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Campaign Finance in Judicial Elections

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CAMPAIGN FINANCE IN JUDICIAL ELECTIONS

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This paper includes explicit recommendations by particularly pertinent sources; the paper's purpose is to serve as a starting point for discussion. While I personally agree with those sources, I have tried hard to limit the paper to the recommendations themselves and the stated reasons given for them.

I. NO NEED TO REPEAT TO YOU THE PATTERNS AND EPISODES SHOWING THE PROBLEMS

The chief justices convened this Summit because many types of problems in judicial election have become more and more acute, raising more and more concern. By now, and for this audience, there is no need to set forth examples of the campaign finance aspects of these problems; below, only one example will be given.

It is well-known, even notorious, that for all kinds of campaigns, from presidential candidates to school board candidates, campaign spending has risen, even soared. Judicial campaigns first experienced this development in only a few states, starting in the early 1980s. But that experience has spread to many states, the amounts have risen from modest to massive, and big spending has come to involve elections of all types, including retention elections.

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II. WHY CAMPAIGN FINANCE PROBLEMS IN JUDICIAL ELECTIONS ARE UNIQUE

Despite a widespread sense that judges who run in elections are like other candidates in elections, the fact is that the job of judging differs from service as an executive or legislator in ways that have major impacts on fund-raising for judicial elections.

A. Insulation for Ex Parte Contacts

Other elective officials are open to seeing—at any time and openly or secretly—their constituents or anyone who may be affected by their action in pending or future matters. Indeed, we protect access to legislators with the constitutional right of petition.

Judges are insulated from contact with the parties to a matter before them, by both norms and legal limits on ex parte contacts.[1] Imagine allowing a party to a suit to have a private chat with the judge about the case. Imagine not being able to talk with a legislator or executive about a matter under consideration by them.

B. Judges Are Not Free to Make Promises

Other elective officials are free to seek support by making promises about how they will perform. Judges are not. Judges must decide what action they shall take on the basis of the facts established in a formal proceeding, and under law established by constitution, statute, and precedent. Imagine a judicial candidate campaigning on the basis that, for example, she believes the media are unduly protected from responsibility for what they report and therefore she will do all she can to change libel law with respect to the press, and to change also the law on confidentiality of sources.

That is why we have Canons of Judicial Conduct that aim at circumscribing campaign statements by judicial candidates. It is inconceivable that we would try to have legal limitations on what

1. "One woman commented, 'You can't go to them.' Another said, 'You can't see them, not unless you are brought up before them.'" COMMITTEE OF SEVENTY, JUDICIAL REFORM ADVOCACY (forthcoming 2001) (manuscript at 2, on file with author). These comments were made in professionally conducted focus groups about the judiciary for Philadelphia's Committee of Seventy. *See id.* at 1. "The participants . . . felt that judges are more distant from the electorate than other elected officials." *Id.*

legislative or executive candidates could say in a campaign. Indeed, it is hard even to imagine such a candidate refusing to state a position on leading issues.

There is no question that to note the limits on judicial candidates' campaign conduct, is not to deny the realities we find in many campaigns. "Tough on crime" is surely the most frequent "platform" of more than a few judicial candidates, whether explicit or only "signaled." However, the overwhelming proportion of judicial campaigners refrain from taking or signaling any such positions. Indeed, this is the precise ground that the media cite to explain their nearly complete denial of coverage to judicial campaigns—"so dull."

C. Judges Are Not Advocates

Other elective officials are free to cultivate and reward support by working with their supporters to advance shared goals. They are advocates. Judges are not advocates. Rather, judges are arbiters who must be neutral toward the parties before them, and must not even talk about a case without all parties present or at least on notice. Imagine a judge who, after hearing a motion or evidence, discusses it with one party because that party was a campaign supporter. Or, imagine the judge telling the parties that she will rule for one side because that ruling will be more popular with more voters.

A judge's obligation of neutrality is totally at odds with seeking the support of organized groups that have clear goals for what they want government to do or refrain from doing. True, some judges have records that bring them the support or opposition of identifiable groups. And, as noted above, some judges and judicial candidates even appeal to, say, voters who are "tough on crime" or voters who want to be "tough on landlords." But, in reality, the frequency and the extent to which legislative and executive candidates work at drawing and energizing the support of groups is much different than any such conduct by judicial candidates.

D. Changing the Law Is Not the Primary Goal of Judges

Other elective officials pledge to change the law, and if elected they often work unreservedly toward change. Judges cannot act in this manner. While judges do have some freedom in construing statutes or precedents, or in making rulings within a range of discretion,

they are—as Oliver Wendell Holmes put it—"confined from molar to molecular motions."[2] While it is true that the United States Supreme Court is a major law-making body, one of the public's worst misunderstandings about our judicial system is to underestimate the vast differences between that Court and other courts.

E. Judges Function Alone

Other elective officials participate in large and diverse multimember bodies, or in the executive branch subject to lively institutional and political checks. Judges function alone or in tiny multimember bodies. With legislators, we accept all-out advocacy because they function in cauldrons of compromise with representatives of other interests. With judges, we rely mainly on their adherence to the facts proved and the law argued before them.

F. Judges Usually Only Affect Parties Before the Court

Other elective officials take actions that affect large numbers of people. That means that the people affected can exercise political safeguards. But judges' actions affect directly—and almost always affect only—the identifiable two or few parties before the court. Those parties have no safeguard except the judge's commitment to taking action only on the proven facts and the applicable law.

G. Judges Draw Little Support for Services Rendered

Other elective incumbents build up support through "constituent casework," patronage, securing benefits for their communities, and similar acts. Doubtless, there are some judges who have won votes because of their votes in particular cases—we know there are judges who lose votes, even lose their seats, because of votes in particular

2. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

cases.[3] But judges draw incomparably less, if any, support for "services rendered" than other incumbents.

H. Few Judges Face Electoral Challenges

Almost all other elected officials face challenges in every election. They are good at campaigning—or they would not survive in elective office. In contrast, very few judges face challenges.[4] True, that is changing—and we do not know yet how much the rise of competition in judicial elections will change the kinds of people who are willing to seek election to the bench, and then willing to seek reelection despite challenges.

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3. Never is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge is campaigned against because of a stand on a single issue or even in a single case. In such a situation, it is particularly important for lawyers to support the judicial process and the rule of law.

ABA REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, PART TWO 6 (1998) [hereinafter ABA TASK FORCE REPORT]. In the view of Task Force Chairman John W. Martin, Jr., then-general counsel of Ford Motor Company, that statement was at least as important as anything else in the Report.

4. Typical was Minnesota this year: 62 of 67 district court judges faced no opposition. *See* Paul Demko, *Name One*, TWIN CITIES READER, Nov. 22, 2000, *available at* http://www.citypages.com/databank/21/1042/+article9158.asp (last visited Mar. 12, 2001).

A study of state supreme court elections, 1980-95, found that 52% of the incumbents were challenged:

> [T]he actual proportion . . . facing opposition varies from year to year and across systems.
>
> . . . .
>
> . . . [T]he court reform advocates are wrong. At least with reference to the two general hypotheses being evaluated here, the court reformers have underestimated the extent to which partisan and nonpartisan elections reflect rational voting and have overestimated the extent to which retention races are insulated from external political forces.

Melinda Gann Hall, Competition in Judicial Elections, 1980-1995, at 5, 12 (Sept. 1998) (unpublished manuscript, paper presented at the 1998 Annual Meeting of the American Political Science Association) (Hall includes Michigan and Ohio in her nonpartisan category).

I. Judges Generally Do Not Like Fund-Raising

Few, if any, elective officials savor fund-raising. It is arguable whether judges and the kinds of people who aspire to the bench are notably worse at fund-raising or less willing to engage in it. But it is not arguable that all but four of the states with judicial elections have adopted the Canon of Judicial Conduct which bars personal fund-raising and requires all fund-raising for judicial campaigns to be done by committees.[5] Again, imagine barring legislative or executive candidates from engaging directly in fund-raising.

J. Judges Face a Great Need for Campaign Funds

The need for campaign funds is acute for most elective officials. But ironically, judges face both greater difficulties in fund-raising and greater need for funds. Rarely, if ever, does a judge or judicial candidate enjoy as much media coverage as other candidates, even for down-ballot offices. Partly this is because, as noted above, judicial candidates are less free—even with First Amendment decisions cutting into the Canons' limitations—to make the kinds of campaign statements that build drama and coverage. Partly, it is because the judge's job rarely involves the drama that so often surrounds a legislative battle or a struggle over what an executive will do. And partly it is because, in many jurisdictions, there are literally scores of judges on the ballot at the same time.

Among the most important facts presented to this Summit are those in charts (courtesy of Chief Justice Phillips) that show the impact of TV advertising in Texas—that is, charts showing the differences in support won in media markets in which the candidate had advertised, and where the candidate had not advertised.[6]

III. THE CONFERENCE OF CHIEF JUSTICES' JANUARY 1999 RESOLUTION

In January 1999, the Conference of Chief Justices resolved, about then-pending proposals to amend the Model Code of Judicial

5. *See* Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 145 (3d Cir. 1991) ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds . . . .").

6. See Appendix immediately following this paper.

Conduct with respect to campaign finance in judicial elections, as follows:

> The Conference endorses the use of court rule to ensure that judicial election practices do not undermine the integrity of the judiciary or public confidence in the justice system. For those states in which the legislature has established comprehensive rules and procedures governing judicial elections, it may be appropriate to seek the enactment of reform measures through the legislative process . . .
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> .
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> . . . .
>
> The Conference shares the concern of the ABA Task Force that excessively large contributions to judicial campaigns may undermine public confidence in the independence of the judiciary and supports the recommendation [to limit contributions] for jurisdictions in which state legislatures have not previously established contribution limits. The Conference also cautions that any court-imposed restrictions on campaign finance should be narrowly tailored so as not to violate constitutional protections of political speech under the First Amendment. . . .
>
> . . . .
>
> The Conference supports judicially created time limits on campaign solicitations for those jurisdictions in which neither the state legislature nor the state supreme court has already established such limits.
>
> . . . .
>
> The Conference agrees with the recommendation that candidates for judicial office should not retain significant surpluses of campaign funds following an election, but would permit judges to retain an appropriate surplus. The Conference also believes that the campaign surpluses should not be used for private benefit of the judicial candidate or others.
>
> The Conference supports the development and dissemination of voters' guides and similar techniques for informing public about the qualifications of candidates for judicial

> office. It especially endorses voter information initiatives such as those recently undertaken in Washington [State] and encourages greater use of Internet and other emerging technologies to provide the public with this information. The Conference encourages bar associations and citizen organizations to provide guidance to judicial candidates about campaign and fund-raising requirements, but cautions that this educational role should be separate and distinct from the regulatory role of state and local election commissioners.
>
> Finally, the Conference supports the recommendation that public funding for election campaigns be extended to candidates for judicial office to the extent that such funding is given to candidates for legislative or executive office. Indeed, because of the unique obligation that judges have to remain independent and impartial, the Conference believes that public funding for judicial campaigns is perhaps even more appropriate than for legislative and executive campaigns.[7]

IV. THE AUGUST 1999 AMENDMENTS ADOPTED BY THE ABA HOUSE OF DELEGATES, ADDING THE FOLLOWING PROVISIONS TO THE MODEL CODE OF JUDICIAL CONDUCT[8]

A. "Aggregate" Contributions

The proposed limits on campaign contributions would apply not merely to sums given directly to a candidate's committee, but also indirectly. For example, if the jurisdiction limits contributions to $1000 and a contributor gives that sum directly to a candidate, the contributor could not also give to a political action committee that the contributor knows, or should know, is supporting, or is likely to support, that same candidate:

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7. Conference of Chief Justices, Resolution XIV, 3, 5-7 (Jan. 1999) (footnote omitted).

8. MODEL CODE OF JUD. CONDUCT (2000).

TERMINOLOGY

. . . .

"Aggregate" in relation to contributions for a candidate under Sections 3E(1)(e) and 5C(3) and (4) denotes not only contributions in cash or in kind made directly to a candidate's committee or treasurer, but also, except in retention elections, all contributions made indirectly with the understanding that they will be used to support the election of the candidate or to oppose the election of the candidate's opponent. See Sections 3E(1)(e), 5C(3) and 5C(4).[9]

B. Limiting Appointments of Lawyers Who Made Excessive Contributions

A lawyer who contributes more than the jurisdiction allows shall not be appointed by the judge to whom the lawyer made such a contribution, unless there are specified special circumstances:

CANON 3

. . . .

C. Administrative Responsibilities.

. . . .

(5) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than [$][10] within the prior [ ] years to the judge's

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9. *Id.* at Terminology.

10. *Id.* Each jurisdiction sets its own specific amounts and times. That treatment is applicable to all the open brackets ("[ ]") in the Code amendments.

As for what should be the amounts of contribution limits: The Model Code Amendments were adopted by the House of Delegates on the basis of a special committee's review of the 1998 REPORT AND RECOMMENDATION OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS PART II. ABA TASK FORCE REPORT, *supra* note 3. The ABA TASK FORCE REPORT stated the following regarding the relevant factors to be considered in setting a contribution limit:

> We stress that the precise figure for the contribution limit must be determined in light of each State's particular circumstances. The figure should reflect several variables, such as: (a) What does the particular jurisdiction's recent experience show are typical levels of contributions for the judgeship in question? (b) What are the typical levels of expenditure in those campaigns, including campaigns for open seats and in competitive elections? (c) What amount of expen-

election campaign, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless

(a) the position is substantially uncompensated;

(b) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or

(c) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.[11]

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ditures would allow a candidate in that jurisdiction to communicate effectively to the electorate, even in a large field of candidates and with many other offices up for election?

We stress also this: the level of contribution limits must be set with full awareness of three almost certain consequences, however unintentional, of such limits: (1) the lower the limits, the higher the status of individuals who raise funds; (2) the lower the limits, the greater the incentive for either independent spending (which is constitutionally protected), or indirect support by political parties or other groups; (3) the lower the limits, the greater the likelihood that more wealthy, self-funding, candidates will win or at least challenge less wealthy candidates. Note also that some limits have been found so low as to interfere with First Amendment rights . . . .

A fourth consequence of contribution limits is well recognized, but to date has not been reflected in law in any jurisdiction: the lower the limits, the harder it is likely to be for challengers who lack ready access to large networks of support; women and minority candidates often have less access than others. There is anecdotal evidence that such candidates often rely on a relatively smaller number of relatively larger contributors to gain sufficient visibility to secure more widespread electoral support. Our nation's most successful PAC, "Emily's List," operates on the principle that "Early Money Is Like Yeast." There is a good case for allowing a "seed money" exception to contribution caps: *e.g.*, candidates (or at least challengers) would be allowed to receive from up to X number of people, contributions as high as several times the otherwise applicable contribution limits, for a prescribed period early in the campaign.

Id. at 28-29 n.49 (citations omitted).

11. *Id.* at Canon 3.

C. Requiring Recusal

Required recusal upon motion if a party or party's lawyer contributed *in violation of* the jurisdiction's limit on the appropriate amount of contributions:

E. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

. . . .

(e) the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [ ] year[s] made aggregate* contributions to the judge's campaign in an amount that is greater than [$] for an individual or [$] for an entity [is reasonable and appropriate for an individual or an entity].[12]

It should be noted that this provision is phrased inartfully. The intention of those involved in the drafting was that a motion requiring recusal could be made *only* by a party who had *not* made an illegal contribution. Unintentionally, the phrasing adopted allows a motion to be made by the very person who had made an illegal contribution; such a possibility would open up clearly undesirable possibilities. This is easily corrected, however, by changing "a timely motion" to "a timely motion by an opposing party."

D. Appropriate Limits on Contributions

Appropriate limits on contributions are to be set by each jurisdiction:

CANON 5

. . . .

C. Judges and Candidates Subject to Public Election.

. . . .

(3) A candidate shall instruct his or her campaign committee(s) at the start of the campaign not to accept campaign contributions for any election that exceed, in

12. *Id.* (footnote omitted).

the aggregate*, [$] from an individual or [$] from an entity. This limitation is in addition to the limitations provided in Section 5C(2).

(4) In addition to complying with all applicable statutory requirements for disclosure of campaign contributions, campaign committees established by a candidate shall file with [ ] a report stating the name, address, occupation and employer of each person who has made campaign contributions to the committee whose value in the aggregate* exceed [$]. The report must be filed within [ ] days following the election.

(5) Except as prohibited by law*, a candidate* for judicial office in a public election* may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.[13]

V. POSSIBLE AND FEASIBLE REFORMS FOR CAMPAIGN FINANCE IN JUDICIAL ELECTIONS

A. The Model Code Amendments

Given that Model Code provisions are adopted in almost all states, obviously these new amendments warrant particular attention. Please now return to these amendments and consider:

What modifications (if any) would you make in the below recommendations, if they were under serious consideration for adoption in your jurisdiction?

- general modifications
- modifications for
  - statewide elections;
  - for large-population jurisdictions;
  - for smaller-population jurisdictions;
  - for limited-jurisdiction courts, e.g. probate or family courts with jurisdiction over estates and guardianships.

13. *Id.* at Canon 5. An asterisk (*) indicates that the term is defined in the Model Code itself. *Id.* at Terminology.

B. An Additional Step That the Conference of Chief Justices Recommended: Limiting "Warchests"

The Conference's January 1999 resolution "agree[d] with the recommendation" of the ABA Task Force on this matter.[14] The Task Force had recommended this:

> If a judicial candidate raises funds but has no opponent (as of the deadline by which candidates must file), or if a judicial candidate finds, after the election and after a reasonable period to pay all sums owed for campaign expenses, that the campaign committee has a final surplus; then the committee shall either return the funds to contributors pro rata and/or give the funds to [__].[15]

The Task Force's reasoning was as follows:

> In our current system, judges and judicial candidates have many incentives to raise every dollar they can . . . . Even candidates without opponents, or candidates who have reached the sum they expect to spend, often continue trying to raise all they can. And why not, since any excess funds can be retained for a later campaign? . . .
>
> We believe everyone would gain from adopting a limit, which six States already have,[16] on the use of excess campaign funds or surpluses. . . .
>
> . . . [F]unds raised for a campaign in one election cycle are for use in that election. To retain surplus funds that may remain after the election (or after the election became uncontested) will seem to some people to violate the implicit contract between the candidate and the contributors, and certainly lacks the justifications for contributions by lawyers and others to support an able judiciary. Contributors who support a judge or candidate today might not continue their support for another campaign years later, let

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14. Conference of Chief Justices, *supra* note 7, at 6.

15. ABA TASK FORCE REPORT, *supra* note 3, at 49.

16. The six states are Arkansas, Florida, Louisiana, Michigan, Nevada, and New Mexico. *See id.* at 50 n.86. Of course, any personal use of any campaign funds is a separate matter, and thirty-one states have adopted Canon 5(C)(2) or a provision like it. *See id.* at 52 n.91.

> alone for a campaign for some other office. Last, if surpluses may be retained without limit, incumbents can help themselves to a great advantage compared to challengers; few if any challengers will have surpluses from prior campaigns.
>
> . . . [T]here may be a public interest in allowing a successful judicial candidate to retain a prescribed amount of any surplus campaign funds. Florida allows retention "for an office account" of up to $6,000 for Supreme Court Justices, up to $3,000 for intermediate appellate judges, and up to $1,500 for lower court judges. Nevada allows a judge to retain unused campaign funds up to $5,000 per year, times the number of years of the term of the judge's office. . . . In some States, such funds are the main source for purchasing computers and similar new office equipment. . . .
>
> . . . .
>
> . . . We urge that consideration be given to whether any such funds be retained but that if the decision is to allow some retention, the amount and uses should be subject to appropriate oversight and limits.[17]

C. An Additional Step That the ABA Task Force Recommended: Limiting Aggregate Contributions from a Law Firm's Members

"A judge's or a candidate's committee may not accept . . . a contribution which aggregates . . . more than $____ if from a law firm, including its lawyers, employees and any firm-sponsored political action committee . . . ."[18]

The ABA Task Force gave the following reasons for having a per-firm limit:

> If there is no [such limit], then the limits on contributions from individuals have a far greater impact on small firms than on large ones.
>
> However, we recognize that flexibility is needed to set fair limits on aggregate contributions from firms. If too low a per-firm limit is set (e.g., for all firms regardless of size,

17. ABA TASK FORCE REPORT, *supra* note 3, at 50-53 (footnotes omitted).
18. *Id.* at 28-30.

> five times the limit on an individual's contributions), then members and employees of large firms may be barred from appropriate political participation. On the other hand, if the per-firm limit is too high, it will be viewed as only a facade.[19]

A recent example illustrating the concerns about aggregate contributions from a single law firm involves the Ohio Supreme Court and a suit for damages against Conrail. Plaintiff's daughter, Wightman, had been killed by a train when she drove onto a grade crossing despite closed gates and flashing lights. The extensive proceedings involved three trials: a jury trial for compensatory damages, a bench trial for punitive damages, and then after an appeal, a jury trial for punitive damages. There then followed another appeal, followed by a final appeal in the Ohio Supreme Court. 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.

Plaintiff was represented by Murray & Murray Co., a firm that includes nine members of the Murray family. Before the Ohio Supreme Court agreed to hear the appeal on February 18, 1998, 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, and to the other justice between January 19 and January 21. Each contribution complied with the relevant legal limit on contributions and totaled $25,000 to each justice. Those justices ran for reelection in November 1998, and according to their post-election campaign finance reports, these contributions turned out to be 4.4% of one justice's total, and 4.7% of the other's. These contributions were, for each justice, one of the largest received.

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. In October 1999, without the court or either of those justices addressing that motion, the court decided in favor of plaintiffs.

19. *Id.* at 30-31 n.51.

Conrail subsequently made these facts their major basis for seeking certiorari in the U.S. Supreme Court, but they were turned down.[20]

Another example comes from this year's Michigan Supreme Court elections. As of September, Michigan's sixteenth biggest law firm (Sommers, Schwartz, Silver & Schwartz, which includes leading personal injury lawyers) had contributed more than $225,000 to the three Democratic candidates.[21] 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.[22]

Note that both Ohio and Michigan have explicit limits on contributions in judicial campaigns. Texas is the only state, so far as we know, that has an aggregate limit on law firms: $30,000, which is six times the $5000 limit on individuals' contributions—the same as Ohio's limit on individual contributions.

Would you line up with Texas, or with Ohio, Michigan et al.? It seems pertinent to note that many observers of campaign finance express particular concern about fund-raising from single or concentrated sources; that is, many observers believe that contributions from many sources, whatever the total amount, is less problematic.

D. What of Spending Limits? What of Public Funding?

Unless *Buckley v. Valeo*[23] is overruled, spending limits are constitutional only when they are accepted voluntarily as a condition on receiving public funds. Judicial elections might be distinguished, but the Sixth Circuit has rejected the distinctions.

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20. *See* Consol. Rail Corp. v. Wightman, 86 Ohio St. 3d 431, *cert. denied*, 120 S.Ct. 1286 (2000). The same law firm, in the prior election cycle, made heavy contributions to an incumbent justice. Ohio Secretary of State, *Campaign Finance Database*, *at* http://www.state.oh.us/sos/contents_campaign_finance.htm.

21. *See* Dawson Bell, *Law Firm Raises Cash, Eyebrows in Judicial Races*, DETROIT FREE PRESS, Sept. 27, 2000, *available at* http://www.freep.com/news/mich/firm27_20000927.htm.

22. *See id.*

23. 424 U.S. 1 (1976).

Even if one had no interest in spending limits, there are many reasons to believe that public funding is not only well suited to judicial campaigns, but uniquely so.[24]

But as powerful as the arguments for public funding for judicial campaigns are, many scholars and other campaign finance observers fear that this is "pie in the sky," i.e., not politically feasible—and if that view is correct, then this is a "red herring" reform, a distraction from steps that may be achievable.

Public funding for some offices (e.g., New Jersey gubernatorial candidates, or all state officials in Minnesota) is provided in twenty-three states. But only Wisconsin includes judicial campaigns, and only for the supreme court—and as Professor Geyh's paper and Appendix show, Wisconsin's funding has declined steadily, nearly to the point of vanishing. Indeed, declining funding has been a characteristic of all public funding programs, since the 1974 enactment for presidential races, throughout every state. Very recently, four states adopted new public funding programs—Arizona, Maine, Massachusetts, and Vermont—and these may bring new success. But it must be noted that in this year's election, the voters in two carefully and wisely selected states, Missouri and Oregon—each with demonstrated strong support for campaign finance reform—decisively rejected ballot propositions for the "Maine model" program.

The optimistic view is that public funding for judicial elections has special sources of support: increased court fees. Once again, the purpose of the papers in this symposium is to serve as a starting point for discussion. Surely that is the best conclusion about the public funding issue.

VI. THREE ADDITIONAL STEPS

In conclusion, I suggest three additional steps. First, more outreach by judges to increase public and media awareness of the differences between judges and other election officials, and therefore the differences between judicial candidates and other candidates.

Second, having nonofficial standing committees of distinguished, diverse community leaders who are available to meet with

24. *See* Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467 (2001).

judicial candidates about campaigning, and if necessary to issue public comment on what they deem inappropriate campaigning, including inappropriate campaign finance activity.[25]

Third, official "Voters' Pamphlets" to provide more information to voters—without reliance on candidates' campaign funds—as is the long-standing practice in five western states.[26]

On the first step noted above, the ABA has produced substantial material. The latter two steps are discussed in other papers for the Summit; those steps are not treated further here, simply to limit this paper's length.

25. *See* Richard Dove, *Judicial Campaign Conduct*, 34 LOY. L.A. L. REV. 1447 (2001) (examining the treatment of such committees).

26. In many California counties, candidates must pay for inclusion in the Voters' Pamphlet. For instance, a Los Angeles County trial court candidate who seeks inclusion in both the English and the Spanish versions must pay over $100,000. *See* Joseph Cerrell, Testimony, Hearing of ABA Commission on Public Financing of Judicial Campaigns, Washington, D.C. 161-62 (Jan. 27, 2001). In the other four states and in New York City, there are no charges for inclusion (or only nominal charges, like under $500). *See* Peter Brien, Voter Pamphlets: The Next Best Step in election Reform 6-8 (Apr. 2001) (unpublished manuscript, on file with author).

APPENDIX

These charts show the impact of judicial candidates' advertising in Texas. They compare the candidates' votes in media markets where the candidate did TV advertising, with markets in which the candidate did none.

The first chart, on this year's primary election, was compiled by Chief Justice Phillips. "Early vote" refers to the votes cast during the period *before* Election Day in which Texas, like eleven other states, allows voting.

The charts for the earlier years were prepared by Karl Rove, consultant to winning candidates in those elections.

All charts are provided to us by Chief Justice Phillips.

2000 REPUBLICAN PRIMARY, SUPREME COURT PLACE 3

MEDIA MARKETS WHERE GONZALES PURCHASED ADVERTISEMENTS

Media Market	Early Vote February 28-March 10				Election Day Vote March 14				Total Vote			
	Gonzales	%	Gorman	%	Gonzales	%	Gorman	%	Gonzales	%	Gorman	%
Dallas-Fort Worth	33,616	52.6	30,347	47.4	137,905	67.2	67,416	32.8	171,521	63.7	97,763	36.3
Houston	34,646	60.7	22,426	39.3	100,236	64.4	55,410	35.6	134,882	63.4	77,836	36.6
Austin	13,195	53.0	11,707	47.0	28,635	63.9	16,143	36.1	41,830	60.0	27,850	40.0
Waco-Temple-Bryan	6,334	51.2	6,034	48.8	18,388	63.6	10,516	36.4	24,722	59.9	16,550	40.1
Abilene-Sweetwater	1,604	40.5	2,359	59.5	5,739	67.6	2,754	32.4	7,343	59.0	5,113	41.0
Tyler-Longview-Lufkin-Nacogdoches	7,023	52.7	6,302	47.3	15,366	61.5	9,631	38.5	22,389	58.4	15,933	41.6
Amarillo	4,187	43.8	5,372	56.2	15,096	58.2	10,832	41.8	19,283	54.3	16,204	45.7
Midland-Odessa	6,279	42.2	8,584	57.8	7,908	51.9	7,327	48.1	14,187	47.1	15,911	52.9
San Antonio	15,006	42.5	20,323	57.5	28,761	49.2	29,737	50.8	43,767	46.6	50,060	53.4
Lubbock	3,177	35.8	5,692	64.2	8,629	50.6	8,435	49.4	11,806	45.5	14,127	54.5
Corpus-Christi	1,850	35.9	3,297	64.1	4,031	45.2	4,891	54.8	5,881	41.8	8,188	58.2
Total	126,917	50.9	122,443	49.1	370,694	62.4	223,092	37.6	497,611	59.0	345,535	41.0

MEDIA MARKETS WHERE NEITHER CANDIDATE PURCHSED ADVERTISEMENTS

Media Market	Early Vote February 28-March 10				Election Day Vote March 14				Total Vote			
	Gonzales	%	Gorman	%	Gonzales	%	Gorman	%	Gonzales	%	Gorman	%
Laredo	478	72.8	179	27.2	376	72.7	141	27.3	854	72.7	320	27.3
Wichita Falls-Lawton	1,114	47.8	1,217	52.2	2,515	51.6	2,361	48.4	3,629	50.4	3,578	49.6
Victoria	320	34.8	599	65.2	1,154	50.2	1,146	49.8	1,474	45.8	1,745	54.2
Shreveport	794	45.0	971	55.0	2,429	45.8	2,880	54.2	3,223	45.6	3,851	54.4
El Paso	1,938	38.2	3,129	61.2	2,941	45.0	3,591	55.0	4,879	42.1	6,720	57.9
San Angelo	1,127	43.8	1,448	56.2	3,050	40.8	4,418	59.2	4,177	41.6	5,866	58.4
Beaumont-Port Arthur	1,731	36.9	2,955	63.1	2,557	45.4	3,077	54.6	4,288	41.2	6,032	58.8
Harlingen-Weslaco-Brownsville-McAllen	1,643	38.3	2,643	61.7	2,205	43.0	2,925	57.0	3,848	40.9	5,568	59.1
Total	9,145	41.0	13,141	59.0	17,227	45.6	20,539	54.4	26,372	43.9	33,680	56.1

GRAND TOTAL

Early Vote February 28-March 10				Election Day Vote March 14				Total Vote			
Gonzales	%	Gorman	%	Gonzales	%	Gorman	%	Gonzales	%	Gorman	%
136,062	50.1	135,584	49.9	387,921	61.4	243,631	38.6	523,983	58.0	379,215	42.0

1998 PRIMARY—HANKINSON VS SMITH BY MEDIA MARKET

Media Market	*Hankinson Votes*	*Hankinson %*	*Smith Votes*	*Smith %*
Dallas/Ft. Worth	84,097	65.29	44,700	34.71
Houston	74,133	62.05	45,341	37.95
Austin	22,839	60.99	14,607	39.01
San Antonio	31,024	59.48	21,137	40.52
Lubbock	9,768	58.19	7,019	41.81
Amarillo	12,708	56.66	9,719	43.34
Tyler/Longview	12,304	55.78	9,756	44.22
Odessa/Midland	9,296	54.11	7,885	45.89
Waco/Temple	8,410	44.04	10,686	55.96
Markets w/TV	264,579	60.76	170,850	39.24
Media Markets w/o TV	*Hankinson Votes*	*Hankinson %*	*Smith Votes*	*Smith %*
Laredo	308	59.57	209	40.43
Texarkana	1,805	52.38	1,641	47.62
Corpus Christi	3,367	52.29	3,072	47.71
El Paso	3,739	50.87	3,611	49.13
Harlingen/Weslaco	2,315	49.16	2,394	50.84
Abilene/Sweetwater	5,584	48.02	6,044	51.98
Wichita Falls	2,755	47.43	3,053	52.57
Beaumont/Port Arthur	2,581	46.91	2,921	53.09
Victoria	1,578	46.22	1,836	53.78
San Angelo	2,353	43.57	3,048	56,43
Markets w/o TV	26,385	48.67	27,829	51.33
Statewide	**290,964**	**59.42**	**198,679**	**40.58**

1994 PRIMARY—HECHT VS HOWELL BY MEDIA MARKET

Media Market	*Hecht Votes*	*Hecht %*	*Howell Votes*	*Howell %*
Abilene/Sweetwater	6,294	70.75	2,602	29.25
Houston	85,940	68.96	38,675	31.04
Dallas/Ft. Worth	76,997	64.09	43,139	35.91
Odessa/Midland	9,521	61.47	5,969	38.53
Lubbock	11,325	59.68	7,651	40.32
Amarillo	11,351	59.19	7,827	40.81
San Antonio	29,617	58.93	20,639	41.07
Markets w/TV	231,045	64.62	126,502	35.38
Media Markets w/o TV	*Hecht Votes*	*Hecht %*	*Howell Votes*	*Howell %*
San Angelo	2,238	57.67	1,643	42.33
Corpus Christi	4,669	53.45	4,067	46.55
Austin	15,622	50.82	15,117	49.18
Tyler/Longview	8,322	50.42	8,183	49.58
Waco/Temple	6,005	48.48	6,381	51.52
Texarkana	1,570	45.75	1,862	54.25
Harlingen/Weslaco	2,211	42.90	2,943	57.10
Wichita Falls	1,387	41.10	1,988	58.90
Laredo	167	40.53	245	59.47
Beaumont/Port Arthur	1,767	36.96	3,014	63.04
El Paso	2,519	30.96	5,618	69.04
Markets w/o TV	46,477	47.65	51,061	52.35
Statewide	277,522	60.98	177,563	39.02

1992 PRIMARY—ENOCH VS HOWELL BY MEDIA MARKET

Media Market	*Enoch Votes*	*Enoch %*	*Howell Votes*	*Howell %*
Dallas/Ft. Worth	129,957	64.54	71,399	35.46
Houston	89,780	64.22	50,031	35.78
Abilene/Sweetwater	5,967	61.72	3,701	38.28
Lubbock	11,833	60.59	7,698	39.41
Odessa/Midland	16,438	60.43	10,765	39.57
San Antonio	37,361	57.62	27,477	42.38
Tyler/Longview	12,660	56.97	9,564	43.03
Austin	22,557	54.75	18,645	45.25
Amarillo	12,606	52.67	11,327	47.33
Waco/Temple	9,442	51.04	9,058	48.96
Corpus Christi	5,991	50.80	5,803	49.20
Markets w/TV	354,592	61.13	225,468	38.87
Media Markets w/o TV	*Enoch Votes*	*Enoch %*	*Howell Votes*	*Howell %*
Wichita Falls	2,577	58.18	1,852	41.82
Victoria	1,118	49.19	1,155	50.81
San Angelo	2,101	47.86	2,289	52.14
Texarkana	1,522	44.80	1,875	55.20
Laredo	233	41.98	322	58.02
Harlingen/Weslaco	2,195	39.20	3,405	60.80
Beaumont/Port Arthur	2,367	38.28	3,817	61.72
El Paso	4,844	37.37	8,140	62.69
Markets w/o TV	16,957	42.59	22,855	57.41
Statewide	**371,549**	**59.94**	**248,323**	**40.06**