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30 Cap. U. L. Rev. 489-498 (2002)

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# GEORGETOWN LAW

## Faculty Publications



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**COMMENT ON PROFESSOR CARRINGTON'S ARTICLE  
"THE INDEPENDENCE AND DEMOCRATIC  
ACCOUNTABILITY OF THE SUPREME COURT OF OHIO."**

ROY A. SCHOTLAND\*

Paul Carrington's paper requires what administrative law people call "hard look" review" for two reasons:

*First:* In his view, life tenure for judges "is a genuinely bad idea," so outlandish it has been copied only once, by "the constitution of Western Samoa."<sup>1</sup>

In my view, whether or not Article III<sup>2</sup> is written as members of a new constitutional convention might write it, there is nothing more fundamental to the way our entire judicial system operates (including in many ways, although indirectly, our state courts) than federal judges being as independent as law can make them. Perhaps I suffer from Burkean skepticism about reform of long-standing institutions, or perhaps I am merely a supporter of the status quo.

But I believe that, despite obvious drawbacks in giving anyone life tenure in any job, we gain *far* more than we lose by making federal judges independent, i.e., so protected from external pressures and internal incentives. Article III's grant of life tenure is the bedrock of our Constitution's guarantees (and therefore our Rule of Law and our protection of minorities and dissenters) and assurances that lasting values are not eroded by ephemeral passions.<sup>3</sup>

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<sup>1</sup> Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, at 467 (forthcoming 2002). Since the aspect of life tenure that concerns Carrington isn't senility but is unaccountability, he ought not ignore New York State's fourteen year terms, let alone the service to age 70 in Massachusetts, New Hampshire and the House of Lords (and for the Lord Chancellor, service to age 75). Perhaps even worse is his not considering how much "accountability" exists in the career judiciaries in Europe, Japan, etc.

<sup>2</sup> U.S. CONST. art. III.

<sup>3</sup> "There are particular moments in public affairs when the people . . . are misled by the artful misrepresentation of interested men. . . . What bitter anguish would not the people of Athens have often escaped if their government had contained as provident a safeguard against the tyranny of their own passions. Popular liberty might have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next." THE FEDERALIST No. 63 (James Madison).

"The republican principle ... does not require unqualified compliance with every sudden breeze of passion for every transient impulse that the people may receive from the arts of men who flatter their prejudices to betray their interest." THE FEDERALIST No. 71 (Alexander Hamilton).

Given the mountain of thoughtful writing about counter-majoritarianism, I will not even try to add to that commentary. There is no proving that life tenure is, on balance, desirable because like everything else in life, it has strengths and weaknesses, and different people may bring out the balance at different points. But when an attack on Article III comes with provable errors, noting those errors raises a caveat about the attack. I believe that life tenure is so uniquely important, that no error-ridden attack on it can enjoy a free pass.

*Second:* Carrington attacks the integrity of elective judges.<sup>4</sup> He says that “what we have in high court elections is interest group politics in its most unwelcome forms;” that such groups “try to buy a high court,” to gain “control over the court,” noting that the U.S. Chamber of Commerce “candidates prevailed in ten of the twelve supreme court races it targeted.”<sup>5</sup> Ohioans know that the Chamber’s effort against Justice Alice Resnick backfired, helping her to a 57% win. (What a shame that the able judge who challenged the able Justice is tarred by some of what was done on his behalf.) Two other Chamber candidates also suffered the Chamber’s back-firing support. The Chamber’s ads for Mississippi’s Chief Justice enabled her opponent to win 52%-48% by attacking her outside support. (That justice had served for 15 years and her challenger had raised only \$9,000 as of mid-October). In addition, the Chamber’s ads defeated another candidate running with her.<sup>6</sup> Carrington buys the Chamber’s inflated count and its self-congratulation, but its other candidates would have won without it.<sup>7</sup> For example, the three Michigan incumbent Justices who were *re*-elected in landslides were not bought and are not controlled by the Chamber.

Carrington uses the kind of hyperbole that I call into question in an analysis of the myth of distortion and of a study slandering the Ohio Justices.<sup>8</sup> For him to disclaim any accusation that some campaign participants and the judges they support are involved in bribery does not free him from the responsibility to be careful.

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4 Carrington & Long, *supra* note 1.

5 *Id.* at 473-74, 479.

6 In September 2001, we learned for the first time not only some major sources of the Chamber’s judicial campaign funds for 2000, but also the internal disagreement about that effort. Jim VandeHei, *Political Cover: Major Business Lobby Wins Back Its Clout by Dispensing Favors*, WALL STREET J., Sept. 11, 2001, at A1. General Motors, a major supporter of other Chamber political efforts, refused to help the judicial campaign effort. *Id.* Contributors of \$1 million each included Wal-Mart, DaimlerChrysler, Home Depot, and the American Council of Life Insurers. *Id.* Efforts by leading corporate general counsels are now under way to avoid repetition of the Chamber’s advertising in 2000.

7 Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, L. REV. M.S.U.-D.C.L. 849 (2001).

8 Roy A. Schotland, *Personal Views*, 34 LOY. L.A. L.REV. 1361, 1364-65 (2001).

Some readers may see little significance in the errors that Carrington makes, but I repeat: I submit this comment only because of the need for serious pause in considering what he writes here-- apart from his fascinating account of Frederick Grimke and the 19<sup>th</sup> century Barnburners.<sup>9</sup>

The errors are set forth not in order of importance, but in the order they appear:

Page 472: "The breakout event [in greater interest in selecting members of state supreme courts] occurred in California in the 1970s when voters reacted strongly against a series of decisions of their state supreme court."<sup>10</sup> What occurred in the 1970s was a 1978 effort by the deputy district attorneys of Los Angeles County to challenge local incumbent trial judges. The successful campaign in 1986 to deny retention to Chief Justice Rose Bird and her colleagues Joseph Grodin and Cruz Reynoso was fueled entirely by only a single series of decisions: Bird's unyielding refusal to uphold any death sentence. Also, the implication that that event was driven by interest groups able to "buy" judicial seats is refuted by the facts about the sources of funds in that campaign.<sup>11</sup>

Carrington also attacks the California, New Jersey, and Ohio high courts for "[f]ollowing the Warren Court [into making] dramatic, high visibility decisions," which brought on the contests to "buy" "control" of such courts.<sup>12</sup> The attack is hit-and-run, lacking explanation of the kinds of decisions he has in mind. In Carrington's last foray against judicial independence, he emphasized one example: courts' decisions that state constitutions require changing school finance from an exclusively property-tax basis. His attack and my response—which include noting that there is much to be said for such decisions and that fourteen state courts have agreed with California and New Jersey (since that time, add Ohio and a New York trial judge.)<sup>13</sup> His attack is not strengthened by repeating it, especially with no examples to explain—or justify—his position.

Page 473: "The medical profession in Texas has come to take a serious interest in judicial politics for the purpose of influencing the development of

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9 Carrington & Long, *supra* note 1, at 2-35.

10 *Id.* at 472.

11 For those facts, see Schotland, *supra* note 8, at 1362 n.4.

12 Carrington & Long, *supra* note 1, at 472.

13 Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 102 (1998); Roy A. Schotland, *Comment: Judicial Independence and Accountability* 61 LAW & CONTEMP. PROBS. 149, 151-52 (1998).

malpractice law. What we have established in high court elections is interest group politics in its most unwelcome forms.”<sup>14</sup>

That first sentence retreats from Carrington’s statement submitted for the Symposium, which was: “I have been told that the most powerful force in Texas judicial politics at this time is the medical profession; that is plausible.”

Given the following facts, query whether he retreats far enough. The total sum contributed to Texas judicial campaigns in the 1994, 1996, and 1998 election cycles is \$17,824,702 according to the National Institute on Money in Politics.<sup>15</sup> Although the Institute has not yet completed analysis of those contributions, of the \$12,568,685 (71%) that it has analyzed, it found that the entire Health Sector—from doctors and their PACs, through nurses, hospitals, medical supplies manufacturers, etc.-- gave \$461,697 or under 5%;<sup>16</sup> The Institute believes it extremely unlikely that that proportion will change materially when the analysis is complete.<sup>17</sup> I am surprised that members of the Health Sector contributed so little, but even if the Institute’s figure errs, the error would have to be massive to justify Carrington’s original statement or his fudged implication. Again, he has hit and run with his comments, with no effort to substantiate.

Page 474: “Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates.”<sup>18</sup>

“Often” is then followed by two examples (attacking two Ohio Justices) and this generalization: “At best, campaign fundraising by judicial candidates is unseemly and degrading. At worst, it tempts those with an interest in a state’s law to try to buy a high court.”<sup>19</sup>

One of the leading myths about judicial campaigns is that they are primarily funded by lawyers. The most recent source on judicial campaign finance found this:

Often attorneys account for large proportions, often even over 75%, of the contributions to judicial candidates; but it is also true that often attorneys’ contributions total only a minor fraction. Given the diversity of our jurisdictions, of

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<sup>14</sup> Carrington & Long, *supra* note 1, at 472-73.

<sup>15</sup> Nat’l Inst. On Money in Politics, *Money in Judicial Politics*, paper submitted to the Chief Justices’ Summit (Dec. 2000) (unpublished paper on file with author).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Carrington & Long, *supra* note 1, at 474. The original phrasing was: “There is no one likely to contribute to such campaigns other than lawyers or litigants who are likely to appear. . . .”

<sup>19</sup> *Id.*

candidates and of campaigns, the lack of a general pattern is no surprise.<sup>20</sup>

That source gave episodic data (which is all we had at that time) on thirteen States.<sup>21</sup>

As for contributions by "litigants who are likely to appear," again, what is Carrington's basis? We do know that even judicial campaigns rely to a varying but often huge extent on the usual diversity of contributors, from lawyers to friends, family, and often supporters drawn by links of party, ethnos, gender, and ideology.<sup>22</sup>

Of course there are episodes of contributions by lawyers that are troublesome indeed, such as the following example, which involved one law firm, the Ohio Supreme Court, and a suit for damages against Conrail.<sup>23</sup> Plaintiffs' daughter had been killed by a train when she drove onto a grade crossing despite closed gates and flashing lights.<sup>24</sup> The extensive proceedings in Ohio courts involved three trials: a jury trial for compensatory damages,<sup>25</sup> a bench trial for punitive damages,<sup>26</sup> and then after an appeal,<sup>27</sup> a jury trial for punitive damages. Another appeal then followed,<sup>28</sup> followed by a final appeal in the Ohio Supreme Court.<sup>29</sup> That appeal was sought by both sides after the second jury had awarded punitive damages of \$25,000,000, reduced by the trial judge to \$15,000,000.<sup>30</sup>

Plaintiff was represented by Murray & Murray Co., a firm that includes nine members of the Murray family. Before the Supreme Court agreed on February 18, 1998 to hear that appeal,<sup>31</sup> campaign contributions were made to two Associate Justices by that firm and by nine Murrays in the firm and seven Murray spouses. Those contributions were made on February 9 to one Justice

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<sup>20</sup> A.B.A. Task Force on Lawyers' Political Contributions, *Report*, Part Two, at 89-95 (1998).

<sup>21</sup> *Id.* A recent study found that lawyers accounted for only twenty-eight percent of the total \$53,128,350 contributed in 1989-99 supreme court elections in Alabama, Idaho, Illinois, Louisiana, Montana, Oregon, Texas, and Wisconsin. See The Nat. Inst. on Money in State Politics, *supra* note 17.

<sup>22</sup> See Schotland, *supra* note 8, at 1365.

<sup>23</sup> See *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546 (Ohio 1999).

<sup>24</sup> *Id.* at 548.

<sup>25</sup> *Id.* at 549.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, referring to, *Wightman v. Consol. Rail Corp.* 640 N.E.2d 1160, 1173 (1994).

<sup>28</sup> *Id.* at 550.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Wightman v. Consol. Rail Corp.*, 690 N.E.2d 16 (Ohio 1998).

and to the other Justice between January 19 and January 21.<sup>32</sup> Each contribution complied with the relevant legal limit on contributions, as did the aggregation of contributions--\$25,000 to each Justice. Those Justices ran for reelection in November 1998, and, according to their post-election campaign finance reports,<sup>33</sup> these contributions turned out to be 4.4% of one Justice's total, and 4.7% of the other's. The source of these contributions was, for each Justice, one of their largest.

Both Justices participated in the oral argument on November 10, 1998. Their campaign finance reports were filed a month later, and in January 1999, Conrail filed a motion seeking the recusal of each Justice.<sup>34</sup> In October 1999, without the Court or either of those Justices addressing that motion, the Court decided in favor of plaintiffs.<sup>35</sup> Conrail subsequently made these facts its major basis for seeking certiorari in the U.S. Supreme Court, but it was turned down.<sup>36</sup>

There is another example from the Michigan Supreme Court elections in 2000. As of September, Michigan's sixteenth biggest firm (Sommers, Schwartz, Silver and Schwartz, which includes leading personal injury lawyers) contributed more than \$225,000 to the three Democratic candidates.<sup>37</sup>

That constituted more than 20% of the total contributed to those candidates—29% of one candidate's total, 19% for another, and just under 19% for one who was once a partner at that firm.<sup>38</sup>

We do of course have problems, even major ones. Facts and factual episodes can justify inferences and recommendations for action. However, unsupported assertions and facile inferences, such as Carrington's, are suspect.

Page 480: "Sitting Justices on high courts have been sitting ducks for political adversaries willing to spend big bucks to drive them off the bench."<sup>39</sup>

This is another unsubstantiated assertion. In the most recent elections, as previously noted, big-buck political adversaries failed in Ohio and Michigan, and lost a Chief Justice whom they were supporting in Mississippi. In 1996,

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32 See Committee to Elect Francis Sweeney, Pre-Primary Campaign Finance Report (April 23, 1998), available at <http://www.state.oh.us/sos>; Committee for Paul Pfeifer, Pre-Primary Campaign Finance Report (April 23, 1998), available at <http://www.state.oh.us/sos/>.

33 See Committee to Elect Francis Sweeney, Post-General Campaign Finance Report (Dec. 11, 1998), available at <http://www.state.oh.us/sos/>; Committee for Paul Pfeifer, Post-General Campaign Finance Report (Dec. 11, 1998), available at <http://www.state.oh.us/sos/>.

34 Respondents Motion to Recuse, *Wightman v. Consol. Rail Corp.*, Ohio St.3d 431 (1999) (No. 97-2342).

35 *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546 (Ohio 1999).

36 *Consol. Rail Corp. v. Wightman*, 529 U.S. 1012 (2000).

37 Dawson Bell, *Lawfirm Raises Cash, Eyebrows in Judicial Races*, DETROIT PRESS, Sept. 27, 2000, at 1A.

38 *Id.*

39 Carrington & Long, *supra* note 1, at 480.



two Justices were denied retention: in Nebraska by the national organization supporting term limits, which spent an estimated \$200,000,<sup>40</sup> and in Tennessee by local partisans who spent roughly \$25,000<sup>41</sup>. In California in 1998, Chief Justice George and Justice Chin were threatened with a campaign against their retention, which required them to raise funds— but the campaign never surfaced.

From 1964-94, in ten States with retention elections, 3912 judges have faced elections, and only fifty (1%) were defeated – twenty-eight of them in Illinois, the only State requiring more than a 50% vote for retention.<sup>42</sup> We lack similarly complete data on contestable elections, but the picture there is similar. Carrington's alarm about "sitting ducks" is baseless hyperbole.

Page 480: "So widely shared is the despair that a meeting of Chief Justices was held soon after the 2000 elections under the auspices of the National Center for State Courts."<sup>43</sup>

Another inaccurate hyperbole. The "Chief Justices' Summit" was initiated in November, 1999, by Texas Chief Justice Tom Phillips and me, to build support for the then-just-adopted campaign finance amendments to the Model Code of Judicial Conduct for which we had worked in the 1997-98 ABA task force. The Summit was under the auspices of Phillips and Texas Senate President pro tem Rodney Ellis, with financial support from the Open Society Institute and The Joyce Foundation. In addition, the National Center gave staff support, as they regularly do for the Conference of Chief Justices. When we began work on the Summit, we did not know that the judicial elections in 2000 (in, e.g., Ohio and Michigan) would be as dramatic and disturbing as they turned out to be. But even after those elections, there was determination, not despair.

Page 485: "An idea under discussion in Ohio newspapers is a proposal for a substantial lengthening of terms of office. There is much to be said for that idea . . . . On the other hand . . . ."<sup>44</sup>

Lengthening terms was the second of twenty recommendations in the Call To Action issued by the Chief Justices' Summit.<sup>45</sup>

Would you waffle on the need to improve on the current scene, which is this: for all states' appellate judges, 58% have initial terms of six years or less,

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40 A.B.A. Task Force on Lawyers' Political Contributions, *Report*, Part Two, at 6.

41 *Id.*

42 Aspin & Hall, *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1 (2000).

43 Carrington & Long, *supra* note 1, at 480. The original phrasing called this an "emergency" meeting.

44 *Id.* at 485.

45 Nat'l Summit on Improving Judicial Selection, *Call To Action*, 34 LOY. L.A. L.REV. 1353, 1355 (2001).

and for subsequent terms, 45%.<sup>46</sup> For all states' trial judges (general jurisdiction), 27% have initial terms of four years or less, and for subsequent terms, 18%, with another 56% having six-year terms.<sup>47</sup>

Do you not believe that if Ohio changed from its current six-year terms to, say, ten or even eight years, there would be substantial gains? The change would reduce campaign finance problems. More importantly, would not more fine lawyers be interested in seeking judgeships, and would not more fine judges want to stay on the bench? And is not the whole object of all efforts about judicial selection, to maintain and improve the caliber of who is on the bench?

In summary, some of the errors noted above are minor, some not. However, they show a lack of care and a readiness to point with alarm—worse, a seeming eagerness to attack judges and others who are participating by the rules in the inherently difficult judicial election scene. The inferences and recommendations that Carrington adopts cannot be considered without taking into account the shakiness of their basis.

Indeed, his major recommendation —“an official judicial voters' guide”—includes not merely what he calls “imperfections,” but ill-considered innovations.<sup>48</sup> I not only share his enthusiasm for Voters' Guides, I've been pressing for them since 1985.<sup>49</sup> For literally decades, Voters' Guides have been mailed to every registered voter in California, Oregon, Washington, Alaska, and, since 1990, New York City (though there only for city-wide candidates). The Guides are enormously popular in those jurisdictions as a favored or favorite source of information about candidates.<sup>50</sup>

But Carrington's innovations are self-defeating. First, rather than charging candidates “a noticeable filing fee,” entries are free or almost free in all jurisdictions, except some California counties. Instead of merely distributing at public libraries and courthouses and to requesters, the Guides are mailed to every registered voter in all jurisdictions. The recent Chief Justices' Summit urged state and local governments to copy this practice, and called on Congress to grant a free mailing privilege.<sup>51</sup>

Second, even without official support, we can do better than the limited distribution Carrington suggests. In 1990, in North Carolina, a citizen committee initiated by the State Bar Association published 550,000 copies of a

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46 Schotland, *supra* note 13, at 152-55.

47 *Id.*

48 Carrington & Long, *supra* note 1, at 483-85.

49 Carrington refers only to voters' guides in the state of Washington, but Oregon, California and Alaska have used them since early in the 20<sup>th</sup> Century. See Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperors' Clothes of American Democracy*, 2 J.L. & POL. 57, 127-28 (1985).

50 *Id.* at 163-67.

51 Nat'l Summit on Improving Judicial Selection, *supra* note 45, at 1357.

guide about that year's judicial candidates and distributed copies as stuffers in the leading Sunday newspapers (total cost was under \$40,000).<sup>52</sup> In 1996 and 1998, in Washington State, that same mode of distribution was used for 1.2 million guides for the primary election (because their primaries were not covered by the Secretary of State's Guide mailed to all voters, but the primaries determine almost all of their judicial races), all pursuant to order by and funding from the Washington Supreme Court. As a result, in 2000, the Washington Secretary of State changed the State's long-standing practice, and published and mailed a Guide for the primaries.

Third, why attach "certain conditions" to candidates' being able to give the voters brief information about themselves? "Rigorous requirement of publicity as to the source of [their campaign] funds" is already required in all states. To the extent that existing law may not suffice, the obvious step is corrective amendment. As for requiring agreement not to borrow money, that is not the law in any jurisdiction, federal or state, because any such limit would so favor incumbents, candidates with wealthy supporters, and wealthy self-funders.

Finally, Carrington's proposed sponsor<sup>53</sup> would conduct publicly-funded advertising "to rebut efforts of organizations to [sic] use 'soft money' to influence the results of the campaign."<sup>54</sup> Do you share my concern about the undesirability of, let alone the constitutional questions raised by, having the sponsor of an official publication run ads attacking candidates or interest groups? If this suggestion is coupled with Carrington's notion of charging the candidates, then to use their fees to fund intervention in their campaigns surely would add irony as well as more constitutional questions.<sup>55</sup>

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52 I was privileged to participate in the initiation and operation of that North Carolina effort. One of the leaders was former Chief Justice Rhoda Billings; before and since her service on North Carolina's Supreme Court, she has served as a professor at Wake Forest U. School of Law.

53 "A not insoluble problem lies in the identity of a sufficiently neutral group to administer the system." Carrington & Long, *supra* note 1, at 484.

54 *Id.* The original phrasing envisioned "a publicity campaign ... using spot ads and any other effective device ... to punish candidates and interest groups who depart from a democratically established morality of democratic campaigning."

55 Of course there is a need to help the public evaluate no-holds-barred negative advertising in judicial campaigns, but the need is met best by non-official, diverse and representative citizens' groups. Columbus, Ohio has long benefited from such a group; more recently, so too have Cleveland and Youngstown. The Chief Justices' Summit urged establishment of such committees. As a result, in 2001 active efforts are under way in New York and Illinois. See Barbara Reed & Roy A. Schotland, *Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002).

I hope you will share his and my enthusiasm for voters' guides. Let us focus on the practices that have been successful so long for so many voters in five states.<sup>56</sup>

#### CONCLUSION

The problems in judicial elections are too serious and too complex, ameliorative steps are too hard to design, and the status quo too hard to change, for us to allow unsubstantiated assertions and attacks that only make progress harder.

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<sup>56</sup> In addition to the four mentioned in note 49, Utah publishes and distributes widely an official voters' guide, but does not mail copies as do the other states. Since 1990, New York City also mails official voters' guides to all voters.