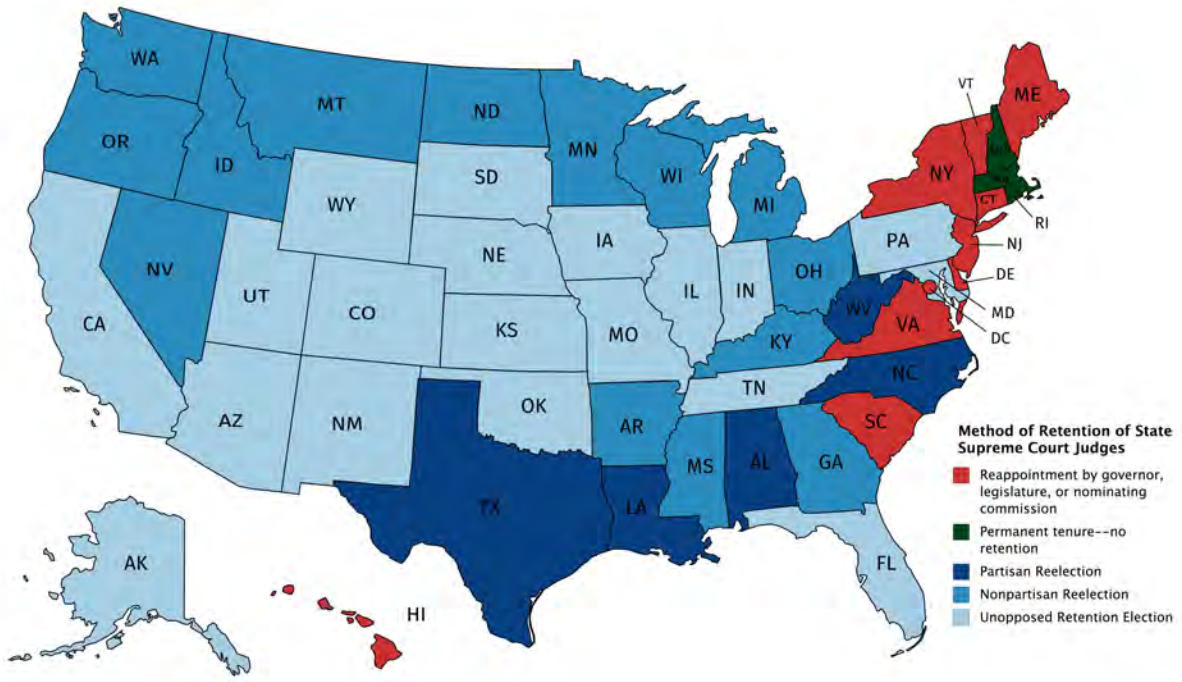
[8] Indiana, New Jersey, Ohio, and Pennsylvania. However, Pennsylvania switched from a 7-year term to a life term in 1790. National Center for State Courts, *History of Reform Efforts: Formal Changes since Inception* (2019), http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=

[9] 2 *Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts* 776 (Boston 1853) (remarks of Benjamin F. Hallett)

[10] *Id.* At 700 (remarks of Foster Hooper)

Figure 2: Method of Retention of State Supreme Court Justices



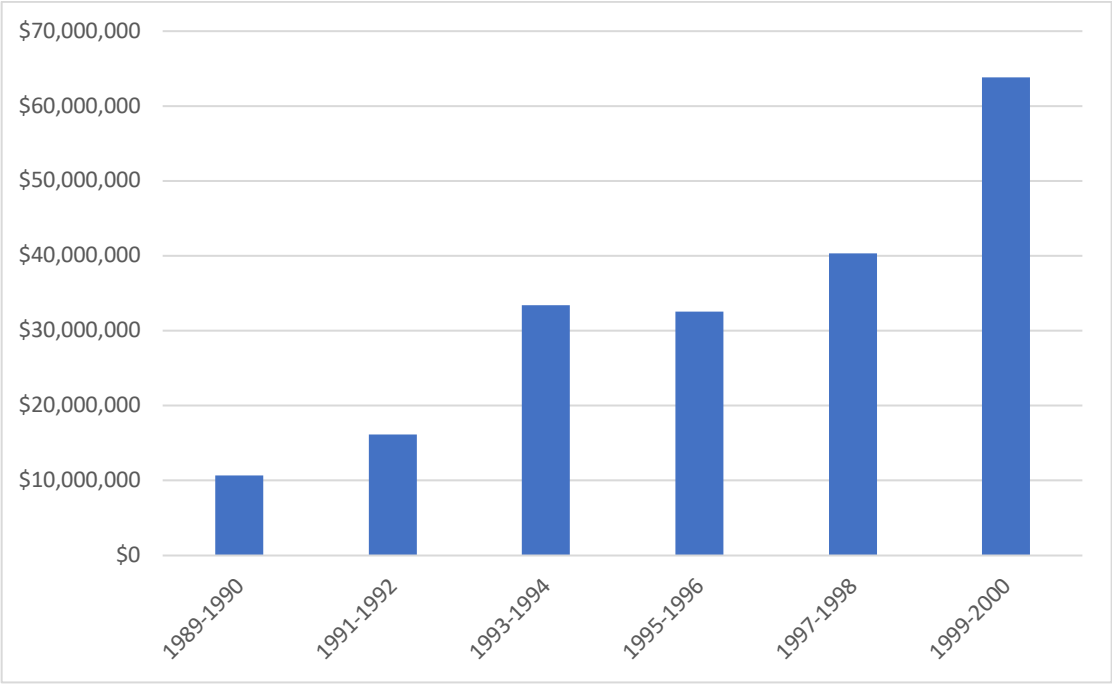
Increasing Costs and Politicization of Judicial Elections: The 1990s

As a result of this long evolution in judicial selection and retention methods, ninety percent of current state judges must face the voters in some type of election. Unfortunately, the nature of judicial elections has fundamentally changed since the original supporters of elections heralded them as shields against partiality. Those original supporters did not envision that judges would one day run for office like other politicians, raising millions of dollars from groups with a personal stake in who is on the bench.

This change in judicial campaigns is primarily a product of the last three decades. As recently as the 1980s, judicial elections were still characterized as "low key" with modest campaign spending and media advertising. But the nature of state supreme court contests changed dramatically during the 1990s as elections became increasingly politicized and campaign spending skyrocketed. At the beginning of the 1990s, state supreme court candidates across the United States raised around $10 million per election

cycle, but by the end of the decade, the total had increased more than six-fold.[11] Figure 3 reports the candidate contributions raised during each cycle of the 1990s.[12]

Figure 3: Total Contributions raised by State Supreme Court Candidates (in 2016 dollars)



So, what happened in the 1990s that caused this dramatic increase in campaign contributions to state supreme court candidates? We believe that three primary forces combined to bring about this inevitable shift. First, we believe that the stakes of state supreme court elections became higher in the last few decades of the twentieth century as the courts themselves increased in power and influence. State supreme court dockets increased as the number of cases filed in some state appellate courts doubled every ten years between the 1960s and 1980s.[13] The courts also began to hear more important cases owing both to the federal government's increasing tendency to devolve power to the states and to the sheer volume of important and divisive issues coming before the state courts. As the American Bar Association described that period: "While federal and state courts

[11] James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* 5 (2010).
[12] James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* 5 (2010). Data for 1989-2000 is not inflation-adjusted in the Decade of Change Report so we adjusted the reported nominal dollars into 2016 dollars.
[13] National Center for State Courts, *Examining the Work of the State Courts, 1999-2000: A National Perspective from the Court Statistics Project* 76 (Brian J. Ostrom, Neal B. Kauder, Robert C. LaFoundtain eds., 2001).

both witnessed an upsurge in the controversial, policy-laden cases they were called upon to decide in the latter half of the twentieth century, this trend has become especially noticeable in state court systems. . . . [S]tate courts have become a new forum of choice for litigation of constitutional rights and responsibilities, which has placed them in the political spotlight with increasing frequency."[14]

The cases that likely played the largest role in increasing the politicization of judicial elections involved disputes over tort reform. During the 1980s and 1990s, several state legislatures were confronted with what they perceived to be an insurance and liability "crisis" characterized by increasing numbers of tort cases, higher damage awards, and rising insurance premiums.[15] Many state legislatures responded by enacting tort reform legislation that curtailed the civil liability or damage awards of tort defendants such as product manufacturers and doctors. However, subsequent to the legislative enactment, many important tort reforms were challenged in the state courts, eventually appearing on the dockets of the state supreme courts.

The tort reform challenges contributed to the second force responsible for the dramatic increase in judicial campaign financing—the rise in interest group involvement in state judicial races. Between 1968 and 1988, the number of registered special interest groups in the United States doubled from 10,300 to 20,600.[16] Although the increase in interest group involvement was originally isolated to legislative and executive elections, it soon spread to judicial elections as interest groups found this a cost-effective means to influence state policy. It was cheaper and easier to affect the outcome of a judicial election than the outcome of a legislative or executive branch election, and interest groups only needed to elect four or five tort-reform-friendly judges to attain a majority in the court, while it would have taken dozens or hundreds of state legislators to form a majority. As one interest group representative explained: "[W]e figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators."[17]

The significant interest group involvement in state judicial elections began in Texas in 1988 when business interest groups decided to inject themselves into the Texas Supreme

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[14] ABA Commission on the 21st Century Judiciary, Justice in Jeopardy 15 (2003), https://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf

[15] Explanations involve the role of the underwriting cycle, conspiracy among insurance companies, increased liability actions, and uncertainty. For an assessment of alternate explanations of the crisis, see, for example, Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio St. L.J. 399 (1987); George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521 (1987); Michael J. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 San Diego L. Rev. 929 (1987); Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 Yale J. on Reg. 455 (1988).

[16] See G. Calvin MacKenzie, *The Revolution Nobody Wanted*, Times Literary Supplement 13 (Oct. 13, 2000).

[17] J. Christopher Heagarty, *The Changing Face of Judicial Elections*, N.C. St. Bar J. 19, 20 (Winter 2002).

Court races. The races soon became the most expensive in the state's history, with candidates raising over $10 million.[18] The effort paid off as business-friendly judges won several seats on the court. Texas appellate judge, Phil Hardberger, explained how that election remade the court and, in turn, transformed tort liability in the state: "With this new Court, previous expansions of the law were stopped, then rolled backwards. Jury verdicts became highly suspect and were frequently overturned for a variety of ever-expanding reasons. . . Damages, too, did not go unnoticed. Juries' assessments were wiped out by increasingly harsher standards. . . ."[19]

Although the expense of the Texas Supreme Court elections in the late 1980s was an anomaly for that decade, it was a harbinger of things to come. In the 1990s, many other states experienced an increase in interest group involvement in state supreme court races over tort reform issues. For example, the Alabama state legislature enacted several tort reforms in 1987 that were overturned by the Alabama Supreme Court in the early 1990s. Interest groups rallied to the cause, generating an over-seven-fold increase in Alabama Supreme Court candidate expenditures from 1986 to 1996.[20] The involvement of interest groups in state judicial elections quickly spread throughout the country. The U.S. Chamber of Commerce summarized the motivation behind many of the interest groups that were newly invested in state judicial elections: "meaningful [tort] reform is unlikely unless and until the justices elected to the [state] Supreme Court by the plaintiffs' bar are replaced by the voters."[21]

The third cause of the increasing politicization and expense of state judicial races is important legal changes that permitted judges to participate more openly and aggressively in judicial campaigns. Until 1990, a canon of judicial conduct in the ABA Model Code had prohibited judges from announcing their views on disputed legal or political issues.[22] That year, the ABA eliminated the canon because of First Amendment concerns and, soon after, twenty-five of the thirty-four states that had adopted it followed suit. In 2002, the United States Supreme Court struck down enforcement of the canon in the remaining nine states in the case *Republican Party of Minnesota v. White*.[23] Scholars have generally viewed White's loosening of the restrictions on judicial campaigning as a watershed event in escalating the politicization of judicial races.[24] However *White* was

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[18] See generally Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 Crime, Law & Soc. Change 91 (1992)

[19] Phil Hardberger, *Juries Under Siege*, 30 St. Mary's L. J. 1, 4-5 (1998).

[20] American Judicature Society, *Alabama, Judicial Selection in the States* (2019) http://www.judicialselection.us/judicial_selection/index.cfm?state=AL

[21] Jonathan Groner, *Mississippi: Battleground for Tort Reform*, Legal Times 1 (Jan. 26, 2004).

[22] Model Code of Judicial Conduct, Canon 7(B)(1)(c) (1989).

[23] *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002);

[24] Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections, 36 (Matthew J. Streb ed., 2007)

only the first U.S. Supreme Court case to have a significant impact on state judicial elections. More were to come.

A Transformation in Judicial Campaigns: the 2000s

The 1990s saw an explosion in the amount of spending and overall politicization of state supreme court elections. In the twenty-first century, we have witnessed an equally dramatic transformation in how this money is raised and how it is spent. Increasingly, the money in judicial elections flows not to the campaigns of the candidates, but rather to outside interest groups. While these groups certainly have an interest in who wins elections, they have, or are at least supposed to have, no direct connection to the campaigns of the candidates.

The spur for this explosive growth in outside spending in state judicial races was the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission.* [25] *Citizens United* was and still is the most important and publicly controversial campaign finance case decided by the U. S. Supreme Court in nearly 40 years. The case overruled half a century's worth of federal law by striking down key prohibitions on corporate and union electioneering. This allowed donors, including corporations and unions, to contribute unlimited amounts to outside groups such as Super PACs, 501(c) and 527 organizations, who can then spend unlimited amounts advocating for the election or defeat of candidates, so long as the spending is independent of candidates or parties. This outside spending generally takes place without complete disclosure about who is funding it, preventing voters from knowing who is truly behind political messages. For example, for only 18 percent of the outside spending by interest groups in the 2015-2016 state supreme court elections could the underlying donor be identified from campaign finance filings.[26] As a result, contributions to Super PACs and other outside groups are often referred to as "dark money."

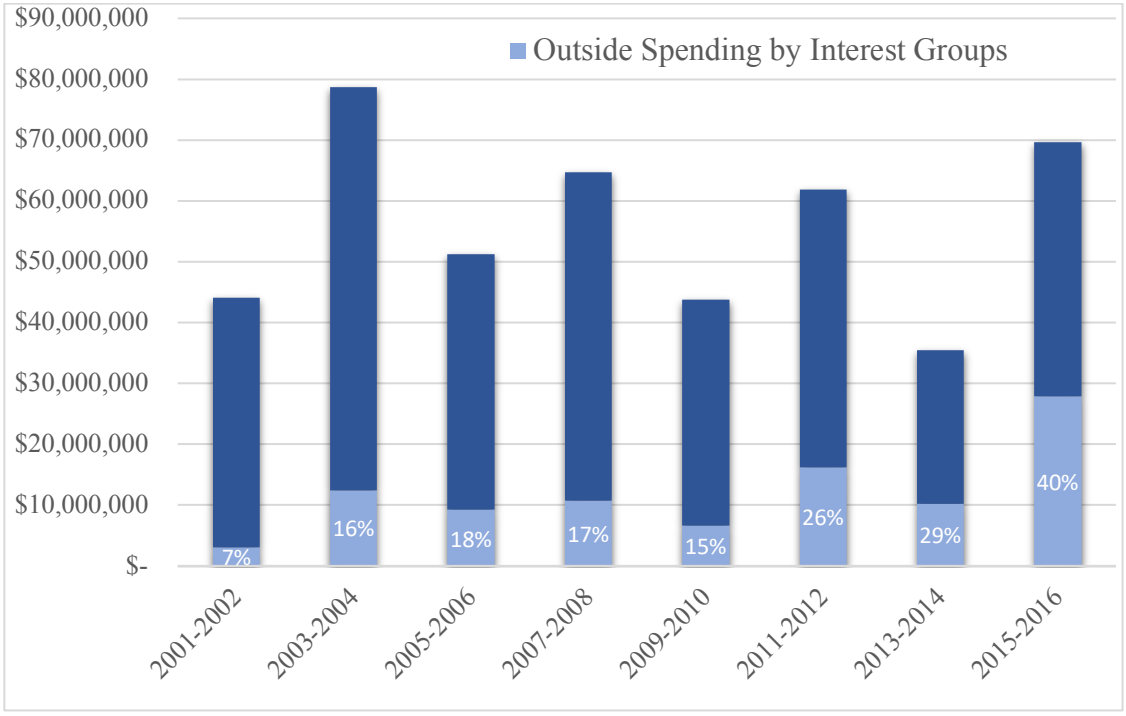
Citizens United has contributed to dramatic increases in outside spending in federal elections. According to the nonpartisan research organization Open Secrets, outside spending in federal elections was roughly $500 million in 2010, the year *Citizens United* was decided. However, by 2018, outside spending had grown to over $1.3 billion.[27] Outside money has also significantly increased relative to overall federal campaign spending. In 2010, outside spending made up about 8 percent of total federal election

[25] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[26] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 8 (2017).
[27] OpenSecrets.org, *Outside Spending by Group* (2010-2018); https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=A

spending, but just three cycles later, in 2016, outside spending comprised approximately 21 percent.[28]

But *Citizens United* has not just affected federal elections; the decision has also unleashed a flood of outside money in state supreme court elections. In every state supreme court election since *Citizens United*, outside spending as a share of total spending has grown. In the 2009-2010 election cycle, interest groups' outside spending totaled $6.6 million, accounting for approximately 15 percent of total spending on state supreme court races. However, by 2016, interest groups' outside spending had grown to almost $28 million and accounted for 40 percent of the total spending on supreme court elections.[29] Figure 4 reports the total spending on supreme court elections and the portion of that total spending made up of interest groups' outside spending.

Figure 4: Total Spending and Outside Spending by Interest Groups in State Supreme Court Elections (in 2016 dollars)



[28] OpenSecrets.org, *8 Years Later: How Citizens United Changed Campaign Finance* (2018), https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/

[29] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 8 (2017).

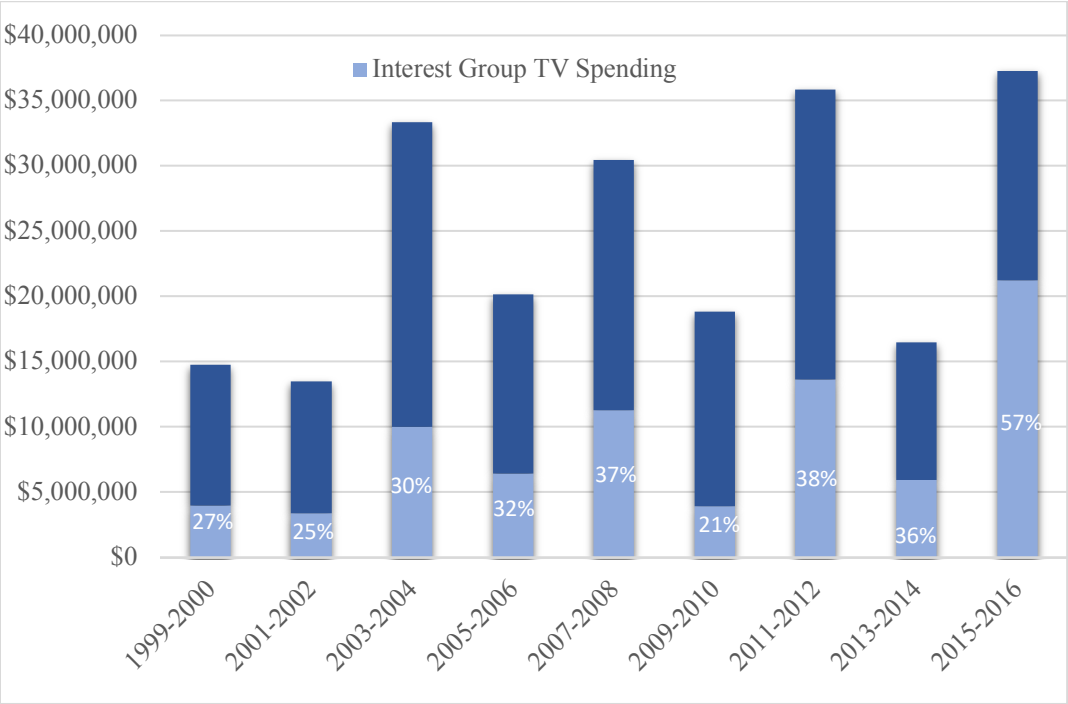
A few things are evident in Figure 4. First, total spending in supreme court races has remained more or less constant since the early 2000s. As with elections for other offices, more money is generally spent in the cycles that coincide with presidential elections because there are more voters and, thus, more spending is needed to reach those voters. However, beyond these four-year cycles there is no other clear trend in the amount of total spending. Yet, the portion of total spending made up of outside spending by interest groups has clearly trended upward, from less than 10 percent of the total at the turn of the century to 40 percent in the most recent election cycle for which data is available.

The increase in both direct-to-candidate contributions beginning in the 1990s and outside spending in the 2000s has transformed the way judicial campaigns are conducted. Campaigns increasingly rely on TV ads to promote a preferred candidate or attack an opposing candidate. Whereas TV advertising in judicial campaigns was essentially nonexistent in the early 1990s, by the 1999-2000 election cycle more than $10.6 million was spent on 22,000 airings.[30] Yet, even with this spending, TV advertising was still relatively rare; TV ads appeared in only 4 states out of the 33 states with state supreme court elections in 2000. TV advertising soon intensified and expanded across the country. By the 2015-2015 cycle, more than $37 million was spent on over 71,000 airings and TV ads appeared in 16 of the 33 states with state supreme court elections.[31]

Outside interest groups, as distinct from the candidates' campaigns, have become the biggest players in TV advertising. As outside spending has increased during the 2000s, so has the groups' focus on TV ads. In the 1999-2000 cycle, outside interest groups spent approximately $3.9 million on TV advertising, constituting just over one-quarter of all dollars spent on TV ads during the two-year period.[32] However, in 2015-2016, outside groups spent a record $21.2 million on TV ads, accounting for 57 percent of all money spent on TV ads.[33] Figure 5 reports the total spending on TV ads and outside groups' share of that spending.

[30] Deborah Goldberg, Craig Holman, & Samantha Sanchez, *The New Politics of Judicial Elections, 2000: How 2000 was a Watershed Year for Big Money, Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns* 14 (2002).
[31] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 32-34 (2017).
[32] Deborah Goldberg et al., *The New Politics of Judicial Elections, 2004: How Special Interest Pressure on Our Courts has Reached a "Tipping Point"—and How to Keep our Courts Fair and Impartial* vii (2004).
[33] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 32 (2017)

Figure 5: Spending on TV Advertising in State Supreme Court Elections and Interest Groups' Share of Spending (in 2016 dollars)



Although funders of TV advertising sometimes euphemistically refer to the ads as "voter education" efforts,[34] the ads typically provide very little informational value. Indeed, as early as 2004, a report reviewing the TV ads in that year's supreme court races concluded that "[t]he judicial campaign ads of 2004 confirm that the days when judicial advertising focused primarily on candidate qualifications are gone, replaced by advertising that signals how candidates might decide cases and sometimes explicitly states their opinions on controversial issues that demand impartial adjudication in the courtroom."[35] Ads run by interest groups are especially likely to attack judges for their votes in a particular case, without providing any details or nuance to explain why the judge voted how they did.[36] In the 1999-2000 cycle, 62 percent of such TV attack ads were financed by special interest groups, but by the 2013-2014 supreme court races, 100 percent of attack

[34] U.S. Chamber, Institute for Legal Reform, *U.S. Chamber Enters Political Debate for Next White House* (Aug. 23, 2004).
[35] Deborah Goldberg et al., *The New Politics of Judicial Elections, 2004: How Special Interest Pressure on Our Courts has Reached a "Tipping Point"—and How to Keep our Courts Fair and Impartial* 9 (2004).
[36] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 35-39 (2017).

ads were purchased by interest groups.[37] Candidates, and even parties, have realized that they can maintain an image of "judicial temperament" by not running attack ads, instead relying on outside groups to do so.

These attack ads often focus on a judge's vote in a criminal case, even when paid for by interest groups with no connection to criminal justice. The groups are well aware of the power of attack advertisements that portray judges as "soft on crime." For example, during a 2004 West Virginia Supreme Court election, an outside group called "And for the Sake of the Kids," which was funded by Massey Coal Company CEO Don Blankenship, ran a TV ad alleging that an incumbent justice voted to release a "child rapist" and then "agreed to let this convicted child rapist work as a janitor in a West Virginia school." Similarly, a series of ads in a 2016 Kansas Supreme Court race claimed that candidates "overturned [a] death sentence on a technicality," "ha[ve] done enough to these victims' families", and "repeatedly pervert the law to side with murderers and rapists." Criminal justice is generally the most common theme of state supreme court election ads, making up between one-third to over one-half of all TV ads aired during supreme court races.[38] These fear-provoking advertisements, funded by outside groups without public accountability, can easily create a distorted profile of a judge and swing an election.

So, who are these donors spending tens of millions of dollars in judicial races? Since at least 2000, business groups, lawyers and lobbyists have been the largest donors of contributions directly to supreme court candidates' campaigns. These donors generally account for approximately half of judicial candidates' direct fundraising, with lawyers and lobbyists usually contributing slightly more than business groups. However, in recent years, direct candidate fundraising has accounted for less than 60 percent of total spending in state supreme court races, while outside spending by interest groups has made up the other 40 percent. This outside spending is overwhelmingly dominated by business groups; in some cycles business groups have been responsible for more than 90 percent of the interest group spending on TV ads.[39] Although each state and election are different, business groups are typically the largest overall spenders in state supreme court races, accounting for around 25 percent of direct contributions to candidates (which makes up 60 percent of total spending) and making up the majority of outside spending (which accounts for the other 40 percent of total spending).[40]

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[37] Scott Greytak et al., *The New Politics of Judicial Elections, 2013-2014: Bankrolling the Bench* 54 (2015)

[38] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 36 (2017)

[39] James Sample, Lauren Jones, & Rachel Weiss, The New Politics of Judicial Elections 2006, 7 (2006).

[40] The Brennan Center estimates sources of outside spending by identifying sources of TV ad buys. Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 25 (2017)

The Growing Alarm about Judicial Elections

The picture of judicial campaign finance that emerges from our work is simple but striking. Campaign contributions have transformed judicial races so that they now, more-or-less, resemble competitive elections for other political offices. In fact, spending in most state supreme court races has surpassed spending for state legislative seats. In the 2015-2016 cycle, 27 judges in 13 states were elected in races in which at least $1 million dollars was spent.[41] In many states, spending was even higher. For example, over $21.4 million was spent on just three open supreme court seats in Pennsylvania.[42] In contrast, the average raised by candidates for state legislative seats in 2015-2016 was over $1 million in only two states—California and Illinois.[43]

As a result, state supreme court justices face many of the same pressures as elected officials for other political offices. They worry about how voters and other politicians will respond to their judicial decisions, with an eye toward the next election. They need to raise campaign money and curry favor with donors to win or keep office. In fact, over 90 percent of supreme court judicial races are won by the candidate that raised the most money.[44] In short, if an elected judge wants to keep the job, then re-election looms over even the best, most principled judges in the country. As a California Supreme Court justice once put it, the next election is like a crocodile in your bathtub when you go into the bathroom: "You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[45]

Indeed, empirical studies have found evidence that these retention pressures affect judges. We discuss this literature in great detail in Chapter 3, including several studies that we have authored, but the studies almost uniformly conclude that judges decide cases in a way that reflects these pressures. For example, Shepherd finds that the judicial decisions of elected judges conform to the preferences of whoever will decide if those particular judges retain their jobs for another term, whether that decision maker is the governor, legislature, or voters.[46] Several studies have also found empirical evidence that judges' voting does, in fact, favor certain campaign contributors. In a previous study, Shepherd finds that contributions from various interest groups are associated with increases in the

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[41] Alicia Bannon, Cathleen Lisk, & Peter Hardin, *The Politics of Judicial Elections 2015-2016: Who Pays for Judicial Races* 2 (2017)
[42] *Id.*
[43] J.T. Stepleton, FollowtheMoney.org, *Monetary Competitiveness in State Legislative Races, 2015 and 2016* (2017), https://www.followthemoney.org/research/institute-reports/monetary-competitiveness-in-2015-and-2016-state-legislative-races
[44] Scott Greytak et al., *The New Politics of Judicial Elections, 2013-2014: Bankrolling the Bench,* v (2015).
[45] Gerald F. Uelmen, *Crocodile in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 Notre Dame L. Rev. 1133, 1133 (1997).
[46] Joanna Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. Legal Stud. 169 (2009)

probability that judges will vote for the litigants whom those interest groups favor.[47] In an earlier study, we together analyzed contributions from business groups in the 1990s and find that campaign contributions from these groups are associated with state supreme court justices favoring business litigants across a range of cases. [48] In a different study, we find that contributions from left- and right-leaning political coalitions—including both political parties and interest groups—are significantly associated with judicial votes in the preferred ideological direction of the relevant political coalition.[49] Separately, we find that judges that receive significant contributions from their political parties are more likely to exhibit partisan loyalty in election law cases like *Bush v. Gore*.[50]

Other studies examine, on a more limited basis, the relationship between contributions from lawyers and case outcomes when those lawyers' interests appear before the courts. These studies find a correlation between the campaign contributions from the plaintiff and defense bars and favorable rulings in arbitration decisions by the Alabama Supreme Court,[51] in tort cases before state supreme courts in Alabama, Kentucky, and Ohio,[52] in cases between businesses in the Texas Supreme Court,[53] in cases before the Supreme Court of Georgia, [54] in civil cases before the Michigan Supreme Court, [55] and in cases before a sample of 16 state supreme courts when the judges face closely contested elections.[56]

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[47] Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L. J. 623, 670–72 & tbls. 7–8 (2009).

[48] Michael Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions,* 86 N.Y.U. L. Rev. 69, 128–29 (2011).

[49] Michael Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. Cal. L. Rev. 1239 (2013)

[50] Michael Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 Stan. L. Rev. 1411 (2016).

[51] Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J. L. & Pol. 645, 660 (1999) (examining arbitration decisions in the Alabama Supreme Court).

[52] Eric N. Waltenburg & Charles S. Lopeman, *2000 Tort Decisions and Campaign Dollars*, 28 Southeastern Pol. Rev. 241, 248, 256 (2000) (examining tort cases before state supreme courts in Alabama, Kentucky, and Ohio).

[53] Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 Pol. & Pol'y 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money). Madhavi McCall & Michael McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court: Assessing the Appearance of Impropriety*, 90 Judicature 214 (2007).

[54] Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making*, 7 State Polit. Policy 281 (2007) (examining cases during the Supreme Court of Georgia's 2003 term)

[55] Aman McLeod, *Bidding For Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 Univ. Detroit Mercy L. Rev. 385 (2008).

[56] Ryan Rebe, *Analyzing the Link Between Dollars and Decisions: A Multi-State Study of Campaign Contributions and Judicial Decisionsmaking* , 35 Am. Rev. of Pol. 65 (2016).

Finally, in the only study examining the relationship between TV advertising and judicial decisions, we find that the more TV ads aired in state supreme court judicial elections—ads that typically criticize the judges for being soft-on-crime—the less likely judges are to vote in favor of criminal defendants.[57]

It is not only academics that have recognized the worrisome incentives created by judicial campaign finance. Polls find that the public also believes judges are influenced by their campaign contributions and need to satisfy donors. For instance, one poll reported that 60 percent of surveyed Americans reported that they believed campaign contributions had "a great deal of influence" on judicial decisions, with a total of 90 percent agreeing that campaign contribution had at least "some" influence on judges.[58] Likewise, 70 percent of Americans felt it was a "very serious problem" that an elected judge may have received contributions from litigants with a pending case before the judge, with only 6 percent believing that it is "not that serious a problem or no problem at all."[59]

More troubling is that even judges seem to agree that campaign fundraising influences judicial decisionmaking. A famous survey of state judges found that roughly 60 percent of state supreme court justices felt a "great deal" of pressure to raise money for campaigning during election years.[60] Eighty-five percent of state judges felt that interest groups are trying to use their campaign contributions to affect public policy.[61] And almost half of state supreme court justices felt that campaign contributions to judges had at least a little influence on decisions, with more than a third agreeing money had some or a great deal of influence on decisions.[62] As a former chief justice for the Tennessee Supreme Court put it: "[w]hether subtle or unintentional or not, there may be a tendency in the future for appellate judges to have one eye looking over their shoulder."[63]

The legal community has similarly expressed widespread consternation about judicial elections. Justice Sandra Day O'Connor, who has championed judicial-election reform since her retirement from the Supreme Court, warns that "there are many who think of judges as politicians in robes" and agrees "[i]n many states, that's what they are."[64] Similarly, she has explained that because "elected judges in many states are compelled to solicit money for their election campaigns. . . . [t]he crisis of confidence in the impartiality

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[57] Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 Mich. L. Rev. 929 (2016).
[58] Justice at Stake/Brennan Center, *National Poll, 2013*, https://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf.
[59] *Id.*
[60] Greenberg Quinlan Rosner Research Inc., *Justice At Stake—State Judges Frequency Questionnaire* 3-4 (2002).
[61] *Id.* at 9.
[62] *Id.* at 5.
[63] Christie Thompson, *Trial by Cash*, Atlantic (Dec. 11, 2014((quoting Gary R. Wade).
[64] Annemarie Mannion, *Retired Justice Warns Against "Politicians in Robes"*, Chi. Trib. (May 30, 2013) (quoting Justice Sandra Day O'Connor).

of the judiciary is real and growing."[65] The American Bar Association has also endorsed the elimination of judicial elections in favor of merit selection plans and retention elections, arguing that "[j]udges have a responsibility to know and impartially apply the law to the facts of the case at hand. In important ways, today's judicial elections often undermine judges' ability to perform this essential role."[66]

Sitting justices on the U.S. Supreme Court have also articulated this perspective. For example, in *N.Y. State Board of Elections v. Lopez Torres*, the Court reluctantly upheld on First Amendment grounds New York's system for electing judges.[67] However, in their concurrence, Justices Kennedy and Breyer noted:

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.[68]

They concluded:

> The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.[69]

In a separate concurrence, Justices Stevens and Souter agreed with "the broader proposition that the very practice of electing judges is unwise."[70] But, they regretfully concluded, "The Constitution does not prohibit legislatures from enacting stupid laws."[71]

Most of the criticism has been aimed at the specific type of election used to select judges, and proposed reforms generally call for replacing one type of election with another. In fact, of the only five states that have reformed their judicial selection methods since 1990, four simply traded in one type of election for another. Arkansas (2000), Mississippi (1994), and North Carolina (2002), simply switched from partisan to nonpartisan elections,

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[65] James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change*, at Foreword (2010).
[66] See Am. Bar Ass'n Coal. For Justice, *Judicial Selection* 2,8 (2008). See also Am. Bar Ass'n Comm'n on the 21st Century Judiciary, *Justice in Jeopardy* 1–2 (2003), https://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf .
[67] *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 801 (2008).
[68] *Id.* at 803 (Kennedy & Breyer, JJ., concurring).
[69] *Id.*
[70] *Id.* at 801 (Stevens & Souter, JJ., concurring).
[71] *Id.* (quoting Justice Thurgood Marshall).

though North Carolina switched back to partisan elections in 2016.[72] Tennessee (1994) switched from partisan elections to a merit selection system under which the governor appoints judges from a list of nominees identified by a judicial nominating commission. However, for retention, the Tennessee judges must run in retention elections to keep their seats.

Thus, both past and present critics of judicial races are generally focused on altering the specific type of election used to select judges. Most reformers do not call for an end to judicial elections altogether. Even proposals to adopt a merit selection system would require judges to face voters in retention elections to keep their seats on the bench.

In contrast, we argue that the best way to reform judicial races depends on how you think the elections and the money raised in elections are affecting judicial outcomes. As we explain in detail in Chapter 4, one possibility is that elections lead to the selection of judges that are already predisposed to favor campaign contributors' interests and, as a result, judicial outcomes reflect those predispositions. If you think that this selection effect is the root of the problem, then the best approach is likely to adopt other non-elective methods of selecting judges. However, another possibility is that pressure on sitting judges to ingratiate themselves with potential campaign donors for their future re-elections causes judges to adjust their decisions in favor of the donors' interests. If you think that the need to raise future campaign money biases judicial outcomes, then the best way to eliminate the problem is to remove the re-election pressures on sitting judges.

[72] National Center for State Courts, *History of Reform Efforts: Formal Changes Since Inception* (2019), http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=. The other state to reform judicial selection, Rhode Island (1994) replaced a system under which the state legislature selected judges with a merit selection system, but maintained permanent tenure for state supreme court justices.

Chapter 4: Why Money Matters

As described in the previous chapter, an expanding literature has found a significant relationship between the money spent in judicial elections and the way that judges decide cases. Money matters. The more money that interest groups donate to judges, the more predictably those judges decide cases in favor of those groups' interests and preferences. The more money that political parties donate to judges, the more predictably those judges vote in favor of their side in election cases. The more campaign ads and specifically attack ads that run in a state's supreme court elections, the more that judges cover their flanks by voting more predictably against criminal defendants, regardless of their party affiliation or ideological predispositions.

What is somewhat less clear, at least so far, is *why* the money matters. There are at least two causal pathways by which campaign finance might be associated with judicial decisions in favor of contributors' interests. The first pathway is a selection bias among the set of judges who win elections. Wealthy contributors, whether interest groups, political parties, companies, or individuals, can often influence the outcomes of judicial elections by contributing substantial campaign funds to favored candidates. Judges who are already predisposed to vote in favor of a particular contributor's interests are likely to draw campaign financing from that contributor and, by virtue of those resources, are more likely to be elected. Campaign finance support from those contributors would then be correlated with decisions in favor of their preferences because the contributors directed the necessary campaign financing to judges they anticipated were ideologically likely to vote in their favor in the first place.

The second pathway by which campaign finance may influence judicial decisions is what we call a biasing effect. Once elected, judges need to get re-elected to keep their jobs. To get re-elected, judges need campaign money. In nine out of ten races for state supreme courts, the candidate with the most money wins.[73] As a result, judges have an incentive to favor contributors' preferences in their judicial decisions in the hopes of obtaining more campaign support from those contributors in future elections. Even judges who are not predisposed to favor of a particular contributor's interests might still, whether consciously or subconsciously, vote in their favor so as to attract future financial support from those contributors or at least head off opposition or attacks funded by those contributors in future campaigns. As a California Supreme Court Justice explained "[t]o this day, I don't know to what extent I was subliminally motivated by the thing you could not forget—that it might do you some good politically to vote one way or the other."[74]

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[73] Scott Greytak et al., *The New Politics of Judicial Elections, 2013-2014: Bankrolling the Bench,* v (2015).

[74] Philip Hager, *Kaus Urges Re-election of Embattled Court Justices*, L.A. Times 3 (Sept. 28, 1986) (quoting Justice Otto M. Kaus, Cal. Supreme Court).

Both biasing and selection effects are empirically plausible and likely explanations for the relationship between campaign contributions and judicial decisions. It is not only likely that both occur, but that they reinforce each other. Moreover, through either causal pathway, money affects judicial decisions. Campaign donors buy their preferred outcomes whether by installing the right judges into office or by biasing judges into doing what they want. However, as worrisome as the effects of selection may be, we are especially troubled if campaign finance is biasing judges.

If selection effects are solely responsible for the relationship between money and votes, then judges are deciding cases as they believe is correct under the law, and it just happens to match up with what their contributors want. The judges themselves, in this account, are not changing their views based on campaign finance or re-election considerations. There is simply favorable selection of judges from the perspective of their contributors.

In contrast, if biasing effects are responsible for the relationship between money and votes, then sitting judges change how they decide cases with campaign finance and re-election considerations in mind. Judges know how they think their cases should be decided but nonetheless change or otherwise adjust their decisions to ingratiate themselves with campaign donors. This is a serious problem for the rule of law. Judges should decide cases correctly rather than bending the law to curry favor with contributors.

Moreover, if biasing is an important part of why campaign money has an influence on judicial outcomes, it indicates a different set of fixes to remedy the problem. If selection is the root of the problem, then it suggests that the basic idea of electing judges doesn't work well. Money buys the candidates it wants from the start, and that's why the money lines up with later judicial decisions by those candidates once in office. However, if the problem is less about selection and more about biasing, then the problem is not simply judicial elections as a general matter. If campaign money matters because judges are too concerned about re-election, then a single-term limitation for elected judges would remove the re-election bias and allow judges to decide freely under the law without worrying about campaign fundraising for the next election. The problem isn't that judicial elections choose bad judges or compromise them as a categorical matter. Instead, judges are affected by campaign money only prospectively when they worry about the need to win re-election in the future. So, taking re-election off the table, by either granting permanent tenure or limiting judges to a single term in office, would free judges from this biasing effect that is responsible for the link between campaign money and decisions.

In this chapter, we focus on identifying whether campaign finance biases judges and their decisions, rather than influencing decisions entirely through selection. Unfortunately, it's difficult to untangle the selection and biasing effects of campaign money on elected judges. A close relationship between a judge's campaign finance support and the judge's voting could exist because the judge's predisposition to voting in certain directions helped the judge attract the campaign funds needed to win an election. The

campaign money therefore would match the later decisions when the judge votes in ways that are consistent with this predisposition. Alternatively, or in addition, the close relationship may exist because the judge hopes to draw future fundraising and therefore votes in ways favored by potential future contributors. The money therefore matches because the judge is deciding in favor of contributors' interests on an ongoing basis to continue receiving contributions in the future. The influence of money could be selection or biasing (or both), but the close relationship between money and decisions would look the same either way.

A few previous studies have tried to empirically distinguish selection and biasing. Some studies tried to control for judges' predispositions in order to isolate the direct influence of campaign funding from selection effects. For example, using an instrumental variable approach to control for judges' ideology, Damon Cann found evidence that campaign contributions have a biasing effect on judicial voting in the Georgia Supreme Court.[75] Other studies have made use of the judges' ideology in their tests for causality by examining whether campaign funding from a source opposite a judge's ideology can cause him or her to deviate from their usual tendency. For example, Damon Cann, Chris Bonneau, and Brent Boyea employ a matching research design to identify judges with the same ideological predispositions but differing campaign contributions to see if they have different voting patterns as a result of different campaign financing. Their study found statistically significant differences in voting and therefore significant evidence of contributions' biasing influence on judicial voting, at least in the Michigan Supreme Court.[76] Similarly, Madhavi McCall found that judges in the Texas Supreme Court that were ideologically predisposed to vote in favor of defendants were significantly more likely to support the plaintiff if they had received contributions from the plaintiffs' side.[77]

Our solution to the methodological challenges of proving bias is to look at lame duck judges in their final term. Lame duck judges are retiring judges who are legally required to retire when they reach a certain age. They are, as a consequence, not eligible for re-election once they reach their final term. Figure 1 shows the thirty-two states that have mandatory retirement laws that compel judges to retire sometime between age seventy and ninety.

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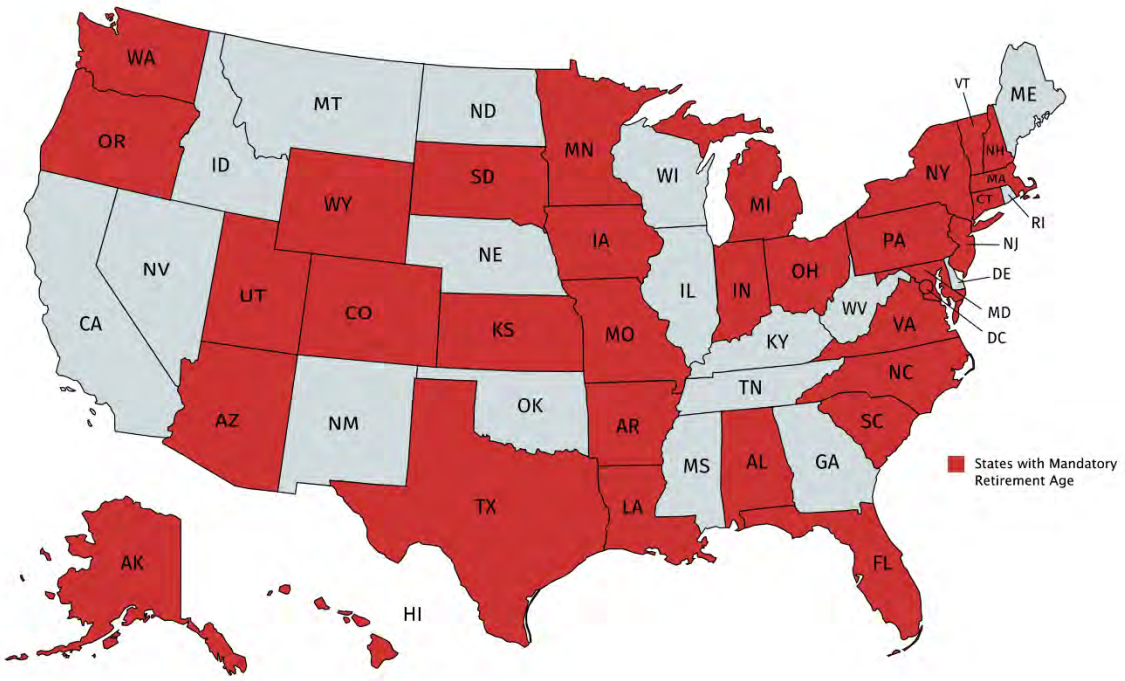
[75] Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making*, 7 State Polit. Policy 281 (2007).

[76] Damon Cann, Chris Bonneau, & Brent Boyea, *Campaign Contributions and Judicial Decisions in Partisan and Nonpartisan Elections*, New Directions in Judicial Politics 38 (KT McGuire, ed., 2012).

[77] Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 Pol. & Pol'y 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money).

Figure 1: States with Mandatory Retirement



By examining the voting of judges in their last term before mandatory retirement, we can test whether judges continue to favor their contributors' interests when they no longer need to attract campaign funds. If lame duck judges continue to favor their contributors' interests, it would suggest that selection bias is largely responsible for their voting. In other words, it would indicate that elections produce judges that are predisposed to favor their contributors' interests, and those judges continue to vote in that way even when they are retiring. In contrast, if lame duck judges no longer favor contributors' interests as their mandatory retirement approaches, it would support the biasing theory that it is the need to raise future campaign funds that drives judges' voting in favor of contributors' interests.

This Chapter sets out our deepest study on lame duck judges and the biasing effect of campaign contributions. We use the latest data on judges' votes in business-related cases form 2010-2012, which updates our earlier studies. This time period is important because it occurs after *Citizens United v. FEC* was decided and therefore reflects current campaign finance law and practices that elected judges face today. We find that campaign finance is generally associated with judges' voting in the direction of contributors' interests. However, for lame duck judges in their final term, without any chance of re-election, there is no meaningful relationship between campaign money and judges' votes. We conduct additional analyses, called robustness checks, to empirically rule out several

of the likeliest counter-explanations for why lame ducks defy the usual relationship between votes and money. Regardless of the way we analyze the data, lame duck judges vote differently than their non-retiring counterparts. This sudden shift in a judge's final term suggests that it's re-election and the need to raise campaign funds that induces judges to vote in favor of their contributors' interests earlier in their careers.

Empirical Analysis: Data and Methodology

To explore the degree to which judges are influenced by the prospective need for campaign financing in future elections we compiled a new dataset of judicial decisions and judge characteristics. Our dataset of judicial decisions consists of the decisions of over 650 state supreme court justices in over 3,000 business-related cases decided between 2010 and 2012 across all 50 states.[78] We supplemented these data with both institutional variables that describe aspects of the judicial system of each state and with detailed information about each judge's background and career.

The sample of cases that we analyze includes cases between a business litigant and a non-business litigant. Our analyses focus on business cases for several reasons. The first reason is simply one of data availability: business cases make up almost one-third of the cases before the state supreme courts. Second, an analysis of judges' votes in business cases and contributions from business groups to those judges is likely one of the best ways to study the relationship between campaign finance and judicial decisions. Compared to many other interest groups, business groups typically have more substantial resources to devote to judicial campaigns. Indeed, over the past two decades, business groups have been among the largest direct contributors to judicial campaigns and have dominated interest group spending on television campaign advertising. In addition, business groups typically have a more focused agenda and clearer preferences than do other interest groups. Business groups generally favor pro-business, pro-tort reform judges and decisions. By contrast, the plaintiffs' bar in many states is typically much more diverse in their economic interests because they represent an assorted range of clients. The magnitude of contributions from business groups and clarity of business groups' preferences provides an ideal case study to empirically isolate the influence of money on votes.

However, despite our empirical focus on business cases and business contributions, our results have important implications for all wealthy campaign donors. Any contributor that is able to marshal sufficiently large campaign contributions likely exerts similar influence over the judiciary.

[78] Business cases were identified by a key search in WestLaw. Once all business cases were identified within a given state and year, 25 cases were randomly selected for the sample. If there were 25 or fewer cases in a given state and year, all available cases were coded.

In all of our empirical tests, we use regression analyses to measure the relationship between campaign contributions from business groups and judicial decisions in business cases.[79] A regression analysis isolates the relationship between the dependent variable (in our case, judges' pro-business votes) and each of the explanatory variables that we describe below. In this way, our analyses can separate the influence of money on judges' voting from, say, the judges' ideology or the underlying state law.

Dependent variable

The dependent variable in our analyses is whether a judge voted for or against the business litigant in a given case. A judge is coded as voting for a litigant if the judge voted to make the litigant any better off, regardless of whether the judge voted to reverse a lower court or to change the damage award.

Our large sample of cases allows us to measure whether there is any relationship between contributions from business groups and judges' voting for business litigants over a wide range of cases. However, the outcomes of many individual cases in our analysis have little, if any, impact on the welfare of most businesses as a general matter. Also, not every vote for a business litigant is necessarily an instance of pro-business bias. These less salient cases create empirical noise that makes it more difficult for our analysis to detect a relationship between contributions and votes in the cases that do matter to business groups. However, if, despite the noise, we do find an empirical relationship in the data, the actual relationship between contributions and votes in the salient cases is likely much larger than our analysis can detect.

Explanatory Variables

To measure the impact of money on votes, the explanatory variable in which we are most interested is the dollar value of campaign contributions from business groups in each judge's most recent election.[80] Our measure of business group contributions aggregates the contributions from several different sectors that are generally supporters of pro-tort reform and pro-business judges: agriculture, communications, construction,

[79] In most analyses, we estimate a multilevel-logit model. Our multilevel model controls for dependence across both individual judges' decisions and specific state supreme courts' decisions. That is, an individual judge's decisions across cases are likely not independent because there is some relationship between how the judge decides one case and how he or she decides another case. Similarly, the decisions of judges on the same court are likely not independent because the judges share not only the court in common, but also the state, its laws, and other environmental influences. Our model accommodates this dependence so we can precisely isolate the influence of business contributions on judicial votes

[80] The data on campaign contributions are collected by the National Institute on Money in State Politics, a nonpartisan, nonprofit charitable organization dedicated to accurate, comprehensive and unbiased documentation and research on campaign finance at the state level.

defense, energy, finance, real estate and insurance, health care, transportation and a general business category.

Our regression analyses separate the influence of each included explanatory variable in order to isolate the relationship between business contributions and judges' voting. Because the explanatory variables control for other factors that might influence judicial voting, their inclusion minimizes the chance that the results are caused by something other than campaign finance. The control variables we include fall into three categories: judge-level variables, state-level variables, and case-level variables. All of these variables may influence how a judge votes in a given case. That is, a judge's vote may be partly determined by his own characteristics, such as his ideology, partly determined by state characteristics, such as the conservatism of the state's laws, and partly determined by case characteristics, such as which litigant appealed to the state supreme court.

Our judge-level control variables include non-business campaign contributions, party affiliation, and the type of retention election. First, we include the dollar value of campaign contributions from non-business groups in each judge's most recent election. [81] This variable provides a measure of the potential influence from interests and sectors opposed to (or unrelated to) business interests. It also controls for the total amount of money raised by different judges—$200,000 in business contributions should have a different impact when the total amount raised is $300,000 than when $2 million is raised in total.

Next, we include each judge's party affiliation.[82] Because Republican judges generally adhere to a more conservative judicial ideology, we expect they would be more inclined to vote for business litigants regardless of campaign finance. Thus, including party affiliation as an explanatory variable allows us to separate the relationships between, on the one hand, ideology and voting, and on the other, campaign finance and voting.

We also include the type of election that the judges in each state face for retention—partisan, nonpartisan, or an unopposed retention election. Different types of elections have different degrees of competitiveness and require the candidates to raise different magnitudes of money. Thus, including the type of retention election as an explanatory variable will control for different judges' need to attract future campaign funds.

Our state-level control variables include the state tort climate, the ideology of the state's citizens, and the ideology of the state government. We include a variable capturing

[81] We follow the common practice of transforming each contribution measure because of the non-linearity observed in bivariate analysis; we use log base 2 for a more straightforward interpretation of the coefficients than the natural log.

[82] Party affiliation was compiled from The American Bench, a directory with biographical information on over 18,000 judges. In situations in which no party information was available for a judge, but the judge was initially appointed to the high court by a governor, the party of the judge was inferred to be the same as that of the appointing governor

the tort liability climate to isolate the influence of business contributions on pro-business votes from the underlying state law.[83] In states with existing law that favors business interests, we would expect judges to vote in favor of business interests regardless of contributions.

We also include variables that measure the liberalism of citizens in the state and the liberalism of the state government.[84] Judges' voting may be influenced by the attitudes of the public and of other governmental officials in the state if they fear that displeasing these groups could negatively impact them. Thus, controlling for citizen and government ideology allows us to isolate the influence of campaign finance from the influence of the political climate in which each judge serves.

Finally, we include two case-specific explanatory variables that capture the likelihood of the business litigant winning the case without regard to a judge's pro-business bias. First, we include a variable indicating whether the business litigant is the petitioner filing the appeal in each case. Because petitioners are more likely to win on appeal, this variable captures the judge's natural propensity to vote for the petitioner.[85]

We also include a measure of the underlying strength of the case. This control variable is important because some cases are so strong (or weak) that judges will vote for (or against) business interests regardless of their ideological predisposition or the influence of campaign contributions. To create a measure of case strength, the study first estimates the model without the case strength variable. The results of this estimation allow us to predict how many of the other judges will vote for the business litigant in each case. The difference between this predicted number and the actual number of the other judges voting for the business litigant provides our measure of case strength. That is, suppose that the model predicts that, based on the judges' ideological predisposition, retention election, campaign contributions, the state tort climate, the citizen and government ideology, and the litigation petitioning the court, four of the six other judges would support the business position. In reality, if five of the other judges supported the business position, the case strength variable would indicate a stronger than average case. In contrast, if only one other justice voted in favor of business instead of the predicted four, the case strength variable would indicate that the case was very weak.

Table 1 provides descriptive statistics for each of the variables we include in our analysis.

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[83] We use the Pacific Research Institute's U.S. Tort Liability Index, which evaluates the tort litigation risks and liability costs across states, as its measure of the state law's underlying partiality to business interests.

[84] We use the Berry measure of citizen and government ideology. William D. Berry et al., *Measuring Citizen and Government Ideology in the American States*, 1960-93, 42 Am. J. of Pol. Sci. 327 (1998).

[85] Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source,* 89 Boston Univ. L. Rev. 1451, 1470-1472 (2009).

Table 1: Descriptive Statistics of Variables in Regression Analysis

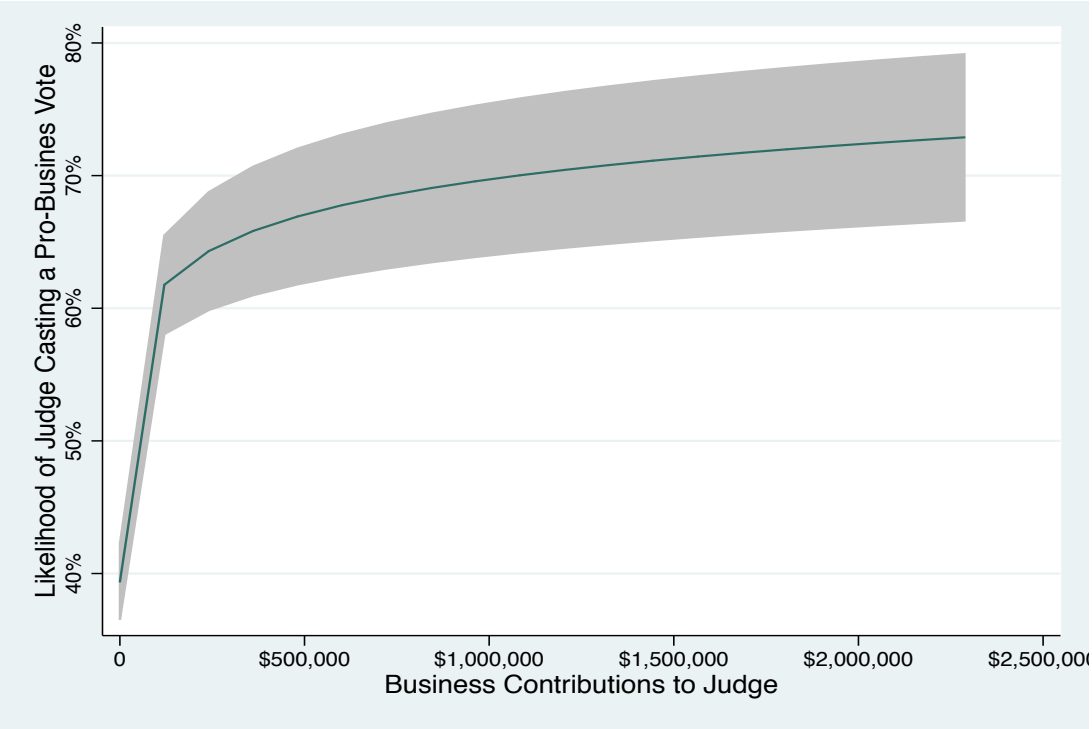
Variable	Mean	Standard Deviation
Pro-Business Vote	0.49	0.49
Business Contributions	$84,790	$234,855
Non-Business Contributions	$196,443	$397,244
Retention Election Indicator	0.31	0.46
Nonpartisan Re-election Indicator	0.32	0.47
Partisan Re-election Indicator	0.14	0.35
Democratic Judge Indicator	0.41	0.49
Republican Judge Indicator	0.43	0.50
State Tort Climate	-0.043	0.46
Citizen Ideology	60.9	17.1
Government Ideology	51.9	14.1
Business Petitioner Indicator	0.48	0.50
Case Strength	-0.02	44.0

Empirical Analysis: Results

We perform several different analyses to determine how judges are influenced by the prospective need for campaign funds. First, we explore the baseline relationship between contributions from business groups and judges' voting in business-related cases. Figure 1 reports the marginal effect of business contributions on the likelihood of a judge casting a pro-business vote, holding all other explanatory variables equal.[86] The figure shows that increasing business contributions are associated with an increase in the likelihood of judges casting pro-business votes.

[86] The margins are computed from a logit regression of pro-business votes on all explanatory variables discussed above. The results from a multi-level logit model are presented in the Appendix.

Figure 1: Relationship between Business Contributions and Pro-Business Votes



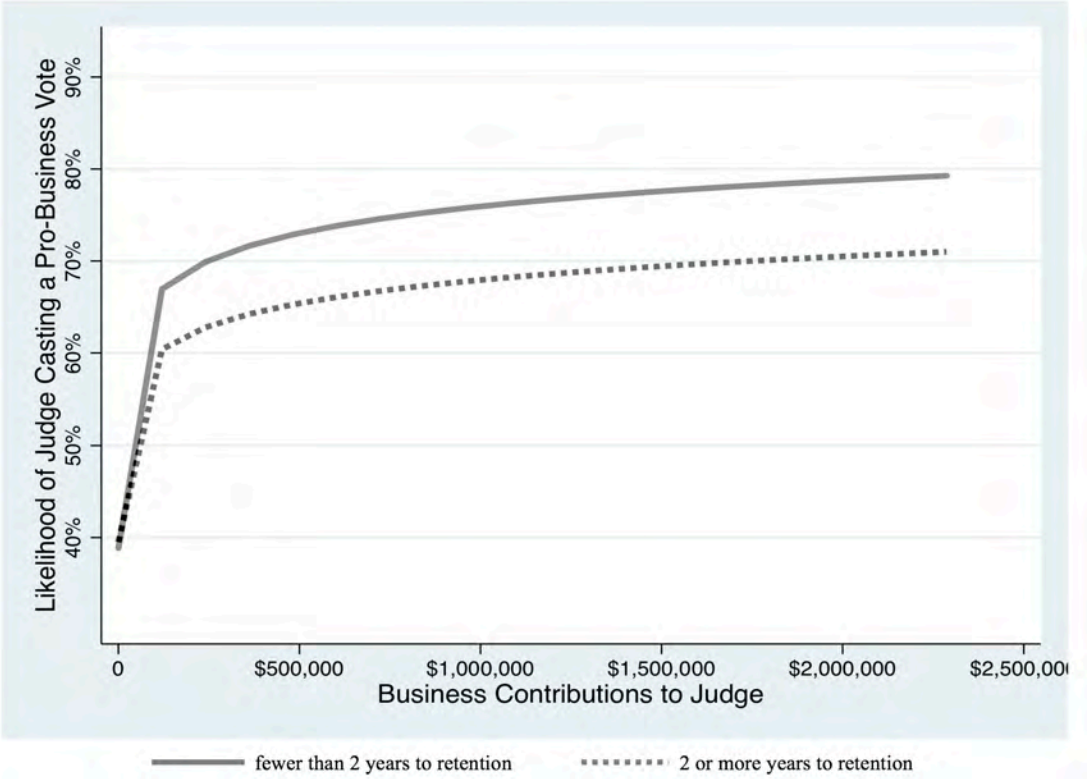
However, the relationship in Figure 1 can be explained by either the selection effects or biasing effects of campaign funding. As we previously discussed, it's possible that greater contributions are related to pro-business votes because business groups fund judges that are more likely to vote in favor of their interests. Alternatively, the relationship could be explained by judges voting in favor of business interests in order to attract future business contributions.

We first examine the impact of future retention concerns and the prospective need for campaign financing by exploring whether judges become more likely to vote for business litigants as their retention event approaches. Because business groups may remember that, even though a judge is casting pro-business votes today, she had cast anti-business votes at the beginning of her term, it is not clear that judges have a real incentive to vote in favor of business interests only as their next election approaches. However, prior studies have suggested that the behavior of elected judges does in fact change in response to an impending retention event; judges deviate from earlier voting patterns, impose longer criminal sentences, and side with the majority in death penalty cases.[87]

[87] See Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. Pol. 427 (1992); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and*

Figure 2 reports the difference in the marginal effects of business contributions on the likelihood of a judge casting a pro-business vote for judges with fewer than two years until their retention versus judges with two or more years until retention.[88] The figure shows that, although there is a relationship between business contributions and pro-business votes throughout a judge's term, contributions are associated with a greater increase in the likelihood of pro-business votes in the two years prior to a judge's retention.

Figure 2: Business Contributions and Pro-Business Votes as Retention Approaches



To further explore the degree to which judges are influenced by the prospective need for campaign financing in future elections, we next examine judges that cannot run for re-election and, as a result, are liberated from campaign finance concerns. Table 2 presents the results of estimations measuring the relationship between business campaign contributions and pro-business votes for judges who are in their mandatory last term and those who are not.[89] We report only the results of the contribution variables for brevity; the full results are reported in the Appendix. We present the results in odds ratios for ease of

a Case Study, 49 J. Pol. 1117 (1987); Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 Pol. Res. Q. 5, 24 (1995)

[88] The margins are computed from a logit regression of pro-business votes on all explanatory variables discussed above. The results from a multi-level logit model are presented in the Appendix.

[89] The average contributions raised from business groups in the most recent election was $119,000 for judges in their mandatory last term and $173,000 for judges not facing mandatory retirement.

interpretation and we also report the p-value associated with each logit coefficient.[90] For simplicity we include a "*" to indicate statistical significance at the .05 level and a "+" to indicate statistical significance at the .10 level. If a coefficient is statistically insignificant, that means that there is not a statistically reliable relationship between the explanatory variable and the dependent variable in the data.

The odds ratios can be used to interpret the magnitude of the relationship between each explanatory variable and the dependent variable. An odds ratio greater than one indicates a positive relationship between the explanatory and dependent variable and an odds ratio less than one indicates a negative relationship. Given the log transformation of our contribution variables, the precise interpretation of each odds ratio for the contribution variables is the percentage increase (or decrease) in the odds of a pro-business vote for a doubling of the business contributions, with all other variable held constant. That is, Table 2 reports that, for judges not in their mandatory last term, a doubling of business contributions is associated with, on average, a 24 percent increase in the likelihood of casting a pro-business vote. However, a doubling of non-business contributions is associated with an average 18 percent decrease (1 – 0.82) in the odds of casting a pro-business vote. In contrast, the statistically insignificant odds ratios for the lame duck judges indicate that our analysis cannot discern a meaningful relationship between the voting of lame duck judges and either business contributions or non-business contributions.

Table 2: Business Contributions and Votes: Impact of Mandatory Retirement

	Judges not facing Mandatory Retirement	Lame Duck Judges
Business Contributions	1.24* (0.000)	1.12 (0.130)
Non-Business Contributions	0.82* (0.000)	0.98 (0.725)
# of observations	7,620	2,310
Chi2	1949.3	644.9

These results support the biasing theory; the need to obtain future campaign support influences how judges vote. When these judges are liberated from future

[90] The p-value for each variable indicates whether there is sufficient evidence in the data to conclude that the variable has a relationship with judges' voting. A small p-value indicates that there is strong evidence that the variable does have a relationship. Researchers generally use a p-value cutoff of 0.05 (or, to a lesser extent, 0.10) as the demarcation between a statistically significant and statically insignificant result. A p-value less than 0.05 indicates that there is strong evidence of a meaningful relationship between the variable and judges' voting; a p-value greater than 0.05 indicates that the evidence is not strong enough to conclude that there is a meaningful relationship between the variable and judges' voting.

campaign fundraising concerns, the money they have raised has no meaningful impact on how they vote. Judges become free to judge when the possibility of re-election is removed.

Robustness Check: Age

We next perform a series of robustness checks to ensure that our interpretation of the results is correct. These checks are aimed at eliminating other possible explanations for the contrasting results between lame duck judges and non-retiring judges. By eliminating counter-explanations, we are left with only one logical explanation for the difference between lame duck and non-retiring judges—when judges no longer need to raise campaign funds or run for re-election, campaign finance ceases to influence how they vote.

Our first robustness checks focus on the influence of the judges' age on the relationship between business contributions and pro-business votes. Because lame duck judges are generally older than other judges, it is possible that age is explaining the different results for lame duck and non-retiring judges. Perhaps, as judges age, either their ideological preferences shift away from business interests or they become less concerned with attracting or maintaining future campaign funds.

Initially we include each judge's age as a control variable to isolate the influence of age from the influence of the mandatory retirement. Table 3 reports the results of the contribution variables; the full results are reported in the Appendix. The insignificant odds ratios on the contribution variables for judges in their mandatory last term indicate that, even controlling for age, contributions have a different effect on lame duck judges than on non-retiring judges.

Table 3: Business Contributions and Votes: Judge's Age as a Control

	Judges not facing Mandatory Retirement	Lame Duck Judges
Business Contributions	1.23* (0.000)	1.11 (0.160)
Non-Business Contributions	0.83* (0.000)	0.98 (0.743)
# of observations	7,341	2,310
Chi2	1874.2	644.6

Our next robustness check involving age takes advantage of the fact that 18 states do not have mandatory retirement ages. Thus, in 18 states, older judges that do not face mandatory retirement are approximately the same age as older judges that do face

mandatory retirement in 32 other states. Because they are the same age, the only variable that differs between these two sets of judges is whether they will need to attract future campaign funds.

As different states have different mandatory retirement ages and different term lengths, judges in their last term can be very different ages. In our data, judges in their mandatory last term range in age from 56 to 79, and judges not in their last term range in age from 37 to 89. To restrict our robustness check to judges of similar age, we include in our sample only judges over age 60. Table 4 reports the results for judges over 60 facing mandatory retirement versus those that are not. We report only the results of the contribution variables for brevity; the full results are reported in the Appendix. The results show that, even when we restrict our estimation to judges over 60, lame duck judges are different from other judges. Older judges that do not face mandatory retirement still respond to business contributions by casting more pro-business votes. However, judges of the same age that cannot run for retention do not respond to business contributions in any meaningful way.

Table 4: Business Contributions and Votes: Judges Over Age 60

	Judges over 60 not facing Mandatory Retirement	Lame Duck Judges over 60
Business Contributions	1.24* (0.002)	1.13 (0.113)
Non-Business Contributions	0.83* (0.002)	0.97 (0.692)
# of observations	4,332	2,106
Chi2	1086.1	588

Robustness Check: States with Mandatory Retirement

Next, we perform a robustness check to ensure that there is nothing particular about the states with mandatory last terms that explains the relationship between contributions and votes. These checks ensure that it is the mandatory last term that affects judges' pro-business voting and not factors, such as business friendly laws, that are present in the state in which the last term judges happen to be located. As shown in Figure 1, states with mandatory retirement ages are not concentrated in a particular region but are spread across the country. However, Table 5 reports that states utilizing mandatory retirement are more likely to use merit selection to select judges and retention elections to retain judges. Similarly, states without a mandatory retirement age are more likely to use nonpartisan elections and re-elections. Our robustness check will ensure that it is not differences between these selection and retention methods, or any other state-specific factors, that are

responsible for the different pro-business votes among lame duck judges and non-retiring judges.

Table 5: Number of States with Different Selection and Retention Methods

	States with Mandatory Retirement Age	States without Mandatory Retirement Age
Method of Selection		
Gubernatorial/ Legislative Appointment	5	2
Merit Selection	16	5
Nonpartisan Election	5	8
Partisan Election	6	3
Method of Retention		
Gubernatorial/Legislative Reappointment	6	2
Retention Election	15	4
Nonpartisan Re-election	6	7
Partisan Re-election	5	2
Permanent Tenure	2	1

Table 6 reports the results of regression analyses that restrict the sample to only the 32 states with mandatory retirement ages. The table presents only the results of the contribution variables; full results are reported in the Appendix. The results remain effectively the same as the estimation results from all fifty states: business contributions are associated with pro-business votes among judges not in their mandatory last term, but this relationship disappears among lame duck judges. Thus, the relationship between contributions and votes cannot be explained by differences among states with mandatory last terms and those without.

Table 6: Business Contributions and Votes: States with Mandatory Last Terms

	Judges not facing Mandatory Retirement	Lame Duck Judges
Business Contributions	1.28* (0.000)	1.12 (0.130)
Non-Business Contributions	0.76* (0.000)	0.98 (0.725)
# of observations	3,939	2,310
Chi2	1013.6	644.9

Robustness Check: Last Term Judges

Our next robustness check isolates the impact of mandatory retirement from other reasons that judges leave the bench. Judges may leave their position because they are appointed to another job, because of an illness or death, because of a voluntary retirement, or because they are not reappointed or lose a re-election. While all of these events result in a judge serving his or her last term before the event, they are different from mandatory retirement. Only when judges face mandatory retirement do they know they will no longer need to attract campaign funds. In contrast, the other events that could also cause a judge to be in the last term are either complete surprises or at least not guaranteed to happen. Thus, we would expect for business contributions to continue to influence pro-business votes for judges that are in their last term for any reason other than mandatory retirement.

Table 7 reports the results of estimations for three sets of judges: true lame duck judges in their last term because of mandatory retirement; judges in their last term because of voluntary retirement, death or illness, appointment to another job, or a failed retention; and judges in their last term because of voluntary retirement only. The table presents only the results of the contribution variables; full results are reported in the Appendix. Despite the similar sample size among these three groups, the contribution variables for lame duck judges remain statistically insignificant while the variables for the other sets of judges reveal a significant positive relationship between business contributions and pro-business votes. These results indicate that, when judges know they will not seek retention nor need to attract campaign funds, contributions have no meaningful relationship with votes. However, even when judges are in their last term, if they are uncertain about whether they'll seek retention or raise money, then past business contributions are associated with more pro-business votes. Thus, it is mandatory retirement that severs the relationship between contributions and votes.

Table 7: Business Contributions and Votes: Other Last Term Judges

	Lame Duck Judges	Judges in Last Term because of Voluntary Retirement, Death or Illness, Appointment to Another Job, or Failed Retention	Judges in Last Term because of Voluntary Retirement
Business Contributions	1.12 (0.130)	1.31* (0.002)	1.36* (0.001)
Non-Business Contributions	0.98 (0.725)	0.77* (0.002)	0.74* (0.001)
# of observations	2,310	2,772	2,250
Chi2	644.9	750.5	597.4

Robustness Check: Initial Selection

Finally, our last robustness checks confirm that the results for lame duck judges cannot be explained by the circumstances of the judges' initial rise to office. That is, if our sample of lame duck judges consists of more judges that are *not* predisposed to favor business interests in the first place, compared to the non-retiring judges, then our lame duck results may simply reflect these predispositions. If this was the case, then the insignificant results for lame duck judges could reflect a selection effect—lame duck judges were somehow selected differently in the first place. This counter-explanation seems unlikely as the lame duck judges in our sample serve in 26 different states that have various methods of selection and retention. Nevertheless, we conduct robustness checks to ensure that the judges' original selection method does not explain the contrasting results between non-retiring and lame duck judges.

Our previous analyses have examined judges that are similar in almost every way except for their retention possibilities—some judges are in their mandatory last term and others are not. By holding other variables constant except for the possibility of retention, these analyses allow us to isolate the impact of retention pressures on the way judges vote. Now, we hold retention pressures constant and, instead, explore judges that vary in the way they were originally selected to the bench. These analyses will allow us to isolate the impact of the judges' original selection on their subsequent votes.

To do this, we examine judges that were originally appointed in elective systems. In many states, if a sitting judge retires, dies, or is otherwise removed from office, the governor or a judicial nominating committee appoints an interim judge to fill the vacancy. These judges will eventually have to win an election to be retained in their position, but

they enter that subsequent election with the substantial advantages that typically accompany incumbents. Our data includes 74 judges in 21 states whom were originally appointed to fill vacancies in systems that otherwise require judges to win elections before taking the bench. Although these judges will later have to attract campaign funds to win re-election, they were originally appointed without raising any money. Thus, by examining judges with similar retention pressures that were selected in different ways, our analyses isolate the impact of the original election on the judges selected to serve and their subsequent voting.

Table 8 reports separate results for non-retiring judges that were originally elected and non-retiring judges that were originally appointed in elective systems. We report only the results of the contribution variables for brevity; the full results are reported in the Appendix. The results show that, regardless of the judges' original selection method, business contributions are associated with an increase in the likelihood of a pro-business vote.

Table 8: Business Contributions and Votes: Impact of Selection Method

	Judges not facing Mandatory Retirement that were Originally Elected to the Bench	Judges not facing Mandatory Retirement that were Originally Appointed to the Bench in an Elective System
Business Contributions	1.34* (0.000)	1.17+ (0.072)
Non-Business Contributions	0.78* (0.000)	0.87+ (0.051)
# of observations	3,129	3,142
Chi2	878	753.3

Table 9 reports the results for lame duck judges: one set of results for originally elected judges and one set for judges originally appointed in elective systems. We report only the results of the contribution variables for brevity; the full results are reported in the Appendix. Regardless of the way the judge was selected for the bench, the relationship between business contributions and pro-business votes disappears in the judges' mandatory last term.

Table 9: Business Contributions and Votes: Impact of Selection Method

	Lame Duck Judges that were Originally Elected to the Bench	Lame Duck Judges that were Originally Appointed to the Bench in an Elective System
Business Contributions	1.07 (0.163)	1.37 (0.758)
Non-Business Contributions	0.98 (0.611)	0.57 (0.643)
# of observations	808	827
Chi2	266.11	202.9

These results show that the circumstances of the judges' initial rise to office cannot explain the divergent results for lame duck judges. In addition to ruling out a counter-explanation, this provides more support for the biasing effects of campaign finance. If selection effects were predominately responsible for the relationship between campaign money and votes, then we would expect that judges selected under different methods would exhibit different voting patterns. However, we find that both elected and appointed judges favor contributors' interests when they will have to run for re-election, and neither set of judges favor contributors' interests when they are liberated from future fundraising concerns. This suggests that it is the retention pressures, not the original selection, that drive the relationship between campaign funds and judicial votes.

Summary of Results

The contrasting results for lame duck judges and non-retiring judges are striking. For non-retiring judges that must face retention, campaign contributions from business groups are associated with more voting for business litigants. But for lame duck judges that cannot run for re-election, there is no meaningful relationship between campaign money and votes. Our robustness checks show that these contrasting results cannot be explained by the older age of lame duck judges, specific characteristics of the states that have mandatory retirement ages, or the circumstances of the judges' initial rise to office. Moreover, the relationship between campaign money and votes remains when there is a possibility that the judges will face re-election, even if they end up leaving the bench for other unanticipated reasons. Thus, only when the possibility of re-election is removed and judges are liberated from the influence of campaign finance considerations do they become free to judge.

These results provide strong evidence that biasing is at least part of the story of campaign money's influence on supreme court justices. We would not argue that selection does not matter at all. Certainly, campaign donors focus their giving on candidates already predisposed in their direction, and that giving increases the chances that those judges will win elections. But our lame duck evidence indicates that biasing is an important cause of the relationship between money and votes. Once seated, judges bend toward monied preferences as they worry about campaign fundraising for their re-election. They are only free to judge once the pressure to fundraise is gone.

This possibility of outright biasing, of judges not voting as they see the law but to boost their re-election prospects, is more worrisome than selection. Selection effects are inherent in judicial elections where we know wealthy donors will push the system toward their preferences by throwing campaign money behind preferred candidates. That comes with the territory. However, even fans of judicial elections should be worried by judges who vote according to their campaign contributors' preferences out of fear about the next election. As troubling as selection seems, judges biased by campaign money is even worse.

Moreover, as we discuss in the next Chapter, the evidence that re-election concerns exert pressure on judges has important implications for reforms. Reformers that are concerned about money in judicial elections often excoriate competitive elections for judges and want to replace judicial elections with appointments. Competitive judicial elections can be undignified free-for-alls and draw judicial candidates into posturing, fundraising, and mudslinging like other candidates for office. However, at least when it comes to the influence of campaign money, our lame duck findings suggest that it may be re-election, not election that is the worse problem. When elected judges are freed from re-election pressure, campaign money no longer seems to affect them, regardless how undignified and pressure-packed the initial election process that put them there. Re-election, and the pressures it puts on judges, needs more attention in the conversations about reform.

Chapter 4 Appendix

Full Set of Results for Figure 1:
Relationship between Business Contributions and Pro-Business Votes

	All Judges
Business Contributions	1.22* (0.000)
7Non-Business Contributions	0.85* (0.000)
Partisan Re-election Indicator	2.67* (0.657)
Nonpartisan Re-election Indicator	1.17 (0.517)
Retention Election Indicator	1.15 (0.002)
Democratic Judge	0.624* (0.043)
Republican Judge	1.58* (0.040)
State Tort Climate	0.536* (0.002)
State Citizens Ideology	1.01 (0.208)
State Government Ideology	0.99 (0.159)
Business Petitioner Indicator	0.57* (0.000)
Case Strength	1.079* (0.000)
# of observations	10,104
Chi2	2660

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*" indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Figure 2:
Business Contributions and Pro-Business Votes as Retention Approaches

	All Judges
Business Contributions	1.21* (0.000)
Indicator for Fewer than 2 Years until Retention	1.15 (0.319)
Business Contributions * Fewer than 2 Years Until Retention	1.05+ (0.079)
Non-Business Contributions	0.84* (0.000)
Partisan Re-election Indicator	2.88* (0.001)
Nonpartisan Re-election Indicator	1.25 (0.381)
Retention Election Indicator	1.17 (0.620)
Democratic Judge	0.617* (0.039)
Republican Judge	1.58* (0.041)
State Tort Climate	0.526* (0.001)
State Citizens Ideology	1.01 (0.183)
State Government Ideology	0.989 (0.193)
Business Petitioner Indicator	0.571* (0.000)
Case Strength	1.079* (0.000)
# of observations	10,104
Chi2	2659.3

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*" indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 2:
Business Contributions and Votes: Impact of Mandatory Retirement

	Judges not facing Mandatory Retirement	Judges facing Mandatory Retirement
Business Contributions	1.24* (0.000)	1.12 (0.130)
Non-Business Contributions	0.82* (0.000)	0.98 (0.725)
Partisan Re-election Indicator	3.34* (0.003)	1.310 (0.602)
Nonpartisan Re-election Indicator	1.37 (0.346)	1.063 (0.904)
Retention Election Indicator	1.40 (0.381)	0.402 (0.382)
Democratic Judge	0.519* (0.015)	0.723 (0.591)
Republican Judge	1.40 (0.177)	1.734 (0.367)
State Tort Climate	0.454* (0.02)	1.51 (0.363)
State Citizens Ideology	1.015 (0.112)	0.982 (0.252)
State Government Ideology	0.986 (0.175)	1.01 (0.540)
Business Petitioner Indicator	0.588* (0.000)	0.499* (0.000)
Case Strength	1.079* (0.000)	1.074* (0.000)
# of observations	7,610	2,310
Chi2	1949.3	644.9

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*" indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 3:
Business Contributions and Votes: Judge's Age as a Control

	Judges not facing Mandatory Retirement	Judges facing Mandatory Retirement
Business Contributions	1.23* (0.000)	1.11 (0.160)
Non-Business Contributions	0.83* (0.000)	0.98 (0.743)
Judge Age	0.977+ (0.062)	0.986 (0.707)
Partisan Re-election Indicator	3.08* (0.009)	1.43 (0.532)
Nonpartisan Re-election Indicator	1.26 (0.310)	1.19 (0.766)
Retention Election Indicator	1.52 (0.497)	0.436 (0.437)
Democratic Judge	0.492* (0.010)	0.69 (0.547)
Republican Judge	1.34 (0.242)	1.60 (0.462)
State Tort Climate	0.484* (0.009)	1.58 (0.336)
State Citizens Ideology	1.012 (0.232)	0.982 (0.264)
State Government Ideology	0.986 (0.208)	1.01 (0.549)
Business Petitioner Indicator	0.584* (0.000)	0.501* (0.000)
Case Strength	1.080* (0.000)	1.073* (0.000)
# of observations	7,341	2,310
Chi2	1874.2	644.6

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 4:
Business Contributions and Votes: Judges Over Age 60

	Judges over 60 not facing Mandatory Retirement	Judges over 60 facing Mandatory Retirement
Business Contributions	1.24* (0.002)	1.13 (0.113)
Non-Business Contributions	0.83* (0.002)	0.97 (0.692)
Partisan Re-election Indicator	2.41 (0.132)	1.14 (0.794)
Nonpartisan Re-election Indicator	0.98 (0.978)	0.976 (0.963)
Retention Election Indicator	1.12 (0.818)	0.32 (0.265)
Democratic Judge	0.536+ (0.096)	0.756 (0.643)
Republican Judge	1.12 (0.742)	2.22 (0.188)
State Tort Climate	0.341* (0.006)	1.51 (0.338)
State Citizens Ideology	1.013 (0.354)	0.978 (0.152)
State Government Ideology	0.989 (0.452)	1.01 (0.586)
Business Petitioner Indicator	0.528* (0.000)	0.523* (0.000)
Case Strength	1.081* (0.000)	1.074* (0.000)
# of observations	4,332	2,106
Chi2	1086.1	579

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 6:
Business Contributions and Votes: States with Mandatory Last Terms

	Judges not facing Mandatory Retirement	Judges facing Mandatory Retirement
Business Contributions	1.28* (0.000)	1.12 (0.130)
Non-Business Contributions	0.76* (0.000)	0.98 (0.725)
Partisan Re-election Indicator	5.73* (0.000)	1.310 (0.602)
Nonpartisan Re-election Indicator	2.637* (0.010)	1.063 (0.904)
Retention Election Indicator	1.866 (0.284)	0.402 (0.382)
Democratic Judge	0.579 (0.145)	0.723 (0.591)
Republican Judge	1.819 (0.107)	1.734 (0.367)
State Tort Climate	0.337* (0.000)	1.51 (0.363)
State Citizens Ideology	1.008 (0.520)	0.982 (0.252)
State Government Ideology	0.996 (0.701)	1.01 (0.540)
Business Petitioner Indicator	0.628* (0.000)	0.499* (0.000)
Case Strength	1.077* (0.000)	1.074* (0.000)
# of observations	3,939	2,310
Chi2	1013.6	644.9

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 7:
Business Contributions and Votes: Judges Over Age 60

	Judges in Last Term because of Mandatory Retirement	Judges in Last Term because of Voluntary Retirement, Death or Illness, Appointment to Another Job, or Failed Retention	Judges in Last Term because of Voluntary Retirement
Business Contributions	1.12 (0.130)	1.31* (0.002)	1.36* (0.001)
Non-Business Contributions	0.98 (0.725)	0.77* (0.002)	0.74* (0.001)
Partisan Re-election Indicator	1.310 (0.602)	3.59* (0.042)	3.45 (0.121)
Nonpartisan Re-election Indicator	1.063 (0.904)	1.63 (0.308)	1.48 (0.465)
Retention Election Indicator	0.402 (0.382)	1.11 (0.851)	1.12 (0.853)
Democratic Judge	0.723 (0.591)	0.469+ (0.068)	0.477 (0.106)
Republican Judge	1.734 (0.367)	1.52 (0.296)	1.35 (0.493)
State Tort Climate	1.51 (0.363)	0.356* (0.011)	0.255* (0.005)
State Citizens Ideology	0.982 (0.252)	1.011 (0.416)	1.020 (0.200)
State Government Ideology	1.01 (0.540)	1.00 (0.875)	1.00 (0.951)
Business Petitioner Indicator	0.499* (0.000)	0.543* (0.000)	0.445* (0.000)
Case Strength	1.074* (0.000)	1.078* (0.000)	1.079* (0.000)
# of observations	2,310	2,772	2,250
Chi2	644.9	750.5	597.4

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

Full Set of Results for Table 8:
Business Contributions and Votes: Impact of Selection Method

	Judges not facing Mandatory Retirement that were Originally Elected to the Bench	Judges not facing Mandatory Retirement that were Originally Appointed to the Bench in an Elective System
Business Contributions	1.34* (0.000)	1.17+ (0.072)
Non-Business Contributions	0.78* (0.000)	0.87+ (0.051)
Partisan Re-election Indicator[91]	.	4.76* (0.027)
Nonpartisan Re-election Indicator	0.596 (0.163)	1.47 (0.485)
Retention Election Indicator	0.830 (0.857)	2.25 (0.209)
Democratic Judge	0.71 (0.403)	0.72 (0.789)
Republican Judge	1.30 (0.459)	2.61 (0.448)
State Tort Climate	0.586+ (0.097)	0.44* (0.041)
State Citizens Ideology	1.04* (0.027)	1.02 (0.189)
State Government Ideology	0.94* (0.003)	0.99 (0.879)
Business Petitioner Indicator	0.736* (0.032)	0.446* (0.000)
Case Strength	1.073* (0.000)	1.084* (0.000)
# of observations	3,129	3,142
Chi2	878	753.3

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

[91] The variable indicating a partisan re-election is dropped as the base category in this analysis.

Full Set of Results for Table 9:
Business Contributions and Votes: Impact of Selection Method

	Judges facing Mandatory Retirement that were Originally Elected to the Bench	Judges facing Mandatory Retirement that were Originally Appointed to the Bench in an Elective System
Business Contributions	1.07 (0.163)	1.37 (0.758)
Non-Business Contributions	0.98 (0.611)	0.57 (0.643)
Partisan Re-election Indicator[92]	.	0.04 (0.442)
Nonpartisan Re-election Indicator	0.628 (0.234)	1.32 (0.555)
Retention Election Indicator[93]	.	0.098 (0.497)
Democratic Judge	0.304* (0.000)	0.232* (0.016)
State Tort Climate	2.02 (0.112)	0.312 (0.134)
State Citizens Ideology	0.93* (0.000)	0.89 (0.476)
State Government Ideology	1.07* (0.005)	1.06 (0.695)
Business Petitioner Indicator	0.629* (0.070)	0.485* (0.026)
Case Strength	1.065* (0.000)	1.081* (0.000)
# of observations	808	827
Chi2	266.11	202.9

We present the results in odds ratios for ease of interpretation, and we report p-values for each logit coefficient below the odds ratios. A "*"indicates statistical significance at the .05 level, and "+"indicates statistical significance at the .10 level.

[92] The variable indicating a partisan re-election is dropped as the base category in this analysis.
[93] The variable indicating a republican judge is dropped as the base category in this analysis.

No. 3:16-CV-595-CWR-LRA

CLARENCE JAMISON,

Plaintiff,

v.

NICK MCCLENDON,
In his individual capacity,

Defendant.

ORDER GRANTING QUALIFIED IMMUNITY

Before CARLTON W. REEVES, *District Judge*.

Clarence Jamison wasn't jaywalking.[1]

He wasn't outside playing with a toy gun.[2]

[1] That was Michael Brown. *See* Max Ehrenfreund, *The risks of walking while black in Ferguson*, WASH. POST (Mar. 4, 2015).

[2] That was 12-year-old Tamir Rice. *See* Zola Ray, *This Is The Toy Gun That Got Tamir Rice Killed 3 Years Ago Today*, NEWSWEEK (Nov. 22, 2017).

He didn't look like a "suspicious person."[3]

He wasn't suspected of "selling loose, untaxed cigarettes."[4]

He wasn't suspected of passing a counterfeit $20 bill.[5]

He didn't look like anyone suspected of a crime.[6]

He wasn't mentally ill and in need of help.[7]

He wasn't assisting an autistic patient who had wandered away from a group home.[8]

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[3] That was Elijah McClain. *See* Claire Lampen, *What We Know About the Killing of Elijah McClain*, THE CUT (July 5, 2020).

[4] That was Eric Garner. *See* Assoc. Press, *From Eric Garner's death to firing of NYPD officer: A timeline of key events*, USA TODAY (Aug. 20, 2019).

[5] That was George Floyd. *See* Jemima McEvoy, *New Transcripts Reveal How Suspicion Over Counterfeit Money Escalated Into The Death Of George Floyd*, FORBES (July 8, 2020).

[6] That was Philando Castile and Tony McDade. *See* Andy Mannix, *Police audio: Officer stopped Philando Castile on robbery suspicion*, STAR TRIB. (July 12, 2016); Meredith Deliso, *LGBTQ community calls for justice after Tony McDade, a black trans man, shot and killed by police*, ABC NEWS (June 2, 2020).

[7] That was Jason Harrison. *See* Byron Pitts et al., *The Deadly Consequences When Police Lack Proper Training to Handle Mental Illness Calls*, ABC NEWS (Sept. 30, 2015).

[8] That was Charles Kinsey. *See Florida policeman shoots autistic man's unarmed black therapist*, BBC (July 21, 2016).

He wasn't walking home from an after-school job.[9]

He wasn't walking back from a restaurant.[10]

He wasn't hanging out on a college campus.[11]

He wasn't standing outside of his apartment.[12]

He wasn't inside his apartment eating ice cream.[13]

He wasn't sleeping in his bed.[14]

He wasn't sleeping in his car.[15]

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[9] That was 17-year-old James Earl Green. *See* Robert Luckett, *In 50 Years from Gibbs-Green Deaths to Ahmaud Arbery Killing, White Supremacy Still Lives*, JACKSON FREE PRESS (May 8, 2020); *see also* Robert Luckett, *50 Years Ago, Police Fired on Students at a Historically Black College*, N.Y. TIMES (May 14, 2020); Rachel James-Terry & L.A. Warren, *'All hell broke loose': Memories still vivid of Jackson State shooting 50 years ago*, CLARION LEDGER (May 15, 2020).

[10] That was Ben Brown. *See* Notice to Close File, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. (Mar. 24, 2017), *available at* https://www.justice.gov/crt/case-document/benjamin-brown-notice-close-file; *see also* Jackson State Univ., Center for University-Based Development, *The Life of Benjamin Brown, 50 Years Later*, W. JACKSON (May 11, 2017).

[11] That was Phillip Gibbs. *See* James-Terry & Warren, *supra*.

[12] That was Amadou Diallo. *See Police fired 41 shots when they killed Amadou Diallo. His mom hopes today's protests will bring change.*, CBS NEWS (June 9, 2020).

[13] That was Botham Jean. *See* Bill Hutchinson, *Death of an innocent man: Timeline of wrong-apartment murder trial of Amber Guyger*, ABC NEWS (Oct. 2, 2019).

[14] That was Breonna Taylor. *See* Amina Elahi, *'Sleeping While Black': Louisville Police Kill Unarmed Black Woman*, NPR (May 13, 2020).

[15] That was Rayshard Brooks. *See* Jacob Sullum, *Was the Shooting of Rayshard Brooks 'Lawful but Awful'?*, REASON (June 15, 2020).

He didn't make an "improper lane change."[16]

He didn't have a broken tail light.[17]

He wasn't driving over the speed limit.[18]

He wasn't driving under the speed limit.[19]

No, Clarence Jamison was a Black man driving a Mercedes convertible.

As he made his way home to South Carolina from a vacation in Arizona, Jamison was pulled over and subjected to one hundred and ten minutes of an armed police officer badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs.

Nothing was found. Jamison isn't a drug courier. He's a welder.

Unsatisfied, the officer then brought out a canine to sniff the car. The dog found nothing. So nearly two hours after it started, the officer left Jamison by the side of the road to put his car back together.

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[16] That was Sandra Bland. *See* Ben Mathis-Lilley & Elliott Hannon, *A Black Woman Named Sandra Bland Got Pulled Over in Texas and Died in Jail Three Days Later. Why?*, SLATE (July 16, 2015).

[17] That was Walter Scott. *See* Michael E. Miller et al., *How a cellphone video led to murder charges against a cop in North Charleston, S.C.*, WASH. POST (Apr. 8, 2015).

[18] That was Hannah Fizer. *See* Luke Nozicka, *'Where's the gun?': Family of Sedalia woman killed by deputy skeptical of narrative*, KANSAS CITY STAR (June 15, 2020).

[19] That was Ace Perry. *See* Jodi Leese Glusco, *Run-in with Sampson deputy leaves driver feeling unsafe*, WRAL (Feb. 14, 2020).

Thankfully, Jamison left the stop with his life. Too many others have not.[20]

The Constitution says everyone is entitled to equal protection of the law – even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called "qualified immunity." In real life it operates like absolute immunity.

In a recent qualified immunity case, the Fourth Circuit wrote:

> Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives.[21]

This Court agrees. Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise.[22] Countless more have suffered from other

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[20] *See, e.g.*, Mike Baker et al., *Three Words. 70 cases. The tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020) (discussing the deaths of Eric Garner, George Floyd, and 68 other people killed while in law enforcement custody whose last words included the statement, "I can't breathe.").

[21] *Estate of Jones v. City of Martinsburg, W. Virginia*, 961 F.3d 661, 673 (4th Cir. 2020), *as amended* (June 10, 2020).

[22] Mark Berman et al., *Protests spread over police shootings. Police promised reforms. Every year, they still shoot and kill nearly 1,000 people.*, WASH. POST (June 8, 2020) ("Since 2015, police have shot and killed 5,400 people."); *see also* Alicia Victoria Lozano, *Fatal Encounters: One man is tracking every officer-involved killing in the U.S.*, NBC NEWS (July 11, 2020), ("As of July 10, Fatal Encounters lists more than 28,400 deaths dating to Jan. 1, 2000. The entries include both headline-making cases and thousands of lesser-known deaths.").

forms of abuse and misconduct by police.[23] Qualified immunity has served as a shield for these officers, protecting them from accountability.

This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer's motion seeking as much is therefore granted.

But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.

As the Fourth Circuit concluded, "This has to stop."[24]

I. Factual and Procedural Background[25]

On July 29, 2013, Clarence Jamison was on his way home to Neeses, South Carolina after vacationing in Phoenix, Arizona. Jamison was driving on Interstate 20 in a 2001 Mercedes-Benz CLK-Class convertible. He had purchased the vehicle 13 days before from a car dealer in Pennsylvania.

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[23] *See, e.g.*, Jamie Kalven, *Invisible Institute Relaunches The Citizens Police Data Project*, THE INTERCEPT (Aug. 16, 2018) (discussing "a public database containing the disciplinary histories of Chicago police officers . . . . It includes more than 240,000 allegations of misconduct involving more than 22,000 Chicago police officers over a 50-year period."); Andrea J. Ritchie, *How some cops use the badge to commit sex crimes*, WASH. POST (Jan. 12., 2018) ("According to a 2010 Cato Institute review, sexual misconduct is the second-most-frequently reported form of police misconduct, after excessive force.").

[24] *Estate of Jones*, 961 F.3d at 673.

[25] The facts are drawn from the parties' depositions.

As Jamison drove through Pelahatchie, Mississippi, he passed Officer Nick McClendon, a white officer with the Richland Police Department, who was parked in a patrol car on the right shoulder.[26] Officer McClendon says he decided to stop Jamison because the temporary tag on his car was "folded over to where [he] couldn't see it." Officer McClendon pulled behind Jamison and flashed his blue lights. Jamison immediately pulled over to the right shoulder.[27]

As Officer McClendon approached the passenger side of Jamison's car, Jamison rolled down the passenger side window. Officer McClendon began to speak with Jamison when he reached the window. According to McClendon, he noticed that Jamison had recently purchased his car in Pennsylvania, and Jamison told him that he was traveling from "Vegas or Arizona."

Officer McClendon asked Jamison for "his license, insurance, [and] the paperwork on the vehicle because it didn't have a tag." Jamison provided his bill of sale, insurance, and South Carolina driver's license. Officer McClendon returned to his car to conduct a background check using the El Paso Intelligence Center ("EPIC"). The EPIC check came back clear immediately. Officer McLendon then contacted the National Criminal Information Center ("NCIC") and asked the dispatcher to run a criminal history on Jamison as well as the VIN on his car.

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[26] That night, Officer McClendon was working in Pelahatchie pursuant to an interlocal agreement between the Richland and Pelahatchie Police Departments.

[27] Jamison testified that there were two other officers on the scene. The record does not contain any evidence from these individuals.

According to Officer McClendon, he walked back to the passenger side of Jamison's car before hearing from NCIC.[28] He later admitted in his deposition that his goal when he returned to Jamison's car was to obtain consent to search the car. Once he reached the passenger side window, Officer McClendon returned Jamison's documents and struck up a conversation without mentioning that the EPIC background check came back clear. Thinking he was free to go after receiving his documents, Jamison says he prepared to leave.

This is where the two men's recounting of the facts diverges. According to Officer McClendon, he asked Jamison if he could search his car. Jamison asked him, "For what?" Officer McClendon says he responded, "to search for illegal narcotics, weapons, large amounts of money, anything illegal," and that Jamison simply gave his consent for the search.

According to Jamison, however, as he prepared to leave, Officer McClendon put his hand over the passenger door threshold of Jamison's car and told him to, "Hold on a minute." Officer McClendon then asked Jamison – for the first time – if he could search Jamison's car. "For what?" Jamison replied. Officer McClendon changed the conversation, asking him what he did for a living. They discussed Jamison's work as a welder.

Officer McClendon asked Jamison – for the second time – if he could search the car. Jamison again asked, "For what?" Officer McClendon said he had received a phone call reporting

[28] This part of Officer McClendon's testimony is undisputed. Jamison testified that he did not know if Officer McClendon heard back from NCIC prior to returning to Jamison's car.

that there were 10 kilos of cocaine in Jamison's car.[29] That was a lie. Jamison did not consent to the search.

Officer McClendon then made a third request to search the car. Jamison responded, "there is nothing in my car." They started talking about officers "planting stuff" in people's cars.

At this point, Officer McClendon "scrunched down," placed his hand into the car, and patted the inside of the passenger door. As he did this, Officer McClendon made his fourth request saying, "Come on, man. Let me search your car." Officer McClendon moved his arm further into the car at this point, while patting it with his hand.

As if four asks were not enough, Officer McClendon then made his fifth and final request. He lied again, "I need to search your car . . . because I got the phone call [about] 10 kilos of cocaine."

Jamison would later explain that he was "tired of talking to [Officer McClendon]." Jamison kept telling the officer that there was nothing in the car, and the officer refused to listen.

Officer McClendon kept at it. He told Jamison that even if he found a "roach,"[30] he would ignore it and let Jamison go. The conversation became "heated." Jamison became frustrated and gave up. He told Officer McClendon, "As long as I can see what you're doing you can search the vehicle."

Officer McClendon remembers patting Jamison down after he exited the car. Both agree that Officer McClendon directed Jamison to stand in front of the patrol car, which allowed

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[29] Officer McClendon denies saying such a thing.

[30] "A 'roach' is what remains after a joint, blunt, or marijuana cigarette has been smoked. It is akin to a cigarette butt." *United States v. Abernathy*, 843 F.3d 243, 247 n.1 (6th Cir. 2016) (citation omitted).

Jamison to see the search. As Jamison walked from his vehicle to the patrol car parked behind, he remembers asking Officer McClendon why he was stopped. Officer McClendon said it was because his license plate – a cardboard temporary tag from the car dealership – was "folded up." In his deposition, the Officer would later explain, "When you got these two bolts in and you're driving 65 miles an hour down the highway, it's going to flap up where you can't see it." Jamison testified, however, that it was not curled up and "had four screws in it."[31]

Officer McClendon later testified that he searched Jamison's car "from the engine compartment to the trunk to the undercarriage to underneath the engine to the back seats to anywhere to account for all the voids inside the vehicle."

As he started the search, NCIC dispatch called and flagged a discrepancy about whether Jamison's license was suspended. Officer McClendon told the dispatcher to search Jamison's driving history, which should have told them the status of Jamison's license. NCIC eventually discovered that Jamison's license was clear, although it is not apparent from the record when Officer McClendon heard back from the dispatcher.

According to Jamison, Officer McClendon continued speaking to Jamison during the search. He brought up "the 10 kilos of cocaine," asserted that the car was stolen, asked Jamison how many vehicles he owned, and claimed that Jamison did not have insurance on the car. Jamison kept saying that there was nothing in his car. At one point, Jamison heard a "pow"

[31] When Officer McClendon was shown the cardboard tag during his deposition, it showed no signs of being creased. The officer claimed that it either could have folded without creasing or that someone had ironed out the crease.

that "sounded like a rock" coming from inside the car, so he walked up to the car to see what had caused the noise. Officer McClendon told him to "Get back in front of my car." During the search, Jamison also requested to go to the bathroom several times, which Officer McClendon allowed.

Officer McClendon admitted in his deposition that he did not find "anything suspicious whatsoever." However, he asked Jamison if he could "deploy [his] canine." Jamison says he initially refused. Officer McClendon asked again, though, and Jamison relented, saying "Yes, go ahead." Officer McClendon "deployed [his] dog around the vehicle." The dog gave no indication, "so it confirmed that there was nothing inside the vehicle."

Before leaving, Officer McClendon asked Jamison to check his car to see if there was any damage. He gave Jamison a flashlight and told Jamison that he would pay for anything that was damaged. Jamison – who says he was tired – looked on the driver's side of the car and on the backseat, told Officer McClendon that he did not see anything, and returned the flashlight within a minute.

In total, the stop lasted one hour and 50 minutes.[32]

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[32] This explains why he was tired. Here he was, standing on the side of a busy interstate at night for almost two hours against his will so Officer McClendon could satisfy his goal of searching Jamison's vehicle. In that amount of time, Dorothy and Toto could have made it up and down the yellow brick road and back to Kansas. *See* Lee Pfeiffer, *The Wizard of Oz*, ENCYCLOPEDIA BRITANNICA (Mar. 19, 2010) (noting the 101-minute run time of the 1939 film). If Jamison was driving at 70 MPH before being stopped, in the 110 minutes he was held on the side of the road he would have gotten another 128 miles closer to home, through Rankin, Scott, Newton, and Lauderdale counties and more than 40 miles into Alabama.

Jamison subsequently filed this lawsuit against Officer McClendon and the City of Pelahatchie, Mississippi. He raised three claims.

In "Claim 1," Jamison alleged that the defendants violated his Fourth Amendment rights by "falsely stopping him, searching his car, and detaining him." Jamison's second claim, brought under the Fourteenth Amendment, stated that the defendants should be held liable for using "race [as] a motivating factor in the decision to stop him, search his car, and detain him." Jamison's third claim alleged a violation of the Fourth Amendment by Officer McClendon for "recklessly and deliberately causing significant damage to Mr. Jamison's car by conducting an unlawful search of the car in an objectively unreasonable manner amounting to an unlawful seizure of his property."

Jamison sought actual, compensatory, and punitive damages against Officer McClendon. He testified that he received an estimate for almost $4,000 of physical damage to his car. He described the damage as requiring the replacement of the "whole top" of the car and re-stitching or replacement of his car seats. In his deposition, Jamison said he provided pictures and the estimates to Officer McClendon's counsel.

Jamison also sought damages for the psychological harm he sustained. During his deposition, he described the emotional toll of the traffic stop and search in this way:

> When I first got home, I couldn't sleep. So I was up for like – I didn't even sleep when I got home. I think I got some rest the next day because I was still mad just thinking about it and then when all this killing and stuff come on TV, that's like a flashback. I said, man, this could

> have went this way. It had me thinking all kind of stuff because it was not even called for. . . .
>
> Then I seen a story about the guy in South Carolina, in Charleston, a busted taillight. They stopped him for that and shot him in the back,[33] and all that just went through my mind . . . .
>
> I don't even watch the news no more. I stopped watching the news because every time you turn it on something's bad.

On December 1, 2017, the defendants filed a motion for summary judgment. The motion said it would explain "why all claims against all defendants should be dismissed as a matter

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[33] Given the timeline – Jamison filed this suit in 2016 – he may be referring to the 2015 killing of Walter Scott by former South Carolina policeman Michael Slager. A bystander captured video of Slager shooting Scott in the back as he ran away, leading to "protests across the U.S. as demonstrators said it was another example of police officers mistreating Blacks." Meg Kinnard, *South Carolina officer loses appeal over shooting conviction*, ASSOC. PRESS (Jan. 8, 2019). Another news source noted that Scott was shot in the back five times. Meredith Edward & Dakin Andone, *Ex-South Carolina Cop Michael Slager gets 20 years for Walter Scott Killing*, CNN (Dec. 7, 2017). "At the time of the shooting, Scott was only the latest black man to be killed in a series of controversial officer-involved shootings that prompted 'Black Lives Matter' protests and vigils." *Id.* Slager pleaded guilty to federal criminal charges that he deprived of Scott of his civil rights and was sentenced to serve 20 years in prison. State murder charges were dropped. The fact that Slager was convicted is an anomaly; law enforcement officers are rarely charged for on-duty killings, let alone convicted. *See generally* Janell Ross, *Police officers convicted for fatal shootings are the exception, not the rule*, NBC NEWS (Mar. 13, 2019); Jamiles Lartey et al., *Former officer Michael Slager sentenced to 20 years for murder of Walter Scott*, THE GUARDIAN (Dec. 7, 2017).

of law." The motion, however, failed to provide an argument as to Jamison's third claim.

Prior to the completion of briefing on the motion, the parties agreed to dismiss the City of Pelahatchie from the case.

On September 26, 2018, the Court entered an order granting in part and deferring in part the motion for summary judgment.[34] The Court found that Officer McClendon had shown he was entitled to summary judgment as to Jamison's Fourteenth Amendment claim for a racially-motivated stop.[35] The Court also found that Officer McClendon was protected by qualified immunity as to Jamison's claims that Officer McClendon did not have reasonable suspicion to stop him. However, after a hearing, the Court requested supplemental briefing to "help . . . determine if McLendon is entitled to qualified immunity on Jamison's lack of consent and prolonged stop claims." The present motion followed.

II. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[36] A dispute is genuine "if the evidence supporting" the non-movant, "together with any inferences in such party's favor that the evidence allows, would be sufficient to support a verdict in

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[34] Docket No. 62.

[35] Jamison provided no evidence of comparative discriminatory treatment of those among similarly-situated individuals of different classes. *See id* at 7–8.

[36] Fed. R. Civ. P. 56(a).

favor of that party."[37] A fact is material if it is one that might affect the outcome of the suit under the governing law.[38]

A party seeking to avoid summary judgment must identify admissible evidence in the record showing a fact dispute.[39] That evidence may include "depositions, . . . affidavits or declarations, . . . or other materials."[40]

When evaluating a motion for summary judgment, courts are required to view all evidence in the light most favorable to the non-moving party and must refrain from making credibility determinations.[41]

III. Historical Context

In accordance with Supreme Court precedent, we begin with a look at the "origins" of the relevant law.[42]

A. Section 1983: A New Hope

Jamison brings his claims under 42 U.S.C. § 1983, a statute that has its origins in the Civil War and "Reconstruction," the brief era that followed the bloodshed. If the Civil War was the only war in our nation's history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter, too. "Reconstruction was the

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[37] *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987) (citation omitted).

[38] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[39] Fed. R. Civ. P. 56(c)(1).

[40] *Id.* at 56(c)(1)(A).

[41] *Strong v. Dep't of Army*, 414 F. Supp. 2d 625, 628 (S.D. Miss. 2005).

[42] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020).

essential sequel to the Civil War, completing its mission."[43] During Reconstruction, the abolitionists and soldiers who fought for emancipation sought no less than "the reinvention of the republic and the liberation of blacks to citizenship and Constitutional equality."[44]

The Reconstruction-era Congress passed "legislation to protect the freedoms granted to those who were recently enslaved."[45] One such piece of legislation created the Freedman's Bureau, a War Department agency that educated the formerly enslaved, provided them with legal protection, and "relocate[ed] them on more than 850,000 acres of land the federal government came to control during the war."[46] Another successful legislative effort was the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, also known as the "Reconstruction Amendments."[47]

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[43] RON CHERNOW, GRANT 706 (2017); *see also* Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi 1870-1890*, 53 J. S. HIST. 421, 421 (Aug. 1987), http://www.jstor.org/stable/2209362 (describing the era as Mississippi's first civil rights struggle and noting that the federal government sought to "secure black civil and political equality in the years after the Civil War.").

[44] DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 2 (2001).

[45] Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 660 (2018) (citation omitted); *see* BLIGHT, *supra* at 47.

[46] CHERNOW, *supra* at 562.

[47] *United States v. Cannon*, 750 F.3d 492, 509 (5th Cir. 2014) (Elrod, J., concurring).

The Thirteenth Amendment "represented the Union's deep seated commitment to end the 'badges and incidents of servitude,' [and] was an unadulterated call to abandon injustices that had made blacks outsiders in the country they helped build and whose economy they helped sustain."[48] The Fourteenth Amendment reversed *Dred Scott v. Sanford*.[49] While the amendment was "unpassable as a specific protection for black rights,"[50] it made all persons born in the United States citizens of this country and guaranteed due process and equal protection of the law. "The main object of the amendment was to enforce absolute equality of the races."[51] President Grant called the Fifteenth Amendment "the most important event that has occurred[] since the nation came into life . . . the realization of the Declaration of Independence."[52] "Each Amendment authorized Congress to pass appropriate legislation to enforce it."[53] Taken together, "Reconstruction would mark a revolutionary change in the federal system, with the national

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[48] Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 542 (2002) (quotations and citation omitted).

[49] 60 U.S. 393 (1857).

[50] DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 47 (6th ed. 2008).

[51] Margaret Bush Wilson and Diane Ridley, *The New Birth of Liberty: The Role of Thurgood Marshall's Civil Rights Contribution*, 6 NAT'L BLACK L.J. 67, 75 n.26 (1978)

[52] CHERNOW, *supra* at 685–86.

[53] THE OXFORD GUIDE TO THE SUPREME COURT OF THE UNITED STATES 442 (Kermit L. Hall et al. eds., 2d ed. 2005).

government passing laws forcing the states to fulfill their constitutional responsibilities."[54]

For the first time in its history, the United States saw a Black man selected to serve in the United States Senate (two from Mississippi, in fact – Hiram Revels and Blanche K. Bruce),[55] the establishment of public school systems across the South,[56] and increased efforts to pass local anti-discrimination laws.[57] It was a glimpse of a different America.

These "emancipationist" efforts existed alongside white supremacist backlash, terror, and violence.[58] "In Mississippi, it

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[54] *Id*.

[55] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 353–57 (1988). Black Mississippians were also elected to local, state, and federal posts. John R. Lynch, a former slave, would serve as Speaker of the House in the Mississippi Legislature and would later represent Mississippi in Congress. *See* JOHN R. LYNCH, REMINISCENCES OF AN ACTIVE LIFE: THE AUTOBIOGRAPHY OF JOHN ROY LYNCH xii–xv (1970). James Hill, also formerly enslaved, would too serve as Speaker of the House and was later elected as Mississippi's Secretary of State. *See* GEORGE A. SEWELL & MARGARET L. DWIGHT, MISSISSIPPI BLACK HISTORY MAKERS 48 (2d ed. 1984).

[56] FONER, *supra* at 365–67. During this period, Mississippi's Superintendent of Education was Thomas Cardozo, a Black man. *See History*, THOMAS CARDOZO MIDDLE SCHOOL, https://www.jackson.k12.ms.us/domain/616 (last visited July 10, 2020).

[57] FONER, *supra* at 368–71.

[58] The chasm between these two visions of America was embodied by President Johnson, who in his official capacity led a nation founded in the belief "that all men are created equal," yet in his individual capacity "side[d] with white supremacists," "privately referred to blacks as 'nig-

became a criminal offense for blacks to hunt or fish,"[59] and a U.S. Army General reported that "white militias, with telltale names such as the Jeff Davis Guards, were springing up across" the state.[60] In Shreveport, Louisiana, more than 2,000 black people were killed in 1865 alone.[61] "In 1866, there were riots in Memphis and New Orleans; more than 30 African-Americans were murdered in each melee."[62]

"The Ku Klux Klan, formed in 1866 by six white men in a Pulaski, Tennessee law office, 'engaged in extreme violence against freed slaves and Republicans,' assaulting and murdering its victims and destroying their property."[63] The Klan "spread rapidly across the South" in 1868,[64] orchestrating a "huge wave of murder and arson" to discourage Blacks from voting.[65] "[B]lack schools and churches were burned with impunity in North Carolina, Mississippi, and Alabama."[66]

The terrorism in Mississippi was unparalleled. During the first three months of 1870, 63 Black Mississippians "were

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gers,'" and had "a morbid fascination with miscegenation." CHERNOW, *supra* at 550; *see generally* FONER, *supra* at 412–59; NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006).

[59] CHERNOW, *supra* at 563.

[60] *Id.*

[61] *Id.* at 568.

[62] *See, well*, *Moore v. Bryant*, 205 F. Supp. 3d 834, 840 (S.D. Miss. 2016) (citation omitted).

[63] Macfarlane, *supra* at 660.

[64] CHERNOW, *supra* at 588.

[65] *Id.* at 621.

[66] *Id.* at 571, 703.

murdered . . . and nobody served a day for these crimes."[67] In 1872, the U.S. Attorney for Mississippi wrote that Klan violence was ubiquitous and that "only the presence of the army kept the Klan from overrunning north Mississippi completely."[68]

Many of the perpetrators of racial terror were members of law enforcement.[69] It was a twisted law enforcement, though, as it prevented the laws of the era from being enforced.[70] When the Klan murdered five witnesses in a pending case, one of Mississippi's District Attorneys complained, "I cannot get witnesses as all feel it is sure death to testify."[71] White suprema-

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[67] *Id.* at 703.

[68] Cresswell, *supra* at 426.

[69] *See* Robin D. Barnes, *Blue by Day and White by (k)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1099 (1996); Randolph M. Scott-McLaughlin, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1371 (1992); Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17, 24–25 (2004); *see also* SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE 21ST CENTURY 77–84 (2007); FONER, *supra* at 434 ("Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it.").

[70] *See* Barnes, *supra* at 1094.

[71] CHERNOW, *supra* at 702; *see also* Cresswell, *supra* at 432 ("Attorneys, marshals, witnesses and jurors suffered abuse and assault, were ostracized by the white community, and some were even murdered.").

cists and the Klan "threatened to unravel everything . . . Union soldiers had accomplished at great cost in blood and treasure."[72]

Professor Leon Litwack described the state of affairs in stark words:

> How many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known.[73] Nor could any accurate body count or statistical breakdown reveal the barbaric savagery and depravity that so frequently characterized the assaults made on freedmen in the name of restraining their savagery and depravity – the severed ears and entrails, the mutilated sex organs, the burnings at the stake, the forced drownings, the open display of skulls and severed limbs as trophies.[74]

"Congress sought to respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.'"[75] It passed The Ku Klux Act of 1871,

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[72] CHERNOW, *supra* at 707.

[73] At least 2,000 Black women, men, and children were killed by white mobs in racial terror lynchings during Reconstruction. *See Reconstruction in America*, EQUAL JUST. INITIATIVE, https://eji.org/report/reconstruction-in-america/ (last visited July 16, 2020). "Thousands more were assaulted, raped, or injured in racial terror attacks between 1865 and 1877." *Id.*

[74] LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 276–77 (1979).

[75] *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983)).

which "targeted the racial violence in the South undertaken by the Klan, and the failure of the states to cope with that violence."[76]

The Act's mandate was expansive. Section 2 of the Act provided for civil and criminal sanctions against those who conspired to deprive people of the "equal protection of the laws."[77] "Sections 3 and 4 authorized the use of federal force to redress a state's inability or unwillingness to deal with Klan or other violence."[78] "The Act was strong medicine."[79]

Section 1 of the Ku Klux Act, now codified as 42 U.S.C. § 1983, uniquely targeted state officials who "deprived persons of their constitutional rights."[80] While the Act as a whole "had the Klan 'particularly in mind,'" Section 1 recognized the local officials who created "the lawless conditions" that plagued "the South in 1871."[81] Thus, the doors to the courthouse were opened to "any person who ha[d] been deprived of her federally protected rights by a defendant acting under color of state

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[76] Macfarlane, *supra* at 661 (quotations and citations omitted); *see also Monroe v. Pape*, 365 U.S. 167, 172–83 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

[77] Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982) (citations omitted).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Monroe*, 365 U.S. at 174.

law."[82] The Act reflected Congress's recognition that – to borrow the words of today's abolitionists – "the whole damn system [was] guilty as hell."[83]

Some parts of the Act were fairly successful. Led by federal prosecutors at the Department of Justice, "federal grand juries, many interracial, brought 3,384 indictments against the KKK, resulting in 1,143 convictions."[84] One of Mississippi's U.S. Senators reported that the Klan largely "suspended their operations" in most of the State.[85] Frederick Douglass proclaimed that "peace has come to many places," and the "slaughter of our people have so far ceased."[86]

Douglass had spoken too soon. "By 1873, many white Southerners were calling for 'Redemption' – the return of white supremacy and the removal of rights for blacks – instead of Reconstruction."[87] The federal system largely abandoned the emancipationist efforts of the Reconstruction Era.[88] And the violence returned. "In 1874, 29 African-Americans were massacred in Vicksburg, according to Congressional investigators. The next year, amidst rumors of an African-American

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[82] Zach Lass, *Lowe v. Raemisch: Lowering the Bar of the Qualified Immunity Defense*, 96 DENV. L. REV. 177, 180 (2018) (citation omitted).

[83] @ignitekindred, TWITTER (Apr. 25, 2016, 6:39 PM) https://twitter.com/ignitekindred/status/724744680878039040.

[84] CHERNOW, *supra* at 708.

[85] *Id.* at 710.

[86] *Id.* at 709.

[87] *Reconstruction vs. Redemption*, NAT'L ENDOWMENT HUMAN. (Feb. 11, 2014); *see also* BLIGHT, *supra* at 101–02.

[88] BLIGHT, *supra* at 137–39.

plot to storm the town, the Mayor of Clinton, Mississippi gathered a white paramilitary unit which hunted and killed an estimated 30 to 50 African-Americans."[89] And in 1876, U.S. Marshal James Pierce said, "Almost the entire white population of Mississippi is one vast mob."[90]

Federal courts joined the retreat and decided to place their hand on the scale for white supremacy.[91] As Katherine A. Macfarlane writes:

> In several decisions, beginning with 1873's *Slaughter-House Cases*, the Supreme Court limited the reach of the Fourteenth Amendment and the statutes passed pursuant to the power it granted Congress. By 1882, the Court had voided the Ku Klux Act's criminal conspiracy section, a provision "aimed at lynchings and other mob actions of an individual or private nature."

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[89] *Moore*, 205 F. Supp. 3d at 840 (quotations, citations, and brackets omitted).

[90] Cresswell, *supra* at 429.

[91] That is not surprising since many of these judges were members of the Klan, supporters of the Confederacy, or both. *See Barnes*, *supra* at 1099 ("judges, politicians, and law enforcement officers were fellow Klansmen"); PETER CHARLES HOFFER ET AL., THE FEDERAL COURTS: AN ESSENTIAL HISTORY 193 (2016) ("a near majority" of Article III judges appointed in the wake of Reconstruction were former Confederates). L.Q.C. Lamar, the only Mississippian to ever serve on the Supreme Court, was on the side of these renegades. *See generally* DENNIS J. MITCHELL, A NEW HISTORY OF MISSISSIPPI 199–200 (2014). As an attorney, Lamar was noted for "wielding a chair" in open court and attacking a U.S. Marshal, "breaking a small bone at the cap of the [Marshal's] eye." Creswell, *supra* at 434.

> As a result of the Court's narrowed construction of both the Fourteenth Amendment and the civil rights statutes enacted pursuant to it, the Ku Klux Act's "scope and effectiveness" shrunk. The Court never directly addressed Section 1 of the Act, but those sections of the Act [were] left "largely forgotten."[92]

For almost a century, Redemption prevailed. "Lynchings, race riots and other forms of unequal treatment were permitted to abound in the South and elsewhere without power in the federal government to intercede."[93] Jim Crow ruled, and Jim Crow meant that "[a]ny breach of the system could mean one's life."[94] While Reconstruction "saw the basic rights of blacks to citizenship established in law," our country failed "to ensure their political and economic rights."[95] Our courts' "involvement in that downfall and its consequences could not have been greater."[96]

Though civil rights protection was largely abandoned at the federal level, activists continued to fight to realize the broken promise of Reconstruction. The Afro-American League, the Niagara Movement, the National Negro Conference (later renamed the NAACP) and other civil rights groups formed to

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[92] Macfarlane, *supra* at 661–62 (citations omitted).

[93] *Id.* at 662.

[94] *Id.*

[95] BELL, *supra* at 48.

[96] *Id.* at 49.

challenge lynching and the many oppressive laws and practices of discrimination.[97] One group's efforts – the Citizens' Committee – led to a lawsuit designed to create an Equal Protection Clause challenge to Louisiana's segregationist laws on railroad cars. Unfortunately, the ensuing case, *Plessy v. Ferguson,* resulted in the Supreme Court's decision to affirm the racist system of "separate but equal" accommodations.[98] Despite this setback, civil rights activism continued, intensifying after the Supreme Court's *Brown v. Board* decision and resulting in many of the civil rights laws we have today.[99]

It was against this backdrop that the Supreme Court attempted to resuscitate Section 1983.[100] In 1961, the Court decided *Monroe v. Pape*, a case where "13 Chicago police officers broke into [a Black family's] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."[101] The Justices held that Section 1983 provides a remedy for people deprived of their constitutional rights by state officials.[102] Accordingly, the Court found that

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[97] Macfarlane, *supra* at 663.

[98] 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled on other grounds by Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

[99] *See generally* Macfarlane, *supra* at 665.

[100] Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1722 (1989).

[101] 365 U.S. at 169.

[102] *Id.* at 187.

the Monroe family could pursue their lawsuit against the officers.[103]

Section 1983's purpose was finally realized, namely "'to interpose the federal courts between the States and the people, as guardians of the people's federal rights.'"[104] The statute has since become a powerful "vehicle used by private parties to vindicate their constitutional rights against state and local government officials."[105]

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[106]

Invoking this statute, Jamison contends that Officer McClendon violated his Fourth Amendment right to be free from unreasonable searches and seizures.

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[103] *Id.*

[104] *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

[105] Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1002 (2002).

[106] 42 U.S.C. § 1983.

B. Qualified Immunity: The Empire Strikes Back

Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983 after *Monroe v. Pape*.[107]

The doctrine of qualified immunity is perhaps the most important limitation.

Although Section 1983 made no "mention of defenses or immunities, '[the Supreme Court] read it in harmony with general principles of tort immunities and defenses rather than in derogation of them.'"[108] It reasoned that "[c]ertain immunities were so well established in 1871[109] . . . that 'we presume that Congress would have specifically so provided had it wished to abolish' them."[110]

On that presumption the doctrine of qualified immunity was born, with roots right here in Mississippi. In *Pierson v. Ray*, "15 white and Negro Episcopal clergymen . . . attempted to

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[107] *See* John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785, 803 (2003) (noting that we "have witnessed the restriction of rights developed during" the Civil Rights Movement, including Section 1983).

[108] *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 339 (1986)).

[109] Several scholars have shown that history does not support the Court's claims about qualified immunity's common law foundations. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) [hereinafter *The Case Against Qualified Immunity*].

[110] *Ziglar*, 137 S. Ct. at 1870 (citations omitted).

use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961."[111] The clergymen were arrested and charged with violation of a Mississippi statute – later held unconstitutional – that made it a misdemeanor "to congregate[] with others in a public place under circumstances such that a breach of the peace" may occur and to "refuse[] to move on when ordered to do so by a police officer."[112] The clergymen sued under Section 1983. In their defense, the officers argued that "they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid."[113]

The Supreme Court agreed. It held that officers should be shielded from liability when acting in good faith – at least in the context of constitutional violations that mirrored the common law tort of false arrest and imprisonment.[114]

Subsequent decisions "expanded the policy goals animating qualified immunity."[115] The Supreme Court eventually characterized the doctrine as an "attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public

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[111] 386 U.S. 547, 549 (1967).

[112] *Id.*

[113] *Id.* at 555.

[114] *Id.* ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

[115] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 14 (2017) (citations omitted).

interest in encouraging the vigorous exercise of official authority."[116]

A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values. Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog;[117] prison guards who forced a prisoner to sleep in cells "covered in feces" for days;[118] police officers who stole over $225,000 worth of property;[119] a deputy who body-slammed a woman after she simply "ignored [the deputy's] command and walked away";[120] an officer who seriously burned a woman after detonating a "flashbang" device in the bedroom where she was sleeping;[121] an officer who deployed a dog against a suspect who "claim[ed] that he surrendered by raising his hands in the air";[122] and an officer who shot an

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[116] *Harlow v. Fitzgerald*, 457 U.S. 800, 800 (1982).

[117] *Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019), *cert. denied*, No. 19-679, 2020 WL 3146693 (U.S. June 15, 2020).

[118] *Taylor v. Stevens*, 946 F.3d 211, 220 (5th Cir. 2019).

[119] *Jessop v. City of Fresno*, 936 F.3d 937, 942 (9th Cir. 2019), *cert. denied* No. 19-1021, 2020 WL 2515813 (U.S. May 18, 2020).

[120] *Kelsay v. Ernst,* 933 F.3d 975, 980 (8th Cir. 2019), *cert. denied*, No. 19-682, 2020 WL 2515455 (U.S. May 18, 2020).

[121] *Dukes v. Deaton*, 852 F.3d 1035, 1039 (11th Cir. 2017).

[122] *Baxter v. Bracey*, 751 F. App'x 869, 872 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020).

unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother.[123]

If Section 1983 was created to make the courts "guardians of the people's federal rights,'" what kind of guardians have the courts become? [124] One only has to look at the evolution of the doctrine to answer that question.

Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not "clearly established."

This "clearly established" requirement is not in the Constitution or a federal statute. The Supreme Court came up with it in 1982.[125] In 1986, the Court then "evolved" the qualified immunity defense to spread its blessings "to all but the plainly incompetent or those who knowingly violate the law."[126] It further ratcheted up the standard in 2011, when it added the

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[123] *Willingham v. Loughnan*, 261 F.3d 1178, 1181 (11th Cir. 2001), *cert. granted, judgment vacated*, 537 U.S. 801 (2002).

[124] *Haywood*, 556 U.S. at 735 (citation omitted).

[125] *See Harlow*, 457 U.S. at 818; *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 81 (2018). Previously, the Court had used "clearly established" as an explanatory phrase to better understand good faith. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (finding compensatory damages "appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.").

[126] *Malley*, 475 U.S. at 341; *see also* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 61 (2012). *Malley* was also the first time "objectively unreasonable" appeared in a Supreme Court qualified immunity decision.

words "*beyond debate.*"[127] In other words, "for the law to be clearly established, it must have been 'beyond debate' that [the officer] broke the law."[128] An officer cannot be held liable unless *every* reasonable officer would understand that what he is doing violates the law.[129] It does not matter, as the Fifth Circuit has explained, "that we are morally outraged, or the fact that our collective conscience is shocked by the alleged conduct . . . [because it] does not mean necessarily that the officials should have realized that [the conduct] violated a

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[127] *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citations omitted) (emphasis added).

[128] *McCoy v. Alamu*, 950 F.3d 226, 233 (5th Cir. 2020) (citation omitted). That leads us to another rabbit hole. A district court opinion doesn't clearly establish the law in a jurisdiction. *Id*. at 233 n.6 (citation omitted). Nor does a circuit court opinion, if the judges designate it as "unpublished." *Id.* Only *published* circuit court decisions count. *See id.* Even then, the Supreme Court has "expressed uncertainty" about whether courts of appeals may ever deem constitutional law clearly established. *Cole*, 935 F.3d at 460 n.4 (Jones, J., dissenting) (collecting cases).

[129] *al-Kidd*, 563 U.S. at 741. As Professor John Jeffries explains, "[t]he narrower the category of cases that count, the harder it is to find a clearly established right." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 859 (2010) [hereinafter *What's Wrong with Qualified Immunity?*]. This restrictive approach bulks up qualified immunity and makes its protections difficult to penetrate. When combining the narrow view of relevant precedent to the demand for "extreme factual specificity in the guidance those precedents must provide, the search for 'clearly established' law becomes increasingly unlikely to succeed, and 'qualified' immunity becomes nearly absolute." *Id*.

constitutional right."[130] Even evidence that the officer acted in bad faith is now considered irrelevant.[131]

The Supreme Court has also given qualified immunity sweeping procedural advantages. "Because the defense of qualified immunity is, in part, a question of law, it naturally creates a 'super-summary judgment' right on behalf of government officials. Even when an official is not entitled to summary judgment on the merits – because the plaintiff has stated a proper claim and genuine issues of fact exist – summary judgment can still be granted when the law is not reasonably clear."[132]

And there is more. The Supreme Court says defendants should be dismissed at the "earliest possible stage" in the proceedings to not be burdened with the matter.[133] The earliest possible stage may include a stage in the case before any discovery has been taken and necessarily before a plaintiff has obtained all the relevant facts and all (or any) documents.[134] If a court denies a defendant's motion seeking dismissal or summary judgment based on qualified immunity, that decision is

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[130] *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) (quotations and citation omitted).

[131] *See Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) ("an officer's actual intentions are irrelevant to the Fourth Amendment's 'objectively reasonable' inquiry") (citing *Graham v. Connor*, 490 U.S. 396, 397 (1989)).

[132] Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 195 (2008).

[133] *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

[134] *See Bosarge v. Mississippi Bureau of Narcotics*, 796 F.3d 435, 443 (5th Cir. 2015) (citation omitted) ("[o]ne of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming and intrusive."); *see also* Lass, *supra*, at 188.

also immediately appealable.[135] Those appeals can lead all the way to the United States Supreme Court even before any trial judge or jury hears the merits of the case. Qualified immunity's premier advantage thus lies in the fact that it affords government officials review by (at least) four federal judges before trial.[136]

Each step the Court has taken toward absolute immunity heralded a retreat from its earlier pronouncements. Although the Court held in 2002 that qualified immunity could be denied "in novel factual circumstances,"[137] the Court's track record in the intervening two decades renders naïve any judges who believe that pronouncement.[138]

Federal judges now spend an inordinate amount of time trying to discern whether the law was clearly established "beyond debate" at the time an officer broke it. But it is a fool's errand to ask people who love to debate whether something is debatable.

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[135] *See Elder v. Holloway*, 510 U.S. 510, 516 (1994).

[136] Brown, *supra* at 196.

[137] *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

[138] *See generally Baude, supra* at 83 ("[A]ll but two of the [Supreme] Court's awards of qualified immunity reversed the lower court's denial of immunity below. In other words, lower courts that follow Supreme Court doctrine should get the message: think twice before allowing a government official to be sued for unconstitutional conduct."); *see also Mullenix*, 136 S. Ct. at 310 (reversing and reminding lower courts that the Supreme Court "has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity"); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (reversing and chastising the appellate court for "misunderst[anding] the 'clearly established' analysis").

Consider *McCoy v. Alamu*, a 2020 case in which a correctional officer violated a prisoner's Constitutional rights when he sprayed a chemical agent in the prisoner's face, without provocation.[139]

The Fifth Circuit then asked if the illegality of the use of force was clearly established beyond debate. The *prison* didn't think the use of force was debatable: it found the spraying unnecessary and against its rules. It put the officer on three months' probation.[140] Yet the appellate court disregarded the warden's judgment and held for the officer. The case involved only a "single use of pepper spray," after all, and the officer hadn't used "the full can."[141] Based on these factual distinctions, the court concluded that "the spraying crossed that line. But it was not *beyond debate* that it did, so the law wasn't clearly established."[142]

These kinds of decisions are increasingly common. Consider another Fifth Circuit case, this time from 2019, in which Texas prisoner Trent Taylor claimed that the conditions of his prison cells violated the Constitutional minimum:

> Taylor stayed in the first cell starting September 6, 2013. He alleged that almost the entire surface—including the floor, ceiling, window, walls, and water faucet—was covered with "massive amounts" of feces that emitted a

[139] 950 F.3d at 231.

[140] *Id.*

[141] *Id.* at 233.

[142] *Id.* A dissent argued that the majority was stretching qualified immunity to rule for the officer, since it was already clearly established that correctional officers couldn't use their fists, a baton, or a taser to assault an inmate without provocation. *Id.* at 234–35 (Costa, J., dissenting).

"strong fecal odor." Taylor had to stay in the cell naked. He said that he couldn't eat in the cell, because he feared contamination. And he couldn't drink water, because feces were "packed inside the water faucet." Taylor stated that the prison officials were aware that the cell was covered in feces, but instead of cleaning it, [Officers] Cortez, Davison, and Hunter laughed at Taylor and remarked that he was "going to have a long weekend." [Officer] Swaney criticized Taylor for complaining, stating "dude, this is Montford, there is shit in all these cells from years of psych patients." On September 10, Taylor left the cell.

A day later, September 11, Taylor was moved to a "seclusion cell," but its conditions were no better. It didn't have a toilet, water fountain, or bunk. There was a drain in the floor where Taylor was ordered to urinate. The cell was extremely cold because the air conditioning was always on. And the cell was anything but clean.

Taylor alleged that the floor drain was clogged, leaving raw sewage on the floor. The drain smelled strongly of ammonia, which made it hard for Taylor to breathe. Yet, he alleged, the defendants repeatedly told him that if he needed to urinate, he had to do so in the clogged drain instead of being escorted to the restroom. Taylor refused. He worried that, because the drain was clogged, his urine would spill onto the already-soiled floor, where he had to sleep because he lacked a bed. So, he held his urine

> for twenty-four hours before involuntarily urinating on himself. He stayed in the seclusion cell until September 13. Prison officials then tried to return him to his first, feces-covered cell, but he objected and was permitted to stay in a different cell.[143]

Taylor spent a total of six days in feces-covered cells.[144] To make matters worse, the trial court found that Taylor "was not allowed clothing and forced to endure the cold temperatures with nothing but a suicide blanket."[145]

The correctional officers didn't submit much to contradict Taylor's evidence of filth.[146] Yet they were granted qualified immunity because it "wasn't clearly established" that "only six days" of living in a cesspool of human waste was unconstitutional.[147] The Fifth Circuit reasoned, "[t]hough the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end, we hadn't previously held that a time period so short violated the Constitution. . . .

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[143] *Taylor*, 946 F.3d at 218–19 (brackets and footnotes omitted).

[144] *Id.* at 218 & n.6.

[145] *Taylor v. Williams*, No. 5:14-CV-149-BG, 2016 WL 8674566, at *3 (N.D. Tex. Jan. 22, 2016), *report and recommendation adopted,* No. 5:14-CV-149-C, 2016 WL 1271054 (N.D. Tex. Mar. 29, 2016), *aff'd in part*, *vacated in part*, *remanded*, 715 F. App'x 332 (5th Cir. 2017).

[146] *Taylor*, 946 F.3d at 219.

[147] *Id.* at 222.

It was therefore not 'beyond debate' that the defendants broke the law."[148]

Never mind the 50 years of caselaw holding that "[c]ausing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted."[149] Never mind the numerous[150] Fifth[151] Circuit[152] decisions[153] concluding that prisoners who live in "filthy, sometimes feces-smeared, cells" can bring a Constitutional claim.[154] Never mind that in other states, it is clearly established that

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[148] *Id.* (citations omitted). It would appear that correctional officers in this Circuit can now just put inmates in feces-covered cells for *five* days or less and escape liability.

[149] *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972).

[150] *Bienvenu v. Beauregard Par. Police Jury*, 705 F.2d 1457, 1460 (5th Cir. 1983) ("Bienvenu's statements that the defendant . . . intentionally subjected him to a cold, rainy, roach-infested facility and furnished him with inoperative, scum-encrusted washing and toilet facilities sufficiently alleges a cause of action cognizable under 42 U.S.C. § 1983.")

[151] *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999) (concluding that plaintiff stated a Constitutional claim when "his only option was to urinate and defecate in the confined area that he shared with forty-eight other inmates").

[152] *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004) (affirming injunction where "cells were 'extremely filthy' with crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles").

[153] *Cowan v. Scott*, 31 F. App'x 832, at *2 (5th Cir. 2002) (finding that prisoner stated a Constitutional claim when he alleged that "he was forced to lie in feces for days without access to a shower").

[154] *Harper v. Showers*, 174 F.3d 716, 717 (5th Cir. 1999).

only *three* days of living in feces-covered cells is unconstitutional.[155] And never mind that the Supreme Court had acknowledged warmth as an "identifiable human need" and that "a low cell temperature at night combined with a failure to issue [a] blanket[]" may deprive an inmate of such.[156] None of that mattered after 2011, the year the Supreme Court ratchetted up the standard to require that the unlawfulness be "beyond debate."[157]

Fifth Circuit Judge Don Willett has succinctly explained the problem with the clearly established analysis:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no

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[155] *See, e.g.*, *McBride v. Deer*, 240 F.3d 1287, 1291 (10th Cir. 2001); *Sperow v. Melvin*, 182 F.3d 922 (7th Cir. 1999); *see also Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) (holding that "forcing inmates to work in a shower of human excrement without protective clothing and equipment" for as little as 10 minutes stated a claim). Judge Wilson of the Eleventh Circuit once wrote that "there is remarkably little consensus among the United States circuit courts concerning how to interpret the term 'clearly established.'" Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). "One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves." Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (collecting cases).

[156] *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

[157] *al-Kidd*, 563 U.S. at 741.

> equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.[158]

To be clear, it is unnecessary to ascribe malice to the appellate judges deciding these terrible cases. No one wants to be reversed by the Supreme Court, and the Supreme Court's summary reversals of qualified immunity cases are ever-more biting.[159] If you've been a Circuit Judge since 1979—sitting on the bench longer than any current Justice—you might expect a more forgiving reversal.[160] Other appellate judges see these decisions, read the tea leaves, and realize it is safer to find debatable whether it was a clearly established Constitutional violation to force a prisoner to eat, sleep, and live in prison cells swarming in feces for six days.

It is also unnecessary to blame the doctrine of qualified immunity on ideology. "Although the Court is not always unanimous on these issues, it is fair to say that qualified immunity has been as much a liberal as a conservative project on the Supreme Court."[161] Judges disagree in these cases no matter which President appointed them.[162] Qualified immunity is

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[158] *Zadeh v. Robinson*, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

[159] *See, e.g.*, *White*, 137 S. Ct. at 552 (per curiam) (chastising the appellate court for "misunderst[anding] the 'clearly established' analysis"). Professor Baude says the Court has been on a "crusade." Baude, *supra* at 61.

[160] *See White*, 137 S. Ct. at 552.

[161] Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 909 (2016).

[162] *See, e.g.*, *Pratt v. Harris Cty., Tex.*, 822 F.3d 174, 186 (5th Cir. 2016).

one area proving the truth of Chief Justice Roberts' statement, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges."[163]

There are numerous critiques of qualified immunity by lawyers,[164] judges,[165] and academics.[166] Yet qualified immunity is the law of the land and the undersigned is bound to follow its terms absent a change in practice by the Supreme Court.

Here is the exact legal standard applicable in this circuit:

> There are generally two steps in a qualified immunity analysis. "First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional

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[163] Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018).

[164] *See, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (No. 18-1287), 2019 WL 2370285.

[165] *See, e.g., Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part); *Zadeh*, 928 F.3d at 474 (Willett, J., concurring in part and dissenting in part); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *10 (E.D.N.Y. June 26, 2018); *Baldwin v. City of Estherville*, 915 N.W.2d 259, 283 (Iowa 2018) (Appel, J., dissenting); James A. Wynn, Jr., *As a judge, I have to follow the Supreme Court. It should fix this mistake*, WASH. POST (June 12, 2020).

[166] *See, e.g., The Case Against Qualified Immunity*, *supra*; Baude, *supra*; Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2305 (2018); *What's Wrong with Qualified Immunity?*, *supra*; Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 678 (1997).

> right. Second . . . the court must decide whether the right at issue was clearly established at time of the defendant's alleged misconduct." However, we are not required to address these steps in sequential order.
>
> In Fourth Amendment cases, determining whether an official violated clearly established law necessarily involves a reasonableness inquiry. In *Pearson*, the Supreme Court explained that [an] officer is "entitled to qualified immunity where clearly established law does not show that the conduct violated the Fourth Amendment," a determination which "turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." However, "a reasonably competent public official should know the law governing his conduct." In general, "the doctrine of qualified immunity protects government officials from . . . liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question *beyond debate*."[167]

The Court will now consider Jamison's claims under these two steps.

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[167] *Heaney v. Roberts*, 846 F.3d 795, 801 (5th Cir. 2017) (citations and brackets omitted).

IV. Qualified Immunity Analysis

A. Violation of a Statutory or Constitutional Right

The Court has already determined that Officer McClendon is entitled to qualified immunity for his decision to pull over Jamison.[168] The Court now turns to the stop itself.

1. Physical Intrusion

"In a valid traffic stop, an officer may request a driver's license and vehicle registration and run a computer check."[169] Officers are also permitted "to require passengers to identify themselves," and "[w]hile waiting for the results of computer checks, the police can question the subjects of a traffic stop even on subjects unrelated to the purpose of the stop."[170]

Officers are not allowed to unreasonably intrude into a person's vehicle. "While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police."[171] It follows that an "officer's intrusion into the interior of [a] car constitute[s] a search."[172]

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[168] *See* Docket No. 62.

[169] *United States v. Estrada*, 459 F.3d 627, 631 (5th Cir. 2006) (citation omitted).

[170] *United States v. Spence*, 667 F. App'x 446, 447 (5th Cir. 2016) (citations omitted).

[171] *New York v. Class*, 475 U.S. 106, 114–15 (1986).

[172] *United States v. Pierre*, 958 F.2d 1304, 1309 (5th Cir. 1992); *see also United States v. Ryles*, 988 F.2d 13, 15 (5th Cir. 1993).

"[T]he intrusiveness of the search is not measured so much by its scope as by whether it invades an expectation of privacy that society is prepared to recognize as 'reasonable.'"[173] Accordingly, "the key inquiry" in these cases is whether the officer "acted reasonably" when he intruded.[174] The question is highly dependent on the facts of each case.[175]

Here, Jamison argues that Officer McClendon "physically prevent[ed] Mr. Jamison from resuming his travel by placing his arm inside Mr. Jamison's automobile."[176] Viewing the evidence in the light most favorable to the non-movant, the Court must conclude for present purposes that the stop happened in this way. Officer McClendon's insertion of his arm into Jamison's vehicle is an "intru[sion] inside a space that, under most circumstances, is protected by a legitimate expectation of privacy."[177] The Court must therefore consider whether Officer McClendon acted reasonably when he intruded.

In *United States v. Pierre*, Border Patrol Agent Lonny Hillin stopped a GMC Jimmy at a fixed checkpoint in Texas.[178] The Jimmy was a "two-door vehicle . . . equipped with tinted fixed rear windows."[179] The defendant, Pierre, "was lying down in

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[173] *Pierre*, 958 F.2d at 1309 (citation omitted).

[174] *Id.*

[175] *See id.*

[176] Docket No. 68 at 21.

[177] *Ryles*, 988 F.2d at 15 (citations omitted).

[178] *Pierre*, 958 F.2d at 1307.

[179] *Id.*

the back seat."[180] During the stop, Agent Hillin "ducked his head in the window to get a clear view of the back seat and to talk to Pierre about his citizenship."[181] The Fifth Circuit considered the following to determine if the agent's intrusion was reasonable: (1) whether the officer intruded upon an area for which there is a reasonable expectation of privacy; (2) whether the officer's "actions were no more intrusive than necessary to accomplish his objective"; and (3) whether the intrusion was reasonable to ensure the safety of the officer.[182]

As to the first consideration, the Fifth Circuit found that "passengers of vehicles at fixed checkpoints near the border of the United States do not have a reasonable expectation of privacy in not being stopped and questioned about their citizenship."[183] The court reasoned that "occupants of a vehicle stopped at a checkpoint have no expectancy that they will not be required to look an agent in the eye and answer questions about their citizenship."[184] In *Pierre*, the "physical features of the Jimmy made it difficult for Agent Hillin to speak with Pierre and verify his citizenship."[185] These considerations weighed toward finding that the agent's intrusion – in this case, sticking his head into the car – was reasonable.[186]

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[180] *Id.*

[181] *Id.* (quotations and brackets omitted).

[182] *Id.* at 1309–10.

[183] *Id.* at 1309.

[184] *Id.* at 1310.

[185] *Id.* at 1309.

[186] *Id.* at 1310.

The Fifth Circuit also found that the sole purpose of Agent Hillin's intrusion was to ask about the passenger's citizenship. Again, the Court noted that vehicle's physical features did not allow Agent Hillin "to see and communicate with Pierre."[187] The court observed that "Agent Hillin's action in sticking his head in the driver's window was certainly less intrusive than requiring Pierre to get out of the vehicle."[188]

Finally, "in evaluating the reasonableness of the search," the Fifth Circuit "considered the safety of the officer."[189] It held that "[a]n agent at a checkpoint, for his own safety, would have good reason to position himself so he could see the person with whom he is speaking."[190]

Here, Jamison had no reasonable expectation of privacy as to being questioned during a lawful stop.[191] However, there is no evidence that the physical features of Jamison's car or any other circumstance made it difficult for Officer McClendon to question Jamison. Accordingly, this first consideration weighs against finding that Officer McClendon acted reasonably when he put his arm into Jamison's car.

Turning to the second consideration, Officer McClendon admitted that his objective was to get Jamison's consent to search the car. He had no reason to physically put his arm into

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[187] *Id.*

[188] *Id.*

[189] *Id.* (citation omitted).

[190] *Id.*

[191] *See Spence*, 667 F. App'x at 447.

the car to accomplish that objective. This situation is inapposite to *Pierre*, where the agent had to intrude in to the car to "see and communicate with Pierre."[192]

As to the third consideration, the same principle discussed in *Pierre* obviously applies here: officers have good reason to see the person they have pulled over. Officer McClendon, however, could already see Jamison. There was no reason to put his arm into Jamison's car to request that he consent to a search, and nothing in this record or the parties' briefs attempts to support that view.

In *Pierre*, the Fifth Circuit emphasized that officers do not have "carte blanche authority" to intrude into vehicles.[193] All of the considerations discussed in *Pierre* point toward a finding that Officer McClendon acted unreasonably.

For these reasons, Officer McClendon's physical intrusion into Jamison's car was an unreasonable search in violation of the Fourth Amendment.

2. Subsequent Vehicle Search

Officer McClendon then argues that Jamison consented to the search of his car. Jamison concedes that he "consented" but argues that his consent was involuntary.

"Consent is valid only if it is voluntary."[194] "Furthermore, if an individual gives consent after being subject to an initial un-

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[192] *Pierre*, 958 F.2d at 1310.

[193] *Id.*

[194] *United States v. Gomez-Moreno*, 479 F.3d 350, 357 (5th Cir. 2007) (citation omitted), *overruled on other grounds by Kentucky v. King*, 563 U.S. 452 (2011).

constitutional search, the consent is valid only if it was an independent act of free will, breaking the causal chain between the consent and the constitutional violation."[195] Factors that inform whether the consent was an independent act of free will include the "temporal proximity of the illegal conduct and the consent," whether there were any intervening circumstances, and "the purpose and flagrancy" of the misconduct.[196]

The Court has found a constitutional violation in Officer McClendon's intrusion into Jamison's vehicle. Jamison's "consent to search . . . was contemporaneous with the constitutional violation, and there was no intervening circumstance."[197] Viewing the evidence in the light most favorable to Jamison, as the legal standard requires, he relented and agreed to the search only after Officer McClendon escalated his efforts and placed his arm inside the car. Officer McClendon's intrusion into Jamison's car was a purposeful and unreasonable entry into an area subject to Fourth Amendment protection. "Thus, under the circumstances of this case, the consent to search was not an independent act of free will, but rather a product of" an unconstitutional search.[198]

Even absent the initial constitutional violation, there is a factual dispute as to whether Jamison's consent was voluntary.

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[195] *Id.* (quotations and citation omitted).

[196] *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002) (citation omitted).

[197] *United States v. Santiago*, 310 F.3d 336, 343 (5th Cir. 2002) (citations omitted).

[198] *Id.*

"The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances."[199] To determine whether a person's consent was voluntary, the Court considers six factors: "(1) the voluntariness of the suspect's custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect's cooperation; (4) the suspect's awareness of his right to refuse consent; (5) the suspect's education and intelligence; and (6) the suspect's belief that no incriminating evidence will be found."[200] "In this analysis, no single factor is determinative" [201] and courts consider other factors relevant to the inquiry.[202]

Viewing the evidence in the light most favorable to Jamison, three factors weigh toward finding voluntary consent. Jamison was aware of his right to refuse consent; he refused to give consent after being asked four times by Officer McClendon. Jamison graduated from high school and there is nothing in the record showing that he "lack[ed] the requisite education or intelligence to give valid consent to the search."[203] Finally, Jamison believed – rightly so – that no incriminating evidence would be found.

The remaining factors weigh against finding voluntary consent. Jamison's custodial status was not voluntary: he was not

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[199] *United States v. Shabazz*, 993 F.2d 431, 438 (5th Cir. 1993) (quotations and citation omitted).

[200] *United States v. Escamilla*, 852 F.3d 474, 483 (5th Cir. 2017) (citation omitted).

[201] *United States v. Macias*, 658 F.3d 509, 523 (5th Cir. 2011) (citation omitted).

[202] *United States v. Tompkins*, 130 F.3d 117, 122 (5th Cir. 1997) (citation omitted).

[203] *United States v. Cooper*, 43 F.3d 140, 148 (5th Cir. 1995).

free to leave. Jamison was also polite but unwilling to let Officer McClendon search his car the first four times the Officer asked. It is difficult to accept that Jamison truly wanted to give consent, since the exchange became "heated." Moreover, when Officer McClendon brought out his canine, Jamison says that he initially refused to consent to the dog sniff.

The parties disagree about whether Officer McClendon's actions were coercive. Jamison mainly points to Officer McClendon's intrusion into the car and repeated requests for consent. Officer McClendon, on the other hand, points to a number of cases where (he claims) other courts cleared officers who used greater restraints on a person's freedom.[204]

Jamison also points to "promises" and other "more subtle forms of coercion" that might have affected his judgment.[205] The existence of a promise indeed constitutes a relevant factor in the Court's determination.[206]

There is a genuine factual dispute about whether Officer McClendon's actions amount to coercive procedures. There is evidence of omissions, outright lies, and promises by the officer: he did not inform Jamison that the EPIC check had come back clear, he lied about a call saying Jamison was transporting drugs, and he promised Jamison that he would allow him to leave if he found a roach in the car. A jury could reasonably conclude that Officer McClendon's lies reasonably caused Jamison to fear that the officer would plant drugs in his car, or worse. McClendon's statement to "Hold on a minute" and

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[204] *See, e.g.*, *Tompkins*, 130 F.3d at 122; *United States v. Olivarria*, 781 F. Supp. 2d 387, 395 (N.D. Miss. 2011).

[205] *United States v. Hall*, 565 F.2d 917, 921 (5th Cir. 1978).

[206] *See United States v. Fernandes*, 285 F. App'x 119, 124 (5th Cir. 2008).

his physical intrusion into the interior of Jamison's car, while separately a constitutional violation, had the effect of physically expressing to Jamison that he was not free to leave – even though Jamison reasonably believed he could go after Officer McClendon returned his documents.

For these reasons, the Court finds a genuine factual dispute about whether Jamison voluntarily consented to the search.

A reader would be forgiven for pausing here and wondering whether we forgot to mention something.[207] When in this analysis will the Court look at the elephant in the room—how race may have played a role in whether Officer McClendon's actions were coercive?[208]

Jamison was a Black man driving through Mississippi, a state known for the violent deaths of Black people and others who fought for their freedom. Pelahatchie is an hour south of Philadelphia, a town made infamous after a different kind of traffic stop resulted in the brutal lynching of James Chaney, Michael Schwerner, and Andrew Goodman.[209] Pelahatchie is

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[207] *Cf.* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1151 n.81 (2012) (identifying cases in which the Supreme Court failed to recognize the potential impact of race and racism).

[208] *Cf. United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (noting that the race, gender, age, and education of a young Black woman who "may have felt unusually threatened by the officers, who were white males" were all relevant factors in determining whether the woman voluntarily consented to a seizure).

[209] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE 1964 MURDERS OF MICHAEL SCHWERNER, JAMES CHANEY, AND ANDREW GOODMAN 7–8 (2018), *available at* https://www.justice.gov/crt/case-document/file/1041791/download.

also less than 30 minutes east of Jackson, where on June 26, 2011, a handful of young white men and women engaged in some old-fashioned Redemption and murdered James Craig Anderson, a 47-year old Black, gay man.[210] Pelahatchie is also in Rankin County, the same county the young people called home. Only a few miles separate the two communities.

For Black people, this isn't mere history. It's the present.

By the time Jamison was pulled over, more than 600 people had been killed by police officers in 2013 alone.[211] Jamison was stopped just 16 days after the man who killed Trayvon Martin was acquitted.[212] On that day, Alicia Garza wrote a Facebook post that said, "Black people. I love you. I love us. We matter. Our lives matter, Black lives matter."[213] And that week, "thousands of demonstrators gathered in dozens of cities" to commemorate Martin "and to add their voices to a debate on race

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[210] Albert Samaha, *"This Is What They Did For Fun": The Story Of A Modern-Day Lynching*, BUZZFEED NEWS (Nov. 18, 2015); *see also* Press Release, U.S. Dep't of Justice, Three Brandon, Miss., Men Plead Guilty for Their Roles in the Racially Motivated Assault and Murder of an African-American Man (Mar. 22, 2012) *available at* https://www.justice.gov/opa/pr/three-brandon-miss-men-plead-guilty-their-roles-racially-motivated-assault-and-murder-african.

[211] *See* MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ (last accessed June 15, 2020).

[212] Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013).

[213] Elazar Sontag, *To this Black Lives Matter co-founder, activism begins in the kitchen*, WASH. POST (Mar. 26, 2018); *see also* Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1095 (2018).

that his death . . . set off."[214] A movement was in its early stages that would shine a light on killings by police and police brutality writ large – a problem Black people have endured since "states replaced slave patrols with police officers who enforced 'Black codes.'"[215]

Jamison's traffic stop cannot be separated from this context. Black people in this country are acutely aware of the danger traffic stops pose to Black lives.[216] Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike.[217] United States

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[214] Channing Joseph & Ravi Somaiya, *Demonstrations Across the Country Commemorate Trayvon Martin*, N.Y. TIMES (July 21, 2013).

[215] Hannah L.F. Cooper, *War on Drugs Policing and Police Brutality*, 50 SUBSTANCE USE & MISUSE 1188, 1189 (2015); *see also* Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 1 ANN. REV. CRIMINOLOGY 2.1, 2.3 (forthcoming 2021); Katheryn Russell-Brown, *Making Implicit Bias Explicit: Black Men and the Police*, in POLICING THE BLACK MAN 139–40 (Angela J. Davis ed., 2018); Brandon Hasbrouck, *The 13th Amendment Could End Racist Policing*, SLATE (June 5, 2020).

[216] *See, e.g.*, Ron Stodghill, *Black Behind the Wheel*, N.Y. TIMES (July 14, 2020); Helen Sullivan et al., *Thousands continue protesting across US as Minneapolis vows to dismantle police department – as it happened*, THE GUARDIAN (June 12, 2020). "There's a long history of black and brown communities feeling unsafe in police presence." *United States v. Curry*, No. 18-4233, 2020 WL 3980362, at *13 (4th Cir. July 15, 2020) (Gregory, C.J., concurring).

[217] *See* Crystal Bonvillian, *Video: Black Miami doctor who tests homeless for COVID-19 handcuffed, detained outside own home*, KIRO 7 (Apr. 14, 2020); David A. Harris, *Racial Profiling: Past, Present, and Future?*, ABA CRIM. JUSTICE MAG. (Winter 2020) (recounting the suit and settlement achieved by Robert Wilkins, U.S. Circuit Judge for the D.C. Circuit); Louis Nelson, *Sen. Tim Scott reveals incidents of being targeted by Capitol Police*, POLITICO (July 13, 2016).

Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as "the world's greatest deliberative body."[218] The "vast majority" of the stops were the result of "nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial."[219]

In a moving speech delivered from the Senate floor just last month, Senator Scott said,

> As a black guy, I know how it feels to walk into a store and have the little clerk follow me around, even as a United States Senator. I get that. I've experienced that. I understand the traffic stops. I understand that when I'm walking down the street and some young lady clutches on to her purse and my instinct is to get a little further away because I don't want any issues with anybody, I understand that.

See U.S. Senator Tim Scott, Senator Tim Scott Delivers Fiery Speech on Senate Floor After Senate Democrats Stonewall Legislation on Police Reform Across America (June 24, 2020), *available at* https://www.scott.senate.gov/media-center/press-releases/senator-tim-scott-delivers-fiery-speech-on-senate-floor-after-senate-democrats-stonewall-legislation-on-police-reform-across-america.

[218] Tim Scott, *GOP Sen. Tim Scott: I've choked on fear when stopped by police. We need the JUSTICE Act.*, USA TODAY (June 18, 2020).

[219] Nelson, *supra* ("Scott also shared the story of a former staffer of his who drove a Chrysler 300, 'a nice car without any question, but not a Ferrari.' The staffer wound up selling that car out of frustration after being pulled over too often in Washington, D.C., 'for absolutely no reason other than for driving a nice car.' He told a similar story of his brother, a command sergeant major in the U.S. Army, who was pulled over by an officer suspicious that the car Scott's brother was driving was stolen because it was a Volvo. . . . Scott pleaded in his remarks that the issues African-Americans face in dealing with law enforcement not be ignored.").

The situation is not getting better. The number of people killed by police each year has stayed relatively constant,[220] and Black people remain at disproportionate risk of dying in an encounter with police.[221] It was all the way back in 1968 when Nina Simone famously said that freedom meant "no fear! I mean really, no fear!"[222] Yet decades later, Black male teens still report a "fear of police and a serious concern for their personal safety and mortality in the presence of police officers."[223]

In an America where Black people "are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles,"[224] who can say that Jamison felt free that night on the side of Interstate 20? Who can say that he felt free to say no to an armed Officer McClendon?

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[220] *See, e.g.*, John Sullivan et al., *Four years in a row, police nationwide fatally shoot nearly 1,000 people*, WASH. POST (Feb. 12, 2019).

[221] Niall McCarthy, *Police Shootings: Black Americans Disproportionately Affected [Infographic]*, FORBES (May 28, 2020) ("Black Americans . . . are shot and killed by police [at] more than twice . . . the rate for white Americans.").

[222] Adam Shatz, *The Fierce Courage of Nina Simone*, N.Y. REV. OF BOOKS (Mar. 10, 2016).

[223] Smith Lee & Robinson, *That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, 45 J. BLACK PSYCH. 143, 146 (2019) (citation omitted).

[224] *Curry*, 2020 WL 3980362, at *14 (Gregory, C.J., concurring).

It was in this context that Officer McClendon repeatedly lied to Jamison. It was in this moment that Officer McClendon intruded into Jamison's car. It was upon this history that Jamison said he was tired. These circumstances point to Jamison's consent being involuntary, a situation where he felt he had "no alternative to compliance" and merely mouthed "pro forma words of consent."[225]

Accordingly, Officer McClendon's search of Jamison's vehicle violated the Fourth Amendment.

B. Violation of Clearly Established Law

The Court must now determine whether Officer McClendon "violated clearly established constitutional rights of which a reasonable person would have known."[226]

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'"[227] "Clearly established law must be particularized to the facts of a case. Thus, while a case need not be directly on point, precedent must still put the underlying question beyond debate."[228] District courts in this Circuit have been told that "clearly established law comes from holdings, not dicta."[229] We "are to pay close attention to

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[225] *United States v. Ruigomez*, 702 F.2d 61, 65 (5th Cir. 1983).

[226] *Samples v. Vadzemnieks*, 900 F.3d 655, 662 (5th Cir. 2018) (quotations, citations, and ellipses omitted).

[227] *Mullenix*, 136 S. Ct. at 308 (citation omitted).

[228] *Id.* (quotations and citation omitted).

[229] *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) (citations omitted).

the specific context of the case" and not "define clearly established law at a high level of generality."[230]

"It is the plaintiff's burden to find a case in his favor that does not define the law at a high level of generality."[231] To meet this high burden, the plaintiff must "point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity."[232]

It is here that the qualified immunity analysis ends in Officer McClendon's favor.

Viewing the facts in the light most favorable to Jamison, the question in this case is whether it was clearly established that an officer who has made five sequential requests for consent to search a car, lied, promised leniency, and placed his arm inside of a person's car during a traffic stop while awaiting background check results has violated the Fourth Amendment. It is not.

Jamison identifies a Tenth Circuit case finding that an officer unlawfully prolonged a detention "after verifying the temporary tag was valid and properly displayed."[233] That court wrote that "[e]very temporary tag is more difficult to read in

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[230] *Anderson v. Valdez*, 913 F.3d 472, 476 (5th Cir. 2019) (quotations and citations omitted).

[231] *Rich v. Palko*, 920 F.3d 288, 294 (5th Cir. 2019) (quotations and citation omitted).

[232] *McLin v. Ard*, 866 F.3d 682, 696 (5th Cir. 2017) (quotations and citation omitted).

[233] Docket No. 68 at 20 (citing *United States v. Edgerton*, 438 F.3d 1043, 1051 (10th Cir. 2006)).

the dark when a car is traveling 70 mph on the interstate. But that does not make every vehicle displaying such a tag fair game for an extended Fourth Amendment seizure."[234] Aside from the fact that a Tenth Circuit case is not "controlling authority" nor representative of "a robust consensus of persuasive authority,"[235] the case is unavailing here since Officer McClendon was awaiting NCIC results when he began to question Jamison. As discussed above, questioning while awaiting results from an NCIC check is "not inappropriate."[236] Officer McClendon's initial questioning was not in and of itself a Fourth Amendment violation.

As to Officer McClendon's "particular conduct" of intruding into Jamison's vehicle, making promises of leniency, and repeatedly questioning him, Jamison primarily argues that "a genuine issue of material fact exists regarding the voluntariness of Mr. Jamison's alleged consent to allow the Defendant McLendon to search his car."[237] He contends that a grant of "qualified immunity [is] inappropriate based on those factual conflicts."[238]

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[234] *Edgerton*, 438 F.3d at 1051.

[235] *Palko*, 920 F.3d at 294.

[236] *United States v. Zucco*, 71 F.3d 188, 190 (5th Cir. 1995).

[237] Docket No. 68 at 23.

[238] *Id.* at 24 (citing *Jordan v. Wayne Cty., Miss.*, No. 2:16-CV-70-KS-MTP, 2017 WL 2174963, at *5 (S.D. Miss. May 17, 2017)).

To prevail with this argument, Jamison must show that the factual dispute is such that the Court cannot "settl[e] on a coherent view of what happened in the first place."[239] Further, "[Jamison's] version of the violations [should] implicate clearly established law."[240] That is not the case here.

While Jamison and Officer McClendon's recounting of the facts differs, the Court is able to settle on a coherent view of what occurred based on Jamison's version of the facts.[241] Considering the evidence in a light "most favorable" to Jamison,"[242] Jamison has failed to show that Officer McClendon acted in an objectively unreasonable manner. An officer's "acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff."[243]

While Jamison contends that Officer McClendon's intrusion was coercive, Jamison fails to support the claim with relevant precedent. He cites to this Court's opinion in *United States v. Alvarado*, which found it unreasonable to detain a person on the side of the highway for an hour "for reasons not tied to reasonable suspicion that he had committed a crime or was

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[239] *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993); *see also Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir. 1994).

[240] *Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1061 (5th Cir. 1994).

[241] *Contra Lampkin*, 7 F.3d at 435 ("The facts leading up to these mistakes are not consistent among various officers' testimony and affidavits.").

[242] *Id.*

[243] *Thompson v. Upshur Cty., TX*, 245 F.3d 447, 457 (5th Cir. 2001).

engaged in the commission of a crime."[244] However, this Court's opinions cannot serve as "clearly established" precedent.[245] Moreover, the facts of that case are distinguishable since the defendant in *Alvarado* was unlawfully held after background checks came back clear.[246]

The cases the Court cited above regarding physical intrusions – *United States v. Pierre* and *New York v. Class* – are also insufficient. While it has been clearly established since at least 1986 that an officer may be held liable for an unreasonable "intrusion into the interior of [a] car,"[247] this is merely a "general statement[] of the law."[248] "[C]learly established law must be particularized to the facts of the case."[249]

In *Pierre*, the officer could not see into the suspect's back seat and had to put his head inside to speak to the suspect. In *Class*, the suspect had been removed from his car and the officer put his hand inside to move papers so that he could see the car's VIN. Neither case considered a police officer putting his arm inside a car while trying to get the driver to consent to a search. Both cases also found the officer's conduct to be reasonable, thus not providing "fair and clear warning" of what constitutes an unreasonable intrusion into a car.

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[244] *United States v. Alvarado*, 989 F. Supp. 2d 505, 522 n.21 (S.D. Miss. 2013).

[245] *See McCoy*, 950 F.3d at 233 n.6.

[246] *Alvarado*, 989 F. Supp. 2d at 522.

[247] *Pierre*, 958 F.2d at 1309; *see also Class*, 475 U.S. at 114–15.

[248] *White*, 137 S. Ct. at 552 (quotations and citation omitted).

[249] *Id.* (quotations and citation omitted).

Given the lack of precedent that places the Constitutional question "beyond debate," Jamison's claim cannot proceed.[250] Officer McClendon is entitled to qualified immunity as to Jamison's prolonged detention and unlawful search claims.

V. Jamison's Seizure of Property & Damage Claim

Jamison's complaint pleads a separate claim for the "reckless[] and deliberate[]" damage to his car he alleges occurred during Officer McClendon's search. Jamison points out, however, that although Officer McClendon sought summary judgment as to all claims and an entry of final judgment, neither his original nor his renewed motion for summary judgment provided an argument as to this third claim.

Jamison is correct. Officer McClendon's failure to raise the argument in his motions for summary judgment means he has forfeited its resolution at this juncture.[251] And his attempt to shoehorn it into his reply in support of his renewed motion for summary judgment was too late, since "[a]rguments

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[250] *Id.* at 551 (quotations and citation omitted).

[251] *See Bank of Am. Nat'l Ass'n v. Stauffer*, 728 F. App'x 412, 413 (5th Cir. 2018). The situation is inapposite to the cases in Officer McClendon's reply brief. Both *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001), and *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1156 (5th Cir. 1983), concerned cases in which a party argued for summary judgment on claims and the opposing party failed to address at least one of the theories of recovery in its response. In such cases, the Fifth Circuit held that the nonmoving party "abandoned its alternative theories of recovery [or defenses] by failing to present them to the trial court." *Vela*, 276 F.3d at 678–79. Here, however, Officer McClendon failed to raise an argument in his original brief as to Jamison's third claim.

raised for the first time in a reply brief are waived."[252] The question of whether to grant or deny summary judgment as to Jamison's "Seizure of Property & Damage Claim" is simply not before the court. Accordingly, the claim will be set for trial.

VI. The Return of Section 1983

Our nation has always struggled to realize the Founders' vision of "a more perfect Union."[253] From the beginning, "the Blessings of Liberty" were not equally bestowed upon all Americans.[254] Yet, as people marching in the streets remind us today, some have always stood up to face our nation's failings and remind us that "we cannot be patient."[255] Through their efforts we become ever more perfect.

The U.S. Congress of the Reconstruction era stood up to the white supremacists of its time when it passed Section 1983. The late Congressman John Lewis stared down the racists of his era when he marched over the Edmund Pettus Bridge. The Supreme Court has answered the call of history as well, most famously when it issued its unanimous decision in *Brown v.*

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[252] *Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015); *see also Dugger v. Stephen F. Austin State Univ.*, 232 F. Supp. 3d 938, 957 (E.D. Tex. 2017) (collecting cases demonstrating that "courts disregard new evidence or argument offered for the first time in the reply brief").

[253] U.S. CONST. pmbl.

[254] *Id.*

[255] John Lewis, Speech at the March on Washington (Aug. 28, 1963), *available at* https://voicesofdemocracy.umd.edu/lewis-speech-at-the-march-on-washington-speech-text/.

Board of Education and resigned the "separate but equal" doctrine to the dustbin of history.

The question of today is whether the Supreme Court will rise to the occasion and do the same with qualified immunity.

A. The Supreme Court

That the Justices haven't acted so far is perhaps understandable. Not only would they likely prefer that Congress fixes the problem, they also value *stare decisis*, the legal principle that means "fidelity to precedent."[256]

S*tare decisis*, however, "isn't supposed to be the art of methodically ignoring what everyone knows to be true."[257] From TikTok[258] to the chambers of the Supreme Court, there is increasing consensus that qualified immunity poses a major problem to our system of justice.

Justice Kennedy "complained"[259] as early as 1992 that in qualified immunity cases, "we have diverged to a substantial degree from the historical standards."[260] Justice Scalia admitted that the Court hasn't even "purported to be faithful to the

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[256] *See June Med. Servs. L.L.C. v. Russo*, No. 18-1323, 2020 WL 3492640, at *22 (U.S. June 29, 2020) (Roberts, C.J., concurring).

[257] *Ramos*, 140 S. Ct. at 1405 (citation omitted).

[258] *See, e.g.*, @thekaranmenon, TIKTOK (June 7, 2020), https://vm.tiktok.com/JLVfBkn/.

[259] That's Professor Baude's word, not mine. Baude, *supra* at 61.

[260] *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

common-law immunities that existed when § 1983 was enacted."[261] Justice Thomas wrote there is "no basis" for the "clearly established law" analysis[262] and has expressed his "growing concern with our qualified immunity jurisprudence."[263] Justice Sotomayor has noted that her colleagues were making the "clearly established" analysis ever more "onerous."[264] In her view, the Court's doctrine "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[265] It remains to be seen how the newer additions to the Court will vote.[266]

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[261] *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., joined by Thomas, J., dissenting) (citation omitted).

[262] *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from the denial of certiorari).

[263] *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part).

[264] *Kisela v. Hughes*, 138 S. Ct. 1148, 1158 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *see also Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

[265] *Id.* at 1162.

[266] According to one analysis, Justice Gorsuch's record on the Tenth Circuit signaled that he "harbors a robust—though not boundless—vision of qualified immunity" and "is sensitive to the practical concerns qualified immunity is meant to mollify—namely, the realities of law enforcement." Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 STAN. L. REV. ONLINE 163 (2017). On the Court of Appeals, however, those were the concerns then-Judge Gorsuch was supposed to honor. The genius of the law is that, as now-Justice Gorsuch observed in 2019, "[t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Gamble v. United States*, 139 S. Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting) (quoting Justice Brandeis).

Even without a personnel change, recent decisions make it questionable whether qualified immunity can withstand the *stare decisis* standard.[267] In 2018, *Janus v. AFSCME* overruled *Abood v. Detroit Board of Education*; in 2019, *Knick v. Township of Scott* overruled *Williamson County v. Hamilton Bank*; and in 2020, *Ramos v. Louisiana* overruled *Apodoca v. Oregon*. Perhaps this Court is more open to a course-correction than its predecessors.

So what is there to do?

I do not envy the Supreme Court's duty in these situations. Nor do I have any perfect solutions to offer. But a Fifth Circuit case about another Reconstruction-era statute, 42 U.S.C. § 1981, suggests vectors of change. The case has been lost to the public by a fluke of how it was revised. I share its original version here to give a tangible example of how easily legal doctrine can change.

Sometimes our understanding of words changes, too, as we glean new insight into the meaning of an authoritative text. *See, e.g.*, *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020). Justice Gorsuch's majority opinion in *Bostock* emphasized that "no court should ever" dispense with a statutory text "to do as we think best," adding, "the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them." *Id.* at 1753. Yet that is exactly what the Court has done with § 1983.

[267] *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2481 (2018); *June Med. Servs.*, 2020 WL 3492640, at *22 (Roberts, C.J., concurring).

B. Section 1981 and Mr. Dulin

Section 1981 "prohibits racial discrimination in making and enforcing contracts."[268] It reads,

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[269]

You don't need a lawyer to understand this statute. The language is simple and direct. It calls for "full and equal benefit of all laws and proceedings" regardless of race.

A few years ago, George Dulin invoked this law in a suit he brought against his former employer. Dulin was a white attorney in the Mississippi Delta. He had represented the local hospital board for 24 years. When he was replaced by a Black woman, Dulin claimed that the Board had discriminated against him on the basis of race. He said that no Board member had complained about his job performance, some of the

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[268] *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020) (citation omitted).

[269] 42 U.S.C. § 1981(a). "[W]hile the statutory language has been somewhat streamlined in re-enactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976).

Board members had made racist remarks, and he was better qualified than his replacement.[270]

Despite being simply stated, Section 1981 is not simply enforced. In Section 1981, as with its cousin Section 1983, federal judges have invented extra requirements for plaintiffs to overcome before they may try their case before a jury.

In Dulin's case, the trial judge and two appellate judges thought he couldn't overcome those extra hurdles. Specifically, the Fifth Circuit majority explained that although some evidence showed that no one *complained* about Dulin's job performance, other evidence revealed that the Board was *silently* dissatisfied with his work.[271] They held that Dulin's evidence of racist remarks was from too long ago—it failed the "temporal proximity" requirement.[272] Then they found that his evidence of superior qualifications could not overcome a legal standard which says that "differences in qualifications are generally not probative evidence of discrimination unless those disparities are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."[273] For the moment, Dulin had lost.

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[270] *Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, 586 F. App'x 643, 645-46 (5th Cir. 2014).

[271] *See George Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, No. 10-60095, slip op. at 6 (5th Cir. July 8, 2011).

[272] *Id.* at 7.

[273] *Id.* at 11 (quotations and citation omitted). This standard is awfully subjective.

To be clear, these judges in the majority hadn't "gone rogue." They were simply attempting to follow precedent that had long since narrowed the scope of Section 1981.

Judge Rhesa Barksdale filed a 22-page dissent. He argued that the many factual disputes should be resolved by a jury, given the Seventh Amendment right to jury trials.[274] He wrote that the temporal proximity test was too stringent since a savvy Board could have "*purposely* waited a year to terminate Dulin in order for that decision not to appear to be motivated by race."[275] He noted the evidence suggesting that the Board was lying about its motives, since "the Board never discussed Dulin's claimed poor performance."[276] Judge Barksdale then flatly disagreed that the court "must apply the superior-qualifications test," given evidence that the Board never cared to even discuss the qualifications of Dulin's replacement.[277] He "urged" the full court to rehear the case en banc.[278]

Judges err when we "impermissibly substitute[]" a jury determination with our own—the Seventh Amendment tells us so.[279] We err again when we invent legal requirements that are untethered to the complexity of the real world.[280] The truth is,

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[274] *Id.* at 13-14 (Barksdale, J., dissenting).

[275] *Id.* at 26.

[276] *Id.* at 30.

[277] *Id.* at 32–33.

[278] *Id.* at 34.

[279] *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 153 (2000); *see also Vance v. Union Planters Corp.*, 209 F.3d 438, 442 n.4 (5th Cir. 2000).

[280] The most confounding made-up standard might have been from the Eleventh Circuit. For years, that court held that a plaintiff could prove discrimination based on her superior qualifications "only when the disparity

Section 1981 doesn't have a "temporal proximity" requirement. It says everyone in this country has "the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property." We should honor it.

Judge Barksdale's powerful defense of the Seventh Amendment eventually persuaded his colleagues. They withdrew their opinion and issued in its place a two-paragraph, per curiam order directing the district court to hold a full trial on Dulin's claims.[281] Dulin subsequently presented his case to a jury of his peers, and the judiciary didn't collapse under a flood of follow-on litigation.[282] That he won his trial hardly matters: the case affirmed Judge Browning's point that "jury trials are the most democratic expression" of which official acts are reasonable and which are excessive.[283, 284]

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in qualifications is so apparent as virtually to jump off the page and *slap you in the face*." *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-57 (2006) (emphasis added) (quotations and citation omitted). The Supreme Court eventually rejected the standard as "unhelpful and imprecise." *Id.* at 457.

[281] *See Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, 657 F.3d 251, 251 (5th Cir. 2011).

[282] We have many tools at our disposal to stop frivolous suits at any stage of litigation. *See, e.g.*, 28 U.S.C. § 1915; Fed. R. Civ. P. 11, 12, 37, and 56; *Link v. Wabash R. Co.*, 370 U.S. 626, 629 (1962). Even after a jury has reached a verdict, a judge may set aside the decision or take other corrective actions if the judge believes a reasonable jury could not have reached the decision. *See, e.g.*, Fed. R. Civ. P. 50, 59 and 60. And where the trial court errs, the appellate court is given the opportunity to correct.

[283] *Manzanares*, 331 F. Supp. 3d at 1294 n.10.

[284] The Court recognizes that juries have not always done the right thing. As the Supreme Court noted in *Ramos*, some states created rules regarding jury verdicts that can be "traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities'" on their

I have told this story today because of its obvious parallels with § 1983. In both situations, judges took a Reconstruction-era statute designed to protect people *from the government*, added in some "legalistic argle-bargle,"[285] and turned the statute on its head to protect the government *from the people*. We read § 1983 against a background of robust immunity instead of the background of a robust Seventh Amendment.[286] Then we added one judge-made barrier after another. Every hour we spend in a § 1981 case trying to parse "temporal proximity" is a distraction from the point of the statute: to determine if there was unlawful discrimination. Just as every hour we spend in a § 1983 case asking if the law was "clearly established" or "beyond debate" is one where we lose sight of why

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juries. 140 S. Ct. at 1394. As other courts have noted, "racial discrimination remains rampant in jury selection." *State v. Saintcalle*, 178 Wash. 2d 34, 35 (2013), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wash. 2d 721 (2017). Like any actor in our legal system, juries may succumb to "unintentional, institutional, or unconscious" biases. *Id.* at 36. However, the federal courts' adoption and expansion of qualified immunity evinces an obvious institutional bias in favor of state actors. With its more diverse makeup relative to those of us who wear the robe, a jury is best positioned to "decide justice." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 701-02 (1995) (citation omitted); *see also* Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019) ("Today, more than 73 percent of sitting federal judges are men and 80 percent are white. Only 27 percent of sitting judges are women . . . . while Hispanic judges comprise just 6 percent of sitting judges on the courts. Judges who self-identify as LGBTQ make up fewer than 1 percent of sitting judges.") (citations omitted).

[285] *United States v. Windsor*, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting).

[286] Afterall, "[q]uite simply, jurors are the life's blood of our third branch of government." *Marchan v. John Miller Farms, Inc.*, 352 F. Supp. 3d 938, 947 (D. N.D. 2018) (citation omitted).

Congress enacted this law those many years ago: to hold state actors accountable for violating federally protected rights.

There is another, more difficult reason I have told this story, though. When the Fifth Circuit withdrew its first opinion, Westlaw deleted it and the accompanying dissent. Other attorneys and judges have thus never had the benefit of Judge Barksdale's analysis and defense of the Seventh Amendment—one forceful enough to persuade his colleagues to reverse themselves.[287] That is a loss to us all.

And, although the panel in *Dulin* ultimately permitted the case to proceed to a jury trial, this fell short of equal justice under the law. Instead of seeking en banc review to eliminate the judge-created rules that prohibited Mr. Dulin's case from moving forward, the panel simply decided his case would be an exception to the rules. They provided no explanation as to why an exception, rather than a complete overhaul, was appropriate. The "temporal proximity" requirement still applies to § 1981 claims in the Fifth Circuit today. *Dulin* shows us an example of judges recognizing the inconsistencies and impracticalities of an invented doctrine, but not going far enough to correct the wrong.

In *Dulin*, federal judges decided that a Reconstruction-era law could accommodate the claims of an older, white, male attorney. They had the imagination to see how their constricting view of § 1981 harmed someone who shared the background of most federal judges. That same imagination must be used to resuscitate § 1983 and remove the impenetrable shield of protection handed to wrongdoers.

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[287] Fortunately, the dissent is readily found on Google searches and an official copy was preserved on the District Court's docket.

Instead of slamming shut the courthouse doors, our courts should use their power to ensure Section 1983 serves all of its citizens as the Reconstruction Congress intended. Those who violate the constitutional rights of our citizens must be held accountable. When that day comes we will be one step closer to that more perfect Union.

VII. Conclusion

Again, I do not envy the task before the Supreme Court. Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of "separate but equal," so too should it eliminate the doctrine of qualified immunity.

Earlier this year, the Court explained something true about wearing the robe:

> Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.[288]

Let us waste no time in righting this wrong.

Officer McClendon's motion is **GRANTED**, and the remaining claim in this matter will be set for trial in due course.

SO ORDERED, this the 4th day of August, 2020.

s/ CARLTON W. REEVES
United States District Judge

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[288] *Ramos*, 140 S. Ct. at 1408.

Judicial Selection Reform:
Examples From Six States

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Library of Congress Control Number: 2003110235

ISBN: 1-928919-14-6

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1

Campaign Finance Reform in Texas

"Expensive judicial races, even if only a symptom of a deeper problem, are not likely to fade from the judicial landscape without broad, serious campaign finance reform."[1]

Until the late 1970s, judicial elections in Texas were unremarkable events. Democrats dominated the state's judiciary to such an extent that the only notable judicial elections occurred during the Democratic primary. Even these races rarely inspired much notice because most judges resigned before the end of their terms, allowing governors to appoint their successors who then easily won re-election. As Anthony Champagne and Kyle Cheek note, "This arrangement was so common in the first 100 years of the 1876 constitution that one study concluded that the Texas judicial selection system was primarily appointive."[2]

Although few could have predicted it at the time, the 1976 supreme court election of Don Yarbrough, a political unknown who had numerous ethical complaints in his background,[3] marked the advent of an era of increasingly expensive and noisy judicial elections in Texas. Yarbrough, who shared the name of a long-time Texas senator, defeated a well-respected incumbent. A similar situation unfolded in 1978, when a little-known plaintiff lawyer named Robert Campbell was elected to the supreme court. Campbell's cause was helped by the fact that University of Texas running back Earl Campbell had won the Heisman Trophy the previous fall.[4]

The year 1978 was also a notable one in Texas politics because William P. Clements was elected governor—the first Republican to hold the position since Reconstruction. As a result of Clements's election, it would be a Republican governor who filled interim vacancies on the courts. Plaintiff lawyers, who thought Democratic judges were more sympathetic to their positions, became concerned.

In the early 1980s, the examples of Yarbrough and Campbell and the concern that an increasingly Republican state would have an increasingly Republican judiciary motivated plaintiff lawyers to seek ways to create the sort of name recognition that had propelled Yarbrough and Campbell to the supreme court. As one study of judicial selection in Texas points out, "name recognition might occur naturally, as with Yarbrough, but it can also be bought."[5] Expensive campaigns provided the name familiarity that plaintiff lawyers desired.

As plaintiff attorneys became more active in supporting judicial candidates, business interests began to see the value of backing their own candidates. Enormous population growth during the same period increased the number of judicial offices in the state and reduced candidates' opportunities to reach voters through

1. Anthony Champagne and Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 938 (2002).

2. *Id.* at 910.

3. Yarbrough had faced disbarment proceedings in which a total of 73 violations were alleged. Although he was not criminally indicted when tape-recorded evidence was discovered of his plans to murder and mutilate his enemies, he was later indicted for perjury in reference to a forged automobile title. He eventually resigned from the court and gave up his law license. *Id.* at footnote 24.

4. *Id.* at footnote 25.

5. *Id.* at 911.

old-fashioned avenues like fairs and speeches to civic groups. In Texas, as in several other states during the last quarter century, expensive campaigns of mass mailings, yard signs, and television spots became typical.[6]

As elections in Texas became more expensive, there was an increased focus on the players behind the scenes who paid for pricey campaigns. More than in any other state, the perception developed in Texas that there was a direct connection between campaign contributions to judicial candidates and the decisions that those candidates later made as judges. Because of the perception that justice was for sale, and because a drawn-out Voting Rights Act dispute precluded any meaningful selection reform efforts in the late 1980s and early 1990s, Texas turned to campaign finance reform. In 1995, after a decade and a half of judicial elections so expensive that they attracted extensive national media attention, the Texas legislature enacted the Judicial Campaign Fairness Act, which imposed mandatory contribution limits and voluntary expenditure limits for judicial campaigns.

CAMPAIGN FINANCE REFORM IN THEORY AND IN PRACTICE

In most states, the same campaign financing provisions apply to both judicial candidates and candidates for other offices.[7] In Texas, contributions from corporations and labor unions are prohibited, but prior to 1995, there were no limits on the amount that individuals and PACs could contribute to candidates for elective office. The Judicial Campaign Fairness Act (JCFA) set limits on contributions to judicial candidates from individuals, law firms, and PACs, and proposed voluntary expenditure limits.

Of the states that hold some form of election for judicial office, fifteen impose no limits on the amount of money that candidates may accept from individuals and PACs. Two states have individual contribution limits of $10,000, eleven states have limits between $1001 and $5000, and ten states limit donations to $1000 or less.[8]

Since the early 1980s, the cost of running for judicial office has risen dramatically. Judicial campaign financing levels reached record highs in many states in the 2000 elections. Supreme court candidates in Alabama raised more than $13 million, and, in Illinois, candidates raised more than $8 million.[9] In Michigan, candidates, political parties, and interest groups spent a total of $13 to $15 million.[10] Judicial candidates around the nation raised more than $45.6 million in 2000, a 61 percent increase from 1998.[11]

Although judicial elections were less costly in 2002, there is a growing concern that judicial elections as expensive as races for other offices will become the norm rather than the exception. One response has been to establish special campaign financing regulations for judicial elections, as the Texas legislature did with the Judicial Campaign Fairness Act. The Ohio Supreme Court chose this route as well. In 1995, the court set contribution and expenditure limits for judicial races. However, the constitutionality of spending limits was challenged by two Ohio judges in *Suster v. Marshall*. The federal district court ruled that spending limits violated the First Amendment,[12] and the court of appeals agreed.[13] The spending limits were repealed in 2001.

Campaign financing regulations must conform to the U.S. Supreme Court's decision in *Buckley v. Valeo*.[14] According to the Court, cam-

6. *Id.* at 909-917.

7. *See* <http://www.fec.gov/pages/cflaw2000 .htm> for information on campaign finance laws nationwide.

8. Deborah Goldberg, PUBLIC FUNDING OF JUDICIAL ELECTIONS: FINANCING CAMPAIGNS FOR FAIR AND IMPARTIAL COURTS 11 (Brennan Center: 2002).

9. Roy A. Schotland, *Judicial Selection at the Crossroads*, prepared for the 2003 Midyear Meeting of the Conference of Chief Justices.

10. *Id.*

11. Deborah Goldberg, Craig Holman, and Samantha Sanchez, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 7 (February 2002).

12. *Suster v. Marshall*, 951 F.Supp. 693 (N.D.Oh. 1996).

13. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998).

paign contribution limits are permissible, but limits on expenditures are not. In *Buckley*, the Court ruled that contribution limits do not pose a First Amendment concern since they do not "in any way infringe the contributor's freedom to discuss candidates and issues."[15] However, spending limits "necessarily reduce the quantity of expression by reducing the number of issues discussed, the depth of their exploration, and the size of the audience reached."[16] Until recently, some legal scholars believed that states' interest in preserving the impartiality of their judiciaries might justify greater restrictions on speech during judicial campaigns than during campaigns for other offices. However, recent court rulings have rejected this argument.[17]

Other states have responded to the rising costs of judicial elections by pursuing public financing of judicial elections. Wisconsin offers public financing for supreme court campaigns, but funding has declined steadily since the program was introduced in the late 1970s. In 2002, the North Carolina legislature adopted the Judicial Campaign Reform Act, which provides public funding for supreme court and court of appeals candidates if they raise qualifying contributions and agree to strict fund-raising and spending limits.

The Road to Reform

In the late 1970s, plaintiff lawyers in Texas began doling out substantial sums to elect the judicial candidates they preferred.[18] In 1980, Texas became the first state in which the cost of a judicial race exceeded $1 million.[19] Between 1980 and 1986, contributions to candidates in contested appellate court races increased by 250 percent.[20] In 1987, the *Wall Street Journal* questioned the Texas Supreme Court's integrity after the court refused to hear an appeal of a case involving Texaco and Pennzoil. The lower court had ruled in favor of Pennzoil, a company whose lawyers had given $355,000 to the court's justices between 1984 and 1987, over Texaco, whose lawyers had also contributed to the campaigns of supreme court justices but in far smaller amounts.[21] This case also received coverage in the *New York Times* and *Time*, and the CBS newsmagazine "60 Minutes" ran a scathing piece about Texas judicial politics entitled "Justice for Sale?"

The increasing amount of money spent in judicial elections and the accusations of favoritism toward the plaintiffs' bar led to calls for dramatic reform. In 1986, Chief Justice John Hill, working with the speaker of the Texas House of Representatives and the lieutenant governor, appointed the Committee of 100 to study judicial reform in Texas. The group came up with a "merit election" plan for the state's judiciary known as the Texas Plan.[22] In promoting the plan, the group cited not only the charges of favoritism toward large campaign contributors but also the tremendous growth in the state's population and the

14. *Buckley v. Valeo*, 424 U.S. 1 (1976).
15. *Id.* at 21.
16. *Id.* at 19.
17. *See*, e.g., *Suster v. Marshall*, 951 F.Supp. 693; *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); and *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).
18. Anthony M. Champagne & Kyle D. Cheek, *Texas Judicial Selection: Bar Politics, Political Parties, Interest Groups and Money*, 3 Gov't, Law & Pol'y J., 51 (Fall 2001).
19. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391 (2001).
20. John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Selection*, 40 Baylor L. Rev. 339 (1988).
21. Thomas Petzinger, Jr. & Caleb Solomon, *Quality of Justice: Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, Wall St. J., Nov. 4, 1987, at 1.
22. The Texas Plan, as originally proposed, called for 16 nominating commissions (one for the appellate courts, one in each of nine administrative regions, and one in each of the counties of Dallas, Harris, Tarrant, Bexar, El Paso, and Travis). Each nominating commission would consist of two lawyers and two non-lawyers chosen by the governor, two lawyers and one non-lawyer chosen by the lieutenant governor, two lawyers and one non-lawyer chosen by the speaker of the house, three lawyers chosen by the president of the state bar association, one non-lawyer chosen by the chair of the Democratic Party, and one non-lawyer chosen by the Republican Party chair. The appropriate commission would nominate three candidates in the case of a judicial vacancy. The governor would appoint one of the nominees, who would have to be confirmed by the senate and face a retention election after a year in office. The judge would then face a retention election every six years. *See* Anthony Champagne, *Judicial Reform in Texas*, 72 Judicature 146, 153 (1988).

increasing lack of voter familiarity with judicial candidates. Between 1950 and 1985, the state had more than doubled in population from 7.7 million to 15 million.[23]

In spite of its support among governmental leaders, the Texas Plan, even with a modification that would have allowed rural counties to keep elections and a later compromise that would have restricted merit selection to appellate courts, encountered intense opposition from all sides.[24] Minorities and women complained that the plan seemed designed to limit their rise to judgeships at a time when their growing numbers made their election more likely than it had in the past. Many Democratic leaders, because they had a strong constituency among minority and women voters, objected to the plan. Democrats also feared that merit selection might limit their ability to put like-minded judges on the bench. Some Republicans opposed the proposal as well, citing gains at the polls during the early 1980s. Plaintiff lawyers came out against the Texas Plan, fearing that the gains they had won would be negated. Organized labor also voiced its disapproval. In response to the Committee of 100, the Committee of 250, which included six supreme court justices, formed. Hill's Texas Plan stirred up so much opposition from his colleagues on the supreme court that he eventually resigned over the issue, believing that he could better lead the reform movement as an outsider.[25] Hill founded Texans for Judicial Excellence (TJE) to lobby for merit selection.

Between 1986, when Hill first proposed the Texas Plan, and 1995, when the Judicial Campaign Fairness Act was passed, a number of events conspired to limit the prospects for judicial selection reform. Merit selection and retention, as embodied in the Texas Plan, took a beating in other states. Missouri, the first state to adopt merit selection, experienced a scandal in which the governor was accused of attempting to stack the supreme court with friendly judges. In California, the unseating of three supreme court justices, including Chief Justice Rose Bird, showed that retention elections could be just as expensive and ideological as other judicial elections. Special interest groups, who targeted the three justices because of their opposition to the death penalty, spent more than $6 million to campaign against them; the justices and their supporters spent more than $3 million.[26]

A case brought against the state of Texas under the Voting Rights Act may have helped to increase resistance to both merit selection and nonpartisan elections as reform possibilities in the late 1980s and early 1990s. In 1988, ten individual voters and the League of United Latin American Citizens (LULAC) filed suit under Section 2 of the Voting Rights Act, claiming that the election of trial court judges on a countywide basis diluted the voting power of African-Americans and Hispanics. The federal district court sided with the plaintiffs and gave the state legislature an opportunity to fashion a remedy before the court imposed one.

In the special legislative session that followed, Governor Clements refused to support the single-member district remedy proposed by LULAC. Instead, Clements and the Democratic leaders of the house promised to push for merit selection in the next legislative session.[27] LULAC and other minority groups opposed this plan, citing Clements's poor record in choosing minorities when given the opportunity to do so.[28] The district court rejected both district-based judicial elections and merit selection, and instead issued an order for nonpartisan elections in the state's nine most populous

23. *Id.* at 151.

24. *Id.* at 152-153.

25. Wayne Slater, *Chief Justice Hill Resigns*, THE DALLAS MORNING NEWS, Aug. 27, 1987, at 1A.

26. Roy A. Schotland, *Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1362, footnote 4 (2001).

27. Debbie Graves, *Officials, Lawyers Demand Reform of Judicial Elections*, AUSTIN AMERICAN-STATEMAN, Nov. 29, 1989, at B2; *LULAC Opposes Plan to Appoint Judges*, AUSTIN AMERICAN-STATEMAN, Dec. 3, 1989, at B8.

28. Bruce Hight, *Minorities Criticize Judicial Merit Election Plan*, AUSTIN AMERICAN-STATEMAN, Dec. 4, 1989, at B1.

counties.[29] Although the U.S. Court of Appeals for the Fifth Circuit later reversed the district court's decision, holding that Section 2 of the Voting Rights Act does not apply to judicial elections,[30] the U.S. Supreme Court rejected this ruling and returned the case to the court of appeals.[31] The Fifth Circuit then ruled that the plaintiffs had failed to prove a Section 2 violation.[32] After six years of litigation, the status quo was preserved.

For judicial reformers, this controversy revealed two points. First, minority voters were strongly opposed to merit selection because they did not trust governors, especially Republican governors, to appoint minorities. Second, many voters would remember nonpartisan elections as a reform imposed by a federal court. Some minority groups also expressed dislike for nonpartisan elections, arguing that minorities had better chances through partisan elections.[33] The likelihood of either of these reforms achieving broad popular or legislative support decreased during and immediately after the Voting Rights Act controversy.

Another reason that judicial selection reform failed to progress during this time was that it did not have the strong gubernatorial support that has proven crucial in other states, such as New York. Texas governors let events lead them rather than taking initiative on the issue. Governor Clements was a late convert to merit selection and, at the time, seemed to support the reform primarily to prevent a federal court from imposing other remedies.[34] Governor Ann Richards, who served from 1990 to 1994, favored a switch to district-based elections as a means of preserving minority voting strength.[35]

In New York, as discussed in another chapter, the strong support of the state's top judge was an important factor in bringing about reform. Texas's chief justices have shown similar leadership but without as much success. Chief Justice Hill resigned from the court to focus his efforts on the fight for merit selection.[36] Hill's successor, Chief Justice Tom Phillips, has followed up on Hill's legacy by being a constant critic of the current system of judicial selection in Texas.[37] In Phillips's view, a system that includes gubernatorial appointment and retention elections[38] or "robust" public funding of judicial elections would be the best solution; however, according to the chief justice, those states that cannot achieve these ambitious measures should "make incremental reforms . . . by imposing reasonable contribution limits, proscribing outrageous campaign tactics, and mandating the full and timely disclosure of all campaign activities."[39]

Since the early 1990s, there have been two tireless advocates of judicial selection reform in the Texas legislature: Senator Rodney Ellis, a

29. Lawrence E. Young, *Ruling Likely to Alter Judges' Campaigns*, THE DALLAS MORNING NEWS, Jan. 7, 1990, at 33A.

30. *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990).

31. *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991).

32. *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993).

33. For example, Demetrius Sampson of the J.L. Turner Legal Association, an African-American group, said that his group was opposed to nonpartisan elections because its membership believed that nonpartisan elections hurt voter turnout. Young, *supra* note 29.

34. After leaving office, Governor Clements joined Texans for Judicial Excellence and later Make Texas Proud, organizations founded by former Chief Justice Hill to fight for judicial selection reform. *Clements, Ex-Foes Cooperate on Judicial Election Reform*, THE DALLAS MORNING NEWS, Oct. 16, 1993, at 13F.

35. Christy Hoppe & Lori Stahl, *New Plan for Electing State's Judges Sought: Democrats, Minorities Who Are Upset with Ruling Vow to Fashion Strategy*, THE DALLAS MORNING NEWS, Jan. 20, 1994, at 23A.

36. Hill was not alone in leaving the supreme court because he hoped for a move away from judicial elections. In 1995, Justice Bob Gammage retired a year before his term ended, describing Texas's judicial selection process as one that "erode[d] public confidence and corrupt[ed] the courts." Gammage said that he hoped his resignation would draw attention to the need for reform. George Kuempel, *Retiring Justice Slams Texas System*, THE DALLAS MORNING NEWS, Aug. 25, 1995, at 22A.

37. Thomas R. Phillips, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 127 (1998).

38. One of the sticking points of Hill's merit selection plan was who would "pick the pickers," i.e., the nominating commission. Although Phillips has endorsed gubernatorial appointment and retention elections, he has not been a vocal proponent of a merit selection system that includes a nominating commission.

39. Phillips, *supra* note 37, at 138.

Democrat from Houston, and Senator Robert Duncan, a Republican from Lubbock.[40] Both senators introduce reform bills in every legislative session, but they face an uphill battle for two reasons. First, Texas's constitution discourages work on "secondary" issues such as judicial selection reform; the legislature only meets every two years and then for only 140 days. With the press of more urgent issues, it is difficult for judicial reform-minded legislators to get their colleagues to pay attention to their bills. Second, the house of representatives has traditionally been resistant to merit selection, with bills either dying in committee or failing to receive the votes of at least 100 members.

Given the obstacles that judicial selection reform faces in Texas, a number of factors made 1995 a good time for campaign finance reform. First, it was clear from events over the past decade that more far-reaching reforms were unlikely to succeed. The new governor, George W. Bush, had also announced his opposition to any plan that would do away with the direct election of judges, and the governor's opinion weighed heavily on Republicans.[41] Bush did not reject other reform possibilities, however.

Second, the 1994 elections had seen another expensive supreme court race between a plaintiff lawyers' candidate and a pro-business lawyers' candidate. In the Democratic primary, Rene Haas challenged conservative Raul Gonzalez, with the two candidates spending a total of nearly $4.5 million.[42] Third, the distracting issue of district-based elections, which appeared likely to affect any judicial selection reform plan, had been settled by the courts. Fourth, the state had new Republican leadership in 1995—leadership that wanted to see tort reform legislation passed and that was willing to agree to judicial campaign finance reform if Democrats would agree to tort reform. Finally, Senator Ellis found a better strategy for pushing a campaign finance bill that had failed in 1993.

In 1993, Ellis had proposed a bill that passed the senate but attained little support in the house. Representative Jerry Madden, a Republican freshman from Plano who served on the house elections committee, described the bill as "too bureaucratic"[43] and worked against it. In 1995, Ellis approached Madden about coming up with a bipartisan bill that would achieve more broad-based support. The 1993 bill had failed in the house in part because of opposition from judges.[44] Madden polled judges and unsuccessful judicial candidates to ask them what reforms they thought would improve judicial elections. Madden and Ellis also sought input from the League of Women Voters, Common Cause, and the leadership of both political parties. According to Madden, they had two main goals: figuring out which reforms would be feasible and restoring the public's faith in the judiciary.

The bill that was eventually proposed focused particularly on limiting individual and law firm contributions because candidate polling and discussions with parties and government reform groups indicated that enormous contributions from wealthy individuals and large law firms tainted the integrity of judicial elections. Plaintiff lawyers, who tend to come from small firms, also wanted law firm limits in addition to individual limits because they felt that they could not compete with the large Dallas and Houston corporate firms.[45]

According to Mark Hey, an aide to Representative Madden, Madden built support for the bill by seeking the opinions of others, especially judges. Reform advocates could point to their research as evidence that the

40. In the Texas house, Representative Pete Gallego and former Representative Robert Junell have also been active in recommending judicial selection reform.

41. Ken Herman, *Bush Signs Judicial Campaign Reform Bill*, AUSTIN AMERICAN-STATEMAN, June 17, 1995, at B5.

42. Champagne & Cheek, *supra* note 18, at 52.

43. Telephone interview with Representative Jerry Madden (Jan. 8, 2003).

44. Telephone interview with Mark Strama, aide to Senator Ellis (Jan. 9, 2003).

45. Telephone interview with Mark Hey, aide to Representative Madden (Jan. 8, 2003).

people most affected by the legislation wanted the recommended changes. Hey also believes that Ellis's decision to reach out to a house Republican on the elections committee helped ensure that the measure would achieve broader support than the 1993 bill.[46] Although Madden was a relatively junior representative, his Republican roots were strong because he had previously served as chair of the Republican Party of Collin County, a predominantly Republican suburban county north of Dallas.

Mark Strama, who was an aide to Ellis at the time, said that another key factor in garnering support in the house was getting the backing of Republicans who sought tort reform. Governor Bush had defeated Democrat Ann Richards after she had served only one term, and Republicans had made gains in the legislature. Tort reform was a key issue for the state's new political leadership, and a group called Texans for Lawsuit Reform had suggested a number of reform measures, including judicial campaign contribution limits. According to Strama, Ellis and other Democrats told the advocates of tort reform that Democrats could agree to some of the tort reform proposals if tort reform supporters were serious about campaign contribution limits.

Strama also maintains that both civil defense lawyers and plaintiff lawyers were willing to give campaign contribution limits a chance because of the high cost of judicial elections. "It was interesting," Strama notes. "When I talked to lawyers from both sides who had been major contributors, each was convinced they were being outgunned by the other. So instead of fighting the legislation to curtail campaign spending, both were willing to try something that they hoped might lower their expenses."[47]

Both the house and the senate approved the Judicial Campaign Fairness Act in May, and on June 17, 1995, Governor Bush signed the bill into law.[48] The act limits individual contributions to statewide judicial candidates to $5000;[49] individual contributions to other judicial candidates are limited to between $1000 and $5000, depending on the population of the district.[50] The law also limits contributions from law firms and members of law firms to $50 if aggregate contributions from a firm and its members exceed six times the maximum individual contribution limit for that judicial office ($30,000 for statewide candidates). Total contributions from PACs are limited to 15 percent of the voluntary expenditure limits for that office, so that candidates for statewide judicial offices may accept up to $300,000 in PAC donations. The law requires that contributors be identified by name, address, and job title. The law also establishes voluntary expenditure limits, with a unique enforcement procedure: the opponent of any candidate who exceeds the expenditure limits is no longer bound by the contribution limits.[51]

The Impact of Reform

On the day Governor Bush signed the Judicial Campaign Fairness Act (JCFA), Chief Justice Phillips described the law as "an excellent first step in comprehensive campaign finance reform."[52] When asked his opinion of this statement in early 2003, Representative Madden, the house Republican sponsor of the measure, disagreed, saying judicial reform had gone "as far as it needs to go."[53] Between these

46. *Id.*

47. Strama, *supra* note 44.

48. V.T.C.A. Election Code § 253.151-253.176.

49. Judges of the supreme court and court of criminal appeals are elected statewide.

50. If the population of the district is less than 250,000, the limit is $1000. If the district's population is between 250,000 and one million, the limit is $2500. The limit is $5000 in districts that have a population greater than one million.

51. Expenditures by candidates for statewide office are limited to $2 million. Expenditures by court of appeals candidates are limited to between $350,000 and $500,000, depending on the population of the judicial district. Expenditures by all other judicial candidates are limited to between $100,000 and $350,000, depending on the population of the judicial district.

52. Herman, *supra* note 41.

two opinions lies the present reality of judicial selection reform in Texas.

While the expense of judicial elections has eased somewhat in recent election cycles and the disclosure rules in the Judicial Campaign Fairness Act have made judicial elections appear "cleaner," the perception that justice is for sale has lingered. Some argue that because Texans prefer to elect their judges, the only hope for further reform is to revisit the contribution limits of the JCFA or to adopt public financing of judicial elections. Organizations that continue to push for campaign finance reform in Texas include Campaigns for People, Common Cause, and Public Citizen. Their efforts are informed by a legal watchdog group founded in 1997, Texans for Public Justice (TPJ). Among other things, TPJ tracks campaign contributions to public officials in Texas, including supreme court justices, and has issued a number of reports that examine the relationship between campaign contributions to the court's members and the decisions of the court.[54]

In 2000, Public Citizen and other nonprofit organizations filed a lawsuit in federal court challenging Texas's judicial campaign finance system as a violation of a citizen's constitutional right to due process of law. The suit alleged that judges cannot be impartial when they solicit and receive campaign contributions from lawyers who argue cases before them. In *Public Citizen, Inc. v. Bomer*, the trial court ruled that the issue should be resolved by Texas citizens and their legislators.[55] The court of appeals affirmed, holding that the plaintiffs lacked standing to bring the suit.[56]

In 1999, Governor Bush vetoed a bill that would have put judicial candidate information on the Internet. Although it had passed both houses with bipartisan support, Governor Bush rejected the measure because it called on the secretary of state to oversee the program. Bush believed that this would put the secretary of state in an "inappropriate role."[57] In 2001, Governor Rick Perry signed a similar law. If implemented by the secretary of state, the law would require judicial candidates to provide a statement that included their education, professional experience, and other biographical information. The guide would be available to the public at least 45 days before the election.

Figures like Chief Justice Phillips, former Chief Justice Hill, Senator Ellis, and other legislators remain steadfast in their pursuit of merit selection or gubernatorial appointment for at least the appellate courts, giving speeches and interviews on the subject, introducing or supporting legislation, and encouraging discussion. In the 1997 legislative session (the first session following the passage of the JCFA), legislators introduced various bills that called for a modified merit selection plan for appellate courts, nonpartisan judicial elections, and the elimination of straight-ticket voting in judicial elections. None of these measures passed. In the 1999, 2001, and 2003 sessions, bills calling for the appointment and retention of appellate judges passed the senate but stalled in the house. In 2003, Hill formed Make Texas Proud, a political committee dedicated to promoting an appointment-retention system.

Various opinion surveys conducted since the 1995 reforms reveal continued dissatisfaction among voters, lawyers, and judges with all aspects of the judicial selection process in Texas. One set of surveys indicated that 83 percent of voters, 42 percent of lawyers, and 52 percent of judges supported nonpartisan elections.[58] In another series of surveys, 55 percent

53. Madden, *supra* note 43.

54 The reports are *Pay to Play, Checks and Imbalances*, and *Payola Justice*. <http://www.tpj.org/reports/>.

55. *Public Citizen, Inc. v. Bomer*, 115 F.Supp.2d 743 (W.D.Tex. 2000).

56. *Public Citizen, Inc. v. Bomer*, 274 F.3d 212 (5th Cir. 2001).

57. Steve Brewer and Kathy Walt, *Bush Vetoes Public-Defense Bill, OKs Health-Care Fee Negotiations*, HOUSTON CHRONICLE, June 22, 1999, at 1A.

58. Texas Supreme Court / State Bar of Texas / Texas Office of Court Administration (1999) <http://www.courts.state.tx.us/publicinfo/publictrust/execsum.htm>; Campaigns for People (2002), discussed in Janet Elliot, *Ethics Rules Revised for Judicial Candidates*, HOUSTON CHRONICLE, Sept. 19, 2002, at 34.

of voters reported having little or no information on judicial candidates in the last election,[59] and 91 percent of judges said that "because voters have little information about judicial candidates, judges are often selected for reasons other than qualifications."[60] According to a recent survey of Texas judges, 50 percent were dissatisfied with the tone and conduct of judicial campaigns, 69 percent felt that they were under pressure to raise money during election years, and 84 percent said that "special interests are trying to use the courts to shape policy."[61] Finally, survey results showed that between 72 percent and 83 percent of voters,[62] and between 28 percent and 48 percent of judges,[63] believed that campaign contributions had at least some influence on judges' decisions.

While the 1995 Judicial Campaign Fairness Act succeeded in placing some controls on expensive campaigns, the continued concerns about judicial elections indicate that more work could be done in Texas. The chief justice, public interest groups, and some lawmakers believe that judicial selection reform should go further. The question in the coming years will be whether state leaders and the public will push for change.

59. Campaigns for People (2002), discussed in Bruce Davidson, *Low-Key Judicial Races Are Expected*, SAN ANTONIO EXPRESS-NEWS, Sept. 1, 2002, at 2G.

60. Justice at Stake Campaign (2001), <http://www.justiceatstake.org/files/SurveyPullOutTexas.pdf>.

61. *Id.*

62. Texas Poll (1997), discussed in Ken Herman, *Legislature Again Tackles Reforms for Election of Judges*, AUSTIN AMERICAN-STATEMAN, Mar. 9, 1997, at B1; Texas Supreme Court (1998), discussed in Warren Richey, *Justice for Sale? Cash Pours into Campaigns*, CHRISTIAN SCIENCE MONITOR, Oct. 25, 2000, at 2; and Campaigns for People (2002), *supra* note 59.

63. Texas Supreme Court (1998), *id.*; Texas Supreme Court / State Bar of Texas / Texas Office of Court Administration (1999), *supra* note 58; and Justice at Stake Campaign (2001), *supra* note 60.

Justice for Sale? Campaign Contributions and Judicial Decisionmaking

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ABSTRACT

As state judicial campaigns become progressively more expensive and political, judicial candidates have turned more frequently to lawyers and law firms for campaign contributions. Given that lawyers who contribute to judges' campaigns frequently appear before them in court, the potential for a conflict of interest arises. I ask whether judges are more likely to rule in favor of attorneys who provide financial support to their campaigns. Looking at cases decided in the Supreme Court of Georgia's 2003 term, I show that campaign contributions are indeed correlated with judges' decisions. Furthermore, I use a two-stage probit least squares estimator to show that these campaign contributions directly affect judicial decisionmaking.

SCARCELY AN ELECTION passes without political pundits asking whether campaign money plays too large a role in American politics. Most of this attention is directed at the role of money in congressional elections, particularly recently with the ethical questions surrounding Representative Tom DeLay, lobbyist Jack Abramoff, and others. However, increasing amounts of campaign money are also targeted at contests for state judicial offices. The paucity of scholarly and journalistic attention to judicial campaign finance may be due in part to the fact that federal judges—and some state judges—are appointed rather than elected. Nearly half of the American states use some form of competitive election to select their judges. Twenty years ago, Schotland (1985) warned that these campaigns were becoming more expensive and political. Television advertising is now common in state supreme court[1] elections, and the tone of the advertising is becoming more negative (Goldberg et al. 2005). Bonneau (2005) has documented the dramatic increase in the average spending in judicial campaigns of almost 60 percent (in real dollars) from 1990 to 2000.

These spiraling costs of judicial campaigns raise the question of the source

State Politics and Policy Quarterly, Vol. 7, No. 3 (Fall 2007): pp. 281–297

of these campaign funds. Hansen (1991) reports that judicial candidates receive a large portion of this money from attorneys. Indeed, in elections to the Supreme Court of Georgia in 2002 and 2004, 65.5 percent of all campaign contributions came from lawyers, law firms, and lobbyists.[2] In state supreme court races across the country in 2002, lawyers were the source of 37 percent of all funds, ranging from a high of 66 percent in Texas to less than 10 percent of contributions in Wisconsin and Minnesota (Goldberg and Sanchez 2004).

Attorneys who contribute to judges campaigns often argue cases before these judges after the election (Champagne 1986, 1988; McCall 2003), creating the appearance of quid pro quo exchanges between attorneys and judges. The very perception of impropriety may be problematic for state court systems even if no exchanges take place. A 2001 survey by the Justice at Stake Campaign found that 81 percent of citizens were concerned by the fact that in some states nearly half of all state supreme court cases involve someone who has contributed to at least one of the judges.[3]

Notwithstanding citizen concerns, the influence of money on judicial decisionmaking is ultimately an empirical question. A data-based approach is particularly important given the highly charged, controversial nature of the topic. In this article, I begin to address this very important, but very difficult, question using data drawn from the decisions of the Supreme Court of Georgia in 2003 and campaign contributions to its members. I show that an attorney's campaign contributions increase the probability that a judge rules in favor of that attorney's client. I conclude with a discussion of the implications of these findings for the debate over methods of judicial selection.

INVESTIGATING THE MONEY-DECISIONMAKING LINK

Competing views on the impact of campaign contributions are based on competing theories of the behavior of elected judges. The hypothesis that campaign contributions influence decisions stems from theories that candidates are vote-maximizers (for example, Mayhew 1974). In this view, election is a proximate goal because any other goals candidates have cannot be attained if the electoral goal is not realized. Thus, candidates will behave so as to maximize their vote share in an election. In the case of sitting judges, maximizing votes means, at least in part, raising money.

Campaign spending has been shown to be an important influence on success in judicial elections (Hall and Bonneau 2006; Bonneau 2005; Jackson and Riddlesperger 1991), and the cost of judicial campaigning has escalated,

making it extremely difficult for candidates to win election and re-election without substantial funding. Thus, vote-maximizing judicial candidates will seek to secure funding to guarantee their election. Attorneys may only be willing to contribute, all else being equal, if judges rule in favor of the contributing attorney should he or she later appear in court. While making such exchanges may require judges to sacrifice their non-elective goals[4] on some cases, by advancing their re-election goal, they perpetuate their ability to reach non-elective goals in at least some portion of cases over the course of an entire term.

Of course, the process is almost certainly more nuanced than simply all judges being equally willing to exchange their votes on any case to support a campaign contributor. This heterogeneity could be structured by institutional factors, such as term length or whether an election is partisan or nonpartisan, factors already known to influence judges' actions and attitudes (Hall 1995; Huber and Gordon 2004; Benesh 2006). Other factors influencing this exchange could be case specific (e.g. the topic or importance of the case) or judge specific (e.g. ideology, length of time since previous election, or personal values). But even with a more nuanced process, if judges are even sometimes under some conditions exchanging favorable rulings for campaign funds, we would expect to see at least a modest correlation between campaign contributions from attorneys on one side of a case and the probability of a judge ruling for that side. Some prior research has supported this notion to varying degrees. A number of studies provide anecdotal evidence of the correlation between campaign contributions and judicial decisions. For example, Champagne (1988, 149) details an incident from the mid-1980s where two Texas Supreme Court justices were chastened for accepting large donations from lawyers who had interests pending in that court. Schotland (1985) describes other incidences of improper exchanges between judicial candidates and lawyers from multiple states.

More recently, a couple of more systematic studies have found a relationship between campaign contributions and judicial decisions. Waltenburg and Lopeman (2000) studied tort cases before state supreme courts in Alabama, Kentucky, and Ohio and found a significant relationship between campaign contributions and case outcomes. Similarly, Ware (1999) examined arbitration decisions from the Alabama Supreme Court and found a correlation between the sources of a judge's funding and his or her rulings.

The fundamental problem associated with these studies—openly admitted by their respective authors—is that the correlation they find is not necessarily indicative of causality. As Waltenburg and Lopeman (2000, 255) state, it is unclear whether "decisions follow dollars or dollars follow decisions."

They argue that a correlation between campaign contributions and judicial decisions exists because contributions from attorneys on the liberal (conservative) side of a case leads judges to reciprocate by voting in a liberal (conservative) way. But it may be that attorneys who generally find themselves on the liberal (conservative) side of a case contribute to candidates who are already likely to rule in a liberal (conservative) direction. This contribution strategy increases the chances of their preferred candidate winning. If their candidate is elected, they are more likely to win cases before them, not because the judge's vote was influenced by the campaign contribution, but because it was the judge's propensity to vote in a particular way that led to the contribution in the first place. An analogous difficulty exists in studies of the relationship between campaign contributions to congressional candidates and their roll call voting once elected (Wright 1996, 136–49).[5] Because of this directionality problem, scholars have not been able to demonstrate that campaign contributions generally cause judges to support contributing attorneys in the courtroom. Cann (2002) applies role theory (Gibson 1978) contending that judges feel constrained to fill a certain role regardless of outside influences, such as campaign contributions. In the classic judicial paradigm, the importance of filling the role of the impartial judge outweighs the importance of collecting campaign contributions (and even the importance of winning the election). Thus, judges dutifully fulfill their roles without compromising their integrity. Furthermore, states with well-tailored campaign finance laws do not even tempt judges to deviate from their role as impartial purveyors of justice. Examining the 1998 term of Wisconsin Supreme Court, Cann (2002) found no correlation between contributions and votes.

Combining the null findings of Cann (2002) and the problems of causality outlined above, a study seeking to establish that judges actually repay attorneys for contributions with favorable rulings must provide two pieces of evidence. First, the study must show that a correlation exists between campaign contributions from attorneys and judges' decisions when those attorneys appear in court. Second, the study must provide evidence that the contributions actually caused those outcomes.

McCall (2003) moves in the direction of meeting these two standards. She argues that while causality is difficult to determine when a liberal attorney contributes to a liberal judge and a liberal decision is made, when a liberal attorney contributes to a conservative judge and a liberal decision is made, a more reasonable claim of causality is made. McCall examined decisions of the Texas Supreme Court (which hears only civil cases) involving two business litigants between 1994 and 1997. In this time period, McCall argues, the

Texas Supreme Court was staffed exclusively by conservative judges. Because these suits largely involved small corporations suing larger corporations for breach of contract, a pro-plaintiff decision (favoring the small corporation) is assumed to be a liberal decision. Liberal decisions by these judges would be difficult to explain on the basis of ideology. McCall claims that if the conservative judges are more likely to make liberal decisions when they have received contributions from liberal attorneys, this would constitute evidence that the contributions changed the judges' votes.[6]

While the McCall (2003) study offers the best test to date of the "decisions-follow-dollars" hypothesis, it has shortcomings. First, her technique can only be applied to test this relationship for judges who are either very liberal or very conservative. Moderate judges would need to be left out because one cannot easily assess their ideological predispositions on a given case. Second, McCall's technique can only be used to test the effect of contributions from attorneys on the opposite side of the spectrum from a judge. While this research design may work for a specific state and some specific years, it could not be extended to a multi-state study to find more generalizable results.

Perhaps a more vexing problem is the fact that not all of the judges on the Texas Supreme Court in her study were uniformly conservative. The party-adjusted ideology scores (PAJID scores, see Brace, Langer, and Hall 2000) for the judges in her dataset ranged from 44.77 (a moderate judge) to 8.51 (a very conservative judge).[7] In her statistical model, McCall actually controls for ideology because she expects the more moderate judges to make liberal decisions sometimes, even in the absence of campaign contributions. Thus, her test of causality for the moderate judges is less convincing.

I develop an approach to studying the relationship between attorney contributions and judicial decisions that could be applied in a wide variety of circumstances of judicial ideology, cases, and types of litigants. I draw from the congressional campaign finance literature relating campaign contributions to roll-call votes in Congress. While the approach is generalizable, in this article I seek to simply establish a foothold for the notion that campaign contributions may directly affect court outcomes by examining the 2003 term of the Supreme Court of Georgia.

JUDICIAL CAMPAIGNS AND DECISIONS IN THE SUPREME COURT OF GEORGIA

The Supreme Court of Georgia is staffed by seven justices who are selected to serve six-year terms in nonpartisan elections. The elections are staggered so that the entire court does not simultaneously face re-election. The court

exercises considerable control over its own docket, allowing them to hear and decide cases as they see fit. While Georgia's judicial elections are not as politicized as those in Texas and Ohio,[8] they are still costly, with candidates in the 2002 and 2004 elections raising an average of $220,000 per candidate. These factors, taken together, make Georgia a suitable test case for the relationship between attorney contributions and judicial decisionmaking.

My data consist of two databases. The campaign contribution database contains the names of all attorneys and law firms who contributed to the campaigns of the six available justices[9] in their most recent elections, along with the amounts contributed. The court outcomes database contains information about each non-unanimous case[10] decided by the Supreme Court of Georgia in the 2003 term, including the names of the attorneys representing the liberal and conservative sides of each case and whether each judge voted in a liberal or conservative manner on each case.[11] The cases represent a wide variety of areas of the law, and approximately half are criminal cases.

These two databases were merged by matching the names of the attorneys arguing the cases with the names of attorneys giving campaign contributions. The result is a dataset showing whether a justice cast a liberal vote on a case and the amount of money the justice received from attorneys arguing each side of the case. The key hypothesis is that, all else being equal, when a justice receives contributions from attorneys on the liberal side of a case, that justice is more likely to make a liberal decision on that case. Conversely, a justice receiving contributions from conservative attorneys is less likely to make a liberal decision on that case. The hypothesis that arises from role theory suggests no relationship here.

Over one-third of the cases in the dataset involved an attorney who contributed to at least one of the justices hearing the case. Table 1 presents descriptive statistics on these campaign contributions. The average contributions from liberal attorneys and conservative attorneys across all observations in the dataset are approximately $260 and $145, respectively. These average amounts appear small because there are a substantial number of cases (just under two-thirds) where no justice received any contributions from attorneys arguing the case. The average size of attorney contributions to a judge when any such contributions were made is approximately $2,600 for the liberal side and $2,300 for the conservative side of a case. When attorneys make contributions, they tend to be significant sums. The largest amount of money contributed by an attorney was $6,200.

Table 2 shows the basic relationship between attorney contributions and judges' decisions. The table shows whether an individual judge ruled liberally or conservatively and whether that judge had received more contributions

Table 1. Descriptive Statistics

	Average over All observations	Average over All contributions	Minimum	Maximum
Liberal attorney contributions	$259.51	$2,622.37	$0	$6,200
Conservative attorney contributions	$144.79	$2,316.67	$0	$5,550

Table 2. Campaign Contributions and Judges' Decisions

	Conservative attorney(s) contributed more	Equal contributions from both sides	Liberal attorney(s) contributed more	Total
Liberal Ruling	0	68	11	79
	0%	*40.48%*	*64.71%*	*41.58%*
Conservative Ruling	5	100	6	111
	100%	*59.52%*	*35.29%*	*58.42%*
Total	5	168	17	190
	100%	*100%*	*100%*	*100%*

Note: Cell entries are frequencies with column percentages in italics. Fisher's exact test: p=.027.

from the liberal side, more contributions from the conservative side, or equal contributions from both sides (almost always $0 from both sides). In all five instances where the attorneys on the conservative side contributed more than the liberal attorneys, the conservative side won. In 65 percent of cases (11 of 17 cases) where the liberal attorneys contributed more than the conservative side's attorneys, the liberal side won. This relationship is statistically significant (Fisher's exact test $p = .027$).

Table 2 provides some preliminary evidence for a correlation between contributions and judges' decisions, but it stops short of the ultimate goal in two ways. First, it establishes a correlation between contributions and votes, but it fails to establish causality. Second, it fails to control for other variables that influence judges' decisions and does not explore any of the possible nuances of the relationship. The correlation-causality problem will be addressed in the next section, but first, I develop a better-specified model.

Several case-specific factors might affect this relationship.[12] Prior research has demonstrated that governments have a high success rate in state supreme courts (Cann 2002). Accordingly, I control for whether the state or a local government was a party to each case in my dataset. As the government always falls on the conservative side of cases in my dataset, government participation in a case should decrease the likelihood of a liberal decision. Additionally, since the Supreme Court of Georgia allows the filing of *amicus curiae* briefs,

I include a variable for the number of such briefs for the liberal side (which should increase the probability of a liberal decision) and for the conservative side (which should decrease the chances of a liberal decision).

Next, I include judge-specific factors that could influence the judge's decision in a case. A judge's ideology can affect his or her decisions (Segal and Spaeth 1993; Comparato and McClurg 2002; Benesh and Martinek 2002). The problems associated with using previous votes as predictors of future votes are well-known, as are the problems with using party identification (Segal and Cover 1989; Brace, Langer, and Hall 2000). Accordingly, I measure a judge's ideology using his or her PAJID score (Brace, Langer, and Hall 2000).

STATISTICAL MODEL

Studies relating campaign contributions to congressional roll-call votes have successfully applied sundry variants of the familiar two-stage least squares (2SLS) estimator to disentangle the complex relationships between money and votes (Wright 1990; Grenzke 1989; Chappell 1982). The current study differs in an important way from these studies of congressional roll-call voting and campaign contributions. My dependent variable is a dichotomous indicator for whether a judge made a liberal decision in the case. Thus, the individual judge's decision is the unit of analysis, and I am analyzing the relationship between the probability of a justice making a liberal ruling and campaign contributions received from attorneys arguing the case. If there were no question of causality, a simple dichotomous probit would suffice. To deal with the endogeneity problem, I employ two-stage probit least squares (2SPLS) (Maddala 1983; Newey 1987). Details regarding the instruments and the statistical technique are contained in the Appendix.

The results of the 2SPLS model are in Table 3. The most prominent finding is that campaign contributions from both the liberal and conservative sides have strong, statistically significant effects in their respective expected directions.[13] In other words, the findings provide strong evidence that attorney campaign contributions have an influence on a judge's decision.

The magnitude of the effects of liberal and conservative contributions are approximately equal.[14] Given the nonlinear nature of the model, the coefficients themselves are difficult to interpret directly. The black line in Figure 1 graphs the probability of a liberal decision at varying levels of liberal attorney contributions assuming that the government is a party to the case and that all other variables (including conservative attorney contributions) are held constant at their means.[15] The gray line shows the predicted probability under

Table 3. Two-Stage Probit Least Squares Model of State Supreme Court Decisions

	Coefficient	Standard Error
Liberal attorney contributions	.0008*	.0003
Conservative attorney contributions	−.0013*	.0003
Government as party	−.503*	.229
PAJID ideology score	−.007	.026
Number of liberal amici	−.186	.053
Number of conservative amici	−.037	.054
Constant	.648	1.240
Percent correctly predicted	64.4	
Proportional reduction of error (PRE)	.21	
n	190	

*p<.05, one-tailed.

Note: The dependent variable is coded 1 for a liberal vote and 0 for a conservative vote. The percentage correctly

the same circumstances, but holding liberal attorney contributions at its mean and varying conservative attorney contributions. The figure shows that the effects of campaign contributions are substantively significant, with a contribution of $2,000 essentially securing the outcome of the case, assuming the other side contributed no more than the average contribution (approximately $260 for the liberal side and $145 for the conservative side).

These results confirm earlier findings (Cann 2002) that state supreme courts tend to defer to the government. When the state or local government is a party to the case, the probability of a liberal decision drops by over .2. However, in contrast to previous work on state supreme court decisionmaking (Comparato and McClurg 2002; Benesh and Martinek 2002), ideology appears to have little effect on court decisions in this dataset. One possible explanation for this discrepancy with earlier research is that contributions simply matter more than ideology. A second, and perhaps more likely, explanation for this unusual result is the ideological homogeneity of the Supreme Court of Georgia. While PAJID scores potentially range from 0 to 100, the scores of the judges on the court in 2003 range only from 40.23 to 51.35. With relatively little variation in this independent variable, it should not be surprising that it has no leverage on the dependent variable. In some sense, the ideological homogeneity of the court essentially controls for the ideology of the judges. That is, since the judges share the same party identification and have little difference in ideology, whatever differences that exist in voting must be attributed to other factors.

Finally, the estimated effects of amici briefs were not as expected. The number of conservative amici had no statistically significant influence on the probability of a liberal decision. The coefficient on the number of lib-

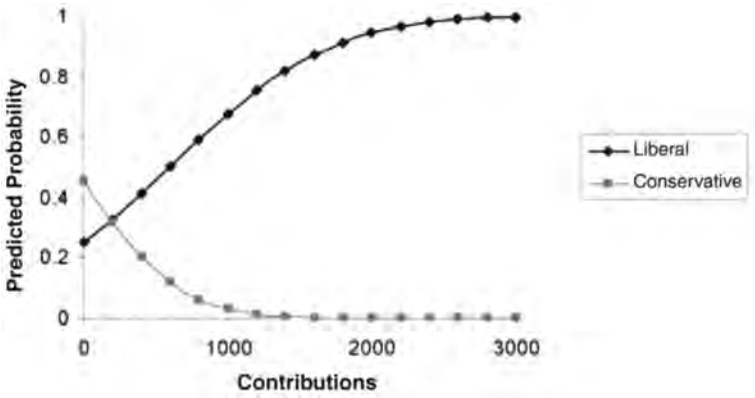

Figure 1. Predicted Probabilities of a Liberal Decision at Varying Contribution Amounts

eral amici has the wrong sign and would be statistically significant in the negative direction with a two-tailed test. It may be that people file amicus briefs mainly when they fear a case will be decided unfavorably, leading to high numbers of amici in cases that the liberal side is likely to lose while no amici file on the liberal side in cases where the liberal side is a likely winner.

THE ISSUE OF GENERALIZABILITY-FINDINGS IN GEORGIA AND WISCONSIN

The purpose of this article was simply to create an empirical foothold for the notion that campaign contributions from lawyers can directly affect the votes of state high court judges. While the analysis of my dataset strongly supports the existence of such a relationship, the data are limited to six judges in a single term of a single state supreme court. Future research must determine whether these results can be generalized to other judges, states, and years. Future research also needs to explore the circumstances under which the influence of campaign contributions is most likely. After all, in previous research, I found no relationship between contributions and votes in Wisconsin (Cann 2002), but here I find such a relationship in Georgia. While a single-state study cannot assess the importance of state institutional factors on this relationship, a brief comparison of my findings in Wisconsin and Georgia may at least give a suggestion of the institutional effects future research should explore.

Table 4 compares selected features of the Wisconsin and Georgia supreme

Table 4. A Comparison of the Georgia and Wisconsin State Supreme Courts

Characteristic	Georgia	Wisconsin
Method of selection	Nonpartisan election	Nonpartisan election
Number of judges on state supreme court	7	7
Public finding for judicial elections	No	Yes
Length of terms	6 years	10 years
Political Culture	Traditionalistic	Moralistic

courts. Both states use nonpartisan elections and have the same number of judges on their courts, so the divergent results cannot be explained by these institutional factors. However, there are other differences between the two courts that could make campaign contributions more influential in Georgia. In particular, in Wisconsin candidates meeting certain criteria can qualify for partial public funding of their campaigns. This policy could lessen the need for candidates to raise funds and thereby decrease judges' reliance on attorney contributions.[16] Georgia offers no public funding to judicial candidates.

Two other potentially important institutional differences exist. Wisconsin Supreme Court judges are elected to 10-year terms while Georgia Supreme Court judges serve for only six years. This additional isolation from elections and campaign contributors may give Wisconsin judges a greater degree of independence. Second, political culture could play an important role in attitudes toward campaign finance. In Elazar's (1972) typology, Wisconsin has a "moralistic" political culture while Georgia is "traditionalistic." Johnston (1983) empirically shows that moralistic states are significantly more concerned with matters of political cleanliness than traditionalistic or individualistic states. Wyatt (2002) specifically argues that moralistic states will be most supportive of campaign finance reforms like public financing. The fact that Wisconsin is generally supportive of campaign finance issues and is willing to pay for partially public-funded elections indicates their commitment to certain political values.

The variation in the structure of judicial institutions in the states is rich. This comparison of Wisconsin and Georgia suggests that variation in judicial institutions may be an important piece of the puzzling relationship between campaign contributions and judicial decisionmaking. My analysis of this Georgia data, based on a single year in a single state, is limited in the extent to which it can explain how contributions to judicial candidates may be affecting court outcomes nationwide. However, it does suggest that a study investigating this relationship on a larger scale is certainly warranted.

CONCLUSION

At the outset of this article, I began by asking an important but controversial question: Do campaign contributions from attorneys influence judges' decisions? By bringing data from the 2003 term of the Supreme Court of Georgia to bear on the question, I have empirically established a relationship between campaign contributions from lawyers and the way judges vote. While limited in scope, the results of this study have important implications for the debate over how judges should be selected in the United States. Many states use some form of competitive elections, and some people have even proposed that federal judges ought to be elected rather than appointed (Davis 2005). The question of election or appointment has been characterized as a choice between maximizing the accountability of the judiciary versus maximizing its independence (Dubois 1980; Hall 2001). As a compromise between the two systems, the popular Missouri Plan merit selection system provides for the appointment of judges to an initial term after which judges must stand for a retention election. My study suggests that competitive elections may seriously compromise the independence of the judiciary. Even though my analysis focuses on a single state, it establishes the existence of some circumstances under which *quid pro quo* electoral exchanges may occur even in the judicial branch. Furthermore, it is difficult for elected judges to be accountable to the electorate when they are first accountable to their campaign contributors. Nevertheless, my earlier research suggests that well-tailored campaign finance laws can protect the independence of the judiciary and make elective systems work (Cann 2002).

Notwithstanding the limitations of a single-state study, demonstrating that campaign contributions influence judicial decisionmaking in Georgia is a vital step in understanding how campaign contributions matter in elective judicial systems holistically. While this evidence does not demonstrate that similar influence exists in all elective systems, it motivates further study of campaign contributions and judicial elections by showing that campaign contributions do matter in some circumstances. With larger, multi-state studies, we may be able to establish empirically which types of elective judicial selection systems are most resistant to fostering relationships between campaign contributions and court decisions.

APPENDIX: STATISTICAL PROCEDURES

To estimate the effect of campaign contributions on judicial voting, the 2SPLS estimator, like the familiar 2SLS estimator, requires an instrumental variable that is related to the

amount of money contributed to a justice but unrelated to that justice's decision. These instrumental variables are then used in a first-stage equation to purge the endogenous variables of their correlation with the error term. The purged variables can then be used in the second-stage equation to obtain correct estimates.

The model to be estimated here has two endogenous independent variables. Liberal attorney contributions and conservative attorney contributions. In order for the 2PSLS to be just identified, we need two instrumental variables; more instruments would make the model over-identified. Because I use three instruments, the model is over-identified. One instrumental variable is whether the judge faced opposition in his or her previous election to the court. Justices who face an opponent will need to raise more money than justices who run unopposed and, therefore, would be more likely to have received contributions from both liberal and conservative attorneys. But whether judges faced opposition in their election has nothing to do with their likelihood of ruling in a liberal or conservative manner on a particular case.

I use two additional instruments: whether one side of the case has a public defender as an attorney and whether a district attorney is among the attorneys arguing the case. These attorneys tend to have lower salaries than private attorneys and contribute much less frequently to judicial candidates. However, there is no reason to believe that the presence of a public defender or district attorney as counsel in a case makes it more likely to have the case decided in either a liberal or conservative fashion.

The model is estimated with Newey's (1987) conditional maximum likelihood estimator. A Wald test for exogeneity rejects the null hypothesis that the contribution variables are exogenous ($p < .01$). Thus, we can proceed with confidence that the instrumental variables approach was necessary. The first stage estimates appear in Table A1. In each equation, one or more of the instruments has a strong, statistically significant effect on

Table A1. First Stage Estimates from 2SPLS Model

	Liberal $	Conservative $
	Coefficient *Standard Error*	Coefficient *Standard Error*
Contested	736.08*	323.68
	223.46	174.30
Public defender	−396.92	−343.88**
	329.97	239.65
District attorney	−79.94	−342.14*
	181.48	143.14
PAJID	3.96	3.19
	25.72	20.49
State as party	−93.52	17.27
	217.93	174.80
Liberal amici	104.21*	−23.33
	35.29	28.43
Conservative amici	−40.24	−33.80
	41.65	34.54
Constant	−71.21	75.72
	1213.11	968.63

*p<.05, **p<.10, one-tailed

the respective endogenous variables. Specifically, conservative contributions are lower when one of the attorneys is a district attorney (and the coefficient for public defender is statistically significant at the $p < .10$ level). Also, conservative contributions are higher for judges who had an opponent in the previous election. Liberal contributions are similarly higher for judges whose previous election was unopposed.

ENDNOTES

The author thanks Chris Bonneau and Jeff Yates for helpful comments. Bryan Cole provided excellent research assistance.

1. In most states (but not all), the state supreme court is the court of last resort. For ease of exposition, I use the term 'state supreme court' to refer to the court of last resort in a state.

2. Campaign spending data for the Supreme Court of Georgia were provided by the National Institute for Money in State Politics. When looking at the occupations of donors, it is clear that in judicial campaigns lobbyists make up only a tiny fraction of the contributions in this category. This small amount likely occurs because lobbyists cannot get access to judges in the way they can with state legislators. Thus, this 65.5 percent figure almost entirely reflects contributions from attorneys and law firms.

3. Results of the full survey are available at http://www.justiceatstake.org.

4. By non-elective goals, I mean legal goals (such as ruling in support of precedent, as adherents to the legal model of judicial decisionmaking would suggest), political goals (ideological preferences as adherents to the attitudinal model would suggest), or moral principles.

5. An additional problem with previous judicial decisionmaking studies is that they restrict themselves to cases of a certain type, such as torts or cases with two business litigants. More general results can be obtained by examining many different types of cases (Cann 2002).

6. In a previous study, McCall (2001) used different measures and reached similar results.

7. Updated and revised PAJID scores downloaded from Laura Langer's website (http://www.u.arizona.edu/~llanger) are used throughout the paper.

8. On the politicized nature of Ohio campaigns, see Baum and Hojnacki 1992, and on Texas see, among others, Champagne 1986 and Jackson and Riddlesperger 1991.

9. Contribution data for Leah Sears' most recent election was not available through the National Institute for Money in State Politics, the source of all of the campaign finance data in this paper.

10. Songer (1982) shows that unanimous reversals actually reflect the ideological preferences of the majority coalition. There are two primary reasons why I still chose to omit unanimous cases. First, the mechanism producing the unanimous decisions on circuit courts of appeal studied by Songer (1982) was presumed to be precedent or some objective factor. In the instance of state supreme courts, the mechanism producing the unanimous decisions, as argued by Brace and Hall (1992), is a norm of unanimity (both in cases that affirm or reverse). Thus, it is not clear that Songer's theoretical reasoning for expecting ideology to be prevalent in unanimous reversals applies to state courts. Second, even if the

Songer result does apply to state courts it is somewhat problematic, while the unanimous reversal may reflect the ideological persuasions of the majority of the judges who ruled on the decision, a judge in the minority may end up being pressured to change his/her vote to create a unanimous outcome. If a contribution was made to a judge who was pressured not to support the contributor in order to create a unanimous outcome, this would mitigate the effect of campaign contributions. Looking at nonunanimous cases does indeed make for a less conservative test of the hypothesis that contributions influence decisions, but the goal of this study is to look for the effect of contributions in the place where it is most likely to be found (because if it were not found in such a place, we could be very confident that it never occurs).

11. I coded votes as liberal or conservative based on the criteria used in the Spaeth Supreme Court Database. The database and coding rules are available at http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm.

12. Note that one advantage of analyzing only unanimous cases is that this controls for any norm of unanimity that might override the potential influence of campaign contributions. While this method creates a less conservative test, my goal is simply to gain a foothold for the idea that campaign contributions may affect judges' votes directly.

13. The sizes of the contribution coefficients may appear small, but because the unit is in dollar of contributions, the magnitude of a $1,000 contribution is substantial. See Figure 1 for an illustration of the magnitude of the effect.

14. A Wald test of the difference between the coefficient for liberal attorney contributions and the coefficient for conservative attorney contributions fails to reject the null hypothesis.

15. These means for contribution levels refer to the means computed from all observations, i.e., $259.51 for liberal attorney contributions and $144.79 for conservative attorney contributions.

16. It is important to note that judicial candidates in Wisconsin are not required to take public funds.

REFERENCES

Amemiya, Takeshi. 1978. "The Estimation of a Simultaneous Equation Generalized Probit Model." *Econometrica* 46:1193–205.

Benesh, Sarah C., and Wendy Martinek. 2002. "State Court Decision Making in Confession Cases." *Justice System Journal* 23:109–33.

Bonneau, Chris W. 2005. "What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections." *State Politics and Policy Quarterly* 5:107–25.

Brace, Paul, and Melinda Gann Hall. 1990. "Neo-Institutionalism and Dissent in State Supreme Courts." *Journal of Politics* 52:54–70.

Brace, Paul, Laura Langer, and Melinda Gann Hall. 2000. "Measuring the Preferences of State Supreme Court Judges." *Journal of Politics* 62:387–413.

Cann, Damon M. 2002. "Campaign Contributions and Judicial Behavior." *American Review of Politics* 23:261–74.

Champagne, Anthony. 1986. "The Selection and Retention of Judges in Texas." *Southwestern Law Journal* 40:66–117.

Champagne, Anthony. 1988. "Judicial Reform in Texas." *Judicature* 72:146–61.
Chappell, Henry W. 1982. "Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model." *Review of Economics and Statistics* 64:77–83.
Comparato, Scott A., and Scott McClurg. 2002. "State Supreme Court Compliance with Supreme Court Precedent." Presented at the Annual Meetings of the Midwest Political Science Association, Chicago, IL.
Davis, Richard. 2005. *Electing Justice: Fixing the Supreme Court Nomination Process* Oxford, UK: Oxford University Press.
Dubois, Philip. 1980. *From Ballot to Bench: Judicial Elections and the Quest for Accountability.* Austin, TX: University of Texas Press.
Elazar, Daniel J. 1972. *American Federalism: A View from the States.* New York, NY: Thomas Y. Crowell.
Gibson, James L. 1978. "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model." *American Political Science Review* 72:911–24.
Goldberg, Deborah, Sarah Samis, Edwin Bender, and Rachel Weiss. 2005. *The New Politics of Judicial Elections 2004.* Washington, DC: Justice at Stake Campaign.
Goldberg, Deborah, and Samantha Sanchez. 2004. *The New Politics of Judicial Elections 2002.* Washington, DC: Justice at Stake Campaign.
Grenzke, Janet. 1989. "Shopping in the Congressional Supermarket: The Currency Is Complex." *American Journal of Political Science* 33:1–24.
Hall, Melinda Gann. 2001. "State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform." *American Political Science Review* 95:315–30.
Hall, Melinda Gann, and Chris W. Bonneau. 2006. "Does Quality Matter? Challengers in State Supreme Court Elections." *American Journal of Political Science* 50:20–33.
Hansen, Mark. 1991. "The High Cost of Judging." *ABA Journal* 77:44.
Jackson, Donald W., and James W. Riddlesperger. 1991. "Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court." *Judicature* 74:184–9.
Johnston, Michael. 1983. "Corruption and Political Culture in America: An Empirical Perspective." *Publius* 13:19–39.
Maddala, G.S. 1983. *Limited-Dependent and Qualitative Variables in Econometrics.* Cambridge, UK: Cambridge University Press.
Mayhew, David. 1974. *Congress: The Electoral Connection.* New Haven, CT: Yale University Press.
McCall, Madhavi. 2003. "The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997." *Politics and Policy* 31:314–43.
McCall, Madhavi. 2001. "Buying Justice in Texas: The Influence of Campaign Contributions on the Voting Behavior of Texas Supreme Court Justices." *American Review of Politics* 22:349–73.
Newey, Whitney. 1987. "Simultaneous Estimation of Limited Dependent Variable Models with Endogenous Explanatory Variables." *Journal of Econometrics* 36:231–50.
Segal, Jeffrey, and Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model.* Cambridge, UK: Cambridge University Press.
Schotland, Roy. 1985. "Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?" *Journal of Law and Politics* 2:57–167.

Waltenburg, Eric N., and Charles S. Lopeman. 2000 "Tort Decisions and Campaign Dollars." *Southeastern Political Review* 28:241–63.

Ware, Stephen J. 1999. "Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama." *Journal of Law and Politics* 25:645–86.

Wright, John R. 1990. "Contributions, Lobbying and Committee Voting in the U.S. House of Representatives." *American Political Science Review* 84:417–38.

Wright, John R. 1996. *Interest Groups and Congress: Lobbying, Contributions, and Influence.* Boston, MA: Allyn and Bacon.

Wyatt, Benjamin J. 2002. *The Origins of State Public Financing of Elections.* Unpublished Honors Thesis, Wesleyan University.

JUSTICE IN JEOPARDY

REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY

The recommendations contained within this report do not reflect the official positions or policies of the American Bar Association. The recommendations will be presented to the ABA House of Delegates at its 2003 Annual Meeting for adoption as official policies of the ABA.

JUSTICE IN JEOPARDY

REPORT OF THE
AMERICAN BAR ASSOCIATION
COMMISSION ON THE 21ST CENTURY JUDICIARY

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American Bar Association

Commission on the 21st Century Judiciary
Justice in Jeopardy

Executive Summary

The judicial systems of the United States at the beginning of the 21st Century remain unparalleled in their capacity to deliver fair and impartial justice, but these systems are in great jeopardy. Our state courts play a critical role in preserving American freedom and democracy. Almost 100 million cases are resolved peacefully and with relatively little fanfare by some 30,000 state judges each year. Increased political involvement in the judiciary, diminished public trust and confidence in the justice system, and uncertain resources supporting the courts place burdens on the judiciary's capacity to provide fair and impartial justice. Indeed, the escalating partisanship and corrosive effects of excessive money in judicial campaigns, coupled with changes in society at large and the courts themselves, have served to create an environment that places our system of justice, administered by independent and impartial judges, at risk.

ABA President Alfred P. Carlton, Jr., convened the Commission on the 21st Century Judiciary to study, report and make recommendations to ensure fairness, impartiality and accountability in state judiciaries. The Commission held four public hearings, generating over 1,000 pages of testimony, and a national colloquium, attended by over 150 judges, lawyers, law and social science scholars, and members of the public. The hearings and colloquium focused on recent developments in the states that have politicized the judiciary and on demographic trends affecting how courts conduct their business.

The Commission recognizes that effective, independent and impartial judicial systems require the trust and confidence of the public, which must understand and care about its courts. A set of enduring principles underscores the importance of an independent, impartial judiciary to uphold the rule of law in a constitutional, democratic republic. Challenges to these enduring principles are identified. Recommendations serve as a framework for the ABA and the states to address and counteract the developments that are adversely affecting the fair and impartial administration of justice.

Eight enduring principles should be central components to each state's understanding of the role of the judiciary as a co-equal branch of government. These principles recognize that judges should uphold the rule of law and be impartial and independent, while possessing the appropriate temperament and character, as well as appropriate capabilities and credentials. Moreover, judges should have the confidence of the public and the justice system should be diverse, reflecting the society it serves. Finally, judges should be constrained to perform their duties in a manner that promotes public trust and confidence in the courts.

A number of factors and trends have led to the excessive politicization of state courts. Among these are the proliferation of controversial cases generally; the rediscovery of state constitutions as a basis to litigate constitutional rights and responsibilities; the increases in caseload; the interposition of intermediate appellate courts between trial courts and courts of last resort; the spread of the two-party system; the emergence of single-issue groups; and the presence of a skeptical and conflicted public. Additional challenges for the judiciary include changes in

classes of litigants, including a trend towards *pro se* litigation and its impact on the role of the trial judge; changes in the demographic composition of America, with concomitant impact on the public's confidence in the courts; and changes in the role of the courts, including the rise of problem-solving courts.

These factors and trends contribute to increased politicization of the courts, placing the fair and impartial administration of justice is at risk. Increasingly expensive state judicial campaigns focus on narrow issues of intense political interest, contributing to the public's perception that judges are influenced by their contributors. Some of the most partisan and misleading campaign related speech comes in the form of "issue advertising." The viability of judicial ethical standards are at risk, especially in light of recent judicial decisions, including that by the U.S Supreme Court in *Republican Party of Minnesota v. White*, limiting some ethics rules. The pronounced lack of diversity in the judicial system inhibits public trust and confidence in the courts, as do apparent trends in the relationships between courts and legislatures that too often have been problematic, manifested by attempts to cut the judiciary's budget, curb court jurisdiction, remove judges from office, and constrain courts' constitutional interpretations.

Thirty-one recommendations address the challenges threatening state courts at the beginning the 21st Century. The first set of recommendations is designed to preserve the judiciary's institutional legitimacy by enhancing judicial qualifications, training, evaluation, ethical standards and diversity. The second set of recommendations is designed to improve judicial selection by encouraging appointment of judges who serve for long terms with limited opportunity for reselection while offering a number of alternatives for jurisdictions that continue to elect and retain judges. The final set of recommendations is designed to promote an independent judicial branch that works effectively with its coordinate branches of government.

An independent judiciary guarantees every citizen access to a branch of government designed to protect the rights and liberties afforded by federal and state constitutions and to resolve disputes peacefully and impartially. Fundamental to this unique role of the courts is the necessity for the judiciary to be distinct from the other two branches of government, functioning independently to ensure an effective role in the American tradition of a republican form of government. The differences unique to the judiciary, manifested in ethical restrictions on judges, judicial selection methods, and the nature of the judicial process, are vital aspects of maintaining balance among the branches of government. With the promulgation of a comprehensive set of recommendations, the Commission on the 21st Century Judiciary provides a call to action that will maintain independent, impartial state judiciaries, functioning as effective, co-equal branches of government, for generations to come.

American Bar Association
Commission on the 21st Century Judiciary

I. ENDURING PRINCIPLES

A. Judges should uphold the law.
B. Judges should be independent.
C. Judges should be impartial.
D. Judges should possess the appropriate temperament and character.
E. Judges should possess the appropriate capabilities and credentials.
F. Judges and the Judiciary should have the confidence of the public.
G. The judicial system should be racially diverse and reflective of the society it serves.
H. Judges should be constrained to perform their duties in a manner that justifies public faith and confidence in the courts.

II. PRESERVING THE JUDICIARY'S INSTITUTIONAL LEGITIMACY

A. Judicial Qualifications, Training and Evaluation

- States should establish credible, neutral, non-partisan and diverse deliberative bodies to assess the qualifications of all judicial aspirants so as to limit the candidate pool to those who are well qualified.
- The judicial branch should take primary responsibility for providing continuing judicial education, that continuing judicial education should be required for all judges, and that state appropriations should be sufficient to provide adequate funding for continuing judicial education programs.
- Congress should fully fund the State Justice Institute.
- States should fully fund the National Center for State Courts.
- States should develop judicial evaluation programs to assess the performance of all sitting judges.

B. Judicial Ethics and Discipline

- The American Bar Association should undertake a comprehensive review of the Model Code of Judicial Conduct.
- The codes of judicial conduct should be actively enforced.

C. Diversification of the Justice System

- Members of the legal profession should expand their use of training and recruitment programs to encourage minority lawyers to join their firms, they should include them fully in firm life, and they should prepare them for pursuing careers on the bench following their years in practice.
- Active promotion of a representative work force and diverse court appointments.
- Courts should act aggressively to ensure that language barriers do not limit access to the justice system.
- Courts should have in place formal policies and processes for handling allegations of bias.
- Information regarding diversity should be shared among the courts in a state and among the states.
- Measures should be adopted to improve and expand jury pool representation.

D. Improving Court-Community Relationships

- Courts should take steps to promote public understanding of and confidence in the courts among jurors, witnesses and litigants.
- Courts should engage and collaborate with the communities of which they are a part, by hosting trips to courthouses and by judges and court administrators speaking in schools and other community settings.
- The continuation of problem-solving courts as a means to promote public confidence in the courts.

III. IMPROVING JUDICIAL SELECTION

A. The preferred system of state court judicial selection is a commission-based appointive system, with the following components:

- The governor should appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, non-partisan, diverse deliberative body or commission.
- Judicial appointees should serve a single, lengthy term of at least 15 years or until a specified age. Judges so appointed should not be subject to reselection processes, and should be entitled to retirement benefits upon completion of judicial service.
- Judges should not otherwise be subject to reselection, nonetheless remain subject to regular judicial performance evaluations and disciplinary processes that include removal for misconduct.

B. Alternative Recommendations on Systems of Judicial Selection

- For states that cannot abandon the judicial reselection process altogether, judges should be subject to reappointment by a credible, neutral, non-partisan, diverse deliberative body.
- For states that cannot abandon judicial elections altogether, elections should be employed only at the point of initial selection.
- For states that retain judicial elections as a means of reselection, judges should stand for retention election, rather than run in contested elections.
- For states that retain contested judicial elections as a means to select or reselect judges, all such elections should be non-partisan and conducted in a non-partisan manner.
- For states that continue to employ judicial elections as a means of judicial reselection, judicial terms should be as long as possible.
- For states that use elections to select or reselect judges, states should provide the electorate with voter guides on the candidate(s).
- For states that use elections to select or reselect judges, state bars or other appropriate entities should initiate a dialogue among affected interests, in an effort to deescalate the contributions arms race in judicial campaigns.
- For states that use elections to select or reselect judges, state bars or other appropriate entities should reach out to candidates and affected interests, in an effort to establish voluntary guidelines on judicial campaign conduct.
- For states that do not abandon contested elections at the point of initial selection or reselection, states should create systems of public financing for appellate court elections.

- For states that retain contested judicial elections and do not adopt systems of public financing, states should impose limits on contributions to judicial candidates.

IV. PROMOTING AN INDEPENDENT JUDICIAL BRANCH THAT WORKS EFFECTIVELY WITH THE POLITICAL BRANCHES OF GOVERNMENT

- Standards for minimum funding of judicial systems should be established.
- The judiciary's budget should be segregated from that of the political branches, and it should be presented to the legislature for approval with a minimum of non-transferable line itemization.
- States should create independent commissions to establish judicial salaries.
- States should create opportunities for regular meetings among representatives from all three branches of government to promote inter-branch communication as a means to avoid unnecessary confrontations on such issues as court funding, judicial salaries, and structural reform of courts.

REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY

"the common task in which we [the bench and the bar] are all engaged – the great and sacred task – the administration of justice"

Justice Benjamin Cardozo

Chair's Introduction

The thirty thousand state court judges who constitute the judicial branches of our fifty states conduct 98% of the country's legal business. Each state's judiciary has the function of providing able and impartial administration of the state's justice system and ensuring justice for all who come before its courts. The trust and confidence of the public are essential to the success of the judiciary.

In recent years state judiciaries have been the subject of several professional surveys to determine how they are viewed by the public. As might be expected the results are in some respects positive, some negative and occasionally inconsistent.

Given the far flung, diverse nature of the fifty states, it is inappropriate to generalize; however, a closer look at these surveys as well as more recent developments suggest that trust and confidence in our judicial systems are on the wane and apathy and dissatisfaction are on the rise, more so in some states than others. Unless checked and addressed, the ability of the state judiciaries to fulfill their constitutional obligations in a democratic republic will be in jeopardy, with deleterious effects for the American system of justice and experiment in self government.

Our tasks are to identify the factors contributing to these trends, suggest ways to improve the current environment in which courts operate, and draw attention to the ramifications if we do nothing.

We have taken our tasks seriously, devoting many hours and much attention, guided by and taken advice from many persons with broad expertise and experience.

Despite the fact that the American system of justice remains the model for emerging democracies around the world, our exercise over the past few months reveals that there are storm clouds gathering that jeopardize the American judiciary's role as the template for establishing judicial organizations.

- Whatever its historic rationale there can no longer be justification for contested judicial elections accompanied by "attack" media advertising that require infusions of substantial sums of money. These contested elections threaten to poison public trust and confidence in the courts by fostering the perception that judges are less than independent and impartial, that justice is for sale, and that justice is available only to the wealthy, the powerful, or those with partisan influence.
- Present and anticipated state and municipal budget deficits have and will continue to impact adversely allocations to the judiciary resulting in reduction or even elimination of core judicial services.
- Within communities of color—that together will comprise a majority of the American people by the middle of this century—concern that they receive unequal, inferior treatment in the courts is compounded by a lack of confidence due to the lack of diversity throughout the judiciary. The perception of two forms of justice-- one for the wealthy and one for the poor -- is widespread.

Unless promptly addressed, one witness colorfully suggested that "Equal Justice Under Law" should be sandblasted from the Supreme Court Building.

- Other constituencies are distrustful of the judicial system especially in jurisdictions that have become magnets for tort litigation as they perceive the playing field as not level.
- The politics of crime imposes intense pressure on judges to decide criminal matters in a manner which satisfies popular expectations.
- Judicial branches are increasingly viewed by Legislative and Executive branches as impediments to policy implementation rather than as a partner, a coequal branch of government, in doing the people's business, with negative impacts for allocation of adequate resources.
- There is a growing concern that the courts are not meeting the public's expectations in areas involving domestic relations, family violence, juvenile justice and substance abuse.
- There is political opposition to support structural changes in the judiciary that would increase economical and efficient judicial administration.

These trends provide cautions and concerns to which we must devote attention and resources – intellectual and financial. The promise of America is broken if the public thinks that judges are captured by special interests, controlled by the wealthy and powerful, and unconcerned about the rights of racial, ethnic and political minorities. Our system of justice must contribute to fulfilling that promise.

The required ingredients for "able and impartial" administration of justice are qualified judges knowledgeable as to their roles and responsibilities and adequate resources supported by the coordinate branches of government to allow the judiciaries to meet, if not exceed, public expectation. It may be that these questions attract the most attention when addressing the problems affecting the judiciary.

But they are not the only issues that must be addressed in this area. The ABA's commitment to supporting judicial independence over the past few years reflects just how broad attention to these issues must be. President N. Lee Cooper convened the ABA Special Commission on Separation of Powers and Judicial Independence, which issued its report on July 4, 1997. Although focusing on the federal judiciary, the Commission noted that the challenges faced by the state judiciaries far outstripped those affecting the federal courts. Based at least in part on this assessment, President Jerome J. Shestack appointed a special committee on judicial independence, which had an immediate impact by encouraging ABA policy to assist those judges who found themselves on the wrong end of personal vindictive that impugned the trust and confidence of the public in the judicial branch. The response to this initiative from the states reflected the depth of concern about challenges to judicial independence at the end of the 20th Century.

The Association's commitment to these issues was strengthened when this special committee was transformed into a standing committee and President Philip S. Anderson appointed Alfred P. Carlton, Jr., as chair. During the next three years, this Committee, undertook important work, including the development of Standards for State Judicial Selection and a seminal proposal for public financing of judicial campaigns.

These projects contributed to legislative proposals around the country to improve judicial selection processes, including the 2002 enactment in North Carolina of the nation's first full public financing law for judicial campaigns.

During this time, other improvements were encouraged. The ABA Model Code of Judicial Conduct was amended to limit bad effects from judicial campaigns upon recommendations from the ABA Task Force on Lawyers' Political Contributions. President Anderson convened symposia that encouraged new thinking about judicial independence and public trust and confidence in the justice system. Indeed, in cooperation with the League of Women Voters, the Conference of Chief Justices and the Conference of State Court Administrators, the ABA under President Anderson participated in a national conference addressing weaknesses in the public support for the justice system.

Our work builds on these past experiences but is necessarily forward looking. President Carlton, in convening this Commission, advised us on more than one occasion to be bold, to think creatively, and not to be timid. The commission members, and their helpful advisory committee, represent a variety of viewpoints, including those of lawyers, judges, legal scholars, legislators, business executives, and citizens. Our experiences are diverse but our commitment is singular and focused: to identify the enduring principles of an independent judiciary and the circumstances that are diminishing these principles and to recommend strategies to preserve an environment that is true to the ideals of Adams, Hamilton and other Founders for an independent judiciary in a democratic republic.

Our able reporter, Professor Charlie Geyh, commissioned experts in several aspects of state judiciaries who provided us with excellent "white papers" that both gave us extensive background and prepared us for our first hearing, which was held in Detroit a week following the 2001 ABA Annual Meeting. We have proceeded from there –

meeting regularly, challenging each other and devising new ideas. We held three additional public hearings in three other disparate regions of the country – Philadelphia, Portland (Oregon), and Austin. We heard from more than 25 witnesses, ranging from state chief justices, law school deans, law and politics scholars, citizen advocates, corporate general counsel, plaintiff trial attorneys, judicial ethics administrators, bar association presidents and others. The transcripts of these hearings encompass more than 1,000 pages. We invited and received submissions from many others interested in our proceedings and ABA staff provided literally thousands of pages of studies, reports, and other resources. The Commission was most well informed, from its collective experiences and the perspectives shared with us by those who participated in its many activities. Our collective thinking has been refined by a colloquium focusing on draft findings and recommendations, where those interested enough to travel to Raleigh, N.C., probed and examined the intricacies of the commission's draft report. The final report is better for that experience in the marketplace of ideas.

Our approach has been shaped by obvious but perhaps often overlooked aspects of efforts to improve the administration of justice in the state courts. We know that no system of judicial selection has yet been devised that is either criticism-free or free from potential political manipulation. We know that no system of justice will be able to satisfy the aspirations of all those citizens who are touched by a goal of equal justice under law. Yet we strive to do the best we can with the resources that are available. Our examination of how this is occurring at the beginning of the 21st Century has been hopefully broad and thorough.

Perhaps we can summarize the objective of those interested in improving the environment for equal justice under law by noting that the goal is to attract able, qualified persons for judicial office and to provide a climate for their continuance in judicial office that shields them from improper, outside influences. It is noteworthy that the founding fathers, most

notably Adams and Hamilton, found little bases for debate as to a selection and tenure mechanism that would attract able and qualified persons, choosing presidential nomination and Senate confirmation with "good behavior" - basically lifetime tenure. Elections came into play in states in the early 19th century and debate has ensued ever since over the relative merits of the "best" means to select judges, with the result that there are varied and hybrid systems in place in states throughout the country and today there is agitation, if not organized initiatives, for change in many states.

If we were writing on a clean slate, based on what we now see in how judicial campaigns have come to be conducted and in light of the Supreme Court's recent decision in *Minnesota Republican Party v. White*, and its impact on the future, judicial elections would gradually be abandoned. Rather, in the 21st Century a preferred system of state court judicial selection would be a "commission-based appointive" system with components that are set forth in the report that follows.

But we write not on the clean slate but in recognition of the varied approaches of the citizens of the 50 states through their Constitutions have dealt and continue to deal with the conundrum of judicial selection. We offer recommendations as to changes in various existing election methodologies and urge that efforts to improve how judicial elections are conducted must continue, such as the trend to nonpartisan campaigns and the use of public financing mechanisms, in the face of difficulties to eliminate the use of judicial elections. Any selection system should be accompanied by a sound code of judicial ethics accompanied by effective, enforced judicial disciplinary procedures.

What follows is an effort to sound a warning bell. Our collective experiences confirm that the American judiciary is special, a work in progress to accomplish what had not been done before by ensuring that independent and impartial judges are motivated by the law

rather than by fear or favor. Our collective examination confirms that the American judiciary is at risk, its capacity to provide impartial decision making as an independent branch sanctioned by the federal and state constitutions threatened by partisan and financial exigencies that are infiltrating a system based on the rule of law. As these trends in American life and law can be identified at the beginning of the 21st Century, it is time now to expend leadership to maintain a feature that is as indispensable to American life as any other American institution – the uniquely independent American judiciary.

Edward W. Madeira, Jr.
May 1, 2003
Philadelphia, Pennsylvania

JUSTICE IN JEOPARDY
REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY
Opening

The judicial systems of the United States remain unparalleled in their capacity to deliver fair and impartial justice. This report explores the serious challenges that confront our judicial systems in the 21st Century, and seeks ways to address them. The focus on problems that our judiciary faces should not obscure the Commission's enormous sense of pride in and commitment to our system of justice generally and our judicial systems in particular, which remain second to none in the world. It likewise should not be construed to impugn the dedication, integrity or capabilities of the extraordinary women and men who are elected or appointed to serve our nation as judges. And in dwelling on the distance we have yet to travel, we must not forget the practicing lawyers who have brought us this far through their work in state and local bar associations, their support, financial and otherwise, for qualified judges and judicial candidates, and their simple devotion to protecting and preserving an independent and impartial judiciary.

In short, ours is a great judiciary, and our goal is to make certain that it remains so. It is in that spirit, we must report that all is not well. Although our judicial systems have served us long and admirably, they are systems in serious jeopardy. They are being jeopardized by the corrosive effect of money on judicial election campaigns, in which some lawyers, businesses, and others interested in the outcomes of the cases judges decide seek to buy advantage in the courtroom by influencing at the ballot box who will be judges. These infusions of campaign dollars have often been spent on attack advertising calculated to persuade a majority of the electorate that incumbent judges should be removed from office because they have made unpopular rulings in isolated

cases, or are beholden to their own campaign contributors. To date, not all states have experienced such problems, but the number that have is growing rapidly.

Such developments threaten to poison public trust and confidence in the courts, by fostering a series of perceived improprieties: that judges are less than independent and impartial, that justice is for sale, and that justice is available only to the wealthy, the powerful, or political and racial majorities. Within communities of color—that together will comprise a majority of the American people by the middle of this century—suspicion of the courts is compounded by a lack of diversity throughout the justice system. And these increasingly jaded views of the judiciary have begun to filter their way into the halls of state legislatures, where general assemblies often take a combative posture toward the judiciary when appropriating monies to fund court budgets and salaries.

The time has come to inoculate America's courts against the toxic effects of money, partisanship and narrow interests.

An independent judiciary is essential in a democracy governed by the rule of law. In our system of government, the people create constitutions that identify their individual rights, empower legislatures to make laws consistent with the terms of those constitutions, and authorize governors to faithfully execute the laws that legislatures make. The laws that the people establish in their constitutions, that legislatures enact in statutes, and that governors execute are intended to protect everyone: the rich, the poor, the majority, the minority, the powerful, and the powerless. If that objective is to be realized, however--if the law is to protect the one as well as the many--it is imperative that the administration of justice *not* become a popularity contest. We need judges who will tell us what the law is and how it applies in individual cases without regard to what the results of the latest opinion poll are, what the judge's campaign contributors think, or

what the political agendas of influential public officials may be. In other words, we need judges who are independent enough to uphold the rule of law, even when the law is unpopular. If the constitution is flawed, the solution is for the people to amend it. If a statute is flawed, the solution is for the legislature to revise it. The solution is not to intimidate a judge into declaring that the law says something it does not, because that will serve only to undermine the rule of law, upon which a constitutional democratic republic depends.

As important as an independent judiciary is to the rule of law in a representative democracy, public trust and confidence are equally so. The consent of the governed is a defining feature of democracy. Without it, democratic institutions must inevitably collapse. That is especially true of the judiciary, which controls neither the sword nor the purse and must depend on public acceptance for its continued existence as an independent branch of government. To the extent that significant segments of the public think that judges are captured by special interests, controlled by the wealthy and powerful, and unconcerned about the rights of racial, ethnic and political minorities, our system of justice is in very serious trouble.

This is not the first time that our courts have been imperiled. The cyclical threats that our state and federal courts have weathered are familiar to many. Our nation was barely a decade old, when the newly elected Jeffersonian Republicans sought to purge the federal courts of strident federal judges at the turn of the 19th century.[1] A generation later, Jacksonian Democrats attempted to control and in some cases defy state and federal courts. In the aftermath of the Civil War, Radical Republicans embarked on an aggressive program of court-curbing. A generation later, populists and progressives pursued numerous strategies to subdue conservative, *Lochner*-era courts on the state and

[1] EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 91-107 (1999).

federal levels, culminating in President Franklin Delano Roosevelt's "court-packing" plan. And two decades thereafter, hostility toward the Warren Court led to threats to defy its rulings and remove its justices.[2]

To say that our courts have been at risk before, however, is not to counsel complacency. To the contrary, it is only because those committed to the well-being of the judiciary responded to crises when they arose by stepping into the breach and defending or reforming the courts, that the judiciary's health has been assured. Nor does the recurrent nature of the challenges the courts have overcome imply that the problems the courts currently confront are no different from those of the past.

Ours is an ambitious project: to review the state of America's courts, and to address their most pressing needs for the coming century. To accomplish such an objective, it may help to place our efforts in historical context. Nearly a century ago, the last great court reform movement began with an address by Roscoe Pound to the American Bar Association, on "The Causes of Popular Dissatisfaction with the Administration of Justice." In that address, Pound isolated four primary sources of dissatisfaction.

The first was "causes for dissatisfaction with any legal system." The second was "causes lying in our Anglo-American legal system." Unlike the first two sources of dissatisfaction, which Pound regarded as inherent in legal systems generally or our American system in particular, the third—"causes lying in American judicial organization and procedure"—he viewed as remediable. It is here that Pound focused his reform agenda.

The fourth and final source of dissatisfaction that Pound discussed, related to "causes lying in environment of our judicial administration." Here, Pound called specific

[2] *Id.* at 54-59.

attention to “public ignorance of” and lack of interest in judicial systems; to the “strain” borne by law to replace “absolute theories of morals” that had “lost their hold” upon society; to the “putting of our courts into politics” and “compelling judges to become politicians,” which had “almost destroyed the traditional respect for the Bench,” and to the press for creating the “impression that administration of justice is but a game.” Pound regarded this final source of dissatisfaction as one which reformers could not remedy because it “inhere[d] in the circumstances of an age of transition.” It is, in some sense, a little odd that he should dedicate the entirety of his reform agenda to addressing the penultimate cause of dissatisfaction he identifies, and close not with a bang but a whimper by detailing a final cause of dissatisfaction that he viewed as unavoidable. It is prescient, however, in that this last cause of dissatisfaction with the courts that Pound left dangling, is the one that confounds us most a century later, and is the one to which we devote the bulk of our attention in this report.

It is perhaps understandable that Pound gave short shrift to problems with the “environment of our judicial administration” that he attributed to “an age of transition,” problems which he may have assumed would disappear once the transition was complete. But over the course of the past century, the pace of cultural, social, political and technological change has accelerated to the point of placing us in a state of perpetual transition. The problems to which Pound alluded: the politicizing of our courts; public apathy toward, distrust of, and lack of familiarity with our judicial systems; and friction over the roles played by courts and legislatures in what would become an age of legal realism, have not been transitory, but have become entrenched. As a consequence, his assessment that these problems “will take care of themselves” has proved overly optimistic.

As the Supreme Court has observed, courts serve as "havens of refuge for those

who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement."[3] Our judicial system is second to none in the world in upholding the rule of law for the benefit of majority and minority alike. But problems nearly a century in the making have recently worsened dramatically, driving that system to the brink of crisis. Now is the time to do something about it.

Commission Mandate

American Bar Association President Alfred P. Carlton, Jr., has directed our Commission:

> To provide a framework and ABA policy that enable the Association to defuse the escalating partisan battle over American courts; to accommodate the principles of merit selection in a new model of judicial selection that minimizes the escalating politicization; to develop a set of guiding principles for an independent, accountable, and impartial judiciary in the 21st Century; to involve broad based constituencies of the legal and nonlegal communities in devising the necessary framework.

The first clause of our charge articulates the Commission's goal: to create a framework for addressing and alleviating the extent to which our courts have been excessively politicized. The remainder directs us to pursue this goal in three ways: by exploring how to improve judicial selection; by articulating principles to promote an independent and accountable judiciary; and by reaching out to the widest possible audience in developing recommendations for defusing the partisan battle over the courts and thereby preserving the principles that ensure judicial independence and accountability.

The logical starting point in the Commission's analysis is with the principles that ought to guide the 21st century judiciary—enduring principles underscoring the importance of an independent, impartial judiciary in a constitutional democratic republic, that upholds the rule of law, and maintains the trust and confidence of the people who the

[3] Chambers v. Florida, 309 U.S. 227, 241 (1940).

judiciary serves. Once these principles have been enumerated in Part I of this Report, in Part II we will describe recent developments among the states, including but not limited to events occurring in the context of judicial selection, that have politicized the judiciary in ways that challenge some of those enduring principles. Finally, in Part III, we offer a series of recommendations to serve as a framework for the ABA and the states to begin to address and counteract developments that have politicized the courts unnecessarily.

I. Enduring Principles

In 1780, nearly a decade before the United States Constitution was ratified, the Commonwealth of Massachusetts adopted a constitution of its own, drafted in large part by John Adams. The document begins with a declaration of rights, Article XXIX of which provides:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

The aspirations Adams articulated for the fledgling judiciary of the late 18th century apply with equal force to the judiciary of the 21st century. Embedded in his simple declaration are several principles that should be isolated and emphasized.

Before launching into that discussion, however, it bears emphasis that while all states should strive to promote the following principles for all their judiciaries and judges that is not to say that all states must employ the same means to promote those ends for all judges. Within any given state, the problems confronting the high court of a state may be significantly different in nature or severity from those confronting the trial courts, which may call for very different solutions. Among states, fundamental differences in constitutional structure, history and culture may make certain reforms desirable and viable in some jurisdictions, but not others.

For example, the Massachusetts constitution that John Adams devised, sought to promote an independent and impartial judiciary by providing that its judges would be appointed to serve during good behavior. Beginning roughly fifty years later, a number of states concluded that they could better serve the ends of judicial independence (in addition to other objectives) by selecting their judges in partisan elections, on the theory that judges who derived their authority directly from the people would be stronger and more independent than those who had been appointed by the governor. Another fifty years thereafter, around the turn of the 20th century, several states determined that partisan elections made judicial candidates too dependent on the political parties for their nomination, and sought to make judges more independent by opting for non-partisan judicial races. And beginning in the early part of the 20th Century, yet another group of states began to decide that contested elections did not adequately promote a capable, qualified and independent judiciary, and devised a system of appointment based on "merit," in which voters would later have an opportunity to retain or oust the judge in retention elections.

We thus confront a patchwork of judicial selection systems across the states, each of which is designed to achieve the same goal of promoting an independent, impartial judiciary. While generalizations concerning the desirability of particular reforms are sometimes possible, respect for state autonomy and an appreciation for interstate differences counsel caution in that regard.

That much said, it bears emphasis that each of the approaches to judicial selection described above were the products of different movements emerging over the course of our history. It has been close to a century since the last of those movements began its course. The time is ripe for a fresh look at an old problem.

Principle 1: Judges should uphold the rule of law

In our system of government, "we the people" ordain, establish, and in so doing consent to be governed by organic laws known as constitutions. The U.S. and state constitutions structure the federal and state governments and enumerate the rights of the people that the government must respect. Those constitutions have structured our governments as representative democratic republics, in which the people elect representatives to make and execute statutory laws that govern them.

Representative democratic republics depend for their success upon the rule of law in two critical respects. First, the rules of law that the people's representatives have embodied in statutes will serve their purpose only if they are honored in the observance and enforced when they are broken. Second, those who make and implement the statutory law must respect both the limits on their own power and the rights of the people as required by the higher law of the constitution.

The all-important task of upholding the rule of law, by determining what the constitutional and statutory law requires and bringing it to bear in individual cases, is one that our constitutions have delegated to judges. When constitutional or statutory law supports the position of an unpopular litigant or group, judges are required to uphold the law in favor of the minority, despite majority opposition. Thus, Adams was not overstating his point by declaring that if the "rights of every individual" are to be protected, it is "essential" that judges be willing and able to interpret and uphold the laws preserving those rights.

To say that judges should uphold the rules of law that the people and the political branches make warrants qualification. Under the common law, for instance, judges remain responsible for lawmaking. More important, perhaps, the notion that constitutional or statutory law is sufficiently fixed and clear that judges can invariably

divine its meaning uninfluenced by their personal or political experience is increasingly unrealistic. One can, however, concede that constitutional and statutory law is sometimes subject to differing interpretations that can be influenced by the judicial or political philosophy of the interpreter, and still recognize that ambiguous law is nonetheless law, which judges have a duty to interpret and uphold. Indeed, it is ambiguity in the law and its application to specific cases that makes judges indispensable to the operation of government and the ultimate triumph of the rule of law.

Principle 2: Judges should be independent

Governors and legislators are not expected to be "independent" of the people; to the contrary, these officials are expected to represent their respective constituencies by acting on the policy preferences of those who elected them. Judges, however, are different. Once voters' policy preferences are enacted into rules of law, it is up to judges to ensure that those rules of law are faithfully interpreted and upheld—an all but impossible task if judges are subject to the influence of threats, favors or "constituencies" that could endanger their unbiased judgment. Put another way, the rule of law would be corrupted if interest groups, public officials, powerful private citizens, or fleeting majorities of the public could intimidate a judge into interpreting a law to their liking or reading a law out of existence altogether. Unlike governors and legislators, then, judges must be, as John Adams urges us, as "independent as the lot of humanity will admit."

Although Adams extolled the virtues of judicial independence generally, it is possible to subdivide judicial independence into two distinct forms, both of which are instrumental to upholding the rule of law. First, judges must be independent enough individually to resist external efforts to influence their decision-making inappropriately. In this regard, it is essential that a judge's interpretations and applications of law be

controlled by what she construes the law to mean, and not by what others would coerce or cajole her into saying it means.

Second, judges must be independent enough collectively as a branch, to resist institutional encroachments from the other branches of government that could place the judiciary—and the decisions its judges make—under political branch control. On this point, the adequacy of judicial salaries, budgets and working relationships with the other branches of government, among other concerns, may be critical to the judiciary's capacity to preserve its strength and institutional integrity. In sum, it is important that judges and the judiciary possess decision-making *and* institutional independence.

Principle 3: Judges should be impartial

A primary goal of judicial independence, as Adams recognized, is "impartial interpretation of the laws." Judges occupy the role of umpires in an adversarial system of justice; their credibility turns on their neutrality. To preserve their neutrality, they must neither prejudge matters that come before them, nor harbor bias for or against parties in those matters. They must, in short, be impartial, if we are to be governed by the rule of law rather than judicial whim.

Judicial independence is necessary but alone may be insufficient to ensure impartiality. It is necessary, because a judge who is not independent may be unable to remain impartial; if he is subject to external manipulation or control of his decision-making, he may lack the capacity to

be or remain open-minded and unbiased. Independence alone, however, is insufficient, because independence provides no guarantee of impartiality: a judge can be entirely independent, but nonetheless biased and closed-minded. If independence alone is not enough to assure impartiality, the question becomes: what more is necessary?

Principle 4: Judges should possess the appropriate temperament and character

If judges are to be impartial, they must not only be independent, but also possess the appropriate judicial temperament. They must be committed to the rule of law. They must be women and men of integrity, who are evenhanded, open-minded, and unyielding to the influence of personal bias. They must be strong-minded and tolerant of criticism, yet resistant to intimidation. Then, and only then, can we be certain that an independent judge will be a truly impartial judge.

Principle 5: Judges should possess the appropriate capabilities and credentials

Up to this point in the discussion, the focus has been on those principles that will assist in discouraging judges from consciously ignoring the rule of law, because they are less than independent, less than impartial, or lack the necessary judicial character or temperament. All of this assumes, however, that the judge is capable of ascertaining what the law is, and how it should be enforced on a case-by-case basis. For this to be a safe assumption, however, the judge must possess the requisite intelligence, legal training and experience.

The relevance of judicial temperament, character, capabilities and credentials underscores the importance of the relationship between judicial selection and the rule of law. Judicial systems can and should be structured to provide judges and the judiciary with institutional and decision-making independence. But independent judges may not be impartial judges who will uphold the rule of law, unless the pool from which their selection is made is carefully limited to those who possess the necessary temperament, character, capabilities and credentials. That, in turn, may underscore the role that independent, deliberative bodies can and should play in defining the pool from which judicial candidates are elected or appointed.

Principle 6: Judges and the judiciary should have the confidence of the public

The first five principles focus on those attributes needed to enable judges to uphold the rule of law. Even if judges follow the rule of law admirably and to the letter, however, it is also important that the public perceives them as doing so. When it comes to judges and the judiciary, appearances matter. That is why Canon 2 of the Model Code of Judicial Conduct declares that "a judge shall avoid . . . the appearance of impropriety in all of the judge's activities," and specifies in Part A of that Canon, that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." And that is why, in the federal system, judges must recuse themselves not only when the judge "has a personal bias or prejudice concerning a party," but also when a judge's "impartiality might reasonably be questioned."

Appearances matter because the public's perception of how the courts are performing affects the extent of its confidence in its judicial system. And public confidence in the judicial system matters a great deal, for at least two reasons. First, and perhaps foremost, public confidence in our judicial system is an end in itself. A government of the people, by the people and for the people rises or falls with the will and consent of the governed. The public will not support institutions in which they have no confidence. The need for public support and confidence is all the more critical for the judicial branch, which by virtue of its independence is less directly accountable to the electorate and thus perhaps more vulnerable to public suspicion.

Second, public confidence in the courts is a means to the end of preserving an independent judiciary. If the public loses its faith in a judiciary it perceives to have run amok, the obvious solution will be to bring the judiciary under greater popular control, to

the ultimate detriment of judicial independence and the rule of law that judicial independence makes possible.

The importance of public confidence in the courts is difficult to overstate. The ability of the courts to serve their purpose in a constitutional democratic republic turns on the public's acceptance and support. Without it, an otherwise sound judiciary cannot long endure.

Principle 7: The judicial system should be racially diverse and reflective of the society it serves

Principle 7 follows naturally from principle 6. The courts are required to protect all the people, and not just popular majorities, for which reason an assessment of the extent of public confidence in the courts must go beyond cursory reviews of general public opinion surveys. If certain segments of the public, defined along racial, ethnic, economic or other lines, do not share the majority's faith in the judiciary, it is a problem that must be addressed. Principle 5 underscored the importance of a judge's qualifications and credentials, while principle 6 emphasized the need for public trust and confidence in the judicial system. Given the need for promoting public confidence in the judiciary within segments of the community that have become increasingly suspicious of the courts, efforts to diversify the bench may fairly be regarded as a qualifications issue as well as one germane to promoting public confidence. We are becoming a more and more diverse people. Our judiciary and the judicial system (including judges, clerks, staff, lawyers and juries) should reflect the diversity of the society in which we live. If they do not, the legitimacy of the courts and the judicial system will be called into question with increasing frequency.

Principle 8: Judges should be constrained to perform their duties in a manner that justifies public faith and confidence in the courts

Judicial independence has its limits. While we do not want judges to be

dependent on any individual or group that might impair their capacity to apply the law fairly and without favoritism, neither do we want judges to exercise power arbitrarily. The judge who acts arbitrarily undermines both the rule of law and the public's confidence in the judicial system.

Judicial independence, then, must be tempered by judicial accountability. We are mindful that the phrase "judicial accountability" is subject to misuse. It can be employed in the service of those who would, in the name of "judicial accountability," obliterate judicial independence and the rule of law altogether by intimidating judges into contorting the law to reach results that are popular with temporary majorities of the public. In our view, however, accountability should be defined more narrowly, to serve the principles of a good judicial system that we enumerate here.

Principle 1, for example, declares that judges should uphold the rule of law; those who do not should be accountable to an appellate process that corrects judicial error. Principle 2 declares that judges should be independent; those who compromise their independence by taking bribes should be held accountable to criminal and impeachment processes. Principle 3 declares that judges should be impartial; judges who exhibit bias in individual cases should be held accountable to a recusal process. Principles 4 and 5 declare that judges should maintain the appropriate temperament and competence; if they do not, they should be accountable to a disciplinary process.

Taken together, then, these processes for promoting this eighth principle of accountability advance the goals of principles 1 through 5. At least as, if not more important, these processes, will further the cause of Principles 6: enhancing public confidence in the courts.

II. Recent Developments

Having spelled out some of the principles that have guided our state and federal

judiciaries in the past and, in the Commission's view, should continue to guide them in the future, we turn now to the task of describing recent developments that have politicized the American judiciary. "Politicize" is an amorphous term. The self-evident definition of "politicize" is "to make political," and if "political," is defined innocuously to mean pertaining to the "structure or affairs of government,"[4] then a "politicized judiciary" is an untroubling truism. When we speak in terms of making the judiciary more "political," however, we typically mean to say making judges more like politicians, and the judiciary more like the political branches. Even then, a "politicized" judiciary is not invariably problematic: the judiciary, like the political branches, should be answerable for its budget, subject to improvements in the efficiency of its operations, and open to criticism. Moreover, to the extent that judges are asked to uphold the rights of the politically unpopular and are subject to intense criticism when they do, this additional pressure that judges bear may be part of the price we pay for the rule of law. It is only when the courts are politicized in ways that undermine the defining principles of a good judiciary enumerated in the preceding part of this report that problems arise.

A. The Politicizing of State High Courts

Although the recent developments this report discusses are categorized in terms of their application to lower courts and high courts, this is at best a rough means of classification. As we emphasize again later, many of the problems we describe here in our discussion of appellate courts likewise apply to lower courts. By the same token, some of the problems we elaborate upon later in our discussion of lower courts—such as the lack of diversity within the judiciary—apply equally to the appellate courts.

[4] THE AMERICAN HERITAGE DICTIONARY 960 (2d Coll. Ed. 1982).

1. Trends Contributing to the Politicizing of State High Courts

A confluence of trends has contributed to making state high courts more politicized. Some of these trends are generations in the making, and reflect fundamental changes in the role of American courts over time. These trends, described in this subsection, have created an environment conducive to the emergence of problems to which we turn in the subsection that follows.

a. The proliferation of controversial cases generally

Commission consultant G. Alan Tarr reports on "the increasing involvement of courts, particularly in recent decades, in addressing issues with far-reaching policy consequences," which he characterizes as a "major development with implications for judicial independence."[5] Professor Robert Kagan noted the beginnings of this trend a generation ago, when he observed that courts had recently become "less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change."[6] Consistent with Professor Kagan's observations on state courts, in the federal system only 296 civil rights suits were commenced in 1961, as compared to 34,027 cases thirty years later.[7] The expanding civil rights docket is one manifestation of a trend toward increased judicial involvement with policy-laden social and political issues that has embraced a wide range of subjects, from environmental protection, to the rights of criminal defendants, abortion, political apportionment, education funding, and the liability of entire industries for toxic torts.[8] It bears emphasis that our intent is not to

[5] G. Alan Tarr, *State Judicial Selection and Judicial Independence* 10 (see appendix).
[6] Robert Kagan, et al, *The Business of State High Courts, 1870-1970,* 30 STAN L. REV. 121, 155 (1977).
[7] Elizabeth Norman, Jacob Daly, *Statutory Civil Rights*, 63 MERCER L. REV. 1499, 1499-1500 (2002).
[8] Richard Birke & Louise Teitz, *U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 183-85 (2002) (discussing categories of cases contributing to the "litigation explosion").

criticize these developments as deleterious, but to describe the confluence of events that have contributed to the political pressure under which our courts operate.

Explanations for this trend are many, varied, and sometimes contradictory: some attribute it to lawyers who have encouraged litigation into controversial arenas.[9] Others point to judges and their alleged propensity toward greater judicial activism.[10] Still others, such as former Chief Justice Warren Burger, have argued that the people themselves labor under a "mass neurosis," which leads them to "think that courts were created to solve all the problems" of society.[11] And still others explain the development in terms of a "law explosion" in which legislatures have expanded the range of statutory remedies available to litigants.[12]

It is beyond the scope of our project to divine the root cause for this trend toward increased judicial decision-making on politically sensitive subjects, or to applaud or condemn it. Suffice it to say that while the courts have always heard cases on highly controversial issues, they may be doing so now more than ever, which places the courts in the middle of politically charged situations with unprecedented frequency.

b. The rediscovery of state constitutions

While federal and state courts both witnessed an upsurge in the controversial, policy-laden cases they were called upon to decide in the latter half of the twentieth century, this trend has become especially noticeable in state court systems. In her report to the Commission, consultant Emily Van Tassel observes "the politicization of state constitutional decision-making coincides with the 'new federalism' of the Reagan era and the willingness of many state appellate courts to look to their own constitutions for

[9] *See, e.g.* WALTER OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991).
[10] *See, e.g.* MAX BOOT, OUT OF ORDER (1998); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjorn Vallinder, eds) (1995)
[11] Warren Burger, *Using Arbitration to Achieve Justice*, 40 ARB. J. 3, 5 (1985).
[12] Albert Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier System in Civil Cases*, 99 HARV. L. REV. 1808, 1817-18 (1986).

guidance in many areas of law previously left to the federal constitution."[13] Professor Tarr concurs that this "rediscovery of state constitutions" called upon state judges to "shape the law of their states," and reports that this development was encouraged by social reform groups that "began to look to state courts as a new arena in which to pursue their goals" as the U.S. Supreme Court became increasingly unsympathetic to their agenda.[14]

As Professor Tarr implies, state courts do not explore novel questions of state constitutional law on their own initiative, but rule on such questions because litigants ask them to do so. As social reform groups began to shift the focus of their efforts toward the less familiar terrain of state constitutional law, state courts were called upon to explore this new frontier. Often times, state constitutions have been read no differently than their federal counterpart. In some instances, however, state courts have read the text of their constitutions differently than comparable text from the U.S. Constitution as construed by the U.S. Supreme Court. In other instances, state constitutions explicitly provide for the protection of rights that the federal constitution does not.

Our essential point here is not normative, but descriptive. Whether these recent developments reflect a salutary change in which state courts are protecting rights too long neglected, or a troubling one in which those courts are overstepping traditional bounds, is well beyond the scope of our report. Rather, our point is simply that state courts have become a new forum of choice for litigation of constitutional rights and responsibilities, which has placed them in the political spotlight with increasing frequency.

c. *Increases in appellate caseload and the interposition of intermediate appellate courts between trial courts and courts of last resort*

[13] Emily Van Tassel, *Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciaries* 3 (see appendix).
[14] See also William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

The National Center for State Courts reports that "starting in the 1950s and continuing through the 1980s, the number of cases filed in state appellate court systems grew to the point that caseloads were doubling nearly every ten years."[15] The Center adds, that "[i]n response, states established two-tiered appellate court systems."[16] As of 1958, only thirteen states had established intermediate appellate courts.[17] Today, they are in place in forty-one states.[18]

The success of intermediate appellate courts at reducing state high court workload has been mixed: often, high courts have experienced temporary relief in the years after intermediate appellate courts were created, but gradually returned to their earlier state of congestion.[19] To provide the state high courts with an additional means of docket control, many states have coupled the creation of courts of appeals with adjustments to the supreme court's appellate jurisdiction, that has given the highest court greater discretion to decline appeals from decisions of the intermediate courts.[20] This has put the high courts in a position to limit their caseload by allowing the courts of appeals to serve as courts of last resort in routine or "easy" cases and confine the cases they hear to important, difficult, and often controversial matters.[21] As a consequence, the percentage of the high courts' docket dedicated to politically sensitive cases is greater, and the likelihood that its decisions will more routinely generate political controversy is correspondingly higher.

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[15] National Center for State Courts, Examining the Work of the State Courts, 2001 at 76.
[16] *Id. See also,* Robert Kagan, Bliss Cartwright, Lawrence Friedman & Stanton Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 972-81 (1978).
[17] Victor Eugene Flango, Nora Blair, *Creating an Intermediate Appellate Court: Does it Reduce the Caseload of a State's Highest Court?*, 64 JUDICATURE 75, 77 (1980).
[18] Peter Murray, *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?*, 52 ME L. Rev. 43 (2000).
[19] Victor Eugene Flango, Nora Blair, *supra* note 17 at 84.
[20] G. ALAN TARR, MARY CORNELIA ALDIS PORTER, STATE HIGH COURTS IN STATE AND NATION 49 (1988); NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS 76 (2001).
[21] *Id.*

d. The spread of the two-party system

Alan Tarr identifies the spread of two-party competition throughout the United States as "one of the most dramatic changes during the latter half of the twentieth century." The relationship between this development and the politicizing of the judiciary is readily apparent. States without meaningful two-party competition typically foster less rancorous judicial races than states where competition between the parties is intense. The decline of single-party dominance in many states over the course of the past generation—particularly in the south—has corresponded with increasingly fractious judicial campaigns in those jurisdictions. Heated campaigns of the past decade in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina and Texas are illustrative. Even states with ostensibly "non-partisan" general elections for judges, such as Michigan and Ohio, have experienced highly politicized races, where two-party competition is fierce and the party affiliations of the candidates are widely known.

e. The emergence of a skeptical and conflicted public

The preceding developments have not been lost on the general public, which shows signs of becoming increasingly skeptical of the view that judges are apolitical decision-makers who simply interpret and apply the law. Alan Tarr attributes this growing skepticism to two trends: a "general decline of confidence in the major institutions of American society;" and the "lessons of legal realism," which have filtered down from the legal community to the general public and left it with a deeper appreciation for the law's indeterminacy and susceptibility to political influence. James Bopp, Jr., made the point more bluntly in his testimony before the Commission:

"[T]he secret is out . . . Judges in the United States make law and the people in the United States know that."[22]

Survey data lend support to this observation. A New Mexico survey conducted in the mid 1990s revealed that 61% of respondents disagreed with the proposition that "Politics do not influence court decisions in New Mexico."[23] More recently, a national survey commissioned in 2001 by the Justice at Stake Campaign asked whether the term "political" accurately described judges, and 76% responded that it described them "well" or "very well."[24]

It would be premature, however, to deduce from this survey data that the public simply rejects the notion that judges follow the rule of law and embraces the view that political considerations do or should be permitted to dominate judicial decision-making. Although 76% of respondents in the Justice at Stake survey thought that judges were "political," 79% of that same group believed that judges were "dedicated to facts and law." When asked whether judges "make decisions based more on facts and law," or "more on politics and pressure from special interests," 58% answered the former. In short, the public is alert to the interplay between politics and law, believes that both are involved in judicial decision-making, and is divided as to which is more influential, with a relatively slender majority believing that law trumps politics.

f. The emergence of single-issue groups

Alan Tarr discusses the emergence of single-issue groups and their relevance to politicizing the judiciary in his consultant's report. In the latter half of the twentieth century interest groups that formed to promote a specific political issue have become

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[22] Testimony of James Bopp, August 21, 2002 at 234**.** In light of the enduring principles that we have developed to guide the 21st century judiciary, it all but goes without saying that we do *not* believe that judges do or should "make law" as legislators do. Our point is limited to one of public perception.
[23] State Bar of New Mexico & Admin. Office of the Courts, Community Survey of Lawyers and the Legal System, §16 at xi (1997).
[24] Campaign, National Survey of American Voters: http://faircourts.org/files/JASNationalSurveyResults.pdf.

increasingly prominent in American politics generally, and more recently have begun to involve themselves in judicial politics. Several consultants have reported to the Commission on roles played by such groups as the Florida Right to Life Committee, the Chamber of Commerce, Oklahomans for Judicial Excellence, Citizens for a Strong Ohio, and the National Rifle Association in seeking to influence the outcomes of judicial elections. The potential for single-issue groups to influence judicial races may be heightened by the general absence of voter interest and participation, insofar as it may then be easier for a comparatively small, highly motivated block of voters to affect the results.

By their very nature, these groups politicize judicial elections because they seek to link an incumbent's tenure in office to her position on a single, politically incendiary issue. It is unsurprising, then, that these groups have been at the center of several of the most troubling developments described below.

2. Specific Problems Arising out of Heightened Politicization of State High Courts

The trends described in the preceding subsection have created a politicized climate among state high courts in which a series of troubling developments have recently occurred.

a. State high court election campaigns are increasingly focused on isolated issues of intense political interest

As state high courts began to decide more politically sensitive cases in a climate of increased two-party competition, with voters believing that politics influences judicial decision-making, and single-issue voter groups seeking to gain ground in judicial races, it was inevitable that high court campaigns would become more contested, and that those contests would center on one or two "hot button" cases decided by those courts. In some instances, attempts to punish judges with loss of tenure for

making unpopular decisions in these cases have been explicit. One notable example occurred in the aftermath of a retention election in Tennessee, in which the Governor remarked: "Should a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so."[25]

Without disputing the right of voters to elect whom they choose for whatever reason they deem persuasive, there is an obvious tension between this right and the preference of 78% of those polled in a recent survey, who believed that courts "should be free of political and public pressure."[26] As Florida Justice Ben Overton observed, "It was never contemplated that the individual who has to protect our rights would have to consider what decision would produce the most votes,"[27] and putting judges in such a position complicates considerably the principles that a judge should be independent, impartial, and uphold the rule of law.[28]

It is worth noting that the problems posed by hinging the outcome of judicial races on one or two politically sensitive issues are most acute in the context of campaigns in which an incumbent is up for reelection or retention. To be sure, there may be problems associated with placing pressure on would-be judges to compromise their future impartiality by revealing how they would decide an especially incendiary issue. But it is incumbents who are put at future risk of losing their tenure when they uphold unpopular laws, invalidate popular laws, or protect the rights of unpopular litigants. In such cases, it is incumbents who are thus presented with the impossible choice of sacrificing either

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[25] Stephen Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 166 (1997).
[26] See note 24 *supra.*
[27] Bright, *supra* note 25 at 166.
[28] Note that such dilemmas potentially faced by judges are not limited to the election context. In Virginia, "an otherwise routine public hearing on judicial nominations" in the Virginia House of Delegates erupted into a heated interrogation, when House Speaker S. Vance Wilkins, a staunch gun-control opponent, noticed that the judge before him had issued a controversial pro-gun-control ruling. While Wilkins foreswore any attempts to keep the judge off the bench, "the speaker's unusual personal interest" caused some to speculate whether "past rulings in gun-related cases could become litmus tests for reappointment to judicial posts. R.H. Melton, *House Speaker Presses Judge on Case*, WASHINGTON POST, January 25, 2002.

their careers, or their independence and the rule of law.[29] In thinking about the relationship between politicized judicial elections and the threats they can pose to judicial independence, then, it is important to differentiate between the issues that arise in the context of initial selection, and those that arise later, in the context of retention or reelection.

The issue at stake in these hot-button cases has varied from jurisdiction to jurisdiction:

Criminal cases: Consultant Jeannine Bell[30] indicates "state court judges around the country" have been challenged because of their rulings in capital and other criminal cases. Among the examples Professor Bell includes:

• In 1992, Florida Justice Rosemary Barkett's retention was opposed by the National Rifle Association and a group of prosecutors and police officers, on the grounds that she was "soft on crime."

• In 1992, Mississippi Justice James Robertson lost his reelection bid, on the basis of a death penalty decision the Justice wrote.

• In 1995, a sitting South Carolina justice was challenged for the first time in over a century, on the grounds that she was "soft on crime."

• In 1996, The Tennessee Conservative Union and other groups successfully campaigned for the defeat of Tennessee Justice Penny White on account of a decision she joined overturning a death sentence. In the next election cycle, Justice Adolpho Birch, Jr., resisted a challenge to his retention based upon his decision in the same case.

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[29] By example, a West Virginia editorial, pointing to state judges' lack of life tenure as the reason the state's powerful coal and labor interests prefer state over federal venues, asks: "What [state] judge is going to take on the coal industry? . . . What are the chances that any three of any five Supreme Court justices ever in office would want to simultaneously take on both the coal industry and the labor movement?" Dan Radmacher, *State Courts Best for the Status Quo*, CHARLESTON, W.V. GAZETTE, May 4, 2001.

[30] Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence* (see appendix).

• In 1999, a candidate challenged the Wisconsin Chief Justice's dissent from a decision upholding the constitutionality of the state's child predator law, suggesting that predators would be free to prey on children if the incumbent had her way.

• In some cases, judges have been supported or attacked for their positions on criminal justice issues as a pretext, by groups concerned about other issues less likely to play well with voters. Thus, for example, one group whose web page explained that it was launching a multi-state advertising campaign in judicial races to "stop the tidal wave of new lawsuits," ran ads in Mississippi focused entirely on the candidates' victims rights record.[31]

• It is also apparent that pressure on judges to decide criminal cases in certain ways is being brought to bear indirectly in the context of political, rather than judicial campaigns. In 2002, state senator Frank Murkowski, a candidate for Alaska governor, delivered a campaign speech in which he criticized Alaska judges for "coddling criminals," and he vowed to "alter" the judicial selection system to favor tough-on-crime judges."[32]

Civil cases: Consultants Carl Tobias and Andrew Spalding report to the Commission[33] that in several jurisdictions, corporate defendants and their lawyers have been alarmed by a concentration of recent tort cases filed in a small group of counties in a handful of states that have yielded "spectacular" punitive damages awards. More generally, court decisions on issues of tort reform and defendants' liability in products and medical malpractice cases have occupied center stage in a number of judicial races. These decisions have prompted segments of the business community to lobby more aggressively for tort reform legislation. A number of states have responded by passing

[31] Emily Heller & Mark Ballard, *Hard-Fought, Big-Money Judicial Races: U.S. Chamber of Commerce Enters Fray With Ad Money*, THE NATIONAL LAW J., Nov. 6, 2000 at A1.
[32] *Tough on . . . Judges?*, ANCHORAGE DAILY NEWS, August 16, 2002.
[33] See appendix.

tort reform legislation, the constitutionality of which has then been challenged, often successfully. That, in turn, has prompted the plaintiffs' trial bar and the business community to redirect their attention toward judicial campaigns. The net effect has been an escalating cycle of contributions and single-issue advertising campaigns in a number of jurisdictions around the country.

• In Alabama, a 1987 supreme court decision invalidating tort reform legislation has triggered an increasingly expensive battle for control of the court, in which some commentators have characterized judicial elections as "referenda on the trend of the court."

• In 2001 in Illinois, business groups vowed to focus on the next year's supreme court race, amid predictions that the cost of the race could exceed $2.5 million. The catalyst for the business groups' interest was an earlier decision striking down tort reform legislation.

• The Commission heard testimony from several witnesses, including ABA President-Elect Dennis Archer and Michigan Bar Association President Reginald Turner, on the 2000 Supreme Court races in Michigan. Those races featured multi-million dollar campaigns with ads attacking and defending justices regarded as business-friendly.

• In the Commission's hearing in Detroit, Michigan, several witnesses, including Chief Justice Thomas Moyer, Dean Joseph Tomain, and Dr. Bill Burges alluded to the 2000 election campaign of Ohio Justice Alice Resnick, who was criticized in ads run by the Chamber of Commerce, after writing the majority opinion in a case striking down tort reform legislation.

• A recent study reports that in Idaho, Louisiana, Ohio, and Michigan, "business groups . . . are preparing 'simplistic and misleading' evaluations of how judges vote in

environmental and other cases and using the results as the basis for supporting the judges for re-election or targeting them for defeat."[34]

Additional constitutional and statutory issues: Consultant Emily Van Tassel[35] reports on a number of additional races in which other discrete constitutional cases have served as a focal point in judicial races.

• In the 1998 California supreme court elections, Chief Justice Ronald George and Justice Ming Chin withstood challenges to their retention based on their rulings in abortion cases.

• In Florida, Justice Leander Shaw's retention was opposed on the basis of his ruling in an abortion case.

• In Idaho, Justice Cathy Silak lost her reelection bid, in large part because of her decision in a federal water rights case.

• In Ohio in 1998, opposition to Justice Paul Pfeifer focused on his decision in a school funding case decided under the Ohio Constitution (and was an ancillary issue in the reelection battle of Justice Alice Resnick in 2000).[36]

b. Judicial races are becoming more expensive

One natural consequence of judicial elections becoming more competitive and heated, is that more money is spent on judicial campaigns. In 2001, the ABA Commission on Public Financing of Judicial Campaigns found, "The cost of running judicial election campaigns is increasing dramatically across the country," and offered illustrations from eleven different states in support of that proposition. Since 1994, campaign expenditures by Supreme Court candidates have increased by over 100%, and

[34] Susan Finch, *Court Races Linked to Ecological Battles*, NEW ORLEANS TIMES-PICAYUNE, October 31, 2000.
[35] *See* appendix.
[36] Thomas Suddes, *Editorials and Forum,* CLEVELAND PLAIN DEALER, May 6, 1998 at 11B.

by 61% between 1998 and 2000 alone.[37] In 1995-96, average spending for 116 judicial candidates was around $260,000. In 1997-98 it had risen to an average of over $340,000 for 95 candidates; and in 1999-2000, 116 candidates spent an average of $431,000.[38]

During the 2000 election cycle, more than a million dollars was spent on supreme court races in each of nine states, including: Alabama, Illinois, Michigan, Mississippi, Nevada, North Carolina, Ohio, Texas and West Virginia.[39] It bears emphasis however, that there is tremendous variation among the states in campaign spending, with candidates in some states spending little or nothing.[40] One possible explanation for the variation may lie in the nature of the issues at stake in the different campaigns. Lawyers and business interests constitute the two most significant sources of contributions to judicial races nationally, and it is therefore reasonable to assume that spending will be greatest in those states where the issues at stake are those of greatest importance to lawyers and business. Consistent with that assumption, the four states with the highest spending levels—Alabama, Illinois, Michigan and Ohio—were states where the hot-button issue was tort-related liability, a matter of acute interest to plaintiff's trial lawyers, on the one hand, and the business community on the other.[41] In Illinois, for example, lawyers contributed more than $60,000 to Appellate Court Justice Melissa Chapman's campaign. Her opponent was able to raise only one-tenth as much money, with little of it coming from lawyers.[42]

It would be an over-generalization to suggest, as some have, that these competing interests are driven simply by a crass desire of plaintiffs or defendants to "buy" judges in

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[37] Deborah Goldberg, Craig Holman & Samantha Sanchez, *The New Politics of Judicial Elections*, *available at* http://bennancenter.org/resources/resources_books.html#ji, at 4.
[38] *Id.*; In Montana, the 2000 race for chief justice of the state Supreme Court was "one of the state's costliest" election campaigns of any branch, with each candidate raising more than one-third of a million dollars. Erin P. Billings, *High Court Race Getting Expensive*, BILLINGS GAZETTE, May 23, 2000.
[39] Goldberg, Holman & Sanchez, *supra* note 37.
[40] *Id.*
[41] *Id.*
[42] Kevin McDermott, *Lawyers Give Big to Judges' Campaigns*, ST. LOUIS DISPATCH, September 9, 2002.

jurisdictions where they happen to sue or be sued. As Thomas Gottschalk explained from the perspective of General Motors, his company does business, hires employees and litigates frequently in every state of the nation. As a "virtual… resident in the courts of most states," his company became concerned by the size of punitive damages awards in cases decided by courts in a limited number of jurisdictions, and lobbied legislatures to reform their tort laws.[43] For its part, the plaintiff's trial bar challenged the constitutionality of tort reform legislation in states across the country, and increased its contributions to judicial races that in turn prompted increased contributions by business interests. The net effect was to create a cycle of escalating contributions from all concerned, driven less by a scheme to manipulate case outcomes than a mutual desire to "level the playing field."

The spiraling cost of judicial campaigns may not, in and of itself, threaten the core principles identified in Part I of this report. It does, however, contribute to a series of related problems described below. As Dean Joseph Tomain testified before the Commission:

> Money is the elephant in the room on judicial selection. It raises serious questions, such as how much money is required for judicial election, from whom does it come, what is the public perception, and so on.[44]

c. The public believes that judges may be influenced by their contributors

As judicial races have become more expensive and hotly contested, the need to generate campaign contributions sufficient to cover escalating costs has become increasingly important. The sources of campaign contributions can be difficult to determine, although a recent study has been able to ascertain the contributor interests associated with 76% of the contributions to high court races between 1989 and 2000. It found that 29% of total contributions came from lawyers; 19.8% from general business;

[43] Testimony of Thomas Gottschalk, November 22, 2002 at 184-96.
[44] Testimony of Joseph Tomain, August 21, 2002 at 163.

11.8% from political parties; 7.8% from the candidates themselves; and the remaining 7.6% of identifiable contributions from labor interests, small contributions, other ideological groups, public subsidies, and "other" contributors.

We should caution against making too much of these statistics. For example, one might assume that the lawyers who make contributions to the campaigns of supreme court justices would typically be state supreme court litigators, but that does not appear to be the case. In Michigan, for example, lawyers constituted 23% of all contributors, but 80% of those lawyer-contributors never appeared before the court during the eight years under study. Studies in Illinois and Wisconsin have yielded comparable results. And while 89% of the cases coming before the Michigan Supreme Court featured at least one participating contributor, the contributors participating in litigation before the court together comprised only 4.5% of all contributors to the campaigns of court members (and contributed only 6.2% of all funds).[45] Finally, there is no evidence to demonstrate that contributing to a judicial campaign increases the contributor's likelihood of success in cases before the court.[46]

A perception problem nonetheless remains. Lawyers and businesses—the two most significant sources of campaign contributions—have an obvious interest in the outcomes of cases decided by the judges whose campaigns they help finance. As judicial candidates become ever more dependent on campaign contributions from lawyers and business for their continuation in office, it is unsurprising that the public has come to suspect campaign contributions of influencing judicial decision-making. One survey commissioned by the American Bar Association in 2002 found that 72% of respondents were extremely, very, or somewhat concerned that "the impartiality of judges is

[45] See Samantha Sanchez, Campaign Contributions and the Michigan Supreme Court (March 27, 2003).
[46] Dawson Bell, *Good News About Judicial Fairness Gets Overlooked,* (May 25, 2002).

compromised by the need to raise campaign money to successfully run for office."[47] Seventy-six percent of respondents in the Justice at Stake survey believed that campaign contributions exert some, or a great deal of influence on judicial decisions.[48] Fifty-five percent went so far as to agree with the statement that judges were "beholden to campaign donors," and 52% agreed that judges were "controlled by special interests."[49]

These results are consistent with earlier surveys conducted in several states. In Ohio, a 1995 survey reported that nine out of ten residents believed that campaign contributions influenced judicial decisions.[50] In Pennsylvania, a 1998 poll sponsored by a special commission appointed by the Pennsylvania Supreme Court, also found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions.[51] In Illinois, a 2002 survey sponsored by the nonpartisan Illinois Campaign for Political Reform showed that 85% of respondents agreed that campaign contributions influenced the decisions of judges.[52] In New Mexico, a poll conducted by the state's Administrative Office of the Courts revealed a strong perception that judges' decisions are influenced by "political considerations" and by "having to raise campaign funds."[53] And in Texas, a 1998 survey sponsored by the state Supreme Court found that 83% of Texas adults, 69% of court personnel, and 79% of Texas attorneys believed that

[47] Harris Interactive, A Study About Judicial Impartiality (August 2002).
[48] *See* note 24*, supra*.
[49] *Id.*
[50] T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE CLEVELAND PLAIN DEALER, February 15, 2000 1A.
[51] See, Report and Recommendations of the Task Force on Lawyers' Political Contributions, Part Two, American Bar Association, July 1998, at Appendix Seven, pp. 124-126.
[52] Steve Neal, *State Needs Fairer Way to Pick Judges*, CHICAGO SUN-TIMES, September 4, 2002.
[53] *Take Partisan Politics Out of Justice System*, THE SANTA FE NEW MEXICAN, June 20, 2000.

campaign contributions influenced judicial decisions "very significantly" or "fairly significantly.[54]

According to a Kansas editorialist, "[t]he money that is being contributed to the election campaigns of judges in parts of Kansas is compromising the integrity of the courts. Inevitably, people expect something in return for their contributions."[55] This notion was echoed by a Maryland judicial candidate, attorney Stuart Robinson, who in his 2002 race refused to accept campaign contributions. Calling his stance "a battle for the conscience and soul of our system," Robinson stated, "[T]here's a perception that if you contribute money, there's a payback down the road."[56] Such perceptions are perhaps inevitable where, as in Nevada, "[a]ttorneys who appear before judges, and casino officials whose companies sometimes have millions riding on rulings, are the ones who write the checks."[57] In Washington, an executive from an industry that had contributed the bulk of one Supreme Court candidate's sizable campaign war chest, said candidly: "[B]usinesses have a lot to lose in this election if the right person . . . isn't elected."[58]

Ohio Chief Justice Thomas Moyer summarized the concern well in his testimony before the Commission: there is "a perception from the people," Chief Justice Moyer explained, "that money contributions to judicial candidates do[] affect their decision[s]." He noted that public suspicion of the extent of influence will vary, depending on "how much money" is at issue, "how educated the people are," and "whether they've served on

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[54] Supreme Court of Texas, State Bar of Texas and Texas Office of Court Administration, *The Courts and the Legal Profession in Texas - The Insider's Perspective* (May 1999).
[55] *Keep Judges Out of Politics*, KANSAS CITY STAR, November 18, 2002.
[56] Michael Olesker, *To Candidate, Contributions May Seem to Tip Justice's Scales*, BALTIMORE SUN, August 29, 2002.
[57] Steve Sebelius, *Tipping the Scales of Justice*, THE LAS VEGAS REVIEW-JOURNAL, May 30, 2002.
[58] Angela Galloway, *Builders Backing Top-Court Candidate*, SEATTLE POST-INTELLIGENCER, October 25, 2002.

juries." Regardless of "whether it's true or not," however, "with the judiciary, the perception is almost as important as the fact."[59]

d. Some of the most politicized and misleading campaign related speech comes in the form of "issue advertising" developed by outside groups

In addition to the support that judicial candidates receive from direct contributions, candidates are often supported indirectly by independent campaigns that run their own advertising. A study of the 2000 supreme court election cycle reveals that of $10.7 million spent on television advertising, outside groups accounted for $2.8 million, as compared to $6.4 million by the candidates' themselves, and $1.5 million by the political parties. Although most of the dollars spent on television advertising came from the candidates, Dr. Craig Holman reported to the ABA Commission on Public Financing of Judicial Campaigns that 76% of all "attack ads"—ads attacking opponents, as opposed to promoting or comparing the candidates—were produced by independent groups.[60]

It has been this downward spiral of attack politics often run by independent groups—most notably in Ohio and Michigan—that Commission witnesses have found most problematic. Political consultant Bill Burges described the negative advertising campaign against his client, Ohio Justice Alice Resnick, by the group called Citizens for a Strong Ohio. Burgess noted the challenge posed by independent campaigns is that contribution and disclosure limits applicable to the candidates do not apply to such groups, making it "hard for a state legal system to get their hands around it."[61] Although the campaign backfired and Resnick won reelection easily, Dean Joseph Tomain told the

[59] Testimony of Thomas Moyer, August 21, 2002 at 107.
[60] REPORT OF THE ABA COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2001).
[61] Testimony of Bill Burges, August 21, 2002 at 194.

Commission that he found the experience quite troubling. The negative advertising, which "more than impl[ied] that Justice Resnick was receiving bags of money from special interests," made him rethink his earlier view that "matters of quality and independence are not dependent upon a particular judicial selection process" and led him to become increasingly skeptical of "the continued use of elections for judicial processes."[62]

In Michigan likewise, ABA President-Elect Dennis Archer testified that the Supreme Court candidates themselves did not "engage in any negative campaigning," but that outside supporters did, the net effect of which undermined respect for Michigan's system of justice.[63] Michigan State Bar President, Reginald Turner, went further, describing the episode as a "debacle," that dealt "a serious blow to public confidence in Michigan's judicial system."[64]

It is important to note that such developments are by no means confined to states such as Michigan and Ohio where media exposure of the problem has been greatest. In a 2002 primary election for the Idaho Supreme Court, for example, a group calling itself "Idahoans for Tax Reform dumped an estimated $75,000 into ads against Supreme Court Chief Justice Linda Copple Trout and for challenger Starr Kelso."[65]

e. The public is insufficiently familiar with judicial candidates, judicial qualifications, and the justice system

The developments described above place the electorate in a very difficult situation. High courts are deciding more and more controversial questions. Those questions are of central importance in judicial campaigns. The information voters receive

[62] Testimony of Joseph Tomain, August 21, 2002 at 163.
[63] Testimony of Dennis Archer, August 21, 2002 at 18.
[64] Testimony of Reginald Turner, August 21, 2002 at 83.
[65] Wayne Hoffman, *Task Force to Look at Role of Money in Judicial Campaigns*, IDAHO STATESMAN, June 8, 2002.

concerning those questions is communicated largely via advertising run either by the candidates themselves with money from contributors whom the public suspects of buying influence, or by outside groups whose largely unregulated and often misleading negative campaigns have helped to undermine public confidence in the courts. Under-informed about the candidates' positions on relevant issues, uncertain about the candidates' qualifications or training, and unfamiliar with the candidates' job performance, voters are often unable to cast an informed ballot, and so decline to vote in judicial races. It is, therefore, not uncommon to see less than 20% of the electorate voting in judicial races,[66] and as much as 80% of the electorate unable to identify the candidates for judicial office.[67]

One manifestation of this phenomenon is voter "roll-off," in which voters go to the polls and cast ballots for political branch candidates at the "top" of the ballot, but decline to vote in judicial races at the "bottom" of the ballot. For example, Michigan State Bar President Reginald Turner told the Commission that in 2000, there were 900,000 voters who voted for governor, Attorney General or Secretary of State, who did not vote in the supreme court races on the same ballot.[68] There is thus an obvious relationship between voter knowledge, voter apathy and the extent to which judicial elections can promote meaningful judicial accountability.

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[66] William Yelverton, *Low Turnout, But Voters Had Some Surprises,* TAMPA TRIBUNE, September 5, 1996 (reporting 17.5% turnout in local Florida judicial races); Stephanie Gauthreaux, *Judicial Race Vote Turnout Running Low,* THE BATON ROUGE STATE TIMES, December 8, 1990 (Reporting 13-15% turnout in Louisiana judicial race); Erich Smith, *Election Watchdogs Expect Low Turnout in Philadelphia*, Associated Press, May 17, 1997 (reporting an anticipated 12% turnout as a sign of "traditional voter apathy toward judicial races"); Sharon Theimer, *Lavish Campaign Spending Doesn't Lift Voter Turnout*, The WISCONSIN STATE JOURNAL, April 3, 1997 (reporting 21% turnout in state Supreme Court race).

[67] *People Want to Elect Judges But Don't Know Them*, THE BIRMINGHAM NEWS, March 26, 2000 (Reporting that between 80-85% of Alabamians could not identify 11 of 12 Supreme Court candidates); Gene Nichol, *Better Justice, By Appointment,* The Raleigh News & Observer, May 10, 2001 (citing exit polls in a neighboring state which revealed that "over 80% of voters said they had no idea who the judges they had just selected were").

[68] Testimony of Reginald Turner, August 21, 2002 at 83.

On a more general note, there may also be an extent to which lack of familiarity with the justice system and its operations corresponds with a lack of public confidence in the courts. A survey conducted by the American Bar Association in 1999 found that only 17% of respondents could name the Chief Justice of the United States; only 39% could identify all three branches of the national government; and when the questionnaire identified the three branches, many respondents exhibited considerable confusion as to their respective functions.[69] The survey then asked respondents about their confidence in the justice system and found that "people who are most knowledgeable are those who have the most confidence in the justice system." [70] Although this conclusion is not free from doubt,[71] it is corroborated by other studies.[72]

f. The recent decision of the United States Supreme Court in **Republican Party of Minnesota v. White, 536 U.S. 765 (2002),** *creates considerable uncertainty surrounding the constitutionality of ethical limits on judicial campaign speech*

Historically, state codes of judicial conduct have imposed significant limits on what judicial candidates may say in judicial races. They may not comment on pending cases,[73] take positions that appeared to commit them on issues that may come before the court,[74] appear at political functions,[75] or make promises of conduct in office.[76] This may help to explain why so much of the negative, case-specific advertising in judicial races

[69] American Bar Association, Perceptions of the U.S. Justice System (1999).
[70] *Id.* at 10.
[71] For example, a 1999 survey conducted by the National Center for State Courts found that "respondents who reported a higher knowledge about the courts expressed lower confidence in courts in their community." National Center for the State Courts, *How the Public Views the State Courts: a 1999 National Survey* 7 (1999). There is, however, a difference between respondents who *reported* a higher degree of knowledge in the NCSC survey, and those who *exhibited* a higher degree of knowledge in the ABA survey; moreover, the "knowledge" at issue in the ABA survey concerns factual knowledge about the justice system, as opposed to more general knowledge that may be derived from personal experience with the justice system.
[72] American Bar Association, Perceptions of the U.S. Justice System at 7-8 (1999).
[73] ABA Model Code of Judicial Conduct Canon 3(B)(9).
[74] ABA Model Code of Judicial Conduct Canon 5(A)(3)(d)(ii).
[75] ABA Model Code of Judicial Conduct Canon 5(A)(1)(d).
[76] ABA Model Code of Judicial Conduct Canon 5(A)(3)(d)(i).

has come not from the candidates themselves, but from independent groups. In *Republican Party of Minnesota v. White,* however, the U.S. Supreme Court left the continuing validity of some—if not all—of these restrictions in doubt, when it invalidated, on first amendment grounds, Minnesota's so-called "announce clause," which forbade candidates from announcing their views on disputed legal issues. Numerous witnesses before the Commission emphasized the significance of the *White* decision and the extent to which it will change the rules of judicial ethics and judicial elections across the country.

Some argue that the decision liberates candidates to communicate more information directly to voters and thereby offset the impact of misleading attacks by outside groups and address the information shortfall that discourages voters from participating more actively in judicial races. Attorney James Bopp, Jr., who represented the Republican Party in the *White* case, testified before the Commission that in his view, "preventing judicial candidates from expressing their general views is . . .decided," and that the "judicial canons frankly require a major revision" to be compliant with *White.* He regarded this as a positive step that the ABA should encourage rather than resist:

> Incumbent judges are most likely to be vulnerable to attacks . . .and the question is, are they going to be hamstrung? . . . There are just massive restrictions on judicial candidates that make judicial incumbents particularly victims of the process. They need to be allowed to participate . . . fully.[77]

Political consultant Bill Burges concurred. "If we're going to elect judges, then these races need to be political," he argued, and the candidates "need to be able to talk," because "if they can't, too much is taken out of their hands and the interest groups . . . will take over the entire debate."[78]

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[77] Testimony of James Bopp, August 21, 2002 at 243-44.
[78] Testimony of Bill Burges, August 21, 2002 at 207.

Others, however, worry that the decision in *White* threatens to compromise judicial independence and impartiality. Ohio Chief Justice Moyer testified that *White* had created a "treacherous" situation for candidates. As the Chief Justice noted, the decision invalidated a rule that prohibited judicial candidates from taking positions on issues likely to come before them, but did not address the validity of a related rule that prohibits candidates from promising to decide those issues in particular ways. That enables candidates to "pound the podium and say, I believe, I believe, I believe, and never . . . commit, never pledge, but . . . it's disingenuous to think people don't walk away thinking, if that issue ever comes by that candidate, he or she will probably vote that way."[79]

Illustrative, perhaps, of Chief Justice Moyer's point is a questionnaire that James Bopp, Jr., circulated to Indiana judicial candidates on behalf of Indiana Right to Life, shortly after he testified before the Commission. In the cover memo accompanying the questionnaire, Mr. Bopp carefully distinguished between candidates "speaking their minds on controversial political or legal issues," which was appropriate after *White,* and "pledges or promises," which in Mr. Bopp's view, were not. Candidates were then asked such questions as: whether they "believe that there is no provision in our current Indiana constitution which is intended to protect a right to an abortion;" whether they "believe that there is no provision of our current Indiana Constitution which is intended to protect a right to assisted suicide;" and whether they "believe that a person should be able to sue another because he or she was born alive with a disability rather than aborted."

Candidates cannot be required to complete questionnaires such as those circulated by Mr. Bopp. In the post *White* environment, however, those who resist may be accused

[79] Testimony of Thomas Moyer at 119.

of hiding behind invalidated ethics restrictions and to that extent feel political pressure to take positions on controversial legal issues they are likely to decide as judges. As a 2002 editorial in the *Idaho Statesman* pointed out, a "no-holds barred judicial campaign" could result in "wild pledges on anything from gun control to abortion" which might "box in a winning candidate" and "force a good judge to issue a bad ruling just to make good on an election promise."[80]

Moreover, to the extent that candidates become increasingly embroiled in disputes over their positions on issues likely to come before them as judges, the recent wave of attack politics that dominates many independent advertising campaigns may soon reach advertising sponsored by the candidates as well.

g. Relationships between courts and legislatures have often been problematic

The effects of trends contributing to politicized high courts have not been confined to judicial elections. The political branches of government have an interest in the cases those courts decide because the political branches represent the people affected by court decisions, and because some of the cases those courts decide have a direct impact on the political branches. Legislatures typically control court budgets, judicial pay increases, court jurisdiction, judicial impeachment, and the means to propose amendments to, if not actually amend, state constitutions. Governors are the most visible and powerful political figures in their states, who—apart from their central role in judicial selection—are uniquely positioned to influence public debates on the role of the courts in the administration of justice. Insofar as these political branch actors use the weapons at their disposal to retaliate against courts for making unpopular rulings, and to encourage

[80] *Justice Should Be Blind: Must It Be Silent As Well?,* IDAHO STATESMAN, September 19, 2002.

them to be more attentive to the will of the majority when deciding cases in the future, the net effect is to politicize the judiciary, and in some cases threaten its institutional integrity and independence.

Commission consultants have catalogued a number of recent episodes in which altercations between the political branches and their respective judiciaries have culminated in threats to the judiciary's budget or jurisdiction, or other proposals to exert greater control over the judiciary as an institution. This is not to imply that such episodes are new to our national experience. Nor is it to suggest that they are universal; Chief Justice Moyer, for example, testified that in Ohio, there was no evidence of the legislature retaliating against the courts. Nor is it our intention to characterize each of the interbranch altercations described below as independence threatening or otherwise inappropriate. Rather, the goal is simply to document recent legislative efforts to affect the courts in ways that may have further politicized the judiciary.

Attempts to cut the judiciary's budget

In his testimony before the Commission, Dr. Roger Hartley observed that there is a "great potential for court budgets to be threatened or even reduced in response to unpopular decisions," and that budgets have, in fact "been used as a sword against courts."[81] There have been a number of instances reported by Commission witnesses, consultants, and in the press, in which the judiciary's budget was threatened in retaliation for unpopular decisions:

- Prior to oral arguments in a case involving Florida's Death Penalty Reform Act, the chair of the Florida House council in charge of court appropriations sent a note to members of the Florida Supreme Court stating, "your decisions continue to be a mockery

[81] Testimony of Roger Hartley, November 1, 2002 at 115, 116.

to the victims and their families." The note identified him as chairman of appropriations, and was interpreted by one newspaper as a budgetary threat.[82]

• The President of the Maryland Senate threatened to cut the budget of the state's highest court because of a constitutional decision. This occurred after the legislature had voted for two years running to withhold millions of dollars from the state budget for Baltimore's courts until court reforms requested by Baltimore's mayor were implemented.[83]

• Professor Aviam Soifer has described an episode in Massachusetts in which the legislature "used its budgetary power to slash funding crucial to the judiciary's infrastructure" in retaliation for the court upholding the clean elections law.[84]

• Lawyer Andru Volinsky, who testified before the Commission, noted that in New Hampshire "the court's budgets had pretty much been accepted by the legislature" until the court decided an unpopular school funding case, at which point they began to receive cutbacks higher than state agencies. Volinsky surmised that "there's some animus there that motivates that,"[85] a point bolstered by the statements of the New Hampshire governor, who had proposed cutting court funding in response to the court's school funding decision.[86]

• In North Carolina, Democratic legislators prepared a budget plan that sought to eliminate the judicial district of a judge who had ruled against the Democrats in a

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[82] Lisa Getter, Mitchell Landsberg, *Decision 2000/America Waits,* LOS ANGELES TIMES, November 16, 200 A21.
[83] Matthew Mosk*, Legislative Antagonism to Courts Intensifying*, THE WASHINGTON POST, March 27, 2000 B01.
[84] Aviam Soifer, *Legislators Seek to Undermine State's Separation of Powers*, BOSTON HERALD, October 13, 2002.
[85] Testimony of Andru Volinsky, September 27, 2002 at 136.
[86] As *Shaheen Plans are Foiled, Some Judges Fallout of Favor*, BOSTON GLOBE, May 2, 1999.

redistricting case. A Democratic Senator acknowledged that the cuts were not unrelated to the judge's decision.[87]

• A recent survey of state court administrators and some legislative and executive budget officers found that over 36% of court administrators (15 respondents) and 28.9% of legislative budget officers (13 respondents) believed that their legislatures had threatened (directly or indirectly) to reduce the judiciary's budget to "influence or protest court rulings or policies." Eleven court administrators and eight legislative budget officers responded that the legislature had actually reduced the judiciary's budget at least once for those reasons.[88]

• Cutting the judiciary's budget is not always perceived as specific retaliation for court policies or decisions. When Massachusetts Acting Governor Jane Swift proposed to cut $37 million from state court budgets, a Boston Globe editorial observed that Massachusetts state courts are "kicked around like a football at the State House, whose leadership likes to show judges how limited their power is."[89]

Attempts to curb court jurisdiction

Several state court systems have confronted efforts to curb their jurisdiction in reaction to unpopular decisions. Commission consultant Emily Van Tassel reports the following:

• After Florida's Supreme Court stayed the implementation of the Death Penalty Reform Act the governor and legislature threatened to shift rulemaking authority from the supreme court to the legislature.

[87] Scott Mooneyham, *State Budget Keeps Judiciary* Cuts, THE NEWS & OBSERVER, June 20, 2002.
[88] Douglas & Hartley "The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process" Table 7 (forthcoming, Public Administration Review 2003).
[89] Adrian Walker, *A Matter of Justice*, BOSTON GLOBE, July 25, 2002.

• In both Ohio and New Hampshire, decisions invalidating the states' school financing schemes met with attempts to remove school funding jurisdiction from the courts and give the legislature sole authority to determine what constitutes a "thorough and efficient education" under the state constitution. [90]

• In New Hampshire, the state legislature proposed a constitutional amendment that would dramatically reduce the state Supreme Court's power to make rules governing state courts.[91]

• New York's Governor George Pataki attacked the state's high court for its strict interpretation of the exclusionary rule. He then proposed legislation that would deprive the court of authority to decide cases on unlawfully seized evidence under the state constitution.[92]

Attempts to remove judges from office

Professor Emily Van Tassel describes several incidents in which legislators have sought to remove judges or justices for making unpopular decisions:

• After the Vermont Supreme Court ruled unconstitutional Vermont's system of funding schools, opponents sought removal of the Justices of that court. Vermont's system gives the legislature the power over re-appointment to the courts. Former Senator John McClaughry led the charge against the Court, arguing that the court's reasoning in the school funding case was enough "to fire [Justices] Dooley, Johnson and Morse."[93]

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[90] Randy Ludlow School Call: Skip Courts-- Lawmakers Want Funding Control Cincinnati Post, March 4, 1999; Catherine Candisky, Two Senators Propose to Amend State Constitution in School Funding Debate, COLUMBUS DISPATCH, MARCH 4, 1999; Shirley Elder Supreme Court Controversies Have Staying Power BOSTON GLOBE, June 24, 2001.

[91] *Removing Trump Card: Judicial Reform Not Up to Judges*, MANCHESTER UNION LEADER, April 30, 2001.

[92] *The Governor's Attack on the Judges,* THE NEW YORK TIMES, A-14, Feb 3, 1996.

[93] Ross Sneyd, *Senators Seek to Open Retention Process*, Associated Press, Feb. 10, 1999.

• In New Hampshire, Chief Justice David Brock faced down an attempted ouster by Bill of Address in 1999 only to be impeached in 2000. Although the charges had to do with lax enforcement of the court's recusal rules, the removal attempts apparently had their roots in the court's school funding ruling. Justice Brock was acquitted on the impeachment charges, but amassed an estimated $1 million legal bill.[94]

• In another school funding case, a Wyoming senator threatened to begin impeachment proceedings against the state's supreme court justices for their decision in that case.[95]

Constitutional amendments to constrain the courts' constitutional interpretations

In several states, legislators have introduced constitutional amendments designed to constrain the courts' power to interpret the constitution.

• Professor Jeannine Bell reports on a proposed constitutional amendment in Texas that would prevent the Texas courts from interpreting the protections of the Texas constitution more broadly than its federal counterpart.

• Two members of the New Jersey State Assembly proposed an amendment to the state Constitution that would deny the state Supreme Court's final authority to rule legislative actions unconstitutional. The proposed amendment would allow a two-thirds majority of both houses of the state legislature to override any state Supreme Court decision.[96]

Emily Van Tassel's report includes two other examples:

• In Florida, a "forced linkage" amendment required state search and seizure provisions to be "construed in conformity with the 4th amendment to the United States

[94] Shirley Elder, Supreme Court Controversies Have Staying Power, BOSTON GLOBE, June 24, 2001.
[95] "Senator Ready to Impeach Judges" CASPER (WYOMING) STAR-TRIBUNE, June 9, 2001.
[96] Associated Press, *Lawmakers Want to Curtail New Jersey's Supreme Court's Power*, TRENTON TIMES, December 12, 2000.

Constitution, as interpreted by the United States Supreme Court." Political scientist Barry Latzer noted: "Before forced linkage, Florida Supreme Court cases rejected U.S. Supreme Court interpretations in favor of broader rights 80% of the time; after forced linkage the rejection rate dipped to 18%."

- In 1997, Washington state legislators sought a constitutional amendment that would give final authority to the legislature on issues of constitutional interpretation.

The general sufficiency of judicial budgets and salaries

There is little evidence to date that legislatures have actually withheld pay increases for judges in retaliation for unpopular decisions. This is not to say, however, that the issue of judicial salaries is immune from political branch manipulation. For example, when the Illinois Judges Association contemplated a suit challenging the constitutionality of the legislature's decision to deny state officials—including judges—an annual cost of living pay increase, one Illinois legislator warned that that "would not be a wise move on their part," because "those folks in the General Assembly will tend to remember that."[97]

When it comes to judicial salaries, however, the more pressing concern is that the strength of the judiciary as an institution depends on its ability to attract judges who embody the principles articulated in Part I of this report. As Professor Richard Creswell explained with respect to the Georgia courts, "Having an excellent system of administering justice . . . depends on having excellent personnel." That, in turn, requires judges to be:

[97] *Some Judges Mull Lawsuit Over Pay Freeze,* THE HERALD NEWS, July 15, 2002.

> sufficiently supported with legal research tools, law assistants, clerical staff, educational opportunities, reasonable performance expectations, and compensation and benefits packages to make Georgia's judgeships successfully competitive with the many other attractive opportunities available to excellent lawyers.[98]

When judicial salaries are low, or routine cost of living adjustments are not made, it makes judicial office less attractive to qualified candidates and incumbents alike. The *Los Angeles Lawyer*, for example, reported on "a serious brain drain going on in our courts," in which "we are losing many of our most experienced jurists" to alternative dispute resolution firms or private practice. "The dominant reason," the article reported, was that "they cannot afford to continue to serve as judges."[99]

With regard to budgets, there are some indications, noted above, that legislators and governors have sought to manipulate the courts' non-remunerative resources for political purposes. Regardless of whether or how often these manipulations occur, however, an essential point remains that the health and well being of the 21st century judiciary depends on it being adequately funded. In times of fiscal austerity, state judiciaries—which typically lack the political and lobbying clout of the executive branch and its agencies—often find it very difficult to secure adequate funding,[100] and this carries the potential for inter-branch confrontation. For example, in Kansas, the supreme court recently resorted to implementing a "stopgap emergency" surcharge on court filings to compensate for a shortfall in the legislature's appropriation.[101] Charging that the court had strayed from its proper boundaries in taking such a measure, Kansas State Rep. Tony Powell warned: "I do not think the Supreme Court wants a showdown with the

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[98] Richard Creswell, Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary, 53 MERCER L. REV. 1, 33 (2001).
[99] *The Case for Raising Judicial Salaries*, LOS ANGELES LAWYER, February, 2001.
[100] Testimony of Roger Hartley, November 1, 2002 at 118-19 (discussing the courts' unique disadvantages in securing adequate funding from legislatures).
[101] *The Price of Justice,* ABA JOURNAL E-REPORT, May 10, 2002.

legislature."[102] In Delaware, the Chief Justice appointed a court resources task force to study ways to stretch the state court budget. "The judiciary has compelling budget needs that must be met," the Chief Justice told the General Assembly, and "we should not put at risk the performance of the judiciary, which is a uniquely valuable Delaware asset."[103]

B. The Lower Courts

Although considerable attention has been devoted to the issues of judicial independence and accountability in the last several years, the vast majority of that attention has been focused on state appellate courts, and high courts in particular. This is to some extent understandable, insofar as the high courts are obvious targets of campaigns to curb courts and judges: they are highly visible, fewer in number, and their decisions have generated the most controversy by virtue of being the final word on what the law is in their respective jurisdictions, which has led to more competitive and expensive campaigns for high court seats.

There are, however, compelling reasons to devote more attention to under-studied issues affecting the trial courts. In the year 2000, there were 290,000 appeals filed in the nation's appellate courts, staffed by 1,300 judges and justices.[104] In that same year, there were 92 million new cases filed before more than 29,000 trial judges and quasi-judicial officers staffing over 16,000 courts of limited and general jurisdiction.[105] In short, our system of justice in the United States is administered largely by the lower courts. To the extent that the public's perceptions of the judicial system matter, and the sixth principle articulated in Part I of this report tells us why they should, those perceptions may be

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[102] John Hanna, *Supreme Court's Budget Order Alters Balance of Power in Government*, Associated Press, March 17, 2002.
[103] Fresh Thinking on Funding Outside Resources are Among Options a Task Force will Consider to Help Support Delaware Courts, ABA JOURNAL E-REPORT, February 1, 2002.
[104] NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 76 (2001)
[105] *Id.* at 11.

formed in no small part on the basis of personal experiences with the trial courts, as litigants, witnesses and jurors.

Another reason to devote more attention to the trial courts is that many of the problems discussed above with reference to the high courts afflict the trial courts as well. A limited number of examples should suffice:

• Trial judges, like high court justices, are put at risk of losing their seats on account of unpopular decisions rendered in isolated cases. One highly publicized example was the retention election of Illinois Judge Daniel Locallo, who generated significant opposition on the basis of a sentence he imposed in a single case.[106] And Professor Jeannine Bell reported to the Commission on Los Angeles trial Judge Joyce Karlin, who faced demands for her recall in the wake of a sentencing decision in a racially charged case.

• On a related front, corporate and insurance defense counsel and their clients have expressed with increasing vehemence concern that a limited number of state trial courts are unduly plaintiff-friendly in tort-related cases. In support of their position, they point to data that Carl Tobias and Andrew Spalding have summarized in their report to the Commission. Spalding and Tobias report, for example, that in one county court "there had never been a punitive damage verdict that surpassed $9 million prior to 1995. Since then, there have been at least 19, totaling more than $2 billion." In response to defense-side arguments that judges in these courts are exhibiting a lack of independence and impartiality, pro-plaintiff groups have accused the accusers. A spokesperson for Americans for Insurance Reform recently alleged that by attacking these judges during an

[106] R. Bruce Dold, *Judges Up for Election Walking a Delicate Tightrope*, CHICAGO TRIBUNE, October 23, 1998, N27.

election cycle, "these corporations, particularly insurance companies, are so fanatical about their crusade for corporate immunity that they are now undermining one of the most sacred precepts of our democracy, judicial independence."[107]

• Problems associated with raising money in judicial campaigns are hardly limited to high courts. A recent survey of over 2,400 judges found that 45% of lower court judges felt under pressure to raise money for their campaigns during election years, as compared to 36% of high court justices.[108]

• Trial judges appear no less concerned than their counterparts in the high courts about the real and perceived relationship between campaign contributions and judicial decisions. Forty-five percent of trial judges expressed the view that campaign contributions influenced judicial decisions to at least some degree (4% said "a great deal," 21% said "some" and 20% said "just a little," as compared to 36% who reported "none"); an identical percentage of high court respondents thought likewise, although more thought that contributions exerted a greater degree of influence. That same survey revealed that 58% of trial judges—as compared to 55% of high court justices - supported the proposition that "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign."[109]

• The concern that judicial campaigns have become increasingly politicized is likewise shared by trial judges. Asked whether "the conduct and tone of judicial campaigns has gotten better or worse over the past 5 years," 54% of lower court judges thought it had gotten much or somewhat worse, as compared to only 8% who thought it was better; those results mirrored the views of high court justices, 54% of whom thought

[107] *Consumer Coalition Calls on State Officials to Investigate Corporate Efforts to Intimidate and Oust Judges,* October 2, 2002 (press release).
[108] http://faircourts.org/files/JASJudgesSurveyResults.pdf
[109] *Id*.

it had gotten worse (although as compared to trial judges, a higher proportion of high court justices thought it was "much" worse), and 7% of whom thought it had gotten better.[110]

• Concern for the state of voter knowledge and apathy may, if anything, be even more acute among trial judges, whose campaigns typically receive less attention and where voter turnout can be lower than the high court's. Eighty-two percent of trial judges were concerned (59% "concerned a lot" and 23% "concerned a little") that "in some states, as few as 13% of people vote in judicial elections." And 87% of trial judges were concerned (61% "concerned a lot" and 26% "concerned a little") that "because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications."

• Uncertainty surrounding the impact of *Republican Party of Minnesota v. White* on judicial codes of ethics applies with equal force to the trial courts. For example, a New York trial judge recently won an action in federal district court, relying on *White* in support of the proposition that an ongoing disciplinary proceeding investigating his campaign related conduct violates his first amendment rights.[111]

Over and above the fact that the trial courts are experiencing many of the same problems as the high courts, there are a number of trends especially relevant to the trial courts that make separate study particularly important.

1. Increases in Trial Court Caseload Over Time

The reports of Commission consultants discuss some of the factors contributing to

[110] Id.
[111] *Spargo v. New York State Commn. On Judicial Conduct*, 244 F.Supp.2d 72 (NDNY 2003); see, Andrew Tilghman, *Ethics Probe Targets Judge*, TIMESUNION.COM, October 19, 2002.

the generally accepted point that lower court caseloads have increased more or less steadily over time. On the civil side of the docket, Dr. Spalding and Professor Tobias refer to the so-called "litigation explosion," variously blamed on increased case filings in the areas of medical malpractice, products liability and insurance coverage. Without disputing that, until very recently, the rate of civil filings generally has followed a longstanding upward trajectory, it is worthy of note that tort filings specifically have bucked this trend, declining by ten percent between 1991 and 2000.[112] On the criminal side, Professor Bell discusses escalating public fear of crime in the 1980s and 1990s that precipitated political branch "wars" on crime in the state and federal systems. And in her report, Professor Babb discusses major developments in child protection, child custody, juvenile delinquency, marital dissolution and family violence that have contributed to a recent surge of interest in those areas, which together account for more than 35% of the civil case filings in the nation's state courts.[113]

These developments and others have contributed to increases in lower court case filings that have exceeded the rate of population growth over the course of the past generation. The National Center for State Courts has reported that between 1977 and 1981, civil filings increased by 23% and criminal filings increased by 29%. Between 1984 and 2000, civil filings increased by 30%, criminal filings by 46%, juvenile filings by 66% and domestic relations filings by 79%. In the last two or three years, however, there are signs that this pattern of steady growth is leveling off—at least temporarily. The National Center reported that in 1999 and 2000, juvenile, criminal and civil filings declined for two consecutive years.[114]

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[112] NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS, 1999-2000: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 26 (2001).
[113] Barbara Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: Application of an Ecological and Therapeutic Perspective,* 72 IND. L. J. 775 (1997).
[114] NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS (2001).

The inexorable rise in lower court caseloads is relevant for two reasons. First, it creates the need for larger budgets and additional salaries that can contribute to friction between the judiciary and the political branches over issues of resource allocation. Second, as discussed below, caseload burdens coupled with the changing nature of the litigants themselves have contributed to the emergence of coping strategies that have changed the role of lower court judges in ways that arguably contribute to politicizing the judicial function.

2. Changes in the Nature of Litigants

In addition to there simply being more litigants in courts across the country than there used to be, there have been changes in the nature of the litigants themselves. Two changes are worthy of special mention here. First, more litigants are proceeding *pro se.* Second, people of color represent an increasingly significant percentage of the population and the litigant pool. As described below, these developments portend to change the role of the trial judge in ways that may affect the political climate in which the courts function.

a. The trend toward* pro se *litigation and its impact on the role of the trial judge

In its 2001 annual report on *Trends in the State Courts,* the National Center for State Courts reports that "the courts have experienced an increase in the number of litigants that are representing themselves."[115] In his testimony before the Commission, David Tevelin, the director of the State Justice Institute, explained this development in terms of a wider cultural phenomenon:

> More and more people will be coming to court without lawyers and not just because they can't afford to pay them. They are coming because they live in a culture that makes self-reliance a virtue that is easier to achieve than ever before. Without anyone's help, Americans pump their own gas, run businesses out of their homes, and thanks to the internet, they do

[115] NATIONAL CENTER FOR STATE COURTS, TRENDS IN THE STATE COURTS 30 (2001).

> everything from diagnose their own medical [symptoms] to record their own albums to sell anything imaginable that happens to be lying around the household. Why shouldn't they think they can represent themselves in court?[116]

In response, court systems have begun to develop an array of mechanisms to assist *pro se* litigants. Included among these mechanisms, are: self-help centers to provide *pro se* litigants with reference materials; one-on-one assistance with court staff or volunteers; court-sponsored legal advice by "facilitators;" improved internet access to court information; and collaborative approaches to assisting *pro se* litigants, that includes legal and community services organizations and the local bar.

The relevance of this development to the mission of this Commission is subtle, but potentially profound. As David Tevelin emphasized in his testimony, the move toward accommodating *pro se* litigants, along with the advent of problem-solving courts (discussed in greater detail below):

> encourage greater participation by judges [in] broad-based efforts to improve the justice system, if not society in general, greater involvement with members of the public, and a more prominent public role of the bench.[117]

Insofar as judges are shedding the mantle of aloof neutrality and becoming more actively involved in helping litigants to help themselves, it may represent a significant shift in the role of the trial judge. The issue is whether this is a troubling trend that needs to be addressed, or a positive one that ought to be encouraged.

b. Diversification of America and public confidence in the courts

Perhaps the most critical demographic change to affect the 21st century judiciary will be the changing racial and ethnic make-up of the American public. The U.S. Census Bureau has projected that the non-Hispanic white population will be declining steadily

[116] Testimony of David Tevelin, September 27, 2002 at 212.
[117] *Id.* at 214.

from 74% in 1995, to 72% in 2000, to 64% in 2020, and to 53% in 2050. During the same time period, the Hispanic population is projected to increase at a rate of more than 2% per year, while the black population is projected to double in size.

The implications of such demographic shifts are many and complex, but one demands particular attention in the present context. Principle 6 of this report states that "Judges and the judiciary must have the confidence of the public." Yet among people of color in this country, African-Americans in particular, such confidence is dramatically lower than among the population as a whole. A 2001 survey conducted by the Justice at Stake Campaign revealed that 85% of African-Americans believe that "there are two systems of justice--one for the rich and powerful, and one for everyone else." Also, while a majority of whites (62%) believe that judges are fair and impartial, a majority of African-Americans (55%) believe that judges are *not* fair and impartial. Moreover, only 43% of African-Americans, as opposed to 67% of whites, believe that judges are committed to the public interest.[118] In a 1999 national survey conducted for the National Center for State Courts, while 34% of non-Hispanic whites "strongly agreed" that "Judges are generally honest and fair in deciding cases," the percentage declined to 29% for Hispanics, and 18% for African-Americans. Almost 70% of African-Americans believed that the courts treated blacks worse than they treated whites and Hispanics, and 40% of whites and Hispanics agreed.[119]

Nor are these perceptions confined to the lay public. In a survey conducted by the *ABA Journal* and the *National Bar Association Magazine*, 52% of African-American

[118] *See* note 24, *supra.*
[119] National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey* (1999).

lawyers polled believe that "very much" racial bias exists in the justice system; and 55% of white lawyers believe "some" racial bias exists.[120]

These numbers demand sincere and immediate attention for at least two reasons. First, to the extent that the justice system actually disfavors African-Americans or other people of color, it is sharply at odds with the principle of even-handed justice upon which the health and legitimacy of the system depends. Second, if minority populations' lack of confidence in the judiciary is left unaddressed, then as these populations grow to occupy a larger and larger proportion of the demographic whole, then the overall level of public confidence in the judiciary will correspondingly diminish. This both explains and justifies the need for a diverse judicial system as the seventh principle for the 21st century judiciary, as discussed in Section I of this Report.

Among the indicators of bias toward minorities in the justice system, observers commonly point to racially unrepresentative juries, disparate arrest, sentencing and incarceration rates, tolerance of police misconduct, inferior access to competent counsel, and unequal treatment at bail and probation proceedings.[121] All of these perceptions exist against a backdrop of disproportionately low numbers of people of color serving in official capacities in the justice system relative to their numbers in the population at large. In Georgia, for example, African-Americans make up 26% of the state population yet only 6% of state court judges.[122] Bryan Stevenson, Executive Director of the Equal

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[120] Terry Carter, *Divided Justice,* A.B.A. J. 43 (February 1999).
[121] *See* Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 828-32 (1998).
[122] *The Percentage of Georgia Judges who are Black Remains Small*, SAVANNAH MORNING NEWS, May 19, 2002. Moreover, this is not confined to southern states. In Maryland, for example, where African-Americans have made notable progress in securing judgeships, of the state's 261 judges, two are Hispanic and none are Asian. Manuel Roig-Franzia, *Asian, Hispanic Judges Rare,* WASHINGTON POST, March 3, 2002.

Justice Initiative of Alabama, told the Commission that 73% of felony defendants in Alabama are people of color, and when they appear at trial:

> They face a white judge. They face a white prosecutor. We have elected district attorneys. There are no black district attorneys in Alabama. And less than 2% of the State Bar is African American. So, frequently, they are the only person of color in the court. [And] we're a state that has unlimited peremptory strikes . . .. [W]e still have cases where the majority of black counties, African American defendants are tried by all-white juries that involved 24 or 26 peremptory strikes being used.[123]

Mr. Stevenson notes that "there are no black judges on any of our appellate courts. . . . There are no people of color on the Alabama Supreme Court, the Alabama Court of Civil Appeals and the Alabama Court of Criminal Appeals."[124] Further, given that all judicial offices in Alabama are elected offices, he points out that any effort to increase diversity through minority voting initiatives or electoral reform confronts some very sobering facts and statistics.

> [W]e also have disenfranchisement laws. In Alabama you permanently lose the right to vote based on a criminal conviction. Right now 31% of the black male population have permanently lost the right to vote. The projection is that by the year 2005 that number could be as high as 40%, which would actually get us at about the same level we were in the 1960s before the Voting Rights Act. And, of course, as these trends continue, the kind of political reforms many of us even thought possible become less and less viable.[125]

It appears clear that minority representation in the justice system has direct implications for the perceived legitimacy of judicial decisions. John Bonifaz, executive director of the National Voting Rights Institute, commenting to the ABA Commission on

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[123] Testimony of Bryan Stevenson, November 22, 2002, at 51; A former president of the Hispanic National Bar Association notes that judges "are feared, not respected, by minorities who appear in lily-white forums." Mike Martinez, *Why Doesn't Utah Have More Hispanic Judges?*, DESERET NEWS, December 3, 2001.
[124] Testimony of Bryan Stevenson, at 28.
[125] *Id*. at 52.

Public Financing of Judicial Campaigns with regard to racial diversity of California courts, noted that:

> [T]he Los Angeles County court system doesn't reflect the population as a whole. And when it comes to matters of racial justice, particularly when it comes to matters with the criminal justice system and disproportionate numbers of African-Americans and Latinos in our prison system, the question of appearing to be fair was a real one.[126]

In a similar vein, Lisa Chang, President of the National Asian Pacific American Bar Association, testified before the Commission:

> if we see that we have Asian Pacific American judges, that we are part of the system, and we can communicate with that system and participate in the system, it will go a long way towards addressing . . . perceived differences in terms of sentencing or treatment in the courts. I think people will be willing to accept the legitimacy of the court if they see that they are actually participating in it in a meaningful way.[127]

In her testimony before the Commission, Suzanne Townsend, President of the Native American Bar Association, agreed that diversifying not only the judiciary, but the legal profession as a whole would do much to reverse the ongoing erosion of public trust and confidence in the justice system. She pointed out, however, that the trends are moving in the wrong direction:

> Ever fewer minority students are choosing law as a career. The entry into the profession has slowed considerably since 1995. And in 1999, for the first time since 1985, minority entry into law school actually declined. The scarcity of minority lawyers has a direct effect on the makeup of the judiciary, as does the scarcity of minority lawyers who are partners at large law firms, which in most states serve as farm teams for the state bench.[128]

Where experienced minority lawyers are relatively scarce, it becomes increasingly important that legislatures and governors in states using merit selection systems make

[126] Testimony of John Bonifaz before the ABA Commission on Public Financing of Judicial Campaigns, November 17, 2000, at 162-63.
[127] Testimony of Lisa Chang, September 27, 2002, at 104-05.
[128] Testimony of Suzanne Townsend, November 1, 2002, at 43-44.

conscious efforts not to overlook the qualified minority candidates who *are* available for judicial posts, as this can exacerbate public perceptions of exclusion.[129] It is also clear that these governors must be alert to the racial make-up of the judicial nominating commissions through which the candidates they select must first pass. Historically, state judicial nominating commissions have been overwhelmingly white and predominantly male; and despite some progress in the 1990s, they remain largely so.[130]

In the context of increasingly politicized state judicial elections, questions about the level of the minority presence on the bench take on particular relevance. Minority groups rely on an independent judiciary to protect their legal rights by upholding the rule of law even when it is unpopular with the majority. As the judiciary becomes more subject to majoritarian political pressures, the continuing ability of the courts to maintain the level of independence necessary to protect the outnumbered is a matter of understandable concern. As Malcom Robinson, President of the National Bar Association, told the Commission:

> The judiciary, as we see it, is there to interpret the Constitution and [to] protect the minority from overreaching by the majority. [As] we go into the 21st Century, there are certain things we have observed. One is that the independence of the judiciary is being seriously eroded. The body politic appears to be losing confidence in the judiciary. There seems to be a disconnect between the judiciary and the body politic. . . . The fact is, that the body politic is made up of very diverse populations, in terms of race, gender and other areas. And that type of diversity is not reflected significantly on the judiciary.[131]

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[129] When Massachusetts Acting Governor Jane Swift appointed only 4 minority judges in 25 opportunities, Robert V. Ward, dean of Southern New England School of Law, observed: "A total of about 15 percent is not likely to cause anyone to label the governor a champion of diversity. Fifteen percent is hardly a profile of courage." Robert V. Ward, *Swift's Legacy Could Be Her Judges*, BOSTON GLOBE, August 23, 2002. This applies in the context of gender as well. For example, when Colorado Governor Bill Owens was presented with three candidates (two male and one female) for an El Paso County judgeship, he chose to interview only the two male candidates. State Representative Jennifer Vierga called Owens's decision "absolutely atrocious," and noted that she found it "disrespectful that the governor chose to not interview the one female in the group." Lynn Bartels, *Group Claims Spurning Indicative of Governor's Pattern of Favoring Men*, ROCKY MOUNTAIN NEWS, June 6, 2002.

[130] See Malia Reddick, Merit Selection: A Review of the Social Scientific Literature, 106 DICK. L. REV. 729, 730-32 (2002).

[131] Testimony of Malcolm Robinson, November 22, 2002, at 101-03.

In her testimony before the ABA Commission on Separation of Powers and Judicial Independence, Constance Rice, the Western Regional Counsel for the NAACP Legal Defense and Educational Fund, emphasized that the judiciary derives its legitimacy, and thus its power to persuade, "through the consent of the public and because the public has faith in that judiciary." She added, however:

> [T]here are parts of the community that I work in [where] I cannot speak with any credibility about the credibility of the judicial system. I'm talking mainly about class. It is poor African-Americans, poor whites, poor Latinos, poor Asian Pacific Americans, poor people of every race who are considered part of the underclass.
>
> I can no longer go to that sector of the public and speak credibly about the integrity, the fairness or the lack of bias in our judicial system. I simply can't. [T]here are sectors of the public I can not discuss the judicial system with anymore and convince them that they should have faith with it, that they should view it as impartial, that they should give it the credence and the support that the public has to give it in order for the judiciary to work. We have lost poor people.[132]

As Ms. Rice's testimony implies, in an era of heavily-financed judicial elections, the system's ability to protect the interests of the outspent is likewise deserving of scrutiny. Lisa Chang notes that "[a] lot of the Asian Pacific American community is not affluent, and . . . is not familiar with and used to the idea of making political contributions."[133] Judge Patricio Moya Serna, then Chief Justice of the Supreme Court of New Mexico, told the Commission that without significant changes in the way judicial elections are financed, "it's going to be exclusion, exclusion, exclusion, because minorities cannot compete. They cannot get millions of dollars."[134]

In his testimony before the ABA Commission on Public Financing of Judicial Campaigns, John Bonifaz pointed to data from Wisconsin relating to the intersection of minority status and wealth in the context of judicial elections. He reported that .0003% of

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[132] Testimony of Constance Rice before the ABA Commission on Separation of Powers and Judicial Independence, February 21, 1997 at 244-45, 248-49.
[133] Testimony of Lisa Chang, September 27, 2002, at 94.
[134] Testimony of Patricio Serna, November 1, 2002, at 32.

the electorate in Supreme Court races supplied 18.5% of total contributions, and that 4.1% of contributors, representing less than 2% of the voters in Supreme Court elections, provided over half of all donations to those races. In addition, when contributions were traced to the zip codes of the contributors, he found that ten wealthy, largely white Wisconsin zip codes supplied 43.3% of all contributions, as compared to the ten Wisconsin zip codes where people of color are in the majority, which contributed only 1.8%. He concluded that "there's a real disparity here between those who have access to the money and their ability to participate in this process and those who don't, and the impact is felt most severely on communities of color."[135]

Stephen Bright offered the Commission the following summation of the relationship between the modern justice system and communities with insubstantial financial resources:

> We're going to come to a reckoning here very shortly where we are going to have to either sandblast "Equal Justice Under Law" off the Supreme Court building, or we're going to have to do something about access to justice for people who don't have any money.
>
> Poor people, more than anybody, need access to the courts . . . because they don't have a PAC, they don't have a representative, they don't have a congressman, they don't have anybody else. And unfortunately, I think the courts are farther away from those people, both state and federal, than they've been in a long time.[136]

In short, while the combined effects of increasing politicization and soaring levels of special-interest financing on state judicial elections are points of concern for the American public in general, they are of particular concern for people of color, and low-income people of all backgrounds, and may exacerbate their sense of estrangement from the courts. Any concerted effort to ensure – and earn -- public confidence in the 21st

[135] Testimony of John Bonifaz, before the ABA Commission on Public Financing of Judicial Campaigns, November 17, 2000 at 166-68.
[136] Testimony of Stephen Bright, November 22, 2002 at 177, 179.

century judiciary will be critically incomplete if it does not allocate substantial and sincere attention to these sectors of the American public that are increasing both in their numbers and in their sense of disenchantment with the justice system.

3. Changes in the Role of Courts

Certain changes in the role of courts over time are well documented. The term "trial judge" is increasingly becoming a contradiction in terms as fewer cases go to trial in state or federal courts.[137] The time, expense and unpredictability of trials have made negotiated or judge brokered settlements, and alternative dispute resolution mechanisms increasingly attractive in a wide range of contexts. One effect of this development has been to create an alternative dispute resolution market for judges, which as discussed above in connection with the importance of adequate judicial salaries, can serve as a "brain drain" for jurists who leave the bench to become mediators or arbitrators. Another effect is to change the role of the judge from someone who dispassionately tries cases, to someone who roles up her sleeves and helps the parties to resolve their dispute by means short of trial.

Another less widely appreciated sign of the changing role of the trial judge has been the nation-wide move toward problem-solving courts. The nation's first problem-solving court opened in Dade County, Florida, in 1989.[138] In response to chronic, drug-related criminal recidivism and overcrowded correctional facilities, the county court began sentencing drug-addicted offenders to long-term, judicially supervised drug treatment in lieu of incarceration. The success of that court attracted national attention

[137] Hope Viner Samborn, *The Vanishing Trial*, ABA J. 24 (October 2002).
[138] Symposium, *The Changing Face of Justice: The Evolution of Problem Solving*, 29 FORDHAM URB. L. J. 1790, 1805 (2002).

and is credited with setting off what Chief Judge of New York Judith S. Kaye has called "the quiet revolution called problem-solving justice."[139] The idea has been extended beyond drug courts to encompass dozens of specialized areas of concern, including: mental illness, domestic violence, as well as numerous "quality-of-life" crimes such as prostitution and shoplifting.

While no single definition fits all problem-solving courts, in his testimony before the Commission, Greg Berman, director of the Center for Court Innovation, identified three essential features of the problem-solving court idea:

1) *Intensive judicial monitoring*: even after sentencing, problem-solving courts tend to require offenders to return to court regularly to report on their progress with drug or mental health treatment, job training, community restitution and other components of their sentence not involving incarceration.

2) *Aggressive professional outreach*: problem-solving courts reach beyond the courthouse walls to engage social scientists and social service providers to create a more symbiotic relationship between these off-site providers and the courts.

3) *Community engagement*: problem-solving courts reach out to not only professional service providers, but also to community leaders, community groups, and to citizens, to encourage them to become involved participants in the justice system.[140]

Clearly, problem-solving courts represent a marked departure from the traditional roles of both state courts and state court judges. They have arisen in response to equally dramatic changes, as described by Chief Judge Kaye:

> Unquestionably the first modern day reality that you have to look at is the numbers of cases in the state courts, which are huge. Then there is the nature of the cases—there are not only more of them, but they've changed. We've

[139] Judith S. Kaye, *Problem-Solving Courts: Keynote Address*, 29 FORDHAM URB. L.J. 1925, 1928 (2002).
[140] See testimony of Greg Berman, September 27, 2002, at 179-80.

> witnessed the breakdown of the family and of other traditional safety nets. We're seeing many, many more substance abuse cases . . . huge numbers of domestic violence cases . . . [and] quality-of-life crimes. And it's not just the subject of the cases that's different. We get a lot of repeat business. We're recycling the same people through the system.[141]

As this description implies, there is more behind the movement toward problem-solving courts than just the courts trying to find non-traditional ways to cope with what Greg Berman called the "incredible explosion in state court caseloads." In a sense, the movement is non-traditional in two directions: the courts are reaching out, trying to influence what comes into the court from the community (i.e., the debilitating caseload); but the community is also reaching in, trying to influence what comes from the court back out into the community (i.e., the procession of unreformed, repeat offenders with intact drug addictions or other features that render them ill-equipped to play a healthy role in the community.)

Although a body of reliable data has yet to emerge, this more collaborative, holistic approach to justice has shown promising results. There are now more than 1,500 problem-solving courts across the country and many report remarkable reductions in low-level crime and improved compliance by offenders sentenced to community restitution or substance-abuse treatment programs. Drug courts have achieved consistent reductions in recidivism and drug use among participants as well as significant reductions in overall criminal justice costs.[142]

Perhaps most promising is that, as Greg Berman observes, "these problem-solving courts have shown some signs that they are able to chip away at the decline in public trust and confidence" in the justice system. Berman notes, for example, that only 9% of

[141] Quoted in Greg Berman, What is a Traditional Judge Anyway? Problem-solving in the State Courts, 84 JUDICATURE 78, 80 (2000).
[142] Greg Berman and John Feinblatt, *Problem-solving Courts: A Brief Primer*, 23 LAW & POLICY 9, 9-10 (2001).

community members polled had positive views of the justice system before the establishment of the Red Hook Community Justice Center, a problem-solving court in Brooklyn. After the court had been established this number rose to 70%. According to Aubrey Fox of the Center for Court Innovation, public opinion surveys about problem-solving courts show that "the people who are most supportive of these measures are exactly the same groups, blacks and Latinos, who report being dissatisfied with the operation of the courts."[143]

At the same time, there is concern that, positive results notwithstanding, the very idea of courts and judges "reaching out" and social workers or treatment professionals "reaching in" represents a challenge to the core principles of judicial independence and impartiality. Even supporters, such as David Tevelin from the State Justice Institute, acknowledged that "the responsibilities of being a judge in the state courts of the 21st century differ from the traditional responsibilities," noting that "judges are being called upon--fairly or unfairly, wisely or unwisely—to become involved in a variety of collaborative, off-the-bench type activities." David Tevelin describes risks inherent in such an approach:

> I think the more courts get pulled into the role of social service agencies, the role of collaborator—and [as] I've said, there's many good aspects to that—the more likely it may be that people will try to continue to politicize the judiciary, try to exercise more executive and legislative control, try to make judges less traditional and more like other politicians.[144]

Problem-solving courts have shown considerable potential to address some of the most intractable problems state courts face - clogged dockets, strained budgets, recidivism, and perhaps most importantly, a lack of public confidence in the justice system, especially within communities of color. It is therefore understandable that

[143] Aubrey Fox, panelist, Eleventh Annual Symposium on Contemporary Urban Challenges, *What the Data Shows*, 29 FORDHAM URB. L. J. 1827, 1843 (2002).
[144] Testimony of David Tevelin, September 27, 2002, at 221.

problem-solving courts have demonstrated themselves to be more than a fad. According to Greg Berman:

> There's just too many of them now to be dismissed in that way, and I think the real question is . . . what's the fit? . . . Is the goal here to continue to replicate these things or is the goal to somehow embed the ideas of problem-solving courts in every courtroom throughout a state system or throughout the country?"[145]

As encouraging as some of the early experiences with problem-solving courts have been, however, there is no denying the tension between the role of judge as engaged problem-solver, and the more traditional model of judge as detached referee. As problem-solving courts continue their ascendancy, coming to terms with this tension may be increasingly important.

III. CONCLUSIONS AND RECOMMENDATIONS

As the preceding section of this report reveals, our survey of the issues confronting the 21st century judiciary has been wide-ranging. It is possible, however, to organize those issues—and the Commission's corresponding conclusions and recommendations—into three broad categories: those that relate to preserving the judiciary's institutional legitimacy; those that relate to improving judicial selection; and those that relate to promoting an independent judicial branch that works effectively with the political branches of government. It is to those conclusions and recommendations that we now turn.

A. Preserving the Judiciary's Institutional Legitimacy

In *The Federalist Papers*, Alexander Hamilton remarked that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the

[145] Testimony of Greg Berman, September 27, 2002, at 183, 186.

Constitution, because it will be least in capacity to annoy or injure them."[146] Unlike the political branches, the judiciary possesses neither the sword nor the purse. The courts are dependent on Congress for their funds and on the President to execute their orders, which ensures that the judiciary cannot act without the acquiescence of the political branches and the people they represent. The continuing ability of the courts to function, then, depends upon public acceptance of their institutional legitimacy; without it, the courts can and will be ignored or obliterated.

All issues addressed in this report are, in a very real way, relevant to promoting public acceptance of the courts, including those of judicial selection and the judiciary's relationship with the political branches, which we reserve for discussion in later sections. There are, however, a number of issues that we regard as especially vital to the judiciary's institutional legitimacy, which warrant separate treatment here.

1. Judicial Qualifications, Training, and Evaluation

The Commission recommends that states establish credible, neutral, non-partisan and diverse deliberative bodies to assess the qualifications of all judicial aspirants, so as to limit the candidate pool to those who are well qualified

The issue of ensuring a qualified judiciary is typically linked to judicial selection. That makes obvious sense: the point at which to determine whether a lawyer possesses the qualifications necessary to be a judge is at the point when he or she is selected. For that reason, the conclusions and recommendations here will be relied upon later, in our discussion of judicial selection. The Commission believes, however, that the importance of a well-qualified judiciary transcends the issue of selection to such an extent as to warrant separate treatment here. There is more at stake here than simply promoting judicial competence. The continuing legitimacy of our judicial institutions requires that a

[146] THE FEDERALIST PAPERS, No. 78.

process be in place to reassure the public that the judges who interpret our laws, rule on our civil claims, resolve disputes affecting our families, and sentence our citizens, are capable and highly qualified.

It is quite common for states in which judges are initially appointed to rely on judicial selection commissions to evaluate the qualifications of candidates the governor appoints. In some states, such as California, the Commission evaluates candidates the governor has previously identified. In other states, such as Missouri, the Commission creates a pool of qualified candidates from which the governor's appointees are drawn.

In 2000, the ABA adopted standards for state judicial selection that expanded commission-based systems for the evaluation of judicial aspirants, to include candidates in contested elections. In its report, the Commission on State Judicial Selection Standards offered the following explanation:

> The evaluation of a judicial aspirant's qualifications by a neutral, non-partisan, credible, deliberative body is a key element of traditional appointment systems. By incorporating this crucial element into an election system, as well as bolstering the process in appointment systems,
>
> the standards strive to provide a fundamental shift in the selection process, without advocating an institutional change in state judicial selection methods. The creation of credible, deliberative, non-partisan bodies to evaluate the qualifications of all judicial aspirants, regardless of whether that person stands for election, is nominated through the appointment process, or reaches the bench through the interim appointment process, serves to assure the public that those judicial aspirants have met a threshold set of qualifications.

We agree with the Commission on State Judicial Selection. This is not to imply that judges who have been selected in states with contested elections that have no commission-based evaluation system are, on average, less qualified than their counterparts in states where such systems are in place. Rather, our point is simply that a commission-based evaluation system can make a valuable contribution toward promoting

public trust and confidence in the courts by reassuring the public that no judges—regardless of how they are selected—will be allowed to serve unless they possess the qualifications necessary to be good judges.[147]

This recommendation should not be construed as an endorsement of all commission-based judicial evaluation programs currently in place. In some jurisdictions, concerns have been raised that the selection commission's evaluations of judicial candidates are unduly influenced by the appointing authority.
In others, critics assert that evaluations are influenced too much by politics in general.[148] If such concerns are well founded, the selection commission is neither nonpartisan nor neutral, will not be perceived by the public as credible, and will fail in its essential purpose. Just as judicial independence is needed to ensure an impartial judge, so too an independent selection commission is needed to ensure impartial evaluation of judicial aspirants.

The Commission likewise believes that judicial selection commissions should be constituted with an eye toward achieving diversity within the judicial system, which, as discussed in Part I of this Report, is the seventh of eight enduring principles that ought to guide the 21st century judiciary. As elaborated upon below in its discussion of recommendations related to diversifying the judicial system, the Commission believes

[147] For example, despite controversy surrounding an appointment to the state supreme court, New Jersey Governor McGreevey was praised for first sending the appointment to the state bar association for review, a practice that had been discontinued by his predecessor, Governor Whitman. *Bar Code*, PHILADELPHIA INQUIRER, July 16, 2002.
[148] For example, a Rhode Island editorial asserted that the state judicial nominating commission rejected a highly qualified candidate, Superior Court Judge Michael Silverstein, for a seat on the state Supreme Court solely because of his lack of political connections. *The High Court Here*, PROVIDENCE JOURNAL, December 12, 2000. More pointedly, a Nebraska editorialist derides the state's judicial nominating commissions for corrupting the state's merit selection system. He asserts that the commissions have changed the nomination process from "a legitimate evaluation of merit" to "a clandestine, political crapshoot," whereby the candidate of the commission's choice is deliberately grouped "with individuals the commissioners believe will be unacceptable to the governor." J. Kirk Brown, *Judicial Commissions Fail People of Nebraska*, OMAHA WORLD-HERALD, September 7, 2000.

that diversification of judicial selection commissions is instrumental to achieving greater diversity of the judiciary itself.

The Commission recommends that the judicial branch take primary responsibility for providing continuing judicial education, that continuing judicial education be required for all judges, and that state appropriations be sufficient to provide adequate funding for continuing judicial education programs

Just as a process for assessing judicial qualifications can promote public confidence in the judiciary by assuring that all judges are capable and qualified, so too, continuing judicial education programs can promote public confidence by assuring that judges keep abreast of new developments relevant to the work they do. This objective can only be met if all judges participate in continuing judicial education programs and have an obligation to do so. The Commission is aware of an ongoing controversy surrounding whether and to what extent it is appropriate for judges to attend privately funded judicial education programs in which program sponsors reimburse attendees their expenses. Without taking a position on that controversy, the Commission believes that state court systems have a critical role to play in the continuing education of their own judges. The courts themselves are often best situated to monitor their own judges' familiarity with recent developments and to develop programs to address deficiencies.[149] For that reason, the Commission recommends that the judicial branch take primary responsibility for providing judicial education services to the judges of the state, and that the states adequately fund such programs. The New York State Judicial Institute and the National Judicial College are but two examples of how judicial education can be provided.

[149] Arizona Supreme Court Justice Charles Jones, is now "using his supervisory powers over lower courts to increase training requirements for justices of the peace and Municipal Court judges." This, according to the Arizona Republic, is "the least the public should expect." This Commission agrees. *Training Reform in JP Courts Welcome*, ARIZONA REPUBLIC, June 30, 2002.

The Commission recommends that Congress fully fund the State Justice Institute

Although our report focuses on state court systems, the issue of promoting judicial education as a means to ensure judicial competence and public confidence in the courts is one with obvious national implications. Over the course of the past two decades, our federal government has returned a range of issues of nation-wide importance to state control. With respect to the perennially pressing problem of crime, the federal government has continued to play a significant role, but has also devoted considerable resources to expanding the states' capacity to police their communities and prosecute law-breakers. The success of these ventures depends in no small part on the state courts, which must process the influx of cases these developments generate. In this regard, preparing state judges to undertake the responsibilities that Congress is counting on them to perform capably and conscientiously should fairly be characterized as a national priority.

The State Justice Institute has funded judicial education programs around the country, and served as an information clearinghouse for court systems interested in replicating programs that others have tried.[150] The Commission concludes that Congress should continue to fund the important work of the State Justice Institute. Although the Commission's focus here has been on the role that State Justice Institute plays in promoting judicial education, the State Justice Institute's larger mission to fund projects designed to improve state court operations generally should be of considerable importance to our federal government at a time when we depend increasingly on states to further our national priorities. The Commission therefore recommends that the SJI be

[150] Testimony of David Tevelin, September 27, 2002 at 202, 209.

fully funded, for reasons including but not limited to the important role it plays in furthering judicial education.

The Commission recommends that the states fully fund the National Center for State Courts

The National Center for State Courts is the single most important source of information and analysis on state court operations in the United States. The Commission has depended heavily on National Center reports, questionnaires, data, and the assistance of NSCS personnel in the preparation of this report. Anyone who does serious research or writing on the state courts relies upon information that the National Center provides. Even more important, perhaps, anyone who is concerned about the role of the courts in the 21st Century and is committed to improving their performance depends on National Center data, research and analysis for guidance. Much of the funding for the National Center for State Courts comes from the states themselves. The Commission therefore recommends that states fully fund the National Center. As many states confront fiscal crises across the country, and legislatures look for ways to trim state budgets, the Commission seeks to emphasize the enormous contribution that the National Center makes relative to the modest contribution of dollars needed to underwrite its operations.

The Commission recommends that states develop judicial evaluation programs to assess the performance of all sitting judges

Many states employ some form of judicial performance evaluation. In most states, evaluations are conducted by state bars; in six states, official, state-sponsored evaluations are conducted as part of the retention election process. In the latter jurisdictions, retention evaluation commissions, comprised of lawyers, judges and non-lawyers, evaluate judges on the basis of information gathered from litigants, witnesses, jurors and lawyers. The factors subject to official state-sponsored evaluation vary from state to state, but typically include such matters as an incumbent's integrity,

communications skills, judicial temperament, administrative performance, fairness, preparation and attentiveness. The judge's knowledge and understanding of the law may likewise be evaluated, on the basis of information gathered from members of the bar. Of course, there is no reason why these more comprehensive criteria cannot be used even in states that rely on state bars for evaluations. The Iowa State Bar Association recently revised its ratings system for retention elections from one that simply surveyed whether attorneys thought a judge should be retained or not, to one where attorneys rate judges on 12 factors including knowledge of the law, objectivity, and clarity of writing.[151]

As with judicial qualifications, discussion of judicial evaluation programs is often linked to judicial selection. The virtues of judicial performance evaluations are, however, multi-faceted. To be sure, voters in retention elections can gather valuable information about incumbent judges from such evaluations, and there is some support for the proposition that judicial performance evaluations exert a positive impact on voter turnout in judicial retention elections.[152] In the Commission's view, however, performance evaluations can be extremely useful regardless of how judges are initially selected or whether they are subject to reselection processes.

Irrespective of whether judges stand for election at any stage in their careers, judicial performance evaluations can be an important accountability-promoting measure. Judges are public servants whose salaries are paid and operating budgets are funded by taxpayers who are entitled to know whether the public officials they support are doing their jobs satisfactorily. Even if the judges under review are not subject to re-selection, publicizing performance evaluations can be rewarding or chastening (depending on the results) for the affected judge, and furnish an excellent opportunity for judicial self-

[151] *Sizing Up State Judges*, DES MOINES REGISTER, October 4, 2000.
[152] Seth Andersen, *Judicial Retention Evaluation Programs*, 34 Loy. L.A. L. Rev. 1375, 1379 (2001).

improvement. A commendable example in this regard is the Chief Justice of the South Carolina Supreme Court, Jean Toal, who requested the state bar to issue an early report on her performance, three years before she would face re-election. "[T]he chief ought to set the tone," she stated. "I'm a big proponent of this rating. I think it keeps us on our toes."[153] As Chief Justice Toal implies, the routine availability of regular feedback on all judges within a court system will serve the long-term interest of reassuring the public that judges are not immune from scrutiny.

The Commission concludes that bar-sponsored surveys alone are insufficient to achieve the above-stated objectives. If the public is to have confidence in the judicial evaluation process, it is important that non-lawyers participate both as information providers and as evaluators. Accordingly, the Commission recommends that states create judicial performance evaluation commissions modeled after the retention evaluation commissions already in place in six states, with one important difference: the primary purpose served by the commissions recommended here is to evaluate and facilitate the improvement of judicial performance, and not merely to assist in judicial re-selection.

2. Judicial Ethics and Discipline

Judicial accountability is absolutely essential to preserving public trust and confidence in our courts. Judges are entrusted to uphold the law independently and impartially. When they violate that trust, it is vital that processes be in place to correct the problem. As discussed below, in conjunction with its recommendations on judicial selection, the Commission does not believe that judicial elections are a desirable means to promote accountability, because of their potential to undermine judicial independence,

[153] Cindi Ross Scoppe, *Evaluations Show Toal, Other Judges Doing a Pretty Good Job*, THE STATE, January 2, 2001.

impartiality and the rule of law. There are, however, other means to promote accountability that the Commission supports and seeks to enhance.

The Commission recommends that the ABA undertake a comprehensive review of the Model Code of Judicial Conduct

Codes of judicial conduct serve a critical role in promoting judicial accountability by creating a body of rules designed to ensure that judges comport themselves in ways consistent with their duty to uphold the law impartially. If adequately publicized, moreover, codes of conduct can reassure the public that there are established ethical constraints on judicial conduct.

Existing codes of judicial conduct have served the state judiciaries well over time, but recent events called to the Commission's attention over the course of four hearings lead it to conclude that the time has come for the ABA to undertake a comprehensive review of its Model Code of Judicial Conduct. First, and perhaps most obviously, the United States Supreme Court's decision in *Republican Party of Minnesota v. White* requires a rethinking of the Code as it pertains to judicial campaign conduct. Easily a dozen witnesses who testified before the Commission alluded to the uncertain impact that *White* will have on rules regulating campaign speech in judicial elections. How far can and should the Code go in continuing to regulate candidates who take positions, appear to commit themselves, or make explicit promises with respect to issues they are likely to decide as judges? To the extent that the Code may not prohibit candidates from making particular kinds of statements during judicial campaigns, may it still require those candidates to recuse themselves later, in cases to which their prior comments relate? During the life of the Commission, at least two federal court cases have been decided, relying on the Supreme Court's decision in *White* to strike down other state ethics

restrictions on judicial campaign speech, that have only added to the state of uncertainty.[154]

Second, the changing role of trial judges, described in the background section of this report, may justify some rethinking of the Code as it applies to them. The traditional image of a judge, which the Code seeks to preserve, is that of a disinterested referee. An emerging trend that several witnesses brought to the Commission's attention, however, calls upon judges to roll up their sleeves and serve as engaged problem solvers on a disparate array of issues ranging from crime, juvenile delinquency and drug and alcohol dependency, to divorce and child support. As will be discussed at greater length below, the Commission encourages the growth and development of problem-solving courts as a means to enhance public confidence in our judicial systems. But the Model Code of Judicial Conduct may require revision to accommodate such changes.

Third, and more generally, the Model Code of Judicial Conduct last received a comprehensive review in the years leading up to its revision in 1990, prior to the acceleration of events leading to a heightened level of interest in and concern over issues of judicial independence and accountability around the country. Revisiting the Code in light of those developments is well advised.

The Commission recommends that codes of judicial conduct be actively enforced

It all but goes without saying that to be effective, codes of judicial conduct must be enforced. All states have disciplinary systems in place, but the aggressiveness with which their respective codes of conduct are enforced can vary dramatically. In North Carolina, an editorial notes that "more than 100 times, the agency that investigates

[154] *See*, *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *Spargo v. New York State Commn. on Judicial Conduct*, 244 F. Supp.2d 72 (N.D.N.Y. 2003); *see also*, Adam Liptak, *Judges and Politics Mix: U.S. Ruling breaks Down a Wall*, New York Times, February 24, 2003 (reporting on case involving New York trial judge Thomas Spargo).

elected judges accused of misconduct has told judges that they have committed a violation of judicial ethics and warned them not to do it again—all in secret." As a result, "voters will go to the polls without complete information. . . . By state law, the [agency's job] is to investigate complaints, dismiss unfounded ones, and recommend . . . censure or remov[al] [of] judges for misbehavior. The law says nothing about private admonitions."[155]

Texas presents a good example of successful reform. The Texas Commission on Judicial Conduct is comprised of eleven members—five judges, two practicing lawyers, and four non-lawyers. ABA Commission member and Texas State Representative Pete Gallego described the State Commission on Judicial Conduct as "a backwater agency that did nothing to anybody for a long time" until it encountered "problems with the legislature in terms of criticism," at which point Margaret Reaves was appointed as the new executive director.

In her testimony before the Commission,[156] Ms. Reaves described how the Commission revitalized itself. First and foremost, the Commission took steps to "create more public awareness," by "giving the sanctions to the press and notifying them of what was going on," putting relevant information on the Commission's web page, and by "letting people know they had the right to file complaints, that the complaints they filed would be investigated fully and fairly . . . and that they would be notified of the results." With respect to the notice complainants received when their complaints were dismissed, the Commission moved from a perfunctory form notice to a personalized letter explaining

[155] Matthew Eisley, *Voters in Dark about Judges' Ethical Records*, RALEIGH NEWS & OBSERVER, October 14, 2002.
[155] Hearing of November 22, 2002 at 229-247.

why. And the entire staff began to travel the state, meeting with judges in judicial education programs to discuss the ethical rules and their enforcement.

The effects of Ms. Reaves' efforts are measurable. In the year before her arrival, the Commission received a total of 743 complaints against the state's 3,500 judicial officers; in her first year, that number increased to over 1,200. During her tenure, the number of requests for reconsideration of complaints the Commission dismissed declined from 133 in the year prior to her arrival, to 43. Thomas R. Phillips, the Texas Chief Justice and a member of this Commission, commended the Texas Commission on Judicial Conduct for hiring "Margaret without any consultation with us . . . they're totally independent—as they ought to be," and for "making the public aware that they exist as an outlet" without creating an adversarial relationship with the judiciary.[157]

In the Commission's view, the experience of the Texas Commission on Judicial Conduct should serve as a model for other states. If judicial discipline is to promote the legitimacy of our courts in the public eye:

- The disciplinary body should include non-lawyer members;
- The public should be made aware of the disciplinary process;
- Discipline should be imposed when it is deserved;
- The public should be made aware when sanctions are imposed;
- When sanctions are not imposed, complainants should be furnished with an explanation as to why.

3. Diversification of the Justice System

This Commission is convinced that increasing the diversity of the judicial branch is more than an attractive goal for the 21st century judiciary. It is a necessity. Within fifty years, fully half of all Americans will be a member of a racial or ethnic minority.

[157] *Id.* at 246-47.

Meanwhile, recent surveys reveal an alarming erosion of trust and confidence in the justice system among people of color. Specifically, surveys reveal persistent attitudes that people of color are not treated fairly by courts, and that because of factors such as language barriers, racial bias, and the increasing influence of money in judicial elections, their access to justice is inferior to that of non-Hispanic whites.

Moreover, the lack of racial or ethnic diversity among legal professionals exacerbates these perceptions. Particularly important in this regard is the relative lack of minority judges in state judiciaries, a figure that now stands at approximately 8%, while people of color comprise nearly 30% of the national population. The Commission is convinced that continued failure to meaningfully diversify the courts will work to the detriment of the 21st Century Judiciary's overall health, quality, and level of public support. Diversification of the judicial branch should therefore be regarded as an urgent priority.

The Commission recommends that members of the legal profession expand their use of training and recruitment programs to encourage minority lawyers to join their firms, to include them fully in firm life, and to prepare them for pursuing careers on the bench following their years in practice

Diversity among the ranks of legal professionals is critical not only to the perception of inclusiveness, but also to its reality. It is imperative that the legal profession aggressively assumes a leadership role and approaches diversification with conscious, persistent, and zealous commitment.

To be sure, minority lawyers should be actively recruited to join established firms, but that is only the beginning. For generations, firms have made it their business to train, mentor, and acculturate new recruits, to the end of grooming them for partnership and beyond, including careers on the bench. The practicing bar needs to appreciate, however, that for young minority lawyers—who may perceive themselves (and be perceived) as outsiders thrust into an unfamiliar environment—special efforts need to be

taken to communicate the message that firm training and mentoring processes are there for the benefit of *all* firm lawyers, including them. For that reason, Commission advisor Bernard F. Ashe has written that lawyers "must reach out to make the workplace a comfortable environment for success. This means adjusting attitudes, culture and language in the workplace. It also means mentoring to facilitate a feeling of inclusion. . . . Lawyers must play a role in creating an atmosphere for improvement in the tensions of the workplace."[158]

The Commission recommends that states with commissions to evaluate the qualifications of judicial aspirants strive to diversify those commissions and sensitize them to the need to assess qualifications more flexibly and inclusively

Some Commission witnesses expressed the concern that for judicial aspirants of color, appointive systems can be a closed door: they do not know where to begin, who to contact or how to initiate the process. To a significant extent, this problem is addressed by the preceding recommendation: if minority lawyers, to no less an extent than their majority counterparts, come to enjoy the benefits of training, mentoring and inclusion in the life and politics of the profession, they will be equipped with the tools they need to secure judicial office regardless of the method by which judges are selected. In states that appoint their judges with the assistance of nominating commissions, however, additional steps can be taken to promote diversification of the bench more actively.

Social science research studying whether appointive or elective systems of judicial selection produce a more diverse judiciary has yielded inconclusive results.[159] As elaborated upon below, the Commission concludes that the enduring principles of a sound judiciary are best served if judges are appointed. The Commission notes, however,

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[158] Bernard F. Ashe*, Racial Progress in the New Millennium—A Different Shade: Mentoring and Outreach, Not Buzzwords*, 11 EXPERIENCE 2, 21 (Winter 2001).
[158] See Malia Reddick, note 130, *supra*, at 740-42 (2002).

that several witnesses criticized the commission-based appointive model for judicial selection, on the grounds that it is not as well suited to promote a diverse bench. As one writer has recently explained:

> Proponents of a diverse bench argue that merit selection prevents women and people of color from reaching the bench by entrenching a system dominated "by state and local bar associations whose members overwhelmingly are white, male Protestant, conservative 'establishment' attorneys." Some empirical studies of the relationship between judicial diversity on state courts and judicial selection methods validate this assertion. At the same time, several studies find no correlation between selection method and diversity, and others show a positive correlation between merit selection and the diversity of the bench.[160]

The varying results of studies comparing the relative ability of elective and appointive systems to promote racial and gender diversity may be attributable, at least in part, to differences among states with appointive systems, in their relative commitment to diverse selection commissions and a diverse bench. The above-quoted author reports on a recent study finding that "[i]n the five states for which data was available, there was some evidence that diverse commissions attracted more diverse applicants and selected more diverse nominees."[161]

The message is clear. States with appointive systems that are serious about the need to diversify the bench—and every state should be—can begin by taking steps to make certain that the commissions that evaluate the qualifications of judicial aspirants include more than the "usual suspects." If special efforts are made to reach out to women and people of color to serve on such commissions, it will send a powerful signal to people of color and women within the legal community and the public at large, that the door to judicial office is open to them.

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[160] *Id.* at 740-41.
[160] *Id*. at 731-32.

Integral to communicating the message that judicial office is available to minority lawyers, is the nominating commission's appreciation for the need to assess the qualifications of all judicial aspirants with sensitivity. Some seemingly neutral indicia of a meritorious candidate may inadvertently exclude minority lawyers who lack such indicia for reasons that have little bearing on their qualifications for judicial office. Thus, for example, Brennan Center Deputy Director Deborah Goldberg reported to the Commission on a nominating commission that had evaluated applicant credentials with reference to their securities litigation experience—a practice area traditionally dominated by white males. Our point is not to suggest that nomination commissions should abandon traditional criteria for evaluating candidate qualifications; our point is simply that traditional criteria can be freighted with traditional biases that nomination commissions should avoid by examining candidate qualifications with greater flexibility and sensitivity.

The Commission recommends that lawyers and judges participate in an aggressive outreach effort to encourage minority enrollment in colleges and law schools

Diversity efforts within the bench and bar can only be so successful without a qualified pool of diverse law school graduates. African-American and Hispanic lawyers comprise only 4% and 3% respectively of lawyers in the United States—far below their representation in the general population. The percentage of minority lawyers who occupy leadership positions within the profession is lower still.[162] As Patricio M. Serna, then Chief Justice of the Supreme Court of New Mexico, told this Commission: "We're looking at an institutional problem. . . . We're going to have to increase the pool of

[162] *See* Elizabeth Chambliss, *Miles to Go 2000: Progress of People of Color in the Legal Profession*, American Bar Association Commission on Racial and Ethnic Diversity in the Profession (2000) at 1, 9.

people of color in law schools. There has been a retrenching of recruitment of people of color in law schools throughout the country, and we've got to reverse that trend."[163] Indeed, the increase in minority law school enrollment, "which had been steady since 1985, ended in 1995. In the past five years, minority enrollment has increased only 0.4% -- the smallest five-year increase in 20 years."[164]

The state of the law regarding race-conscious admissions policies is currently before the U.S. Supreme Court. Although that decision may affect the *manner* in which state institutions are permitted to improve minority enrollment, it should have no bearing on their continuing commitment to do everything within their constitutional power to create a student body that reflects the diversity of the society that college and law school graduates serve. Regardless of the Supreme Court's decision, then, law schools should aggressively improve minority outreach and recruitment efforts at colleges and universities around the country, including but not limited to those that are traditionally black.

Legal professionals themselves, however, should reach even deeper. As Chief Justice Serna observed, "We have to go even to high schools, because there's a disproportionate dropout rate amongst minorities."[165] Visits by judges and lawyers to high schools, youth centers, and other places where the public congregates, are critical to increase the personal interaction with people of color that can create opportunities for encouraging students to pursue college degrees and legal careers.

The Commission recommends active promotion of a representative work force and diverse court appointments

[163] Testimony of Patricio M. Serna, November 1, 2002, at 25-26.
[164] *See* Elizabeth Chambliss, supra note 162, at 1.
[165] Testimony of Patricio M. Serna, at 26.

Lawyers and judges are not the only faces of the judicial branch. The rationales of actual and apparent inclusiveness that underlie the need for diversity among lawyers and judges apply equally to other court employees, who often are an individual's first point of interaction with the judicial system. Courts should adopt formalized recruitment, hiring and promotion policies and practices to ensure that the pool of qualified applicants for court employment is as broad and diverse as possible. The National Center for State Courts recommends "placing ads in foreign-language newspapers, accessing minority databases, approaching minority colleges, and contacting minority professional associations," as important outreach efforts in this regard.[166]

The Commission recommends that courts act aggressively to ensure that language barriers do not limit access to the justice system

Implicit in the promise of equal justice under law is the "ability of the courts to understand those who come before them and to be understood in return."[167] This can and should be made a practical reality. Courts should enact measures to minimize language barriers so that non-English speaking citizens are not deterred from pursuing their legal rights in American courts. These measures include making all relevant court information – e.g., general information, court forms, signage -- available in non-English languages commonly spoken in the community. The National Conference of Specialized Court Judges has sponsored the publication of a booklet entitled "Translations of Commonly Used Court Phrases,"[168] to be used by judges, court employees, and litigants in the absence of an interpreter. The booklet contains translations of dozens of basic court phrases in 30 languages.

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[166] National Center for State Courts, *Race and Ethnic Bias Trends in 2002: Diversity in the Courts*, available online at http://www.ncsconline.org/WC/Publications/KIS_RacEth_Trends02_Pub.pdf.
[167] Foreword, *Translations of Commonly Used Court Phrases*, American Bar Association Judicial Division (1998).
[168] *Translations of Commonly Used Court Phrases*, American Bar Association Judicial Division (1998).

While such measures are indispensable, they cannot displace the need for adequate interpreter services. Interpreters are necessary not only in sufficient numbers to meet the need in a given court setting, but interpreters should also receive appropriate training in cultural and racial diversity. Moreover, judges and other court personnel should be trained to identify the not-always-obvious circumstances under which an interpreter is necessary.

The Commission recommends that courts have in place formal policies and processes for handling allegations of bias

People of color are not fully confident that they will always be treated in an unbiased manner by the courts. If this lost trust is to be restored, it is critical that allegations of bias be vigorously addressed when they arise. Courts should establish formal mechanisms for the investigation, evaluation and resolution of allegations of specific incidents of bias. These mechanisms should include simple and accessible procedures for litigants and other interested persons to report such allegations in a manner that promotes confidence that they will be addressed promptly and objectively.

The Commission encourages sharing of information regarding diversity among the courts in a state and among the states

Diversity is a system-wide goal that will require system-wide solutions. Accordingly, the Commission strongly recommends that state courts assume a leadership role in establishing both intra- and inter-state data collection and information sharing networks to ensure that the best practices and innovative strategies developed on local levels are made available both statewide and nationwide. Such networks would also provide critical information in the effort to identify often overlooked inequities in the system. The National Center for State Courts has taken an important step toward this goal by maintaining an online "Clearinghouse of State Task Force Materials" with up-to-date information about diversity strategies, best practices, and other information resources

being developed within each state.[169] Yet as the Conference of State Court Administrators has noted, and this Commission strongly agrees, "States would benefit from a structured method of sharing their respective programs with each other, and one way to do this would be by designating a contact person in each state's court administration through whom the NCSC could obtain and share information regularly."[170]

The Commission recommends that measures be adopted to improve and expand jury pool representation

Among people of color recently surveyed, 77% believed that "Juries are the most important part of our judicial system."[171] This is therefore a critical point at which minority confidence in the system is determined. Meaningful steps should be taken to ensure that every jury pool represents a fair cross-section of the community from which it is drawn. Such steps include expanding source lists and reducing exemptions to increase the number of residents available for the pool. Also, obstacles common to low-income people often lessen their participation on juries. "Reducing the length and frequency of service, raising compensation, even providing child-care, all make it easier for individuals to serve without unduly interfering with work and family obligations."[172]

4. Improving Court-Community Relationships

The Commission recommends that courts take steps to promote public understanding of and confidence in the courts among jurors, witnesses and litigants

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[169] National Center for State Courts, *Racial and Ethnic Bias: Clearinghouse of State Task Force Materials*, available online at http://www.ncsconline.org/WC/Publications/KIS_RacEthStateTFPub.pdf.
[170] Conference of State Court Administrators, *White Paper on State Court's Responsibility to Address Issues of Racial and Ethnic Fairness*, at 6, National Center for State Courts, Government Relations Office (2001).
[171] *Perceptions of the U.S. Justice System*, note 69 *supra*, at Table 6.
[172] Conference of State Court Administrators, *White Paper on State Court's Responsibility to Address Issues of Racial and Ethnic Fairness*, at 4.

Public perceptions of the courts are undoubtedly influenced by what people read in the papers, hear on the radio, see on the evening news or in campaign advertising, and learn in school. In addition, however, their views can be profoundly shaped by direct contact with the judicial system as jurors, witnesses or litigants, or indirectly when a friend or family member serves in those capacities. These points of contact should be capitalized upon, and a number of courts are already doing so**.** Jury service, for example, creates a unique opportunity for court personnel and the judges themselves to provide the public with information on the operation of the courts, the importance of juries, and the relevance of judicial independence and accountability to the role courts play in American government. It likewise creates a duty on judges and court personnel to treat jurors with fairness and respect, because for many people, jury service will be their only point of interaction with the justice system.

The Commission recommends that courts engage and collaborate with the communities of which they are a part, by hosting trips to courthouses and by judges and court administrators speaking in schools and other community settings

The preceding recommendation addresses ways to promote public confidence among those who find themselves obliged to go to court as witnesses, jurors or litigants. As to those who are not obligated to come to the courthouse, however, the Commission believes that courts and judges should explore additional ways to strengthen their ties to the community and improve their relationship with the public they serve. Judges and court personnel should be encouraged to become involved with civic organizations and primary and secondary schools, speaking at school and organization events as a way to educate the public on the role of the courts, encourage students from communities of color to pursue legal careers, and build bridges between judges and the community. Courts should encourage courthouse visits from schools and other groups, and open

channels of communication with community leaders. The ABA Judicial Division Judges Network is an example of judges reaching out to their communities. As problem-solving justice becomes increasingly pervasive, the importance of these outreach efforts will only become greater.

The Commission encourages the continuation of problem-solving courts as a means to promote public confidence in the courts

The ABA is already on record in support of problem-solving courts as an innovative means to achieve promising results in the areas of crime, substance abuse, juvenile delinquency and family law**.** Our Commission, however, has not been created for the purpose of developing strategies to improve the enforcement of substantive law. We have been asked to explore ways in which a politicized judiciary may be made less so, and to that end, the Commission concludes that problem-solving courts should be encouraged as a means to enhance public trust and confidence in the courts. As elaborated upon in the background section of this report, the introduction of problem-solving courts into communities with deep-seated skepticism of their local court systems has yielded promising gains in public approval. By making judges more visible and active "problem solvers" in their communities, such courts have the potential to reduce public alienation from the courts—particularly in communities of color where such alienation is a commonplace.

Problem-solving courts are no panacea, and the Commission's recommendation encouraging their proliferation should not be read in isolation. To the extent that problem solving-courts call upon judges to further modify their traditional roles as detached referees, it raises questions as to how far "problem solving" judges may go before running afoul of their ethical obligations. For that reason (among others), the Commission has recommended that the Model Code of Judicial Conduct be reexamined.

This recommendation must likewise be read in tandem with earlier recommendations regarding diversification of the bench; if courts are to become accepted as community problem solvers, it may be all the more important that the judges in those courts reflect the diversity of the communities they serve. Finally, the Commission's earlier recommendations regarding judicial training and education are uniquely relevant here: to the extent that judges are being asked to serve a very different role than before, the importance of adequate training and education to make the transition smoothly is obvious.

B. Improving Judicial Selection

Some of the most serious problems confronting our judicial systems today relate to judicial selection and reselection. As discussed at length in the background section of this report, judicial election campaigns at all levels are increasingly focused on isolated issues of intense political interest. The issue *de jour* varies by jurisdiction and campaign. Sometimes it is products liability, insurance or medical malpractice litigation; sometimes it is crime; sometimes it is school funding, abortion, or capital punishment. But the message sent to the electorate is the same in each case: sitting judges should lose their jobs if they make a ruling of law in a particular case that a popular majority thinks is wrong. In the Commission's view, that message is antithetical to principles of judicial independence, impartiality, and the rule of law.

These increasingly shrill single-issue messages have been communicated in campaign advertising often run not by the candidates themselves, but by independent organizations. The candidates, then, are left with no choice but to defend themselves by raising more and more money from contributors, from lawyers and from other groups interested in the outcomes of cases judges decide. That, in turn, has undermined public confidence in the courts by making judges appear increasingly dependent on their

contributors, making judicial office increasingly available only to candidates with wealth or with wealthy contributors, and making judges look and act like stereotypical "politicians."

To complicate matters even further, judicial elections are likely to become an increasingly problematic means of judicial selection, in the aftermath of the United States Supreme Court's decision in *Republican Party of Minnesota v. White*. Scholars are bound to disagree as to the breadth of the *White* decision, and the extent to which the first amendment freedom of speech provisions prevent state high courts from imposing ethical limits on the campaign speech of judicial candidates. Although we now know that states may not simply prohibit candidates from announcing their views on controversial issues that could come before them as judges, uncertainties remain as to whether, for example, the states retain regulatory authority over candidates who make statements that appear to commit them to deciding particular issues in particular ways.

Additional litigation may be needed to resolve such uncertainties, but this much is already clear, based upon the testimony we received from supporters and critics of the Supreme Court's ruling: the *White* case is likely to politicize judicial elections as never before. Judicial candidates will be competing for votes on the basis of their positions on issues they will later decide as judges. When voters ask for the candidates' views on politically explosive issues of the day, the candidates must either answer, or decline and hazard a negative reaction from the electorate at the ballot box. And the risk that judges will be selected not because they are best qualified to impartially uphold the law, but because they will best represent their "constituents" views from the bench, becomes increasingly real.

Underlying the majority's opinion in *White* is a relatively simple and straightforward message: A state that opts to select its judges by election may not,

consistent with the first amendment, deny judicial candidates the opportunity to discuss what the election is about; and the election is in no small part about the issues those candidates will decide as judges. If a state is concerned that judicial candidates will compromise their impartiality when they take positions on issues that may come before them later as judges, it has an obvious solution, as emphasized by Justice O'Connor in her concurring opinion: it may select judges by means other than election.

In the Commission's view, states *should* be concerned about the impact of judicial elections on judicial impartiality and the rule of law. Moreover, as judicial campaigns become further politicized in the aftermath of *White,* the need to act on those concerns and rethink the future of judicial elections may be increasingly acute. Notwithstanding widespread dissatisfaction with the judicial selection process in many states, judicial selection reform is among the most contentious subjects that the Commission has been directed to address, for at least two reasons. First, nowhere is the tension between judicial independence and judicial accountability more palpable than in the context of judicial selection. It is one thing to acknowledge the need for selection systems to preserve and promote independence *and* accountability—a point with which few would disagree—and quite another to determine what selection system strikes the optimal balance between the two, where consensus is highly elusive. Disagreement over the relative merits of appointive versus elective systems of judicial selection thus persists with no sign of abating. Professor Paul Carrington and Adam Long report on a state chief justice who "not long ago declared that there is no method of selecting and retaining judges that is worth a damn. He was not the first to express that wisdom."[173] Although we might not go quite that far, it is fairly said that there is no perfect selection system.

[173] Paul Carrington and Adam Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio,* 30 CAP. U. L. REV. 455, 471 (2002).

Second, nowhere is the challenge of balancing the philosophically preferable and the politically possible more daunting, than in the context of judicial selection. On the one hand, if we recommend that states adopt our preferred selection system without regard to whether there is any realistic hope of those states eventually following our lead, we will have squandered a unique opportunity to improve judicial selection in the United States. On the other hand, if we simply decline to think outside the box created by the political realities that exist in 2003 and confine our recommendations to those that legislatures are willing to implement tomorrow, we will have issued a timid report that ignores our charge to assess and address the needs of the state judiciaries for the coming century.

To overcome these difficulties, the Commission has decided to sequence its judicial selection recommendations. We will begin by presenting our primary conclusions and recommendations to implement the selection system that we regard as optimal in the long term, recognizing that one size does not fit all and that our preferred system of selection may not be as well suited as other alternatives for adoption in some states. We will then present additional recommendations to improve other selection systems in states that are unprepared to adopt our primary recommendations.[174]

1. The Preferred System of Judicial Selection

The Commission recommends, as the preferred system of state court judicial selection, a commission-based appointive system, with the following components:

• The Commission recommends that the governor appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, non-partisan, diverse deliberative body or commission

[174] The Commission was unanimous in its view that our recommendations should be sequenced so as to better meet different needs of different states with flexibility. And the Commission was virtually unanimous that the sequence we present here was optimal.

• The Commission recommends that judicial appointees serve a single, lengthy term of at least 15 years or until a specified age and not be subject to a reselection process. Judges so appointed should be entitled to retirement benefits upon completion of judicial service

• The Commission recommends that judges not otherwise subject to reselection, nonetheless remain subject to regular judicial performance evaluations, and disciplinary processes that include removal for misconduct.

The American Bar Association has long supported appointive-based, or so-called "merit selection" systems for the selection of state judges, and in the Commission's view, rightly so, for several reasons. First, the administration of justice should not turn on the outcome of popularity contests. If we accept the enduring principles identified in the first section of this report, then a good judge is a competent and conscientious lawyer with a judicial temperament, who is independent enough to uphold the law impartially, without regard to whether the results will be politically popular with voters. Second, initial appointment reduces the corrosive influence of money in judicial selection, by sparing candidates the need to solicit contributions from individuals and organizations with an interest in the cases the candidates will decide as judges. Some argue that in appointive systems, campaign contributions are simply redirected from judicial candidates to the appointing governors, but that is an important difference, because it is the money that flows directly from contributors to judicial candidates that gives rise to a perception of dependence. Third, the escalating cost of running judicial campaigns operates to exclude from the pool of viable candidates those of limited financial means who lack access to contributors with significant financial resources. The potential impact of this development on efforts to diversify the bench is especially troublesome. Fourth, the prospect of soliciting contributions from special interests, and being publicly pressured to take positions on issues they must later decide as judges, threatens to discourage many

capable and qualified people from seeking judicial office. For these and other reasons upon which the ABA has relied in the past, the Commission believes that judges should initially be selected by appointment.

Consistent with an earlier recommendation in this Report, the Commission likewise recommends that the qualifications of all judicial aspirants be evaluated by an independent deliberative body, and that candidates eligible for nomination to judicial office be limited to those who have been approved by such a body. In grounding its support for appointive judiciaries on the principle that the viability of a would-be judge's candidacy should not turn on her or his political popularity, the Commission does not mean to suggest that appointive systems are apolitical. Any method of judicial selection will inevitably be "political" because judges decide issues of intense social, cultural, economic and political interest to the public and the other branches of government. In this inherently political environment, however, the requirement that an independent commission review the qualifications of and approve all would-be judges provides a safety net to assure that all nominees possess the baseline capabilities, credentials and temperament needed to be excellent judges.

Despite the occasional tendency to regard "politics" as a bad word, at its root, politics refers to the process by which citizens govern themselves. In that regard, it is not only inevitable but also perhaps even desirable that judicial selection have a "political" aspect, to ensure that would-be judges are acceptable to the people they serve. Because judges, by virtue of their need to remain independent and impartial, serve a role in government that is fundamentally different from that of other public officials, the Commission has recommended against the use of elections as a means to ensure public acceptability.

The Commission did, however, consider another possibility: legislative

confirmation of gubernatorial appointments. Requiring that judges be approved by an independent commission and *both* political branches of government could conceivably increase public confidence in the judges at the point of initial selection and serve as a form of prospective accountability that reduces the need for resort to more problematic reselection processes later. A majority of the Commission ultimately decided, however, not to recommend legislative confirmation as a component of its preferred selection system. The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states has led the Commission not to recommend such an approach.

The last of the Commission's recommendations with respect to the selection system it regards as optimal, is that states not employ reselection processes. Discussions of judicial selection often overlook a distinction that the Commission regards as absolutely critical, between initial selection and reselection. When non-incumbents run for judicial office in contested elections, the threat that elections pose to their future independence and impartiality, though extant, is limited. Granted, non-incumbent candidates can be made to appear beholden either to their contributors, to positions they took on the campaign trail, or more generally to the electoral majority responsible for selecting them. But unlike incumbent judges, first-time judicial office seekers are not at risk of being removed from office because they made rulings of law that did not sit well with voters.

A similar point can be made with respect to judges initially selected by appointment. The process by which those candidates are first chosen may be partisan and political, and some judges may feel a lingering allegiance to whomever appointed them. But they are not put in danger of losing jobs they currently hold on account of judicial decisions made in those positions.

In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection. It is then that judges who have declared popular laws unconstitutional, rejected constitutional challenges to unpopular laws, upheld the claims of unpopular litigants, or rejected the claims of popular litigants, are subject to loss of tenure as a consequence. And it is then that judges may feel the greatest pressure to do what is politically popular rather than what the law requires. Public confidence in the courts is in turn undermined to the extent that judicial decisions made in the shadow of upcoming elections are perceived—rightly or wrongly—as motivated by fear of defeat.

The problems with reselection may be most common in contested reelection campaigns, but are at risk of occurring in any reselection process—electoral or otherwise. Thus, for example, the issue arises in states that delegate the task of judicial reselection to legislatures, whose enactments judges are to interpret, and if unconstitutional, invalidate**.** For that reason, the Commission recommends against resort to reselection processes.

While the Commission recommends that judges be appointed to the bench without the possibility of subsequent reappointment, reelection, or retention election, the Commission has remained flexible as to the optimal length of a judge's term of office. Most states that appoint judges without the possibility of subsequent reselection cap judicial terms at a specified age. States could also set judicial terms at a fixed number of years. In either case, however, it is important that states take pains to preserve judicial retirement benefits, because judicial office will lose its appeal to the best and brightest lawyers if judges are obligated to conclude judicial service before their retirement benefits vest.

If states opt for a single term, it is important that the term be of considerable length, at least fifteen or more years, for several reasons. First, there are obvious advantages that

flow from experience on the bench that will be lost if judges are confined to short terms of office. Second, the most qualified candidates for judge will often be lawyers with very successful private practices that they may be reluctant to abandon if they are obligated to return to practice after only a few years on the bench. Third, to the extent that lawyers view judicial service as the culmination of their legal careers, and not simply as a temporary detour from private practice, short terms may discourage younger lawyers from seeking judicial office. Fourth, insofar as judges are obligated to reenter the job market at the conclusion of their judicial service, their independence from prospective employers who appear before them as lawyers and litigants in the waning years of their judicial terms, may become a concern.

In earlier recommendations, the Commission urged that systems of judicial discipline be actively enforced, and that regular and comprehensive judicial evaluation programs be instituted. These recommendations are critically important to ensuring accountability in a system that does not rely on reselection processes. All states have procedures for judicial removal, typically including but not limited to those subsumed by the disciplinary process.

The Commission believes that judges must be removable for cause, to preserve the institutional legitimacy of the courts. It is beyond the scope of this report to describe in detail the nature and extent of "for cause" removal. By way of general guidance, however, the Commission points to the enduring principles discussed in the first part of this report. An overriding goal of our system of justice is to uphold the rule of law. Judges should never be subject to removal for upholding the law as they construe it to be written, even when they are in error, for then the judge's decision-making independence—so essential to safeguarding the rule of law in the long run—will be undermined. On the other hand, we do not want judges who are so independent that they

are utterly unaccountable to the rule of law they have sworn to uphold. Thus, judges who disregard the rule of law altogether by taking bribes or committing other crimes that undermine public confidence in the courts, should be removed. One could reach a similar conclusion with respect to judges who, despite the best efforts of nominating commissions to weed out unqualified candidates, manifest an utter lack of the competence, character or temperament requisite to upholding the law impartially.

2. Alternative Recommendations on Systems of Judicial Selection

The Commission opposes the use of judicial elections as a means of initial selection and reselection for the reasons discussed above. Over the long term, as elections become ever "noisier, nastier and costlier," to borrow the phrase of a noted scholar,[175] the Commission believes that this view will win widespread acceptance. Over the short term, however, the Commission acknowledges that support for judicial elections remains entrenched in many states. It is to those states that the Commission now directs its attention, with recommendations aimed at ameliorating some of the deleterious effects of elections on the enduring principles of a good judicial system.

For states that cannot abandon reselection processes altogether, the Commission recommends that judges be subject to reappointment by a credible, neutral, non-partisan, diverse deliberative body

States reluctant to relinquish control over judicial reselection can reduce the risk that judges will lose their tenure for reasons detrimental to judicial independence and impartiality by delegating the task of reappointing judges to the same commissions that are to assist in the process of initial selection. A Commission-based reselection process, such as that used in Hawaii, may be better suited than contested or retention elections to

[175] Thomas Phillips, *When Money Talks, the Judiciary Must Balk,* THE WASHINGTON POST, April 14, 2002 at B2 (quoting Professor Roy Schotland).

evaluating judicial performance with reference to incumbents' competence, diligence character and temperament, and without regard to the popularity of the judges' rulings.

For states that cannot abandon judicial elections altogether, the Commission recommends that elections be employed only at the point of initial selection

It bears emphasis that the Commission's greatest concern with respect to judicial elections is their potential to undermine judicial independence, impartiality and the rule of law, by threatening judges with loss of tenure if their prior rulings are disagreeable to a majority of the electorate. As far as elections are concerned, however, that concern is relevant only when they are employed to reselect judges. At the point of initial selection judicial candidates may worry, at least after the *White* decision, that they may not win judicial office in the first place unless they express politically popular views on issues likely to come before them later. But they are not put at risk of losing their jobs because they honored their oaths of office by upholding the law in the teeth of public opposition.

Accordingly, the Commission recommends that if elections are used as a means of judicial selection, they be employed solely for the purpose of initial selection, and not reselection. Once elected, candidates should be permitted to serve until a specified age, or for a single, lengthy term.

Consistent with the Commission's earlier recommendation, candidates favored for judicial office should be limited to those whose qualifications have been approved by an independent, deliberative body. It may be noted that when making the case for appointed judiciaries, the Commission did not contend, as many proponents of appointed judiciaries have in the past, that judges who are appointed will, on average, be better qualified than their elected counterparts. Empirical research contradicts such a conclusion; moreover, lingering doubts can, in the Commission's view, be extinguished if the qualifications of every judicial aspirant—elected or appointed—are evaluated and approved.

If such a system is implemented, subjecting sitting judges to elections may still be necessary in the limited sense that when a governor fills mid-term vacancies with new appointees, those appointees may later need to run for election to be eligible to sit for a full term. In the Commission's view, however, if a judge must be subjected to election, it is preferable for it occur in the initial stage of the judge's tenure, when the risk that the election will become a referendum on the popularity of the judge's past rulings is less likely to occur.

For states that retain judicial elections as a means of reselection, the Commission recommends that judges stand for retention election, rather than run in contested elections

The American Bar Association has long supported so-called "merit selection" systems in which judges are appointed by governors from a pool of candidates whose qualifications are approved by a merit-selection commission. Typically, merit selection systems require appointed judges to stand for retention elections after a term of years. The Commission's preferred method of judicial selection embraces all aspects of traditional merit selection systems, except the retention election feature. Because the Commission is troubled by the impact of reselection on judicial independence, impartiality and the rule of law, it has serious reservations about any reselection process. If elections are unavoidable, the Commission regards it as preferable that they be employed at the point of initial selection, for reasons discussed above.

In criticizing retention elections, the Commission does not intend to undermine the efforts of those who are seeking to implement traditional merit selection systems in states that employ contested elections as means of judicial selection and reselection. Quite the contrary, we are following the lead of a merit-selection system proponent, who admonished the Commission to "take the high ground" and not "compromise [its] principles," before testifying that in merit selection proposals, the "principal goal" of the

retention election is itself a "compromise" designed to overcome the "political reality" of entrenched support for judicial elections.[176]

If, however, a state is unwilling to abandon elections at the point of reselection, the Commission believes that retention elections are preferable to contested elections. In retention elections, judges run against their records, rather than against opposing candidates, which means that incumbents are at risk of losing their seats only if voters deem their records unacceptable. Because voters have no way of knowing whether the judge that the governor would appoint to replace the ousted incumbent would be preferable, dissatisfaction must run relatively high before a serious campaign to remove a judge will emerge. In contested elections, on the other hand, an incumbent's record will be challenged whenever there is an opponent who wants the incumbent's job, and the incumbent will lose whenever the opposing candidate convinces the electorate that he is preferable. The political pressure brought to bear on a sitting judge who must decide a controversial case in the months leading up to an election is therefore likely to be correspondingly higher. It is unsurprising, then, that most—though not all—of the meanest, priciest and most troubling judicial campaigns have been in contested elections rather than retention elections. Accordingly, if states insist on some form of election to reselect judges, the Commission concludes that retention elections are preferable to contested elections.

For states that retain contested judicial elections as a means to select or reselect judges, the Commission recommends that all such elections be non-partisan and conducted in a non-partisan manner

[176] Testimony of Clifford Haines, Hearing of September 27, 2002 at 52, 67-68, 74-75 (testimony of Clifford Haines). Mr. Haines added that a secondary justification for retention elections was to remove an appointee who "turns out to be a disaster"—a problem the Commission regards as better remedied through improved methods of judicial evaluation, discipline and removal.

To the extent that states retain their allegiance to contested elections as a means of judicial selection—at the point of initial selection or reselection—the Commission recommends that all such elections be non-partisan. As a general matter, judges are responsible for upholding the law without regard to whether they are Democrats, Republicans, Libertarians or independents. Without disputing that a judge's political philosophy can exert some influence over a judge's thinking on some questions of law, partisan elections make party affiliation the single most salient feature of a judge's candidacy, by including it as the only information about the candidates on the ballot itself. Some states go even further by enabling voters to pull a single-party lever for all candidates in all branches of government, including judges. The net effect is to further blur, if not obliterate the distinction between judges and other elected officials in the public's mind, by conveying the impression that the decision-making of judges, like that of legislators and governors, is driven by allegiance to party, rather than to law. It is therefore unsurprising that many of the most extreme examples of independence-threatening election related behavior have occurred in states that select their judges in either openly partisan elections, or elections that are non-partisan in name only.

Contested elections—be they used to elect a judge initially, or to reelect a judge for another term—should therefore be conducted in a non-partisan manner. Political parties should not be responsible for nominating judicial candidates, and the judicial candidates' partisan affiliation should not appear on ballots in either primary or general elections. States with true non-partisan elections, such as those in Wisconsin, must therefore be distinguished from states such as Michigan, where the political parties nominate candidates to run in ostensibly nonpartisan general elections, which in fact have been very partisan indeed. In the recent past, states such as North Carolina and Arkansas have moved toward nonpartisan systems—a trend that should be encouraged.

For states that continue to employ judicial elections as a means of judicial reselection, the Commission recommends that judicial terms be as long as possible

The Commission agrees with the first National Summit on Improving Judicial Selection, which concluded that states in which judges serve for relatively short terms would do well to make judicial terms longer.[177] Regardless of whether states employ partisan, non-partisan or retention elections as means to reselect sitting judges, the risk that sitting judges will lose their tenure on account of unpopular rulings or allow apprehension of the electorate to color their decision-making, is necessarily reduced if elections are made less frequent by lengthening judicial terms. In this regard, we share the view of the Honorable Morris Overstreet, a former Chief Justice of the Texas Court of Criminal Appeals, when he testified before the Commission, that "if you don't have to go back and face the voters, you don't have to worry about how they're going to retaliate or if they're going to retaliate." That led him to propose judicial terms of ten to fifteen years, which would "reduce even the thought of having to be reelected or reappointed" and "produce some independence" as a result.[178]

For states that use elections to select or reselect judges, the Commission recommends that states provide the electorate with voter guides on the candidate(s)

In his testimony before the Commission, Dean Joseph Tomain urged the Commission to recommend voter guides as a useful means to better inform the electorate in judicial elections.[179] At our Portland, Oregon hearing, the Honorable Gerry Alexander,

[177] Call to Action: Statement of the National Summit on Improving Judicial Selection, January 16, 2001.
[177] Testimony of Morris Overstreet, November 22, 2002 at 77-78.
[177] Testimony of Joseph Tomain, August 21, 2002, at 168.
[178] Testimony of Morris Overstreet, November 22, 2002 at 77-78.
[179] Testimony of Joseph Tomain, August 21, 2002, at 168.

Chief Justice of the Washington Supreme Court, furnished the Commission with examples of voters' pamphlets used in that state.

When Professor Roy Schotland testified before the ABA Commission on Public Financing of Judicial Campaigns, he made a special point of endorsing the use of voter guides in states that elect their judges. As Professor Schotland described them, "voter pamphlets, which have pictures and little descriptions of each candidate for each office, have been in place and enormously popular in the four west coast states for almost a century." He noted that the effectiveness of voter guides was reflected in exit polling data, which shows that "voters regard [voter pamphlets] as their favorite source of information." Because voter pamphlet programs are comparatively inexpensive and have been successfully implemented in several states, Professor Schotland concluded that exporting such programs to other jurisdictions would be quite feasible.[180]

The ABA Commission on Public Financing of Judicial Campaigns recommended the proliferation of voter guides for states that use judicial elections, and we concur. To the extent that elections are employed to select or reselect judges, voters should be supplied with more information rather than less. We therefore share the views of the state Chief Justices who, in their call to action following a summit meeting on judicial selection concluded:

> State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election at no cost to judicial candidates. Congress should provide a free mailing frank to any voters' guide sponsored by a state or local government.[181]
>
> **For states that use elections to select or reselect judges, the Commission recommends that state bars or other appropriate entities**

[180] Hearing before the ABA Commission on Public Financing of Judicial Campaigns, January 27, 2001 at 113-16.
[180] *Call to Action*, 34 Loy. L. A. L. REV. 1353, 1357 (2001),

initiate a dialogue among affected interests, in an effort to deescalate the contributions arms race in judicial campaigns

In states where judicial campaigns have focused on issues relating to products liability, tort reform or medical malpractice, dissatisfaction with the process is widespread. Individuals and organizations sympathetic to the interests of defendants in civil litigation dislike spending enormous sums of money on judicial elections and worry about its impact on impartial justice. As Thomas Gottschalk, General Counsel of General Motors Corporation, testified before the Commission:

> We are reaping what we sow. Why should the public believe our courts will dispassionately and fairly dispense justice based on the unique facts and pertinent laws of each particular case when each political party, each candidate, and each candidate's supporter are telling the public in each election that the candidates have perceived notions and bias[es] which will dictate how they will rule in many of the cases that come before them? We know these ads are unfair, one-sided, exaggerated and often downright disgusting.[182]

Trial lawyers and others with pro-plaintiff leanings are equally troubled by the impact of money on judicial elections. Robert Peck, a Commission advisor and counsel to the American Trial Lawyers Association, echoed Mr. Gottschalk's concerns, adding that "we are equally anxious to look for a way out of this."[183] The problem, from the perspective of both sides, is a reluctance to "disarm" unilaterally, for fear that doing so will give the other side unfair advantage.

We agree with Mr. Gottschalk, that "one of the outcomes of this Commission might be to get much more focused on getting leaders together in a way to talk about

[182] Testimony of Thomas Gottschalk, November 22, 2002 at 196.
[182] *Id.* at 226 (statement of Robert Peck).
[182] *Id.* at 222 (testimony of Thomas Gottschalk).
[182] *Id.* at 226 (statement of Robert Peck).
[182] *Id.* at 222 (testimony of Thomas Gottschalk).
[182] *Id.* at 226 (statement of Robert Peck).
[182] *Id.* at 226 (statement of Robert Peck).

bilateral steps that could be taken there."[184] It may be that the differences separating the warring factions on the civil justice issue are simply too great to bridge. But there is clearly common ground, in that a significant segment of the business and trial lawyer communities acknowledges that too much money is being spent on a dubious cause that has yielded disastrous results. The Commission therefore encourages state bars or other appropriate bodies to initiate talks between the affected interests in jurisdictions where campaign costs have soared, for the purpose of exploring whether agreement to suspend the judicial campaign contributions arms race is feasible.

For states that use elections to select or reselect judges, the Commission recommends that state bars or other appropriate entities reach out to candidates and affected interests, in an effort to establish voluntary guidelines on judicial campaign conduct

The U.S. Supreme Court's decision in *White* has created considerable uncertainty as to the first amendment limits on the power of state high courts to regulate candidates' campaign-related speech. Such uncertainties, however, impose no constraints on voluntary action. In the preceding recommendation, the Commission has urged that state bars or other appropriate entities initiate a dialogue between the business community and the trial bar, in an effort to escape the cycle of escalating campaign spending that a growing number of states have begun to experience. Even if participants in the process are reluctant to "disarm," however, it may be possible to reach voluntary agreement on campaign practices that can better protect the interests of promoting judicial independence and accountability. In his testimony before the Commission, ABA President-Elect Dennis Archer described his efforts to initiate a dialogue with those involved in the recent judicial elections in Michigan, to the end of securing voluntary compliance with a set of campaign conduct guidelines designed to avoid problems

[184] *Id.* at 222 (testimony of Thomas Gottschalk).

encountered in the previous election cycle.[185] The Commission believes that this approach holds promise, and recommends that state bar leaders initiate comparable dialogues in their respective states. The goal should be to convince all affected interests—the candidates, trial lawyers, business interests, political parties and others—that a truly independent and impartial judiciary is in the best interest of *all* concerned, and that compliance with voluntary campaign guidelines is the best means to that end.

The Constitution Project has developed "The Higher Ground Standards of Conduct for Judicial Candidates" that may provide state bar leaders with a starting point in their discussions.[186] They include some provisions that are already a part of many codes of judicial conduct, but elevate their profile if candidates subscribe to them publicly. They declare, for example, that candidates should not make promises about how they will decide issues that may come before them; that they should only solicit or accept funds through their campaign committees; that they should promptly disclose the sources of contributions they receive; that they should not make misleading statements themselves, take responsibility for the information their own campaigns disseminate in advertising or otherwise, and condemn misleading statements and advertising disseminated by others on their behalf.

President-Elect Archer's statement of principles, a copy of which is included as an appendix, provides another source of information. It seeks to limit signatories from representing that a judicial candidate has engaged in criminal conduct, racial or ethnic bias, immoral conduct or professional misconduct, in the absence of an official ruling by a regulatory or judicial body.

[185] Testimony of Dennis Archer, August 21, 2002.
[186] See http://www.constitutionproject.org/ci/standards.pdf.

For states that do not abandon contested elections at the point of initial selection or reselection, the Commission recommends that states create systems of public financing for appellate court elections

For states that elect their judges in contested elections, the potential advantages of underwriting judicial campaigns with public funds are clear. The more money judges receive from public sources, the less they will have to raise from private groups and individuals who are interested in the outcomes of cases the judges decide, which will reduce the potential for campaign contributions to influence judicial behavior and address the public perception that such influence occurs. Indeed, the case for public financing of judicial elections may be more compelling than it is for the legislative or executive branch races, notwithstanding the fact that almost all public funding programs have confined themselves to political branch contests. Governors and legislators are supposed to be influenced by their constituents' point of view. In judicial races, on the other hand, where "constituent" and other external influence over a judge's independent decision-making is inappropriate, the desirability of insulating judges from the influence of–and the appearance of influence of--private campaign contributions is correspondingly greater. The Commission therefore supports ABA policy, as recommended by the

Commission on Public Financing of Judicial Campaigns, that states that select judges in contested elections finance those elections with public monies.[187]

For states that retain contested judicial elections and do not adopt systems of public financing, the Commission recommends that states impose limits on contributions to judicial campaigns

In states that continue to finance elections through private contributions, the perception that judges are influenced by their contributors is exacerbated to the extent that contributions are permitted in amounts large enough to foster such perceptions. The ABA has recently amended the Model Rules of Judicial Conduct to require that a judge

[187] *See* REPORT OF THE ABA COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS (2001).

recuse himself in cases where a lawyer or litigant has contributed to the judge's campaign in excess of a specified amount. In addition, however, the states should impose caps on contributions to judicial campaigns, and establish maximum contributions at a level that will reduce the appearance that judges are dependant on or beholden to any one individual, interest group, law firm or corporation.

C. Promoting an Independent Judicial Branch that Works Effectively with the Political Branches of Government

Up to this point, the Commission's concern with judicial independence has focused on the decision-making independence of individual judges—their capacity to decide cases according to law without inappropriate interference from voters, contributors, interest groups, political opponents, the media, or public officials. As described earlier in the course of enumerating the enduring principles of a sound judiciary, however, there is a second form of judicial independence that relates to the capacity of the judiciary to preserve itself as a separate and coequal branch of state government. Without some measure of "institutional independence," state judiciaries would be so completely beholden to the political branches for their survival as to eviscerate their capacity to keep the political branches in check through the exercise of judicial review. Accordingly, state constitutions establish their judiciaries as separate branches of government, and many go further than their federal counterpart, by making the separation of powers among the branches explicit, or by delegating to the judicial branch specified powers of self-governance.

At the same time, state judiciaries are by no means completely independent. Most significantly for our purposes, state constitutions typically give legislatures the power to authorize—or not—the expenditure of funds for judicial budgets and salary increases, which can serve as a powerful check on the judiciary's institutional autonomy. When

exercised responsibly, the legislature's power of the purse constitutes an appropriate and essential check to ensure that the judiciary is operating efficiently and effectively. Recently, however, states around the country have experienced budgetary deficits that often exert a disproportionate impact on judicial systems. As the *ABA Journal* recently reported, "A state budget crisis is gripping the justice system, forcing many states to close courts and prisons, release some inmates early, stop prosecuting certain nonviolent crimes and slash indigent defense funding."[188]

In some cases, discussed in the background section of the report, the legislature has cut the judiciary's budget in ways that at least appear to be retaliatory. More often, budget cuts are not the product of legislative indifference or animus but of a need for state-wide fiscal austerity. Even then, however, state judiciaries are often ill equipped to lobby legislatures for their fair share of the shrinking fiscal pie, and lose ground relative to other priorities the legislature regards as more pressing.

Although the Commission discusses the issue of the judiciary's continuing independence as a branch last, and devotes less space to its recommendations here than in the preceding two sections, it would be a mistake to infer that the Commission regards the issue here as less important. The fiscal health of many states has taken a sharp decline in the immediate past, which has created crisis conditions for court budgets in a number of states. Those conditions demand immediate attention. They are, however, currently being attended to by other organizations, or other entities within the ABA. For that reason, we have elected not to develop our recommendations here in as much detail, and focus our efforts on lending support to other ongoing efforts by calling public attention to them.

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[188] David Hudson Jr., *Courts' Cash Crunch, A*BA J. E-REPORT, January 24, 2003.

The Commission recommends the establishment of standards for minimum funding of judicial systems

State courts must be adequately funded. The fair and impartial administration of justice is a priority of the highest order. Protecting and preserving that system requires adequate funding for judgeships, staff, facilities and jury trials. The cost of running state court systems represents a small percentage of the states' overall operating budgets, averaging only 1.5% across the country. For these reasons, the Commission believes that states should develop and adhere to minimum standards for state court funding.

Minimum funding standards can help to guard against retaliatory budget cuts that, in the Commission's view, are simply indefensible. In times of fiscal belt-tightening, minimum funding standards can likewise assist legislatures in assessing whether and how deeply the judiciary's budget can be cut without impairing the courts' capacity to render fair and impartial justice. "Minimum funding standards" as that phrase is used here, does not mean setting minimum dollar amounts for state appropriations to the judicial branch. Rather, it means isolating the core functions that a judiciary and the judicial system must perform and the critical services it must provide, for the benefit of lawmakers confronting hard choices when crafting state budgets. In times of fiscal austerity, all branches of government must make sacrifices; minimum funding standards can assist judges and legislators in establishing the floor below which state budgets must not go if the judicial system's core mission is to be preserved.

The Commission notes that some research and writing has been devoted to the issue of adequate court funding.[189] To date, however, no comprehensive effort has been

[189] *See, e.g.* INSTITUTE FOR COURT MANAGEMENT, COURTS AND THE PUBLIC INTEREST: A CALL FOR SUSTAINABLE RESOURCES (May 2002).

undertaken to explore minimum funding standards that the Commission recommends here.

The Commission recommends that the judiciary's budget be segregated from that of the political branches, and that it be presented to the legislature for approval with a minimum of non-transferable line-itemization

The state judiciary is not an administrative agency in the executive branch, but an independent branch of government, and needs to be treated as such. In the federal system, the judiciary's annual budget request was controlled by the Department of Justice until 1939, when the Attorney General successfully lobbied Congress to have the judiciary present its own budget requests through a newly created Administrative Office of U.S. Courts. Not all states, however, have followed the federal government's lead.[190] If the judiciary is an independent branch of government, its budget should be assessed independently of the executive branch. The Commission urges states that fold the judiciary's budget request into the executive branch and give the executive branch power to adjust the judiciary's appropriations request before it is acted upon by state legislature, to abandon that antiquated practice.

In a similar vein, the legislature has a duty to minimize waste in state government and take pains to assure itself that appropriations are spent wisely, but at some point, careful oversight can degenerate into micromanagement of a coequal branch of government. In Massachusetts, for example, the judiciary's budget is funded in more than 100 separate line items, in which the courts have no capacity to transfer funds from

[190] James W. Douglas and Roger E. Hartley, *State Court Budgeting and Judicial Independence: Clues from Oklahoma and Virginia.* 33 ADMINISTRATION AND SOCIETY 54 (March 2001) "Unlike in Oklahoma, Virginia does not submit its budget request directly to the legislature. Instead, after putting together the budget request, the Chief Justice submits the budget to the governor's Dept. of Planning and Budget. Here the governor's staff has the power to review and alter the request prior to sending it on to the legislature as part of the governor's executive budget document."

one item to another.[191] The net effect is to invite micromanagement, or worse—retaliatory budget cuts of particular line items, as discussed in Part II of this report. To the extent that states preserve line itemization as a means to preserve the judiciary's financial accountability, the burden on courts can be reduced if they are authorized to transfer funds among approved line items.

The Commission recommends that states create independent commissions to establish judicial salaries

If the judiciary is to be capable, qualified and independent, it is imperative that judges be adequately compensated. Judges should be selected from the ranks of our most talented private practitioners, government lawyers and academicians. While it may be true that some financial sacrifice is a price many fine women and men are prepared to pay when they ascend the bench, there is a point below which salaries may not fall without discouraging the best and the brightest from seeking judicial office. As recent events described in Part II of this report reveal, however, in many places judicial salaries are not even keeping pace with inflation, let alone staying competitive with the market for the services of qualified lawyers. State judge pay ranges often fall below that of many state and local officials; in California, for example, trial judges are paid less than many county sheriffs and district attorneys.

The process by which salaries are set is likewise important to the independence and impartiality of the judiciary. Judicial independence can only be harmed by the annual spectacle of judges going, hat in hand, to beg their legislatures for much needed salary increases and cost of living adjustments.

The Commission heard testimony concerning the experience in the State of Washington with a salary commission that sets the pay levels for judges independent of

[191] Hearing of November 1, 2002 at 148-49 (statement of Hon. Margaret Marshall).

the political branches.[192] Washington is not the only state to employ a salary commission of this kind. Some twenty states currently employ salary commissions of some kind, of which nine have the power to issue binding recommendations, unless affirmatively disapproved.[193]

The Commission regards this as a very promising avenue to explore. The ABA Standing Committee on Judicial Independence is currently developing a detailed salary commission proposal, and the Commission supports the Standing Committee in its efforts.

The Commission recommends that states create opportunities for regular meetings among representatives from all three branches of government to promote inter-branch communication as a means to avoid unnecessary confrontations on such issues as court funding, judicial salaries, and structural reform of courts

Often the conflicts that arise between courts and legislatures over judicial budgets and salaries, and their priority relative to other state needs, is the product not of political animus, but of a communications failure. Although courts speak to legislatures in their opinions, and legislatures speak to courts in the statutes they enact, opportunities for less formal interaction are often quite limited. The necessary separation and independence of legislative and judicial functions do not require isolation. To the contrary, there is much to be gained by creating mechanisms to foster comity and interbranch communication that can defuse crises before they occur.

The commission therefore recommends that states create opportunities for regular meetings among representatives from the three branches of government, to discuss issues of mutual concern. Such meetings can take a variety of forms: states may constitute tri-

[192] Testimony of Hon. Gerry Alexander, November 1, 2002 at 169-72.
[193] JANICE FERNETTE & MARY PAT BERKENBAUGH, JUDICIAL COMPENSATION COMMISSIONS (National Center for State Courts 1994).

branch commissions to improve court operations; one branch of government may host periodic conclaves; state law schools may host periodic conferences; and individual judges may simply reach out to their local legislators. The ABA Standing Committee on Judicial Independence is seeking to establish a model for this kind of interbranch activity, and the Commission encourages these efforts.

APPENDIX 1

American Bar Association
Commission on the 21st Century Judiciary
Roster of Witnesses, Commission Hearings

The ABA Commission on the 21st Century Judiciary held four national hearings between August and November 2002. A wide variety of national experts on the judiciary, including scholars, lawyers, state chief justices, and public leaders, testified before the commission on a number of topics. Hearings were held at Wayne State University Law School in Detroit, Michigan; James A. Byrne US Courthouse in Philadelphia, Pennsylvania; Portland State University College of Urban and Public Affairs in Portland, Oregon; and the Old Supreme Court Chambers of the Texas State Capitol in Austin, Texas. The four hearings generated a total of 1032 pages of testimony.

The following people testified before the Commission:
Hon. Gerry Alexander, Chief Justice, Supreme Court of Washington
Hon. Dennis Archer, President-Elect, American Bar Association
Hon. Phyllis Beck, Pennsylvania Superior Court
Greg Berman, Director, Center for Court Innovation
James Bopp, Jr., Bopp, Coleson & Bostrom
Mark Brewer, Chair, Michigan Democratic Party
Stephen Bright, Director, Southern Center for Human Rights
Dr. Bill Burges, President, Burges & Burges
Lisa Chang, President, National Asian Pacific American Bar Association
Allan Gordon, Chancellor, Philadelphia Bar Association
Thomas Gottschalk, General Counsel, General Motors Corporation
Cliff Haines, Pennsylvanians for Modern Courts
Hon. Brenda Harbin-Forte, Alemeda County Superior Court, former Dean, B.E.

Witkin Judicial College of California (provided written testimony)

Guy Harrison, President, State Bar of Texas
Dr. Roger Hartley, University of Arizona School of Public Administration and Policy
Article I. J. Barlow Herget

Hon. Dale Koch, Presiding Judge, Multnomah County Courts, member, Board of Trustees, National Council of Juvenile and Family Court Judges
Angel Lopez, President, Oregon Bar Association
Hon. Frederica Massiah-Jackson, President Judge, Philadelphia Court of Common Pleas
Hon. Thomas Moyer, Chief Justice, Supreme Court of Ohio
Robert Newell, President, Multnomah County Bar Association
Hon. Morris Overstreet, former Justice, Texas Court of Criminal Appeals
Margaret Reaves, Executive Director, Texas State Commission on Judicial Conduct
Malcolm Robinson, President, National Bar Association
Hon. Patricio Serna, Chief Justice, Supreme Court of New Mexico, President, National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts

Bryan Stevenson, Executive Director, Equal Justice Initiative of Alabama
David Tevelin, State Justice Institute
Joseph Tomain, Dean, University of Cincinnati College of Law
Suzanne Townsend, President, National Native American Bar Association
Reginald Turner, President, Michigan Bar Association
Andru Volinsky, Stein, Volinsky & Callaghan, PA

In addition, the Commission sought written testimony from any interested party. The Commission received written statements from the following organizations, totaling 64 pages of testimony:

Campaign for Media and Legal Center
ABA Death Penalty Moratorium Implementation Project
ABA Section of Individual Rights and Responsibilities, Death Penalty Committee
State Bar of Wisconsin Committee on Politics and the Wisconsin Judiciary
Center for American Politics and Citizenship at the University of Maryland
Hennepin County (MN) Bar Association
The Justice at Stake Campaign

APPENDIX 2

STATEMENT OF PRINCIPLES REGARDING MICHIGAN JUDICIAL CAMPAIGNS

We, the undersigned, agree that judicial campaigns should be conducted in a manner that encourages public trust and confidence in the justice system. Accordingly, we agree that judicial campaigns, whether conducted on behalf of candidates for judicial office or by others interested in the election of particular judicial candidates, should adhere to the following practices:

(1) criminal conduct shall not be attributed to a judicial candidate (unless consistent with the ruling of an official regulatory or judicial body);

(2) racial or ethnic bias shall not be attributed to a judicial candidate (unless consistent with the ruling of an official regulatory or judicial body);

(3) immoral conduct shall not be attributed to a judicial candidate (unless consistent with the ruling of an official regulatory or judicial body);

(4) knowing misrepresentations about a judicial candidate are not appropriate subjects for an advertisement about the judicial candidate; and

(5) professional or judicial misconduct shall not be attributed to a judicial candidate directly or by inference (unless consistent with the ruling of an official regulatory or judicial body).

what's happening in my state?

Summaries of Selected Studies

Findings on who usually wins judicial races, the amount of money involved and its sources, and the public's perception of judges.

The parts of the country covered in these studies are:

- Los Angeles County
- Illinois
- Louisiana
- North Carolina
- Ohio
- Pennsylvania
- Texas

The Price of Justice: A Los Angeles Area Case Study in Judicial Campaign Financing

(California Commission on Campaign Financing-1995)

Report was written by the California Commission on Campaign Financing, a private, non-profit organization formed in 1984. Focus of the report was 1976 to 1994. The Commission interviewed dozens of judges, campaign consultants and academic experts and examined literature on judicial elections.

At time of report, Los Angeles County was home of 9.2 million people, 3.6 million registered voters.

The Commission identified four problems:

- The controversial races create pressure to raise more money.
- Candidates are forced to solicit campaign contributions from lawyers and litigants.
- Candidates are the largest contributors to the campaigns, leaving them in debt.
- Given the scale of the voting population, candidates lack sufficient money to inform the voters of their merits. Given the nature of the judicial elections, voters lack clues to gage the merits of individual candidates, such as party affiliations, committee assignments, voting records, press releases or policy positions.

The Commission made the following findings:

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November 17, 2015 / 1:59 pm
"The Most Risky … Job Ever." Reporting on "ISIS in Afghanistan"

· Incumbents easily donate spending and win nearly every time. In the Superior Court contest between 1988-1994, incumbents outspent challengers $55,000 to $29,000 in median expenditures. In the same period, municipal court winners spent a median amount of $48,000, compared to $18,000 for losers.

· 1976 median expenditure by a superior court candidate was about $3,000. By. 1994, the figure was $70,000. Median incumbent spending jumped 95 fold, from just over $1,000 in 1976 to nearly $95,000 in 1994.

· 46% of total campaign dollars raised in Los Angeles County superior court races comes from the candidates' own purses.

· 45% of total outside contributions come from attorneys.

The Commission made the following recommendations:

· Contributions to any one judicial candidate from individuals, corporations, labor unions, organizations, and PACs should be limited to $500 per election.

· Judicial candidates should all be given a conditional right to print a free statement in the official countywide voters' pamphlet .

Funding Judicial Campaigns in Illinois

77 Judicature 294(1994)
Marlene Arnold Nicholson and Norman Nicholson

Authors studied funding for judicial races from 1980 to 1990, comparing selected data from recent supreme, appellate, and trial court elections to an earlier comprehensive study of the 1980 through 1984 elections.

The study made the following findings:

· Many judicial elections in Illinois are not real contests. Often, candidates who could not lose received the most contributions. Similarly, candidates sure to lose but sitting as judges at the time of the contribution also received many contributions.

· Small number of candidates raising funds in retention elections suggests fundraising practices for such elections do not currently raise substantial problems.

· Unlike the retention campaigns, partisan elections of supreme court and appellate judges involved active fundraising. All but one of 12 candidates between 1980 and 1990 reported raising funds, with the highest sums being just under $200,000. There was a modest increase in contributions to successful appellate campaigns from approximately $36,000 in 1984 to $40,000 in 1990.

· In 1988, candidates unopposed in both primary and general elections raised an average of $17,225. Some of this fundraising occurred before the filing deadline--when the candidate did not know if there would be opposition.

· In the general elections, more was contributed where only one party had a realistic opportunity to win than where elections were more contested. This included "sure winners" and also included "sure losers" who were sitting as judges at the time of the solicitation.

· Attorneys were the largest single source of contributions for nearly all Judicial campaigns, with higher proportions in the retention elections. Contributions in excess of $1000 were extremely rare.

Judicial Campaign Financing & Merit Selection

Public Affairs Research Council of Louisiana (1996).

Public Resources Council of Louisiana, Inc. (PAR) examined all judicial elections at the district court level and above from 1990 to 1994 and closely analyzed individual contributions for four selected races.

The study made the following findings:

· 61% of Louisiana judges win election without voter approval. Under Louisiana law, an unopposed candidate automatically wins, and the candidate's name simply does not appear on the ballot.

· 78° of contested elections were won by the contestant who spent the most money. The average winner spent $438,000 for the supreme court, $194,000 for the court of appeal, and $77,000 for the district court. On average winners spent 70% more and incurred 75% more debt: than their closest challengers.

· Winning judges often end elections with large campaign debts. As of February 1995 winning candidates from 1990-1994 with debt had an average outstanding debt of $47,081--ranging from $1,184 to $373,800. Losing candidates had average debt of $27,260. Several judges were still soliciting contributions three years after the campaign. On average, more than 60% of debt was personal loans from the candidate to the campaign.

· Judicial incumbents were rarely challenged (less than 20%) or defeated (6%).

· In three of the four closely scrutinized campaigns, lawyers provided approximately two-thirds of the contributions. The winners of three of the four received a majority of lawyer contributions in their races. The exception was the 1994 Supreme Court election, which

received considerable attention in medical and business groups.

· About half the lawyers contributing were plaintiffs' lawyers, but they gave about 63% of the amount contributed by lawyers.

· Plaintiffs' lawyers provided about 40% of the total contributions to all candidates from all sources in the four elections.

· Identifiable contributions from non-lawyer PACs, business and the medical profession ranged from about 14% to 30% of funding for all candidates.

The study made the following recommendations:

· Adopt merit selection of judges, at least for Supreme Court and Court of Appeal judges.

· Put all judicial elections on the ballot.

· Limit fundraising period and limit campaign surpluses.

PAC Participation in North Carolina Supreme Court Elections

80 Judicature 21 (1996) Traciel V. Reid

Study focused on four North Carolina Supreme Court elections between 1986 and 1994 as vehicle for evaluating participation of PACs in judicial elections.

The study made the following findings:

· PAC involvement in judicial races is increasing for these reasons: elections are becoming more expensive; states are evolving politically from one party to two party states, movement of federal responsibilities to states enhances policy making power of state appellate judges. From 1986 to 1994, the number of PACs rose from 8 to 29.

· The 1986 election was highly politicized. Republicans focused on the death penalty and Democrats focused on judicial independence and integrity in judicial selection. Total contributions to Supreme Court candidates from all sources was $395,397. PAC contributions made up 4 .5% of total contributions.

· 1990 and 1992 campaigns were lower profile. Total contributions from all sources was $263,404 and $116,516, respectively. PAC contributions amounted to 11% in 1990 and 2.6% in 1992.

· In 1994, a highly publicized campaign was waged for a vacant associate judgeship. Total contributions from all sources was $514,449, 8.4% of which came from PACs.

· The biggest PAC contributor to Supreme Court campaigns was the North Carolina Academy of

Trial Lawyers, representing plaintiffs' lawyers. Its typical contribution was $4,000 and total contributions for the period studied were $48,000.

· In 1994, business PACs increased in number, and combined to give more money to their candidates than the trial lawyer PAC.

· Only four law firm PACs funded candidates during the study--for a total of $3,500.

· PAC strategy is traditionally risk averse--Sanding expected winner, and tending towards incumbents. This differed in these judicial elections, as in three of eleven races PACs contributed more to challengers than to incumbents. This divergence from expected PAC behavior may be explained by the changing balance of power between the political parties That is, as the Republicans gain power statewide, Republican judicial candidates, including challengers, will continue to garner more PAC support.

Report of the Citizens' Committee on Judicial Elections (Ohio)

(1995)

Citizens Committee on Judicial Elections was established by Chief Justice Moyer to conduct top-to-bottom review of Ohio's judicial election system in Spring, 1994. An effort was made for a broad perspective--majority of Committee were not attorneys. The Committee's .work was premised on underlying assumption that although judges run for office like other officials, they are different from other politicians, and are held to a higher standard. The Committee conducted hearings, commissioned a poll, met with broad array of experts and interested parties and reviewed research.

The Committee made the following findings:

· Nine out of ten Ohioans believe that judicial decisions are affected by political contributions, and the public clearly questions the impartiality of a judge who sits on a case involving a campaign contributor.

· 56% of Ohioans favor spending limits for judicial elections.

· 45% support contribution limits.

· 45% want more reporting requirements.

· 9% favor public financing.

The Committee proposed the following reforms of campaign conduct:

· Compulsory uniform candidate questionnaire concerning candidate qualifications.

· Changes in speech limitations on candidates

· Compulsory campaign ethics training for candidates.

· Encouragement of voluntary campaign monitoring groups.

· Clarification of candidate's ultimate responsibility for the conduct of the campaign.

· Expedited and enhanced enforcement and sanctions mechanisms.

The Committee proposed the following reforms of campaign finance:

· Campaign contribution limits (including in-kind contributions and loans) of $500 from individuals and $2500 for organizations (doubled for the Supreme Court).

· Imposition of recusal requirement for judges in cases involving attorneys or parties from whom judge received a significant contribution.

· Limitations on fundraising periods.

· Ban on contributions from court appointees.

· Ban on tiered fundraising events.

· Elimination of campaign surpluses.

· Increased disclosure requirements including full identification of each donor and rapid reporting in the 20 days before an election.

· Limitations on receipt of funds from political parties.

Report of the Special Commission to Limit Campaign Expenditures (Pennsylvania)

(1998)

The Pennsylvania Supreme Court appointed this Special Commission to determine whether public perception of judicial elections had caused a loss of respect for the judiciary in Pennsylvania and, if so, what if anything might be done by the Supreme Court to ameliorate this problem. The Special Commission conducted public hearings, met with officials involved in reform efforts outside Pennsylvania, and conducted a telephone poll of 500 Pennsylvania citizens margin of error +/-4.4%.

The Special Commission made the following findings:

· 59% of Pennsylvanian registered voters thought too much was spent on judicial campaigns. After being informed of amounts actually spent, that figure jumped to 81%.

· 73% thought judicial candidates received too much from large corporations and PACs. 66% thought they received too much from wealthy individuals. 64% thought they received too much from insurance companies and their

PACs. 62% thought they received too much from lawyers and lawyer organizations.

· 88% thought judges' courtroom decisions were influenced at least some of the time by campaign contributions, 37% thought it was most or all of the time.

· 75% thought people and organizations who can afford to make large contributions have more influence in electing judges.

· 64% believed that limiting campaign contributions would improve honesty and integrity in judicial elections.

· 59% strongly favored a $1000 cap contributions to judicial campaigns from individuals; 61% strongly favored a $5000 limit on contributions from organizations or PACs.

· 65% strongly favored reporting of contributions over $100.

· 52% strongly favored a spending limit.

· 46% strongly favored public funding for candidates who did not accept contributions.

· Voters strongly believe that amount spent on campaigns threatens integrity and fairness of elections and judicial rulings. Voters believe special interest contributions dominate ordinary voters. Voters believe the money problem is growing worse. Voters believe contributors expect and receive something for their contributions.

· Voters are more anxious about the judiciary than about other elected offices.

· There is little demographic, geographic, or partisan variation in voters' attitudes on these issues.

The Special Commission made the following recommendations:

· Contribution limits including $1,000/individual, $5,000/legal entity for statewide races.

· Expenditure limits, including $1,000,000 for Supreme Court office, $500,000 for Superior Court and Commonwealth Court office, and $250,000 for Court of Common Pleas.

· Expedited disclosure, accessible on web page designed by the court's administrative office.

· Mandatory recusal of judges in cases where opposing party or counsel has contributed above the limits.

· Public education and enforcement enhancements.

Campaign Contributions in Texas Supreme Court Races

17 Crime, Law & Social Change 91 (1992)
Anthony Champagne

Study analyzed financing of the 1988 Texas Supreme Court races--identified as "probably the most expensive partisan judicial election campaign [dotlessi]n history." Unusual circumstances led to two-thirds of Texas Supreme Court justices' seats being at issue in 1988.

The study made the following findings:

· Three of the four elections From 1982 to 1988 involved at least one million dollar campaign. The 1988 election involved two campaigns each spending more than two million dollars.

· Total contributions to the 1988 general election's twelve candidates were $10,092,955. Including unsuccessful primary candidates the total contributions were $10,374,442.

· The campaigns for the Criminal Court of Appeal involve substantially less expensive campaigns: a $100,000 race is considered expensive. Most expensive of these campaigns was $524,137.

· For 1987 and several earlier campaigns, eight Texas firms or lawyers contributed 17.7% of all funds. All but one of the firms were plaintiffs' firms. Three contributed over $200,000 each.

· Breadth of support varied. Justice Phillips had the broadest support base, with only 11.2% of his contributions from his top ten contributors. His opponent received 22.8% of his contributions from 10 law firms. Others obtained as much as 31.9% from the top ten contributors. Several candidates received their largest contributions From their prior law firms.

· The overall top ten contributors to the races contributed $1,414,021 or 13.6% of all contributions. '

· The top 20 contributors gave 20.7% of the total.

· The top 50 law firms and the Texas Medical Association (TMA) contributed over one-third of all contributions.

· The Fund for Democratic Texas raised 51.4 million, mostly from plaintiffs' lawyers.

· The PAC for the TMA gave $181,355. The TMA also encouraged doctors to contribute directly, which resulted in estimated contributions of $250,000 or more.

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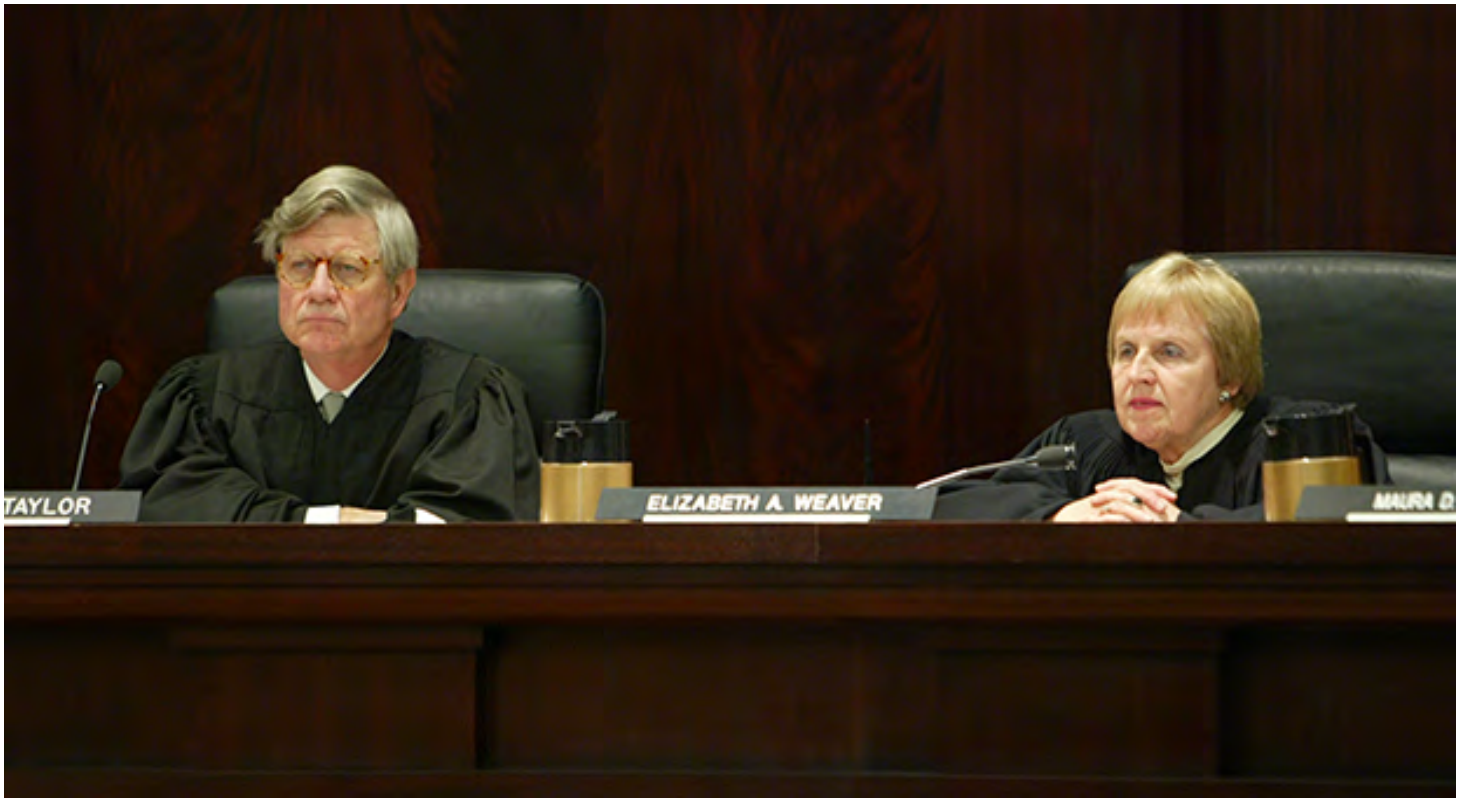
Center for American Progress

COURTS

Partisan Judicial Elections and the Distorting Influence of Campaign Cash

By Billy Corriher | October 25, 2012, 3:08 am



AP/Al Goldis

Michigan Supreme Court Justice Elizabeth Weaver, right, and Chief Justice Clifford Taylor listen to oral arguments Thursday, January 11, 2007, in Lansing, Michigan. Data from recent Michigan Supreme Court elections clearly suggests that a partisan nominating process results in more campaign cash and a court where the justices' votes break along party lines.

This report is the second in a series on different policies that could help mitigate the influence of corporate campaign cash in judicial elections. The reports are intended for advocates or

Endnotes and citations are available in the PDF and Scribd versions.

legislators who want to ensure our justice system works for everyone, not just those with enough money to donate.

The steep rise in campaign contributions for judicial elections has been well documented. Candidates in state supreme court races raised around $211 million from 2000 to 2009—two and a half times more than in the previous decade. The states that have seen the most campaign cash are those that hold partisan judicial elections. This year, political parties are intervening at an unprecedented level in judicial races in two states – Montana and Florida – that have nonpartisan elections.

This report argues that partisan elections lead to more campaign contributions and increased partisanship among judges. These problems may be the reason why several states have abandoned the idea of partisan judicial elections in recent decades.

While 38 states elect their state supreme courts, only six elect justices in partisan races—Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia. All of these states are among the top ten in total judicial campaign contributions from 2000 to 2010. In fact, four of the top six states include those with partisan elections. The other states in the top six, Ohio and Michigan, have ostensibly nonpartisan elections but use partisan processes to nominate their judicial candidates.

Inundated with campaign cash, courts with partisan elections have seen their share of scandals in recent years. West Virginia saw the integrity of its high court questioned when it came to light that a coal company executive spent millions in 2004 to elect a justice who subsequently voted to overturn a $50 million verdict against his company. A similar scandal erupted that same year in Illinois, when it was revealed that the insurance and financial services giant State Farm spent millions (the actual amount of the firm's campaign spending is in dispute) to elect a justice who voted to overturn a $1 billion class-action verdict against the insurer. The Louisiana Supreme Court was accused of bowing to pressure from varied corporate interests after it took action against law school legal clinics that were investigating environmental hazards in New Orleans. The Texas Supreme Court has been the subject of multiple media reports looking into the influence of judicial campaign donors, including the poster child for corporate malfeasance, the Enron Corporation.

Many of these state supreme courts—Alabama, Texas, Ohio, and Michigan—are now dominated by conservative judges that favor corporate defendants over individual plaintiffs. Republican justices outnumber Democratic justices nearly two-to-one in the six states with partisan elections.

Some state high court justices have publicly called for nonpartisan races. Chief Justice Wallace Jefferson of the Texas Supreme Court argues his state's partisan system "permits politics to take precedence over merit." Justice Maureen O'Connor of the Ohio Supreme Court says a nonpartisan primary would "keep moneyed special interests, ideologues and partisan politicians out of the courthouse."

Political parties funnel special interest money to judicial candidates

Why are partisan judicial races so much more expensive than nonpartisan contests? One answer could be that potential campaign donors find it easier to donate money in these races. In states with partisan judicial elections, there is a ready-built infrastructure for "bundling" donations in place, with state parties acting as conduits for special interests. In judicial elections, these interest groups usually include trial lawyers (for Democratic candidates) and big business groups (for Republican candidates).

Moreover, in partisan elections, campaign donors can be much more certain of a candidate's views prior to donating money. Partisan primaries tend to force candidates to appeal to the base constituencies of their respective parties, pushing Democrats to the left and Republicans to the right. By the time a candidate is chosen in a partisan primary, special interests can be sure the party's candidate is a "team player."

Not mincing words, Justice James Nelson of the Montana Supreme Court said political parties and special interests want "their judge" on the bench. "In partisan elections they have a leg up, as they already know the judge's likely political philosophy." Nelson also said Republican judges tend to be "pro-business, anti-government, pro-life, etc.," while Democrats are pro-choice and less skeptical of government regulation of markets. "Each party wraps within its brand a number of different issues and ideologies," he said.

Removing restrictions on judicial campaigning

Justice Nelson also noted that federal courts have recently struck down statutory and ethical rules that limited the ability of judicial candidates to expound their views while campaigning. In *Republican Party of Minnesota v. White*, the U.S. Supreme Court struck down a Minnesota judicial ethics standard which forbade candidates from commenting on issues that might come before them as judges. The Court said the rule "burdene[ed] a category of speech that is at the core of First Amendment freedoms—speech about the qualifications of candidates for public office." The Court decreed that

Minnesota cannot hold judicial elections while "preventing candidates from discussing what the elections are about."

Federal appeals courts have expanded this holding to strike down a variety of restrictions on judicial politicking. The U.S. Ninth Circuit Court of Appeals recently struck down a Montana law that prohibited political parties from endorsing judicial candidates and spending money to support or oppose them. The court said the Montana law was not justified by the state's interest in a "fair and independent judiciary."

The dissenting judge in the case argued that the majority's decision "threatens to further erode state judges' ability to act independently and impartially." She called the court's ruling "another step in the unfortunate slide toward erasing the fundamental distinctions" between elections for the judiciary and the political branches of government. One pundit commenting on the decision predicted that "America is going to get more of what it seems to want—state judiciaries that are as beholden to special interests, and as corrupted by money and lobbying, as the other two branches of government."

Increased partisanship on the bench

In addition to increasing campaign donations, partisan elections also create a different dynamic on the bench. When justices owe their offices to political parties and their fundraising machines, they must invariably feel a certain pressure to "toe the party line." As a consequence, the judges form liberal and conservative factions, which often lead to very clear ideological divides on these courts.

Admittedly, this phenomenon is also evident to some degree in states with nonpartisan elections. Wisconsin's judicial races are nonpartisan, but as special interest money has flooded these elections, the Wisconsin Supreme Court has been beset by what Justice Ann Walsh Bradley termed "hyperpartisanship." When campaign costs rise, all judges feel the pressure to please interest groups that spend big on judicial races.

Because states with partisan elections see more campaign cash than other states, this "hyperpartisanship" is even more evident. Further, the experience of the Supreme Court of Michigan suggests that a partisan nominating process, more so than partisan general elections, may bear the bulk of the blame for divisiveness on the bench. Although its judicial elections are ostensibly nonpartisan, Michigan's nominating process is in fact even more partisan than partisan primaries. Michigan's Republican and Democratic parties choose their judicial candidates at state party conventions where the political elites of each party select candidates in accord with the party's views. A recent University of Chicago study examined "whether judges are influenced by partisan

considerations" and ranked the Michigan Supreme Court as the most influenced. Justice Marilyn Kelly said the partisan nominating process "infects the process with a partisan component that is hard to deny."

Michigan's absurdly partisan nominating process, along with a surge in campaign spending, has resulted in a court with a very clear ideological divide. Campaign contributions in Michigan Supreme Court elections peaked in 2000, around the same time that conservative judges obtained a clear majority on the court. The 2000 election saw candidates and independent entities spend a total of $16 million. The Michigan Campaign Finance Network estimates that the state political parties and other organizations spent nearly $27 million on independent political ads from 2000 to 2010, but only 22 percent of this spending was reported under state law.

An August 2012 report from the Center for American Progress included a compilation of rulings from the state supreme courts with the most campaign cash. The compilation consists of all cases from 1992 to 2010 in which an individual plaintiff sued a corporation. The appendix to this report is comprised of the compilation's data for the Michigan Supreme Court. The appendix includes 50 cases from 1998 to 2004, the era after Republicans and pro-corporate justices gained a majority on the Michigan High Court. In 64 percent of those cases, the court was divided 5-2, with five justices voting in favor of the corporate defendant and two justices dissenting.

The chart below illustrates the court's divide in each of the 135 Michigan Supreme Court cases in the appendix. Before 1999 the court's decisions were less predictable, with a mix of results that favor individual plaintiffs and those that favor corporations. After the big money elections of 1998 and 2000, however, the 5-2 split is clear.

Party identification as relevant voter information

Conservative scholars point out that identifying judges by party gives voters at least some basis on which to make an informed decision. Some might argue that partisan elections leave less room for ads funded by "independent" interest groups to define the candidates.

This argument might bear more weight if citizens had a clearer idea of what judges do on a daily basis. If voters understood how a Republican judge differs from a Democratic one in the run-of-the-mill cases that occupy most of the courts' time, then partisan identification might prove more useful. Simply labeling a judge as a Republican or Democrat probably tells most voters little about how the judges will decide cases.

When voters think of judges' political affiliation, they often think of cases involving controversial social issues, such as abortion or gay marriage, that garner a lot of media attention but constitute merely a fraction of a court's rulings. But in the states that have seen the most judicial campaign cash, the campaign donors are not concerned with social issues. Instead, liberal judges are supported by trial lawyers who want to see judges protecting individuals' right to sue wrongdoers; conservative judges are strongly backed by corporate interest groups that want judges who will uphold "tort reform" laws that limit lawsuits. These interest groups often fail to mention these goals in the "independent" political ads they air, instead focusing on criminal justices issues that frighten viewers. This further muddies the water for voters seeking information to help them make their decisions in judicial races.

There are ways that states can provide voters with relevant information without relying on political parties. Ten years ago, as the surging tide of judicial campaign cash was swelling, North Carolina decided to end partisan judicial elections.At the same time, the state implemented a public financing program, and it began distributing voter guides on judicial candidates. Although its public financing program will face a test this year from a super PAC, North Carolina has shown that judicial elections can be held in a manner that minimizes the influence of partisan special interests.

Conclusion

Reasonable minds can differ over whether to elect judges, but it is clear that electing judges in partisan elections leads to a myriad of problems. The U.S. Supreme Court has loosened restrictions on judicial campaigning and struck down campaign finance rules, all in the name of the First Amendment. These developments have amplified the problems presented by partisan judicial races. In these elections, it is easier for special interests to spend money influencing the courts. Political parties serve as "bundling" agents, and they have contacts with donors that judicial candidates can exploit.

Special interests in states with nonpartisan elections may face greater difficulty in swaying voters with independent political ads. Two states—Georgia and Washington—that had never experienced high-profile judicial races saw their 2006 elections overwhelmed with money from corporate special interests. In the 2006 election for the Georgia Supreme Court, corporate-funded groups and the state Republican Party spent more than $2 million attacking incumbent Justice Carol Hunstein, who was appointed by a Democratic governor. Although she was attacked as a "liberal incumbent activist judge," she held onto her seat in a state that strongly leans conservative. In Washington an incumbent judge was attacked with more than $1 million worth of ads from corporate special interests and the real estate industry. But again the incumbent judge won, despite being outspent. Though special interests have had more success in other states, these two examples suggest that special interests might find it harder to influence nonpartisan judicial elections, at least in states where voters are accustomed to low-key, inexpensive judicial races.

Partisan primaries lead to judicial candidates who are clearly on the side of one interest group or another, and once on the bench, judges in states with expensive judicial races are dependent on special interests for their reelection. This leads to more partisanship on the bench—a court with clear conservative and liberal factions. If judges were deciding cases based on the law, one would expect that some cases would favor the plaintiff and some the defendant. That is not the case, however, in states with partisan nominating processes. The data from the Michigan Supreme Court

clearly suggests that a partisan nominating process results in more campaign cash and a court where the justices' votes break along party lines.

Additionally, partisan elections may affect the quality of jurists. A recent study examined the success rates of judicial candidates rated highly by state bar associations and found that in a partisan election, a high rating by a bar association had no impact on a candidate's chances of winning. Instead, voters tend to vote for the judicial candidates from the party with which they are affiliated. "By contrast, the quality of judicial candidates has a substantial effect on their vote share and probability of winning in nonpartisan elections." Another study from two conservative scholars looked at the relationship between campaign contributions and rulings in three state supreme courts. It concluded, "Campaign contributions appear to affect the outcome of cases in states where judges are elected in a partisan contest (Michigan and Texas) but not where they are elected on a nonpartisan ballot (Nevada)."

The New York Times editorial board agrees that partisan nominating processes can lead to lower-quality judges:

> Requiring would-be judges to cozy up to party leaders and raise large sums from special interests eager to influence their decisions seriously damages the efficacy and credibility of the judiciary. It discourages many highly qualified lawyers from aspiring to the bench. Bitter campaigns — replete with nasty attack ads — make it much harder for judges to work together on the bench and much harder for citizens to trust the impartiality of the system.

Partisan politics have no place in judicial races. More than other politicians, judges are expected to be true to the law, not to political parties or campaign contributors.

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The appendix is included in the PDF version of this issue brief.

Center for American Progress

TEXAS JUDICIAL ETHICS OPINIONS

1975 to Present

Editor's Note: The General Counsel of the Office of Court Administration has used footnotes designated by asterisks to refer to current code provisions. Other footnotes are those of the Committee. The Subject Index is composed by the General Counsel of OCA and is not an official index.

GENERAL INDEX TO ETHICS OPINIONS

Opinion No.

NEPOTISM
Opinion No. 1 (1975)

QUESTION: Would the appointment to represent indigent defendants by a district judge of his grandnephew, related to the judge in the fourth degree of consanguinity, constitute nepotism in violation of Canon 3, Section B(4)* of the Code of Judicial Conduct?

ANSWER: It is the opinion of the Committee that the appointment of a grandnephew, related to the district judge in the fourth degree of consanguinity, would not be nepotism in violation of Canon 3, Section B(4) of the Code of Judicial Conduct. [NOTE: The Texas Atty. Gen. has ruled that "a district judge may not appoint his grandnephew to represent an indigent defendant if the appointed counsel is to be compensated in any manner from public funds." In the opinion (LA No. 11), Atty. Gen. John Hill determined that the grandnephew was related in the third degree of consanguinity and thus the appointment is proscribed by the terms of Article 5996a, V.T.C.S. The Ethics Committee opinion was delivered in the May meeting. The Committee, in its July meeting, voted not to reconsider its opinion.]

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** Now see Canon 3C(4).*

POLITICAL ACTIVITY
Opinion No. 2 (1975)

QUESTION: May a Texas judge privately introduce candidates for judicial office to his friends and recommend that such friends vote for such candidates?

ANSWER: It is the opinion of the Committee on Judicial Ethics that a Texas judge would not violate the Code of Judicial Conduct by privately introducing candidates for judicial office to his friends and recommending that such friends vote for such candidates.

JUDGE AS TRUSTEE
Opinion No. 3 (1975)

QUESTION: Does a district judge violate the Code of Judicial Conduct if he serves as trustee, without pay, of a charitable trust or foundation which qualifies as a charitable trust or foundation under the U.S. Internal Revenue Code?

ANSWER: It is the opinion of the Committee that a Texas district judge may serve as a trustee, without pay, of a charitable trust or charitable foundation under the provisions of Canon 5, Section B* of the Code of Judicial Conduct and would not violate any other provisions of the Code by such service so long as such service does not detract from the dignity of his office or interfere with the performance of his judicial duties.

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** Now see Canon 4C.*

POLITICAL CONTRIBUTIONS
Opinion No. 4 (1975)

QUESTION: Would a Texas judge violate the Code of Judicial Conduct by making a contribution to the Democratic party?

ANSWER: It is the opinion of the Committee on Judicial Ethics that Canon 7A(2)* permits a Texas judge to make a contribution to the Democratic party.

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**Now see Canon 5.*

WIFE AS BENEFICIARY OF TRUST
Opinion No. 5 (1975)

QUESTION: If a judge's wife is a beneficiary of a trust, managed by others, containing a portfolio of various stocks, real estate interests and other assets, should the judge report the names of the corporations, businesses, or other financial undertakings, the stocks or interests in which constitute part of the assets of the trust, as corporations, businesses, or other financial undertakings in which he has an interest in order to comply with Canon 6C(c)* of the Code of Judicial Conduct?

ANSWER: The Committee is of the opinion that the judge should determine all of the assets of the trust and list them in compliance with Canon 6C(c)* of the Code of Judicial Conduct.

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**Now see Canon 4D.*

ATTORNEY AS TRUSTEE
Opinion No. 6 (1975)

QUESTION: Should a judge recuse in a case in which one of the attorneys is presently serving as trustee, with discretionary powers, of a trust in which the judge's wife is a beneficiary?

ANSWER: It is the opinion of the Committee that the judge should recuse because "his impartiality might reasonably be questioned" in compliance with Canon 3C(1)* of the Code of Judicial Conduct.

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**Now see Rules 18a and 18b, Texas Rules of Civil Procedure.*

LAWYER IN FIRM OF TRUSTEE
Opinion No. 7 (1975)*

QUESTION: Should a judge recuse in a case in which one of the lawyers is a member of the same firm as a lawyer who is a trustee, with discretionary powers, of a trust in which the judge's wife is a beneficiary?

ANSWER: It is the opinion of the Committee that the judge is not required to recuse unless he knows that his impartiality is likely to be questioned.

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**Now see Rules 18a and 18b, Texas Rules of Civil Procedure.*

RENT HOUSE AS FINANCIAL UNDERTAKING
Opinion No. 8 (1975)

QUESTION: Is a rent house owned by a judge and his wife a "financial undertaking" within the meaning of Canon 6C(c)* of the Code of Judicial Conduct?

ANSWER: It is the opinion of the Committee that a rent house owned by a judge and his wife is a "financial undertaking" within the meaning of Canon 6C(c)* of the Code of Judicial Conduct.

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**Now see Canon 4D.*

PART-TIME COUNTY JUDGE
Opinion No. 9 (1975)

QUESTION: Where a court county at law judge is appointed by the commissioners court of his county with the distinct understanding and agreement that, because of the light docket of the county court at law and the fact that all of the judicial business of that court can be accomplished in approximately one-half of the working hours of the judge, the county court at law position is to be considered a part-time position and insofar as the commissioners court is concerned, the county court at law judge would be permitted to continue his law practice so long as it did not interfere with his judicial duties as judge of the county court at law, is such county court at law judge prohibited from practicing law by Canon 5F* of the Code of Judicial Conduct?

ANSWER: The Committee is of the opinion that Canon 5F* of the Code of Judicial Conduct clearly prohibits such county court at law judge from practicing law regardless of any agreement with his commissioners court at the time of his appointment.

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**Now see Canon 4G.*

FUND RAISING
Opinion No. 10 (1976)

The National Conference of Metropolitan Judges (composed of trial judges from jurisdictions whose populations exceed 650,000) will hold its annual meeting in Dallas during 1976 and contributions of approximately $20,000 must be obtained to finance the conference.

QUESTION: Since the National Conference of Metropolitan Judges is a professional organization, are we (the local judges participating therein) limited in any manner in soliciting funds? Are there any guidelines under Canon 5B of the Code of Judicial Conduct?

ANSWER: Canon 4C* permits a judge to "serve as a member, officer, or director" of an organization, such as the National Conference of Metropolitan Courts. It also provides that a judge may "assist such an organization in raising funds...but (he) should not personally participate in public fund-raising activities." However, Canon 5B(2)** manifests the clear prohibition that "A judge should not solicit funds..." as well as the further prohibition that he should not "use or permit the use of the prestige of his office for that purpose...." The intent of the canons, therefore, forbids the solicitation of funds by judges, or the use of the prestige of judicial office for solicitation of funds.

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**Now see Canon 4B.*
*** Now see Canon 4C.*

SELLING TICKETS
Opinion No. 11 (1976)

QUESTION: Is the selling of tickets for various fund-raising activities prohibited by Canon 5B(2)* ("A Judge should not solicit funds for any educational, religious, charitable. . . .")?

ANSWER: Canon 5B(2),* forbidding the solicitation of funds or the use of the prestige of his office for that purpose, includes "the selling of tickets for various fund-raising activities" and the answer to the question is in the affirmative.

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**Now see Canon 4C(2).*

RECUSAL BY JUDGE
Opinion No. 12 (1976)

QUESTION: A lawyer who is now a district judge borrowed money from A, executing his promissory note payable over a period of four years; prior to maturity, A was shot and killed by B who was found to be mentally incompetent to stand trial and was committed to a mental hospital; the lawyer, now the district judge, paid A's widow the loan balance but made another loan from her which has since been repaid. B has now been returned to the court for trial. Is the district judge disqualified to preside at any judicial proceedings involving B?

ANSWER: The Code of Judicial Conduct does not contain a specific answer to the question presented. A judge should bear in mind the provisions of Canon 3C(1)* and should recuse himself from any pending matter if he knows or has reason to believe that "his impartiality might reasonably be questioned."

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**Now see Rules 18a and 18b, Texas Rules of Civil Procedure.*

POLITICAL ACTIVITIES
Opinion No. 13 (1976)

QUESTION: May a district judge introduce a candidate for the state Legislature to his personal friends and recommend that such friends vote for such candidate?

ANSWER: The Committee on Judicial Ethics is of the opinion that the question should be answered in the affirmative. In Opinion Number 2 this Committee held that a Texas judge would not violate the Code of Judicial Conduct by privately introducing candidates for judicial office to his friends and recommending that such friends vote for such candidates. The Committee now reaffirms that opinion and extends its scope so that henceforth it will be applicable to all candidates for public office.

POLITICAL ACTIVITY
Opinion No. 14 (1976)

QUESTION: Whether or not a district judge is in violation of the Code of Judicial Conduct by meeting with and privately discussing political issues and political campaign strategy with a candidate for elective public office other than his own.

ANSWER: It is the opinion of the Committee on Judicial Ethics that the conduct inquired about in the question amounts to "other political activity" contrary to Canon 7A(4). The essence of Canon 7 is to prevent judges from engaging in political activity other than that which is necessary and appropriate for their own election.

**Now see Canon 5*

RETIRED JUDGE
Opinion No. 15 (1976)

QUESTION: Question concerning the applicability of the Code of Judicial Conduct to retired judges who are eligible for recall to judicial service and to retired judges who are not subject to recall.

ANSWER: A retired judge who is eligible for recall to judicial service should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G.* A retired judge who is not subject to recall for judicial service is excused from compliance with Canon 5G.* [NOTE: Canon 5G* provides: Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice.]

**Now see Canon 4H.*

TV AUCTIONEER
Opinion No. 16 (1976)

QUESTION: Would it be unethical for a judge to participate as a "celebrity auctioneer" on a television "telethon auction" to raise funds for a non-profit public educational television station where all he does is describe the article to be sold and asks that bids be telephoned to the TV station personnel?

ANSWER: Such activity upon the part of a judge would be a violation of Canon 5B(2)* of the Code of Judicial Conduct in that it would amount to the solicitation of funds in a manner prohibited by such canon.

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**Now see Canon 4C(2).*

SERVICE, BAR GRIEVANCE COMMITTEE
Opinion No. 17 (1976)

QUESTION: May a member of the State Bar Grievance Committee continue to serve in such a capacity after his election and qualification as a judge of a court of record?

ANSWER: Such activity upon the part of a judge of a court of record would be contrary to the proscriptions found in Canon 5G* of the Code of Judicial Conduct. The Committee is of the opinion that the resignation of the lawyer from such Bar Committee before accepting his judicial post would be appropriate.

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**Now see Canon 4H.*

POLITICAL ACTIVITY
Opinion No. 18 (1976)

QUESTION: May an incumbent judge in a multi-court county (who is a candidate for reelection or election to a higher court and who is opposed by a lawyer, incumbent judge, or judge of an inferior court) preside over or participate in the weekly juror qualification process (while he is an official candidate) without violating the letter or the spirit of Canon 7* of the Code of Judicial Conduct?

ANSWER: The question is answered in the affirmative. Standing alone, the mere appearance and participation in such process by such a judge does not violate either the letter or the spirit of Canon 7* of the Code of Judicial Conduct. While performing such judicial functions, such judge should refrain from conduct which might tend to arouse reasonable belief that he is using such functions to promote his own candidacy.

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**Now see Canon 5.*

TV IN COURTROOM
Opinion No. 19 (1977)

QUESTION: Does a trial judge violate Code of Judicial Conduct, Canon 3A(7)*:

1. By permitting newsmen to film, photograph, record or broadcast all or any of the trial proceedings from a vantage point inside the courtroom?
2. By permitting newsmen to film or photograph all or any part of trial proceedings through the glass panels in the doors without actually entering the courtroom?
3. Is the answer the same if the parties, attorneys, and witnesses agree to the filming, photographing, broadcasting or recording?

ANSWER: We answered each of the three questions in the affirmative for the reasons now to be stated.

Each of the questions is prefaced with "permission" having been given by the judge for such conduct. The canon does not speak to "permission"; rather, it speaks clearly but negatively; the judge should prohibit all broadcasting except upon the occasions specified in the canon, none of which are material here.

The most recent authoritative expression of opinion in this area of the law is that found in Nebraska Press Association v. Stuart, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976), and the opinion should be studied carefully before taking any action which might be considered as a prior restraint upon the freedom of the press.

On the other hand, the opinion in Bird v. State, 527 S.W.2d 891, 895-896 (Tex. Crim. App. 1975), is directly in point and should govern judges in Texas conducting criminal trials subject to review by that Court. This latter opinion is particularly helpful since it is the only judicial construction of the particular canon under consideration known to the Committee.

The Committee on Judicial Ethics declines to answer questions propounded seeking advice as to steps to be taken against a person who may violate any rules regulating the conduct of spectators at a trial of a case. Such questions relate to the duties and responsibilities of members of the judiciary and do not come within the scope of the authority of this Committee.

**Now see Rule 18c, Texas Rules of Civil Procedure.*

JUDGE ON CRIMINAL JUSTICE ADVISORY BOARD
Opinion No. 20 (1977)

QUESTION: May a judge of a court of record serve as a member of a Criminal Justice Advisory Board which supervises applications for LEAA and juvenile justice funds?

ANSWER: The Committee is unanimous in its opinion that such activity is a proper one for a judge to engage in, subject, however, to the preliminary language found in Canon 4 of the Code of Judicial Conduct.

PART-TIME JUDGE
Opinion No. 21 (1977)

QUESTION: What criteria determines whether a judge is a part-time judge under the provisions of Compliance Section,* paragraph B, Code of Judicial Conduct (Feb. 18, 1977)?

ANSWER: Essentially, the determination of whether a judge is a "part-time judge," as defined in the cited paragraph of the Code, is a factual determination and must be made upon a case by case basis.

Without intending to lay down any hard and fast rules governing every situation, the Committee is of the opinion that one would be considered a part-time judge if two conditions are met:

1. The statute creating the court does not specifically prohibit the judge thereof from devoting time to some other profession or occupation; and,

2. The agency making the appointment of the judge to such court (ordinarily the commissioners court), at or about the time of the appointment, acknowledges that the compensation of such judge is less than that of a full-time judge.

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**Now see Canon 6.*

PUBLIC SERVICE TV
Opinion No. 22 (1977)

QUESTION: May a district judge act as a moderator for a short (five-minute) bi-weekly television program designed to educate the public on the duties and functions of courts and related agencies dealing with the administration of justice?

ANSWER: Such activity is authorized by the provisions of Canon 4A.* Before engaging in such activity, however, the judge should familiarize himself with the provisions of Canon 2A, the preamble to Canon 4, and Canon 7A.** Conduct in violation of either of the latter provisions of the Code is not authorized by the broad language found in Canon 4A.*

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** Now see Canon 4B.*

*** Now see Canon 5(1).*

JUDGE IN ABSTRACT BUSINESS
Opinion No. 23 (1977)

QUESTION: May a district judge become a part owner (with no more than three co-owners, one of which is a local attorney) of a title insurance business?

ANSWER: The Committee is of the opinion that such ownership and participation in a title insurance business would be in violation of Canon 5C(1)*:

> "A judge should refrain from financial and business dealings that tend to reflect adversely on his [or her] impartiality, interfere with the proper performance of [the] judicial duties, exploit his [or her] judicial position, or involve [the judge] in frequent transactions with lawyers or persons likely to come before the court on which he [or she] serves."

This opinion is confined to the specific facts set forth herein.

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** Now see Canon 4D.*

ATTENDANCE AT MEETING TO HONOR JUDGE
Opinion No. 24 (1977)

QUESTION: Does a judge violate any of the canons of the Code of Judicial Conduct by attending a public meeting of an organization composed largely of local citizens of a particular religious faith at which time such organization will bestow upon the judge an award of honor? The organization specifically states in its invitation "that funds will not be solicited during this event."

ANSWER: No. Attendance upon such an event, even though a minimum couvert is required for attendance, does not violate Canon 5B(2)* of the Code of Judicial Conduct.

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**Now see Canon 4C(2)*

SOLICITATION OF FUNDS
Opinion No. 25 (1977)

QUESTION: A development council formed to assist in the funding of a new parochial school has invited a judge to join the council which is "designed to lend prestige to the development program and to provide individual and collective advice and guidance" to the leadership of the entity. The invitation recites that the "insight, counsel and prestige [of the judge] in the community will be very helpful." It has been made known to the Committee that the judge will not be required to take part in any fund-raising program "other than to allow the use of his name as a member of the group seeking to raise funds." Is it a violation of the Code of Judicial Conduct for a judge to accept membership in such council?

ANSWER: Yes. Participation in such an activity would be in violation of Canon 5B(2)* of the Code of Judicial Conduct.

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** Now see Canon 4C.*

MEMBERSHIP IN BAR CORPORATION
Opinion No. 26 (1977)

QUESTION: May a judge serve upon the Board of Directors of Advocacy, Inc.?

BACKGROUND INFORMATION: The Committee considered the following facts which were furnished in connection with this inquiry: The Congress adopted "Developmental Disabilities Bill of Rights and Assistance Act" (P.L. 94-103), some of the pertinent provisions of which now appear in 42 U.S.C.A. subsec. 6012. The Governor designated the State Bar of Texas to act as the planning agent. The State Bar ordered the creation of Advocacy, Inc., as the vehicle whereby its delegated duties would be accomplished. It reserved the right to appoint six of an eleven-member board of directors of the corporation. The Board will set broad policies only and will have no operating functions.

ANSWER: Based upon the limited information available, the Committee is of the opinion that membership upon the Board of Directors of Advocacy, Inc., would not be in contravention of any of the canons of Judicial Conduct, provided such membership poses no conflict with judicial duties and responsibilities.

OWNERSHIP OF AT&T SHARES
Opinion No. 27 (1977)

QUESTION: Should a judge recuse or disqualify himself in a case involving Southwestern Bell Telephone Company when he owns shares of stock in American Telephone & Telegraph Company?

ASSUMED FACTS: In preparing our answer we have assumed that AT&T has more than six hundred million shares of stock outstanding in the hands of nearly three million stockholders; that the judge owned less than ten shares having a gross market value of approximately $500 and an annual dividend payment of less than $35. We have further assumed that AT&T owns all or substantially all of the capital stock of Southwestern Bell.

ANSWER: Your Committee does not have authority to pass upon the question of whether or not the judge is disqualified. The Constitution (Art. 5, Sec. 11) and the statute (Art. 15, V.A.C.S.) speak to the disqualification of a judge. The determination of disqualification is a judicial function. See authorities collated in the concurring opinion in City of Pasadena v. State, 428 S.W.2d 388, 400 (Tex. Civ. App.--Houston [1st Dist.] 1967), reversed on other grounds, 332 S.W.2d 325 (Tex. 1969). See also, 25 A.L.R. 3d 1331, 1339. We decline to pass upon whether a judge, under these enactments, must note his disqualification to participate in the case.

On the other hand, whether or not a judge should recuse himself from a pending litigation presents a question within the authority of this Committee since it is germane to Canon 3C(1)(c)* and 3C(3)(b).* The Committee is of the opinion that neither of the cited sections of Canon 3C*

requires the judge to recuse himself from participation in a case involving Southwestern Bell Telephone Company. His financial interest, as defined in Canon 3C(3)(b),* could not be substantially affected by the outcome of the proceedings, as provided in Canon 3C(1)(c).*

**Now see Rules 18a and 18b, Texas Rules of Civil Procedure.*

COMMISSION ON STATUS OF WOMEN
Opinion No. 28 (1978)

QUESTION: May a judge continue to serve upon the Texas Commission on the Status of Women without violating the Code of Judicial Conduct?

ASSUMED FACTS: The Commission was created by Executive Order D.B. No. 32, dated August 11, 1977, with the duties and authorities of the members defined in Section II of the order. These duties are broadly defined and intended to develop recommendations for policies and programs which will achieve equal opportunity for women throughout the state.

ANSWER: Based upon the information available, the Commission is of the opinion that membership upon the Texas Commission on the Status of Women would not be in contravention of any of the canons of Judicial Conduct, provided such service poses no conflict with judicial duties or responsibilities.

JUDGE'S SON AS MEMBER OF FIRM
Opinion No. 29 (1978)

QUESTION: Does a judge violate the Code of Judicial Conduct in participating in the trial of a case when one of the lawyers is a member of a firm in which his child is also a partner?

ANSWER: Subject to the opening words in Canon 3C(1),* "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to, instances where: [followed by three subdivisions]," the Committee is of the unanimous opinion that the question should be answered in the negative.

Canon 3C(1),* and subdivisions (a), (b), and (c) thereof were lifted word for word from the Canons of Judicial Ethics adopted by the American Bar Association in 1982. We are of the opinion that it is significant that ABA Canon 3C(1)* contains a fourth subdivision which is not to be found in our canons, reading as follows:

> "(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> *** * ***
>
> (ii) is acting as a lawyer in the proceeding."

Professor E. Wayne Thode, reporter for the ABA committee which formulated the ABA canons, comments on subdivision (d) of the ABA canon, supra, in "Reporter's Notes to Code of Judicial Conduct" (ABA, 1973), p. 15:

> "The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii)* may require his disqualification."

The Committee adopts Professor Thode's analysis as applicable to the Texas Code of Judicial Conduct.

**Now see Rules 18a and 18b, Texas Rules of Civil Procedure.*

APPOINTMENT OF BAILIFF
Opinion No. 30 (1978)

QUESTION: Does a judge violate Canon 3B(4)* by the appointment of his bailiff as investigator to make social studies in adoption cases when: such appointment is made with the consent of all counsel in the case and only in contested matters; and where the prior results were found to be excellent, the task performed diligently, and economically?

ANSWER: Upon the basis of recited facts, it is the unanimous opinion of the Committee that such action is not violative of the cited provision of the Code of Judicial Conduct.

**Now see Canon 3C.*

BAR ACTIVITIES
Opinion No. 31 (1978)

QUESTION: May a judge subject to the Code of Judicial Conduct properly sign a letter endorsing a candidate for elective office in the State Bar of Texas when such letter is addressed to members of the State Bar generally; or such letter is addressed to judges only?

ANSWER: The members of the Committee are seriously divided as to an answer applicable to both facets of the question. A majority of the Committee is of the opinion that since the amendment of Canon 7* permits a judge to participate in political activities generally, participation in State Bar election activities is not forbidden. However, the same majority considers such conduct undesirable since such an endorsement might be construed as the lending of the prestige of judicial office to advance the private interests of others in violation of Canon 2B.

**Now see Canon 5.*

RETIRED JUDGE: EXTRA-JUDICIAL SERVICE
Opinion No. 32 (1978)

QUESTION: There being two types of retired judges mentioned in subdivision D of the Compliance Section* of the Code of Judicial Conduct (those eligible for recall to judicial service and those not eligible), what difference, if any, is there in the applicability of the exemptions mentioned in the subdivision to the two classes of retired judges?

ANSWER: A retired judge eligible for recall to judicial service must, in the language of subdivision D of the Compliance Section, "refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G."** There is no such restraint upon a retired judge not eligible for recall to judicial service. Otherwise, there is no difference in the applicability of the exemption provisions to the two classes of retired judges mentioned in the Compliance Section.

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** Now see Canon 6.*
*** Now see Canon 4H.*

RETIRED JUDGE: FINANCIAL ACTIVITIES
Opinion No. 33 (1978)

QUESTION: After August 31, 1978, active judges subject to the provisions of the Code of Judicial Conduct may not serve as officers or directors of a publicly owned business, defined in Canon 5C(2)* as one having "more than ten owners." Does a retired judge violate any of the canons of the Code of Judicial Conduct by serving as an officer or director of such a publicly owned business after August 31, 1978?

ANSWER: No. Although there are two types of retired judges mentioned in subdivision D of the Compliance Section** of the Code (those eligible for recall to judicial service and those who are not eligible for recall), both classes of retired judges are exempt from the provisions of Canon 5C(2)* of the Code.

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**Now see Canon 4D(2).*
*** Now see Canon 6.*

POLITICAL ACTIVITY
Opinion No. 34 (1978)

QUESTION: The defeated candidate in a primary election for the office of district judge (where one of the candidates was a constitutional county judge and the other a private attorney) has sought a determination of the Committee as to whether certain advertisements of the winning candidate amounted to a violation of Canon 7* of the Code of Judicial Conduct.

ANSWER: The Committee declines to pass upon the questions of fact for lack of jurisdiction over the parties (neither of whom were at the time subject to the Code of Judicial Conduct) or the subject

matter of the inquiry. The Committee acts only as an advisory peer group in determining the application of the Code of Judicial Conduct to undisputed factual situations.

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**Now see Canon 5.*

RECUSAL -- OWNERSHIP OF STOCK
Opinion No. 35 (1978)

FACTUAL ASSUMPTION: A district judge owns a small number of shares of stock in a large international oil company which is frequently a party to litigation in the district courts of his county.

QUESTION: Is the district judge required to note his disqualification or to recuse himself in all litigation involving such corporation?

ANSWER: As we held in Opinion Number 27 (October 17, 1977), this Committee does not have authority to pass upon the question of whether or not a judge is disqualified. The Constitution (Art. 5, Sec. 11) and the statute (Art. 15, V.A.C.S.) speak to the disqualification of a judge. The determination of disqualification is a judicial function.

However, whether a judge should recuse himself from pending litigation presents a question within the authority of this Committee since it is germane to Canon 3C(3)(b)* of the Code of Judicial Conduct. Moreover, under Canon 2A, a judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Committee is of the opinion that such judge should recuse himself from participating in litigation in cases involving corporations in which he owns stock, regardless of the number of shares owned.

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**Now see Rules 18a and 18b, Texas Rules of Civil Procedure.*

DIVESTITURE OF STOCK OWNERSHIP
Opinion No. 36 (1978)

(Submitted contingently upon an affirmative answer to the question set out in Opinion No. 35.)

QUESTION: What action, if any, under the Code of Judicial Conduct, should such district judge take to remove the cause of such disqualification of recusation?

ANSWER: Canon 5C(3)* is explicit and mandatory. It requires that a judge manage his financial interests so as "to minimize the number of cases in which he is disqualified." Divestiture of investments resulting in frequent disqualifications must be accomplished "(a)s soon as he can do so without serious financial detriment."

Divestiture is mandatory; but the Committee is unwilling to set a specific time period within which such divestiture must be accomplished. The question posed must be answered by the individual judge bearing in mind the admonitions of Canon 3: "The judicial duties of a judge

take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law."

This requires that a judge be in position to dispose of all cases which reach his docket; and, if his financial affairs frequently prevent his acting on all such matters, he should consider becoming either an investor or a judge, but not a continuation of both activities.

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**Now see Canon 4D(3).*

DIRECTOR - MUTUAL ASSOCIATION
Opinion No. 37 (1978)

QUESTION: May a judge continue to serve as a director of a mutual savings and loan association, incorporated under prior laws of this State, wherein the depositors own, ratably, all of the reserve funds and assets of the association?

ANSWER: It is the opinion of the Committee that such an entity falls within the definition of a "publicly owned business" as set out in the Canon 5C(2)* of the Code of Judicial Conduct and continued service as a director would be in violation of such canon.

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**Now see Canon 4D(2).*

ADVISORY DIRECTOR
Opinion No. 38 (1978)

QUESTION: Assuming that a judge may not continue to serve as a director of a mutual savings and loan association, as mentioned in Opinion Number 37 this date released, may such judge serve as an "advisory" director thereof?

ANSWER: In the opinion of the Committee, there are at least two reasons why such service is impermissible under the Code of Judicial Conduct; (a) since he may not serve as a director under Opinion Number 37, supra, he should not be permitted to do indirectly that which he cannot do directly; and (b) such service would be in contravention of Canon 2B of the Code of Judicial Conduct in that it might be construed as lending the prestige of his office to advance the private interests of others.

ATTENDANCE AT LAWYERS' PARTY
Opinion No. 39 (1978)

QUESTION: Does a judge subject to the Code of Judicial Conduct violate Canon 2B and/or 5C(4)* by accepting an invitation from a firm of attorneys to be entertained with lodging, food and drinks for two nights and three days at a lake lodge? The outing is referred to as the firm's annual "Judicial Conference."

ANSWER: The Committee assumes that the name of the conference was chosen in jest or inadvertently; and, upon such assumption, gives an affirmative answer to the question as presented. Such answer, however, is confined to the precise factual situation presented.

The Committee is of the opinion that when one assumes judicial office he does not forfeit his right to associate with his friends and acquaintances nor is he condemned to live the life of a hermit. In fact, such a regime would, in the view of the Committee, lessen the effectiveness of the judicial officer.

While a judge should so conduct his impersonal affairs as to avoid all impropriety and appearance of impropriety, he is not precluded from accepting the hospitality of his friends, attending social activities of bar associations, groups of lawyers, or other citizens.

He should not allow such social relationships to influence his judicial conduct or judgments, nor should he permit others to convey the impression that they are in a special position to influence him.

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**Now see Canon 4D(4).*

POLITICAL PARTY CONTRIBUTIONS
Opinion No. 40 (1979)

QUESTION: Does a judge subject to the Code of Judicial Conduct promulgated by the Supreme Court of Texas violate such Code by making periodic and regular financial contributions to a political party?

ANSWER: The Committee, by unanimous vote, answers the foregoing question in the negative. Since the amendment of Canon 7* of the Code of Judicial Conduct, on February 18, 1977, such a contribution does not constitute an ethical violation of the Code.

Whether a judge makes a contribution or refrains therefrom is a purely personal determination and presents a question not within the jurisdiction of this Committee.

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**Now see Canon 5.*

PARTICIPATION IN FUND-RAISING ACTIVITIES
Opinion No. 41 (1979)

QUESTION:: May a judge subject to the provisions of the Code of Judicial Conduct appear as an operatic singer at fund-raising activities of religious or charitable organizations?

ANSWER: The Committee is of the opinion that such activity would be in violation of Canon 5B(2).* While a judicial officer may not be a speaker or guest of honor at such an event, he may attend such events.

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**Now see Canon 4C(2).*

COUNTY COURT JUDGE AS CORPORATE DIRECTOR
Opinion No. 42 (1979)

QUESTION: May a lawyer who has for many years been a director of a bank and of a savings and loan association continue acting as director of the corporate entities after his appointment and qualification as a judge of a newly created county court at law?

ANSWER: The Committee is of the opinion that continued service as a director after qualification as a judge would be in violation of Canon 5C(2)* of the Code of Judicial Conduct. The fact that one person owns more than 95 percent of the stock of one entity is immaterial since there are more than ten other "owners" of stock in the corporate entity.

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**Now see Canon 4D(2).*

JUDGE AS DIRECTOR OF CREDIT UNION
Opinion No. 43 (1979)

QUESTION:: Is it a violation of Canon 5C(2)* of the Code of Judicial Conduct for a county-level judge to serve as an uncompensated member of the board of directors of a county employees' credit union operating under Tex. Rev. Civ. Stat. Ann. art. 2461 - 1.01, et seq. (Supp. 1978-79)?

ANSWER: Assuming that there are more than ten members of the credit union, the Committee is of the opinion that such continued service would be in violation of the cited canon. See Opinion Number 37.

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** Now see Canon 4D(2).*

FREE PASSES
Opinion No. 44 (1979)

QUESTION:: Can a judge who is subject to the Code of Judicial Conduct accept free passes to movies, football games, college plays, etc.?

ANSWER: Canon 5C(4)(c)* of the Code of Judicial Conduct controls the answer to the question. If the gift is from an entity whose interest has not come and is not likely to come before the judge, and if it is clearly understood by all parties that such is not an effort to curry favor, such gift may be accepted by the judge.

If any gift has a potential value in the aggregate of more than $100, it must be reported as required under the provisions of Canon 6C.**

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**Now see Canon 4D(4)(c).*

DISCIPLINARY ACTION AGAINST LAWYER
Opinion No. 45 (1979)

QUESTION:: Does a judge subject to the Code of Judicial Conduct have an obligation to initiate disciplinary measures against a lawyer when he becomes aware that such lawyer has been guilty of unprofessional conduct or has presented false information to the court in order to obtain the entry of a judgment?

ANSWER: Under Disciplinary Rules promulgated by the Supreme Court of Texas, "A lawyer shall not engage in conduct that is prejudicial to the administration of justice." DR 1-102(5).

Canon 3B(3)* of the Code of Judicial Conduct reads: "A judge should take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which the judge may become aware."

The Committee is of the opinion that the knowing presentation of false information to a court in order to obtain the entry of a judgment is unprofessional conduct as defined in DR 1-102(5) and that when the judge becomes aware thereof, it becomes his duty to "initiate appropriate disciplinary measures" against such lawyer.

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**Now see Canon 3D(2).*

RETIRED JUDGE: PRACTICE OF LAW -- ADMINISTRATIVE TRIBUNAL
Opinion No. 46 (1979)

QUESTION:: May a retired judge who is eligible for recall to judicial service practice law by appearing before an administrative tribunal which restricts appearances on behalf of others to licensed attorneys?

ANSWER: Yes. While Canon 5F* forbids a judge in active service practicing law, such provision is inapplicable to a retired judge under Compliance Section D.** We express no opinion on the applicability of Tex. Rev. Civ. Stat. Ann. art. 6228b, subsec. 7 (Supp. 1978-79) to such practice.

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**Now see Canon 4G.*
*** Now see Canon 6(F)*

JUDGE AS PROBATE COUNSEL FOR FAMILY MEMBER
Opinion No. 47 (1979)

QUESTION:: May a judge subject to the Code of Judicial Conduct appear as counsel in the probate of the will of a member of his family as that term is used in Canon 5D*?

ANSWER: No. The practice of law is forbidden by Canon 5F.** While a judge is permitted to engage in certain fiduciary activities under Canon 5D,* appearance as counsel is impermissible under the Code. Incidental counseling with immediate members of the family is not considered by the Committee to constitute the practice of law.

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** Now see Canon 4E.*
*** Now see Canon 4G.*

LAWYERS' CONTRIBUTIONS TO JUDICIAL CAMPAIGN
Opinion No. 48 (1979)

QUESTION: Does a candidate for judicial office violate the Code of Judicial Conduct by accepting, through his campaign treasurer, contributions from lawyers who might be expected to appear before him if the candidate is elected to judicial office?

ANSWER: Although there is no mention of this subject in the Code of Judicial Conduct,* the Committee, after careful consideration of all of the factors involved in the question, is of the unanimous opinion that such contributions proffered by lawyers without hope of reward and accepted in the same spirit, do not violate either the letter or the spirit of the statutes, the Code of Professional Responsibility, or the Code of Judicial Conduct.

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**Now see Canons 4D(1), 5, and 6G.*

ATTORNEY REFERRAL FEE
Opinion No. 49 (1980)

QUESTION:: Is a judge subject to the Judicial Code of Conduct entitled to a referral fee under the following facts: 1) prior to his appointment as judge, he represented a client in a workman's compensation case and in a third party action; 2) also prior to his appointment, the judge referred such cases to another lawyer and at that time a referral agreement between them was made; 3) the litigation in both cases has now been completed resulting in an award of more than $1 million; 4) the attorney to whom the cases were referred reportedly has refused to pay the judge any referral fee?

ANSWER: The referral of cases by a judge prior to taking office does not constitute the practice of law and referral fees may be accepted without violation of either Article 319, Texas Revised Civil Statutes or the Code of Judicial Conduct.

POLITICAL PARTY--SUPPORT FOR CANDIDATE FOR EXECUTIVE COMMITTEE
Opinion No. 50 (1980)

QUESTION: Is a judge subject to the Code of Judicial Conduct in violation of the Code if he supports a candidate for the office of executive chairman of a political party?

ANSWER: The Code of Judicial Conduct as amended February 18, 1977, does not specifically prohibit a judge from supporting a candidate for the office of executive chairman of his party; however, the Code in Canon 2A* expressly states: "He (a judge) should not lend the prestige of his office to advance the private interests of others...." The Code in Canon 1 provides: "A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."** The Committee is of the further opinion that supporting a candidate for executive chairman of a political party is within the discretion of a judge provided the nature and type of support does not contravene Canon 1 and Canon 2A of the Code of Judicial Conduct.

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**Now see Canon 2B.*
*** Now also see Canon 5.*

OFFICER, AD HOC POLITICAL COMMITTEE
Opinion No. 51 (1980)

QUESTION: Would I, as a district judge, be in violation of Canon 7* by accepting a position as treasurer of an ad hoc political organization, which confines itself to a "get out the vote" program for all Democratic candidates?

ANSWER: Canon 7* is limited to "any candidate for a judicial office." Since you are not a candidate for reelection, the restraints imposed by that canon are not applicable to you at this time. Therefore, the mere acceptance by you of the office of treasurer of the organization described in your question would not be in violation of Canon 7.*

However, your acts and activities after you have accepted the office of treasurer may cause you to be in violation of Canon 5B(2),** which, in relevant part, provides: "A judge should not solicit funds for any...political...organization, or use or permit the use of his office for that purpose, but he may be listed as an officer...of such an organization."

The question asked by you does not set forth the manner in which the ad hoc political organization intends to "get out the vote." The majority of the Committee is of the opinion that if the nature of the activities of such political organization is to use your name or title in the literature sent out in the solicitation of funds, such activities would be in violation of Canon 5B(2).** The majority of the Committee is of the further opinion that there would not be a violation of Canon 5B(2)** if you merely accepted the office of treasurer and performed the usual duties of such an office, and your name or title as "Judge" did not appear in the literature or other means of solicitation of money. Other members of the Committee are of the opinion that the office of the treasurer of any organization, by its very nature, involves soliciting of funds and since a treasurer is so integrally related to soliciting of funds, the acceptance of that office by a judge subject to the Code of Judicial Conduct would be in violation of Canon 5B(2).**

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**Now see Canon 5.*
*** Now see Canon 4G(2).*

SERVICE ON MHMR BOARD
Opinion No. 52 (1980)

QUESTION: May a judge serve on the Board of a Mental Health Mental Retardation Center (MHMR)?

ANSWER: Canon 5G* of the Code of Judicial Conduct states as follows: "A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice," and Canon 5B(1)** states: "A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him [or her] or will be regularly [or frequently] engaged in adversary proceedings in any court."

The Committee is not wholly aware of all the duties and responsibilities of the office, however, it is of the opinion that if such duties and responsibilities of the office do not contravene Canon 5G* or Canon 5B(1)**, it would not be unethical to serve on the Mental Health Mental Retardation Board.

** Now see Canon 4H.*
*** Now see Canon 4C(1).*

ENDORSEMENT OF CANDIDATE
Opinion No. 53A (1980)

QUESTION: May a judge endorse a specific candidate or candidates?

ANSWER: The Code of Judicial Conduct as amended February 19, 1980, does not specifically prohibit a judge from supporting a candidate or candidates, however, the Code in Canon 2B expressly states: "He (a judge) should not lend the prestige of his office to advance the private interests of others...." The Code in Canon 1 provides: "A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."

The Code further states in Canon 2A: "A judge...should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Committee is of the opinion that endorsing a candidate or candidates is within the discretion of a judge provided the nature and type of endorsement does not contravene Canon 1, Canon 2A and Canon 2B of the Code of Judicial Conduct.*

**Now also see Canon 5(3).*

ENDORSEMENT OF POLITICAL PARTY
Opinion No. 53B (1980)

QUESTION: May a judge endorse a specific party?

ANSWER: The Committee assumes that the question is referring to a political party as distinguished from a specific person. Canon 5B(2) states*: "A judge should not solicit funds for any... political...organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, delegate or trustee of such an organization."

The Committee is of the opinion that since Canon 5B(2)* permits a judge to be an officer, director, delegate or trustee of a political party, that the endorsing of such political party is within the discretion of a judge and does not violate Canon 5B(2)* of the Code of Judicial Conduct.

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**Now see Canon 5 (3).*

DELEGATE TO PARTY CONVENTION
Opinion No. 53C (1980)

QUESTION: May a judge engage in precinct, county and state party conventions as a delegate?

ANSWER: Canon 5B(2)* states:

> A judge should not solicit funds for any educational, religious, charitable, fraternal, political, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, delegate, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund-raising event, but he may attend such events.

The Committee is of the opinion that Canon 5B(2)* permits a judge to be a delegate at precinct, county, and state party conventions.

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**Now see Canon 5(3).*

JUDGE AS TRUSTEE
Opinion No. 54 (1981)

QUESTION: May a judge serve as a trustee on a trust which involves oil and gas properties only where such properties are all located outside the elected district of such judge with one minor exception?

ANSWER: No. Section 5D* of the Code of Judicial Conduct states as follows: "A judge should not serve as the executor, administrator, trustee, guardian or other fiduciary...." The Code is quite explicit and since the only exception stated therein pertains to members of a judge's family, which situation is not involved in this question, the Committee is of the opinion that to act as a trustee under the circumstances described would violate Section 5D* of the Code of Judicial Conduct.

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**Now see Canon 4E.*

FUND-RAISING EVENTS
Opinion No. 55 (1981)

QUESTION: May a judge periodically have fund-raising benefits to pay for (1) campaign costs, (2) living expenses or (3) office expenses?

ANSWER: (1) Campaign Costs: Canon 7* of the Code of Judicial Conduct, which pertains to the political activities of a judge, does not specifically address itself to fund-raising matters to cover campaign expenses; therefore, the Committee is of the opinion that it is not unethical to have fund-raising benefits to raise funds to pay for campaign expenses provided the nature and type of benefit does not, in any manner, compromise the judge in his integrity, his independence in judicial affairs, nor give the appearance of impropriety.

(2) Living Expenses: The Committee is of the opinion that fund-raising benefits to pay the living expenses of a judge would be unethical. Canon 5C(1)* of the Code of Judicial Conduct would appear to prohibit such fund-raising events as it states:

> A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

In addition to the above, to permit such fund-raising events would seem to defeat the purpose and spirit of the Code of Judicial Conduct.

(3) Office Expenses and Overhead: The Committee is of the opinion that fund-raising benefits for the purpose of raising funds to cover the office expense or office overhead of a judge would be unethical for the same reasons he should not have such benefits to pay for his living expenses.

**Now see Canons 5 and 4b(1).*

OFF-YEAR FUND-RAISING EVENTS
Opinion No. 56 (1981)

QUESTION: Does the Code of Judicial Conduct prohibit a judge from having a fund-raising benefit in a year when he is not up for election?

ANSWER: The Committee is of the opinion that the Code of Judicial Conduct does not prohibit non-election year fund-raising activity provided the purpose of such fund-raising does not contravene other provisions of the Code.

MEMBERSHIP, ADVISORY BOARD NON-PROFIT CORPORATION
Opinion No. 57 (1981)

QUESTION: May a judge serve as an advisory board member to a private non-profit corporation whose purpose is to operate a home to house and offer counseling to battered wives?

The Judicial Ethics Committee is informed that the jurisdiction of the court of the judge is limited to misdemeanor cases, that the judge's name will not be used on any corporate stationery, that the judge will act only as an advisor to the corporate board and will not participate in corporate decisions or day-to-day operations of the corporation, and that the judge has never had an assault case involving an assault by a husband on his wife in his court.

ANSWER: Canon 5* of the Code of Judicial Conduct, as amended February 19, 1980, states that a judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties. Canon 5B* sets forth the limitations on extra-judicial civic and charitable activities of a judge, as follows:

> Canon 5B*
>
> "Civic and Charitable Activities: A judge may participate in civic and charitable activities that do not reflect adversely upon his [or her] impartiality or interfere with the performance of his [or her] judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him [or her] or will be regularly [or frequently] engaged in adversary proceedings in any court.(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, political, or civic organization, or use or permit the use of the prestige of his [or her] office for that purpose, but may be listed as an officer, director, delegate, or trustee of such an organization. [A judge] should not be a speaker or the guest of honor at an organization's fund-raising events, but he may attend such events.(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions."

The Committee is of the opinion that a judge may serve as an advisory member to a private non-profit corporation whose purpose is to operate a home to house and offer counseling to battered wives provided his activities do not contravene the provisions of Canon 5B* of the Code of Judicial Conduct.

**Now see Canon 4C.*

SOLICITATION OF FUNDS: TEXAS CENTER FOR JUDICIARY
Opinion No. 58 (1982)

QUESTION: Does a judge subject to the Code of Judicial Conduct of the State of Texas violate the letter or spirit of the Code when, as an authorized representative of the Texas Center for the Judiciary, Inc., he or she solicits contributions for the benefit of the Center from charitable and educational foundations and other donors who would not ordinarily come before the court?

ANSWER: The Committee is of the opinion that such conduct would not violate the letter or spirit of the Code of Judicial Conduct. Participation in worthwhile organizations that depend upon fund-raising for support is a continuing dilemma for judges. While a judge may serve in a leadership capacity in such an organization, Canon 5B(2)* of the Code of Judicial Conduct prohibits any type of participation, or lending the prestige of judicial office, in soliciting funds no matter how worthy the purpose.

An exception to such activity is wisely provided in Canon 4,** when the purpose of an organization is "devoted to the improvement of the law, the legal system, or the administration of justice." The Texas Center for the Judiciary, Inc., clearly qualifies under such exception. Canon 4C** provides that the judge "may make recommendations to public and private fund-granting* agencies on projects and programs concerning the law, the legal system, and the administration of justice."

Canon 4C** also provides that a judge "may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities."It is the interpretation of the Committee that "public fund-raising activities" are those activities aimed at the general public or a large segment thereof. A more narrow interpretation would render the language "assist such an organization in raising funds" meaningless.

The Committee is of the opinion that Canon 4 permits a judge to present the purposes and financial requirements of the Texas Center for the Judiciary, Inc., to one or more of the prospective donors referred to in the question. Such a presentation must be in harmony with the spirit of the Code of Judicial Conduct particularly Canons 1 and 2. The Committee recommends that the judge making such a presentation clearly state that such presentation is made as an authorized representative of the organization and not for the judge personally.

**Now see Canon 4C(2).*
*** Now see Canon 4B(2).*

CHAIRMAN, FUND-RAISING EVENTS FOR ANOTHER
Opinion No. 59 (1982)

QUESTION: May a judge act as a co-chairman of a fund-raising event for another person seeking public office?

ANSWER: No. Canon 5B(2)* states in pertinent part as follows: "A judge should not solicit funds for any...political... organization, or use or permit the use of the prestige of his [or her] office

for that purpose...." The Committee is of the opinion that Canon 5B(2)* prohibits a judge from acting as a co-chairman of a political fund-raising event for another person.

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**Now see Canon 5 (3).*

SUPPORTIVE COMMENTS AT FUND-RAISINGEVENTS FOR ANOTHER
Opinion No. 60 (1982)

QUESTION: May a judge sit at the head table and make supportive comments in behalf of another person seeking public office at a fund-raising event for the other person?

ANSWER: The Committee is of the opinion that sitting at the head table and saying supportive comments about a third person at a fund-raising event for that person would be using the prestige of the judge and his office to benefit the third person. Such conduct would be in contravention of Canon 5B(2)* and is prohibited.

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**Now see Canon 5(3).*

BANK DIRECTOR OF HOLDING COMPANY BANK
Opinion No. 61 (1982)

QUESTION: May a judge serve as a director of a bank where the board of the bank consists of 10 directors, where one of the directors is the representative of a holding company which owns all of the stock of the bank?

ANSWER: The Committee is of the opinion that for a judge to serve as a bank director under such circumstances would be contrary to the purposes of Canons 5C(1)* and 5C(2),* as well as Canon 2. A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties and he should avoid impropriety and the appearance of impropriety in all his activities. The fact that a holding company is the sole owner of the bank should not permit a judge to do indirectly that which he could not do directly.

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**Now see Canon 4D.*

CONSULTANT FOR NON-PROFIT HOUSING
Opinion No. 62 (1982)

QUESTION: May a district judge serve as a consultant for a private non-profit corporation engaged in the construction and development of a housing project for the elderly?

FACTS: The Judicial Ethics Committee is informed on the following facts pertinent to the question. The project is financed by a loan from the Department of Housing and Urban Development under Section 202 of the Housing Act of 1959. The judge served in a similar consulting capacity on numerous projects before assuming the bench. He would be compensated

on a fee basis by the private non-profit corporation that employs him. The fee is based upon a formula established by HUD and based upon the loan authority for the project. As a consultant he would give advice on the determination and selection of the project site and on various other matters related to the project, confer with representatives of the various entities involved in the project and assist in the establishment of sound business practices for the project. He would not perform any legal work. The legal work would be performed by an attorney outside his district who does not appear regularly before him. The corporation he would be assisting also does not appear regularly in his court. The work would require an average of 10 hours per month for 15 to 18 months and could be done before or after normal working hours. The judge would not be engaged in arbitration or mediation, nor would he participate in hearings or testimony before governmental bodies.

ANSWER: The Committee is of the opinion that service as a consultant under the facts stated does not violate the Code of Judicial Conduct.

The resolution of the question is controlled by Canon 5 of the Code. Canon 5C(2)* permits a judge to "engage in other remunerative activity including the operation of a business." That permission is conditioned upon compliance with Canon 5C(1),** which states:

> A judge should refrain from financial and business dealings that tend to reflect adversely on his [or her] impartiality, interfere with the proper performance of [the] judicial duties, exploit his [or her] judicial position, or involve [the judge] in frequent transactions with lawyers or persons likely to come before the court on which he [or she] serves.

Canons 5E*** and 5F,**** which bar a judge from acting as an arbitrator or mediator or from practicing law, are also restrictions on the activity in question.

Under the facts stated none of the conditions or limitations in Canon 5 are violated; however, a judge should at all times keep in mind that it is his duty to uphold the integrity and independence of the judiciary and avoid impropriety and the appearance of impropriety in all his activities. Thus, the judge should carefully monitor his activities and immediately terminate his service as a consultant if he perceives a violation of the Code.

** Now see Canon 4D(2).*
*** Now see Canon 4D(1).*
**** Now see Canon 4F.*
***** Now see Canon 4G.*

JUDGE AS COLUMNIST
Opinion No. 63 (1982)

QUESTION: May a judge write a weekly column concerning legal matters for publication in a newspaper?

ANSWER: Canon 4A* of the Code of Judicial Conduct states as follows: "[A Judge] may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system and the administration of justice." The Committee is of the opinion that the Code of Judicial Conduct encourages judges to write articles concerning the improvement of the law, the legal system and

the administration of justice, provided that in doing so he does not cast doubt on his capacity to act impartially on any matter that may come before him.

The Committee is of the further opinion that a judge should not answer inquiries from the public on any matter in the field of law, other than in those areas specifically enumerated above.

** Now see Canon 4B(1).*

SUPPORT OF BOND ELECTION
Opinion No. 64 (1982)

QUESTION: May a judge actively support a bond election to raise funds to develop a city water project?

ANSWER: No, for several reasons. First, a judge should regulate his outside activities to minimize the risk of conflict with his judicial duties. Elections often are contested, and to actively engage in a bond election could interfere with the judicial responsibility of the judge.

Secondly, a judge should refrain from using the prestige of his office to help a political organization to raise funds. Canon 5*, Code of Judicial Conduct.

Thirdly, a judge should uphold the integrity and independence of the judiciary. Involvement in an election, other than his own, by a judge tends to raise questions of why he is involved and casts doubts on his capacity to decide impartially an issue that may come before him.

A majority of the Committee is of the opinion that to actively participate in such an election would violate the Code of Judicial Conduct.

**Now see Canons 4C and 5.*

SERVICE ON STATE AGENCY BOARD
Opinion No. 65 (1983)

QUESTION: May a judge serve as member of a board of a State agency created by the Legislature, which appointment requires appointment by the Governor and confirmation by the Senate, where the responsibilities are non-judicial and there is no compensation except reimbursement for expenses?

ANSWER: Canon 5G* of the Code of Judicial Conduct states as follows:

> "A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his [or her] country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities."

The Committee is of the opinion that a judge may not accept an appointment to a state board concerned with non-judicial matters, unless the function of that board is limited to historical, educational, or cultural activities.The Committee is of the further opinion that a judge should

regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties, keeping in mind that an independent judiciary is indispensable to justice in our society.

The Committee notes that the stated question raises the issue of separation of powers which deserves consideration, but such issue is not within the scope of the Committee's function.

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** Now see Canon 4H.*

INSTRUCTION OF LAW OFFICERS ON CROSS-EXAMINATION
Opinion No. 66 (1983)

QUESTION: May a judge participate with law enforcement officers in the development and preparation of a program designed to inform law enforcement officers concerning possible pitfalls during cross-examination? The program would be sold to law enforcement agencies, but the title of "Judge" would not be used in connection with the program.

ANSWER: Several sections of the Code of Judicial Conduct speak to the problem. Canon 4A* states: "[A judge] may speak, write, lecture, teach, and participate in other activities concerning law, the legal system, and the administration of justice."

Canon 5C(1)** states: "A judge should refrain from financial and business dealings that tend to reflect adversely on his [or her] impartiality, interfere with the proper performance of [the] judicial duties, exploit his [or her] judicial position, or involve [the judge] in frequent transactions with lawyers or persons likely to come before the court on which he [or she] serves."

Canon 6*** states: "A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by the Code, if the source of such payments does not give the appearance of...impropriety."

The Committee is of the opinion that the Code of Judicial Conduct encourages a judge to write, lecture and teach on matters concerning law, the legal system, and the administration of justice. However, the program described in the question has the appearance of advocating particular results in certain kinds of cases and, as such, reflects adversely on the judge's appearance of impartiality.

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** Now see Canon 4B.*
*** Now see Canon 4D.*
**** Now see Canon 4I.*

USE OF LETTERHEAD FOR FRATERNITY SOLICITATION
Opinion No. 67 (1983)

QUESTION: May a judge use his official letterhead (or a reproduction of that letterhead) to invite members of a fraternal organization, who live in the jurisdiction of his local organization but have their membership elsewhere, to transfer their membership to the local organization?

ANSWER: Canon 2B of the Code of Judicial Conduct impart states: "... (A judge) should not lend the prestige of his [or her] office to advance the private interests...of others..."The use of his official

letterhead by a judge to invite or solicit transfer of membership in a fraternal organization appears to lend the prestige of the judge's office to assist his fraternity and is violative of Canon 2B.

LETTER OF APPRECIATION TO JURORS
Opinion No. 68 (1983)

QUESTION: Would judges who participate in a central jury system violate the Code of Judicial Conduct by sending a form letter expressing their appreciation to those persons who reported for jury duty, including those not selected as jurors? The letterhead would contain all the names of the judges in the system and the names of the District and County clerks. Costs would be borne by the county.

ANSWER: Your Ethics Committee is of the opinion that if the contents of the letter is a genuine expression of appreciation, the letter is mailed routinely when the panel is discharged, and the signatory privileges are rotated regularly, that such a letter would be appropriate.

Canon 3A(3)* requires a judge to be courteous to jurors. Canon 2 requires that a judge avoid impropriety and the appearance of impropriety in all of his activities, and Canon 7A** requires that any candidate for judicial office, including an incumbent judge, should refrain from conduct which might tend to arouse reasonable belief that he is using the power or prestige of his judicial position to promote his own candidacy. If the content and timing of mailing the letter of appreciation meet the criteria of these three canons the letter would be appropriate.

The Committee sees no impropriety in the county bearing the costs of such a letter, if the costs do not become prohibitive. Consideration might be given to attaching such a letter to each panel member's check when mailed.

**Now see Canon 3B (4).*
*** Now see Canon 5.*

LETTER OF APPRECIATION TO JURORS
Opinion No. 69 (1983)

QUESTION: May a judge ethically write letters of appreciation to persons who have served as jurors in his court?

ANSWER: Yes. However, the Committee is of the opinion that the judge should avoid the appearance of impropriety in selecting the content of the letter. The judge should also mail the letter immediately after the service has been rendered on a routine basis. See Canons 2, 3A(3)* and 7A.**The Committee is aware that judges throughout the State are continually making speeches wherein they are stressing the importance of the jury system and urging that all persons report when summoned for jury duty. Thus, for a judge to say "thank you," to those who have given of themselves and their time by serving as jurors, appears to be logical and appropriate.

**Now see Canon 3B (4).*
*** Now see Canon 5.*

JUDGE AS BANK ORGANIZER; SPOUSE AS CORPORATE DIRECTOR
Opinion No. 70 (1983)

QUESTION: 1. Would a judge be in violation of any section of the Code of Judicial Conduct by serving as an organizer of a new bank?

2. Would a judge be in violation of the Code of Judicial Conduct if the judge's spouse serves as a director on the board of a publicly owned corporation?

(In each of the above situations, neither the judge nor spouse would trade on or emphasize the fact of the judge's position as a judicial officer.)

ANSWER TO QUESTION 1: The Committee is of the opinion that the Code of Judicial Conduct does not specifically prohibit a judge from serving as an organizer of a new bank. Canon 5C(2)* permits a judge to hold and manage investments and engage in other remunerative activities, including the operation of a business.

When making such an investment, however, the judge must comply with paragraph C(1) of Canon 5**, which requires a judge to refrain from financial or business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position or involve him in frequent transactions with lawyers or other persons likely to come before the court on which he serves. In his business dealings, the judge must also comply with Canon 5C(3)*** which requires him to divest himself of interests that might require frequent disqualification (see Canon 3C**** and Canon 2B, which prohibits him from lending the prestige of his office to advance the private interest of others.)

Subject to the stated conditions, the investment in question is permissible under the Code.

ANSWER TO QUESTION 2: The Committee is of the opinion that the Code of Judicial Conduct does not prohibit a judge's spouse from serving as a director on the board of a publicly owned corporation. The Committee suggests, however, that a wife should serve under her own name. The judge is disqualified in any proceeding involving the company. (Canon 3C(1)(c))****(Adopted by the Committee, one judge dissenting, one judge dissenting on the answer to Question 1, and one judge not participating.)

** Now see Canon 4D (2).*
*** Now see Canon 4D(1).*
**** Now see Canon 4D(3).*
*****Now see Texas Rules of Civil Procedure 18a and 18b.*

SERVICE ON STATE SCHOOL REVIEW BOARD
Opinion No. 71 (1983)

QUESTION: May a judge serve on the Institutional Review Board of the Mexia State School?

FACTS: The Mexia State School is a state eleemosynary institution. Tex. Rev. Civ. Stat. Art 3263c (Vernon 1968). The Institutional Review Board, appointed by the superintendent of the school, is responsible generally for reviewing and overseeing research at the school.

ANSWER: The committee is of the opinion that service on the Mexia State School Institutional Review Board would violate the Code of Judicial Conduct. Canon 5G* restricts a judge's service on governmental boards by providing that a judge should not accept appointment to a governmental committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice.

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* *Now see Canon 4H.*

ADVERTISING AND CHARGING FOR MARRIAGE SERVICES
Opinion No. 72

QUESTION: 1) Can a judge place an advertisement in the personals section of the newspaper classified ads to inform the public that he will perform marriages? The ad would read either "Weddings by Judge - home phone number," or "Weddings Performed - home phone number."

2) Can a judge charge a fee to perform a wedding? Does the location of the wedding matter as to where there can be a fee, i.e., in chambers vs. a house call or other private place?

ANSWER: The Committee is of the opinion that a judge who advertises the performance of weddings and charges fees for weddings violates the Code of Judicial Conduct. Section 1.83 of the Family Code (Vernon Supp. 1982) authorizes a judge to perform weddings. To advertise and charge fees for a service the judge can perform only because of judicial office violates Canon 5C(1)* which requires a judge to refrain from financial dealings that exploit his judicial position.

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* *Now see Canon 4D(1).*

ENDORSEMENT OF POLITICAL CANDIDATE
Opinion No. 73 (1984)

QUESTION: Does a judge subject to the Code of Judicial Conduct violate the Code by publicly endorsing a candidate for public office?

ANSWER: The Committee is of the opinion that such action would violate the Code of Judicial Conduct. The heading under Canon 7* states that a judge should refrain from political activity inappropriate to his judicial office. Paragraph A of Canon 7 states: "Political Conduct in General. Any candidate for judicial office, including an incumbent judge, and others acting on his behalf, should refrain from all conduct which might tend to arouse reasonable belief that he is using the power or prestige of his judicial position to promote his own candidacy."

The essence of Canon 7A is that a judge should not use the prestige of his office to advance his own private interests. It naturally follows that if he cannot use his power or prestige to help his own candidacy, he should not do this for others.

Canon 2B is similar to 7A in that it prohibits a judge from lending the prestige of his office to advance the private interest of others.

Further, Canon 1 directs a judge to maintain the independence of the judiciary, and Canon 2A requires a judge to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

It is difficult for a judge to realistically separate the prestige of his office from his personal affairs. Thus, the Committee is of the opinion that the public endorsement of another person=s candidacy, of necessity involves the use of the prestige of the judge and the prestige of his office. Additionally, a judge=s involvement in another person's political race places the judge in a partisan posture and gives the public cause to question the judge's independence. Thus, the described activity violates the Code of Judicial Conduct.

(Adopted by the Committee on Judicial Ethics the 9th day of March, 1984, one member dissenting.)

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**Now see Canon 5.*

SERVICE ON BAR DISCIPLINARY COMMITTEE
Opinion No. 74 (1984)

QUESTION: Does a judge violate the Code of Judicial Conduct by serving on the Disciplinary Review Committee of the State Bar of Texas?

ANSWER: The Committee is of the opinion that such service does not violate the Code of Judicial Conduct, so long as it does not conflict with or affect the performance of judicial duties. Canon 4A* permits a judge to participate in activities concerning the law, the legal system and the administration of Justice. Service on the Disciplinary Review Committee, which oversees and hears appeals from local grievance committees, is clearly an activity that concerns the legal system. The Committee is aware that Canon 5G** prohibits service on most governmental committees and commissions. However, that Canon contains an exception for the activities listed in Canon 4A.*

(Approved by the Committee on Judicial Ethics the 20th day of September, 1984, one judge dissenting.)

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**Now see Canon 4B.*

***Now see Canon 4H.*

TELEVISING OF VOIR DIRE EXAMINATION
Opinion No. 75 (1984)

FACTS: The television program "20/20" wants to film the voir dire examination of a jury panel in a criminal case. The film will be used in a "20/20" program to educate and inform the public

on the voir dire procedure. The defendant has consented to the filming, which will be done in an unobtrusive manner that does not detract from the dignity of the proceedings. The film will not be exhibited until after the trial is over.

QUESTION: Does a judge violate the Code of Judicial Conduct by permitting the described filming?

ANSWER: The Committee is of the opinion that the trial judge would violate Canon 3A(7)* by permitting the described activity. That Canon prohibits filming or recording in a courtroom and areas adjacent thereto during sessions of court or recesses between sessions. Although various exceptions are permitted, the described activity does not fit within the exceptions because there is no assurance that the display of the film will be delayed until all direct appeals have been exhausted (Canon 3A(7)(c)(iii).*

Also, the use of the film in a commercial television program that is displayed to the general public does not satisfy the requirement that "the reproduction will be exhibited only for instructional purposes in educational institutions" (Canon 3A(7)(c)(iv)).*

(Unanimously adopted by the Committee on Judicial Ethics the 6th day of August, 1984.)

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**Now see Texas Rule of Civil Procedure 18c.*

JUDGE AS DRAFTER OF LEGISLATION
Opinion No. 76 (1985)

QUESTION: May a judge draft or originate legislation dealing with substantive law?

ANSWER: The Committee's answer to the question is "yes." Canon 4 of the Code of Judicial Conduct permits a judge to engage in activities to improve the law, the legal system and the administration of justice. Specifically, under paragraph B of Canon 4, a judge may engage in such activities as appearing at a public hearing before an executive or legislative body. Also the judge may consult with executive or legislative officials on matters concerning the administration of justice. The Committee considers the foregoing language to encompass the drafting or origination of legislation dealing with substantive law.

JUDGE AS TRUSTEE OF CHARITABLE TRUST
Opinion No. 77 (1985)

QUESTION: Would a judge violate the Code of Judicial Conduct if he acts as the sole trustee of a charitable trust created by an individual contributor who is not a member of his family?

ANSWER: Canon 5D* provides that a judge should not serve as trustee or other fiduciary except for one or more members of his family. Although Canon 5B** does permit a judge to serve on

the board of directors or trustees of an organization, that type of service is not involved in this question. The Committee is of the opinion that for a judge to act as a trustee under the circumstances stated by this question would be a violation of Canon 5D.*

**Now see Canon 4E.*
*** Now see Canon 4C.*

REMOVAL OF RETAINED ATTORNEY
Opinion No. 78 (1985)

QUESTION: Under the Code of Judicial Conduct, does a judge have the authority, in a criminal case, to remove a retained attorney for ineffective assistance of counsel?

ANSWER: No. The Committee is of the opinion that the action or removal of an attorney by a judge is a matter of law, not a question of ethics. Although the Code of Judicial Conduct, Canon 3B(3)* provides that "a judge should take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which the judge may become aware," it does not authorize a judge to remove or take disciplinary action. The intent of Canon 3B(3)* is to advise a judge that it is unethical for a judge not to fulfill the responsibilities that the law places upon him; in this instance, to initiate appropriate action when he becomes aware of unprofessional conduct by a lawyer. See Guillory v. State, 557 S.W.2d 118, 121 (Tex. Crim. App. 1977) for types of appropriate action a judge may initiate.

**Now see Canon 3D(2).*

APPOINTMENT OF MASTER
Opinion No. 79 (1985)

QUESTION: May a judge appoint an attorney as a master, pursuant to Art. 1918B, V.A.C.S., or Rule 171, Tex. R. Civ. P., where that attorney appears in the judge's court on a regular basis in other unrelated matters?

ANSWER: The Committee is of the opinion that this is a question of law as distinguished from a question of ethics. Whether an attorney is qualified to be appointed a master is a matter of law. The only foreseeable ethical consideration would be if a judge knowingly appointed a master who was not qualified or made an appointment in disregard of Canon 3B(4).* Your Committee respectfully declines to assume that a judge would knowingly not follow the law by appointing a master who is not qualified.

Your Committee also points out that its function is limited to issuing opinions on ethical matters, not matters of law. Therefore, your Committee respectfully declines to give an opinion on the legal question you have posed.

**Now see Canon 3C(4).*

MASTER'S SERVICE ON CITY BOARD
Opinion No. 80 (1985)

QUESTION: May a person who has been appointed as a Master of a District Court continue to serve as a member of a city planning and zoning board?

ANSWER: Although a Master of a Court is not a judge, the compliance section * of the Code of Judicial Conduct makes a master or a referee, who are permanently appointed by a district judge, subject to compliance with the provisions of the Code.

Canon 5G,** concerning extra-judicial appointments, states "A judge should not accept appointments to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the Law, the Legal system or the Administration of Justice."

The Committee is of the opinion that serving on a city planning and zoning board, by a permanently appointed master, does not fall within any of the exceptions enumerated in Canon 5G and is prohibited by the Code of Judicial Conduct.

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**Now see Canon 6.*
***Now see Canon 4H*

TITLE COMPANY, SERVICE ON BOARD
Opinion No. 81 (1985)

QUESTION: May a judge serve as chairman of the board of a title company, a private corporation?

ANSWER: The Code of Judicial Conduct does not specifically prohibit a judge from serving as chairman of the board of a title company which is a private corporation. It does set forth guidelines that a judge should observe:

(1) A judge should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (Canon 2A).

(2) A judge should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. (Canon 2B).

(3) A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial activities (Canon 5)*, and manage his investments and other financial interests to minimize the number of cases in which he is disqualified. (Canon 5C(3))**. See Canon 3C*** for judicial disqualifications.

The Committee assumes that the judge would not permit his title to be used upon the company stationery or any other printed material of the title company.

If there is no conflict with the canons set out above, the Judicial Ethics Committee perceives no violation of the Code of Judicial Conduct.

**Now see Canon 4*
*** Now see Canon 4b(3).*
**** Now see Texas Rules of Civil Procedure 18a and b.*

SUPPORT OF COUNTY BOND ELECTION
Opinion No. 82 (1986)

QUESTION: May judges support a county bond election, designated a "law and order election," to fund an expanded and improved jail facility, a new county criminal courts building, and renovation and improvement of civil district and family courts facilities?

ANSWER: Yes, with certain limitations. Canon 4 of the Code of Judicial Conduct permits a judge to engage in activities to improve the law, the legal system, and the administration of justice. However, Canon 4 also sets forth certain limitations, "subject to the proper performance of his judicial duties, [a judge] may engage in [such duties], if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him."

A possible second limitation may occur if the "law and order" bond issue is not segregated from other issues which do not pertain to law improvement, the legal system and the administration of justice. In our Opinion No. 64, this committee was of the opinion that it would be unethical for a judge to actively support a bond election to raise funds to develop a city water project. If the "law and order" bond issue is submitted with other issues and not segregated, ethical considerations may become involved. See Canon 5*.

A possible third limitation may occur depending upon what the judges mean by "support" the bond election. To support a bond issue connotes much more than a mere endorsement. Canon 1 states, "A judge should uphold the integrity and independence of the judiciary." Canon 2 states, "A judge should avoid impropriety and the appearance of impropriety." Canon 7** states, "A judge should refrain from political activity inappropriate to [the Judiciary]."
Your Committee is of the opinion that proper facilities and equipment for courts and jails are essential to the legal system and the proper administration of justice.
Subject to the limitations set forth above, a majority of the committee is of the opinion that it would not be unethical to support a bond issue for those purposes enumerated in the posed question.

**Now see Canons 4C and 5.*
*** Now see Canon 5.*

APPOINTMENT OF COUNSEL
Opinion No. 83 (1986)

QUESTION: Would a judge violate the Code of Judicial Conduct by appointing an attorney to represent indigent, if the attorney is an employee of a law firm consisting of the judge's father, brother, and the attorney receiving the appointments? All fees paid to the attorney for the judicial appointments would benefit the law firm.

ANSWER: Canon 3B(4)* states in pertinent part as follows: "[A judge shall] exercise his [or her] power of appointment only on the basis of merit, avoiding nepotism and favoritism. [A judge shall] not approve compensation of appointees beyond the fair value of services rendered." Although the appointment of a father's or brother's employee would not be nepotism, such action would indirectly accomplish that which cannot be done directly. It violates the spirit of Canon 3B(4)* and could be considered favoritism.
Canon 2 states that a judge should avoid impropriety and the appearance of impropriety in all of his activities.
Your committee is of the opinion that judicial appointments made under the factual situation posed would violate the Code of Judicial Conduct.

** Now see Canon 3C(4).*

TRUSTEE FOR FORMER LAW ASSOCIATE
Opinion No. 84 (1986)

QUESTION: Prior to becoming a district judge, an attorney served as a trustee for many years in a trust created by a law associate for the benefit of the law associate's wife's grandchildren. May the judge ethically continue to serve as a trustee after he has taken his oath of office?

ANSWER: No. Canon 5D* of the Code of Judicial Conduct states, "A judge should not serve as...[A] trustee...except for the...trust of a member of his [or her] family; and then only if service will not interfere with the proper performance of [judicial] duties."
Although the judge and the beneficiaries of the trust obviously enjoy a warm and cordial relationship, the beneficiaries are not members of the judge's family. Canon 5D* is quite clear, and to continue as trustee would be a violation of the Code of Judicial Conduct, Canon 5D*.

** Now see Canon 4E.*

TRUSTEE OF CHARITABLE EDUCATION TRUST
Opinion No. 85 (1986)

QUESTION: May a judge serve on a charitable educational trust (consisting of 5 trustees) created for the sole purpose of funding student summer educational internships to study in a specific United States Congressman's District office during the summer. The trust will bear the name of a former Congressman of the district who is now deceased. The trustees will not be involved in fund-raising and their names will not be used in solicitation attempts.

ANSWER: Canon 5* admonishes judges to regulate their extra-judicial activities to minimize the risk of conflict with their judicial duties. However, Canon 5B expressly states that judges may serve as trustees of an educational or charitable organization not conducted for economic or political advantage of its members, subject to the following limitations enumerated in Canons 5B(1), B(2), and B(3). Judges should not serve: (1) if the organization would regularly appear in any court in adversary proceedings; and (2) they should not solicit funds, or use or permit the use of the prestige of their offices for that purpose, or be a speaker or guest of honor at an organization's fund-raising events; and (3) they may not give investment advice to such organization even though they may serve on a board which is responsible for approving investment decisions.

Subject to the limitations set forth in Canons 5B(1), B(2), and B(3), the Committee is of the opinion that it would not be a violation of the Code of Judicial Conduct to serve as a trustee in the described organization.

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**Now see Canon 4.*

ADVISOR TO PUBLIC TASK FORCE
Opinion No. 86 (1986)

QUESTION: May judges serve in an advisory capacity to a public board or task force, where in all probability they will later preside over cases arising out of the crisis or problem for which the board or task force was created to solve?

ANSWER: Judges should regulate their activities to minimize the risk of conflict with the proper performance of their judicial duties. Canon 4 applies this admonition to judges' activities to improve the law, the legal system, and the administration of justice. Canons 5A, 5B, and 5D apply this same admonition to judges' extra-judicial activities. Canon 3 states, "The judicial duties of a judge take precedence over all his other activities."

A majority of the Committee is of the opinion that it would be a violation of the Code of Judicial Conduct for judges knowingly to agree to serve on or to continue to serve on such a board or task force, if in serving, a conflict with the proper performance of their judicial duties probably would arise or does arise. One judge dissented.

RETIRED JUDGE ON LAW FIRM'S LETTERHEAD
Opinion No. 87 (1986)

QUESTION: May retired or former judges, who have elected to accept judicial assignments under former Art. 200a, Sec. 5a, V.T.C.S. (Now Art. 200a-1, Sec. 4.014(3), V.T.C.S.) ethically permit the use of their names on a law firm's stationery without the phrase "of counsel" or a similar phrase?

ANSWER: The question submitted requires a legal construction of Sec. 44.005, of Title 110B, Public Retirement Systems, which is entitled "Ineligibility to Practice Law."* Your Judicial

Ethics Committee is not authorized to give legal opinions. However, the Committee would observe that if a construction of Sec. 44.005 should hold that retired or former judges, who have elected to subject themselves to judicial assignment, are ineligible to practice law; then, to permit the use of their names on a law firm's stationery without proper qualifying language would be a violation of the Code of Judicial Conduct, Canon 2A. The essence of Canon 2A is that a judge should respect and comply with the law, thereby avoiding improprieties and the appearance of improprieties.

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** Now see Texas Government Code Section 74.0551.*

CONDITIONS OF PROBATION
Opinion No. 88 (1987)

QUESTION: Would a trial judge violate Canon 3A(1) or Canon 2A if he imposed as a term of felony probation, that a defendant remain in his home during certain hours and monitored compliance through electronic means?

ANSWER: The question posed requires a legal construction of a statute fixing the range of punishment for specific crimes. The function of the Judicial Ethics Committee is to write opinions construing the Code of Judicial Conduct as applied to given fact situations. The Committee does not give legal opinions. Because the submitted question requires a legal interpretation of a criminal statute prior to reaching any ethical considerations, the Committee respectfully declines to answer the question.

DIRECTOR OF BANK
Opinion No. 89 (1987)

QUESTION: May an attorney who has been elected as judge of a county court at law ethically continue to be a director of a bank which has one stockholder, which stockholder is a publicly held corporation? If not, can he be an advisory director?

ANSWER: The Committee is of the opinion that he cannot ethically be a director or advisory director. As stated in our Opinion 61, for a judge to continue as a director of a bank would be contrary to the purposes of Canons 5C(1)* and 5C(2), as well as Canon 2.

In our Opinion 38, the Committee was of the opinion that to accept the position of advisory director of a bank would permit a judge to do indirectly that which he cannot do directly. This same principle applies when the sole stockholder of the bank is a public corporation. Canon 5C(2)* prohibits a judge from being an officer, director or manager of a "publicly owned business." It then defines a "publicly owned business" as "a business having ten or more owners." In the present case there is only one stockholder owner which is a publicly held corporation. Ordinarily, since there is only one owner of the bank, there would not be a violation of Canon 5C(2)* for a judge to be an advisory director of the bank, however, since the sole

owner of the bank is a publicly held corporation, there appears to be more than ten actual owners of the corporation and the bank.

A judge should neither lend the prestige of his office to advance the private interest of others (Canon 2B), nor engage in business dealings that tend to exploit his judicial position (Canon 5C(1))*, and should manage his financial interests to minimize the number of cases in which he is disqualified. (Canon 5C(3))*.

** Now see Canon 4D.*

GOOD FAITH INTERPRETATION OF LAW
Opinion No. 90 (1987)

QUESTION: Is a judge's good faith but incorrect interpretation of the law a violation of either Canon 2A ("A judge should respect and comply with the law and should at all times conduct himself [or herself]...in a manner that promotes public confidence in the integrity and impartiality of the judiciary") or Canon 3A(1)* ("A judge should be faithful to the law and maintain professional competence in it")?

PREFACE: The Committee has been advised by the judge who submitted this question that he has received a public reprimand from the State Commission on Judicial Conduct for violations of Canon 2A and 3A(1)* because:
a. that in a number of criminal cases presided over by..., the judge ordered a sentence to begin at a time earlier than the date on which the sentence was pronounced...in at least one instance, the sentence was ordered to begin even prior to the time the offense was committed.

ANSWER: The function of the Judicial Ethics Committee is to write advisory opinions in answer to questions involving potential violations of the Code of Judicial Conduct. Where a ruling on the actions of the judge has been rendered by the State Commission on Judicial Conduct, the Committee considers the request for an advisory opinion to be untimely and beyond the scope of the function of the committee.
The Committee observes that the issue of the judge's "good faith" appears to have been considered and resolved by the Commission on Judicial Conduct.
The Committee respectfully declines to write an opinion on the posed question.

** Now see Canon 3B(2).*

ADVISORY DIRECTOR FOR POLITICAL SUBDIVISION
Opinion No. 91 (1987)

QUESTION: May a judge serve as an advisory director on the board of a political subdivision not located within the primary jurisdiction of the judge's court?

The following information has been furnished to the Committee. The judge would act in a non-legal capacity, receive a nominal fee to cover expenses, and attend meetings after normal working hours. There appears to be little likelihood that the political subdivision or its directors

would have business-related activities in the county in which the judge was elected or appear in the judge's court.

ANSWER: The Committee is not aware of the nature of the political subdivision referred to in the posed question; however, since a political subdivision is involved, Canon 5G* is applicable. Canon 5G* states:

> "A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice."

Based on the facts submitted to the Committee, unless the political subdivision board's responsibilities are limited to the improvement of the law, the legal system, or the administration of justice, the Committee is of the opinion that to accept such appointment would be a violation of Canon 5G.*

** Now see Canon 4H.*

PART-TIME JUDGE--ENDORSEMENT OF CANDIDATES
Opinion No. 92 (1987)

QUESTION: May a part-time municipal judge publicly endorse judicial or non-judicial candidates for political office?

ANSWER: Canon 2B of the Code of Judicial Conduct states that a judge should not lend the prestige of his or her office to advance the private interest of others. The Committee is of the opinion that the public endorsement of another person's candidacy necessarily involves the use of the prestige of the judge and of his other office.

Canon 8A,* as amended in 1987, provides that judges of municipal courts shall comply with the Code, and Canon 8B(1)** does not exempt part-time judges from Canon 2. The Committee is of the opinion that a part-time municipal judge would violate the Code of Judicial Conduct by publicly endorsing a candidate for public office.

**Now see Canon 6C.*
*** Now see Canon 6D.*

ELECTIVE OFFICE IN VOLUNTEER FIRE DEPARTMENT
Opinion No. 93 (1987)

QUESTION: May a judge hold the elective office of Fire Chief of a volunteer fire department during his elected term as a judge?

ANSWER: Whether the judge may hold two elective offices simultaneously requires a legal opinion. The function of the Judicial Ethics Committee is to write advisory opinions involving potential violations of the Code of Judicial Conduct.

The Committee respectfully declines to answer the question, and suggests that the judge obtain a legal opinion from the office of the Attorney General or other appropriate official.

DIRECTOR OF BANK
Opinion No. 94 (1987)

QUESTION: May a justice of the peace ethically obtain loans from a bank where he is an advisory director?

ANSWER: In Judicial Ethics Committee Opinions 37, 38, 42, 61, and 89 the Committee has stated that in its opinion a judge may not ethically serve as a director or advisory director of a bank or savings and loan association. Canon 8A* of the Judicial Code of Conduct requires compliance with the Code by justices of the peace. Canon 9** provides that a person should arrange his or her affairs as soon as possible to comply with the provisions of the Code.

The question of whether an advisory director of a bank may obtain loans from that bank requires a legal opinion. The function of the Judicial Ethics Committee is to write advisory opinions involving potential violations of the Code of Judicial Conduct, and not to give legal opinions. The Committee respectfully declines to answer the question.

** Now see Canon 6C.*
*** Now see Canon 7.*

RESPONSE TO NEWS MEDIA INQUIRIES
Opinion No. 95 (1987)

QUESTION: May a justice of the peace respond to news media inquiries concerning inquest proceedings prior to a final ruling on the death certificate?

ANSWER: Canon 3A(8)* states, "A judge shall abstain from public comment about a pending or impending proceeding in any court...." Canon 3A(8)* does permit a judge to explain court procedure.

The Committee is of the opinion that a news media inquiry about the court's procedure may be answered. However, the committee is of the opinion that it would be unethical to discuss the facts or other aspects of the case with the news media during the investigation, or while the matter is pending in his court or any other court.

**Now see Canon 3B(10).*

RAISING CAMPAIGN FUNDS BY DIRECT MAIL
Opinion No. 96 (1987)

QUESTION: Will the Judicial Ethics Committee advise a justice of the peace whether it is ethical to raise campaign funds by direct mail to his constituents?

ANSWER: Whether the raising of campaign funds, either before or after election, by direct mail is lawful or unlawful requires a legal opinion. Giving legal opinions is beyond the scope of the function of the Judicial Ethics Committee. The Committee would note that if such procedure was unlawful, it obviously would be unethical. Canon 5C(1)* sets forth guidelines for a judge's financial and business dealings.

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**Now see Canon 4D.*

COMMENT ON PROCEEDINGS BEFORE COMMISSION ON JUDICIAL CONDUCT
Opinion No. 97 (1987)

QUESTION: Will the Judicial Ethics Committee write an opinion on the specified conduct of a judge, as to whether such conduct is a violation of the Code of Judicial Conduct, where a formal complaint for the same conduct has been filed with the State Commission on Judicial Conduct, and the disposition of the complaint is pending?

ANSWER: No. The State Commission on Judicial Conduct is a constitutionally created commission, Tex. Const. Art. 5 Sec. 1-a, which is required to make disposition of complaints filed against judges. Your committee considers such a complaint to represent pending or impending litigation because certain dispositions of complaints by the commission are subject to judicial review. See, Tex. Const. Art. 5 Sec. 1-a(6)A, C (eff. Jan. 1, 1985).

The Judicial Ethics Committee is a nine judge committee created by the bylaws of the Judicial Section of the State Bar of Texas. As a committee, and individually, our conduct is subject to the provisions of the Code of Judicial Conduct. Canon 3A(6)* states, "A judge should abstain from public comment about a pending or impending proceeding in any court...."

The Committee respectfully declines to make, knowingly, public comment on a pending or impending proceeding before the Commission on Judicial Conduct which may require judicial review.

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** Now see Canon 3B(10).*

RETIRED JUDGE--TRUSTEE IN FORECLOSURE
Opinion No. 98 (1987)

QUESTION: Does a Senior District Judge violate any ethics by serving as a substitute trustee in non-judicial foreclosure proceedings?

ANSWER: No, although the judge would of course be disqualified from any subsequent litigation involving such sale.

A trustee is normally considered to be a fiduciary because of the duty owed to those whom he serves, and Canon 5D* does provide that a judge should not serve as a fiduciary with certain specified exceptions. But, Canon 8D** exempts a retired judge from the provisions of Canon 5D.*

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** Now see Canon 4E.*
*** Now see Canon 6.*

FORMER JUDGE--SERVICE AS ARBITRATOR OR MEDIATOR
Opinion No. 99 (1987)

QUESTION: May a former District judge, who has qualified to accept judicial assignments, act as an arbitrator or mediator when not on a judicial assignment?

ANSWER: The Code of Judicial Conduct does not mention former district judges, but Tex. Rev. Civ. Stat. Ann. Art. 200a-1, Sec. 4.014(B) (Vernon 1987), places former judges in the same category as retired judges, when discussing "judges subject to assignment." Since the nature of the judicial assignments and duties are identical, your committee, for the purpose of this opinion, will consider a former judge in the same category as a "retired judge subject to recall" under the code.

Canon 5E* states that a judge should not act as an arbitrator or mediator. However, Canon 8D** states that Canon 5E* is not applicable to retired judges, provided the judge should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G.***Subject to the limitations in Canons 8D** and 5G,*** your committee is of the opinion that a former judge may act as an arbitrator or mediator when not on a judicial assignment.

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**Now see Canon 4F.*
*** Now see Canon 6F.*
**** Now see Canon 4H.*

JOINT POLITICAL ACTIVITY BY TWO JUDGES
Opinion No. 100 (1987)

QUESTIONS: (1) May two or more judges running for judicial office at the same time jointly sponsor or have some politically active group sponsor for them a joint fund raising event?

(2) May two or more judges running for judicial office at the same time jointly advertise or have some politically active group jointly advertise for them by any news media?

ANSWER: A majority of the committee is of the opinion that such joint activity by each of the judges would be a violation of Canon 2* that prohibits a judge from lending the prestige of his

office to advance the private interests of others, even though the other person is a judge or group of judges.

The Code of Judicial Conduct does not prohibit a judge from identifying himself or herself as a member of a political party, or from contributing to a political party, or from speaking to such gatherings on his or her own behalf.

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** Now see Canon 5.*

GRIEF COUNSELLING
Opinion No. 101 (1987)

QUESTION: Would it be a violation of the Code of Judicial Conduct for a judge to work in conjunction with a professional therapist in group counselling of persons who have sustained grievous losses in their lives?

ANSWER: The committee has been informed that the classes are scheduled at such times as to not interfere with the judge's judicial duties and that the judge will be paid a stipend of $200 monthly, apparently to cover the cost of required insurance.

Canon 5A permits a judge to speak and teach on non-legal subjects in his or her avocational activities provided those activities do not detract from the dignity of his or her office or interfere with the performance of his or her judicial duties. Subject to the limitations set out in Canon 5A,* the committee is of the opinion that it would not be a violation of the Code of Judicial Conduct for a judge to work with the described group counselling classes.

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**Now see Canon 4A and B.*

"DISTRICT JUDGE RETIRED" ON LETTERHEAD
Opinion No. 102 (1987)

QUESTION: May a retired judge, who has elected to return to the practice of law rather than being subject to recall, ethically have a phrase such as "District Judge Retired" printed on his letterhead, professional cards, telephone listings or office door?

ANSWER: Canon 2B admonishes a judge "not [to] lend the prestige of his or her office to advance the private interests of himself or herself...." Canon 2B is applicable to retired judges who have elected to return to the active practice of law.

The committee is of the opinion that after a retired judge has initially sent out his or her announcement of retirement and of returning to the active practice of law, to use the prestige of his or her former judgeship to advance the private interest of his or her law practice would violate Cannon 2B.

SERVICE ON GOVERNMENTAL BOARD
Opinion No. 103 (1987)

QUESTION: Would it be a violation of the Code of Judicial Conduct for a judge of a statutory county court at law to serve on the board of trustees of the Texas Association of Counties Health Insurance Trust?

ANSWER: The committee is informed that the TAC Insurance Trust is the vehicle through which the Texas Association of Counties affords its members group health insurance. The TAC trust board's responsibilities include: acquisition of insurance, collection of premiums, development of policy for that trust, preparation of contracts with (1) insurance companies, (2) participating members, (3) leases, and (4) other contracts necessary to proper administration of the trust. Board members serve without compensation. Service is voluntary.

Whether county employees have a group health program is determined by the Commissioners Court of each county. This is a governmental decision and the fact that a group of counties associate themselves into a common health program does not alter the nature of the decision. This is so because it is only the respective Commissioners Courts that decide whether to join a specific health program.

The committee is of the opinion that the TAC insurance trust is governmental is nature with each county delegating its authority to the trust board.

Canon 5G* admonishes a judge not to accept an extra-judicial appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice.

The health insurance trust is involved with issues of fact and policy on matters not concerning the improvement of law, the legal system, or the administration of justice. The committee is of the opinion that if a judge serves as a trustee on the TAC insurance trust, he or she would violate Canon 5G.*

**Now see Canon 4H.*

PREPARATION OF PLEADINGS
Opinion No. 104 (1987)

QUESTION: May a judge who handles a mental illness docket ethically prepare applications and other legal pleadings for persons who desire to commit someone to a mental hospital?

ANSWER: No, for several reasons. Canon 3A(5)* prohibits a judge from directly or indirectly initiating, permitting, or considering ex parte communications concerning the merits of a pending or impending legal proceeding. Canon 2B admonishes a judge from lending the prestige of his office to advance the private interests of others. The giving of advice and preparation of legal instruments to be filed in court is considered practicing law, which is prohibited by Canon 5F** of the Code of Judicial Conduct. Finally, for a judge to prepare legal instruments to be filed in that judge's own court poses a conflict of interest and would violate the intent and purpose of the Code.

**Now see Canon 3B(8).*

*** Now see Canon 4G.*

COLLECTION OF COURT FEES
Opinion No. 105 (1987)

QUESTION: May a County Court at Law Judge participate in the collection of court fees and other fees owed to the County Clerk's Office by writing letters to or personally contacting the persons who owe the fees?

ANSWER: No. A judge should uphold the integrity and independence of the judiciary (Canon 1), and should avoid impropriety and the appearance of impropriety in all his activities (Canon 2). The collecting of the past due debts of the County by a judge constitutes the practice of law. A judge should not practice law (Canon 5F)* and should not have ex parte communications concerning the merits of impending litigation. [Canon 3A(5)].**

The collecting of past due debts of a county is the duty of an authorized agency, i.e. County Attorney, District Attorney, or retained private practicing attorney.

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**Now see Canon 4G.*
*** Now see Canon 3B(8).*

APPLICABILITY TO EMPLOYEE OF JUDGE
Opinion No. 106 (1987)

QUESTION: Is a person who is an employee of a judge or a group of judges subject to the provisions of the Code of Judicial Conduct?

ANSWER: Canon 3B(2)* states, "A judge should require his or her staff and court officials subject to the judge's direction and control to observe the standards of this code."

The committee is informed that the person is hired by a group of judges and appears to be under the direction and control of the judge(s). Under such circumstances, it is the duty of the judge(s) who employ that person to see that the employee complies with the provisions of the code.

The code makes no provisions for the sanctions against the employee for non-compliance with the code, but it does provide sanctions against the judge(s) in the event of non-compliance by the judge(s) in not requiring personnel under the direction and control of the judge(s) to adhere to the provisions of the code.

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**Now see Canons 3B(4),(6),(8), and (10) and 3C(2).*

SALE OF REPORT ON DOCKET BY CLERK
Opinion No. 107 (1987)

QUESTION: Is it a violation of the Code of Judicial Conduct for a docket assignment clerk, an employee of a judge or judges, to sell subscriptions to attorneys and others, a report which the

clerk compiles advising his or her subscribers of the disposition of and other docket information concerning completed jury trials?

ANSWER: The committee is advised that the docket assignment clerk in his or her discretion determines (1) the order of assignment of cases for jury trial; (2) the judge or court to whom a case is assigned or not assigned; and (3) whether, after a case is assigned, a formal written motion and hearing for continuance are required or whether the clerk will grant an "informal" continuance.

The committee is further informed that the funds received from the subscriptions are retained by the clerk.

Canon 2 requires that a judge should avoid impropriety and the appearance of impropriety. The committee observes no patent impropriety but respectfully suggests that the combination of the delegated authority to the clerk and the sale of the subscriptions by the clerk invites violation of the code.

CAVEAT: Any sanctions imposed for violations of the Code of Judicial Conduct are imposed against the judge(s), not the clerk.

PROPERTY OWNERS CORPORATION
Opinion No. 108 (1987)

QUESTION: May a judge ethically serve as an officer or director of a non-profit corporation which collects maintenance fees from subdivision property owners and uses the money to maintain roads and parks in the subdivision? The corporation is controlled by subdivision property owners, and the subdivision is not located within the geographical area assigned to the court over which the judge presides.

ANSWER: The answer to the question is determined by whether the corporation is a "publicly owned business" or a "civic organization." Canon 5B(2)* prohibits a judge from being "an officer, director or manager of a publicly owned business." Canon 5B** permits a judge to serve "as an officer, director, trustee or non-legal advisor of a ... civic organization not conducted for the economic or political advantage of its members, subject to" the limitations set forth in Canon 5B(1), (2), and (3).**

The committee is divided five to four on the proper classification to be given to the corporation, but the majority of the members of the committee are the opinion that the corporation is a publicly owned business. Thus, if a judge serves as an officer or director of the publicly owned corporation, it would be a violation of Canon 5B(2).*

**Now see Canon 4D(2).*

*** Now see Canon 4.*

STEERING COMMITTEE FOR CONSTITUTIONAL AMENDMENT
Opinion 109 (1987)

QUESTION: May a judge serve on a steering committee for an organization whose purpose is to effectuate the passage of a constitutional amendment giving certain rights to victims of crime?

ANSWER: Canon 4 of the Code of Judicial Conduct permits a judge to engage in activities to improve the law, the legal system, and the administration of justice provided that in doing so the judge does not cast doubt on his or her capacity to decide impartially any issue that may come before the court.

Canon 4C* permits a judge to serve as a member, officer, or director of an organization or governmental agency devoted to the same purposes stated in Canon 4.

A majority of the ethics committee is of the opinion that the purpose of the described steering committee is the improvement of the law, and that, subject to the limitations state in Canon 4, it would not be a violation of the Code of Judicial Conduct for the judge to serve as a member of the steering committee.

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**Now see Canon 4B.*

COURT PERSONNEL -- FUND RAISING
Opinion No. 110 (1988)

QUESTION: Is there a violation of the Code of Judicial Conduct if the court personnel in a judge's office solicit funds for charitable organizations, churches, or civic projects?

ANSWER: Canon 5B(2)* prohibits a judge from engaging in such activities or from using or permitting the use of the prestige of his or her office for such activities.

Canon 3B(2)** requires that a judge should require his or her staff and court officials subject to the judge's direction and control to observe the standards of the code of judicial conduct.

The purpose of Canon 3B(2)** is not to infringe upon the rights or liberties of court personnel but to assist the judge in: (1) upholding the integrity and independence of the judiciary, and (2) to avoid impropriety by the personnel under the judge's direction and control.

The committee perceives no violation of the Code of Judicial Conduct by court personnel engaging in the described activities so long as: (1) the judge's prestige or the prestige of the court is not being used to solicit funds, (2) the solicitation of funds does not interfere or conflict, in any manner, with the official duties of the court or the person doing the solicitation, and (3) there is no impropriety or appearance of impropriety in the manner of solicitation and in being a representative for the organization for which the solicitation is being done.

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**Now see Canon 4C(2).*
*** This Canon has been amended.*

COURT PERSONNEL -- SALES FOR CHARITY
Opinion No. 111 (1988)

QUESTION: Is there a violation of the Code of Judicial Conduct for the court personnel of a judge's office to sell Girl Scout cookies or other items to benefit community, school, civic, or community organizations?

ANSWER: This committee's answer in our opinion No. 110 is applicable to the posed question. Subject to the limitations set forth in that opinion, the committee perceives no violation of the Code of Judicial Conduct in the described activities.

COURT PERSONNEL -- SERVICE ONCHARITABLE BOARD OF DIRECTORS
Opinion No. 112 (1988)

QUESTION: Is it a violation of the Code of Judicial Conduct for court personnel in a judge's office to be a director on a Girl Scout council board? Duties would include giving budget and investment advice.

ANSWER: Canon 5B(3)* prohibits a judge from giving investment advice to such organizations. Canon 3B(2)** requires court personnel under the direction and control of the judge to observe the standards of the code of judicial conduct.

For the reasons stated in this committee's Opinion No. 110, we perceive no violation of the Code of Judicial Conduct in the described activity provided the limitations set forth in that opinion are followed.

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** Now see Canon 4C(3).*

*** This Canon has been amended.*

COUNTY JUDGE -- SERVICE IN ORGANIZATIONS
Opinion No. 113 (1988)

QUESTION: Would it be a violation of the Code of Judicial Conduct for a constitutional county judge to serve as a director or member of the following type organizations?

1. A metropolitan transportation organization that reviews and develops transportation needs for the county and cities in the county in which the judge is the county judge. Service is voluntary.

2. A tax increment financing district that oversees the development of public work projects and contracts for such projects in a city in the judge's county. Service is voluntary.

3. A regional planning commission, established by state law, for the development of cooperation between cities, counties, and other governmental entities in the region. Further, to discourage duplication of service in the region. Service and governmental membership is voluntary.

ANSWER: The Code of Judicial Conduct, as amended December 16, 1987, recognized the fact that constitutional county judges have a dual status: (1) their administrative capacity as head of their county governments, and (2) their judiciary capacity as judges of their constitutional county courts. Thus, where Canon 5G* prohibits most judges from accepting appointments to most

governmental committees or commissions, Canon 8C(1)** provides an exception that permits constitutional county judges who perform judicial functions the right to engage in duties which relate to the judge's role in the administration of county affairs, regardless of other Code restrictions. In addition, the Code in Canon 8C(2)** makes Canon 5G* not applicable to constitutional county judges.

The committee is of the opinion that a constitutional county judge may be a member or director of the three described organizations, and that such activity is not a violation of the Code of Judicial Conduct provided compliance with other provisions of the Code are met, i.e. (1) such activities do not interfere with his or her judicial duties [Canon 5B];*** (2) investment advice is not given to the organization by the judge [Canon 5B3];**** (3) the organization does not engage in proceedings that would ordinarily come before the judge, in his judicial capacity, or will be regularly or frequently engaged in adversary proceedings in any court [Canon 5(B)].*****

**Now see Canon 4H*
***Now see Canon 6B*
****Now see Canon 4A(2)*
*****Now see Canon 4C(3).*
******Now see Canon 4C(1).*

COUNTY JUDGE -- SERVICE ON ECONOMIC DEVELOPMENT CORPORATION BOARD

Opinion No. 114 (1988)

QUESTION: Would it be a violation of the Code of Judicial Conduct for a constitutional county judge to be an ex officio member of a private non-profit corporation created for the purpose of increasing economic development in the judge's county. The corporation solicits funds to sustain its operational costs.

ANSWER: The corporation appears to be engaged in a function that is highly beneficial to a county. A county judge, in his administrative capacity as titular head of the county commissioners court, has a duty to encourage projects which are beneficial to his or her county. Canon 8C(1)* of the Code permits a county judge to engage in such activities so long as they relate to the administration of the county.

The committee is of the opinion that it would not be a violation of the Code of Judicial Conduct for the judge to be a member provided the judge does not personally solicit funds (Canon 4C),** or lend the prestige of his office for that purpose, and further provided no other canons of the Code are violated.

** Now see Canon 6B.*
*** Now see Canon 4B.*

COUNTY JUDGE -- SERVING ON DRUG ABUSE BOARD
Opinion No. 115 (1988)

QUESTION: May a constitutional county judge ethically serve as a co-chairman of a committee created for the purpose of eliminating drug abuse in his or her county? The committee would solicit funds for the purpose of educating the public, offering rewards, compiling statistics, and seeking necessary legislation.

ANSWER: As a titular head of county government, a county judge should encourage the formation of such described organizations. Canon 8C(1)* permits the judge's participation in such programs so long as they relate to his or her duties in the administration of the county. However, the code imposes other restrictions which might make it impractical for a judge to participate in the organization=s activities. For instance, (1) a judge should not personally solicit funds (Canon 4(C));** (2) a judge should not give investment advice (Canon 5B(3));*** (3) such activities do not interfere with his or her judicial duties (Canon 5B(1));**** (4) the organization does not engage in proceedings that would ordinarily come before the judge in his judicial capacity, or will be regularly or frequently engaged in adversary proceedings in any court (Canon 5B(1));***** (5) service on the committee would not detract from public confidence in the integrity and impartiality of the judiciary (Canon 2A); (6) the judge would be unswayed by partisan interest, public clamor, or fear of criticism (Canon 3A(1));****** (7) such service does not cast doubt on the judge's capacity to decide any issue that may come before his or her court (Canon 4A); and (8) the judge does not try drug or drug related cases.

The committee is of the opinion that Canon 8C(1)* permits a judge to ethically serve as a co-chairman of such described committee, provided he or she adheres to those provisions of the code enumerated above.

** Now see Canon 6B.*
*** Now see Canons 4B(2) and 4C(2).*
**** Now see Canon 4C(3).*
***** Now see Canon 4A.*
****** Now see Canon 4C(1).*
******* Now see Canon 3B(2).*

ESTABLISHMENT OF DOMESTIC RELATIONS OFFICE
Opinion No. 116 (1988)

QUESTION: May a trial court judge adopt local rules to provide for an "Office of the Guardian Ad Litem" and appoint an attorney to that office who shall have the responsibility, in accordance with orders in all domestic relations cases involving child support orders, to collect and distribute all support payments, maintain necessary records for the court, and file motions for contempt where payments are not promptly made, and in return for such services receive a small monthly service charge out of court-ordered child support payments in order to finance this office?

ANSWER: The proposal is to create a self-supporting plan whereby a representative of the court will take the necessary steps to insure prompt payment of child support in accordance with court orders. The procedure would insure against a former spouse becoming delinquent for many months before this was ever brought to the attention of the court.

The proposed procedure does not result in a violation of the Code of Judicial Conduct. A trial judge has a legitimate interest in seeing that the best interest of a child is protected by prompt payment of support orders. The order creating the position of guardian ad litem would not result in the judge lending the prestige of his office to advance the private interest of others in violation of Canon 2B and would not constitute the practice of law in violation of Canon 5F.* The judge should not engage in ex parte communications with the guardian ad litem as to the merits of the motions for contempt or other proceedings pending in the court in violation of Canon 3A(5).**

Although Tex. R. Civ. P. 173 authorizes the appointment of a guardian ad litem and the allowance of a reasonable fee for his services, this opinion does not pass upon the legality of the proposal for an office of the guardian ad litem, but only the ethical considerations.

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** Now see Canon 4G.*

*** Now see Canon 3B (8).*

CANDIDATE -- REPUDIATE ILLEGAL VOTE
Opinion No. 117 (1988)

QUESTION: Must a candidate for judicial office repudiate a vote or votes shown by uncontroverted evidence to be illegal?

ANSWER: Whether a vote is illegal is a question of law to be decided by the proper forum, not the judicial ethics committee.

The committee finds nothing in the Code of Judicial Conduct that requires a candidate in a judicial race to publicly repudiate a vote either before or after a legal determination of the validity of the vote.

DESIGNATION OF SAFETY DRIVING COURSE
Opinion No. 118 (1988)

QUESTION: Where a defendant elects to take a safety driving course in lieu of other penalty, may the judge designate a specific agency and course that the defendant attend?

ANSWER: Assuming that there is more than one agency offering a safety driving course, the committee is of the opinion that the judge may not designate a specific agency because Canon 2B prohibits a judge from lending the prestige of his or her office to advance the private interests of others.

SERVICE ON COUNCIL OF GOVERNMENTS
Opinion No. 119 (1988)

QUESTION: May a statutory county court at law judge ethically serve on a regional "Council of Governments" which administers federal programs and grants for various county entities?

ANSWER: No. The various functions of the council and the name of the council itself indicate that the council is governmental in nature.

A statutory county court at law judge must comply with Canon 5G* of the Code of Judicial Conduct which prohibits such judge from accepting an appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy matters other than the improvement of law, the legal system, or the administration of justice.

** Now see Canon 4H.*

MEDIATION TO EXPEDITE SETTLEMENT
Opinion No. 120 (1988)

QUESTION: Is it ethical for a district judge to mediate civil cases in order to expedite the settlement process?

ANSWER: The committee is of the opinion that a district judge may not mediate civil cases. Canon 3A(5)* states "A judge...shall not directly or indirectly initiate, permit, nor consider ex parte or other communications concerning the merits of a pending or impending judicial proceeding." (Emphasis added.) Furthermore, Canon 5E** of the Code of Judicial Conduct states, "A judge should not act as an arbitrator or mediator." Canon 8*** makes Canon 5E** applicable to district judges. However, Canon 8*** also lists other classifications of judges who are exempt from compliance with 5E.**

**Now see Canon 3B(8).*
*** Now see Canon 4F.*
**** Now see Canon 6A.*

CONDUCT SETTLEMENT CONFERENCES
Opinion No. 121 (1988)

QUESTION: May a district judge conduct settlement conferences for suits filed (1) in his court or (2) in another judge's court, where he only conveys settlement offers and asks question? In the conference he sets no values, gives no opinions, and discloses no confidential information.

ANSWER: Although judges should encourage settlement negotiations, the described procedure appears to make the judge a mediator. Canon 5E* of the Code Of Judicial Conduct prohibits a judge from being a mediator. Also, Canon 3A(5)** states, "A judge...shall not directly or indirectly initiate, permit, nor consider ex parte or other communications concerning the merits of a pending or impending judicial proceeding."

The committee is of the opinion that the use of the settlement procedure outlined above by a district judge would be a violation of Canons 5E* and 3A(5)** of the code. Whether the litigation is filed in the judge's court or any other court makes no difference. The committee notes that Canon 5E* is not applicable to all classifications of judges. See, Canon 8.***

*Now see Canon 4F.
** Now see Canon 3B(8).
*** Now see Canon 6A.

SERVICE ON JOB TRAINING AGENCY BOARD
Opinion No. 122 (1988)

QUESTION: Would it be a violation of Canon 5G of the Code of Judicial Conduct for a County Court at Law Judge to serve as a member of the board of directors of a private agency which is established to oversee the operations of job-training, remedial education, summer youth employment programs, on-the-job training programs, etc., under a federal job training program?

PREFACE: The committee is advised that the board of directors decides which local agencies receive funding and in what amounts. The board of directors also has oversight and reporting duties and further generally designs and implement programs to insure that the money is spent wisely and effectively.

ANSWER: From the information furnished to the committee, the agency is a private, non-profit organization. Even though the agency implements programs funded by the federal government, the agency is not a governmental committee or commission; and therefore, the committee perceives no violation of Canon 5G* of the Code of Judicial Conduct in serving on the board of directors of such agency. See, limitations set out in judicial ethics opinion No. 85.

* Now see Canon 4H.

SENIOR JUDGE'S WIFE ON PAC
Opinion No. 123 (1988)

QUESTION: If a senior judge's wife becomes a member of a political action committee for a group of hospitals, does this in any manner constitute a violation of the Code of Judicial Conduct?

ANSWER: The code does not in any manner attempt to regulate the activities of a judge's spouse. Canon 2B does prohibit a judge from (1) allowing family members to influence his judicial conduct or judgment (2) allowing others to use the prestige of his office (in this case his title) to advance their private interests, and (3) allowing others to convey the impression that they are in a special position to influence the judge.

Canon 2A admonishes judges to conduct themselves in a manner to promote public confidence, and Canon 3A(2)* admonishes judges to be unswayed by partisan interests.

The committee perceives no violation of the code if the senior judge's wife accepts the described appointment. However, if the judge perceives, in the acceptance of assignments, any impropriety or appearance of impropriety as a result of his or her spouse's appointments, refusal to accept such assignment or recusal after accepting the assignments would not be inappropriate.

* Now see Canon 3B(2).

FORMER JUDGE AS AN ARBITRATOR
Opinion No. 124 (1988)

QUESTION: Would a former district judge, who has consented to be subject to assignment, violate the code of judicial conduct by acting as an arbitrator or mediator?

ANSWER: Canon 5E* of the Code of Judicial Conduct Act states "A judge should not act as an arbitrator or mediator." However, a former district judge who has complied with the Court Administration Act, Art. 74.054(3) is placed by Canon 8G** of the code in the same category as a senior judge. Canon 8G(1)** states, "[A former district judge]... is not required to comply with Canon 5E@,* but Canon 8G(2)** qualifies this exception by stating "[A former district judge]... should refrain from judicial service during the period of extra-judicial appointment permitted by Canon 5G."***

The committee is of the opinion that a former district judge who has qualified under Art. 74.054(3) may act as an arbitrator or mediator provided the judge refrains from performing judicial service during the period of an extra-judicial appointment.

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**Now see Canon 4F.*
***Now see Canon 6F.*
**** Now see Canon 4H.*

SELECTIVE SERVICE REGISTRATION AS CONDITION FOR SUSPENDED SENTENCE
Opinion No. 125 (1988)

QUESTION: May a judge ethically require proof of registration with the United States Department of Selective Service by eligible young men as a condition for the judge giving consideration to a suspended sentence or deferred adjudication as provided by Art. 45.54, Texas Code of Criminal Procedure?

ANSWER: The posed question requires a legal opinion. The function of the judicial ethics committee is to write opinions construing the Code of Judicial Conduct. The giving of legal opinions is beyond the scope of authority given to the committee.

The committee respectfully declines to answer the question and suggests that it be submitted to the office of the Attorney General or other appropriate officers authorized to give legal opinions.

LETTER TO COLLECT COURT FEES
Opinion No. 126 (1989)*

QUESTION: If a parent incurs fees charged by a Juvenile Board's Court Services Department for receiving and disbursing child support or for social studies, and if the applicable statute provides that payment of such fees may be enforced in district court, may a District Judge sign a letter to such parent, or authorize a letter from the court to such parent, to collect such fees?

ANSWER: There are no specific Code of Judicial Conduct provisions that guide a judge in avoiding conflicts between adjudicative and administrative responsibilities, but the Committee is of the opinion that a judge should not personally participate in attempting to collect such fees. If a judge may be required to preside at a hearing concerning the payment of fees, a judge should not write a letter for the purpose of collecting those fees. Such a letter would give the appearance of being inconsistent with the Canon 3A(4)* provision that a judge shall afford to every party the full right to be heard according to law, and the Canon 3A(5)* provision that a judge shall not initiate or permit ex parte communications concerning an impending proceeding.

The committee is also of the opinion that such letters should not appear to be from the "court", that is, from the judicial entity of which the judge is the principal officer. As the authority to determine disputed law and fact issues concerning the fees is actually delegated by law to that entity, it should not send collection letters.

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**Now see Canon 3B(8).*

PREPARATION OF APPLICATION TO COMMIT PERSON TO MENTAL HOSPITAL

Opinion No. 127 (1989)

QUESTION: Is there a conflict between Opinion 104 and Section 36 of the Mental Health Code (Art. 5547-36)?

ANSWER: No. Opinion 104 states that a judge should not "prepare applications and other legal pleadings for persons who desire to commit someone to a mental hospital." The statute provides that a motion for an order of protective custody may be filed "on the court's own motion." (Emphasis supplied.)

The "court" is the judicial agency created by law for the purpose of hearing and determining issues of law and fact and authorized to exercise that power according to prescribed rules. The "judge" is the principal officer of that entity. An attempt by the judge to assist an interested person in preparing an application or pleading would conflict with the statutory duty of the judge to make for the court the judicial decision whether to initiate protective custody proceedings without an application. Such assistance would be inconsistent with the provisions of Canon 3A(4)* that a judge must accord to every legally interested person the right to be heard, of Canon 3A(5)* that a judge must not permit ex parte communications, and of Canon 5F** that a judge may not practice law.

The judge who submitted this question also inquired whether a judge who makes an Art. 5537-36 decision to initiate a protective custody proceeding should recuse himself from making the protective custody determination under the statute. The recusal provisions that were stated in Canon 3C of the Code of Judicial Conduct are now covered by the Texas Rules of Civil Procedure. The Committee concludes that a decision on recusal is an adjudicative responsibility of the judge and that the Committee should no longer undertake to answer questions concerning recusal.

The committee also concludes that it would not be appropriate for the Committee to respond to a question concerning the meaning of the Art. 5537-36 words "on the court's own motion," because that is a question of law that must be resolved by each judge who encounters it.

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** Now see Canon 3B(8).*
*** Now see Canon 4G.*

LETTERHEAD OF FORMER JUDGE
Opinion No. 128 (1989)

QUESTION: May a former district judge use the following stationery letterhead for official correspondence while on assignment?

John Doe, District Judge
Formerly, Nine Hundred Ninety-ninth Judicial District
Post Office Box xxxx
xxxx, Texas (zip code)
(telephone)

ANSWER: No. The Committee is of the opinion that the letterhead may be misleading because the word "Formerly" modifies the word "District" and not the word "Judge". The Canon 3B* provision that a judge should not use the prestige of his office includes the requirement that a judge should not use the prestige of his former office. The Committee believes that a judge should avoid any statement about his judicial status that could be ambiguous.

The Committee is also of the opinion that in official correspondence a former district judge may be identified as a former district judge or as a former judge of a court that is correctly identified.

**The committee corrected this reference in Opinion 155 to be Canon 2B.*

OWNERSHIP IN PROFESSIONAL CORPORATION
Opinion No. 129 (1989)

QUESTION: If a lawyer owns and practices law in a professional corporation and then becomes a judge, may the judge continue to own, and may the judge receive a salary from, the corporation while pending matters are being completed by other lawyers?

ANSWER: No. Canon 5F* provides that a judge should not practice law, and the Committee is of the opinion that a judge should not own or receive a salary from an existing corporation whose only purpose is the practice of law.

The liquidation of the assets of a law practice professional corporation is governed by the Canon 5C(3)** provision that a judge's financial interests that might require frequent disqualification should be disposed of as soon as the judge can do so without serious financial detriment.

** Now see Canon 4G.*
*** Now see Canon 4D(3).*

ENDORSEMENT OF POLITICAL CANDIDATES
Opinion No. 130 (1989)

QUESTION: A judge brings to the attention of this Committee the Texas Attorney General's March 10, 1989 Opinion LO-89-21 which states that Canons 2 and 7 do not prohibit a judge from endorsing a candidate, and the judge submits this question: May a judge endorse a candidate for public office?

ANSWER: No. The Judicial Ethics Committee concludes again that a judge's public endorsement of a candidate for public office violates the Code of Judicial Conduct because such an endorsement tends to diminish public confidence in the independence and impartiality of the judiciary and may give the appearance of involvement in partisan interests and of judicial concern about public clamor or criticism, and because such an endorsement of necessity involves the use of the prestige of the judge and the prestige of his office. See Canons 1, 2A, 2B, and 3A(1), and Judicial Ethics Committee Opinions No. 73, 92, and 100.

The Committee has considered the Attorney General's Opinion and the provisions of the amended Code adopted in 1987, and the Committee is not persuaded by the Attorney General's conclusion that, in the Canon 2B provision that a judge should not lend the prestige of office to advance the private interests of others, the words "private interests" do not include candidacy.

> The committee reaffirms its Opinion No. 73, and, by a unanimous vote, respectfully recommends that the Supreme Court of Texas amend Canon 7* of the Texas Code of Judicial Conduct by adding to Canon 7* the following provisions from proposed Canon 5A of the May 1, 1989 Draft Revisions to the American Bar Association Code of Judicial Conduct: "A judge or a candidate for election or appointment to judicial office shall not make speeches for a political organization or candidate or publicly endorse a candidate for public office." [Proposed ABA Canon 5A(1)(b)]"A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his or her own behalf when a candidate for election, identify himself or herself as a member of a political party, and contribute to a political party or organization." [Proposed ABA Canon 5A(3)]

**Now see Canon 5.*

SERVICE ON COMMITTEE TO RESTORE COURTHOUSE
Opinion No. 131 (1989)

QUESTION: May judges serve on, and allow their names to appear on the letterheads of, steering and coordinating committees to consider funding and organizing a project to restore their courthouse dome, and a project committee to consider the design and appropriateness of the restoration?

ANSWER: The Committee concludes that a judge may serve on and advise such committees but may not allow their names to appear on letterhead used for fund raising.

As proper facilities for courts are essential to the legal system and to the proper administration of justice (see Committee Opinion 82), this courthouse dome project is within the provisions of Canon 4C*, which reads as follows:

> "A judge may serve as a member, officer or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice."

As stated in Committee Opinion 58, a judge may serve in a leadership capacity in a Canon 4C* organization, but Canon 5B(2)** prohibits any type of participation in, or lending the prestige of judicial office to, public fund raising activities.

The Canon 4C* exceptions to the Canon 5B(2)** prohibition against participating in fund raising are limited to advice to legal system and administration of justice organizations and to recommendations to fund-raising agencies and similar donors. See Opinion 58. This construction of Canon 4C* gives effect to the principles of Canon 1 and Canon 2B that a judge should not lend the prestige of judicial office, or permit others to curry favor or to give the impression that they can influence the judge.

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** Now see Canon 4B.** Now see Canon 4C(2).*

PART-TIME JUDGE REPRESENTATION OF CLIENTS
Opinion No. 132 (1989)

FACTS ASSUMED: In the county in question municipal court judges act as magistrate in most criminal cases in which defendants are arrested. Those judges consider affidavits for, and they issue, both search and arrest warrants. They also arraign defendants, and they set bonds.

QUESTION 1: May a relief judge for a municipal court represent, or practice law with a lawyer who represents, a defendant in a county court or district court case in which a magistrate who is another judge of the same municipal court took some action?

QUESTION 2: May such a part-time judge represent, or practice law with a lawyer who represents, an accused in a criminal case that has not been considered by another municipal court judge?

QUESTION 3: May a municipal court judge continue to serve in that position if the judge's lawyer spouse represents defendants mentioned in Questions 1 and 2?

ANSWER: The answer to Question 1 is No. The provision of Canon 8D(1)(d)* that a municipal court judge may practice law except in the court on which the judge serves or "in a proceeding in which he or she has served as a judge or in any proceeding related thereto," does not expressly prohibit a municipal court judge from representing clients in criminal cases which other judges of the same court have considered. However, the Committee concludes that such representation would be inconsistent with Canon 5C(1),** which provides that a judge should refrain from

financial and business dealings that (1) tend to reflect adversely on the judge's impartiality, (2) interfere with the proper performance of judicial duties, (3) exploit his or her judicial position, or (4) involve the judge in frequent transactions with lawyers or person likely to come before the court on which he or she serves.

The Committee believes that in this context the words "financial and business dealings" include the practice of law. A part-time municipal court judge would at least give the appearance of disregarding all four parts of Canon 5C(1)** if the judge's law practice includes clients whose cases were considered by other judges on the same court.

In response to Question 2 the Committee concludes that the Code of Judicial Conduct does not prohibit a part-time municipal court judge from representing an accused in a criminal case if such representation does not violate Canon 5C(1).**

The answers to Question 3 correspond to the answers to Questions 1 and 2. The judge's financial interest in the income from the spouse's representation of clients who appear before other judges of the same court would be inconsistent with the provisions of Canon 5C(1).** The judge would not necessarily violate that Canon if the judge's spouse represents defendants whose cases are not considered by other municipal court magistrates.

** Now see Canon 6C.*
*** Now see Canon 4D.*

MEETING WITH COUNTY COMMISSIONERSCONCERNING COUNTY'S CASES
Opinion No. 133 (1990)

FACTS ASSUMED: A Commissioners Court developed a concern about a judge's impartiality in eminent domain cases and about behavior of the judge "which may indicate a prejudice" against the County. Two members of the Commissioners Court requested a meeting with the judge to make the judge aware of this concern before public Commissioners Court discussion or action. No pending or future case would be discussed.

QUESTION: Should a judge meet with County Commissioners to discuss previous decisions in cases in which the County was a party?

ANSWER: No. The Committee concludes that such a meeting would be inconsistent with the following provisions of the Code of Judicial Conduct:

The Canon 1 provision that an independent judiciary is indispensable to justice in our society.

The Canon 2A provision that a judge should promote public confidence in the integrity and impartiality of the judiciary. The Committee believes that the proposed private meeting, between a judge and the principal officers of one party to a series of lawsuits, would tend to impair public confidence in the impartiality of the judiciary.

The Canon 2B provision that a judge should not convey or permit others to convey the impression that they are in a special position to influence the judge.

The Canon 3A(1)* provision that a judge should be unswayed by partisan interests, public clamor, or fear of criticism.

The Canon 3A(5)** provision that a judge shall not directly or indirectly permit private communications concerning the merits of a pending proceeding. The Committee believes that

under the circumstances stated a meeting to discuss previous decisions in eminent domain cases would give the appearance of being a meeting concerning decisions in pending or future eminent domain cases.

Although the Supreme Court has abrogated the Code of Judicial Conduct provision [Canon 3A(8)]*** that a judge shall abstain from public comment about a pending or impending proceeding in any court, the members of this Committee agree that such comments are unethical. By attending such a meeting about previous decisions a judge would give the appearance of accepting an invitation to comment on impending decisions in similar cases.

The Canon 7(2)**** provision that a judge shall not make pledges or promises regarding judicial duties other that the faithful and impartial performance to the duties of office. The Committee believes that by attending such a meeting a judge would give the appearance of accepting an invitation to give assurance concerning decisions in pending and future eminent domain cases.

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** Now see Canon 3B(2).*
*** Now see Canon 3B(8).*
**** Now see Canon 3B(10).*
***** Now see Canon* 5(2).

MEETING WITH NEWSPAPER'S EDITORIAL BOARD
Opinion No. 134 (1989)

FACTS ASSUMED: In one of the large Texas cities, which is served primarily by one major daily newspaper, that newspaper periodically files suits in the courts of the county, and two such suits are pending in the court of the judge in question.

QUESTION: Would the judge violate any provision of the Code of Judicial Conduct by participating in an interview with the newspaper editorial board to provide information on which the newspaper will base an endorsement to be published before the election at which the judge seeks reelection?

ANSWER: No. The Code of Judicial Conduct does not prohibit a judge from meeting with, and responding to questions from a newspaper's editorial board. The possibility that the judge may decide to recuse himself in a case or cases involving the newspaper should not prevent the judge from attending such an interview.

USE OF WORDS "REELECT" AND "KEEP"IN CAMPAIGN MATERIAL
Opinion No. 135 (1990)

QUESTION: May a judge, who sought reelection and was defeated, use the words "reelect" or "keep" on campaign material in a subsequent campaign, against an incumbent, for election to another court?

ANSWER: No. The Committee concludes that the use of such words in campaign material would violate the Canon 7(2)* provision that any statement of a judicial candidate's record should be such as can withstand the closest scrutiny as to accuracy, candor, and fairness.

** Now see Canon 5.*

CAMPAIGN BUMPER STICKERS ON JUDGES' VEHICLES
Opinion No. 136 (1990)

QUESTION: May a judge display on the judge's vehicle a bumper sticker supporting a political candidate?

ANSWER: No. For the reasons stated in Opinion No. 130 a judge's public endorsement of a candidate for public office violates the Code of Judicial Conduct.

After Opinion 130 was issued, the Texas Supreme Court amended Canon 7(3)* so that it now expressly prohibits the public use of a judge's name endorsing another candidate. The Committee concludes that a judge displaying such a bumper sticker would also violate at least the spirit of this new Canon 7(3)* provision, because a judge cannot realistically separate the prestige of judicial office from the judge's personal affairs. See Opinion No. 73.

** Now see Canon 5(3).*

USE OF JUDICIAL LETTERHEAD
Opinion No. 137 (1990)

DEFINITION: In this opinion "judicial letterhead" means letterhead that shows a judge's title, position, and official address and is suitable for official judicial correspondence.

QUESTION 1: May a judge use judicial letterhead, or letterhead that simply shows the title "Judge", for personal business and social correspondence?

ANSWER: Yes. The Code of Judicial Conduct does not prohibit the use of judicial letterhead, or letterhead that shows the title "Judge", for personal matters. However, a judge should avoid any appearance of impropriety (Canon 2), or of conflict with the judge's judicial duties (Canon 5),* that might result from such use of such letterhead, including the following:

a. letterhead use that would give the appearance of using the prestige of the judge's office to advance the private interests of the judge or others, or would reflect on the independence, integrity, or impartiality of the judiciary (Canons 1 and 2);

b. letterhead use that would appear to exploit the judge's position or would require frequent disqualification (Canon 5C);* or

c. using letterhead as a part of any conduct that violates another provision of the Code.

QUESTION 2: May a judge place a small picture of the judge on judicial letterhead purchased with personal funds?

ANSWER: While placing a picture of the judge on the judge's official letterhead would not violate any specific provision of the Code of Judicial Conduct, the Committee believes that the use of a picture of the judge on judicial letterhead would be undignified. See Canon 3A(3).** Such a picture could also place an unusual and unnecessary emphasis on the appearance and personality of the judge, which could tend to obscure the basic principle that the administration of justice should be an impersonal, predictable, and consistent process, based on the application of established rules of law to the facts of each case, and not on the individual judge presiding in each case.

QUESTION 3: May a judge use judicial letterhead to solicit contributions or other support in the judge's campaign for reelection or for election to another office?

ANSWER: No. Canon 5C(1)*** provides that a judge's financial activities must not reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to be in court. On December 19, 1989 the Texas Supreme Court amended Canon 5C(1)*** by adding thereto a sentence providing that this "limitation" on financial activities does not prohibit a judge from soliciting campaign contributions. (Emphasis added.)

The Committee concludes that this amendment manifests the Supreme Court's intent to provide that campaign solicitations are subject to the same Canon 5C(1)*** rules that govern a judge's other financial activities. Therefore, in soliciting campaign contributions, a judge must avoid activities that reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to be in court.+

The Committee believes that the use of judicial letterhead to solicit campaign contributions or other campaign support would violate Canon 5C(1)*** as amended. Of course a judge's campaign literature should state the judge's present title and position, but the use of official judicial letterhead for campaign purposes could give the appearance that a judge candidate is attempting to exploit the judge's judicial position.

QUESTION 4. May a judge who is chairman of the local Bar Association membership committee use judicial letterhead for a letter from the judge asking lawyers to join the Bar Association?

ANSWER: Yes. To a limited extent Canon 4C**** condones the use of judicial prestige for the improvement of the law, the legal system, or the administration of justice, and it permits a judge to serve as a member, officer, or director of an organization devoted to those purposes. However, the Code does not permit a judge to use the prestige of judicial office by participating personally in fund raising activities for such an organization, and use of judicial letterhead for that purpose would be improper.

+Committee Footnote: Judges should not assume that the Supreme Court intended the other meaning that could be given this amendment: that a judges may solicit a campaign contribution

even if the solicitation reflects adversely on the judge's impartiality, interferes with the proper performance of judicial duties, exploits the judge's judicial position, and involves the judge in frequent transactions with lawyers or persons likely to be in court.
** Now see Canon 4.*
*** Now see Canon 3B(4).*
****Now see Canon 4D.*
*****Now see Canon 4B.*

APPOINTMENT TO GOVERNMENTAL COMMITTEE
Opinion No. 138 (1991)

FACTS ASSUMED: The statutory duties of the Local Government Records Committee are to review and approve the State Library and Archives Commission's schedules and rules for the retention and care of local records, and to advise that Commission on all matters concerning the management and preservation of such records. Government Code Section 441.162 provides that the person who is appointed chairman of the Committee must be an active or retired district judge.

QUESTION: Would an active judge, or a retired district judge subject to assignment, violate Canon 5G* of the Code of Judicial Conduct by serving on the Local Government Records Committee?

ANSWER: No. The Committee concludes that service on this Committee would not violate the provision of Canon 5G that a judge should not accept appointment to a governmental committee that is concerned with issues of fact or policy other than the improvement of the law, the legal system, or the administration of justice.

The statute referred to in the question manifests a legislative intent to coordinate the record keeping responsibilities of the three branches of government, and the Committee concludes that a judge's participation in that statutory arrangement would serve a proper judicial purpose.

** Now see Canon 4H.*

JUDGE AS AN EXPERT WITNESS
Opinion No. 139 (1991)

QUESTION: May a judge testify as an expert witness in a lawsuit in which the defendant is a lawyer who is accused of malpractice that allegedly occurred during a previous trial at which the proposed judge witness was the presiding judge?

ANSWER: Not voluntarily. A judge may testify as an expert witness in such a proceeding only if the judge is subpoenaed as a witness and required to testify, but a judge should not testify voluntarily and should discourage a party from requiring the judge to testify as an expert witness.+

The Committee concludes that a judge should not cooperate with a party in becoming an expert witness in such a case, because that would create the appearance of using the prestige of judicial office for the benefit of the party for whom the judge testifies and could also create the appearance of compromising the independence of the judge, by placing the judge on one side of an adversarial proceeding between lawyers who may often appear before the judge.

A judge should not, under any circumstances, accept compensation for testifying.

+ Committee Footnote: Compare Joachim v. Chambers, 815 S.W.2nd 234 (Tex. 1991), holding that under these circumstances a trial judge abused his discretion in refusing to order a party not to call the proposed judge witness.

ACCEPTANCE BY COURT STAFF OF FAVORS
Opinion No. 140 (1991)

QUESTION 1: May a district judge allow a court administrator to participate in a group weekend trip that is sponsored, organized, and paid for by an attorney who practices before the judge?

ANSWER: No. Canon 5C(4)(c)* provides that a judge should not accept favors from a person whose interests have come or are likely to come before the judge. Canon 3B(2)** provides that a judge should require the judge's staff to observe the standards of the Code of Judicial Conduct. The Committee concludes that the trip inquired about would be inconsistent with these provisions.

QUESTION 2: May a district judge allow a court administrator to participate in such a trip if the court administrator pays all expenses involved?

ANSWER: The Committee concludes that a judge may allow such participation if the arrangements, social activities, and other circumstances do not reflect on the independence or impartiality of the court or its staff, or create the appearance of impropriety.

** Now see Canon 4D(4)(c).*
*** Now see Canon 3C(2).*

SERVICE ON DOWNTOWN DEVELOPMENT COMMITTEE
Opinion No. 141 (1991)

QUESTION: May a judge be the chairman of and serve on a committee to encourage and expand the economic development and historical restoration of a downtown area in which the judge owns real property? The committee will solicit funds from private businesses and individuals and from the city to fund the project.

ANSWER: No. Canon 2B provides that a judge should not permit the use of the prestige of judicial office for the private interests of the judge or others. Canon 5C(1)* provides that a judge should refrain from financial and business dealings that tend to exploit the judge's judicial position.

The Committee concludes that the judge's participation, as chairman of the committee or as a member, in sponsoring a project that may benefit the judge and that depends upon fund raising would create the appearance of using the prestige of judicial office for the benefit of the owners of the downtown property, including the judge. That activity could also give the appearance of compromising the independence of the judge by permitting a contributor to attempt to curry favor

with the judge or to convey the impression that the contributor is in a special position to influence the judge.

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** Now see Canon 4D(1).*

JUSTICE OF THE PEACE IN BAIL BOND BUSINESS
Opinion No. 142 (1991)

QUESTION: May a newly elected Justice of the Peace who has had a bail bond license for several years continue his bail bond business if his son manages the business and does not make bond for accused persons who come before the Justice of the Peace.

ANSWER: No. Canon 5C(1)* provides that a judge should refrain from financial dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. The Committee concludes that continuing a bail bond business under the circumstances stated in the question would be inconsistent with these provisions of Canon 5C(1).*

The Committee does note that Canon 8D(1)(b)** provides that the requirement of Canon 5C(3),*** that a judge should divest financial interests that require frequent disqualification, does not apply to Justices of the Peace. However, the Committee believes that Canon 5C(1),* which does apply, controls this question. Canon 9,**** which is also applicable, provides that a person to whom the Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

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** Now see Canon 4D(1).*
*** Now see Canon 6C(1)(b).*
**** Now see Canon 4D(3).*
***** Now see Canon 7.*

SERVICE BY JUSTICE OF THE PEACE ON SCHOOL BOARD
Opinion No. 143

QUESTION: May a person serving as Justice of the Peace also serve as a school board trustee?

ANSWER: Such service would not violate the Code of Judicial Conduct, but this Committee is not authorized to consider the question of law presented by the question.

Canon 8D(1)(b)* provides that a Justice of the Peace is not required to comply with the provision of Canon 5G** that a judge should not accept appointment to a governmental committee that is concerned with issues of fact or policy other than the improvement of the law, the legal system, or the administration of justice. This Committee has considered only the ethical issue presented

under these Code provisions, and respectfully declines to consider or decide any issue of law that may be presented by the question.

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** Now see Canon 6C(1)(b).*
*** Now see Canon 4H.*

SERVICE ON BOARD OF ONE HOSPITAL DIVISION OF A NONPROFIT CORPORATION
Opinion No. 144

FACTS ASSUMED: A nonprofit corporation operates three hospitals that are not separately incorporated, but each hospital is a corporate division with a board of trustees to which the corporate board delegates extensive responsibility.

QUESTION: May a judge serve on the board of trustees of one of the hospital divisions of such a nonprofit corporation?

ANSWER: Yes, subject to certain limitations provided by Canon 5B,* as stated in the following paragraph. Subject to those conditions, a judge may serve as a trustee of a charitable organization not conducted for the economic or political advantage of its members.

Canon 5B* provides that a judge should not serve if the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court. Also, a judge should not solicit funds or permit the use of the judge's name in fund raising, and a judge should not give investment advice to such an organization.

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** Now see Canon 4C.*

POLITICAL ACTIVITY OF JUDGE'S STAFF
Opinion No. 145 (1992)

QUESTION: Should a judge permit members of the judge's office staff to participate in political activities such as publicly supporting a candidate for election, acting as a campaign manager, and fund raising?

ANSWER: No. Canon 7(3)* provides that a judge shall not authorize the public use of the judge's name to endorse another candidate for any public office. The reasons for that rule are stated in the first paragraph of the answer in Opinion 130. Canon 3B(2)** provides that a judge should require the judge's staff, as well other court officials subject to the judge's direction and control, to observe the standards of the Code.

The Committee concludes that such political activity by a member of a judge's office staff would imply, or would be likely to give the appearance of, the judge's support for the candidate.

RELATED QUESTIONS:

The inquiring judge also asks whether a judge should permit a staff member to contribute money to a candidate. The Committee concludes that to permit such a contribution would be

appropriate only under the circumstances that would allow the judge to contribute, that is, when the judge is satisfied that neither the contribution nor the public record thereof will receive public attention before the election.

The inquiring judge also mentions the uncertain nature of a "judge's direction and control" over a county employee on the judge's office or court staff. The Committee does not reach the issue of how that direction and control should be exercised, because it involves questions of law and because it arises in so many different situations and circumstances that it cannot be addressed in general terms.

Therefore, this opinion is limited to the conclusion that for a judge to permit or to condone such political activity by a staff member would be inconsistent with the ethical standards of the Code of Judicial Conduct.

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** Now see Canon 5(3).*
*** Now see Canon 3C(2).*

EXTRAJUDICIAL RECOMMENDATIONS TO BOARD OF PARDONS AND PAROLES
Opinion No. 146 (1992)

QUESTION: Should a judge who has no professional connection with a criminal case make a recommendation to the Board of Pardons and Paroles concerning parole of the defendant?

ANSWER: No. Canon 2B provides that a judge should not use or permit the use of judicial prestige for the benefit of the judge or others. The Committee concludes that if the judge has no professional connection to the case, such a recommendation by a judge would be, or at least would give the appearance of being, an attempt to use Judicial prestige for the benefit of another. This would be true even if the judge has some personal basis for the recommendation, because there is no realistic way to separate the prestige of the judge's office from the judge's personal affairs. Compare Opinion 73.

PARTICIPATION IN PLAN TO ENCOURAGEJURORS TO DONATE JURY PAY
Opinion No. 147 (1992)

QUESTION: Should a judge participate in a plan to advise jurors that they may make a voluntary donation of their jury pay to a "Children's Protective Services Fund?"

ANSWER: No. Canon 5B(2)* provides that a judge shall not solicit funds for any educational, religious, charitable, fraternal, political, or civic organization. Canon 4C** provides that a Judge should not personally participate in public fund raising activities for an organization devoted to the improvement of the law, the legal system, or the administration of justice. Opinions 10, 58, 131, and 137 (Question 4) construe this Canon 4C** provision.

There is another consideration if the court on which the judge serves has jurisdiction in cases involving the protection of children. Canon 2A provides that a judge should promote public confidence in the impartiality of the judiciary. The Committee concludes that a judge's

participation in raising money for the protection of children would create the appearance of partiality in cases involving accusations of abuse of, or failure to protect, children. (Compare Opinion 126.)

The Committee concludes that a judge should not participate in advising jurors that they may donate their jury pay to any cause.

** Now see Canon 4C(2).*
*** Now see Canon 4B(2).*

SERVICE ON BOTH COUNTY JUVENILE BOARDAND TEXAS JUVENILE PROBATION COMMISSION
Opinion No. 148 (1992)

FACTS ASSUMED: A district judge is the judge of a court designated as a juvenile court and serves on the County Juvenile Board, which has the statutory duty and authority to employ juvenile probation department staff members, designate the titles of employees, and set their salaries. The same judge also serves on the Texas Juvenile Probation commission, which has the statutory duty and authority to allocate and distribute to juvenile boards the funds appropriated by the Legislature and to give technical assistance and training to juvenile boards and juvenile probation departments. A pertinent statute provides that two members of the Commission shall be district judges who are judges of juvenile courts.

QUESTION: When acting as a member of the Commission should the judge vote on questions which affect funding for the juvenile probation department supervised by the Juvenile Board on which the judge serves and on questions concerning funding formula and guidelines that apply to all juvenile boards?

ANSWER: Yes. Canon 3B(1)* provides that a judge should diligently discharge all administrative responsibilities. The statutory arrangement manifests a legislative intent to coordinate the Commission's work with that of local juvenile boards, as well as a legislative assumption that the arrangement itself does not create a conflict of interest.

However, this Committee observes that there may be circumstances under which such a judge may decide that it would be appropriate in order to avoid the appearance of partiality for the judge to abstain from voting on a specific matter that would have an apparent and substantially greater impact on the judge's own probation department than on other departments generally.

** Now see Canon 3C(1).*

SERVICE AS JUSTICE OF THE PEACE IN ONE COUNTY AND AS RESERVE DEPUTY SHERIFF IN ANOTHER
Opinion No. 149 (1992)

QUESTION: Should a Justice of the Peace serve as a Reserve Deputy Sheriff in another County?

ANSWER: No. The Committee concludes that service by a Justice of the Peace as a law enforcement officer would be inconsistent with the provisions of Canons 1 and 2 concerning the impartiality and independence of the judicial.

JUDGE AS MEMBER OF HOST COMMITTEE FOR FUND RAISING EVENT
Opinion No. 150 (1992)

QUESTION: Should a judge permit the judge's name to be included in a list of the members of the "Host Committee" on an invitation to a fund raising event?

ANSWER: No. Canon 5B(2)* provides that a judge shall not solicit funds for any educational, religious, charitable, fraternal, political, or civic organization.+ Canon 10** provides that the word "shall" when used in the Code means compulsion. The Committee concludes that if a judge should agree to be listed as a host on an invitation to a fund raising event, that would constitute soliciting funds for the cause benefited by the event and, therefore, would violate Canon 5B(2).**

Canon 2B is also relevant. It provides that a judge should not lend the prestige of judicial office to advance the interests of others. Such use of a judge's name would use, or at least would give the appearance of using, judicial prestige for fund raising even if the invitation does not identify the host judge as a judge, because a judge cannot realistically separate the prestige of judicial office from the judge's personal affairs. (Compare Opinions 73 and 136.)

Canon 2B also provides that a judge should not permit others to convey the impression that they are in a special position to influence the judge. By hosting a Fund raising event a judge would create an opportunity for a litigant to attempt to curry favor by contributing generously, and then to convey such an impression.

The applicable principles are also addressed in Opinions 11 (1976), 16 (1977), 41 (1979), 61 (1980), 59 and 60 (1982), and 131 (1989). The same rules apply to judges' personal participation in public fund raising activities for organizations devoted to the improvement of the law, the legal system, or the administration of justice. Canon 4C.***

+Committee Footnote: As the Cannon 5B(2) distinction between soliciting funds, and being a speaker or guest of honor at such an event, is quite specific, the Committee does not reach or consider the rationale for that distinction.

** Now see Canon 4C(2).*

*** Now see Canon 8B(1).*

**** Now see Canon 4B(2).*

JUDGE AS TRUSTEE OF FAMILY TRUST AND AS BUSINESS PARTNER OF AUNT AND COUSINS
Opinion No. 151 (1993)

QUESTION: May a judge handle her family's business interests, some of which are held in trust and in partnerships with an aunt and several cousins?

ANSWER: Yes. Canon 5C(1), (2), and (3)* allow this activity if the business is not a publicly owned business, does not require the judge's frequent disqualification from cases, does not reflect adversely on the judge's impartiality, does not interfere with the proper performance of judicial duties, does not exploit her judicial position, and does not involve the judge in frequent transactions with lawyers or others likely to come before the judge's court. The affirmative answer to this question assumes that none of these conditions will occur.

Further, a judge may serve as a fiducial for a member of her own family, if such service will not interfere with the proper performance of judicial duties. This affirmative answer is subject to the conditions stated in Canon 5D,** i.e., the judge should not serve if her fiduciary duties will engage her in proceedings that "that would ordinarily come before the judge, or if the estate, trust, or ward would become involved in adversary proceedings in [her] court or one under its appellate jurisdiction."

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** Now see Canon 4D(1), (2), and (3).*
*** Now see Canon 4E.*

JUDGE AS TRUSTEE OF NONPROFIT CEMETERY TRUST ASSOCIATION
Opinion No. 152 (1993)

QUESTION: May a judge serve as trustee for a Cemetery Trust Association that is non-profit, meets once a year to approve investments made, and to advise on future investments?

ANSWER: A judge may serve, but should not approve investments made or advise on future investments. Canon 5B(3)* provides that a judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions. The same canon provides that a judge may serve as an officer, director, trustee, or nonlegal advisor of an organization not conducted for the economic or political advantage of its members, subject to the following limitations:

1. A judge should not serve if it is likely the organization will be engaged in proceedings that would come before her or would be regularly or frequently engaged in adversary proceedings in any court.

2. A judge shall not solicit funds for such organization but may be listed as a trustee and may be a speaker or guest of honor at an organization's fund raising events.

3. A judge should not give investment advice to such an organization. Canon 5B** provides that a judge may participate in civic and charitable activities that do not reflect adversely upon her impartiality or interfere with the performance of judicial duties, and Canon 2B provides that a judge should not lend the prestige of her office to advance the private interests of herself or others. Subject to these conditions, such service is allowed under the code. See Judicial Ethics Opinions Nos. 57, 70, and 144.

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** Now see Canon 4C(3).*
*** Now see Canon 4C.*

JUDGE AS LESSOR OF LAW OFFICE TO ATTORNEYS PRACTICING IN HER COURT
Opinion No. 153 (1993)

QUESTION: May a judge lease her former law office, of which she is the sole owner, directly to attorneys who will be practicing in her court?

ANSWERS: No. Canon 5C(1)* provides that a judge should refrain from business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before her court. The committee believes that such a relationship constitutes a business dealing that falls within this prohibition. Because the judge's ownership interest is large, the relationship may create the appearance of impropriety.

Canon 5C(3)** provides that a judge should manage her investments and other financial interest to minimize the number of cases in which she is disqualified. As soon as the judge can do so without serious financial detriment, she should divest herself of investments and other financial interests that might require frequent disqualification. See Judicial Ethics Opinion No. 129.

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** Now see Canon 4D(1).*
*** Now see Canon 4D(3).*

EX PARTE COMMUNICATIONS FROM LITIGANTS
Opinion No. 154 (1993)

QUESTION: What is a judge's ethical obligation upon receiving from a litigant a letter which attempts to communicate privately to the judge information concerning a case that is or has been pending?

ANSWER: Canon 3A(5)* provides that a judge shall not permit or consider improper ex parte or other private communication concerning the merits of a pending or impending judicial proceeding. (Canon 10** provides that the word "shall" when used in the Code means compulsion.) Judges may comply with Canon 3A(5)* by doing the following: 1) Preserve the original letter by delivering it to the court clerk to be file marked and kept in the clerk's file. 2) Send a copy of the letter to all opposing counsel and pro se litigants. 3) Read the letter to determine if it is proper or improper; if improper, the judge should send a letter to the communicant, with a copy of the judge's letter to all opposing counsel and pro se litigants, stating that the letter was an improper ex parte communication, that such communication should cease, that the judge will take no action whatsoever in response to the letter, and that a copy of the letter has been sent to all opposing counsel and pro se litigants.

Canon 3A(4)* provides that a judge shall accord to every person who is legally interested in a proceeding the right to be heard according to law. Consideration of an ex parte communication would be inconsistent with Canon 3A(4),* because it would not accord to other parties fair notice of the content of the communication, and it would not accord to other parties an opportunity to respond.

Canon 3*** provides that the judicial duties of a judge take precedence over all the judge's other activities. A judge's consideration of a controversy that is not brought before the court in the manner provided by law would be inconsistent with the judicial duty to determine "cases" and "controversies" (Art. 3, Constitution of the United States). A judge has no authority or jurisdiction to consider, or to take any action concerning, out-of-court controversies. A judge's consideration of a controversy that is not properly before the court could give the appearance of inappropriate action under color of judicial authority, which would tend to diminish public confidence in the independence and impartiality of the judiciary, rather than promote it as Canon 1 and Canon 2 require a judge to do.

Finally, a judge should try to minimize the number of cases in which the judge is disqualified. If a judge permits a communication to the judge concerning any matter that may be the subject of a judicial proceeding, that could necessitate disqualification or recusal.

** Now see Canon 3B(8).*
*** Now see Canon 8B(1).*
**** Now see Canon 3A.*

ACTIVITIES OF RETIRED JUDGES
Opinion No. 155 (1993)

QUESTION 1: May a retired judge who is subject to assignment do the following things?

a. Lawyer Activities: (1) appear in court as a lawyer; (2) practice law without appearing in court; (3) use judicial title; (4) be "of counsel" to a business.

b. Other Than in Law Practice, Use Former Judicial Title in Directories, on Stationery or Business Cards: (1) for judicial purposes; (2) for business and social purposes.

c. Political Activities: (1) publicly endorse another candidate for office; (2) work on a political campaign.

d. Raise Money for Charities.

e. Activities Governed by Law: (1) perform weddings; (2) administer oaths; (3) disregard financial disclosure requirements.

ANSWERS TO QUESTION 1: (Retired Judges Subject to Assignment):

a. Lawyer Activities

(1) Appear in Court As a Lawyer. No ethical question is presented, because under Government Code Section 74.055 every judge who is eligible for assignment has certified the judge's willingness not to appear and plead as an attorney in court.

(2) Practice Law Without Appearing in Court. Yes, but subject to the provisions of Canons 2, 2B, 5,* and 5C (1) and (6).** Canon 8G*** says that a retired judge subject to assignment is not required to comply with the Canon 5F**** provision that a judge should not practice law (with exceptions that do not apply). However, the principles stated in the headings of Canons 2 and 5,* and the specific provisions of Canon 2B and Canon 5C (1) and (6),** do apply to retired judges subject to assignment.

A retired judge subject to assignment should avoid the appearance of impropriety (Canon 2), and should minimize the risk of conflict with judicial duties (Canon 6). A judge should not use the prestige of judicial office to advance private interests. Canon 2B and Canon 5C(1)** provide that a judge should refrain from financial and business dealings that (a) tend to reflect adversely

on the judge's impartiality, (b) interfere with the proper performance of judicial duties, (c)exploit the judge's judicial position, or (d) involve the judge in frequent transactions with lawyers or persons likely to come before the court on which he or she serves. The words "financial and business dealings" include the practice of law. Opinion 132. Canon 5C(6)** provides that a judge should not use or disclose for any nonjudicial purpose any information that the judge acquires in a judicial capacity. These provisions impose on a retired judge who is subject to assignment the duty to observe rather strict limitations in any law practice in which the judge engages. Paragraph (3) discusses one example.

(3) Use Judicial Title in Law Practice. No. The use of the title "Judge" or "Justice" on letterhead, in directories, or in any other public way would at least give the appearance of using judicial prestige for private advantage and of exploiting the judge's judicial position. See Opinion 102, which concluded that a retired judge would violate Canon 2B by using the prestige of the judge's former title to advance the private interest of a law practice. (That judge was not subject to assignment, but at that time the same Code provisions applied to all retired judges.) See also Opinions 67 and 128. (In Op. 128 the reference to Canon 3B should say 2B).

(4) Be "Of Counsel" To a Business. Yes, subject to the limitations stated above in sections (1), (2), and (3). The Committee notes that Opinion 87 is no longer useful. The statute headed "Ineligibility to Practice Law", which was cited in Opinion 87, has been repealed.

b. Other than in Law Practice, Use Former Judicial Title in Directories, on Stationery or Business Cards.

(l) For Judicial Purposes. Yes. In official judicial correspondence and cards, and in law directories, a retired judge subject to assignment may be identified as a retired judge or justice. Opinion 128.

(2) For Business and Social Purposes. Yes, but subject to the pertinent provisions of Canons 2B and 5C(1).** For personal business and social correspondence and cards, and in business and social directories, the Code of Judicial Conduct does not prohibit the use of the title "Judge" or "Justice". However, Canon 2B provides that a judge should not use judicial prestige for private advantage, and Canon 5C(1)** provides that a judge should refrain from financial and business dealings that tend to exploit the judge's judicial position. A judge should avoid any use of judicial title that would give the appearance of using the prestige of judicial office for private advantage, or of exploiting the judge's position. See Opinion 137, Question 1.

c. Political Activities.

(1) Publicly Endorse, or Work on Campaign for, Another Candidate for Office. No. Canon 7(3),***** which applies to retired judges subject to assignment, provides that a judge shall not authorize the public use of the judge's name to endorse another candidate for any public office. Such a judge's endorsement of another candidate, or participation in another's campaign, would be inconsistent with the principles stated by Opinions 145, 136, 130, 100, 92, and 73.

(2) Work on a Political Campaign for a Party or Issue. Only to the extent permitted by Canon 7(3),***** which provides that a judge may indicate support for a political party, attend political events, and express the judge's personal views on political matters. Other Code provisions preclude campaign work other than that expressly permitted by Canon 7(3).***** A judge should promote public confidence in the impartiality of the judiciary (Canon 2A), and should be and appear to be (Canon 2) unswayed by partisan interests or public clamor. Canon 3A(1).****** A judge may not serve as an officer, director, trustee, or advisor of an organization if it is conducted for the political advantage of its members. Canon 5B.* A judge should not use or appear to use judicial prestige for the benefit of others. Canon 2B.

d. Raising Money for Charities. No. Canon 5B(2),******* which applies to retired judges subject to assignment, provides that a judge shall not solicit funds for any charitable organization. See Opinions 150, 131, 110, 60, 59, 51, 41, 25, 16, 11, and 10.

e. Activities Governed by Law

(1) Perform Weddings;
(2) Administer Oaths;
(3) Disregard Financial Disclosure Requirements.

As these activities are governed by rules of law, it would not be appropriate for this Committee to undertake advisory opinions concerning them, either as to retired judges who are subject to assignment or as to those who are not. See Opinion 127, last paragraph.

QUESTION 2: May a retired judge who is not subject to assignment do the things listed in question 1?

ANSWER TO QUESTION 2: (Retired Judges Not Subject to Assignment):

As Canon 8,** headed "Compliance with the Code of Judicial Conduct" now imposes no specific responsibilities on retired judges not subject to assignment, the Code does not prohibit such judges from engaging in any of the activities listed under Question 1. Opinions 15 and 32 no longer apply to retired judges not subject to assignment, because when those opinions were issued the Code compliance provisions imposed substantially the same requirements on retired judges who were not subject to assignment and on those who were.

The right of retired judges to practice law is a law issue on which the Committee expressed no opinion, but the Committee does note that the statutory prohibition against appearing and pleading as an attorney does not apply to judges who do not choose to be subject to assignment. The Committee also notes again that the Legislature repealed the "Ineligibility to Practice Law" statute cited in Opinion 87.

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+Committee Footnote: A February 10, 1988 Supreme Court Order deleted from Canon 5B(2) the word "political", thereby resolving the previous conflict between Canon 5B (a judge may not be an officer of an organization conducted for political advantage) and Canon 5B(2) (a judge may be an officer of a political organization)....

** Now see Canon 4.*
*** Now see Canon 4D.*
**** Now see Canon 6F.*
***** Now see Canon 4G.*
****** Now see Canon 5(3).*
*******Now see Canon 3B(2).*
******** Now see Canon 4C(2).*

COUNTY JUDGE'S ADMINISTRATIVE ROLE
Opinion No. 156 (1993)

QUESTION: May a constitutional county judge accept a seven day expense paid trip to a foreign country to tour the facilities and meet representatives of a corporation that is building a large industrial facility in his county?

FACTS: ln addition to judicial responsibilities, the county judge is the presiding officer of the commissioners court and his duties include representing the county at ceremonial functions and promoting economic development. The corporation is requesting a tax abatement from the county. The judge's judicial responsibilities include presiding in cases of probate, juvenile delinquency, misdemeanors, and civil dispute, none of which presently involve the interests of the corporation hosting the trip.

ANSWER: Yes. Canon 8A(4)* defines "County Judge" to mean the judge of the county court created in each county by article V, section 15 of the Texas Constitution. Canon 8C(1)** provides, "A county judge who performs judicial functions shall comply with all provisions of this code except he or she is not required to comply: (1) when engaged in duties which relate to the judge's role in the administration of the county ...." Traveling to meet with agents of a corporation building a large industrial complex and seeking tax abatement in his county are duties that relate to the judge's role in the administration of the county. Consequently, in performing those duties, the county judge is not required to comply with the code. The county judge should be alert to the fact that future cases may come before him in his judicial function in which the corporation may be a party or its interests may be affected. If that happens, the judge should comply with Canon 2, which requires that a judge act so as to promote public confidence in the integrity and impartiality of the judiciary, not allow social or other relationships to influence his judicial conduct or judgment, and not lend the prestige of his office to advance the private interests of others nor permit others to convey the impression that they are in a special position to influence him. The judge should also comply with Canon 3A(1),*** which provides that a judge should be unswayed by partisan interests, public clamor, or fear of criticism; 3A(5)**** prohibiting ex parte communication concerning the merits of a pending or impending judicial proceeding; and 3A(9),***** providing that a judge shall perform judicial duties without bias or prejudice.

Whether the judge should recuse or disqualify himself in such cases is governed not by the Code of Judicial Conduct but by Texas Rules of Civil Procedure 18a and 18b. Consequently, the committee expresses no opinion on that subject.

** Now see Canon 8B(17).*
*** Now see Canon 6B (1).*
**** Now see Canon 3B(2).*
***** Now see Canon 3B(8).*
****** Now see Canon 3B(5).*

PARTICIPATION IN POLITICAL FUND RAISING EVENT
Opinion No. 157 (1993)

QUESTION 1: Can a Justice of the Peace, County Court at Law Judge or District Judge join in raising funds for a political party by participating in a car wash at a function sponsored by that political party? The names of the judges are not advertised with relation to the event. However, the judges are present and actively participate in the car wash.

ANSWER: Canon 7(3)* specifically provides that a judge or judicial candidate may attend political events, and may indicate support for a political party. This provision of the code applies

to a Justice of the Peace, County Court at Law Judge or District Judge. Given the conditions stated, it would appear that the question should be answered "Yes".

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** Now see Canon 5(3).*

QUESTION 2: Can a Justice of the Peace, County Court at Law Judge or District Judge be the chairman of a committee within a political party that will be responsible for holding fund raising events to obtain money for a donation to a particular charitable organization within their community? The decision as to which charitable organization will receive the funds will be made by a committee which does not include any judges. It is contemplated that the judge will chair the committee which decides on the fund raising events and help organize those events.

ANSWER: The answer to Question Two is "No". With respect to County Court at Law and District Judges, this activity would be prohibited by Canon 5B(2)* which provides that a judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization. Even though under the proposed arrangement a judge would not participate in the selection of the particular charitable organization to receive the funds, the judge
would, nevertheless, be lending the prestige of his office to the solicitation and giving the impression that
contributors might obtain special favor with him.

With respect to a Justice of the Peace, Canon 5B(2)* is made inapplicable by the specific provisions of Canon 8D.** However, other canons which do apply to Justices of the Peace, and all other judges, appear to prohibit a justice's participation in the activity described. For instance, Canon 4C*** provides that a judge should not personally participate in public fund raising activities even for an organization devoted to the improvement of the law, the legal system or the administration of justice. Canon 5C(1)**** provides that a judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, exploit his or her judicial position or involve the judge in frequent transactions with lawyers or persons likely to come before the Court. Canon 2B provides that a judge should not lend the prestige of his or her office to advance the private interests of himself, herself or others nor convey nor permit others to convey the impression they are in a special position to influence him or her. Consequently, the committee concludes that the question should be answered "No" for Justices of the Peace, too.

Previous ethics opinions have discouraged such activities in any similar contexts. See Opinions 10, 11, 16, 25, 41, 51, 59, 60, 67, 110, 131, 147 and 150.

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** Now see Canon 4C(2).*
*** Now see Canon 6C.*
**** Now see Canon 4B.*
***** Now see Canon 4D.*

PRINCIPLES AND PRACTICES OF ORGANIZATIONS
Opinion No. 158 (1993)

QUESTION NO. 1: Can a judge serve as a District Chairman or District Commissioner of a local Boy Scouts of America organization which denies homosexuals and persons without religious principles from serving as leaders?

QUESTION NO. 2: Can a judge be a member of the Knights of Columbus organization whose principles are against abortion?

ANSWER: Yes to both Question 1 and Question 2. Canon 5B* clearly allows for a judge to be a District Chairman or District Commissioner in an organization such as the Boy Scouts of America or a member of religious, charitable and fraternal organizations such as the Knights of Columbus. Such leadership or membership is subject to the prohibition against soliciting funds found in Canon 5B (2),* giving investment advice in Canon 5B (3).*

With respect to serving as a District Chairman or District Commissioner in the Boy Scouts of America, the judge should be aware of Canon 5B (1)* which states: "A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or her or will be regularly or frequently engaged in adversary proceedings in any court." An organization as large as the Boy Scouts of America may be involved in adversary proceedings anywhere throughout the country. The determination of whether the Boy Scouts of America will be "regularly" or "frequently" engaged in adversary proceedings must be made by the individual judge.

Both questions go further inasmuch as it is the principles and practices of the respective organizations which cause the judge to question the propriety of his involvement either as a District Chairman or District Commissioner of a local Boy Scouts of America organization or as a member of the Knights of Columbus. The respective principles and practices in and of themselves do not prohibit a judge from serving as a leader or being member. However, in light of the controversy surrounding these issues the judge should consider Canon 2A before deciding how involved to become with any organization. Canon 2A provides that a judge should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Most organizations have principles and policies with which others disagree. For example, Canon 7(3)** allows a judge to support a political party, attend political events, and in accordance with Canons 7** and 3A(8),*** express views on political matters. Such associations are allowed even though political parties express, in their platforms and elsewhere, their views on the same and similar subjects. A judge's membership does not necessarily diminish the public's confidence in the character of the judiciary.

** Now see Canon 4C.*
*** Now see Canon 7.*
**** Now see Canon 3B(10).*

USE OF "JUDGE" BY SITTING JUDGE RUNNING FOR NON-JUDICIAL OFFICE
Opinion No. 159 (1993)

QUESTION NO. 1: May a sitting judge who runs for a non-judicial political office use the title "Judge" as part of political advertising; e.g., "Elect Judge to Congress"?

QUESTION NO. 2: May a sitting judge who runs for a nonjudicial political office use the title "Judge" in the name of the campaign committee?

ANSWER: No, a sitting judge may not use the title "Judge" as part of his or her advertising for nonjudicial office nor may he or she use the title "Judge" in the name of the campaign committee.

Canon 2B provides that a judge should not lend the prestige of his or her office to advance the judge's private interest. The use of the term "Judge" in the campaign material would give the appearance of using the prestige of judicial office for the private gain of the candidate. See Opinion 137, Question No. 3, where the use of judicial letterhead for campaign purpose for election to another office was prohibited as giving the appearance the candidate was attempting to exploit his judicial position.+

QUESTION (3): May a sitting judge describe in his or her political literature for a nonjudicial office his or her past experience as a judge, and use the word "Judge" in that connection?

ANSWER: Yes, a judge may describe in his or her political literature for a nonjudicial office his or her experience as a judge. In such a situation, the judge must be cautious not to give undue emphasis to his or her present position so as to give the impression he or she is attempting to exploit his or her judicial office. See Opinion 137, Question No. 3.

+ It is significant to note that the 1972 and the 1990 revision of the ABA Model Code of Judicial Conduct requires that a judge running for nonjudicial office resign his or her judicial office. According to the American Judicature Society, it is thought this is the rule adopted in all states except Texas. The clear theme throughout the country in cases concerning this subject is that a person who identifies himself or herself as "Judge" in a political campaign for nonjudicial office is using the prestige of judicial office for personal gain.*

** Now see Canon 5.*

USE OF COURT STAFF AND RESOURCESFOR STATE BAR COMMITTEE WORK
Opinion No. 160 (1993)

QUESTION: May a judge who serves as chairman of a State Bar committee use court staff, equipment, postage, and long distance telephone service to conduct the business of the committee without violating the Code of Judicial Conduct?

ANSWER: Yes. Although Canon 5G* prohibits a judge from serving on most governmental committees and commissions, an exception exists pursuant to Canon 4A* and 4B* for participation in activities concerning the law, the legal system, and the administration of justice, all of which this Committee perceives to be appropriate judicial activities in the interest of the State and for its benefit. Being permitted to participate in such activities necessarily implies a judge does not violate the Code by using resources available to him to conduct the business of a State Bar committee that promotes the improvement of the law, the legal system, or the administration of justice. This Committee notes, however, that the use of any such resources in a manner that would cause a judge to violate the Code would itself also be a violation of the Code. For example, Canon 3 prescribes that judicial duties take precedence over all other activities. If by using court resources for the business of a State Bar committee a judge is unable to use the same resources to discharge his judicial duties, the use of the resources would be improper. Also, Canon 2A dictates that a judge

comply with the law. If a judge were to use court resources in a manner that would cause the judge to violate the law, use of the resources would also violate the Code.

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** Now see Canon 4H.*

SERVE PRO BONO AS MEDIATOR
Opinion No. 161 (1993)

QUESTION: May a trial judge appoint another sitting judge to serve pro bono as a mediator of a dispute that is the subject of a pending case?

ANSWER: No, because, for the following reasons, it would be inappropriate for the appointed active judge to serve as a mediator:

1. Mediation is not a judicial activity. A court's referral of a dispute to a mediator initiates a statutory, nonjudicial dispute resolution procedure that is an alternative to and outside of the judicial system. The applicable statute only authorizes a judge to refer the dispute to a "non-judicial" forum. Civ. Prac. & Rem. Code, Sec. 154.021(a)(3). Diverting a pending civil dispute to a nonjudicial forum is analogous to diverting a defendant from criminal prosecution to nonjudicial drug or mental health treatment, outside of the criminal justice system. The purpose of such procedures is to move disputes out of the court system so that courts can devote their limited resources to due process litigation of cases that must be tried. The Code of Judicial Conduct recognizes this principle by locating its mediation provision in Canon 5,* concerning extra-judicial activities.

2. Judges should not be mediators in a private capacity.

a. Texas Canon 5E,** which prohibits an active full-time judge from acting as a mediator for compensation outside the judicial system but permits a judge to encourage settlement in the performance of official duties, should be construed to have the meaning stated by the corresponding ABA Code provision, which provides that a judge shall not act as a mediator in a private capacity. ABA Canon 4F. Texas Canon 5E** does not permit a judge to be a mediator without compensation outside the judicial system. A judge's statutory duty to encourage parties to attempt out of court procedures to resolve a dispute does not imply authority to act as a statutory mediator.

b. Texas Canon 3A(5)(b),*** concerning one of a judge's "Duties of Office", permits a judge to try to settle a case by conferring separately with the parties, but such an attempt to settle a case in court does not constitute mediation pursuant to the statutory plan.

3. Mediation confidentiality conflicts with judicial duty. Canon 3A(5)(b)*** states the only exception to the principle that a judge should not participate in secret proceedings concerning any pending case, and it has a proviso that such ex parte communications in effect terminate the judge's judicial authority in the case. The Committee concludes that, except when using this limited procedure in Canon 3A(5)(b)*** subject to the proviso, active judges should not be mediators, because a mediator's duty not to disclose confidential information (Civ. Prac. & Rem. Code, Sec. 154.053) may conflict with a judge's duty to disclose certain types of information (such as criminal conduct or a lawyer's unprofessional conduct). Another problem is that being a mediator could involve a judge in litigation under related Sec. 154.073 to resolve a conflict between mediation confidentiality and other law requiring the judge to disclose information.

4. Judge mediation would impair confidence in judiciary. Widespread judge participation in negotiating and deal making for the purpose of avoiding the judicial system would diminish public confidence in the independence, integrity, and impartiality of the judiciary. A judge should refrain from activities that involve the judge in frequent nonjudicial transactions with lawyers likely to come before the court. Advisory opinions and private conversations with parties and lawyers are essential to mediation; but advisory opinions are not consistent with the constitutional duty of the judicial branch to decide "cases" and "controversies", and ex parte conferences are not consistent with due process or with the adversary.

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** Now see Canon 4.*
** *Now see Canon 4F.*
**** Now see Canon 3B(8)(b).*

GUEST OF HONOR AND FUND RAISING FOR A POLITICAL PARTY
Opinion No. 162 (1993)

QUESTION: May a judge be a guest of honor at a fund raising event for a political party?

ANSWER: Yes. Canon 7(3)* states that a judge may indicate support for a political party and attend a political event. Canon 5C(4)(a)** allows a judge to accept a gift incident to a public testimonial and by implication endorses public testimonials to judges.

Canon 5(B)2*** at one time prohibited judges from soliciting funds for any educational, religious, charitable, *political*, fraternal, or civic organization. The Canon also prohibited judges from speaking or being guests of honor at such an organization's fund raising events. The word "political" was removed from this section of the canon by the Supreme Court February 10, 1988 (published S.W.2d Vol. 743-744, page XXIX). The Committee believes this change was to allow judges to be speakers or guests of honor at "political" fund raising events. The Canon later was amended by the Supreme Court, effective December 19, 1989, to allow judges to be speakers or guests of honor at educational, religious, charitable, fraternal or civic organizations while continuing the prohibition against fund raising for such organizations (published S.W.2d Vol. 779-780, page XXX).

It should be noted that Canon 5B(2) found on page 125 of the 1990 edition of the Texas Judicial Service Handbook erroneously includes the word "political," which was deleted by the Supreme Court in 1988.

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** Now see Canon 5(3).*
*** Now see Canon 4D(4)(a).*
**** Now see Canon 4C(2).*

PUBLIC SUPPORT FOR BOND ISSUE TO BUILD CRIMINAL JUSTICE CENTER
Opinion No. 163 (1993)

QUESTION: May a judge actively support and campaign for voter approval of a bond issue to build a criminal justice center by speaking at civic clubs, writing letters, and preparing documentary material in support of the bond issue?

ANSWER: Yes, with certain limitations. Canon 3 provides that judicial duties of a judge shall take precedence over all other activities. Thus, judicial duties should take precedence over campaigning for a bond issue to build a new criminal justice center.

Other limitations are set out in Opinion No. 82 (1986). Because the question in Opinion 82 is so similar to the question asked in this opinion, the Committee reiterates the answer it gave in Opinion 82.

USE OF TITLE "JUDGE" BY MUNICIPAL COURTJUDGE RUNNING FOR

JUSTICE OF THE PEACE
Opinion No. 164 (1993)

QUESTIONS: 1. May a municipal court judge running for Justice of the Peace use the title "Judge" in campaign literature, campaign stationery, and press releases?

2. May a municipal court judge running for Justice of the Peace use a photograph of herself wearing a judicial robe in campaign literature and newspaper articles?

ANSWER: Yes to both questions.

In Opinion 137 (1990), the committee stated in answer to question 3 that "a judge's campaign literature should state the judge's present title and position . . . ." The committee also stated that the judge should not use "judicial letterhead" to solicit contributions or other support for the judge's campaign. The term "judicial letterhead" was defined in that opinion as "letterhead that shows a judge's title, position, and official address and is suitable for official judicial correspondence." Thus, the committee concludes that while the municipal court judge may use the title "Judge" in campaign literature, stationery, and press releases, she should not use "judicial letterhead" as defined in Opinion 137 for those purposes.

In Opinion 159 (1993), the committee stated in answering questions 1 and 2 that a judge running for *non-judicial political office* should not use the title "Judge" in political advertising or in the name of a campaign committee. The committee believes that a different result is proper when a judge is running for a judicial office. In that case, the committee believes that it is permitted to use the title "Judge" in political advertising, in the name of the campaign committee, in campaign literature, in campaign stationery, in campaign press releases, and in newspaper articles. In addition, a judge may describe in her political literature her experience as a judge, see Opinion 159, question 3.

FUND-RAISING FOR ORGANIZATIONS
Opinion No. 165 (1993)

QUESTIONS: 1. After March 1, 1994, may a full-time Municipal Judge who is a member of a non-profit organization for religious purposes speak to churches for the purpose of raising funds when such judge is not introduced as a judge? If not, may he do so outside his territorial limits?

2. May a judge participate in fund-raising activities of a civic organization in which he is a mere participant of selling items bought by the organization?

ANSWER: 1. No. After March 1, 1994, Canon 5 controlling the Judge's extra-judicial activities will be re-designated Canon 4. Specifically, Canon 5B(2), which addresses this question, remains unchanged as it is re-designated Canon 4C(2) after March 1, 1994. It will continue to provide that a judge shall not solicit funds for any religious, educational, charitable, fraternal or civic organization. While the Canon distinguishes between soliciting funds (prohibited), and being a speaker or guest of honor at fund-raising events (allowed), the Committee does not reach or consider the rationale for that distinction inasmuch as the question specifically addresses speaking "for the purpose of raising funds" and is, therefore, a prohibited solicitation.

Additionally, Canon 2B provides that a judge should not lend the prestige of judicial office to advance the interest of others. The fact that the speaker is not introduced as a judge does not remove the prohibition because a judge cannot realistically separate the prestige of judicial office from the judge's personal affairs. (Compare Opinions 73, 136 and 150).

Finally, the activity in question is prohibited, even outside the judge's territorial limits, because there is no exception in Canon 4C(2) based on territorial limits.

2. No. In addition to being a prohibited solicitation as addressed above, the judge's participation would violate Canon 2B by lending the prestige of judicial office to advance the interests of others and would create an opportunity for someone to convey the impression that they are in a special position to influence the judge by making generous purchases from him. The fact that the judge would be a "mere participant", or one of many selling the items, would not remove the prohibition under the Canons. See Opinions 10, 11, 16, 25, 59, 131, 150 and 155.

MASTER APPEARING AS LAWYER IN COURT WHICH HE SERVES
Opinion No. 166 (1993)

QUESTION: May a master appointed to conduct probable cause hearings in mental commitment cases on an "as needed" basis appear as an attorney on unrelated matters in the probate court for which he serves as a master?

ANSWER: No. Canon 6D(2) specifically suggests that a part-time master of a probate court should not practice law in the court which he serves as long as his appointment is in effect. Although the master would conduct the probable cause hearings only on an "as needed" basis, he is considered a part-time master for purposes of Canon 6D(2) because Canon 8B(18) defines "part-time" to include service on a periodic basis.

See Opinion Number 79 (1985) for related issue. All references herein are to the Texas Code of Judicial Conduct, effective March 1, 1994.

SERVICE ON MUNICIPAL COMMISSION ON DISABILITIES
Opinion No. 167 (1993)

QUESTION: May a judge accept appointment to a city commission on disabilities whose purposes are to advise and make recommendations to the mayor, city council, and city department directors regarding the needs, rights and privileges of people with disabilities? The commission's duties shall include, but not be limited to, developing programs to provide employment opportunities for people with disabilities; to address accessibility issues; to address issues of

alcoholism and drug abuse; to take advantage of all federal, state, and local funding opportunities; and to insure adequate housing for people with disabilities.

ANSWER: No. Canon 5G provides that a judge should not accept appointment to a governmental commission concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. This governmental commission is not concerned with the improvement of the law, the legal system, or the administration of justice. The committee concludes that service on the commission is therefore prohibited by Canon 5G. See also Canon 4H of the new code of judicial conduct, effective March 1, 1994, which is the same as Canon 5G now in effect.

FACULTY EVALUATIONS IN CAMPAIGN ADVERTISEMENTS
Opinion No. 168 (1994)

FACTS ASSUMED: A municipal judge, who is also a candidate for a county-level judgeship, currently serves as a faculty member for the Texas Municipal Courts Education Center (TMCEC) and as a Discussion Leader for a course at the National Judicial College (NJC). Both the TMCEC and the NJC provide faculty evaluation forms where judges (whose identities are completely confidential) make comments about the judge.

QUESTION: May the judge use the comments from the faculty evaluation form in his campaign advertising, e.g., comments such as "as asset to the judiciary", "knowledgeable", "a commonsense judge"? The comments would be used in the context of "this is what other judges from around the state think about Judge X". No comment would be attributed to any particular judge, since the identity of the judge making the comment is unknown.

Would Judge X be permitted to state "this is what lawyers from around the state say about Judge X" if Judge X can ascertain that the judge making the comment was a lawyer?

ANSWER: No. Even though the anonymity of the quotes would remove this question from the specific application of Canon 5(3), prohibiting a judge from authorizing the public use of his or her name endorsing another candidate for any public office, this type of advertising would nevertheless imply that other judges were endorsing this candidate. Such an implication would violate Canon 2(A) by causing the public to question the integrity and impartiality of the judiciary. Furthermore, the candidate would be causing the judges who made the evaluations to lend the prestige of judicial office to advance his private interests in violation of Canon 2(B).

Additionally, this type of campaign advertising referring to lawyers is questionable. Text, out of context, is pretext. The quotations in question were made about a faculty/discussion leader. To lift them from that context and apply them in a political campaign would be a misleading use of these speaker evaluations. The judges and/or lawyers who filled out the evaluations may or may not be supportive of the candidate. Canon 2 states that a judge should avoid impropriety and the appearance of impropriety in all the judge's activities. The Committee believes that the unauthorized use of these evaluation quotes would violate the trust in which they were given and should not be used.

CAMPAIGN STATEMENT THAT OPPONENT "REMOVED" FROM OFFICE
Opinion No. 169 (1994)

QUESTION: Would a candidate for judicial office violate the Canons of Judicial Conduct by stating that his or her opponent had been "removed" as a District Judge when, in fact, the opponent had not been removed but had been defeated for reelection?

ANSWER: Yes. The word "removed" could refer to the voters having previously voted for the candidate's opponent and therefore the candidate has lost his or her bench. However, Canon 5(2)(ii) states that a judge or judicial candidate shall not "knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent".

The term "removed" suggests that a statutory or administrative process was used to expel a judge for misconduct or other matters that would make him or her unfit to serve. Although the voters are, in effect, "removing" an office holder by voting for the non-incumbent, this is a process of the electorate and does not state a reason for defeat. To suggest that a defeated judge was "removed" from office would be misleading and violate Canon 5(2)(ii).

Additionally, judges and judicial candidates should engage in the highest form of campaigning to reflect their understanding of the dignity and important public trust of the office they are seeking. To suggest, by the use of words that could be misleading or taken out of context, that a defeated judge was removed for misconduct defeats not only the Canon, but also the spirit of the office.

CAMPAIGNING FOR OTHER CANDIDATES
Opinion No. 170 (1994)

QUESTIONS: 1. May a judge of a district, county or J.P. court running for reelection or candidate for any such office hand out campaign material for candidates of one's own political party along with one's material and recommend to people that they vote for these candidates?

2. May a judge of a district, county, or J.P. court running for reelection or candidate for any such office hand out campaign material for candidates of one's own political party along with one's material without making any endorsement but with the request that the voters consider these other candidates?

3. May a judge of a district, county, or J.P. court running for reelection or candidate for any such office hand out a campaign piece produced and paid for by one's own political party that contains an advertisement for such judge along with advertisements for the other candidates?

4. For any of the activities described above which are determined to violate the new code, would it be permissible for one's spouse to engage in such action?

ANSWERS: It is the opinion of the Committee that the first three questions are prohibited by Canon 5(3) of the Code of Judicial Conduct which provides in the first sentence, "A judge or judicial candidate shall not authorize the public use of his own name endorsing another candidate for public office except that either may indicate support for a political party."

Public activity by handing out campaign material for another candidate by a judge or candidate for judge as set out in Questions 1 through 3 would be a public endorsement. Articulating a "recommendation" as set out in Question 1 or by asking "consideration" as set out in Question 2 would merely be another form of public endorsement.

Question 3, although it does not involve articulating support for another, still involves an overt act of personally handing out campaign material for another candidate and would be a public endorsement.

Opinion No. 100 concluded that joint campaign activity by two judge candidates would violate the Canon 2 prohibition against lending the prestige of judicial office to advance the "private interests" include candidacy. See also Opinions No. 73, 92, 136, and 145.

Question 4 involves the conduct of a spouse of a judge. The Code does not attempt to regulate the activities of a judge's spouse so this conduct would not be prohibited.

JUDGE AS FACILITATOR OR MODERATOR
Opinion No. 171 (1994)

QUESTION: May a judge facilitate or moderate a discussion between two factions of a community dispute (developer vs. environmentalist)?

The focus of the discussion is to find ways to improve communication in order to avoid conflicts that ultimately would require legislative or judicial determination. There would be no compensation for the judge.

ANSWER: No. The activity described is that of a mediator. Opinion 161 discusses the judge's role as mediator and clearly states that mediation is not a judicial activity. (See Opinion 161 for further discussion of judges and mediators.)

RECUSAL OF MUNICIPAL JUDGE
Opinion No. 172 (1994)

QUESTION: Should the judge of a municipal court recuse himself from presiding over the trial of cases of a Defendant who has civil actions pending against the judge in state and federal courts?

FACTS: The question is submitted by an attorney in private practice who also serves as a part-time municipal court judge. In the municipal court over which he presides, there are a number of pending complaints against an individual who has named the judge as a party, along with a number of others, in state and federal lawsuits. There is some indication that the judge may have been added as a party defendant in the civil actions to secure his recusal from the municipal court cases.

ANSWER: Since this is a recusal question, there is a threshold issue which the Committee must address. Since the adoption of Tex. R. Civ. P. 18a and 18b and the companion Tex. R. App. P. 15 and 15a, the Committee has not responded to questions regarding recusal. See Opinion No. 127 (1989). The facts presented by this inquiry, though, require that a limited exception to this rule be established. The judge presides over a municipal court, and it appears that no statute or rule of court specifically applies to recusal. For instance, Tex. R. Civ. P. 2 provides that the rules govern procedure "in the justice, county, and district courts of the State of Texas in all actions of civil nature, with such exceptions as may be hereafter stated." The judge in question presides over a municipal court, and the question submitted does not involve actions of a civil nature but rather actions of a criminal nature. There appears to be no provision of the Code of Criminal Procedure directly governing this matter. Tex. Code Crim. P. Ann. art. 30.01 deals with disqualification but

does not appear to apply to this case. It seems that the specific question regarding recusal is not governed by any statute or rule of court. Since the reason for the Ethics Committee's reluctance to deliver opinions on recusal issues does not exist in this case, we conclude that we should proceed to render an opinion.

Canon 2A provides that a judge should act in a way that promotes public confidence in the integrity and impartiality of the judiciary. Canon 2B provides that a judge should not allow "family, social, or other relationships to influence his or her judicial conduct or judgment." While not directly governing the issue, the spirit of Rule 18b(2), which provides that a judge shall recuse himself in any proceeding in which his impartiality might reasonably be questioned, has applicability here. Consequently, it is the conclusion of the Committee that the judge should recuse himself. Procedural mechanisms which might effectively deal with the problem of a party making a practice of naming a judge and his successors as party defendants for the sole purpose of securing a recusal are beyond the scope of this Committee's authority.

EX PARTE COMMUNICATIONS TO MUNICIPAL COURT JUDGE; MUNICIPAL COURT JUDGE ACTING AS CITY ATTORNEY FOR THE SAME MUNICIPALITY; MUNICIPAL COURT JUDGE AS A PRACTICING ATTORNEY

Opinion No. 173 (1994)

QUESTIONS: 1. What is a municipal court judge's ethical obligation upon receiving ex parte phone communications from a criminal defendant concerning a pending case?

2. May a municipal court judge simultaneously serve as city attorney for the same city?

3. May a municipal court judge who is a practicing attorney preside in a case when one of his clients is a party?

ANSWER: Judicial Ethics Opinion 154 (1993) discusses a judge's obligation when receiving ex parte communications in writing. The general considerations discussed there also apply here. It should be noted that Canon 3A(4) and (5) discussed in Opinion 154 have been amended by the new Code effective March 1, 1994. Comparable provisions are now found in Canon 3B(8) of the present Code; however, it should also be noted that Canon 3B(8) does not apply to justice and municipal court judges. See Canon 6C(1)(a). Instead, Canon 6C(2) of the present Code applies to municipal and justice court judges.

Canon 6C(2) provides that a justice or municipal court judge should not consider ex parte communications concerning the merits of a pending judicial proceeding, unless authorized by law or by one of the seven listed exceptions to the rule. Thus, justice and municipal court judges may comply with Canon 6C(2) by doing the following: 1. Upon receiving an ex parte phone call, the judge should inform the caller that ex parte communication is prohibited unless it falls within one of the exceptions of Canon 6C(2). The judge should then converse with the caller in order to determine if the call is a proper ex parte communication allowed by Canon 6C(2) or an improper ex parte communication. If improper, the judge should inform the caller that the communication is improper, that such communication should cease, that the judge will take no action whatsoever in response to the call, and that no improper communication should take place in the future. The call should then be ended.

Regarding Question No. 2, a municipal court judge should not simultaneously serve as an attorney for the same city. Such action compromises the independence of the judiciary. It violates numerous code provisions including, at least, the following: 1) Canon 1, which requires a judge

to uphold the integrity and independence of the judiciary, 2) Canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, 3) Canon 2B, which provides that a judge should not allow any relationship to influence judicial conduct or judgment nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge, 4) Canon 3A, which requires that a judge's judicial duties take precedence over all the judge's other activities, 5) Canon 3B(2), which provides that a judge shall not be swayed by partisan interest, public clamor or fear of criticism, 6) Canon 3B(5), which requires that a judge perform judicial duties without bias, 7) Canon 4D(1), which requires that a judge refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with persons likely to come before the court on which the judge serves, 8) Canon 4I, which provides that a judge may receive compensation if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, 9) Canon 5(1), which provides that a judge shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which he holds.

Regarding Question 3, a municipal court judge who is a practicing attorney should not preside in a case in which one of his clients is a party. Doing so would violate all of the Canons listed in the previous paragraph. In such a case, the judge should recuse himself. See Judicial Ethics Opinion 172 for further guidance.

PASSING OUT BUSINESS CARDS OF THE HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION
Opinion No. 174 (1994)

QUESTION: Does the Code allow a judge to give to unrepresented criminal defendants business cards of the Harris County Criminal Lawyers Association?

ANSWER: The Harris County Criminal Lawyers Association is a private and voluntary organization of criminal defense attorneys. The organization has asked district and county court judges to provide unrepresented defendants with a business card urging the defendant to call the association for referral to a lawyer among its members.

Canon 2B states that a judge should not lend the prestige of judicial office to advance the private interests of others, nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. The Committee concludes that by presenting the association's business card, the judge would be advancing the private interests of the association and its members, in violation of Canon 2B.

PROBATE COURT INVESTIGATOR SERVING SIMULTANEOUSLY AS MASTER IN THE SAME COURT
Opinion No. 175 (1994)

QUESTIONS: 1. May a probate judge appoint a person to serve simultaneously in the same court as both a master under Section 574.0085 of the Health and Safety Code and as a probate court investigator under Section 25.0025 of the Government Code?

2. May a person appointed to be a probate court master simultaneously serve in the same court as a court investigator?

FACT ASSUMED: The person serving as statutory probate court investigator would file applications for guardianship for indigent incapacitated persons.

ANSWER TO QUESTIONS: 1. The Committee has previously declined to answer a question concerning who a judge may appoint as a master because that is a question of law as distinguished from a question of ethics. See Opinion No. 79 (1985). Whether a person is qualified to be appointed a master is a question of law. As we stated in Opinion No. 79, the only foreseeable ethical consideration would be if a judge knowingly appointed a person who was not qualified or made an appointment in disregard of Canon 3C(4). Because the Committee assumes the judge would only appoint a qualified person and would follow the requirements of Canon 3C(4), the Committee declines to answer the question for the same reasons it declined to answer a similar question in Opinion No. 79.

2. No. In Opinion No. 104 (1987) and again in Opinion No. 127 (1989), the Committee concluded that a judge should not prepare pleadings to begin the process of civil commitment for mentally ill persons. The Committee adheres to those conclusions and concludes that a master should not do so for the same reasons stated in Opinions 104 and 127.

Even if the master does not prepare applications for guardianship or other pleadings, the Committee concludes that he should not simultaneously serve in the same court as an investigator. In Opinion No. 166 (1993), the Committee concluded that a master conducting probable cause hearings and mental commitment cases should not appear as an attorney on unrelated matters in the same court he serves as a master. Opinion No. 166 was based on Canon 6D, which provides that a part-time master should not "practice law" in the court in which he or she serves. Although the duties of a court investigator may not include practicing law and may therefore not be expressly prohibited by Canon 6D(2), such simultaneous service would contravene other code provisions. These include, at least, the following: 1) Canon 1, which requires a judge to uphold the integrity and independence of the judiciary, 2) Canon 2(A), which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, 3) Canon 2B, which provides that a judge should not allow any relationship to influence judicial conduct or judgment nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge, 4) Canon 3A, which requires that a judge's judicial duty takes precedence over all the judge's other activities, 5) Canon 3B(2), which provides that a judge shall not be swayed by partisan interests, public clamor or fear of criticism, 6) Canon 3B(5), which requires that a judge perform judicial duties without bias, 7) Canon 4D(1), which requires that a judge refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with persons likely to come before the court on which the judge serves, 8) Canon 4I, which provides that a judge may receive compensation if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, and 9) Canon 5(1), which provides that a judge shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which he holds. The Committee concludes that serving simultaneously as a master and court investigator would be likely to cause a conflict with all of these provisions.

In Opinion No. 173 (1994), the Committee cited all these provisions in concluding that a municipal court judge should not simultaneously serve as city attorney for the same city. The Committee believes that the same conflicts are inherent when a probate court master serves simultaneously as the court's investigator.

APPLICABILITY OF LIMITATIONS ON JUDICIAL FUNDRAISING IN NEW CANON 5, EFFECTIVE JANUARY 1, 1995, TO CANDIDATES IN THE 1994 GENERAL ELECTION
Opinion No. 176 (1995)

QUESTION: May a judge or judicial candidate in the 1994 general election solicit and accept contributions later than 120 days after the general election?

ANSWER: Yes. On January 1, 1995, a new version of Canon 5 of the Code of Judicial Conduct takes effect that imposes time limits on fundraising by judges and judicial candidates. The relevant parts provide:

> (4) In addition to any other restrictions imposed by law a judge or judicial candidate shall not either personally or through others solicit or accept contributions:
>
> (i) earlier than 210 days before the filing deadline for the office sought by the judge or
>
> (ii) later than 120 days after the general election in which the judge or judicial candidate seeks office.
>
> (5) The requirements of (4) above shall not apply to political contributions solicited or accepted solely for one or more of the purposes sent forth in Tex. Elec. Code Sec. 253.035(i).

The question is whether section (4) applies to the 1994 election, so that the 120 days begins to run on November 9, 1994, the day after the general election. The Committee concludes that it does not.

The Supreme Court adopted the order establishing the new Canon 5 on September 21, 1994, but did not make it effective until January 1, 1995. The Committee concludes that if the Supreme Court intended for the new limitation to apply to judges and candidates in the 1994 election, it would have made the new Canon 5 effective on or before November 9, 1994. Because it did not do so, we conclude that the new Canon 5 imposes no limitations on fundraising by judges and judicial candidates in the 1994 general election.

DOLLAR LIMITS ON FUNDRAISING BY JUDGES
Opinion No. 177 (1995)

QUESTION: Is there a dollar limit on the amount of money a judge who was elected in 1994 and who will not stand for reelection until 1998 may raise after January 1, 1995?

ANSWER: No. The Code of Judicial Conduct contains no provisions on this subject.

MAINTAINING A PART-TIME OFFICE AT A LAW SCHOOL OF A STATE UNIVERSITY

Opinion No. 178 (1995)

QUESTIONS: 1. May a judge of a court of appeals maintain a part-time office at a state law school where a portion of his judicial duties would be performed? The office would be provided without charge, and the judge would be an occasional guest lecturer at the law school.

2. If the judge may maintain such an office, would he be required to disqualify or recuse himself from any appeal involving the university?

3. Does the Code require that a judge perform judicial duties exclusively at the place where the court of appeals sits?

ANSWERS TO QUESTIONS: 1. Yes, subject to certain qualifications.[1] Canon 4D(4)(c) provides that a judge shall not accept a gift from anyone and lists certain exceptions. The pertinent exception provides that a judge may accept "any other gift," which means a gift not specifically prohibited in the Code, "only if the donor is not a party or person whose interests have come or are likely to come before the judge; . . . ." If the university's interests have not come and are not likely to come before the judge, the judge could accept the gift of a free part-time office without violating that provision. If, on the other hand, the university has interests that have come or are likely to come before the judge, the judge should not accept the gift of a free office.

Canon 3B(11) provides, "The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion, or in accordance with Supreme Court guidelines for a court approved history project." Performing an appellate judge's duties outside of the court's offices creates a risk that confidences of the court will be lost. The affirmative answer to this question assumes that the judge could conduct his research, writing, and oral communications at the part-time office in a way that would preserve the confidences of the court. If that is not the case, the judge should not perform judicial duties in such a location.

2. Questions of disqualification and recusal are not governed by the Code of Judicial Conduct. They are controlled by Tex. R. Civ. P. 18b and Tex. R. App. P. 15a. The Judicial Ethics Committee does not issue advisory opinions on questions of law.

3. The Code does not mention this issue, but Canon 2A provides that a judge shall comply with the law. Therefore, the judge is required to comply with any statute on this subject.

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[1] One member of the Judicial Ethics Committee dissents.

FORMER LAW OFFICE RENTED TO LAWYERS WHO PRACTICE BEFORE JUDGE

Opinion No. 179 (1995)

QUESTION: Does a violation of the Code of Judicial Conduct occur if a judge's former law office now owned by a trust created to benefit judge's minor children is rented to lawyers who practice in judge's court?

FACTS: Judge owned office building where he practiced law. One year, prior to filing to run for his present position, the judge conveyed ownership of the building to a trust established to benefit the judge's minor children. Judge's brother is trustee. Since the judge assumed the bench (approximately 1-1/2 years after conveying the building to the trust), the trustee has made all decisions concerning management of the trust assets with no input from the judge. The portion of the building which is judge's former law office is now rented to lawyers who practice in judge's court.

FACTS ASSUMED: Judge's children are receiving a direct benefit from the rental of the building by lawyers. Lawyers are not paying greater than market value for the office space.

ANSWER: Yes.[1] This question is not governed by Opinion 153 nor is it a violation of Canon 4D(1) (2) or (3) because this is not a financial or business dealing of the judge. It is not an economic interest of the judge since he is not an officer, advisor or other active participant in the affairs of the trust. See Canon 8B(5).

The Code does not govern the conduct of judge's family members under the circumstances presented here, assuming the law office is being rented for fair market value. Canon 4D(4) (d) specifically allows the judge's children to receive a benefit provided the benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

Canon 2A provides that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B requires that a judge not allow any relationship to influence his judicial conduct or judgment or permit others to convey the impression that they are in a special position to influence the judge.

Although the judge has made all efforts to remove himself from the management, control or involvement in the operation of the trust, the fact remains that his children are directly benefitting from the rents paid by lawyers who regularly appear before the judge. Because the judge has a statutory duty to support his minor children, any support the children receive from the trust provides an indirect benefit to the judge. He has a conflict between his desire to be removed and detached from the operations of the trust, but is required by Canon 4 D(3) to "... make a reasonable effort to be informed about the personal economic interest of any family member residing in the judge's household."

It is the Committee's opinion that the judge cannot allow lawyers to appear in his court when those lawyers are renting his former law office from a trust established to benefit his minor children who are living in the judge's household. If this relationship continues, public confidence in the integrity and impartiality of the judiciary would be diminished, and the public would have the impression that some lawyers are in a special position to influence the judge.

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[1] One Committee member dissents.

JUDGE'S SPOUSE A CANDIDATE FOR ELECTIVE OFFICE
Opinion No. 180 (1995)

QUESTION: May a judge whose spouse is a candidate for elective office:

1) Allow the judge's name and title to be used in press releases or campaign literature identifying the candidate as the judge's spouse?

2) Attend campaign functions with the candidate?

3) Be introduced by name and title as the candidate's spouse?
4) Speak at public gatherings generally in support of the spouse's candidacy?

ANSWERS: 1) No. Canon 2B provides that a judge should not lend the prestige of judicial office to advance the private interests of the judge or others. Additionally, the use of the judge's name and title in campaign literature could be perceived as a public endorsement of another candidate for public office in direct violation of Canon 5(3).

2) Yes. A judge may attend political events so long as any views expressed by the judge comport with the applicable canons. Canon 5(3).

3) No. Identifying the judge by title would lend the prestige of judicial office to advance the private interests of another. Canon 2B.

4) No. The judge's public support of the spouse's candidacy would violate Canon 2B and Canon 5(3). See opinions No. 60, 73, 130.

EFFECTIVE DATE OF FUNDRAISING LIMITATIONS
Opinion No. 181 (1995)

QUESTION: May a judge elected in 1994 and who does not plan to seek judicial office in 1996 have a fundraising event in November 1995?

ANSWER: No. In Opinion 176, the Committee concluded that section 4(ii) of new Canon 5, the 120 day post-election fundraising deadline, did not apply to judges and candidates in the 1994 elections because it did not take effect until January 1, 1995. To have applied the new Canon to 1994 candidates would have required that the deadline period begin to run on November 9, 1994, which was before the new Canon took effect. There is no such problem, however, in applying section 4(i), the 210 day pre-election fundraising deadline, to candidates in the 1994 election, as well as to all other judges and candidates.

Section 4(i) provides a date when persons expecting to be candidates in the 1996 election may begin to raise funds. It allows fundraising after that date only by persons who, in good faith, expect to be candidates for judicial office in the 1996 election, and allows only such persons to begin raising funds 210 days before the filing deadline for the office to be sought in the 1996 election.

Because the judge who posed this question does not plan to seek office in 1996, she may not have a fundraising event on November 11, 1995. We further conclude, however, that the judge in question, like all candidates in the 1994 general election, may raise funds until the 210th day before the filing deadline for the 1996 elections. See Opinion 176.

BENEFITTING RELATIVE WITH POWER OF APPOINTMENT
Opinion No. 182 (1995)

QUESTION: The Texas Human Resources Code provides that the county judge and the district judges in the county shall comprise the county juvenile board. The Code requires the board to appoint an advisory council consisting of not more than nine citizens. By practice, the board has allowed each board [member] to appoint one member of the council. May a district judge, sitting as a member of the county juvenile board, appoint his brother-in-law to the county juvenile advisory council?

ANSWER: No. Canon 3C(4) provides that, "A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism." In Opinion No. 83 (1986), we found the canon prevented a judge from appointing the lawyer-employee of his father and brother to represent the indigent. Although Opinion No. 83 is primarily concerned with the extent to which the lawyer's compensation would benefit the father and brother, and thereby accomplish indirectly that which cannot be done directly, it is not based solely on the pecuniary benefits that would accrue to the judge's relatives. Opinion No. 83 is equally concerned with the appearance of impropriety and perception of favoritism inherent in the arrangement, which concerns, together with nepotism, are more obviously present in the instant case.

Although we do not render legal opinions, and therefore do not decide whether Section 573.041 of the Texas Government Code answers the question posed, we note that a brother-in-law is within the degree of affinity commonly addressed by nepotism statutes. See Tex. Gov't. Code Ann. 573.041, .002, .024 (Vernon 1994). Thus, by appointing his brother-in-law, the judge would engage in nepotism. Because Canon 3C(4) proscribes nepotism, the judge may not appoint his brother-in-law to serve on the advisory council. Additionally, such an appointment would run afoul of Canon 2B's requirement that a judge not allow any relationship to influence judicial conduct or judgment and of Canon 2A's requirement that a judge act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

EX PARTE HEARING CONCERNING HIRING OF EXPERTS TO ASSIST INDIGENT CRIMINAL DEFENDANTS

Opinion No. 183 (1995)

QUESTION: May a judge ethically conduct an ex parte hearing with appointed defense counsel representing an indigent client on the subject of expert witnesses?

BACKGROUND: A defendant is charged with capital murder, and the state is seeking the death penalty. Appointed counsel seeks judicial authorization to employ experts for assistance, but does not want the prosecutor to know the relief requested, the reasons urged in support of the motion, or the relief granted.

ANSWER: Yes. Canon 3B(8) generally prohibits ex parte communications concerning the merits of a pending or impending judicial proceeding, but it does not prohibit ex parte communications expressly authorized by law. See Canon 3B(8)(e). At least 10 states have judicially allowed ex parte hearings on such requests. State of Louisiana v. Touchet, 642 So. 2d. 1213, 1218 (La. 1994). At least two have held that such ex parte hearings are required by the United States Constitution. State v. Touchet, supra; State of North Carolina v. Ballard, 428 S.E. 2d 178, 183, (N.C. 1993). In Ballard, the court limited the requirement to psychiatric experts, but in Touchet, the rule was extended to hearings to authorize funds for experts to examine physical evidence gathered by the state. See also Ake v. Oklahoma, 105 S.Ct. 1087, 1096 (1985) (referring to ex parte hearing).

The Committee concludes that a judge would not violate Canon 3B(8) by conducting such an ex parte hearing, assuming the judge believed that it was expressly authorized by law.

The Committee on Judicial Ethics expresses no opinion on questions of law; therefore, it expresses no opinion on the issue of whether an ex parte hearing is constitutionally required in any

particular case. The cases above are mentioned only to demonstrate that a judge could reasonably conclude that the ex parte communication was expressly authorized by law so as to fall within the exception provided by Canon 3B(8)(e).

POLITICAL ADVERTISING: ENDORSEMENTS, STAND ON ABORTION
Opinion No. 184 (1995)

QUESTION 1: May a judicial candidate ethically list in political advertising the endorsement of special interests groups with an obvious political agenda, such as Texans Against Drunk Driving, Texans for Tort Reform, Texas Prosecutors Association, Texas Peace Officers Association, Texans for Law Enforcement, Pro-Life Texans, or Texans for Choice?

ANSWER: Yes, a judicial candidate may list endorsing groups.

Canon 5 speaks to political activity and states:

1. A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held.

2. A judge or judicial candidate shall not make pledges or promises of conduct in office other than faithful and impartial performance of judicial duties.

It is obvious that the endorsing organizations have made strong political statements. The judge or candidate by listing the organizations has made no statement indicating an opinion on an area subject to judicial interpretation. The only statement the candidate is making is that these groups endorse him/her.

QUESTION 2: May a judicial candidate advertise or state a position on abortion, i.e. "I am the pro-choice/pro-life candidate"?

ANSWER: No, a judicial candidate may not make a statement on abortion.

A judge or candidate may not make a statement declaring that he/she is pro-life or pro-choice, based on Canon 5 paraphrased above. The judge or candidate is clearly making a statement that indicates an opinion on an issue possibly subject to judicial interpretation. Further, there is a strong implication of a promise of particular conduct in office other than the faithful performance of official duties.

PUBLIC SUPPORT FOR ANTI-CRIME LUNCHEON
Opinion No. 185 (1996)

BACKGROUND: A luncheon is being held as part of a "Walk Out on Crime" weekend sponsored by the Citizens Crime Commission of Tarrant County. The speaker will be a nationally recognized expert on domestic terrorism and workplace violence. He will provide an overview of current activities in American cities and their implications for Tarrant County. The luncheon is one of many events of the weekend.

QUESTION: May a judge be on the host committee, attend the event, promote it within the community, and have her name on the invitation?

ANSWER: Yes. Canon 4 provides that a judge may participate in activities concerning the law, the legal system, and the administration of justice so long as such participation does not cast doubt on her capacity to decide any issue that may come before the court.

It appears from the description of the luncheon that the focus of the Citizens Crime Commission is to explain problems that are facing the legal system and suggest possible solutions. The judge may be on the host committee, attend the luncheon, and allow her name on the invitation.

In promoting the luncheon, the judge should not lend the prestige of her office to advance the private interests of any vendors or others associated with the event as prohibited by Canon 2.

See also Opinions 82 and 163.

APPLICABILITY OF CODE TO RETIRED JUDGE NOT SUBJECT TO ASSIGNMENT
Opinion No. 186 (1996)

QUESTION 1: Does the Code of Judicial Conduct apply to a former judge who is now retired and has not elected to take judicial assignments?

ANSWER 1: No. Canon 6F provides that "a Senior Judge, or a former district judge, or a retired or former statutory county court judge who has consented to be subject to assignment as a judicial officer" shall comply with all provisions of the Code, with minimal exceptions. However, compliance with the Code is not required for a former judge, now defined as a "Retired Judge" by Canon 8B(14), who has not consented to be subject to assignment pursuant to Tex. Gov't. Code Ann. 75.001 (Vernon Supp. 1996).

QUESTION 2: Does the Code of Judicial Conduct prohibit a former judge who is now retired and has not elected to take judicial assignments from writing to Texas district and appellate judges requesting their contribution to a fund to be used to seek an increase in judicial pay?

ANSWER 2: No. Given the resolution to Question No. 1 above, the current Code of Judicial Conduct does not prohibit a former judge who is now retired and has not elected to take judicial assignments from writing to Texas district and appellate judges requesting their contribution to a fund to be used to seek an increase in judicial salary.

MUNICIPAL JUDGE AS PART-TIME MASTER
Opinion No. 187 (1996)

QUESTION: May an associate municipal court judge serve as a part-time Special Master under the authority of Article 11.07 3(d), V.A.C.C.P.?

ANSWER: The Committee is of the opinion that this is a question of law not a question of ethics.

The Committee on Judicial Ethics writes advisory opinions interpreting the Code of Judicial Conduct. The Committee declines to answer the question and suggests the judge seek a legal opinion from the proper forum.

NEWLY ELECTED DISTRICT JUDGE "WINDING DOWN" OBLIGATIONS AS EX COUNTY JUDGE; DISTRICT JUDGE ON CRIMINAL JUSTICE POLICY COMMITTEE
Opinion No. 188 (1996)

QUESTION: (A) May a newly appointed district judge "wind down" his service on the North Central Texas Council of Governments by attending three meetings in his capacity as immediate past president? Similarly may he attend two meetings remaining during his term as the Texas representative on the board of the National Association of Regional Councils of Government?

(B) Additionally, this district judge asks if he can sit on the Criminal Justice Policy Committee of the local Council of Governments, a committee which deals exclusively with criminal justice and juvenile and juvenile justice policy issues.

ANSWER: (A) No. Canon 4H prohibits judges from accepting appointment to a governmental committee that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. There is no provision for "winding down" a previous appointment; if it is improper to accept such an appointment, it is improper to continue such an appointment after assuming the bench.

(B) Yes. Service on a local council of governments committee concerned exclusively with criminal justice and juvenile justice policy issues is permitted by the language of Canon 4H allowing judges to accept appointment to governmental committees concerned only with issues of fact or policy involving the improvement of the law, the legal system, or the administration of justice. However, service on such a committee must comply with Canon 4A's admonition that the activities not interfere with judge's proper performance of judicial duties and not cast reasonable doubt on his capacity to act impartially as a judge.

COUNTY JUDGE SERVING ON UNITED WAY BOARD OF DIRECTORS
Opinion No. 189 (1996)

QUESTION: May a constitutional county court judge who performs judicial functions serve on the board of directors of a local United Way charitable organization, provided that the board does not participate in fund raising and only sets policy?

ANSWER: Yes. A county judge who performs judicial functions is subject to the provisions of the Code of Judicial Conduct under Canon 6(B), subject to exceptions not relevant to this inquiry. Canon 4(C) of the Code authorizes a judge to serve as a director of a charitable organization, provided that he or she does not personally solicit funds and provided that service on the board will not otherwise interfere with the performance of his or her judicial duties.

PART-TIME ASSOCIATE JUDGES AND PARTNERS PROHIBITED FROM PRACTICING IN COURT WHERE ASSOCIATE JUDGE APPOINTED
Opinion No. 190 (1996)

QUESTION: May the partners or associate attorneys of a part-time associate judge practice in the court of the district judge where the associate judge is appointed to serve?

ANSWER: No, they may not. Canon 6D(2) states that a part-time commissioner, master, magistrate, or referee should not practice law in the court in which he or she serves. Canon 2B provides that a judge shall not permit others to convey the impression that they are in a special position to influence the judge. In this situation, partners or associates of the part-time associate judge would be in a position to convey this impression.

APPELLATE JUDGE WRITING ARTICLE DISCUSSING PRIOR DECISION
Opinion No. 191 (1996)

QUESTION: May a judge on the Court of Criminal Appeals or the Supreme Court write a newspaper article in the form of an opinion/editorial piece discussing his/her stated position on a case that has been finally resolved by the Court?

ANSWER: No. Canon 3(B) prohibits a judge from discussing a matter which may show his/her probable decision in a matter. Even though a matter has already been decided, it can be revisited and the opinion/editorial would be talking about more than just particular procedures of the court, which is what this Canon allows. More importantly, this would be a direct violation of Canon 3(B)11 where a judge is not allowed to talk about "discussions, ..., positions taken," and/or "writings of appellate judges..." as these "shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines...."

JUDGE'S LETTER INCLUDED IN FOR-PROFIT PUBLICATION
Opinion No. 192 (1996)

QUESTION: A "for-profit" publisher of an excellent booklet dealing with substance abuse has asked a judge to write a letter on the judge's letterhead dealing with substance abuse to be included in the publication. The judge and law enforcement will be given free copies for distribution. May the judge write such a letter to be included in the booklet?

ANSWER: Yes, the judge may write a letter to be included in the booklet so long as the judge's letter cannot be interpreted as an endorsement of the booklet and the letter does not impact the appearance of impartiality on the part of the judge in the trial of related matters. Canon 2B specifically states that a judge should not lend the prestige of judicial office to advance the private interests of others. Further, Canon 4 permits a judge to engage in activities to improve the law, the legal system, and the administration of justice; provided that in doing so, the judge's activities must not cast doubt on the judge's capacity to decide impartially any issue that may come before the Court.

J.P. CANDIDATE REQUIRED TO COMPLY WITH CODE J.P. CANDIDATE MAY NOT ADVERTISE "J.P. WEDDINGS" FORMER J.P. ADVERTISING "J.P. WEDDINGS"
Opinion No. 193 (1996)

QUESTION 1: May a former Justice of the Peace advertise "Justice of the Peace Weddings?"

ANSWER 1: The Committee on Judicial Ethics declines to answer this question. Such question concerns legal, rather than ethical, matters and does not come within the scope of the authority of this Committee. We act only as an advisory peer group in determining the application of the Code of Judicial Conduct to undisputed factual situations; we do not address legal questions.

QUESTION 2: Must a candidate for Justice of the Peace comply with the provisions of the Code of Judicial Conduct?

ANSWER 2: Yes. Canon 6G(4) states that the conduct of "any other candidate for elective judicial office. . .who violates Canon 5 or other relevant provisions of the Code is subject to review by the Secretary of State, the Attorney General, or the local District Attorney for appropriate action." As contemplated by the Code, "any other candidate for elective judicial office" includes a candidate for Justice of the Peace.

QUESTION 3: Is it a violation of the Code of Judicial Conduct for a candidate for Justice of the Peace who is a former Justice of the Peace to imply in his political advertising that he is a current Justice of the Peace?

ANSWER 3: Yes. Canon 5(2)(ii) provides that a judge or judicial candidate shall not "knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent."

QUESTION 4: Is it a violation of the Code of Judicial Conduct for a Justice of the Peace or candidate for Justice of the Peace to advertise "Justice of the Peace Weddings" in the telephone directory?

ANSWER 4: Yes. As noted in the answer to Question No. 2, a candidate for Justice of the Peace is subject to the Code of Judicial Conduct. In Opinion No. 72, we determined that a "judge who advertises for performance of weddings and charges fees for weddings violates the Code of Judicial Conduct." Such conduct violates Canon 4D(1), which provides, "A judge shall refrain from financial and business dealings that. . .exploit his or her judicial position. . . ."

ACCEPTANCE OF HOLIDAY GIFTS BY JUDGE AND STAFF
Opinion No. 194 (1996)

QUESTION: Is it a violation of Canon 4(d)(4) of the Texas Code of Judicial Conduct for a judge, court coordinator, court reporter (and clerks and bailiffs) to:

1. accept holiday or seasonal gifts (assuming such to be commensurate with the occasion); or
2. attend holiday or seasonal law firm parties?

ANSWER 1: Yes. A judge may only accept a gift from a friend for a special occasion and then only if the gift is fairly commensurate with the occasion and the relationship. Canon 4D(4)(b). A Judge may accept any other gift only if the donor is not a party or person whose interests have come or are likely to come before the judge. Canon 4D(4)(c). Opinion No. 44.

The Committee concludes that a holiday or seasonal gift from a lawyer or law firm where a lawyer is not a friend is prohibited. Where a friendship exists, the gift must be commensurate with the occasion and the judge must be mindful of Canon 2A and should act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge should not convey or permit others to convey the impression that they are in a special position to influence the judge. Canon 2B. Opinion No. 39.

ANSWER 2: No. A judge may attend holiday or seasonal law firm parties if the party is open to people other than judges and court personnel. Rule 4D(4)(b) and Opinion No. 39 permits a judge to accept ordinary social hospitality. The judge should act in a manner that promotes public confidence in the integrity and impartiality of the judiciary and should not convey or permit others to convey the impression that they are in a special position to influence the judge. Canon 2(A) and (B).

The answers above apply equally to the judge's staff, court officials and others subject to the judge's direction and control. Canon 3C(2) provides a judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge. See Canon 3B(2) Code of Judicial Conduct, September 1, 1974, through December 31, 1993, and Opinions 110, 112 and 140 applying Code to court personnel.

POLITICAL ADVERTISING USING "JUDGE" WHEN NOT CURRENTLY HOLDING JUDICIAL OFFICE
Opinion No. 195 (1996)

QUESTION 1: Can an individual who resigned from a County Court at Law bench to run for a District Court bench, and who is currently practicing law as a civil defense attorney, use the title "Judge" in political advertisements without running afoul of Canon 5?

QUESTION 2: Can an individual who resigned from a County Court at Law bench to run for a District Court bench, and who is currently practicing law as a civil defense attorney, use election materials from previous campaigns for her county bench races that say only "Vote for Judge _____"?

ANSWER: No to both questions. Canon 5(2)(ii) provides that a judge or candidate for judicial office shall not knowingly misrepresent, among other things, the present position of the candidate. A judicial candidate who is not currently an active judge and who does not currently hold a judicial office cannot therefore use the title "Judge" in any political advertisements or campaign literature, and to do so would violate Canon 5(2)(ii).

FUND RAISING PROHIBITED BY JUDGES FOR NATIONAL CENTER FOR STATE COURTS
Opinion No. 196 (1996)

QUESTION: May a judge who is director of the National Center for State Courts (a nonprofit organization serving the needs of justice in state courts) sign a letter soliciting funds for the organization mailed to lawyers who appear in front of him?

If not, may a judge solicit funds for the National Center for State Courts from lawyers who are only licensed in other states and who practice in firms with no offices in Texas?

ANSWER: No. It is a violation of Canon 4C(2) of the Texas Code of Judicial Conduct for a judge to sign a letter soliciting funds for any educational, religious, charitable, fraternal or civic organization. The National Center for State Courts is among the organizations included in this prohibition.

No. The Judicial Ethics Committee is of the opinion that the Texas Code of Judicial Conduct applies to the activities of the Texas judiciary both in and out of this state.

Historically, the code has encouraged the Texas judge to participate as an officer, director, delegate, or trustee of educational, religious, charitable, fraternal, and civic organizations. At the same time, it has prohibited a judge for engaging in the direct solicitation of funds for such organizations[1], including political parties[2], and from being a speaker or guest of honor at such an organization's fund raising event[3]. At one time the Committee interpreted then Canon 4C as permitting a judge to participate in "private" fund raising activities[4].

The Committee is of the opinion that Canon 4C(2) permitting a judge to be listed as an officer, director, delegate, or trustee on the letterhead of a corporation, implicitly allows the use of such stationary for fund raising purposes. Judges should be encouraged to participate in professional and community activities to the maximum extent permitted by the Canons.

The question presented here serves to further emphasize the conundrum faced by members of the judiciary in attempting to further the development and efficiency of the justice system without bursting the bubble in which they must exist. In the instant situation, the placing of the judge's name on the letterhead or referring to the judge as one of the supporters of the National Center, would send enough of a message without it being a direct solicitation. Signing the solicitation letter would be prohibited.

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[1] See Opinion 10 (1976 prohibiting a judge from soliciting funds for the National Conference of Metropolitan Judges, Citing then Canon 5B(2).

[2] See Opinion 154 (1993) prohibiting a judge from chairing a political fund raising committee.

[3] See Opinion 41 (1979) prohibiting a judge form being a singer, speaker, or guest of honor at a fund raising event.

[4] See Opinion 58 (1982) permitting fund raising for the Texas Center for the Judiciary, Inc.

COURT COORDINATOR COLLECTING FEES AS NOTARY PUBLIC
Opinion No. 197 (1996)

QUESTION: May a court coordinator who has qualified as a notary public at her own expense, not reimbursable, notarize papers for the public at a fee as long as the instrument notarized does not pertain to any case in her court?

ANSWER: No. Although the activity is an accommodation, once a fee is charged, a business activity is being conducted out of the judge's office and is a violation of Canon 2, Section B.

A much better practice would be for the county to pay for the cost of qualifying the staff member as a notary and notarization be done at no charge.

JUDGE AS SUBJECT OF A ROAST AT A FUND RAISER
Opinion No. 198 (1996)

QUESTION: Can a sitting state district judge be the subject of a local League of Women Voters annual fund raising "roast" of an elected official?

ANSWER: No. Under Canon 1, a judge should maintain the high standards and integrity of the office, which could be undermined by being the subject of a "roast." Under Canon 4C, a judge should not participate in public fund raising activities. Although under Canon 5B(2) a judge may be a speaker or a guest of honor, the conflict with other Canons would require a "no" answer to this question.

FUND RAISING BY JUDGES FOR TEXAS CENTER FOR THE JUDICIARY, INC.
Opinion No. 199 (1996)

QUESTION 1: May a judge solicit contributions to the Texas Center for the Judiciary, a not for profit organization dedicated to the education of judges, from individuals, businesses or foundations promoting judicial education or similar endeavors?

ANSWER 1: No. In 1982 we issued Opinion No. 52 holding that a judge may solicit funds for the Texas Center for the Judiciary from foundations and other donors not likely to come before the court without violating the letter or the spirit of the Code of Judicial Conduct. Since that time the letter of the code has changed; Canon 4C(2) now squarely prohibits a judge from soliciting funds for any educational, religious, charitable, fraternal or civic organization without excepting organizations devoted to the improvement of the law. No longer is there any language that could justify a distinction between public fund raising and solicitations directed to private foundations. While it might seem appropriate for a judge to be able to solicit funds for an organization that promotes judicial education, the Code as presently drafted does not permit any direct fund raising by Texas judges, as we noted recently in Opinion No. 196 concerning solicitation of funds for the National Center for State Courts.

QUESTION 2: May a judge introduce the executive director of the Texas Center for the Judiciary to foundations, businesses, or individuals expressing an interest in supporting the Center?

ANSWER 2: Yes. As we noted in Opinion No. 196, Canon 4C(2) permits judges to be listed as an officer, director or trustee of a civic or charitable organization, and implicitly allows stationary bearing their names in such positions to be used for fund raising purposes, so long as the judge does not sign the solicitation letter. Allowing a judge to make an introduction of the executive director to a potential donor serves a similar function: it informs the donor that the judge is associated with and sponsors the Texas Center for the Judiciary. The judge must not participate in or be present during the executive director's fund raising efforts as this would constitute direct solicitation.

QUESTION 3: May the executive director of the Texas Center for the Judiciary solicit contributions or sponsorships from vendors of legal materials, such as West Publishing?

ANSWER 3: Because the Code of Judicial Conduct only governs the activities of judges, the Committee expresses no opinion regarding the actions of the executive director of the Texas Center for the Judiciary. The solicitation efforts of the Center directly reflect upon judges, but the executive director's activities are subject to review by the organization's board of directors and not this Committee.

MASTER MAY NOT PRACTICE IN COURT SERVED
Opinion No. 200 (1996)

QUESTION: May a master who is appointed by the county judge but serves at the will of the probate judge and hears mental health proceedings in the absence of the probate judge, practice in that probate court? The Mental Health and Retardation Code statute authorizing the appointment of the master (' 74.0085) specifically states that the master shall comply with the Code of Judicial Conduct in the same manner as the county judge.

ANSWER: No. Since the master is actually sitting for the probate judge, Canon 6B(3) clearly states that such person may not practice law in the court in which he or she serves.

RAISING MONEY FOR TEXAS ASSOCIATION OF DISTRICT JUDGES
Opinion No. 201 (1996)

QUESTION 1: May a committee of the Texas Association of District Judges send a letter to the members of the association or those eligible for membership in the association soliciting $100.00? The funds would be spent to hire a lobbyist to assist the efforts of the association before the Legislature.

QUESTION 2: May a committee of the Texas Association of District Judges send a letter explaining the aims of various groups that are forming to raise money to assist the judiciary in explaining their desires to the Legislature?

QUESTION 3: May a committee of the Texas Association of District Judges send a letter accompanying correspondence from another group formed to raise money to assist the judiciary in explaining their desires to the Legislature?

ANSWER 1: Yes. Canon 4C(2) prohibits a judge from soliciting funds for any "education, religious, charitable, fraternal or civic organization." It is the opinion of the Committee that the Code of Judicial Conduct does not prohibit such activity so long as the letter is restricted to members of the Texas Association of District Judges or those eligible for membership in the association.

ANSWER 2: No. Such implicit recognition of the "various groups" would "lend the prestige of judicial office to advance the private interests" of the groups, in violation of Canon 2B.

ANSWER 3: No. Given the resolution to Question No. 2, any letter accompanying the correspondence of another group would violate both the letter and spirit of the Code of Judicial Conduct.

PART-TIME MUNICIPAL JUDGE ON ZONING BOARD
Opinion No. 202 (1996)

QUESTION: May a home rule city Municipal Court Relief judge, appointed by the city council, also serve on the City's Zoning Board of Adjustment, a wholly voluntary and uncompensated position also appointed by the city council?

ANSWER: Yes. Canon 6C(1)(b) exempts Municipal Court judges from the requirements of Canon 4H.
Canon 4H provides that a judge should not accept appointment to a governmental committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice.

JUDGE'S ENDORSEMENT OF LAWYER REFERRAL SERVICE
Opinion No. 203 (1996)

QUESTION 1: May a judge permit brochures in her courtroom and other public areas in the courthouse that announce the availability of a county bar sponsored lawyer referral service? The referral service is a non-profit organization open to all qualified lawyers and complies with American Bar Association guidelines, State Bar guidelines, and state statutory requirements. The referral service in question screens questions to determine if legal representation is needed, informs callers if they qualify for pro bono legal services, makes a referral to the next name on a rotating list of attorneys who have agreed to provide an initial consultation for a nominal fee in their given areas of expertise, and maintains a list of attorneys available to provide legal services at a reduced fee in certain legal matters.

ANSWER 1: Yes. Canon 4-B permits a judge to participate in extra-judicial activities concerning the law, the legal system, and the administration of justice. Access to our courts is usually not meaningful without the assistance of lawyers. Many members of the public do not know how to find a lawyer, especially one they can afford. A judge who advertises the existence of a lawyer referral service is promoting meaningful access to our legal system for all persons, regardless of their economic condition.

Even though the lawyers selected through this referral program will charge a fee to their clients, the judge is not promoting the individual lawyer but is assisting the public to locate a lawyer who professes familiarity with the legal issues, maintains malpractice insurance and agrees to charge only a modest consultation fee, and perhaps a reduced fee to clients of modest means. By informing the public of this bar sponsored service, the judge is improving the administration of justice, as permitted under the Code, not misusing the influence of her office.

QUESTION 2: May a judge appear in a televised public service announcement and recommend that unrepresented parties contact the county bar sponsored lawyer referral service to find a lawyer before going to court?

ANSWER 2: Yes. Canon 4B would allow the judge to inform the public that it is wise to have legal representation in court. Because the judge is not recommending any individual lawyer, but a lawyer referral service that is open to all lawyers who maintain malpractice insurance, announce

their areas of expertise, and agree to a nominal consultation fee, the judge is not lending the influence of her office to specific lawyers but is using the influence of her office to advise the public of the desirability of obtaining a lawyer before appearing in court and informing those without other resources of one service that might help them find appropriate legal representation. Because a lawyer selected through such a referral service is never identified there is no danger that lawyers on such a list would be in a position to influence the judge who endorses the lawyer referral service.

SITTING JUDGE EMPLOYED AS TV JUDGE
Ethics Opinion 204 (1997)

QUESTION NO. 1: May an active, sitting judge accept employment to appear in a television program portraying a judge presiding over simulated court proceedings based on actual trials? Program credits would indicate that the judge is presently a member of the Texas judiciary.

QUESTION NO. 2: May an active trial judge accept employment to consult with the producers of such a television proceeding, sharing his experiences with the producers and writers of such program and advise them as to proper court decorum and procedures?

ANSWER: No, to both questions, but only because the judge is being paid. Canon 1 of the Code of Judicial Conduct calls upon the judiciary to maintain high standards of conduct. Canon 4D(l) states that a judge shall refrain from exploiting his or her judicial position. Both activities in Questions No. 1 and No. 2 would exploit a judge's position for financial gain.

The subject activity is not prohibited if the judge is not paid so long as all other portions of the Code are followed, i.e. does not demean the judiciary, etc. Canon 4(B) specifically allows the judge to participate in activities concerning the law, the legal system, and the administration of justice.

JUDGES DONATIONS TO FUND RAISING AUCTIONS
Opinion No. 205 (1997)

QUESTION NO. 1: May judges participate in county bar association fund raiser "auctions" by donating such items as dinners with the judge or golfing rounds with the judge, to be awarded to the highest bidder?

ANSWER: No. This conduct would violate Canon 2B. A fund raiser auctioning dinner or golf with a judge would lend the prestige of judicial office to advance the private interests of others. It would also convey or permit others to convey the impression that they are in a special position to influence the judge.

A judge is allowed to participate in civic and charitable activities if those activities do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. Canon 4C. A judge is prohibited by Canon 4C(2) from soliciting funds for any educational, religious, charitable, financial or civic organization. See Opinion 165.

QUESTION NO. 2: May judges participate in political party fund raiser "auctions" by donating items to be auctioned off where the proceeds benefit the sponsoring political party?

ANSWER: No. The conduct would violate Canon 2B as stated in the answer to Question 1 because this would lend the prestige of judicial office to advance the private interests of the judge or others. It would also convey or let others convey the impression they are in a special position to influence the judge. Participation in "political party fund raiser auctions" where the prestige of the judicial office is not used is permissible. Where the items donated are attributable to a judge such as dinner or golf with a judge, a violation of Canon 2B would occur.

A judge may indicate support for a political parry and attend political events. Canon 5(3). Canon 4C(2) prohibits solicitation of funds only for education, religious, charitable, fraternal or civic organizations. Under a previous codification of this section, political solicitation was also prohibited. This change appears to allow political solicitations. See Opinion 162. A judge may participate in political party fund raisers but the level of participation is limited by Canon 2B.

JUDICIAL REFERRALS
Revised Ethics Opinion No. 206 (1997)

To address its backlog of criminal cases, the county initiated a program to require first time family violence offenders to attend a course in family counseling. If the defendant completes the course, criminal charges are dismissed; if the defendant does not cooperate or does not complete the course of counseling, the agency notifies the court and the cause is set for trial. The defendant pays the cost of the counseling.

QUESTION: May a judge in this county order the defendant to attend counseling at only one agency or business, or to select between two or three specified agencies or businesses without violating the Code of Judicial Conduct?

ANSWER: Yes, so long as the selection process encourages referrals to qualified programs that advance the county's objective of reducing family violence. Canon 2B admonishes the judge not to influence the selection process to advance the private interests of any provider.

JUDGE WRITING "CHARACTER AFFIDAVIT"
Opinion No. 207 (1997)

QUESTION: May a Judge file a Character Affidavit on behalf of a person seeking a pardon from the President of the United States?

ANSWER: No. This would be a violation of Canon 2B, where A judge shall not testify voluntarily as a character witness.

JUSTICE OF THE PEACE SERVING AS CASA VOLUNTEER
Opinion No. 208 (1997)

QUESTION: Can a justice of the peace serve as a Court appointed special advocate (CASA volunteer) in the county in which he or she serves as a justice of the peace or in other counties?

BACKGROUND INFORMATION: The CASA program consists of community citizens trained and appointed by district judges to serve as volunteers to advocate for the best interests of children who are involved in the court system due to abuse, neglect or abandonment, and to aid in reducing the time spent by these children in foster care. According to the Texas CASA, Inc. Annual Report - FY96, there are currently 44 CASA programs covering 85 counties in Texas, serving approximately 6,537 children. CASA volunteers serve without compensation.

ANSWER: Yes, to both parts of the question. Canon 6(C) provides that a justice of the peace shall comply with all provisions of the Code of Judicial Conduct, except that he or she is not required to comply with several specified provisions, such as Canon 4(F) (acting as an arbitrator or mediator) or Canon 4(G) (practicing law, if an attorney). It would appear that serving as a court appointed special advocate for a child in court proceeding would be similar in nature to these non-prohibited activities, and it is the opinion of the ethics committee that a justice of the peace would therefore not be in violation of the Code of Judicial Conduct by serving as a CASA volunteer, provided further that he or she complies with Canon 3A (requiring that the judicial duties of a judge take precedence over the judge's other activities).

JUDGE'S RESPONSE TO NEGATIVE PUBLICITY
Opinion No. 209 (1997)

QUESTION: May a senior judge who presided in a massive tort litigation action respond publicly, while the case is still pending, to unfair criticism of his actions in the case, including allegations of bias because of personal ties to the attorney for the plaintiffs and suggestions that the judge's political interests favor plaintiffs who mostly reside in the judge's county? This judge feels the need to defend his reputation now against these false accusations even though the matter is still pending because of fears the litigation may not be concluded during his lifetime**.**

ANSWER: No. A senior judge who has consented to accept judicial assignment is required to comply with the Code of Judicial Conduct. See Canon 6F(l) (with exceptions not relevant to this inquiry.) Canon 3B(10) requires a judge to refrain from public comment about a pending or impending proceeding which may come before the judge. This canon bars public commentary by the judge except for judicial statements explaining the procedures of the court. It is the Committee's opinion that the senior judge's wish to respond publicly to unfair criticism of his actions in a pending matter goes beyond explaining to the public the court's procedures, and this violates Canon 3B(l0). To engage in an editorial debate with his critics about the merits or motivations of his decision not to recuse himself or his ability to be impartial would place the judge in the position of taking sides outside the courtroom for or against parties urging certain positions inside the courtroom. That is to say that the judge's editorial efforts to defend his impartiality could unwittingly cast further doubt on his impartiality. Canon 4A(l) requires that the judge's extra-judicial activities not cast reasonable doubt on the judge's capacity to act impartially as a judge.

In Opinion No. 95 (1987) the Committee stated that it would be unethical for a judge to discuss the facts "or other aspects of the case" with the news media while a matter is pending in that judge's court or any other court. In Opinion No. 191 (1996) the Committee determined that Canon 3(B) prohibits an appellate judge from discussing in a newspaper article or editorial that judge's stated position on matters already decided by the court because they may come up again. A judge's editorial comment on pending matters, even in defense of his reputation, is likewise

prohibited. We are sympathetic with the judge's desire to refute unfair or false criticism of his actions, but any response to critics of the judge's actions or motives places that judge in a potentially adversarial position that may cast doubt on his impartiality in the matter. When the judge no longer consents to accept judicial assignment and is no longer governed by the Code, he may respond publicly to his critics.

JUDICIAL ACCEPTANCE OF REFERRAL FEES
Opinion No. 210 (1997)

QUESTION: May a judge who is asked by former clients and friends to recommend a realtor accept a referral fee from the realtor? The recommended realtor is not a lawyer but is the largest firm in the county.

ANSWER: No, a judge may not accept a referral fee. Canon 4 begins by admonishing a judge to conduct all of his extra-judicial activities so that they do not cast reasonable doubt on a judge's capacity to act impartially. Canon 4(D) goes on to require that a judge refrain from business dealings that exploit his or her judicial position or involve the judge in frequent transactions with persons likely to come before the judge's Court.

In the facts presented, it seems that the appearance of impropriety is present, i.e., judges receiving money for referring business would not be seen as appropriate by the general public. There is a strong potential for the judge's position to be exploited. Additionally, since the real estate firm is the largest in the county, there is a potential for the real estate firm to come before the judge, additionally violating Canon 4.

J.P. RUNNING COLLECTION AGENCY
Opinion No. 211 (1997)

QUESTION: May a Justice of the Peace make telephone calls and send letters to debtors on behalf of a collection agency? The judge's communications would not mention her judicial status, she would do the work at home and not at the court offices, and any suits to collect the debts would be heard by a different judge.

ANSWER: No. Such activity would violate Canon 4D(l), which provides that "A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves."

Canon 2B also contains this general prohibition: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or other." Direct debt collection activities by the judge would inevitably cause some litigants and others in the community to question her impartiality in debt collection cases, or to perceive that she is exploiting her office or lending its prestige to the private interests of the collection agency and the creditors it represents.

For similar reasons, previous opinions have forbidden judges to own an interest in a title insurance company (Opinion 23), to serve as directors of banks or related corporate entities (Opinions 37, 38, 42, 61, and 89), or to serve on a downtown development committee (Opinion 141).

JUDICIAL CAMPAIGN STATEMENTS
Opinion No. 212 (1998)

FACTS: During a political campaign in a judicial election, a candidate produced a campaign brochure including the following material:

1. statements that the candidate should receive a vote because he or she would "get tough with criminals" or was "tough on crime";
2. a statement that the candidate should receive a vote because he or she was "an experienced prosecutor for judge";
3. a statement that the candidate would be a "conservative judge";
4. a statement criticizing the incumbent's previous decisions, for example, "Judge X was wrong in giving probation to a convicted drug dealer.";
5. a photograph of the candidate with a recognized office-holder who has not endorsed the candidate in the race.

QUESTION: Does the inclusion of these matters in campaign literature violate the Code of Judicial Conduct?

OPINION: Political campaigns by judges and judicial candidates are governed by Canon 5 of the Code of Judicial Conduct. A judge and judicial candidate may not make statements that indicate an opinion on any issue that may be subject to judicial interpretation, except that discussion of judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case, Canon 5(l). A judge or judicial candidate may not make pledges or promises of conduct in office other than the fair and impartial performance of the duties, Canon 5(2)(i), and may not knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent, Canon 5(2)(ii). A judge or judicial candidate should also act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2 A.

The statements contained in 1. ("tough on crime") would not violate Canons 5(2)(i) and 2A. The pledges to be tough with criminals and tough on crime are of such an amorphous nature that they do not define any specific conduct and, therefore, are not violative of Canon 5(2)(i). The Committee also believes the amorphous nature of these phrases prevents them from indicating an opinion on an issue subject to judicial interpretation as proscribed in Canon 2A.

Statement 2 ("experienced prosecutor") does not violate the Code, assuming that it is a true statement. An accurate discussion of qualifications is permissible, including prior positions held, even though some person reading the statement might conclude that a judge or judicial candidate who had been a prosecutor would be more likely to rule a particular way in certain types of cases.

Statement 3 ("conservative judge") does not violate the Code. Stating that one will be a conservative judge is a statement of judicial philosophy. While it may appear to convey some meaning, the meaning is so complex that it certainly does not suggest a probable decision in any particular type of case.

The fourth statement ("criticizing decision of the incumbent") violates Canons 5(l) and 2A. A statement that criticizes an earlier decision is a violation if the candidate goes beyond a statement of judicial philosophy and implies to a reasonable person that he or she would reach a different decision in a similar type of case.

The fifth inquiry, concerning the use of a photograph in political material of a person or officeholder who has not endorsed the judge or candidate, would be a violation of Canon 5(2)(ii) of the Code. The use of the photograph clearly implies permission or an endorsement. If that permission or endorsement does not exist, the photograph is a misrepresentation of a fact concerning the candidate and clearly a violation.

MULTIPLE CANDIDATES ENDORSED OR ADVERTISED IN SINGLE PUBLICATION
Opinion No. 213 (1998)

FACTS: A political party, a Political Action Committee (PAC), a specialty bar association, and/or an individual endorse several candidates in one publication.

QUESTION: May a judge or judicial candidate contribute toward the publication of the advertisement?

ANSWER: Political Party, Yes. A judge and a judicial candidate may contribute to a political party. If the political party uses that contribution to pay for campaign publicity and decides to include only candidates who helped pay for the advertisement, this does not violate the Judicial Code.

ANSWER: PAC, Yes. Unless the judge or judicial candidate participates in the selection of candidates promoted by the PAC, the Code of Judicial Conduct does not prohibit the judge or judicial candidate from contributing to the PAC. The Committee would draw attention to Texas Election Code Section 253.1611 which severely limits contributions by a judge or judicial candidate to a PAC.

ANSWER: Specialty Bar, Yes. Unless the judge or judicial candidate participates in the specialty bar=s selection of candidates, the Code of Judicial Conduct does not prohibit the judge or judicial candidate from contributing to the specialty bar to promote the publication of the advertisement.

ANSWER: Individual, Yes. Unless the judge or judicial candidate participates in the individual's selection of candidates the Code does not prohibit a judge or judicial candidate from contributing to the publication.

QUESTION: May two or more judges conduct a joint campaign that includes a mailed brochure and a newspaper ad? The judges invite only certain other judges to participate. The campaign is funded totally by the participating judges' campaigns. All funds are given to the political party, which actually pays the campaign expenditures. Is such a campaign permissible under the Judicial Code of Conduct?

ANSWER: No. Since the judicial candidates selected the candidates with whom they advertised, it is the opinion of the committee that this constitutes an endorsement prohibited by Canon 5(3) and 2(b). Additionally, it constitutes a joint campaign as prohibited in Opinion 100. In responding to these inquiries the Committee referred to Canons 2(b) and 5, and Committee Opinions Nos. 100, 170 and 180. Canon 2(b) provides that a judge shall not lend the prestige of office to anyone's

private interest. Canon 5(3) provides that a judge or judicial candidate shall not publicly endorse another candidate for public office. Committee Opinion No. 100 prohibits joint campaigns by judges; Opinion No. 170 prohibits a judge handing out material that advertises candidates other than the judge; Opinion No. 180 prohibits a judge from using the judge's name to promote a spouse's candidacy. (It should be noted that Texas Election Code Section 253.1611 sets limits on political contributions by a judge or judicial candidate.)

To avoid the appearance of impropriety, judges should request that in any multiple candidate material a prominent disclaimer be included that states that the inclusion of any judge or judicial candidate does not constitute an endorsement by that judge or judicial candidate of any other candidate. Any contribution permitted by this opinion that is intended as a subterfuge for joint campaigning forbidden by Opinion No. 100, constitutes an endorsement that would violate Canon 5(3).

SUPPORT FOR ORGANIZATION SEEKING CJAD FUNDING
Opinion No. 214 (1997)

QUESTION: May a judge write a letter of support for a non-profit organization pertaining to the organization's seeking CJAD funding if the letter deals only with the judge's knowledge of the services the organization provides in the community and does not itself solicit funds?

ANSWER: Yes. Canon 4(C)(2) states that a judge "shall not solicit funds for any educational, religious, charitable, fraternal or civic organization..." If the letter were restricted to a recitation of the services the organization provides in the community, based on the judge's knowledge, and does not solicit funds, there would be no violation even if the net effect of the letter would be to make more likely the organization's receiving the funds, if the other requirements of Canon 4 were met. In this context, a judge could very well be in a unique position to provide such information.

QUESTION: May a judge serve as a member of an advisory board of an organization which is partly funded by government and partly by private funding?

ANSWER: Yes. Canon 4(C)(2) states that a judge "may be listed as an officer, director, delegate or trustee of (any educational, religious, charitable, fraternal, or civic organization)."

GIFTS TO JUDGES FOR CATASTROPHIC LOSS
Opinion No. 215 (1997)

QUESTION 1: May a judge or a judge's family, who has suffered a catastrophic loss, accept gifts of money from individuals who work in the courthouse or practice in the judge's court?

ANSWER: Yes and no. Canon 4D(4)(c) clearly states neither a judge nor his family may accept gifts from anyone whose interests have come or are likely to come before the judge. Therefore, a judge may not accept gifts from lawyers or parties who have come or might come before the court.

The Canon 4D(4)(c) also states that a judge or his family may accept gifts from individuals whose interests have not come and are not likely to come before the Court. It would seem, then, that the judge and family could accept gifts from non-lawyer friends and acquaintances who happen to work in the courthouse but have no interest that has or might come before the Court.

QUESTION 2: May a judge accept gifts he would otherwise be prohibited from receiving if they are placed in a blind trust?

ANSWER: No. The prohibition against accepting gifts is clear. A judge may not accept gifts from ANY persons whose interests have or may come before the court, whatever the form!

LAWYER HOSPITALITY
Opinion No. 216 (1997)

QUESTION: Would it be proper for a judge who is hearing a case out of county to stay in the lake house of a lawyer who often appears in his court? The lawyer has no connection with the out of county case. Would it make any difference if the county paid the attorney the same rate that would be paid if the judge stayed in a motel?

ANSWER: No, a judge may accept gifts or hospitality only under very limited circumstances as described in Proposed Opinion No. 215. This use of the lake home is specifically disallowed in Canon 4D(4)(c), i.e., a judge may not accept the gift from a person whose interests have come or are likely to come before the judge.
If the county pays for the judge's stay, the judge could avoid ethical violation, but only if the payment is commensurate with the market value of the accommodations and the rental is done regularly and not just to the judge.

JUDICIAL CODE APPLIES TO JUDGES UNDER SUSPENSION
Opinion No. 217

QUESTION NO. 1: May a judge who is currently under suspension by the Commission on Judicial Conduct and receiving judicial pay receive compensation for services as a mediator?

ANSWER: It is the belief of the committee that since the judge is receiving judicial pay although suspended by the Judicial Commission, he is required to comply with the Code of Judicial Conduct. It is clear from Advisory Opinion 161 that a judge is prohibited from serving as a mediator.

QUESTION NO 2: If a judge cannot be paid, may he ask the parties to make a donation to the Children's Assessment Center?

ANSWER: This portion of the question is moot as a judge may not mediate. (In the interest of clarity, the committee would offer the opinion that the request of a donation to a charity is fund raising and clearly prohibited by Canon 4C(2).

COUNTY JUDGE AS PRACTICING PSYCHOLOGIST
Opinion No. 218 (1998)

FACTS: Prior to assuming the bench, a constitutional county court judge (who is also a licensed mental health professional) maintained a private clinical practice which included preparation of court-ordered social studies in adoption and child custody proceedings.

QUESTION: May a constitutional county court judge who is also a licensed mental health professional provide clinical and technical (but not legal) consultation to other licensed mental health professionals who are involved in the preparation of court ordered social studies? The consultations would only be given under the following conditions:

1. the judge is not involved in the interview process, investigation or other information gathering activity required in conducting the studies;
2. the judge would only consult with other licensed mental health professionals, and he would not be involved in frequent transactions with lawyers or other persons likely to come before the court on which the judge serves;
3. the judge will not voluntarily testify as an expert witness while continuing to serve on the bench;
4. the fact that the judge was consulted in preparation of a social study report may be noted in the report by listing his name and professional credentials (absent his judicial title); however, a disclaimer will be given and no representation will be made that the judge holds a particular opinion or makes a specific recommendation regarding disposition of the case under study; and
5. the judge would be compensated on a fee basis by the mental heath professional who employs him.

ANSWER: No. The purpose of a court-ordered social study is to provide evidentiary support for a determination of the best interests of a child in a custody or adoption proceeding, and it is ordered specifically prepared for use of a court in making that determination. Recognition of the contribution of the county judge in preparation of a social study would tend to lend the prestige of his judicial office to advance the private interests of others in violation of Canon 2(B).

This activity could also exploit the judge's judicial position, and by making him a potential witness in all cases in which he serves as a recognized consultant in preparation of a social study, it could involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves, in violation of Canon 4(D)(1).

Canon 2(A) requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and the judge should restrict his private clinical practice to non-court related activities while serving as a county judge.

CHARITABLE GIFT IN LIEU OF EXPENSE OF FUND-RAISING PARTY
Opinion No. 219 (1997)

QUESTION: A judge proposes to invite supporters to a "non-event" fund raiser. Instead of paying for a fund-raising event, the judge announces that he will contribute existing campaign funds to a local charity serving inner city youth. The invitation explains that no funds raised by the solicitation letter would go to the charity. Does the proposal violate the Code of Judicial Conduct?

ANSWER: No, this approach to fund-raising does not contravene Canon 4C(2)'s prohibition against fund-raising for charitable organizations. The Judge is clearly not going to use any of the funds being solicited for that charity. The Committee is of the opinion that the charity should not be named.

JUDGE AS CHARITY WAITER
Opinion No. 220 (1997)

QUESTION: Is it an ethical violation for a Judge to participate as a "celebrity server" for a fund raising dinner for Court Appointed Child Advocates (CASA). CASA is a nonprofit organization. The judges' names will be used in the publicity for this event. The judges will not participate in any actual fund raising. The judge's only job will be to serve dessert to the amusement of the guests.

ANSWER: No, the proposed activity is not a violation of the fund raising prohibition found in Canon 4C(2). The judge's participation is analogous to being a guest speaker at a fund raiser that is specifically allowed in Canon 4C (2).

CONSTITUTIONAL COUNTY JUDGE AS SALES AGENT
Opinion No. 221 (1998)

QUESTION: May a Constitutional County Judge become an independent agent in order to sell products and/or services for a communications company and receive commission?

ANSWER: No. Even though a judge may attempt to separate two careers, when a judge is an independent agent selling products or services for a communications company he may lend the prestige of his office to that position and thereby advance the private interest of himself or his company in violation of Canons 2B and 4D(l).

Furthermore, these activities could interfere with the judge's proper performance of judicial duties in violation of Canons 2A, 3A and 4A(2) in that his acts may not promote public confidence in the judiciary and his selling duties may take precedence over judicial duties or interfere with the proper performance of judicial duties.

LETTERS OF RECOMMENDATION
Opinion No. 222 (1998)

QUESTION: May a judge write a letter of recommendation for (1) a secretary in the office; (2) a prosecutor who is applying for a position with a law firm; (3) a fellow judge, who has made application for another judicial position?

ANSWER: Yes. Such letters may be written. The applicable section of the Code of Judicial Conduct is 2B, which states that a judge should not lend the prestige of judicial office to advance the private interests of the judge or others. The commentary to Canon 2B of the ABA 1990 Model Code provides:

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may provide a letter of recommendation based on the judge's personal knowledge. A judge also may permit the use of the judge's name as a reference, and respond to a request for a personal recommendation when solicited by a selection authority such as a prospective employer, judicial selection committee or law school admissions office. A judge may also provide information in response to a request from a sentencing judge or probation or corrections officer. The Committee is of the opinion that so long as letters are based on the judge's own personal knowledge and are written to a specific person the letters may be written. It is not appropriate for a judge to write a "to whom it may concern" letter because of the lack of knowledge by the judge as to its specific use.

MASTER ON LEAVE REQUIRED TO COMPLY WITH CODE
Opinion No. 223 (1998)

QUESTION: An Associate Judge (Master) appointed by a District Judge is seriously considering running for district judge. She wishes to take leave from her current position beginning on the date she files as a candidate. While on leave she will not act in any judicial capacity nor will she receive pay or benefits. She would like to continue coverage for county group health insurance, the cost of which would be borne completely by her. She may have accrued vacation and sick leave which would be reinstated if and when she returns to her job as Associate Judge. While she is on leave without pay:

1 . Is she prohibited from working for pay in a job unrelated to the law?

2. Is there any kind of law-related work for pay which she cannot perform? If so, what?

3. Can she practice law or act as a mediator? Can she associate with a law firm whose lawyers appear in court or accept court ordered mediations?

ANSWER: A full-time district court master must comply with all provisions of the Code of Judicial Conduct whether on leave or not. A leave of absence is not a complete separation from employment; it connotes a continuity of employment status. As a result, the master on leave cannot take any employment prohibited by Canon 4.

J.P. AND CONSTABLES ASSOCIATION ENDORSING POLITICAL CANDIDATE
Opinion No. 224 (1998)

QUESTION: May a Justice of the Peace and Constables Association endorse candidates for political office?

ANSWER: No. Canon 5 states, in part, that a judge shall not authorize the public use of his or her name endorsing another candidate for any public office. Judges as a group cannot do what judges individually cannot do even if the group consists of some non-judicial members.

JUDICIAL NEUTRALITY PROHIBITS J.P. "WAR ON HOT CHECKS"
Opinion No. 225 (1998)

QUESTION NO. 1: May a county-wide decal issued as a part of a "declared war on hot checks" that includes the names of the district attorney, sheriff and constable and contains a generic warning against passing hot checks also include the justice of the peace's name?

ANSWER: No. Canon 3A provides that a judge must act at all times in a manner that promotes impartiality of the judiciary. If a justice of the peace allows his or her name to appear on a decal, along with the names of the prosecutor and law enforcement officials, the clear implication is that the judge is acting in conjunction with these entities to prevent and prosecute issuance of hot checks. This violates Canon 3A by implying that the judge is partial to law enforcement, the judge will assume the accused is guilty, and that the judge is indeed assisting law enforcement in hot check prosecution efforts. Thus, a judge should not permit use of his or her name in a general law enforcement program.

QUESTION NO. 2: Justices of the peace across Texas "in reality . . . conduct an executive branch prosecutorial function in hot check cases." The victim files the complaint and all relevant evidence in the justice of the peace office, the J.P. office then investigates and prosecutes the case by interviewing potential witnesses and contacting the accused "to pay restitution . . . ." Is this appropriate judicial conduct?

ANSWER: Canon 1 of the Code of Judicial Conduct states that a judge should observe standards to preserve the independence of the judiciary. When Canon 1 speaks of independence, it refers to the judicial branch of government that must remain separate from the other two branches under Article II, Sec. 1, of the Texas Constitution. The executive branch includes prosecutors, sheriffs and constables; therefore, a judge cannot at any time act as a prosecutor in any capacity.

If the inquiring justice of the peace, or any judge, is prosecuting cases within its jurisdiction, especially contacting the accused for guilty plea arrangements, then the judge is absolutely, unequivocally, and indefensibly violating both the Code of Judicial Conduct and the Texas Constitution. Further activity in this vein must immediately cease.

JUDGE AS ATTORNEY FOR SELF, SPOUSE AND/OR CORPORATION
Opinion No. 226 (1998)

QUESTION: A judge is sued individually, along with her spouse and a corporation that the judge and her spouse solely own. May the judge represent herself, her spouse and/or the corporation in the suit as attorney of record?

ANSWER: Yes and No. A judge may always represent herself in a legal action. Whether she is permitted to represent her spouse or the corporation depends on the type of judge being sued. Canon 4G and Canon 6 must be looked at together for the answer. Canon 4G provides that a judge may not practice law but may represent herself and, without compensation, give legal advice to and draft or review documents for a member of the judge's family. Judges required to comply with

Canon 4G (appellate judges at all levels, district and county court at law judges) may not represent their spouse or the corporation.

With minor exceptions, Canon 4G does not apply to a County Judge, a J.P. or a municipal judge. The Code of Judicial Conduct does not prohibit these judges from representing their spouse, and the corporation and themselves.

JUDGE OR JUDICIAL CANDIDATE OWNED BUSINESS
Opinion No. 227 (1999)

A candidate for judicial office owns, with his spouse, the only abstract title insurance company in the county.

QUESTION 1: Is this business relationship permissible under the code for a judicial candidate? For a sitting judge?

ANSWER 1: Yes, as to the candidate and no as to the sitting judge.

The Code's only requirement of a judicial candidate is that the candidate refrain from inappropriate political activity as described in Canon 5. See Canon 6 for list of those covered by the Code.

It is the belief of the committee that a sitting judge is not permitted to maintain these business interests due to the provisions of Canon 4. While Canon 4(D)(2) does allow a judge to operate a business, not publicly held, this provision is subject to 4(D)(1). Canon 4(D)(1) requires a judge to refrain from financial and business dealings which tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. The nature of this business, coupled with the fact it is the only abstract title company in the county, and the court is one of general jurisdiction, make such a conflict inevitable. See Opinion 23.

QUESTION 2: Assuming a candidate who owns an abstract title insurance company or whose wife owns such business is elected, would the judge or the spouse be obligated to divest themselves of these business interests?

ANSWER 2: Yes, under the reasoning in the answer to Question 1, the elected judge should divest himself of the business in a reasonable fashion. Canon 7 requires that a person to whom the code becomes applicable, should arrange his or her affairs as soon as reasonable to comply with the code.

In the event that the spouse of a sitting judge owns an abstract business, the judge must recuse himself in any case involving a lawyer or other person who does business with the judge's spouse. It is the duty of the judge to be informed about the economic interests of any family member residing in the judge's household. If the spouse's interest causes frequent disqualification, then Canon 4D(3) requires a judge to divest himself of economic interests as soon as the judge can do so without serious financial detriment.

QUESTION 3: May a sitting judge acquire an interest in a private mortgage company?

ANSWER 3: Yes, so long as the requirements of Canon 4(D) are followed. The ownership, whether as an active participant or an investor only, must not be in a company that is "publicly owned" (i.e. has more than 10 unrelated owners), must not exploit the judge's position or involve the judge in frequent transactions with persons likely to come before the court. The Canon requires that a judge's investments should be managed so as to minimize the number of cases in which the judge is disqualified.

QUESTION 4: May a judge who owns a corporation which operates a title company located outside the judge's district, lease the company to a private company?

ANSWER 4: Yes, with the same restrictions as enumerated in answer (3) above. See Opinion 179.

QUESTION 5: Could potential violations in any of the above situations be remedied by a blind trust?

ANSWER 5: No. A blind trust operates by investing a judge's assets without the judge having any knowledge of where his/her assets are invested. The blind trust is not an effective tool for shielding the judge from knowledge of his investments when the judge's asset is a company doing business such as the abstract and title company described here.

The committee would comment that it is difficult to answer these inquiries in the abstract. Each situation would depend upon its own circumstances, the types of cases a judge hears, and the effect of the ownership interests on those who appear before the judge, both in reality and in perception. The committee cautions any judge or candidate to evaluate each such situation very carefully. Besides the above referenced Canons, each such situation should be judged with Canons 1 and 2 in mind.

JUSTICE OF THE PEACE AS BOARD MEMBER OF WATER SUPPLY CORPORATION

Opinion No. 228 (1998)

QUESTION: May a justice of the peace serve as a member of the board of directors of a water supply corporation if the customers are located in the justice's precinct?

ANSWER: No. For a justice of the peace to serve as a director under such circumstances would be a violation of Canon 4D(l). This provides that "a judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves." A director of a corporation occupies a position of a fiduciary toward the corporation for its shareholders. A justice of the peace accepting such director's position could be involved in financial and business dealings which would tend to reflect adversely on his impartiality as a judge, and he could be involved in frequent transactions with persons that would likely be before him in court.

For a justice of the peace to so serve as director would also be violative of Canon 4A(l), which provides that "a judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge."

It should be noted that Canon 4D(2) does not apply here because the judge asking the question is a justice of the peace. See Canon 6C(l)(b).

JUDGE MAY NOT SOLICIT FUNDS FOR BANQUET
Opinion No. 229 (1998)

QUESTION: May a municipal judge serve as the Director of the County Crime Commission? The position receives a $500 per month salary if the Commission has the funds. In those months that there are no funds the Director is expected to donate his time. The major duty is to organize and collect funds for an annual banquet. The banquet is held to recognize area law enforcement personnel.

ANSWER: No. Canon 4C(2) states that, "A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization.. ." Although municipal court judges and justices of the peace are exempted from portions of Canon 4, they are not exempted from 4C(2).

JUDGE AS ASSISTANT TO COUNTY PARTY CHAIR FOR APPOINTMENTS
Opinion No. 230 (1998)

QUESTION: May a judge serve as Special Assistant to the County Party Chair responsible for Appointments? The position would require the judge to communicate the process of applying for various county, city and state governmental appointments as well as communicating what appointment positions are available.

ANSWER: No. A judge may not act in this capacity due to the public nature of the position. It places the judge in the position of a de facto political power broker. This is a violation of Canon 2 which states that a judge should not lend the prestige of judicial office to advance the private interests of other; nor shall a judge permit others to convey the impression that they are in a special position to influence the judge.

JUDGE ON THANK YOU PAGE IN POLITICAL PARTY STATE CONVENTION FOR CONTRIBUTION
Opinion No. 231 (1998)

QUESTION: May a judge be publicly thanked in a political party state convention program for contributing to the cost of a dinner provided to young people who served as pages and sergeants-at-arms at the state convention?

ANSWER: Yes. Canon 5 states, in part, that a judge may indicate support for a political party. The presence of a judge's name on a list of contributors to a dinner sponsored by a political party is permitted by the Canons.

APPOINTED JUDGE LISTED AS "JUDGE" IN CAMPAIGN MATERIAL
Opinion No. 232 (1998)

QUESTION: May any of the following individuals refer to themselves as "judge" in campaign material (including public forums) when running for elected judicial office-- family law associate judge, criminal law magistrate, juvenile referee, jail magistrate, Title IV master?

ANSWER: The Code does not dictate whether such individuals are considered "judges". Reference to appropriate statutes or constitutional provisions may be required to make that determination. The Committee notes, however, that Canon 5(2)(ii) provides that a judicial candidate shall not knowingly or recklessly misrepresent the candidate's identity, qualifications, or present position.

SITTING JUDGE COMPLETING MEDIATION TRAINING
Opinion No. 233 (1998)

QUESTION: May a sitting judge, as part of a mediation training program, (1) observe three mediation sessions conducted by other persons serving as mediators, and (2) conduct two pro bono mediations, so long as the mediations would not be in connection with any case pending in the judge's court and the judge would receive no compensation for her services?

ANSWER: Yes. A sitting judge may observe mediation sessions conducted by another mediator and may, without compensation, serve as a mediator. Canon 4.F provides: "An active full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system, but a judge may encourage settlement in the performance of official duties." Canon 3B.(8)(b) concerning ex-parte communications does not prohibit a judge from "conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties."

Since Opinion No. 161 in 1993 first addressed the propriety of a judge serving as a mediator, alternative dispute resolution procedures have become more favored as a state policy in numerous legislative enactments, more favored by judges because of their effectiveness in disposing of disputes at every level, more favored by state agencies which now build ADR procedures into many of their rules, and more favored by individuals who include ADR procedures in their agreements and rely on them to resolve more and more of their disagreements. In light of this growing reliance on ADR procedures as an adjunct to traditional forms of adjudication, and in light of the favorable experience of many judges in encouraging and participating in alternative dispute resolution procedures, we withdraw in its entirety our former Opinion 161 and find in the Code no prohibition against an active judge serving as a mediator or arbitrator without compensation so long as the judge follows the guidelines of Canon 3B.(8)(b).

There is no prohibition against an active judge serving as a mediator or arbitrator without compensation so long as the judge follows the guidelines of Canon 3B.(8)(b) and that such a mediation or arbitration does not interfere with the prompt and efficient management of that judge’s own court docket.

COURT ADMINISTRATOR CAMPAIGNING FOR CANDIDATE OF HER CHOICE
Opinion No. 234 (1998)

QUESTION: May a court administrator for a judge campaign for political candidates and support referendum issues during non-court hours, when she is away from the courthouse and on her own personal time?

ANSWER: Yes. Canon 5's prohibition of "inappropriate political activity" applies only to judges and judicial candidates, not to court personnel. Canon 6 does not list court administrators or staff as persons subject to the Code. Although an earlier version of Canon 3C.(2) required court staff to observe "the standards of this Code," since March 1994 Canon 3C.(2) has required judges, as part of their administrative responsibilities, to ensure only that members of their staff observe "the standards of fidelity and diligence" that judges must observe. Canon 3 also instructs judges to ensure that staff and court officials observe other code provisions not at issue in this opinion. See Canon 3B.(4), 3B.(6), 3B.(8), and 3B.(10).

The code does not prohibit political activities by the administrator, provided that she engages in them away from the courthouse, during non-court hours, on her own time, without giving the impression that she speaks for the judge. The administrator must remember that the judge for whom she works cannot lend the prestige of his office to advance the political interests of others [Canon 2B.], indicate his opinions on issues likely to come before his court [Canon 5(l)], or endorse candidates for public office [Canon 5(3)). The administrator must scrupulously avoid suggesting in any way that the judge personally approves of the candidates she endorses or the positions she takes on the issues. She must also schedule her political activities so that they do not interfere with her official duties. Canon 4A.(2).

JUDGE AND POLITICAL ACTIVITIES
Opinion No. 235 (1998)

FACTS: A person serving as President of a County Women's Political Caucus and who also serves as the Mayor's appointee and Chair of the Mayor's Commission on the Status of Women will soon be appointed as a part-time Master over the Mental Health cases for a County Court at Law and a Probate Court for the county where she resides. It is anticipated that the Master will preside over hearings two or three days a month.

QUESTION: Is it a violation of the Code of Judicial Conduct for a Master over mental health cases in a statutory county court to 1) remain as president of a county women's political caucus; and/or 2) remain as Chair of the Mayor's Commission on the Status of Women?

ANSWER: No, as to both positions. Under-Canon 6D.(l), a part-time master of a statutory county court is required to comply with all provisions of the Code of Judicial Conduct except, among others, Canon 4H. This exception would permit a part-time master to serve as an appointee to a commission even if it is concerned with issues of fact or policy on matters other than improvement of the law, the legal system or the administration of justice.

There is no direct prohibition in the Code of Judicial Conduct regarding service as president of an organization such as a county woman's political caucus, as long as the master does not authorize the public use of her name endorsing another candidate for any public office under Canon

5(3) or solicit funds under Canon 4C.(2). Additionally, the master must conduct her extrajudicial activities so they do not cast reasonable doubt on her ability to act impartially as a master or interfere with the proper performance of her judicial duties under Canon 4A.(l) and (2).

JUDGE COMPENSATED FOR PERFORMING A MARRIAGE CETEMONY
Opinion No. 236 (1998)

QUESTION NO. 1: May a judge receive a fee for performing a marriage ceremony during regular office hours?

QUESTION NO. 2: May a judge charge for weddings, after hours, away from the courthouse?

ANSWER TO BOTH QUESTIONS:

Yes, within reason. Canon 4D.(1) states, in part:

> A judge shall refrain from financial and business dealings that . . .
> exploit
> his or her judicial position.

This provision ensures that a judge does not take advantage of his or her judicial office with regard to financial issues.

The Committee considered whether a judge may charge a fee for performing a wedding in Judicial Ethics Op. No. 72. In that opinion, the Committee decided that charging a fee for a wedding would exploit the judge's judicial position in contravention of Canon 5(l) (later renumbered as Canon 4D.(l), with no change in language).

Giving further consideration to the issue, the Committee now withdraws that part of Op. 72 concerning fees. Relevant to our decision is DM-397, issued May 31, 1996. Although the Attorney General's opinion interpreted the law, and although finding conduct legal does not necessarily mean that conduct is also ethical, several holdings in the opinion inform our decision on the ethics questions presently raised.

In DM-397, the Attorney General considered whether a judge could perform marriages, at the office or elsewhere, and whether the judge could charge and keep any fees assessed for this service. Initially, the Family Code authorizes certain state judges to perform marriage ceremonies, thereby denominating performance of a wedding ceremony as a proper judicial function. Next, acceptance of a fee for performing this discretionary judicial function is proper under Section 154.005 of the Local Government Code and JM-22. Last, a fee paid to a judge for performing an official function does not fall within the definition of "honorarium" Thus, a judge authorized to perform a marriage ceremony may collect and retain a fee for performing a marriage ceremony.

With regard to use of the judge's office or court personnel, the Attorney General noted that marriage performance is an officially sanctioned judicial function. As such, weddings may be performed at the judge=s office during business hours, and clerks may assist. A Judge must take care, however, that use of public resources be reasonable in relation to the function being carried out: each judge has many mandatory duties to perform in addition to the discretionary authority to conduct marriages.

We find this logic persuasive with regard to Canon 4D.(l)'s admonishment that judges not exploit their judicial positions. As long as the fees are reasonable and conducting ceremonies during business hours does not unreasonably interfere with required judicial duties, then no ethics violation arises. Judges should not, however, take advantage of their official position to conduct

such services, or such activity will constitute exploitation of judicial position and a violation of Canon 4 D.(l).

JUDGE IN FUND RAISING EVENT
Opinion No. 237 (1999)

QUESTION: Judges are invited to participate in a sports event with members of a bar association. The event is a fund raiser for scholarships given by the bar association. The Judge's participation is the main attraction used in selling tickets to the event. May Judges participate in such an event?

ANSWER: Yes. The competing issues are found in Canon 4C. (2) which prohibits judicial fund raising but allows a judge to be a speaker or guest of honor at a fund raising event. It is clear that the judge cannot fund raise directly. The issue becomes difficult when others are selling tickets (fund-raising) based on judges participation. It is the committee's opinion that in this instance the participation of the judge is similar to serving as a guest of honor and is therefore not violative of the code.

JUDGE AS FUND RAISER FOR TEXAS CENTER FOR THE JUDICIARY, INC.
Opinion No. 238 (1999)

QUESTION: May a judge solicit contributions to the Texas Center for the Judiciary, Inc., a not-for-profit organization dedicated to the education and service of Texas judges, from individuals, businesses, foundations, and other organizations? These contributions would be used to promote judicial education and to improve the resources and services provided by the Texas Center for the Judiciary, Inc. to the judiciary.

ANSWER: Yes. This is the third opinion on this subject. In Op. No. 58 (1982), this Committee considered then Canon 4C as an exception to the absolute prohibition against judicial fund raising found in then Canon 5B(2), and

determined that a judge could solicit contributions for the Texas Center for the Judiciary from charitable and educational foundations and other donors who would not ordinarily come before the court.

In 1994, the language found in former Canon 4C as dropped from the Code. Therefore, in 1996, we issued Op. 199, which held that a judge could no longer solicit funds for the Texas Center for the Judiciary and similar organizations. See Op. 196 (1996).

Effective January 1, 1998, the Supreme Court amended the Code to readopt the language of former Canon 4C, now designated as Canon 4B(2), which provides:

> *"A judge may assist such an organization* [devoted to the improvement of the law, the legal system or the administration of justice] *in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities."*

Because this language was readopted into the Code, we now follow the reasoning set forth in Op. No. 58 (1982) to hold that once again a judge may assist in raising funds for one of the organizations described in Canon 4B(2), specifically in this case the Texas Center for the Judiciary, Inc. However, Canon 4B(2) prohibits the judge from public fund raising activities. This restricts the manner in which the judge may assist with fund raising, and we adopt the limits set forth in Op. 58:

1. a judge may solicit contributions only from charitable and educational foundations and other donors who would not ordinarily come before the court;
2. the organization for which funds are sought must be one which is devoted to the improvement of the law, the legal system, or the administration of justice;
3. any solicitation by the judge should be made as an authorized representation of the organization and not as a personal solicitation; and finally,
4. any judge assisting a Canon 4B(2) organization must strictly comply with the admonition found in Canon 1 to preserve the integrity and independence of the judiciary and the prohibition in Canon 2B against:
    a. lending the prestige of office to advance the interests of others, or
    b. conveying the impression that any donor would be in a position to influence the judge.

MAY A JUDGE LEASE TO ATTORNEYS?
Opinion No. 239 (1999)

QUESTION: At the time a judicial candidate was elected to office, she owned an office building with her sister. The sister is an attorney and the office building space is leased to attorneys. May the judge-elect, once she takes office, continue her ownership in the building? If not, may she be a guarantor on a note securing a mortgage held by the judge's sister on the building that will continue to be leased to attorneys?

ANSWER: The applicable Code provisions are Canon 4D(l) and (2). Canon 4D(l) states:

> "A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves."

Canon 4D(2) states: "Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business."

Consistent with these provisions, the Judge would not violate the Code of Judicial Conduct if she recused herself from cases in her court in which the attorneys who lease space in her building appear. Similarly, if the Judge chose to guarantee the note held by her sister, the Judge should still recuse herself from cases in her court in which the attorneys who lease space in her building appear.

A problem could arise, however, in a smaller county in which the judge may be the only judge in the county. In that situation, recusal may be impractical and the judge would be required to

either divest herself of the property interest or lease the property only to persons who are not likely to come before the court.

JUDGE ON BOARD OF NON-PROFIT CORPORATION WHICH TRAINS VOLUNTEERS AND PAID STAFF TO BE APPOINTED BY THE JUDGE TO SERVE AS GUARDIANS OF INCAPACITATED PERSONS
Opinion No. 240 (1999)

QUESTION: May a judge serve as a member of a Board of Directors of a non-profit corporation which trains volunteers and employs professional staff to be appointed by the judge to serve as guardians of incapacitated or minor persons?

ANSWER: No. Canon 4 states that a judge "...shall conduct all of the judge's extra-judicial activities so that they (1) do not cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties." The difficulty with the scenario presented is that the qualifications and competence of a guardian must be determined and approved by the judge. A judge cannot pass on the qualifications and competence of an individual trained by a corporation if the judge is a member of the board of that corporation without creating an appearance of impropriety regarding the judge's capacity to act impartially. A casual observer could well conclude that the judge would consider anyone trained by "his/her" corporation to be qualified and competent regardless of evidence to the contrary. It is the appearance of impropriety that must be avoided. It would make no difference if the judge were a voting or non-voting member of the board.

MAY A JUDGE REQUIRE DONATIONS TO SPECIFIC CHARITY?
Opinion No. 241 (1999)

FACTS: A trial judge requires defendants in certain cases to donate items (such as toys, clothing, diapers, and food) to specific charities or crime victim groups as a condition of community supervision. She also orders such charitable donations pursuant to plea bargains in which the defendant has agreed to make such donations, and grants dismissals when she knows the state has required the defendant to make donations as a condition of the dismissal. The charities vary each month.

QUESTION: Does the Code of Judicial Conduct permit a judge to order such charitable donations, on her own volition or as part of a plea bargain, or to grant a motion to dismiss knowing that the state has required the defendant to make a charitable donation?

ANSWER: The Code of Criminal Procedure and the case law govern the trial court's discretion to impose conditions of community supervision. See, e.g., Article 42.12, §§ 11(a) & (b), and annotations. These statutes are interpreted by the courts and not by the ethics committee. The committee answers questions of ethics and not questions of law. See Opinions 79 & 175.

The judge must not only act within the legal limits set by statutes and case law but also within the ethical standards set by the code of judicial conduct, which restrict a judges freedom to single out certain charities and private organizations for court-ordered benefits. Canon 2B forbids judges to lend the prestige of their judicial office to advance the private interests of others. In an

analogous situation, the committee has ruled in Opinion 118 that under Canon 2B when a defendant has elected to take a driver safety course in lieu of other penalty, the trial judge may not designate a specific agency if there is more than one qualified agency to choose from. Judicial power should not be used to force litigants to provide gifts or services to specified charities, or to other organizations; judges should not be choosing among competing charities.

MUNICIPAL JUDGE SERVING AS CERTIFIED PEACE OFFICER, BAILIFF, DEFENSE AND/OR PROSECUTING ATTORNEY
Opinion No. 242 (1999)

QUESTION 1: Can a Municipal Court Judge be employed as a certified peace officer/bailiff?

ANSWER 1: No. A Municipal Court Judge may not be employed as a certified peace officer/bailiff. A Municipal Court Judge presides over criminal actions in which the State's primary witness is a certified peace officer. This would create an appearance of impropriety in violation of Canon 2A, which provides, "a judge shall comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Such conduct would also be in violation of Canon 4A(1), which provides that "a judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge."

QUESTION 2: Can a peace officer serve as a Municipal Court Judge?

ANSWER 2: Yes, a certified peace officer may serve as a Municipal Court Judge only in the event he/she is totally on inactive status as a peace officer.

QUESTION 3: Can a lawyer serve both as a part-time Municipal Court Judge for one city and a part-time prosecutor for another?

ANSWER 3: Yes. Canon 6C(1)(d) allows a Municipal Court Judge to practice law if the judge is an attorney. Pursuant to this Canon, the judge would not be permitted to prosecute in the Court on which the judge serves, nor would he/she be permitted to prosecute, in any court, any case related to a matter heard as a judge.

QUESTION 4: Can a lawyer serve as a part-time Municipal Court Judge and continue his practice as a defense lawyer in the same area?

ANSWER 4: Yes. See answer to Question 3.

JUSTICE OF THE PEACE AS SALES TAX COORDINATOR
Opinion No. 243 (1999)

QUESTION: May a Justice of the Peace act as a Sales Tax Coordinator? The duties would include: 1) developing, coordinating and preparing sales tax forms; 2) assisting the city in meeting with any business to evaluate sales tax issues and negotiate with the local businesses the terms and conditions of sale tax sourcing; 3) issue sales tax reports on a monthly basis; 4) coordinate with

businesses the filing of necessary documents with the State; and 5) make recommendations to the city council about sales tax collections matters. The Justice of the Peace would not be acting in any capacity as a tax collector.

ANSWER: No. Such activity would violate Canon 3B which provides that , "A judge should not lend the prestige of judicial office to advance the private interest of the judge or others." Meeting with business people as Sales tax Coordinator would inevitably cause some business people, who are also litigants in the judge's court, to question the impartiality of the judge in cases involving that business person or to perceive that eh judge is lending the prestige of the judge's office to the private interest of the city.

Further, Canon 4D(1) says that, "A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality ...or involve the judge in frequent transaction with lawyers or persons likely to come before the court on which the judge serves." Since both the city and the business taxpayers are persons likely to come before the court on which the judge serves, it is best that the Justice of the Peace not also serve as the city's Sales Tax Coordinator.

JUDGES TO GIVE AWARD TO PRACTICING LAWYER
Opinion No. 244 (1999)

QUESTION: May a group of judges give an award to honor a deceased member of the Judiciary? The recipient would be an outstanding lawyer that practices before them and would be named on plaque on permanent display.

ANSWER: No. This would indicate that this lawyer held some special position with the local judiciary. Canon 2 requires that a judge should act at all times in a manner that promotes public confidence in the impartiality of the judiciary.

JUDGE ON BOARD OF NON-PROFIT CORPORATION
Opinion No. 245 (1999)

QUESTION: May a judge serve as director of a private, non-profit corporation supported by public and private funds. The purpose of the corporation is to provide necessaries for CPS children. The judge would do no fund raising. The judge's name would appear on the letterhead as a director on a fund raising letter. Some of the children benefitting from the program could appear in the judge's court.

ANSWER: Yes. Canon 4C(2) specifically allows the judge's name to appear on the letterhead of the organization's fund raising letter. The committee sees no conflict with children who benefit from the organization appearing in the judge's court.

JUDGE SERVING AS VISITING JUDGE WHILE SERVING ON TEXAS BOARD OF CRIMINAL JUSTICE
Opinion No. 246 (1999)*

QUESTION: May a retired judge who is eligible for judicial service be appointed to hear civil and family cases while serving on the Texas Board of Criminal Justice?

ANSWER: No, The Code of Judicial Conduct (the Code) prohibits such activity. Service on the Board by a sitting or retired judge would violate Canon 4A and 4H* of the Code.

Canon 4A of the Code provides:

"A judge shall conduct all of the judge's extra-judicial activities so that they do not:
(1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or
(2) interfere with the proper performance of judicial duties."

Canon 4H* of the Code provides in part:

"A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice."

Canon 6F of the Code provides:

"A Senior Judge, or a former district judge or a retired or former statutory or county court judge who has consented to be subject to assignment as a judicial officer:
(1) shall comply with all the provisions of this Code except he or she is not required to comply with Canon 4D(2), 4E, 4F, 4G, or 4H*, but,
(2) should refrain from judicial service during the period of an extra-judicial appointment permitted by Canon 4H."*

The Texas Board of Criminal Justice governs the Texas Department of Criminal Justice, TEX GOV'T CODE 492.001 (1998). The duties of the Board include employment of the Executive Director of the Department, supervising the Executive Director, and approving the operating budget of the department, TEX. GOV'T CODE 492.013 (b), (c), (1998).

**Now see amended Canon 4H. The Supreme Court's comment to the amendment provides, "This change is to clarify that a judge may serve on the Texas Board of Criminal Justice."*

RESPONSIBILITY OF JUDGE TO NOTIFY IMMIGRATION DEPARTMENT OF UNDOCUMENTED ALIEN
Opinion No. 247 (1999)

FACTS: A judge learns from the evidence during trial that a witness or party is an undocumented alien.

QUESTION: Does the code require the judge to report the individual to the Immigration and Naturalization Service? Does the code prevent the judge from making such a report?

ANSWER: No to both questions. Some statutes may require judges to report law violations to the proper authorities. This committee does not interpret statutes; it only issues opinions interpreting the Code of Judicial Conduct. Canon 3D specifies what judges must do when they learn that another *judge* has violated the code, or that a *lawyer* has violated the rules of professional conduct. But the code neither requires judges to report criminal violations by witnesses or parties nor prevents them from reporting violations. The committee therefore concludes that the judge's obligations are not governed by the code.

MAY COURTS USE A LAW FIRM'S WEB SITE TO POST COURT INFORMATION?
Opinion No. 248 (1999)

FACTS: A law firm offers to let the local courts post their dockets, regularly updated by court personnel, on the firm's web site. In accessing the web site, users would be exposed briefly to the firm's advertisement.

QUESTION: Would this arrangement violate the code?

ANSWER: Yes. Court use of a law firm's web site would violate Canon 2B, which says: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

MAY A JUDGE SERVE AS CHAIRPERSON OF FUND RAISING EVENT FOR NON-PROFIT GROUP?
Opinion No. 249 (1999)

QUESTION: May a Judge serve as the Chairperson of the annual fund raiser for a non-profit charity organization?

ANSWER: No, the Code does not permit a Judge to act as chairperson of a charities fund raising event. Canon 4C(2) prohibits fund raising by a judge but does allow a judge to be a speaker or guest of honor. In analyzing this activity it appears to the committee that a judge cannot act as chair because this position entails real duties (as compared with an honorary chair with no real duties) and is so inextricably intertwined with the fund raising as to constitute prohibited behavior.

MAY A JUDGE OR JUDICIAL CANDIDATE ANSWER QUESTIONS REGARDING PARTY'S PLATFORM?
Opinion No. 250 (1999)

QUESTION: May a Judge or Judicial Candidate answer questions propounded by a political party regarding the judge/candidate's position regarding specific planks of the parties' platform?

ANSWER: No, Judges are prohibited under the code of judicial conduct from answering such questionnaires. Canon 5 (1) states "a judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being is being sought or held... ." Additionally Canon 5 (2) (1) states a judge or judicial candidate shall not: "make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of the office..."

In the event a judge answered such questions, in addition to violating the code of judicial conduct, the judge might be subject to being recused from any case dealing with the subject matter of the question.

JUDGE ON HONORARY COMMITTEE FOR CHARITY
Opinion No. 251 (1999)

QUESTION: May a Judge serve on the Honorary Committee for an annual Sickle Cell Association Fund Raiser?

ANSWER: Yes, so long as the judge does no actual fund raising. The answer is governed by Canon 4C (2) which states that a judge shall not solicit funds for charitable organizations but the judge's name may be listed as an officer, director, delegate or trustee of such an organization. It appears to this Committee that such activity is allowed so long as the judge does no actual fund raising. The committee believes that being listed as an Honorary Committee member is analogous to being listed as a speaker or guest of honor. See Opinions 237, 249.

MAY JUDGES SERVE ON THE HOST COMMITTEE FOR FUND RAISER FOR THEGUARDIAN AD LITEM TASK FORCE, INC.?
Opinion No. 252 (1999)

QUESTION: May a judge serve on the Host Committee of a Fund Raiser for the benefit of the Guardian Ad Litem Task Force, Inc., a non-profit corporation that provides training and organization for volunteer ad litems in the Family Courts? The judges would do no direct fund raising.

ANSWER: Yes, a judge may serve on the Host Committee. This activity is governed by Canon 4. Canon 4B (2) allows a judge to serve as a member, officer, or director of an organization devoted to the improvement of the law, the legal system or the administration of justice. A judge may assist such an organization in raising funds, but should not personally participate in public fund raising activities. Additionally Canon 4C(2) allows a judge to be a speaker or guest of honor at a charitable fund raiser. In light of both these sections of Canon 4, it is the opinion of the committee that such activity is permissible.

MAY A JUDGE APPEAR ON TELEVISION IN A PUBLIC SERVICE ANNOUNCEMENT FOR A NON-PROFIT ORGANIZATION ASKING FOR VOLUNTEERS?
Opinion No. 253 (1999)

QUESTION: May a judge appear on television in a Public Service Announcement for the Texas non-profit office of "Recording for the Blind and Dyslexic" asking people to volunteer their time as readers?

ANSWER: Yes the judge may make such announcement so long as the prestige of judicial office is not used. Canon 4 of the Code allows a judge to participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. It is the belief of the Committee that although the Judge may be identified as a judge it would be improper if he appeared in the announcement wearing his robe. The committee believes

wearing the judicial robe other than while performing official duties or during official ceremonies inappropriately lends the prestige of office to the activity in which the robe is worn.

JUDGES MAY SUPPORT CREATION OF THE JUDICIAL COMPENSATION COMMISSION
Opinion No. 254 (1999)

QUESTION: May judges publicly support new legislation creating a Judicial Compensation Commission? The Commission would set the salaries of Texas Judges.

ANSWER: Yes, judges may publicly support such legislation. Canon 4 allows judges to speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system and the administration of justice. For a judge to support such legislation comes within the activity allowed by this section of the Code.

MAY A LAWYER/JUDGE ACCEPT A REFERRAL FEE WHILE IN OFFICE?
Opinion No. 255 (2000)

QUESTION: Is a judge entitled to accept a referral fee under the following facts: A judge refers the case of a family member to an attorney who does not regularly appear before the judge. Neither the family member nor the referred attorney reside in the same jurisdiction as the judge. The referred case involves a specialty known as "fen-phen" litigation. The case has settled and the referred attorney seeks to pay a referral fee to the judge as a "forwarding attorney." May the judge accept the fee?

ANSWER: No. The Code of Judicial Conduct does not provide a direct answer to the question. Canon 4G does, however, state that: A judge shall not practice law except as permitted by statute or this Code. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

Allowing a judge to receive compensation for referring a family member's case to an attorney would be inconsistent with the spirit of Canon 4G, which would disallow the judge from receiving compensation for actually working on that case.

Additionally, Canon 4D provides:

> A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

In Ethics Opinion No.210, this provision was applied to disallow a judge from accepting a referral fee for referring former clients to a realtor. The opinion noted that "[J]udges receiving money for referring business would not be seen as appropriate by the general public. There is a strong potential for the judge's position to be exploited."

That rationale seems to apply to the facts of this case too.

VISITING JUDGE AS MEMBER OF NATIONAL COMMITTEE TO PREVENT WRONGFUL EXECUTIONS
Opinion No. 256 (2000)

QUESTION: May a visiting judge who is assigned only to the intermediate appellate courts accept an invitation to join the National Committee to Prevent Wrongful Executions?

The committee is part of the Constitution Project housed at Georgetown University Law Center. It describes itself as a bipartisan "blue ribbon" committee of former elected officials, judges, legal scholars, and journalists, including both supporters and opponents of capital punishment, which seeks to promote "greater fairness in the way the death penalty is administered." The members of the committee authorize the use of their names in connection with its work.

ANSWER: Yes. Canon 4 (B) allows a judge to serve as a member of an organization devoted to the improvement of the law, the legal system, or the administration of justice. As it describes itself, the National Committee to Prevent Wrongful Executions takes no position on the death penalty but seeks to educate the public and policy makers about ways to prevent "wrongful" executions and the need for certain constitutional protections when the death penalty is administered.

Furthermore, an active or visiting judge on the court of appeals could belong to this Committee without violating the mandate of Canon 5 (1) to make no statement that indicates an opinion on issues that may be subject to that judge's interpretation because intermediate appellate courts in Texas have no jurisdiction to hear death penalty cases.

MAY A JUDGE'S STAFF ACCEPT PAYMENT FOR INFORMATION REGARDING CASES IN JUDGE'S COURT?
Opinion No. 257 (2000)

QUESTION: A commercial web site that publishes data about civil litigation has solicited information from a trial judge regarding cases decided in her court. The company has offered to pay $7.50 for every jury verdict reported. The company requests the following data for each case: date, style, case number, court and name of judge. They also ask for a case description, identity of plaintiff's attorney and defendant's attorney, plaintiff's experts, defendant's experts, and "the verdict or settlement." The company suggests that the judge's court reporter be asked to fill out the form. May the judge or her staff supply information to this commercial data base? May they receive payment for doing so?

ANSWER: No to both questions. Canon 4(D)(1) says that a judge shall refrain from business dealings that exploit her judicial position. Here the judge would be exploiting her judicial position if she accepts pay for forwarding information regarding official court proceedings to a commercial enterprise.

Canon 2(B) says a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others and shall not convey the impression that others are in a special position to influence the judge. Even if the judge did not accept payment for funneling "litigation

results" to the web site, the judge is using her office to advance the private interests of the commercial web site. Furthermore, serving as a conduit for information to one commercial web site but not others could foster the impression that one business is in a special position to influence the judge.

Finally, Canon 4(A)(2) directs a judge to conduct extra-judicial activities so that they do not interfere with the proper performance of judicial duties. By supplying the requested information on each case litigated in her court, or directing her court reporter to do so, the judge or her staff would be taking time away from their official duties to perform these non-judicial tasks for a commercial enterprise.

In reaching this answer we note that this commercial data base has not asserted that it is collecting data in an effort to improve the law, the legal system, or the administration of justice.

MAY JUDGE SEND LETTER TO BAR ASKING FOR VOLUNTEERS?
Opinion No. 258 (2000)

QUESTION: May a Board of Judges send out a letter with the signatures of all the judges to all members of the local bar association asking them to consider volunteering by donating time and services to the Volunteer Lawyer Project's pro bono legal clinic of Legal Services in order to supplement and /or expand the services of that organization?

ANSWER: Yes, the Board of Judges may send out such a letter. The proposed letter identifies the Volunteer Lawyer's Project as a joint undertaking of the Legal Services organization and the local and area bar associations, explaining that the project's aim is to insure the administration of justice to those served by the program. Canon 4C allows the use of judicial prestige in very limited circumstances for the improvement of the law, the legal system, or the administration of justice.

MAY A JUDGE SERVE AS A DELEGATE TO A PARTY CONVENTION OR SERVE ON A STATE PARTY EXECUTIVE COMMITTEE?
Opinion No. 259 (2000)

QUESTION: Do the Rules of Judicial Conduct allow judges to serve as delegates to a county, state or national party convention? Do the Rules of Judicial Conduct allow judges to serve on a state Republican/Democrat Executive Committee?

ANSWER: No, to both questions. Canon 4 provides in part as follows:

> A. Extra-judicial Activities in General.
>
> A judge shall conduct all of the judges extra-judicial activities so that they do not:
>
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or
>
> (2) interfere with the proper performance of judicial duties.

B. Avocational Activities.

A judge may speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

Canon 5 provides in part:

(1) A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that the discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office...Service as a delegate to a political party convention would violate both Canons 4 and 5. Delegates not only may select candidates to other offices, but they also adopt the party or convention platform. The platform contains positions on numerous issues that come before judges of all courts, criminal, civil, and family.

Service as a member of a state party executive committee would also violate Canons 4 and 5. The political parties support candidates and positions on issues, which a judge cannot do.

Opinion 53C is hereby withdrawn.

MAY A JUDGE PRESIDE IN A CASE WHERE THE COUNTY JUDGE APPEARS AS AN ATTORNEY?

Opinion No. 260 (2000)

QUESTION: Is it appropriate under the Code of Judicial Conduct for a county court at law judge to preside over cases where the county judge appears as an attorney?

ANSWER: No, Canon 2(A) says that a judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Furthermore, Canon 1 states that a judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. A county court at law judge presiding over cases where the county judge acts as an attorney would violate these two canons. The county judge has administrative authority (i.e. budget approval, etc.) over all county departments and divisions, including the county courts at law. Canon 6B 3 authorizes the county judge to practice law in this court. The county court at law judge should be mindful of the appearance of impropriety. The practice of law by the county judge in this judicial forum may create the appearance of partiality and may call into question the integrity and independence of the judiciary.

MAY A BAIL BONDSMAN SERVE AS A MUNICIPAL JUDGE?
Opinion No. 261 (2000)

QUESTION: Can a city appoint a part-time bail bondsman as an alternate municipal court judge? The part time position does not receive a salary, but is paid a pro rata payment for the days worked. The alternate judge will not bail out any defendants with whom he has come in contact as a judge.

ANSWER: Yes, Canon 4 A states that a judge shall conduct all of the judge's extra-judicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of official duties.

Canon 4D(2) and 4D(3) which restrict activities of judges are not applicable to municipal judges. Canon 4I does apply to all judges and it states that,

> "A judge may receive compensation and reimbursement of expenses for extra-judicial activities permitted by the Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety."

Whether the municipal judge is an alternate judge or the chief judge is not material, neither is the method of compensation. When a person acts as a judge all other activities (including occupations) are considered "extra-judicial activities." The concern would be that the alternate judge, acting as a magistrate, might appear to set bonds in a way which would result in lower payments to his competitors and further, since the alternate judge is also a bail bondsman, defendants might use the alternate judge as a surety under the impression that they would get better treatment.

The bondsman can act as a municipal judge provided he disqualifies himself if: (i) he is hearing a matter involving a person for whom he has acted as surety or (ii) the compensation received from the extra-judicial activity of issuing bail bonds gives the appearance of influencing his performance or otherwise gives the appearance of impropriety.

IS IT APPROPRIATE FOR A JUDGE TO ATTEND A LAW FIRM FUNCTION ATTENDED BY CLIENTS, PROSPECTIVE CLIENTS AND/OR EMPLOYEE RECRUITS?
Opinion No. 262 (2000)

QUESTION: May a judge present a legal overview of a particular type case that is handled in the judge's court to an in-house law firm seminar attended by lawyers from the firm, its clients and prospective clients? Does it matter whether the law firm currently has a case pending?

QUESTION: May a judge attend a law firm function where only attorneys from that firm, invited clients, and legal recruits attend? May a judge participate in a law firm's attorney recruitment program?

ANSWER: No to both questions. Such activities would violate Cannon 2 (B) which provides that "A judge should not lend the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge nor permit others to convey the impression that they are in a special position to influence the judge."

By presenting a legal overview of a case to an in-house law firm seminar attended by lawyers from the firm, it's clients and prospective clients, the judge would not only be lending the prestige of her judicial office to advance the interest of that law firm, the judge would also be indirectly allowing the law firm to convey the impression to its clients and prospective clients that the firm has a special position of influence with the judge. It does not matter whether the law firm currently has a case pending in the judge's court or not.

By attending the law firm's function where only attorneys from that firm, invited clients and legal recruits attend, the judge would be lending the prestige of his office to advance the interest of that law firm in its attorney recruiting efforts.

See also Opinion 194, Opinion No. 39 and Cannon 4(D)(4)(b).

DOES THE CODE PERMIT EX PARTE COMMUNICATION BETWEEN AN APPELLATE JUDGE AND A TRIAL JUDGE?
Opinion No. 263

QUESTION: Does the Code of Judicial Conduct permit an ex parte communication between an appellate judge and a trial judge regarding a pending appeal from the trial judge's court?

ANSWER: No, such a communication is clearly prohibited by the Code of Judicial Conduct. The list of prohibited ex parte communications found in Canon 3 B. (8) is not an exclusive list of inappropriate ex parte communications by judges. Canon 3 requires that a judge perform his/her duties impartially and requires that every person who is legally interested in a proceeding the right to be heard. To allow a trial and appellate judge to communicate ex parte regarding an appeal from the trial judge=s court would clearly violate these requirements. The consultation between judges that is permitted in Canon 3 are conversations between judges regarding the law and its application where neither judge has an interest in the out come of the litigation being discussed.

DOES THE CODE OF JUDICIAL CONDUCT PERMIT A JUDGE'S RELATIVE TO ACT AS A CASA VOLUNTEER?
Opinion No. 264 (2000)

Question A: Is it permissible for a judge to appoint a person within the third degree of consanguinity as a CASA volunteer in a case in the judge's court?

Answer A: No. It is not permissible for a judge to appoint a person within the third degree of consanguinity as a CASA volunteer in a contested case to be heard by the judge. Canon 2 requires a judge to avoid impropriety and the appearance of impropriety in all of the judge's activities. It is the responsibility of a CASA volunteer to advocate the position of a child in a lawsuit. It seems apparent that the judge’s impartiality would be questioned if a close family member of the judge appeared in a contested matter before the judge.

Question B: Is it permissible for a judge's family member to serve as a CASA volunteer so long as the activity does not have a significant potential for requiring the volunteer to testify in court?

Answer B: Yes. As long as the judge's close relative is not testifying or in a position to have an ex parte communication with the judge about a specific case, it is appropriate.

MAY JUDGE PARTICIPATE ON A MEDIA RESPONSE TEAM?
Opinion No. 265 (2000)

QUESTION: May a judge participate on a media response team whose job it is to respond to negative or inaccurate media stories about the legal profession, the judiciary and the courts?

ANSWER: No. Canon 3B.(10) prohibits a judge from publically commenting on pending litigation. Participation in this group would inevitably entail comment about pending litigation. A judge cannot do something as part of a group which he/she cannot do as an individual

MAY THE SENTENCING JUDGE MAKE A RECOMMENDATION TO THE BOARD OF PARDONS AND PAROLES?
Opinion No. 266 (2000)

QUESTION: May a judge make a recommendation for commutation of sentence pursuant to the Rules of the Texas Board of Pardons and Paroles? In relevant part the Texas Administrative Code, [Title 37, Part 5, Chapter 143, Subchapter E, Rule 143.52**Commutation of Sentence, Felony or Misdemeanor],** states that the board will consider recommending to the governor a commutation of sentence upon a request accompanied by the written recommendation of a majority of the trial officials. Trial officials are defined among others as the judge in the court of offense, conviction and release.

ANSWER: Yes, any recommendation made by the judge would be in his/her official capacity and therefore permissible. See Opinion 146 which by implication would allow this official activity.

MAY A JUDGE EMPLOY A CANDIDATE FOR JUDICIAL OFFICE?
Opinion No. 267 (2000)

QUESTION: May a sitting judge hire in a staff position a lawyer who is a candidate for judicial office?

ANSWER: No. The judge would violate Canon 2 A and B and Canon 5(3). Canon 2 A requires a judge to promote public confidence in the integrity and impartiality of the judiciary. Cannon 2 B prohibits lending the prestige of judicial office to advance the private interest of others. Canon 5 (3) prohibits a judge from making a public endorsement of a candidate for public office.

A lawyer running for judicial office must comply with the Code of Judicial Conduct (RPC 8.02 (b) and Canon 6 (G) 1). While these rules set the standard for expected conduct of the sitting judge and the candidate, the rules do not alleviate the appearance to the public that the sitting judge holds the candidate in high esteem or the judge would not have hired the candidate. The judge should avoid the appearance of lending his/her endorsement to a political candidate.

The result would be different if a staff attorney for a judge became a candidate sometime after being hired.

DOES THE CLOSE PROXIMITY OF COUNTY ATTORNEY'S OFFICE AND JUDGE'S OFFICE GIVE AN APPEARANCE OF INSTITUTIONAL BIAS AND PREJUDICE?

Opinion No. 268 (2000)

QUESTION: In the portion of the courthouse where mental commitments are heard, the offices for the county attorney and the judge are right next door to each other and opposite the holding area for patients. There is no office provided for the attorneys for the proposed patients. Does this layout create an appearance of an institutional bias and prejudice in favor of the state?

ANSWER: No, although this is not an ideal office layout, it is understood that county commissioners are responsible for assigning office space in the courthouse and not judges. It is the position of the committee that reasonable people understand the practicalities of the often less than perfect office space allocated to government employees. Close proximity of the two offices alone does not create an appearance of institutional bias and prejudice.

MUNICIPAL COURT JUDGE OR J.P. AS SCHOOL BOARD MEMBER OR HEAD OF SCHOOL SECURITY

Opinion No. 269 (2001)

Question 1: May a municipa1 court judge or justice of the peace serve as a school district board member, given the fact that such judge presides over cases involving students, employees and parents of students of that school district?

Answer 1: Yes, Canon 6C(1)(b) removes the restrictions set by Canon 4H which would prohibit a judge from serving on a school board. In serving on the school board, the judge should be mindful of the restrictions of Canon 4, A(1), A(2) and C(1). Section A(1) of Canon 4 requires a judge to conduct extra-judicial activities so they do not cast reasonable doubt on the judge's impartiality. Canon 4A(2) requires a judge to conduct all of the judge's extra-judicial activities so that they do not interfere with the proper performance of the judge's duties. Canon 4C(1)prohibits a judge from participating in civic activities if the organization is likely to be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court. See op. 143.

Question 2: Can a municipal court judge serve as head of security for the same school district?

No, a municipal court judge may not serve as head of security for the school district. The duty of the head of security would be to enforce the regulations passed by the school board for the safety and welfare of the students, employees and property of the district. V.T.C.A., Education Code Sec. 2(1).483. Since the judge has jurisdiction to hear alleged violations of those regulations, such employment would also violate Canons 2A and 4A(1).

IS IT A VIOLATION OF THE JUDICIAL CANONS OF ETHICS FOR A JUDGE TO SERVE ON THE JUDICIAL COUNCIL OF THE CHILDREN'S ASSESSMENT CENTER?

Opinion No. 270 (2001)

QUESTION: Is it a violation of the Judicial Canons of Ethics for a judge to serve on the judicial council of the Children's Assessment Center. The center is a public/private partnership whose mission is "to provide a professional, compassionate and coordinated approach to the treatment of sexually abused children and their families and to serve as an advocate for all children in our community." The center provides various services to such children such as: 1. videotaping a forensic interview with the child sexual abuse victim; 2. provide a sexual assault examination; 3. provide expert testimony in civil and criminal court; 4. provide advocacy for children as they make their way through the justice system. The purpose of the judicial council is to open a dialogue regarding mutual concerns about the sensitivity of child sex abuse cases.

ANSWER: Yes, it is a violation of the Judicial Canons of Ethics for a judge to serve on such a council. It is a judge's function to act impartially and to be seen as neutral. Canon 2 provides, "A judge...should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B provides, "A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of ...others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." For a judge to give advice to an organization whose mission is to advocate for witnesses/parties in law suits is a violation of this Canon.

Cannon 4 which requires a judge to conduct extrajudicial activities so as not to interfere with judicial duties would be violated. Membership on this council would require frequent recusal in cases in which the members of the organization were testifying.

The committee has issued several opinions regarding similar organizations and has consistently found membership in such groups to be a violation of the Canons. See Opinions 66, 86, 133, 225 and 240.

MAY A JUDGE BROKER THE SALE OF FINAL JUDGMENT, CASH STREAMS OR ACCOUNTS RECEIVABLE?

Opinion No. 271 (2001)

QUESTION: May a sitting district judge broker the purchase and sale of final judgments, cash streams or accounts receivable? None of the brokered transactions involve any pre-judgment

matters in any Texas court. The judgments could issue from any Texas court with the exception of the court over which the judge presides.

ANSWER: No. The Canons allow a judge to engage in financial and business matters with the limitation that such activity not exploit his or her judicial position or advance his private interest. The Committee believes that the nature of this business is such that it would be very difficult to conduct it without exploiting the judge's official position to advance the judge's private interests. Since the sale of judgments is inextricably intertwined with the judicial function there is at least an appearance of impropriety.

APPROPRIATE FOR JUDGE TO SEND CORRESPONDENCE STATING, "IF NO RESPONSE YOU WILL BE LISTED AS MY SUPPORTER"?
Opinion No. 272 (2001)

QUESTION: Is it a violation of the Canons of Judicial Conduct for a judge to send a letter to attorneys stating, "If I do not hear from you that you do not support me, I will list you on my campaign literature as a supporter"?

ANSWER: Yes, this would be a violation of the Canons of Judicial Conduct. Canon 5 (2) (ii) requires that a judge shall not knowingly or recklessly misrepresent the identity, qualification or other fact concerning the candidate. To assume that no response is an act of support violates this Canon. Also Canon 1 requiring a judge to uphold the integrity of the judiciary would be violated.

MAY A FULL-TIME FAMILY COURT ASSOCIATE JUDGE PRESIDE AS A MUNICIPAL JUDGE OR TEEN COURT JUDGE?
Opinion No. 273 (2001)

QUESTION: May a full-time associate judge hearing family law matters serve as municipal judge and supervise Teen Court for a municipality?

ANSWER: Yes. There is no violation of the Canons of Judicial Conduct for an associate judge to preside as a municipal judge or supervise "Teen Court." The Committee is not considering any question of law presented by this question.

IS IT A VIOLATION OF THE JUDICIAL CANONS OF ETHICS FOR A COUNTY JUDGE TO SERVE ON THE BOARD OF DIRECTORS OF A SHRINE TEMPLE?
Opinion No. 274 (2001)

QUESTION: Is it a violation of the Judicial Canons of Ethics for a county judge who has judicial responsibilities to serve on the board of directors of a Shrine Temple? The board has administrative functions over the temple. The judge would not be involved in fund raising or any activities that could be considered an embarrassment to the office of county judge.

ANSWER: No, it would not violate the Canons of Judicial Conduct for a county judge (with judicial responsibilities) to serve on the board of a shrine temple. Canon 4(c) provides that a judge

may participate in civic and charitable activities with certain restrictions. The service with the organizations must not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. This Canon specifically authorizes a judge to serve on charitable or civic organizations boards: 1. so long as the organization is not likely to come before the judge in a judicial proceeding; 2. the judge does not solicit funds for the organization; or, 3. The judge does not give investment advice to the organization.

See Opinions 158, 189, 245, 249.

DISTRICT JUDGE AS UNIVERSITY REGENT
Opinion No. 275

QUESTION: May a district judge serve on the board of regents of a state university? The duties of the board are listed in Texas Education Code, Section 65.01 et. seq. ?

ANSWER: No, a district judge may not serve on the board of regents of a state university.

> Canon 4H of the Code provides in part:
> "A judge should not accept appointment to a governmental committee, commission or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice."

The Texas Education Code 65.16 and 65.31 lists the duties of the board to include the employment and supervision of the chief executive officer of the system, and the establishment of policies for the general management of the university system. These activities are exactly those prohibited by Canon 4H.

The judge should also be mindful of the restrictions of Canon 4A. This section of the Code provides in part that, "A judge shall conduct all of the judge's extra-judicial activities so that they do not... interfere with the proper performance of judicial duties." If the judge's judicial district includes one of the universities that she would be supervising she would be required to recuse herself in any case involving the university.

See also Opinion 246

JUDGE PRESENTING CLE AT PRIVATE LAW FIRM
Opinion No. 276 (2001)

QUESTION: May a judge speak at an in-house CLE event sponsored by a law firm? The audience will consist solely of employees of the law firm.

ANSWER: No. It is the belief of the committee that the presentation by the judge of a CLE program for a private law firm violates 2B of the Code of Judicial Conduct. Section 2B prohibits a judge from lending the prestige of judicial office to advance the private interests of others. It also prohibits the judge from allowing anyone to convey an impression that they are in a special position to influence the judge.

QUESTION: If the law firm allows any lawyer not affiliated with the firm who wishes to attend the CLE event to do so without charge, but does not publicize the event, change the answer?

ANSWER: No, the same reasoning as above applies. With no invitations the CLE remains private.

QUESTION: A judge is invited by a local bar association to speak at a CLE event sponsored by the bar association. Members can attend at a reduced price from non-members. The judge is not receiving any money from the entry fee. By speaking at an event whose entry fee schedule encourages membership in a bar association, is the judge promoting the private interests of that group?

ANSWER: A judge may speak at such an event. The event is open to all lawyers and therefore no one group of lawyers is benefitting from the event.

QUESTION: A judge is invited to speak at a CLE event sponsored by a law school. The law school hopes to make money for their scholarship fund by virtue of the quality speakers they have recruited for the event. The judge knows this. By speaking at such an event is the judge lending the prestige of office to the private interests of the law school?

ANSWER: The judge may speak at the law school event. Canon 4B allows a judge to speak and participate in activities concerning the law. Canon 4C.(2) allows a judge to be a speaker at an educational organization's fund raising event.

MAY A JUDGE SIGN AN AFFIDAVIT CERTIFYING AN ATTORNEYS LEGAL PROFICIENCY?
Opinion No. 277 (2001)

QUESTION: May a judge sign an affidavit attesting to the competency of an attorney who practices before the judge to be used in a grievance proceeding against the lawyer?

ANSWER: No. Canon 2B prohibits the lending of the prestige of judicial office to advance the private interests of another and convey to others the impression that the attorney is in a special position to influence the judge. In addition, a judge is specifically prohibited from voluntarily testifying as a character witness. The judge could testify at the grievance hearing if subpoenaed.

MAY A JUDGE ACCEPT AN HONORARIUM FROM THE JUSTICE DEPARTMENT FOR REVIEWING GRANT APPLICATIONS?
Opinion No. 278 (2001)

QUESTION: A judge has been asked by the Justice Department to review grant applications (VAWA, violence against women). The Justice Department indicated they use judges for this all the time and want to pay the judge an honorarium. May the judge take the honorarium?

ANSWER: No. Canon 4(B)(2) allows a judge to "make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice." Canon 4(D)(4) prohibits a judge from accepting a gift, bequest, favor, or loan unless it is from relative or friend on a special occasion, it is not excessive and the donor has no interest that might come before the Court and there is no reasonable perception of an intention to influence the judge. Penal Code Section 36.07 Acceptance of Honorarium states that a public servant commits an offense if he/she agrees to accept an honorarium in consideration for service that the public official would not have been requested to provide but for the public servant's official duties or position.

See Opinions 20, 86, 215.

JUDGE SERVING ON COMMUNITY ASSOCIATIONS
Opinion No. 279 (2001)

QUESTION: May a judge serve as an officer of a non-profit neighborhood association? The purpose of the organization is to promote the well-being of the neighborhood by representing the interest of its residents in matters of civic involvement, community interaction, security and physical improvements of its environment. Service would not involve fund raising. The organization has never been involved in litigation.

ANSWER: Yes. A judge is permitted to serve as an officer of a civic organization not conducted for profit provided the judge may not use the prestige of judicial office to advance the private interest of the organization. See Opinions 108, 144, 152.

QUESTION: May a judge serve on a homeowner's condominium board to help manage the building where the judge owns a condominium?

ANSWER: Yes. For the same reasons as above.

MAY A JUDGE SERVE IN THE DARE ORGANIZATION?
Opinion No. 280 (2001)

QUESTION: (1). May a judge serve as president of DARE (drug educational awareness organization)? (2). May the judge's name be used on the letterhead used in fund raising solicitation so long as the judge is not actively involved in the fund raising? (3). May a judge handling criminal cases serve as DARE president when some funds are used to help the local police department or make civic speeches describing how DARE helps local DARE officers?

ANSWER: No, to all the questions above. Service as a DARE official would reflect adversely on the judge's impartiality since part of the organizations purpose is to support the police and provide DARE officers with funds.

MAY A JUDGE SERVE ON THE BOARD OF THE HOUSTON VOLUNTEER LAWYERS PROGRAM?
Opinion No. 281 (2001)

QUESTION: May a judge serve on the Board of the Houston Volunteer Lawyers Program, an organization whose staff and volunteer attorneys appear as advocates in the judge's court? May a judge serve on the Advisory Board in an ex officio advisory capacity, not involved in decision or policy making?
ANSWER: No, as to both questions. See Opinion 270. Service in any capacity in an organization whose staff appears in the judges court violates Canon 2. Canon 2 requires a judge to act at all times in a way that promotes the public confidence in the judge's impartiality. Canon 2 further prohibits lending the prestige of office to advance the private interest of others or to convey that others are in a special position to influence the judge.

MAY A JUDGE PARTICIPATE IN A CONFERENCE HOSTED BY THE TEXAS ASSOCIATION OF DOMESTIC RELATIONS OFFICERS?
Opinion No. 282 (2001)

QUESTION: May a family court judge speak and/or participate in an annual conference hosted by the Texas Association of Domestic Relations Officers?
ANSWER: Yes, Canon 4 allows a judge to speak or participate in activities concerning the law, the legal system, and the administration of justice so long as such participation does not cast doubt on the judge's capacity to decide any issue that may come before the court or interfere with the proper performance of judicial duties.

MAY AN APPELLATE COURT STAFF ATTORNEY PERFORM PRO BONO APPELLATE WORK?
Opinion No. 283 (2001)

QUESTION: May an attorney employed at a state intermediate appellate court perform pro bono work on a federal appeal when the issue appealed involves only a federal issue and no state, Texas or otherwise, has concurrent jurisdiction? May the same attorney perform pro bono work on an appeal in another state?
ANSWER: No, to both questions. Canon 3 B (6), (8), (10) and 3C (2) require that appellant court staff attorneys are subject to the same ethical standards as the judge for whom they work. Cannon 4G prohibits a judge from practicing law except as permitted by statute or this Code. Pro bono appellate work in a federal or sister-state requires the practice of law. No Code sections provide an exception to the prohibition against practicing law under the circumstances presented here.

MAY A JUDGE'S SPOUSE HOST A FUND RAISER FOR A JUDICIAL CANDIDATE IN THE JUDGE'S HOME?
Opinion No. 284 (2001)

QUESTION: May a judge's spouse host a fund raiser for a judicial candidate in the judge's home?
ANSWER: No. A judge may not host, sponsor or give a fund raiser in the judge's home for a judicial candidate. Canon 5 (3) states that a judge shall not authorize the public use of his or her name endorsing another candidate for any public office. Canon 2 (B) prohibits lending the prestige of judicial office to others or to convey the impression that someone is in the special position to influence the judge. A fund raiser for a judicial candidate held in a judge's home violates all of these provisions.
While the Committee has long been cognizant of the independent nature of spouses of judicial members, the hosting of the event at the judge's residence crosses the line of permissible conduct. The public perception would be that the event is being sponsored by the judge.
It would be permissible for the spouse of the judge to sponsor the event at another location provided no reference to the judge is made or implied.
QUESTION: May a person who believes they may later be appointed to a judicial position sponsor a fund raiser for a judicial candidate?
ANSWER: Yes, such a person could sponsor a fund raiser for a judicial candidate. The Code of Judicial Conduct only applies to sitting judges or official judicial candidates.
See opinions 73, 130, 259

MAY A JUDGE CONTACT THE DISTRICT ATTORNEY TO DISCUSS THE CONDUCT OF AN ASSISTANT DISTRICT ATTORNEY APPEARING IN THE JUDGE'S COURT?
Opinion No. 285 (2001)

QUESTION: A judge is hearing a case in which an assistant district attorney is representing the state interests in a case involving Child Protective Services. Individual attorneys are representing the parents. May the judge hearing the case, after or during temporary hearings or after the final hearing contact the district attorney to advise him of the failure of the assistant district attorney to properly prepare or handle the court proceedings?
ANSWER: Yes, but only under **limited** circumstances. Canon 3B(8) provides that a judge shall not initiate or permit ex parte communications concerning the merits of a pending or impending judicial proceeding. Conversation between the Judge and the District Attorney is permitted if it is confined to conduct of the assistant district attorney. If the conversation involves specifics of a case it may only be done after the case is final.

SUMMER INTERNSHIP PROGRAM
Opinion No. 286 (2003)

QUESTION: May a judge receive the benefits of a law student serving as a summer judicial clerk/intern who receives a monetary stipend from money raised and distributed by a local bar association’s foundation scholarship program funded by contributions from local law firms, businesses, private individuals and fundraisers sponsored by the bar association?

ANSWER: Yes, with certain qualifications regarding implementation of the program.
Canon 4B provides considerable latitude to a judge regarding activities to improve the law. The Committee perceives this summer internship program to be primarily an educational endeavor which furthers the administration of justice, and should be permitted. However, the judge should avoid participating in any of the fundraising activities that might violate Canon 4C(2). Additionally, although the summer interns will not officially be employees of the judge to whom they are assigned, the Committee views them as court personnel who would be subject to all the provisions of the Code. Thus, the judge would be responsible for instructing the interns about their obligations and responsibilities under the Code.

AUTHORIZED COMMUNICATION WITH SURETY
Opinion No. 287 (2003)

QUESTION: Is it considered an ex parte communication for a bail bondsperson to present an affidavit to surrender authorized by Sec. 17.19 of the Code of Criminal Procedure to a judge or magistrate in chambers or open court without the presence of the Principal/Defendant and/or his or her lawyer?
ANSWER: No. Canon 3B(8) generally prohibits ex parte communications concerning the merits of a pending or impending judicial proceeding, but it does not prohibit communications expressly authorized by law. See Canon 3B(8)(e) and Advisory Opinion No. 183 (1995).
Art. 17.19 C.C.P. specifically authorizes and requires that a surety submit an affidavit to a judge or magistrate in order to relieve the surety of liability on a bond. That article also requires that the affidavit state that the surety gave notice to the defendant's attorney of his intention to surrender. Because the affidavit procedure is well-defined and specifically authorized by law, the presentment of the affidavit to the judge or magistrate would not violate the Code of Judicial Conduct.

LEGAL REPRESENTAION BY PART-TIME MUNICIPAL JUDGE
Opinion No. 288 (2003)

QUESTION: May an associate (part-time) municipal judge of a city represent a police officer of that municipality in connection with a criminal investigation of an alleged conspiracy to violate civil rights of individuals by planting fake drugs on them?
ANSWER: No.
Canon 2A provides that "a judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 4A provides that "a judge shall conduct all of the judge's extra-judicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially as a judge . . . ." The representation set out above does not promote the integrity and independence of the judiciary, and it creates an appearance of impropriety.
The Committee is also of the opinion that the representation constitutes business dealings that "reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves," which is prohibited by Canon 4D(1). Defendants charged with criminal offenses in municipal court should be able to reasonably anticipate that when they appear before the court their case will be heard by an entirely

fair and unbiased judge. In the vast majority of municipal court cases, the municipality's main witness is often one of its police officers. A defendant who is aware of the fact that the judge hearing his case also privately represents police officers employed by that very same municipality could reasonably doubt that the judge was impartial when considering the testimony of any police officer and the weight to be given thereto.

A built-in dilemma exists in our justice system when a part-time judge also maintains a law practice. Under the Texas Disciplinary Rules of Professional Responsibility a lawyer has an obligation to zealously represent his client within the bounds of the law. When that lawyer also serves as a judge, however, his duty as a judge is to be impartial and to promote public confidence in the integrity and impartiality of the judiciary. The Committee stresses to all part-time judges to keep this conflict in mind when choosing to accept representation.

This answer is specific to the query and does not overrule Opinion No. 132 (1989).

REFERRAL TO PRIVATE LAW FIRM FOR PRO BONO REPRESENTATION
Opinion No. 289 (2004)

QUESTION: May a Judge refer a criminal defendant to a private law firm if the criminal defendant does not qualify as an indigent for purposes of a court appointed attorney, and the law firm would provide legal representation without a fee? The law firm would be part of a short list which includes a law school criminal defense clinic. The lawyers would be qualified and meet the minimum requirements for appointment as required by the Fair Defense Act.

ANSWER: No.

Notwithstanding the fact that the representation would be pro bono, the Committee is of the opinion that the referral outlined in this question would constitute a recommendation of private counsel which is prohibited by Canon 2B which states, in part, "a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others, nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." By recommending a specific lawyer or private firm, the judge would be indicating support for the services of a particular lawyer or firm over others.

However, the Committee emphasizes that this opinion should not be interpreted to prohibit judges or court personnel from referring persons in need of legal assistance to departments, agencies, organizations or law school clinics which provide pro bono legal services, lawyer referral services, or lists of attorneys willing to assist the public in various areas of legal expertise.

APPOINTMENT OF SPOUSE OF COURT PERSONNEL
Opinion No. 290 (2004)

QUESTION: May a County Court at Law Judge, who is assigned all of the probate cases for the county, appoint the spouse of one of the two probate assistants in the Judge's office as an ad litem in guardianship and heirship cases? The spouse, who is an attorney and meets the requirements established by law to serve as an ad litem, would be one of approximately twenty qualified attorneys on the Judge's appointment list.

ANSWER: Yes, provided certain procedural safeguards are taken.

There is no express prohibition in the Code of Judicial Conduct that prevents the appointment of a qualified spouse of a court employee provided the appointment is made impartially and on the basis of merit. See Canon 3C(4).

However, the Committee expresses its concern that to avoid the appearance of impropriety, the court employee should not be involved in any aspect of the specific case to which his or her spouse is appointed and the judge should make full disclosure of the nature of the relationship to all parties. Furthermore, all court personnel should be cautioned about the danger of *ex parte* communications regarding those cases. See Canon 3B(8).

LEGAL REPRESENTATION OF JUDGE OR COURT STAFF BY COUNTY ATTORNEY
Opinion No. 291 (2005)

QUESTION: Would it be a violation of the Code of Judicial Conduct for a judge or the Judge's staff to be represented by the County Attorney in court proceedings wherein the judge and/or the court staff have been sued in their official capacity, even though the judge presides over cases in which the County Attorney, or an Assistant County Attorney, represents the State in mental health and indigent guardianship matters, and the County in various areas of civil litigation involving its various departments, agencies, and programs?

ANSWER: No. The Committee expresses no opinion concerning the legality of any given type of legal representation. Legal representation by the County Attorney is established by the Constitution and laws of the State of Texas. Assuming that a given type of representation is authorized by law, and further that there are no other facts present which would otherwise require recusal or disqualification under Canon 3(B)(1), the Committee is of the opinion that the judge can be represented by the County Attorney and continue to preside over other matters in which the County Attorney is appearing as legal counsel.

SOLICITATION OF WEDDING BUSINESS
Opinion No. 292 (2006)

QUESTION: May a judge directly contact couples as they leave a county clerk's office with their marriage license for the purpose of soliciting a marriage ceremony for pay?

ANSWER: No.

Canon 2A states in part "A judge….. should act at all times in a manner that promotes public confidence in the integrity …of the Judiciary." It is the belief of the Committee that a judge's active solicitation of wedding business in this manner does not promote public confidence in the judiciary.

The judge should also be mindful of the restrictions of Canons 2B and 4D. Canon 2B prohibits using the "prestige of judicial office to advance the private interests of the judge or others." Canon

4D requires judges to "refrain from financial and business dealings that tend to …exploit his or her judicial position." Solicitation of wedding business in this manner is a use of the prestige of judicial office to advance the judge's private interests and constitutes financial and business dealings that exploit the judge's judicial position.

Canon 4I (1) provides, "A judge may receive compensation…for the extra-judicial activities permitted by this Code, if the source of such payment does not…give the appearance of impropriety." The committee believes that the acts described above give the appearance of impropriety.

JUDGE WINDING DOWN LEGAL PRACTICE
Opinion No. 293 (2007)

A practicing attorney has been appointed (or elected) as a judge, and has taken the constitutional Oath of Office.

QUESTION 1: May the judge appear on behalf of a client in a federal district court in another state for the limited purpose of representing the defendant in a sentencing hearing to be concluded shortly after the judge takes office?

ANSWER 1: No, Canon 4(G) provides as follows: "A judge shall not practice law except as permitted by statute or this Code." No statute or provision of the Texas Code of Judicial Conduct would permit such a practice.

QUESTION 2: Can the judge continue to represent a client through mediation in a state court lawsuit in which liability is not contested and the only remaining issue is the dollar amount of settlement necessary to conclude the case?

ANSWER: No, for the same reason as set out above. Although mediation does not involve appearance before a court, representation of clients as described would involve the practice of law and would be prohibited by Canon 4(G).

QUESTION 3: Regarding the judge's remaining civil and criminal cases, may the judge refer the cases to other attorneys and with the consent of clients, and if permissible under the law generally relating to referrals, collect referral fees?

ANSWER: Yes, so long as the referrals and agreements are otherwise permitted by law, the judge may receive referral fees after taking office for work performed and referrals made prior to taking office. Section 33.051 of the Government Code provides criminal penalties for referral of cases for a gift or fee after taking office.

The judge should be mindful, however, that the pendency of referred cases could lead to violations of other provisions of the Code. The judge should at all times be careful to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2(A)). The judge should be most careful not to lend the prestige of judicial office to advance the private interests of others, including the attorneys and parties involved (Canon 2(B)). Finally Canon 4(D)

requires that the judge refrain from financial and business dealings that would involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. The judge should either recuse or make full disclosure in all cases involving attorneys with which the judge has pending referral transactions.

LOCAL ASSOCIATION JUDICIAL LIAISON PROGRAM
Opinion No. 294 (2009)

FACTS: A local trial lawyers association has established a judicial liaison program. Under the program, the association will have one of its members assigned to each civil court in the county to act as the association's liaison for that court. The duties of the liaison include:

1. Introducing himself or herself to the judge and court coordinator and providing personal contact information;
2. Learning the court's unique rules and procedures and acting as a resource for other association members;
3. Investigation of any complaint by the judge, court coordinator or court staff about any member of the association and investigation of any concern or issue that the association has about the court;
4. Endeavor to meet personally with the judge at least every 60 days;
5. Attend all association functions that the judge attends and personally invite the judge to the appropriate association functions; and
6. Update the Board of the association regarding the court.

The program specifically requires liaisons to act within the bounds of judicial ethics as prescribed by the Code of Judicial Conduct and to comply with all ethical guidelines regarding communications with the court.

QUESTION: May a judge participate in this program?

ANSWER: No. A judge's participation in the program as described is not permitted by the Code of Judicial Conduct.

Canon 2 A. provides that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality (emphasis added) of the judiciary." Canon 2 B. provides that a judge shall not "convey or permit others to convey the impression that they are in a special position to influence the judge."

A judge's participation in the program would join the judge and a faction of the bar in such a close relationship that the judge could not avoid the public appearance that Canon 2 A. and Canon 2 B. expressly prohibit.

JUDGE'S SPOUSE AS CANDIDATE FOR JUDICIAL OFFICE
Opinion No. 295 (2009)

FACTS: A judge's spouse is running for a judicial office.

QUESTIONS:

1. Can the judge appear in a family photo or image in the political advertising of the spouse and be identified in the photo caption by name, but not title, as the spouse of the candidate for office?
2. Can the judge be identified as the spouse of the candidate by name, but not title, in the biographical political advertising of the candidate?
3. If an inquiry is made to the candidate at a political event or interview as to who their spouse is, can the spouse be identified by name, but not title?
4. If an inquiry is made to the candidate at a political event or interview as to what their spouse's occupation is, can the occupation of the spouse who is a current judge be stated?

ANSWER:

The committee answers all of the questions in the affirmative.

DISCUSSION: In Opinion No. 180, the committee determined that a judge could not allow his name and title to be used in campaign materials and could not be introduced by name and title as the candidate's spouse without violating Canon 2 B. That Canon provides in part that "A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others…."

Canon 5 (2) further provides in part that "A judge … shall not authorize the public use of his or her name endorsing another candidate for any public office…."

It is the committee's opinion that the conduct that is the subject of this opinion is distinguishable from the conduct addressed in Opinion No. 180. By avoiding the use of the title of the judge, the judge avoids lending the prestige of office to his spouse and the conduct does not amount to an endorsement of the spouse.

This opinion is strictly limited to the questions stated. A judge who is the spouse of a candidate and who attends campaign events with the spouse should be ever vigilant to avoid placing himself in situations where his conduct could be construed as a public endorsement of his spouse.

PRACTICE OF LAW BY PART-TIME JUDGE
Opinion No. 296 (2013)

FACTS: An attorney has been appointed as a part-time family law associate judge by the district judge. The associate judge continues to represent family law clients before other district courts of that county and before courts in other surrounding counties.

QUESTIONS:

May a part-time family law associate judge, appointed by a court, represent family law clients before any of the other courts

1. in that county?
2. in surrounding counties?

ANSWER:
The committee answers Question 1 "No."
The committee answers Question 2 with a qualified "No."

DISCUSSION: A part-time associate judge appointed by a court is governed by the Code of Judicial Conduct. Canon 6D. As stated in Canon 6D(1) , certain portions of the Code of Judicial Conduct do not apply to part-time judges, including the prohibition set out in Canon 4G that a judge may not practice law. However, the following provisions of the Code do apply to a part-time judge, and are relevant to the stated inquiry:

- Canon 6D(2) states that a part-time judge "should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves, or act as a lawyer in a proceeding in which he or she has served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto."
- Canon 2A provides that "a judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
- Canon 2B provides that "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge…."
- Canon 4A provides that "a judge shall conduct all of the judge's extra-judicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially as a judge…."
- Canon 4D(1) provides, "A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or person likely to come before the court on which the judge serves…."

The committee believes that it is inconsistent with Canons 6D(2), 2A, 2B, 4A and 4D(1) for a part-time family law associate judge, appointed by a court, to represent clients before any court of the county in which he or she is appointed and before courts in the counties surrounding the county in which he or she is appointed, provided that those courts are "subject to the appellate jurisdiction of the court which he or she serves". If a part-time judge chooses to practice before any other court, the judge must be aware of the obligations under the Code of Judicial Conduct, and practice consistent with these obligations, especially Canons 2A, 2B, 4A and 4D(1).

The roles of advocate and impartial judge are in opposition to each other, and a judge may not use the authority of judicial position to advance one's private interests as an advocate. As stated in Opinion 288 (2003), A built-in dilemma exists in our justice system when a part-time judge also

maintains a law practice. Under the Texas Disciplinary Rules of Professional Responsibility a lawyer has an obligation to zealously represent his client within the bounds of the law. When that lawyer also serves as a judge, however, his [or her] duty as a judge is to be impartial and to promote public confidence in the integrity and impartiality of the judiciary. The Committee stresses to all part-time judges to keep this conflict in mind when choosing to accept representation.

COMMUNITY MINDED CHANGES MADE BY HOUSTON 19

- Criminal District Court provided more opportunities for drug treatments for those individuals facing drug charge.
- Criminal District Court increased the number of pre-trial bonds (no fee bonds) for those charged with criminal offenses.
- Criminal District Court implemented walk through bonds for persons with an arrest warrant pending allowing for the person to report to court to post a bond rather than after arrest on the warrant.
- Criminal District Court ended the practice of prohibiting parents with small children from entering the courtroom.
- Criminal District Court worked with other departments to expand services to youth offenders.
- Criminal District Court worked with other departments to expand mental health services.
- Criminal District Court was one of the first criminal courts to allow a witness to testify at trial via Skype.
- Criminal District Court invited students to visit the court to watch proceedings and talk to lawyers and court staff.
- Criminal District Court expanded dockets to include afternoon hearings as requested by the parties.
- Criminal District Court ended the practice of automatic bond revocation if a person is late to Court or fails to appear.
- Criminal District Court increased bail opportunities for those in jail waiting for trial by adding bails with House arrest, curfew, or electronic monitor.
- Civil District Court tried almost three times more cases in the first year than had been tried on average annually for the past 10 years in the court.
- Civil District Court implemented oral hearings for cases involving pro se and unanswered litigants, which provided more notice and opportunity for unrepresented and unanswered defendants to appear in court.
- Civil District Court implemented implicit bias instructions in jury trials.
- Civil District Court significantly reduced its caseload within the first year.
- Civil District Court diversified the Courts' guardian ad litems, mediators, and arbitrators with more women and minorities.
- Civil District Court increased the docket settings for oral hearings so that a litigant may receive a hearing promptly upon request.
- Juvenile District Court no longer allow detained juveniles to appear in court in their jail jumpsuit. Instead, they are given a grey polo style shirt and black pants.
- Juvenile District Court no longer cuff juveniles with leg irons when they are in court. Now, they are only hand cuffed.
- Juvenile District Court has shrunk the juvenile detention population significantly. The courts are averaging about 104 kids in detention.
- Juvenile District Court has significantly decreased the number of kids that are sent to TJJD.

- Juvenile District Court has increased the variety of court appointed attorneys who work in juvenile courts.
- Family District Court appointed to the Texas Supreme Court Children's Commission Training Committee.
- Family District Court invited to serve on the TDFPS Region 6 TXPOP Advisory Board (invitation).
- Family District Court is the only family court in Harris County to participate in the Supreme Court of Texas Children's Commission Inaugural Judicial Trauma Institute.
- Family District Court cleared backlogged docket.
- Family District Court held jury trials within first month.
- Family District Court was the first family law court to implement full Zoom/virtual court (two days after courts closed).
- Family District Court created a more compassionate court - created a "Care Closet" which contains clothes, shoes, toys, toiletries, etc., for CPS parties.
- County Criminal at Law settled the bail reform lawsuit.
- County Criminal Court at Law allowed qualified DWI first offenders to enter into diversionary programs whereby the successful completion affords defendants an expungement.
- County Criminal Court at Law substantially decreased docket size by having trials set nearly each week and sometimes twice weekly.
- County Criminal Court at Law reduced the number of trials set in 2019 from 115 to 60.
- County Criminal Court at Law implemented alternative sentencing whereby defendants sentenced to jail time may qualify for community service at our Houston Food Bank in lieu of jail time.
- County Criminal Court at Law waives the appearance for defendants who are not set for a trial or hearing where their testimony is not required.
- County Criminal Court at Law committed outsourcing court appointments to a third-party neutral group, Managed Assigned Counsel, to ensure appointments are more fair and inclusive.
- County Criminal Court at Law significantly increased the number of pretrial bonds granted so those accused of crimes may fight their case from outside the confines jail. Statistically an innocent person is more likely to plead guilty if incarcerated.
- County Criminal Court at Law added unprecedented diversity, which leads to cultural sensitivity.
- County Criminal Court at Law significantly decreased the jail population.
- County Criminal Court at Law brought about positive change in the culture and atmosphere of the courthouse.
- County Criminal at Law improved case outcomes.
- County Criminal Court at Law is developing youthful offender docket program along with fellow CCL judges.

- County Criminal Court at Law rejecting pleas that would result in criminal convictions for first time offenders.
- County Civil Court at Law was the first county civil court to implement the paperless e-filing process advancing improved judicial administration.
- County Civil Court at Law inherited a tremendous backlog of demand for jury trial cases, the court held numerous trials, clearing that backlog within the first year of being on the bench.
- County Civil Court at Law conducted a poll of 100 jurors after trial to determine areas of court performance improvement and trial process quality. The court received an overall 96% approval and satisfactory rating.
- County Civil Court at Law spearheaded the first known annual training for appointed special commissioners. The training ensures a fair and equitable hearing process. The second training is slated for the Fall.
- Justice of the Peace Court completed 72 civil cases including Evictions, Debt Claims and Drivers License Suspensions within first few days of service.
- Justice of the Peace Court completed 418 criminal cases, which included appearance and non-appearance show cause for traffic tickets, in one day.
- Justice of the Peace Court completed 701 civil cases and 1281 criminal cases in one month of service.
- Justice of the Peace Court conducted eviction workshop and invited landlords as well as tenants to educate them on proper procedures necessary for evictions.
- Justice of the Peace Court conducted the first ever truancy workshop attended by three (3) Independent School Districts at that courtroom. The workshop allowed attendees to make sure they were on the same page as far as Truancy Procedures.
- Implemented a telephone docket.
- Implemented video appearances program PRIOR TO the pandemic.
- Reviewed EXPUNCTION docket back to 2008 and got backlog up to date.
- Reviewed ATTORNEY AD LITEM appointments back to 2008, and got backlog up to date.
- Reviewed GUARDIAN AD LITEM appointments back to 2008, and got backlog up to date.
- Created and implemented a student Leadership Program.
- Created and implemented a student Participation Program. More than 1000 students have participated.
- Created a community-based training tool on Expunctions.

FILED
19-0410
7/28/2020 2:54 PM
tex-44895764
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 19-0410

In The Supreme Court of Texas

APACHE CORPORATION

Petitioner-Defendant

v.

CATHRYN DAVIS

Respondent-Plaintiff

On Petition for Review from the Court of Appeals for the Fourteenth District of Texas, Houston, No. 14-17-00306-CV

RESPONDENT, CATHRYN DAVIS', SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO APACHE CORPORATION'S PETITON FOR REVIEW

Respectfully submitted,

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent, Cathryn Davis, files this Supplemental Memorandum In Opposition To Apache Corporation's Petition For Review and respectfully asserts as follows:

I. Introduction

> A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.
>
> *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1909 (2016)

The United States and Texas' Constitutions guarantee a litigant due process,[1] an "open" court,[2] and due course of law."[3] This State's Code of Judicial Conduct and the Texas Rules of Civil Procedure safeguard this guarantee by mandating that Texas judges be neutral and independent and render fair and impartial justice: that

[1] U.S. CONST., amend. XIV

[2] TEX. CONST., art. I, section 13

[3] TEX. CONST., art. I, sections 13, 19

is, justice that is not only fair and impartial but *appears* to be fair and impartial.[4] The Texas Disciplinary Rules of Professional Conduct further safeguard this guarantee by barring Texas lawyers and law firms from "seek[ing] to influence a tribunal concerning a *pending* matter" by improper means.[5]

Apache—through its outside counsel, Vinson & Elkins' ("V&E"), political action committee—has imperiled Davis' aforementioned federal and state constitutional rights by making outsized, targeted campaign contributions to four of this Court's Justices' election campaigns while this case has been pending before this Court. These contributions create a substantial potential for bias in Apache's favor and undermine the public perception of and public confidence in this Court's independence and neutrality. For these additional reasons, Apache's Petition For Review should be denied.

[4] *See Tex. Code of Judicial Conduct*, at Canon 2A ("A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); Tex. R. Civ. P. 18b(b)(1) (A judge must recuse in any proceeding in which:(1) the judge's impartiality might reasonably be questioned").

[5] *See Tex. Disciplinary Rules of Prof'l Conduct* R. 3.05(a) (emphasis added) ("A lawyer shall not seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure."). This rule requires that a lawyer not engage in "any conduct that is or could reasonably be construed as being intended to corrupt or to unfairly influence the decision-maker." *Id.*, at Comment, 'Undue Influence," at n. 2.

II. Facts

1. Over the last two decades, Apache's appellate counsel, Vinson & Elkins ("V&E")—through its political action committee, Vinson & Elkins Texas PAC—has been the largest contributor to this Court's Justices' election campaigns.[6]

2. Since January 1, 2017, V&E's PAC has contributed $245,000 to the election campaigns of this Court's nine sitting Justices.[7] Those contributions are as follows:

Hon. James Blacklock	**$30,000**
Hon. Jane Bland	**$40,000**
Hon. Brett Busby	**$45,000**
Hon. Jeff Boyd	**$45,000**
Hon. John Devine	**$25,000**
Hon. Paul Green	**$5,000**
Hon. Eva Guzman	**$5,000**
Hon. Nathan Hecht	**$45,000**
Hon. Debra Lehrmann	**$5,000**

[6] https://www.law360.com/articles/1215859/these-10-firms-gave-the-most-to-state-judicial-elections; https://www.texastribune.org/2010/02/02/lawyers-biggest-donors-to-judicial-elections/; https://www.ethics.state.tx.us/search/cf/;

[7] *See* https://www.ethics.state.tx.us/search/cf/

3. Since May 20, 2019—one week after Apache notified this Court it intended to file a Petition for Review—V&E's PAC has contributed $175,000 to four Justices' (Chief Justice Hecht; Justice Bland, Justice Boyd, and Justice Busby) election campaigns. It contributed $80,000 to these Justices' campaigns *after* this Court ordered the parties to file merits briefs:

Hon. Jeff Boyd	**$25,000** **$20,000**	**May 20, 2019** **June 24, 2020**
Hon. Nathan Hecht	**$25,000** **$20,000**	**May 20, 2019** **June 24, 2020**
Hon. Brett Busby	**$25,000** **$20,000**	**May 20, 2019** **June 24, 2020**
Hon. Jane Bland	**$20,000** **$20,000**	**September 30, 2019** **June 24, 2020**

4. In the period 2019-2020, V&E's PAC's contributions to Chief Justice Hecht and Justices Bland, Boyd, and Busby's election campaigns make V&E their largest campaign donor.[8]

5. V&E's PAC's contributions to these four sitting Justices' campaigns far exceed the contributions V&E's PAC has made to their opponents' campaigns in this same time period: $0.00.[9]

[8] https://ballotpedia.org/Nathan_Hecht; https://ballotpedia.org/Jane_Bland; https://ballotpedia.org/Jeffrey_S._Boyd; https://ballotpedia.org/Brett_Busby

6. In the period January 1, 2017 through present, Davis' counsel has not contributed any money to any sitting Texas Supreme Court Justice's election campaign.

7. Empirical studies have found a "significant relationship" between judicial campaign contributions to state Supreme Court justices and the justices' decisions. For example, a 2013 study found:

- "A significant relationship…between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters."
- "The more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants appearing before them in court."
- "A justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time."

See Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Elections,* AMERICAN CONSTITUTION SOCIETY 7 (2013) available at http://www.acslaw.org/sites/default/files/ACS_Justice_at_Risk_6_24_13_0.pdf; *see also* Morgan L.W. Hazelton, et al, *Does Public Financing Affect Judicial Behavior? Evidence From the North Carolina Supreme Court,* 44 AMERICAN POLITICS RESEARCH, Issue 4, 587-617 (September 2, 2015), available at

[9] *See* https://www.transparencyusa.org/tx/pac/vinson-and-elkins-texas-pac-16023-mpac

https://journals.sagepub.com/doi/pdf/10.1177/1532673X15599839; Michael Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011); Damon M. Cann, *Justice For Sale? Campaign Contributions And Judicial Decision-Making*, August 10, 2006, available at SSRN: https://ssrn.com/abstract=991364; Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices*, 1994-1997, 31 POL. & POL'Y 314, 330 (2003).

8. A 2013 poll found that 59% of the respondents believed campaign contributions to judges had a "great deal" (59%) influence on their decisions. *See* https://www.brennancenter.org/sites/default/files/press-releases

9. A 2009 poll found that 68% of the respondents would doubt a judge's impartiality where one of the litigants spent $50,000 to support the judge's election campaign. *See* https://www.brennancenter.org/sites/default/files/2009

10. A 2001 poll found that almost half of state Supreme Court justices (45%) and state appellate court judges (49%) polled believe campaign contributions influence their decisions. *See* GREENBERG QUINLAN ROSNER RESEARCH, INC., *Justice At Stake—State Judges Frequency Questionnaire* (2002), available at

https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey%20of%20Almost%202%2C500%20Judges.pdf

11. In November, 2019 Chief Justice Hecht opined that "lawyers, and even judges themselves, believe that raising money and running with partisan labels give the appearance of outside influence." *See* Hon. Nathan L. Hecht, *Judicial Independence: Threats From Without And Within*, 94 N.Y.U. Law Review 1057, 1064 (2019).

12. On April 11, 2019, Chief Justice Hecht asserted that allowing judges to accept campaign contributions from lawyers appearing before them "stinks to high heavens." *See* David M. Davies, *Is There A Better Way To Pick Judges? A New Bill Wants To Explore That Process,* Texas Public Radio, April 11, 2019, available at https://www.tpr.org/post/there-better-way-pick-judges-new-bill-wants-explore-process

13. In his 2009 "State of the Judiciary" Address, Hon. Wallace B. Jefferson—then, this Court's Chief Justice—criticized "the corrosive influence of money in judicial elections"; noted that "[p]olls…find that more than 80% of those questioned believe contributions influence a judge's decision"; and stated that, based on the deteriorating "confidence in the courts" those contributions engendered, "[t]he status quo is broken." *See* https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-2009.pdf

14. In his 1999 "State of the Judiciary" Address, Hon. Thomas R. Phillips—then, this Court's Chief Justice—observed that judicial campaign contributions "*do* compromise the appearance of fairness." *See* Hon. Thomas R. Phillips, *State of the Judiciary Address to the 76th Legislature of the State of Texas*, at 11 (March 29, 1999) (emphasis original), available at https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-1999.pdf

III. Argument

Apache's Counsel's Outsized, Targeted Contributions To This Court's Justices During This Case's Pendency Imperil Davis' Right To Due Process, An Open Court, And Due Course of Law

Vinson & Elkins—through its PAC's—outsized, targeted campaign contributions to four Justices of this Court during this case's pendency imperil Davis' right to due process under the United States Constitution and to an "open court" and "due course of law" under the Texas Constitution by creating the potential for bias in its client—Apache's—favor and by undermining the public perception of and confidence in this Court's independence and neutrality.

The United States Supreme Court has held that a litigant's Fourteenth Amendment right to Due Process includes the right to judge(s) and to a court that are truly neutral and disinterested. *See Williams v. Pennsylvania*, 135 S.Ct. 1899 (2015). The test for neutrality is "whether, as an objective matter, the ***average judge*** in his position is likely to be neutral, or whether there is an unconstitutional

potential for bias." *Id.*, at 1905 (emphasis added), citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) (internal quotations omitted).

In *Williams*, the Court held that, on a multi-judge panel, the neutrality requirement applies not only to each individual judge but to the court as a whole. *Id.*, at 1909 ("A multimember court must not have its guarantee of neutrality undermined…"). Critically, the Court emphasized, the Due Process clause proscribes even the "***appearance*** of bias"." *Id.* (emphasis added) ("[T[he appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.").

In *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015), the Court reiterated that a judge and a court must not only be neutral and disinterested in fact but in appearance. In *Williams-Yulee*, the Court held that the First Amendment permits States to bar judges and judicial candidates from personally soliciting funds for their campaigns. The Court based this holding on its determination that there is a "compelling interest" in the "***public perception***" of and ***"public confidence"*** in "judicial integrity." *Id.*, at 1666 (emphasis added) ("It follows that public perception of judicial integrity is 'a state interest of the highest order.'"); 1667 ("The concept of public confidence in judicial integrity…is genuine and compelling."). The Court made clear that "justice must satisfy the ***appearance of***

justice." *Id.* (emphasis added), citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (internal quotations omitted).

The Texas Constitution's Open Courts and Due Course of Law provisions are equally—if not, more—protective of a litigant's right to a neutral, independent judicial decision-maker and to impartial justice. The "Open Courts" provision states, in relevant part:

> All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX CONST., art. I, sec. 13

This Court has held the "Open Courts" provision is *sui generis*:

> [T]here is no provision in the federal constitution corresponding to our constitution's "open courts" guarantee. Indeed, that guarantee is embodied in Magna Carta and has been a part of our constitutional law since our republic.

See Lucas v. United States, 757 S.W.2d 687, 690 (1988)

The Due Course of Law provision provides:

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEX. CONST., art I, sec. 19.

This Court has held that the Due Course of Law provision has "independent vitality, separate and distinct from the due process clause of the Fourteenth

Amendment to the U.S. Constitution…" *In the Interest of J.W.T.*, 872 S.W.2d 189(Tex. 1994).

1. V&E's Substantial, Targeted Contributions To This Court's Justices Create The Potential For Bias In Apache's Favor

V&E's PAC's outsized, targeted contributions to Justices of this Court while this case has been pending before it create a substantial potential for bias in Apache's favor. As detailed above, multiple independent studies establish that judicial campaign contributions influence judicial decision-making. Most concerningly, a 2013 study found "a significant relationship" between business group contributions to state supreme court justices and those justices' votes in business cases. *See* Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Elections*, AMERICAN CONSTITUTION SOCIETY 7 (2013) available at http://www.acslaw.org/sites/default/files/ACS_Justice_at_Risk_6_24_13_0.pdf

Apache is a Fortune 500 oil and gas company with over $18 billion in assets.[10] Its outside counsel—V&E—routinely represents energy companies and other business interests before this Court.[11]

[10] *See* https://fortune.com/company/apache/fortune500/

[11] *See* https://www.velaw.com/practices/texas-supreme-court/ ("Our work before the Court covers all major industries, including energy, healthcare, media, transportation, construction, engineering, and insurance, among others.").

Since January 1, 2017, V&E's PAC has contributed $245,000 to this Court's Justices' election campaigns—making it the largest donor to their campaigns. It has contributed $175,00 to four Justices' campaigns in the approximately one-year period this case has been pending in this Court. It contributed $80,000 to those Justices' campaigns ***after*** this Court ordered the parties to file merits briefs. Moreover, it has given no money to those Justices'—or, apparently, to any other sitting Justice's—opponents' campaigns.

Based on these facts and the empirical evidence chronicled above, the "average judge" would unlikely be neutral in this matter. In short, V&E's outsized, targeted contributions to this Court's Justices' campaigns create a substantial potential for bias in Apache's favor. *See Williams v. Pennsylvania*, 135 S.Ct. at 1905.

2. V&E's Substantial, Targeted Campaign Contributions To This Court's Justices Undermine The Public Perception Of And Public Confidence In This Court's Independence And Neutrality

V&E's PAC's outsized, targeted contributions to four sitting Justices of this Court during this case's pendency undermine the public perception of and public confidence in this Court's independence and neutrality. As the polls chronicled above reveal, an overwhelming majority of the public believes that judicial contributions influence judicial decision-making. According to a 2009 poll, 68% of the public would doubt a judge's impartiality where one of the litigants spent

$50,000—approximately the *same* amount as V&E's PAC has given four of this Court's Justices during this case's pendency—to support the judge's election campaign. *See* https://www.brennancenter.org/sites/default/files/2009

Even more damning, approximately half of state supreme court and appellate justices polled believe this to be true. *See* GREENBERG QUINLAN ROSNER RESEARCH, INC., *Justice At Stake—State Judges Frequency Questionnaire* (2002), available at https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey%20of%20Almost%202%2C500%20Judges.pdf

Indeed, in November, 2019 Chief Justice Hecht affirmed that "judges…believe that raising money and running with partisan labels give the appearance of outside influence." *See* Hon. Nathan L. Hecht, *Judicial Independence: Threats From Without And Within*, 94 N.Y.U. Law Review 1057, 1064 (2019). In so stating, Chief Justice Hecht echoed the views of two former Chief Justices of this Court (Hon. Wallace B. Jefferson and Hon. Thomas R. Phillips), United States Supreme Court Justice Sandra Day O'Connor (ret.), and former Justice (current United States Court of Appeals for the Fifth Circuit Judge) Don Willet, among others.

Justice O'Connor—who has long vigorously opposed allowing lawyers and litigants to contribute to the campaigns of judges before whom they appear—pithily summarized the problem:

> Ignoring the role of special-interest money, particularly in judicial election, is like ignoring an alligator in your bathtub.[12]

Judge Willet stated:

> I understand 100% the suspicion that donations drive decisions. That skepticism siphons public confidence, and that's toxic to the idea of an impartial, independent judiciary. [13]

Quoting former Texas Governor Sul Ross, Judge Willet further opined:

> The loss of public confidence in the judiciary is the greatest curse that can ever befall a nation.

Id.

IV. Conclusion

Apache—through its outside counsel, Vinson & Elkins' political action committee—has imperiled Davis' federal and state constitutional rights to due process, an "open court," and "due course of law" by making outsized, targeted contributions to this Court's Justices while this case has been pending before it.

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[12] *See* Nina Totenberg, *Justice O'Connor Criticizes Campaign Finance Ruling*, January 26, 2010, available at https://www.npr.org/templates/story/story.php?storyId=122993740

[13] Andrew Cohen, "An Elected Judge Speaks Out Against Judicial Elections," September 3, 2013, available at https://www.theatlantic.com/national/archive/2013/09/an-elected-judge-speaks-out-against-judicial-elections/279263/

These contributions create a substantial potential for bias in Apache's favor and undermine the public perception of and public confidence in this Court's independence and neutrality.

For these additional reasons, Respondent, Cathryn Davis, respectfully requests this Court deny Apache's Petition For Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), I hereby certify that this Reply complies with Tex. R. App. P. 9.4(i)(2)(C), as it contains 2,695 words, excluding those sections not counted under Rule 9.4(i)(1).

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