SMU | DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 53 | Issue 1 Article 10

2000

Opening Comment to the March 1999 Roy R. Ray Lecture: Judicial Independence and Democratic Accountability in Highest State Courts

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OPENING COMMENT TO THE MARCH 1999 ROY R. RAY LECTURE

"JUDICIAL INDEPENDENCE AND DEMOCRATIC ACCOUNTABILITY IN HIGHEST STATE COURTS"

*William V. Dorsaneo, III**

I. INTRODUCTION

BEFORE judges can be called ideal or even good, they must be fair and impartial as well as courteous and humane; as former Texas Supreme Court Justice W. St. John Garwood once said, "[b]efore you can be a *good* judge, you've first got to be a judge."[1] The judicial selection and retention process, including the judicial campaign finance practices, are the controlling factors in this equation. As these attributes of Texas judicial elections are currently receiving increased attention and criticism, they are particularly important issues in Texas today.[2]

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* Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law, Southern Methodist University School of Law. Professor Dorsaneo acknowledges the contributions of Tom M. Dees, III to this article.

1. Attributed to Texas Supreme Court Justice W. St. John Garwood (1948-58) (emphasis added).

2. On February 23, 1999, the Supreme Court of Texas Judicial Campaign Finance Study Committee issued its report recommending certain changes for improving judicial elections in Texas. The supreme court appointed the committee "to determine whether the Supreme Court of Texas can improve the administration of justice by promulgating or amending rules that bear upon judicial campaign finance." WAYNE FISHER ET AL., SUPREME COURT OF TEXAS JUDICIAL CAMPAIGN FINANCE STUDY COMMITTEE, REPORT AND RECOMMENDATIONS, 2 (February 1999) [hereinafter CAMPAIGN FINANCE STUDY] (quoting Order in Misc. Docket No. 98-9179 (Oct. 19, 1998), ¶ 1). Thus, the committee's primary goal was that "Texans . . . perceive their judges as fair and impartial, and Texas judges . . . in fact, be fair and impartial." CAMPAIGN FINANCE STUDY at 3.

The committee made six recommendations for the Supreme Court of Texas to consider as effective means of improving judicial elections in Texas. The committee's first recommendation is that the supreme court enhance public access to information concerning both judicial campaign contributions and direct expenditures. *See id.* at 10. To accomplish this first recommendation, the committee made six specific proposals. First, the committee proposes that the supreme court amend the Code of Judicial Conduct to require judges and judicial candidates to file their campaign reports with the Office of Court Administration (OCA). *See id.* at 11. Second, the Legislature should amend the Election Code such that those persons who are to file direct expenditure reports should be required to file copies of these reports with the OCA. *See id.* Third, the Legislature should provide budgeting and staffing assistance to the OCA to enable it to post copies of these direct expenditure reports on the Texas Judiciary Internet site, and judges and candidates should be encouraged to file these reports electronically to facilitate their being posted timely. *See id.* Fourth,

the Legislature should also assist the OCA with budgeting and staffing needs so "reminder" cards may be send to judges and judicial candidates ten days prior to the date the direct expenditure reports are due, and, for those who failed to file their reports timely, such cards may be sent ten days after the reports are due. *See id.* Fifth, action should be taken to make the public aware that these reports are available. *See id.* Finally, the Ethics Commission and county elections officials should ensure they have full access to the campaign contributions and direct expenditure reports they are charged with maintaining. *See id.* at 13.

The committee's second recommendation is that the supreme court promulgate rules extending and strengthening the Judicial Campaign Fairness Act's contribution limits. *See id.* Specifically, the committee made four proposals to this effect. First, the committee proposes that the supreme court revise Texas Rule of Civil Procedure 18c to recuse any judge who accepts campaign contributions from a litigant or lawyer exceeding the Judicial Campaign Fairness Act's limits and extend this rule to direct expenditures and non-natural persons other than law firms as well as re-name Rule 18c "Recusal Based on Excessive Contributions or Direct Campaign Expenditures." *See id.* at 15-17. In conjunction with this proposition, the committee also proposes that the supreme court renumber the current Rule 18c (regarding the recording and broadcasting of court proceedings) as Rule 18d. *Id.* at 15 n.79. Second, the committee proposes that the supreme court amend Canon 5 of the Code of Judicial Conduct to track the Judicial Campaign Fairness Act and Proposed Rule 18c's language such that one who violates the Judicial Campaign Fairness Act is subject to judicial discipline. *See id.* at 17. Third, the committee proposes that the supreme court appoint a special task force to study direct campaign expenditures, "soft money," and other forms of campaign spending not directed towards candidates, such as "voter education" organizations. *See id.* at 18. Fourth, the committee proposes that the Legislature re-evaluate the limits and regulations of direct campaign contributions and "soft money" in an effort to eliminate perceived loopholes, and that the supreme court consider utilizing a tiered fund-raising system "to advance the objective of public access and openness in matters relating to judicial campaign finance." *Id.* at 19. Moreover, the committee specifically rejects the notion that judges should form committees of lawyers to solicit or manage their campaign funds, because such committees may precipitate the perception that there is a group of individuals with special access to judges, or to whom judges are particularly indebted. *See id.* at 20.

The committee's third recommendation is that the supreme court promulgate rules to limit the aggregation of campaign "war chests" to a reasonable amount. *See id.* Rejecting the proposal prohibiting judges from retaining any surplus campaign funds between elections, the committee proposes that the supreme court should allow judges to retain "an amount equal to one-half of the voluntary campaign expenditure limits applicable to . . . judge[s] under the Judicial Campaign Fairness Act but not to exceed $150,000" between elections. *Id.* at 21. Moreover, the committee further proposes that the supreme court amend Canon 5 of the Code of Judicial Conduct to state that the supreme court requires judges and candidates to divest themselves of additional surplus campaign funds six months after the election by remitting such funds to the comptroller of public accounts for deposit in the state treasury, or to one or more persons who made the contributions. *See id.* at 21-23; *see also* TEX. ELEC. CODE ANN. § 254.204(a)(3), (4) (Vernon 1986).

The committee's fourth recommendation is that the supreme court limit political organizations' ability to use judges as fund-raising tools, although Chief Justice Davis, Judge Godbey, and Judge Kennedy object to this recommendation. *See* CAMPAIGN FINANCE STUDY at 23. Upon further reflection regarding how judges are to divest themselves of additional surplus campaign funds, the committee determined that many judges are expected to make contributions from their campaign funds to political organizations, including political parties, and that failure to comply with such expectations is often met with "dire political consequences." *Id.* As average Texans often perceive such circumstances as an inference of impropriety, the committee proposes that the supreme court amend Canon 5 of the Code of Judicial Conduct such that neither political organizations nor candidates shall solicit judges, and judges shall not make contributions to political organizations or candidates, with the noted exceptions that judges may purchase tickets for political events and make political contributions from their personal funds. *See id.* at 24.

The committee's fifth recommendation is that the supreme court limit judicial appointments for campaign contributors who give amounts exceeding the Judicial Campaign Fairness Act's limits for individuals who have been appointed numerous times repetitively. *See*

Although forty states elect or re-elect some of their judges, only nine states, including Texas, do so with regard to higher State Court judges through partisan judicial elections[3] that have become considerably more partisan since the 1960's.[4] The current Texas Constitution of 1876 provides for the election of all judicial officers.[5] During the recently concluded 76th Legislative Session, however, proposed constitutional amendments and companion legislation calling for the gubernatorial appointment of appellate judges and for the election of appellate judges on a non-partisan retention election basis were debated in both the House of Representatives and the Senate.[6] Similarly, the regulation of campaign

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id. at 25. To this effect, the committee proposes an amendment to Canon 5 of the Code of Judicial Conduct that would ban judges from knowingly appointing a lawyer who has made a direct expenditure on the judge's behalf or who has made a contribution to the judge in excess of the Judicial Campaign Fairness Act's limits. *See id.* at 25-27. The committee further proposes that "judges refrain from repeatedly reappointing lawyers, particularly campaign contributors, to fee-paying positions if other qualified lawyers are susceptible of appointment." *Id.* at 27.

The committee's final recommendation is that the supreme court encourage the State Bar of Texas and the Secretary of State to continue efforts to develop and disseminate voter guides or pamphlets for judicial elections. *See id.* at 27. The committee adopts the American Bar Association's position regarding the use of such educational efforts as "reduc[ing] the pressure for judicial fund-raising and reduc[ing] the unlevel playing field and other frequent problems of campaign fund-raising . . . [which] obviously will go far to enable voters to make more informed choices." *Id.* (quoting AMERICAN BAR ASSOCIATION TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, REPORT AND RECOMMENDATIONS, Part II, 56 (July 1998)). Hence, the committee applauds the introduction of a voter's guide for the statewide judicial elections of November 1998 by the State Bar of Texas and the Secretary of State's proposal to the Legislature for similar guides to be used for various other elections, and encourages additional action in the future by both parties. *See* CAMPAIGN FINANCE STUDY at 27.

3. The nine states are: Alabama, Arkansas, Illinois, Louisiana, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia. *See* Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still The Best Compromise?*, 49 U. MIAMI L. REV. 1, 13 n.56 (1994).

4. Politically speaking, Texas was essentially a one-party state when the Texas Constitution of 1876 was adopted. The conservative Democratic party (not to be confused with the modern Democratic party) was the dominant force, and strong anti-Republican sentiments originated from Radical Republican Governor E. J. Davis' Reconstruction administration . In fact, from 1874 until 1961, no Republican candidates were elected to local offices. *See* L. TUCKER GIBSON, JR. & CLAY ROBINSON, GOVERNMENT AND POLITICS IN THE LONE STAR STATE 163 (1993). In 1961, however, John Tower was elected as "the first Republican United States senator to represent Texas during the 20th Century." *Id.* at 167. Tower's election in 1961, as well as his subsequent re-elections in 1966, 1972, and 1978, paved the way for the election of other Republican candidates statewide thus effectively marking the two-party political system's beginning in Texas. *See id.*

5. *See* JOHN CHARLES TOWNES, PLEADING IN THE DISTRICT AND COUNTY COURTS OF TEXAS 102 (2d ed. 1913).

6. Twenty separate bills were submitted to the Texas Senate or House of Representatives regarding judicial election reform during the recently concluded 76th Legislative Session. In particular, Senate Joint Resolution 9, Senate Joint Resolution 11, Senate Bill 59, Senate Bill 78, House Joint Resolution 49, House Bill 346, and House Bill 1361 all concern the selection of appellate judges in Texas. Of this proposed legislation, Senate Joint Resolution 9 had the most support. *See* Thomas R. Phillips, *The Great Debate: Election Versus Appointment of Judges*, HEADNOTES, May 1, 1999, at 10. Senate Joint Resolution 9 proposed "a constitutional amendment providing for gubernatorial appointment to fill vacancies in the offices of appellate justices and judges, for nonpartisan retention elections for those justices and judges, and for gubernatorial appointment to fill vacancies in the office

finance practices is also receiving wide-spread attention in the Texas Legislature as well as in a number of other important quarters.[7] Hence, as

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of district judge in accordance with certain standards." Tex. S.J. Res. 9, 76th Leg., R.S. (1999). This proposed method, often referred to as the "Missouri Plan," is the basic scheme used by a majority of states for selecting and retaining judges. *See* Hon. Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur On The Edge Of Extinction Or A Survivor In A Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 319 (1997). The proposed legislation successfully passed the Senate Jurisprudence Committee with minor alterations only to encounter significant changes in the House of Representatives' State Affairs Committee, apparently undermining the chances of having an agreed bill to submit to the Governor. The House Committee radically changed Senate Joint Resolution 9 to match House Joint Resolution 96, which previously died in committee. In addition to judicial election reform, the resolution, as altered by the House Committee, abolished the Court of Criminal Appeals and made one Supreme Court with fifteen justices.

Ironically, while Texas strives to adopt a version of the Missouri Plan, it has lost considerable support in its home state. *See id.* at 330. In fact, in 1988 an effort began in the Missouri House of Representatives to have the Missouri Non-Partisan Court Plan abolished. In 1992, the issue was again addressed when House Joint Resolution 25 was proposed, advocating "the direct election of judges in partisan elections." *Id.*; *see* Mo. H.R.J. Res. 25, 86th Leg., 2d Sess. (1992). The partisan judicial elections called for in House Joint Resolution 25 are similar to those used in Texas today.

Of the twenty articles of proposed legislation submitted during the 76th Legislative Session, only two minor bills were submitted to the Governor: House Bill 59 and Senate Bill 1726. House Bill 59, advocating a voter's information guide for judicial elections available to the public on the Internet, passed both the Senate and the House by unanimous vote, but was vetoed by Governor Bush on June 20, 1999. *See* Texas Legislature Online (visited Sept. 27, 1999) <http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/billhist.d2w/report?LEG=76&SESS=R&CHAMBER=]H&BILLTYPE=B&BILLSUFFIX=00059>. Senate Bill 1726 was signed into law by Governor Bush on June 18, 1999, and became effective on September 1, 1999. The bill amends section 252.005 of the Election Code, and requires a candidate for district judicial office with voters from only a single county to file documents showing the appointment of a treasurer and campaign finance reports. Such filings have been required for most statewide elections other than judicial elections. *See* Texas Legislature Online (visited Sept. 27, 1999) <http://www.capitol.state.tx.us/cgi-bin/db2www/tlo/billhist/billhist.d2w/report?LEG=76&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=01726>. Similarly, the 75th Legislative Session of 1997 was successful, "[e]xcept for the recurring inability to improve judicial selection." Thomas R. Phillips, *An Update From The Chief Justice* (visited Sept. 27, 1999) <http//www.supreme.courts.state.tx.us>.

7. The most widespread attention brought to the issue of judicial campaign contributions possibly affecting favorable court decisions in Texas came from the nationally aired CBS television show *60 Minutes*. In 1987, *60 Minutes* asked whether justice was for sale in Texas. *See 60 Minutes: Justice For Sale* (CBS television broadcast Dec. 6, 1987). The issue was again given national attention in 1998 when *60 Minutes* broadcasted a second segment asserting justice is still for sale in Texas due to judicial campaign contributions. *See 60 Minutes: Justice For Sale* (CBS television broadcast, Nov. 1, 1998). Moreover, a study conducted by Texans for Public Justice (TPJ) supports the position that sizable campaign contributions corrupt the appearance of judicial independence. According to this study, more than forty percent of the $9.2 million raised by the seven winning judicial candidates for the Texas Supreme Court in 1994 and in 1996 came from parties with cases before the court, or from sources closely affiliated with those parties. *See* Mark Hansen, *A Run For The Bench*, 84-OCT A.B.A. J. 68, 71 (1998). Likewise, sixty percent of the court's decisions between 1994 and 1997 involved a judge who accepted campaign contributions from one of the parties of a suit before the court. *See id.*

Similarly, Texas Supreme Court Chief Justice Thomas Phillips noted in his "State of the Judiciary" address to the 76th Legislature that despite generally favorable reviews of Texas courts, a recent Texas poll revealed that eighty-three percent of the respondents believe judges are strongly or at least somewhat influenced by campaign contributions while only seven percent of the respondents did not. *See* Thomas R. Phillips, *State of the Judiciary*

you can see, today's Roy R. Ray Lecture topic is both important and timely, as the final outcome of these debates will affect all Texans.

II. SPEAKERS

It would be difficult to select a better or more qualified group of leading legal citizens to discuss these issues. I will introduce our principal speaker, Paul Carrington, first and then the responders, Nathan Hecht, Sharon Keller, and Tom Phillips, in the order they will speak. Please do not applaud until all of the introductions are finished. When the speakers have concluded, we will have a question and answer session for which microphones are located in the aisles.

PROFESSOR PAUL D. CARRINGTON

Our principal speaker is Professor Paul D. Carrington, who is a native of Dallas and a graduate of the University of Texas and Harvard Law School. He has been teaching law since 1957. In that time, he has taught in fifteen American law schools, including Southern Methodist University, and five foreign universities. He has authored over one hundred law review articles as well as several books and monographs. His current work, *Stewards of Democracy: Laws of Public Profession*, will be published by Harper Collins in July. Professor Carrington was Dean of the Duke University School of Law from 1978 until 1988 and he is still a member of that faculty as the Harry R. Chadwick, Sr. Professor of Law. He has served in the important position as reporter to the Civil Rules Committee of the Judicial Conference of the United States, advising the Supreme Court on changes in the Federal Rules of Civil Procedure. More recently, he served the American Bar Association by planning a national conference on the topic of judicial and independence accountability. Professor Carrington also presently serves as reporter of the Citizens for Independent Courts, and the Organ of the Century Fund addressing the same topic.

JUSTICE NATHAN L. HECHT

Justice Nathan L. Hecht of the Texas Supreme Court was elected to the Court in 1988 and re-elected in 1994. Throughout his service on the

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(visited Sept. 27, 1999) <http//www.supreme.courts.state.tx.us>. Likewise, Chief Justice Richard Posner of the Seventh Circuit Court of Appeals also commented on the effect of to judicial campaign contributions, referring to "the low professional quality and rampant politicization of many of the state judiciaries, led by Texas." *Id.* Additionally, Charles Wolfram, a legal ethics scholar, noted "the ritualized scandals of political spending" in Texas judicial elections. *Id.* Chief Justice Phillips makes the point, however, that "partisan, well-funded campaigns are necessary and inevitable in modern Texas" and that while most judicial candidates do not enjoy campaign fund raising, "those who decline to raise money or severely restrict the contributions they accept are not likely ever to be called 'judge.'" *Id.* Chief Justice Phillips clarified the effect of such contributions to judicial elections in Texas by adding "[m]ost judges in Texas, as elsewhere, base their rulings on the facts and the law, not on extraneous considerations. But these attributes [judicial campaign contributions] of Texas justice *do* compromise the *appearance* of fairness." *Id.*

court, he has been its liaison to all committees involved in studying and revising the rules of practice, procedure, and administration in Texas courts. Justice Hecht began his judicial service in 1981 when he was appointed to the 95th District Court of Dallas County, to which he was elected in 1982 and re-elected in 1984. In 1986, he was elected to the Court of Appeals for the Fifth District in Dallas, where he served until being elected to the Texas Supreme Court in 1988. Justice Hecht received his B.A. degree with honors in Philosophy from Yale University in 1971. He attended Southern Methodist University School of Law as a Hatten Sumners Scholar and received his J.D. degree with honors in 1974. While attending Southern Methodist University, he was elected to the Order of the Coif and served as an Editor for the *Southwestern Law Journal*, now named the *SMU Law Review*. Justice Hecht is licensed to practice law in Texas and the District of Columbia as well as the United States Supreme Court and other Courts. He is a member of the American Bar Association, the Philosophical Society of Texas, and an elected member of the American Law Institute as well as a fellow in various bar foundations. Since 1971, he has attended the Valley View Christian Church of Dallas where he is an elder, teacher of an adult Sunday School class, and an expert organist and pianist.

JUDGE SHARON KELLER

Our next participant is Judge Sharon Keller of the Court of Criminal Appeals. Judge Keller is from Dallas and is a graduate of the Greenhill School. She attended Rice University, receiving her B.A. degree in Philosophy in 1975. She received her J.D. degree from Southern Methodist University School of Law in 1978. Judge Keller has one son, Temple. In 1978, she began her legal career in private practice in Dallas. In 1981, she began working in her family's restaurant business. From 1987 until 1994, Judge Keller worked as an Assistant District Attorney in the appellate section of the Dallas County District Attorney's Office. She was elected to the Texas Court of Criminal Appeals in 1994. Currently, she is a member of the Judicial Advisory Council to the Community Justice Assistance Division of the Texas Department of Criminal Justice. Judge Keller presently serves on the Judicial Committee on Information Technology and recently served on the Supreme Court Jury Task Force. She also serves on the Rules Committee of the Court of Criminal Appeals and on the court's Capital Murder Habeas Corpus Committee. She is also a member of the Executive Board of the Southern Methodist University School of Law. Importantly, Judge Keller is the first woman to serve on the Court of Criminal Appeals. Her current term on the Court runs through the year 2000.

CHIEF JUSTICE THOMAS R. PHILLIPS

And finally, but certainly not least, Texas Supreme Court Chief Justice Thomas R. Phillips. A Harvard Law graduate, Chief Justice Phillips was

appointed to the Texas Supreme Court on January 4, 1988. He was subsequently elected in November of 1988 as well as on the completion of his first abbreviated term in 1990 and again in 1996. His current term continues through the year 2002. A Dallas native, Chief Justice Phillips was a trial attorney in Houston before being appointed to the 280th District Court in Harris County in 1981. Like Justice Hecht, Chief Justice Phillips is also an elected member of the American Law Institute, serving as an advisor to its Federal Judicial Code project. He is also a member of the American Bar Association's Task Force on Lawyer Political Contributions, and he serves on the Board of Directors of the Southwest Legal Foundation. From 1989 to 1996, Chief Justice Phillips served on the Federal - State Jurisdiction Committee of the Judicial Conference of the United States, and from 1989 to 1995 he was director of the American Judicature Society. Chief Justice Phillips is also a member of both the Philosophical Society of Texas and the Houston Philosophical Society.

CONCLUSION

I would like to thank all of our participants for generously donating their time to the Roy Ray Lecture and to Southern Methodist University School of Law as well as to all of you in the audience for attending. I know you will find the lecture both interesting and informative. I will now turn the podium over to Professor Carrington.