IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 94-9141

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ADOPTION OF AMENDMENTS TO THE

TEXAS CODE OF JUDICIAL CONDUCT

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Pursuant to this Court's Order of January 24, 1994, No. 94-9020, the Supreme Court Task Force on Judicial Ethics has conducted public hearings across the state and solicited written communications to secure public comment, statements and other communications concerning any changes to Canon 5.

The Task Force and the Court have received many communications on Canon 5 and other parts of the Code, and the Task Force reported its recommendations to the Court on July 11, 1994.

After considering these communications, the Court adopts a new Canon 5 to the Code of Judicial Conduct, to be effective January 1, 1995.

A copy of the new Canon 5 and corresponding changes to Canon 5 and Canon 6 are set forth as Exhibits A and B, attached.

The Clerk of the Supreme Court is directed to file an original of this Order with the Secretary of State and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the Texas Bar Journal.

The Clerk shall file an original of this Order in the minutes of the Court to be preserved as a permanent record of the Court.

Dissenting opinion by Justice Doggett to follow.

In Chambers, this 21st day of September, 1994.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

Craig T. Enoch, Justice

Rose Spector, Justice

EXHIBIT A

CANON 5 REFRAINING FROM INAPPROPRIATE POLITICAL ACTIVITY

(1) A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

(2) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

(3) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(4) In addition to any other restrictions imposed by law, a judge or judicial candidate shall not either personally or through others solicit or accept contributions:

(i) earlier than 210 days before the filing deadline for the office sought by the judge or judicial candidate; or

(ii) later than 120 days after the general election in which the judge or judicial candidate seeks office.

(5) The requirements of (4) above shall not apply to political contributions solicited or accepted solely for one or more of the purposes set forth in Tex. Elec. Code § 253.035(i).

EXHIBIT B

CANON 5~~7~~ ~~A JUDGE SHALL~~ REFRAINING FROM INAPPROPRIATE POLITICAL ACTIVITY ~~INAPPROPRIATE TO THE JUDICIARY~~

(1) A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

(2) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties; ~~Any statement of qualifications, record, or performance in office of either the candidate or the candidate's opponent should be such as can withstand the closest scrutiny as to accuracy, candor and fairness.~~

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

(3) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon ~~3A(8)~~ 3B(10).

(4) In addition to any other restrictions imposed by law, a judge or judicial candidate shall not either personally or through others solicit or accept contributions:

(i) earlier than 210 days before the filing deadline for the office sought by the judge or judicial candidate; or

(ii) later than 120 days after the general election in which the judge or judicial candidate seeks office.

(5) The requirements of (4) above shall not apply to political contributions solicited or accepted solely for one or more of the purposes set forth in Tex. Elec. Code § 253.035(i).

CANON 6 COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

. . .

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

. . .

(4) with Canon 5(4) or 5(5).

C. . . .

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

. . .

(e) with Canons 5(4) or 5(5).

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 94-9141

Concurring Opinion to Supreme Court Order

The supreme courts in the majority of states which hold judicial elections have instituted critically needed judicial campaign reform by eliminating year-round fundraising by judges. Today we join that majority. While I am reluctant to file a separate opinion in connection an administrative order of the Court, the intemperate writing of my colleague, Justice Doggett, compels a reply in the interest of fairness.[1]

The latest amendments to the Code of Judicial Conduct are part of an ongoing process by the Court to make the rules for appropriate judicial behavior fair, balanced and current. To that end, the Court appointed the Task Force on Judicial Ethics in 1992. Its charge was to examine the entire Code, with particular reference to "the recent revisions of the Model Code of Judicial Conduct recommended by the American Bar Association . . . ." Misc. Docket No. 92-0068, March 11, 1992. In mid-1993, the Task Force, under its Chair, Justice Doggett, returned a number of recommendations for changes to the Code. However, the Task Force

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[1]*See Weirich v. Weirich*, 867 S.W.2d 787 (Tex. 1993) (Enoch, J., concurring).

failed to address Canon 5. This Court then specifically directed the Task Force's attention to Canon 5. Misc. Docket No. 93-0132. Ultimately, the Task Force through Justice Doggett returned *no* recommendations for changes to Canon 5. The Court adopted the new Code, except for Canon 5, effective March 1, 1994. Misc. Docket No. 93-0233.

Today we complete the rewrite of the Texas Code of Judicial Conduct by adopting a new Canon 5, Refraining From Inappropriate Political Activity. As we have in many other parts of our Code, we follow the American Bar Association Model Code which limits the fundraising activities of judges and judicial candidates to a reasonable period around the election contest. We thus eliminate year-round fundraising by judges.

Our action is neither novel nor radical. Not only is the provision we adopt a part of the Canon 5C(2) of the Model Code, but it has also been adopted by a majority of the supreme courts of the various states where judges stand for election or reelection. *See* Alaska Code of Judicial Conduct Canon 7B(2); Arkansas Code of Judicial Conduct Canon 5C(2); Florida Code of Judicial Conduct Canon 7B(2); Illinois Code of Judicial Conduct 7B(2); Indiana Code of Judicial Conduct Canon 5C(2); Kansas Code of Judicial Conduct Canon 7B(3)(b); Kentucky Code of Judicial Conduct Canon 7B(2); Maine Code of Judicial Conduct Canon 5C(3); Michigan Code of Judicial Conduct Canon 7B(2)(c); Mississippi Code of Judicial Conduct Canon 7B(2); Nebraska Code of Judicial Conduct Canon 5C(2); Nevada Code of Judicial Conduct Canon 5C(2); New York Code of Judicial Conduct Canon 7B(2); North Dakota Code of Judicial Conduct Canon 5C(2); Ohio Code of Judicial Conduct Canon 7B(2); Oklahoma Code of Judicial

Conduct Canon 7B(2); Pennsylvania Code of Judicial Conduct Canon 7B(2); South Carolina Code of Judicial Conduct Canon 7B(2); South Dakota Code of Judicial Conduct Canon 5C(2); Tennessee Code of Judicial Conduct Canon 7B(2); Vermont Code of Judicial Conduct Canon 5C(3); Washington Code of Judicial Conduct Canon 7B(2); Wyoming Code of Judicial Conduct Canon 5C(2).

Nor did the Court adopt this provision without due consideration. In 1993, the Texas Ethics Commission submitted two recommendations *jointly* to the Legislature and this Court that are in large part encompassed in Canon 5. Its report stated:

Requirements unique to judges and judicial candidates

RECOMMENDATION NO. 15.

NO CONTRIBUTIONS TO UNOPPOSED JUDICIAL CANDIDATES

> Prohibit any judicial candidate from soliciting or accepting a political contribution after the filing deadline for an election and until six months after that election if that judicial candidate is unopposed for election, unless on the filing deadline the candidate has unpaid campaign debt that may be repaid by political contributions.

We do not believe there is any legitimate need for a judge who is unopposed in an election to solicit or accept campaign contributions.

RECOMMENDATION NO. 16.
LIMIT PERIOD FOR JUDICIAL CAMPAIGN FUNDRAISING

> Prohibit any candidate for election to a district or statutory county court from soliciting or accepting a political contribution except during a period that begins six months before the first day of the filing period and extends through the thirtieth day after the general election, unless the candidate has unpaid debt that may be repaid by contributions, in which case the period is extended until six months after the general election.

We acknowledge that most judges will need to solicit and accept contributions to conduct an effective election campaign and to provide funds for authorized office-holder expenditures. However, we are convinced that this fund-raising activity should be restricted to a reasonable time period before and after the election to avoid any appearance of impropriety.

Report of the Texas Ethics Commission, January 6, 1993. Later in 1993, the judges of Texas narrowly approved these concepts in a referendum at the annual meeting of the Judicial Section of the State Bar of Texas.[2] In 1994, the Task Force conducted five open hearings on these and other issues. From these, the Court received valuable input about the benefits and detriments of the proposed restriction. As significantly, the final report of another Supreme Court Task Force, that on Judicial Appointments, advised:

> Some members believe that year-round fundraising in itself constitutes the appearance of impropriety. In some areas of the state, judges consistently report monthly increases in their officeholder accounts. There is support on the task force for limiting the time within which candidates for trial court positions are permitted to fundraise. It was proposed that fundraising be limited to six months before the filing deadline, three months after the deadline in an uncontested race, and six months after the deadline in a contested race. Some members thought that the time periods should be shorter. Others believed that other limitations, such as a limitation upon the amount of contributions, should be imposed. Some members felt unopposed judicial candidates should not be allowed to receive campaign contributions beyond those necessary to pay the filing fee.
>
> A majority of the task force concluded, however, that while these proposals merit consideration by the appropriate body, campaign finance reform is a more sweeping proposal than is contemplated by the Supreme Court's charge to this task force.

[2]The judges voted in favor of restrictions on time of fundraising, 60 to 59, and in favor of Recommendation No. 15 of the Ethics Commission, 67 to 52.

Report of the Supreme Court Task Force on Judicial Appointments at 13 (March 1, 1993).[3]

I recognize that the Task Force on Judicial Ethics chose not to make this recommendation regarding Canon 5. While Justice Doggett asserts that the Task Force he chaired "soundly rejected" the proposal we adopt today, his report to this Court actually states that "[t]he Task Force [non-unanimously] believes that time limits should be considered only in the context of comprehensive campaign finance reform enacted by the Legislature." Report of the Supreme

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[3]The following letter was recently sent out by a judge. It speaks for itself.

January 8, 1994

Dear PAC Chair/Mng. Ptnr.:

This will probably be one of the most novel campaign contribution solicitation letters that you and/or your firm have ever received. It's different because I'm soliciting contributions of **only $100 to $250**. And it's different because I'm not up for re-election until 1998.

Here's the story: For the fifteen years I've been on the bench, we have held an annual St. Patrick's Day Fundraiser in March. That tradition may well come to an end after 1994. The Texas Supreme Court is considering prohibiting campaign contributions to judicial candidates during years when they are not on the ballot. Obviously, if I'm going to be able to raise the $3,000 or so it costs just to throw our annual celebration, I've got to do it now. Thus, this letter.

I want to continue holding our St. Patrick's Day Party. Thus this **extremely** early solicitation of your and/or your firm to contribute **now** as sponsors of our 1994 event. There will be only two sponsor levels -- "Honorary Irish Clans", for those firms contributing $250, and "Honorary Irish", for those individuals contributing $100. If the prohibition mentioned above is in place by March 17, 1994, **our St. Patrick's party will be free.** I'm just trying to recapture a part of our costs by soliciting these early sponsorships.

Will you and/or your firm help me by sending a $100/$250 check this month? I've enclosed a reply envelope for your convenience, and I'll obviously appreciate your help. Thank you for being my friend.

Sincerely,

Justice

Court Task Force on Judicial Ethics, July 11, 1994. Following the Task Force report, Justice Doggett suggests we forego this step on the road of reform to await a more comprehensive legislative action. Misc. Docket No. 94-9141 (Doggett, J., dissenting). However, this concern is only one factor for this Court to consider in deciding whether to take action. On the other hand, the action we have taken received favorable comment from both another Task Force of this Court and from the Texas Ethics Commission. We should not forego the good we can do out of hope that someone else may do something better. "The best is the enemy of the good." VOLTAIRE, (FRANCOIS MARIE AROUET), DICTIONAIRE PHILOSOPHIQUE, § Dramatic Art (1764), *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 306 (Justin Kaplan ed., 16th ed. 1992). The need for reform is too great. To ignore this call, and to fail to impose upon ourselves, when we have the authority to do so, restrictions that the majority of other states' elected judiciaries have imposed upon themselves, would be, in my view, inexcusable.

Craig Enoch
Justice

Opinion delivered: September 23, 1994.

IN THE SUPREME COURT OF TEXAS

MISC. NO. 94-9141

Dissenting Opinion to Supreme Court Order

Adoption of the new Texas Code of Judicial Conduct represents one of the more bizarre chapters in the recent history of this Court. These developments have occurred following important legislative efforts in 1993 to achieve comprehensive judicial campaign finance reform. Chief Justice Phillips endorsed the Judicial Campaign Fairness Act, S.B. 309, sponsored by Senator Rodney Ellis, as presented in Senate committee, then threatened to withdraw his endorsement unless changes were thereafter adopted during floor consideration by the Senate, and thereafter quietly opposed the measure in the Texas House. S.B. 309 was not approved by the Texas House.

On March 11, 1992, this Court created a Task Force on Judicial Ethics to recommend revisions to the Code. This bipartisan task force included Professor Barbara Jordan, ethics lecturer Joan Sanger, freedom of information expert Keith Shelton, and eight jurists, one a former chair of the State Commission on Judicial Conduct. *See* Misc. Order No. 920069. The Task Force met jointly with the State Commission on Judicial Conduct and with representatives of the Texas Ethics Commission. Hearings were conducted to obtain input from the judiciary as well as the public. With the Texas Ethics Commission recommending legislative action to address the political campaign activities of judges, the Task Force initially focused much of its attention on

important Code provisions other than Canon 5, which references such activities.[1] Fortunately, its work was highly successful. On April 6, 1993, the Supreme Court received a unanimous report from the Task Force proposing an extensive revision of the Code. Comments were also sought on this document from every administrative district and county court at law judge in Texas, as well as other types of judges and other interested parties. After almost three months, the Court unanimously approved the Code on June 30. *See* Misc. Order No. 93-0132. Not until June, shortly before this approval, did Chief Justice Phillips first request that the Code be amended to impose time limits on judicial campaign fundraising. After consulting with election experts and conducting public hearings in 1992, a bipartisan Texas Ethics Commission had previously rejected this restriction for appellate courts.[2] The Task Force chose to continue its study of this issue in the aftermath of the defeat of S.B. 309.

At an August 27, 1993 public hearing, the Task Force again considered the issue of campaign finance reform, including a new fundraising limitation not previously presented to it by the Chief Justice. Such piecemeal campaign finance reform was uniformly opposed in testimony from the various public interest groups that supported S.B. 309. It also drew objection from Judge Morris Overstreet and Senator Ellis. Letters to Chief Justice Phillips, (Oct. 19, 1993). Accordingly, on October 20 the Task Force respectfully asked the Court to defer action on the Chief Justice's proposal while agreeing that

[1] Contrary to the concurrence, *see* Misc. Docket No. 91-9141 (Enoch, J., concurring), the Task Force did recommend some changes to Canon 5, but the principal relevant recommendation was that changes in the Code should be coordinated with legislation.

[2] As the concurrence notes, the Ethics Commission limited its recommendation to local races. *See id.*

> [a] time limit on fundraising is a concept worthy of further consideration as one element in a reform package. Imposing unrealistic limits, however, may serve only to protect incumbents and to force all judges to become dependent on a small number of those with known fundraising skills. Moreover, the shorter the time for fundraising, the less the judicial work that can be expected during this period because of the urgency of completing fundraising efforts.

Unfortunately, the response to this request was the majority's suspension of the entire Code, including even those many provisions over which there was no dispute. *See* Misc. Order No. 93-0233 (Doggett, J., dissenting) (expressing concern about the majority's determination to hold the entire new Code hostage to obtain approval of the two Phillips' amendments). Finally, after conducting a joint hearing with the Task Force in December, 1993, the majority agreed to reinstate the Code and seek further comments on the two proposals at four regional judicial conferences.

Based on a report of these hearings as well as a further public hearing in Austin, the Task Force once again reported to the Court on July 11, 1994, rejecting the proposals and noting "that time limits should be considered only in the context of comprehensive campaign finance reform enacted by the Legislature." Among those who joined in opposing the measure was the Hispanic Issues Section of the State Bar of Texas, which noted that the "proposed limitation on fundraising is one more obstacle that will serve to exclude members of the Hispanic community." As I have written previously, the proposal now adopted is deficient:

> Judicial campaign finance reform will be incomplete and skewed as long as some candidates can benefit from unlimited campaign expenditures by special interest groups operating as so called "independent" committees. Increasing reliance on such contributions that "are very difficult, and sometimes impossible, to track" from special interests that have "abused and misused" the current system has already been well documented. *See* David Bragg, *Political Contributions to the Supreme Court of Texas, An Appearance of Impropriety*, Part II 3 (1993). The majority proposes no limitation on the time during which such a committee can

> raise funds, the amount of such funds, or on the ability of justices on this Court to promote such committee activities.

Misc. Order No. 93-0233 (Doggett, J., dissenting).

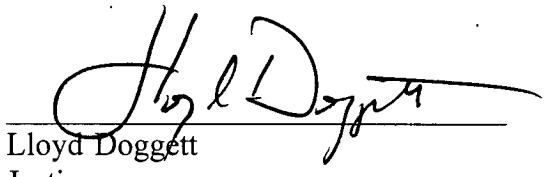
Concurrently with these developments has been the continuing effort to undermine another Code provision. As adopted by the Court on June 30, 1993, Canon 2C provides

> A judge shall not knowingly hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

TEX. CODE JUD. CONDUCT, Canon 2, pt. C (1994). This provision reflects a growing sensitivity to all forms of discrimination. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). While responsible judges have supported this new rule, the Tyler Eagle Forum, whose agenda has little to do with the administration of justice, has orchestrated opposition to Canon 2C. Judges symbolize the principles of equality and justice valued by our legal system. They should be leading the way toward a society free from all forms of prejudice and discrimination, not pandering to a vocal minority clinging to anachronistic prejudices.

Even before the instant order was signed or opinions completed, Chief Justice Phillips announced that the dual effort to impose time limits and repeal the ban on discrimination had been approved. In fact, an article concerning one of these issues has already been published. *See* Robison, *Fund-raising held to political 'season,'* HOUS. CHRON., Sept. 20, 1994, at A13. This is similar to his interaction with newspaper editors during the Court's deliberations on this same matter in 1993. I continue to support a bipartisan, comprehensive approach to campaign finance

reform such as that envisioned in S.B. 309. Today's amendment represents instead only an attempt to gain political advantage and avoid a real solution.[3]



Lloyd Doggett
Justice

Order delivered: September 23, 1994.

[3] Justice Enoch once again confuses a firm dedication to principle with "intemperance." *Cf. Weirich v. Weirich*, 867 S.W.2d 787, 787 (Enoch, J., concurring) (criticizing as "striden[t]" the dissent's opinion that cases of significant public interest should be published). Justice Enoch's concurrence dismisses the thoroughly considered and careful judgment of this bipartisan Task Force and substitutes a handful of ad hoc opinions, including the comments of the Task Force on Judicial Appointments, which was charged with an entirely different mission. As that group's report indicated,

> while these proposals merit consideration by the appropriate body, campaign finance reform is a more sweeping proposal than is contemplated by the Supreme Court's charge to this task force.

The "appropriate body" was the Task Force on Judicial Ethics, which soundly rejected the proposal that the majority forces on us today.