REPORT OF THE TEXAS JUDICIAL COUNCIL
COMMITTEE ON JUDICIAL SELECTION
August 2010

Executive Summary

At the March 19, 2010 Texas Judicial Council meeting, Chief Justice Jefferson announced the creation of a committee to examine judicial selection in Texas. The committee has examined potential changes related to the judicial selection process in light of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), and *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

This committee report addresses several topics:

- the Judicial Campaign Fairness Act;
- recusal standards;
- frequency of campaigns;
- straight-ticket voting; and
- criteria for judicial qualifications.

This report will provide a starting point for the Texas Judicial Council to evaluate particular proposals in anticipation of the Texas Legislature's 82nd Legislative Session, which begins on January 11, 2011.

In preparing this report, the committee has communicated with Texas Judicial Council member Senator Duncan and with Representative Lewis. Since the 1990s, Senator Duncan has worked on various reforms to the judiciary and has advocated for proposed changes to judicial selection in Texas. During the last legislative session,

Senator Duncan filed a bill that would have created a merit selection system for the appellate courts. Senator Duncan's institutional knowledge on this issue is invaluable and the committee hopes to continue working with him through this process. As a member of the House Judiciary & Civil Jurisprudence Committee, Representative Lewis is examining potential legislative changes to aspects of judicial selection in Texas pursuant to the committee's interim charge number 6.

While the committee invites continued dialogue on proposals to replace partisan judicial elections with alternatives such as appointment followed by retention elections, this report explores changes that are less sweeping and, perhaps, more attainable in the short term. *See, e.g.*, James Sample, *Caperton: Correct Today, Compelling Tomorrow,* 60 SYRACUSE L. REV. 293, 303 (2010) ("[W]hile opinions differ as to optimal selection methods, the judiciary, regardless of how selected, must respect — and protect — core minimum fairness values."). The proposals discussed below address potential modifications related to the Texas selection process that could be implemented within a framework of continuing partisan judicial elections.

This report draws on commentary regarding judicial selection and statistical information from sources including the Office of Court Administration and the National Center for State Courts. Analysis of potential changes includes discussion of practical ramifications; comparisons to practices in other states; and consideration of whether such changes would require amendments to the Texas Constitution in addition to legislation.

Analysis

I. The Impact of *Citizens United* and *Caperton* on Judicial Selection in Texas

The council's consideration of potential changes related to judicial selection in Texas is prompted in significant part by the decisions in *Citizens United*, 130 S. Ct. at 886, and *Caperton*, 129 S. Ct. at 2257. These decisions also have prompted renewed attention to the subject of judicial elections nationwide. *See generally* JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER, LINDA CASEY, AND CHARLES HALL, THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: DECADE OF CHANGE 1, 55-64 (2010), http://brennan.3cdn.net/c223cc1310d3b42314_g1m623rkz.pdf.

A. *Citizens United*

Citizens United addresses a First Amendment challenge to a federal statute that was amended by the Bipartisan Campaign Reform Act of 2002 to prohibit "corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate." *See Citizens United*, 130 S. Ct. at 886 (citing 2 U.S.C. § 441b).

"An electioneering communication is defined as 'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election." *Id.* at 887 (citing 2 U.S.C. § 434(f)(3)(A)). "Section 441b makes it a felony for all corporations — including nonprofit advocacy corporations — either to expressly advocate the election or defeat of

candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election." *Id*. at 897.

The Court invalidated this restriction and reasoned that "[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Id*. at 886.

The Texas Ethics Commission applied *Citizens United* to the Texas campaign finance statute in Ethics Advisory Opinion No. 489 issued on April 21, 2010. An overview of some key statutory terms will put the commission's conclusions in context.

The Texas statute does not use the phrase "independent expenditure" that was discussed in *Citizens United*. With certain exceptions, the Texas Election Code prohibits corporations and labor organizations from making a "political contribution" or a "political expenditure." *See* Tex. Elec. Code Ann. § 253.094 (Vernon 2010).[1] The term "political expenditure" encompasses a "campaign expenditure." *Id*. § 251.001(10) (Vernon 2010). The term "campaign expenditure" encompasses a "direct campaign expenditure." *Id*. § 251.001(8). The term "direct campaign expenditure" describes a campaign expenditure that is not a "campaign contribution." *Id*. § 251.001(8).[2] The

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[1] A "political contribution" is defined as a "campaign contribution" or an "officeholder contribution." *Id*. § 251.001(5) (Vernon 2010). A "political expenditure" is defined as an "officeholder expenditure" or a "campaign expenditure." *Id*. § 251.001(10). A "campaign expenditure" is defined as "an expenditure made by any person in connection with a campaign for an elective office or on a measure." *Id*. § 251.001(7).

[2] "For example, a person who pays for a billboard supporting a candidate by making a payment directly to the owner of the billboard, without obtaining prior consent

Texas Election Code also prohibits any person from knowingly making or authorizing a "direct campaign expenditure," again with certain exceptions. *Id.* § 253.002.

The Texas Ethics Commission concluded that the terms "independent expenditure" discussed in *Citizens United* and "direct campaign expenditure" used in the Texas Election Code are "interchangeable for the limited purpose of determining the effects of *Citizens United* upon title 15 of the Election Code." Op. Tex. Ethics Comm'n No. 489 at 2 (2010).

After equating the terms "independent expenditure" and "direct campaign expenditure," the commission analyzed *Citizens United*'s application to Texas election law. "Although a federal statute was at issue in *Citizens United*, its holding raises the question of whether it renders unconstitutional the state prohibition on corporations making direct campaign expenditures to support or oppose a candidate for elective office." *Id.* "[W]e believe the Texas Legislature intended the laws under our jurisdiction to prohibit political expenditures made by corporations to the full extent allowed by the United States Constitution as interpreted by the United States Supreme Court." *Id.* "It is clear that under *Citizens United*, sections 253.094 and 253.002 of the Election Code cannot be enforced to prohibit direct campaign expenditures by corporations or labor organizations." *Id.* "Furthermore, based on *Citizens United*, section 253.002 of the

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or approval from the candidate, would make a direct campaign expenditure." Op. Tex. Ethics Comm'n No. 489 at 2 (2010). "If the candidate gives prior consent or approval to the offer to pay for the billboard, the person has made (and the candidate has accepted) a campaign contribution to the candidate. *Id.* (citing Op. Tex. Ethics Comm'n No. 331 (1996)).

Elections Code cannot be enforced to prohibit direct campaign expenditures by any other person." *Id.*

The Texas Ethics Commission concluded that *Citizens United*'s reach is limited to prohibitions on ***direct campaign expenditures***. "The decision of *Citizens United* does not impact the restrictions under our jurisdiction that prohibit a corporation or labor organization from making a ***political contribution*** to a candidate or officeholder." *Id.* (emphasis added). "Thus, we will continue enforcing the restrictions that prohibit a corporation or labor organization from making a political contribution to a candidate or officeholder." *Id.*

The commission also concluded that *Citizens United* "does not impede us from continuing to enforce the political advertising disclosure requirements under chapter 255 of the Election Code." *Id.* at 5. "In addition, title 15 requires a corporation, labor organization, or other person that makes one or more direct campaign expenditures from its own property in connection with an election of a candidate to comply with the reporting requirements that apply to an individual as set out in section 253.062 of the Election Code." *Id.*

B. *Caperton*

In contrast to *Citizens United*, which focuses on the permissibility of prohibiting certain types of political speech, *Caperton* focuses on the circumstances under which permissible political speech directed at a judicial election can require recusal of an elected judge under the Fourteenth Amendment's Due Process Clause. *See Citizens*

United, 130 S. Ct. at 910 ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's speech could be banned.").

Caperton arose from a case in which the Supreme Court of Appeals of West Virginia reversed a trial court judgment in connection with a 2002 jury verdict awarding $50 million in favor of Caperton and against A.T. Massey Coal Co. *Caperton*, 129 S. Ct. at 2256. "The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion." *Id*. "The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages." *Id*. at 2256-57.

The Court held that "[u]nder our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id*. at 2257 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). "Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal." *Id*.[3]

The circumstances in *Caperton* included a series of donations by Don Blankenship, who serves as Massey's chairman, chief executive officer, and president:

[3] Pre-*Caperton* decisions from Texas courts rejected recusal arguments predicated on campaign contributions in judicial elections. *See, e.g., Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App.—El Paso 1993, writ denied); *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App.—Dallas 1990, no writ); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 844-45 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App.—San Antonio 1983, no writ).

(1) $1,000 contributed directly to the campaign committee of Brent Benjamin, who was running for election in 2004 to the West Virginia appellate court against an incumbent justice; (2) $2.5 million contributed to a separate political organization supporting Benjamin and opposing the incumbent; and (3) $500,000 in independent expenditures for direct mailings and letters soliciting donations to Benjamin's campaign, as well as television and newspaper advertisements supporting Benjamin. *Id.* Benjamin prevailed in the 2004 election. *Id*.

In October 2005, Caperton moved to recuse Justice Benjamin under the Due Process Clause based on Blankenship's election-related spending. *Id*. Justice Benjamin denied the motion. *Id.*

In December 2006, Massey filed its petition seeking review of the $50 million judgment by the West Virginia Supreme Court of Appeals to which Justice Benjamin had been elected. *Id*. at 2258. The court ruled in Massey's favor in November 2007 and reversed the judgment by a 3-2 vote; Justice Benjamin voted with the majority and joined the opinion reversing the trial court's judgment. *Id.* Thereafter, Justice Benjamin rejected two additional recusal requests. *Id*.

The United States Supreme Court concluded that these circumstances created "an extraordinary situation where the Constitution requires recusal." *Id*. at 2265. The Court applied "objective standards that do not require proof of actual bias," and it disclaimed any determination as to "whether there was actual bias" on Justice Benjamin's part

arising from Blankenship's spending on his behalf in connection with the 2004 election. *Id*. at 2263.

The Court stated, "We conclude that there is a serious risk of actual bias — based on objective and reasonable perceptions — when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 2263-64. "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* at 2264.

In concluding that Blankenship's campaign efforts "had a significant and disproportionate influence in placing Justice Benjamin on the case," the Court stressed that (1) Blankenship's $3 million "eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee;" (2) the election was decided by fewer than 50,000 votes; and (3) "[i]t was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." *Id.* at 2264-65. "On these extreme facts the probability of actual bias rises to an unconstitutional level." *Id*. at 2265.

The *Caperton* majority rejected contentions that recognizing a constitutional violation under these circumstances would prompt a flood of recusal motions and give rise to "unnecessary interference with judicial elections." *Id.* The majority reasoned that

existing codes of judicial conduct directing judges to avoid the appearance of impropriety would address most situations involving recusal issues related to election activity. *Id.* at 2267.

C. Impact in Texas

Citizens United and *Caperton* pull in opposite directions.

Under *Citizens United*, First Amendment protections invalidate the Texas Election Code's prohibition against direct campaign expenditures by corporations, labor organizations, and individuals. Under *Caperton*, "objective and reasonable perceptions" arising from newly permissible expenditures in judicial elections by corporations, labor organizations, or individuals require recusal if those expenditures reach an unquantified level creating a "significant and disproportionate influence" and a "serious risk of actual bias" — regardless of whether evidence of actual bias exists.

Texas judges now sit at the uneasy intersection of *Citizens United* and *Caperton*.

Corporations, labor organizations, and individuals cannot be prohibited from making direct campaign expenditures in connection with the partisan election process used to select Texas judges. But these same expenditures can result in recusal — or a due process violation if recusal does not occur — based on criteria that are imprecise at best. *See Caperton*, 129 S. Ct. at 2263 ("Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."). According to Chief Justice Roberts, "[T]he standard the majority articulates — 'probability of bias' — fails to provide clear, workable guidance for future

cases." *Caperton*, 129 S. Ct. at 2269 (Roberts, C.J., dissenting). "Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?)." *Id*. at 2272 (Roberts, C.J., dissenting). The dissent identified 40 open questions concerning the circumstances and procedures governing recusal under *Caperton*. *Id*. at 2269-72 (Roberts, C.J., dissenting).

The *Caperton* majority contemplated that existing recusal standards and codes of judicial conduct will serve as a primary mechanism for determining when judges must decline participation in particular matters for election-related reasons. "Almost every State — West Virginia included — has adopted the American Bar Association's objective standard: 'A judge shall avoid impropriety and the appearance of impropriety.'" *Id*. at 2266 (quoting ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004)). "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution." *Id.* at 2267.[4] "Application of the constitutional standard implicated in this case will thus be confined to rare instances." *Id.*

[4] Although the Supreme Court referred to disqualification and recusal interchangeably in *Caperton*, these are separate concepts under Texas law. Disqualification of a judge who has an interest in a case or a relationship to a party, or who has served as counsel in a case, is absolute under the Texas Constitution. Tex. Const. art. V, § 11. Disqualification can be raised at any time, including by collateral attack on the judgment. *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 146 Tex. 18, 20, 202 S.W.2d 218, 220 (1947). In contrast, recusal on any ground not enumerated as disqualifying under the Texas Constitution is governed by statute and rule, and can be waived. *See Glaser*, 632 S.W.2d at 148.

As described below, the Texas Supreme Court Advisory Committee is discussing post-*Caperton* revisions to the recusal procedures set forth in Texas Rule of Civil Procedure 18a and the recusal standards set forth in Rule 18b.

While attention to recusal procedures and standards is warranted at this juncture, recusal alone is not necessarily a complete response. *See* Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. at 303-04 (After *Caperton*, "[s]trengthened recusal practice is not a panacea for the courts, but it is an important step."). Resolution of a single recusal dispute addresses the particular circumstances of a particular judge involved in a particular matter. But the approach adopted in *Caperton* sweeps beyond the circumstances surrounding any one judge by framing the due process standard in terms of "objective and reasonable perceptions" that "do not require proof of actual bias." *Caperton*, 129 S. Ct. at 2263.

By grounding its analysis upon public perceptions rather than proof of actual bias, *Caperton* unavoidably raises larger questions about decision-making in the context of an elected judiciary.

According to the United States Supreme Court, "[O]bjective standards may . . . require recusal whether or not actual bias exists or can be proved." *Id.* at 2265. "Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Public perceptions of an elected judiciary may be affected regardless of whether particular recusal motions succeed or fail

in particular circumstances under *Caperton*'s fact-bound approach. *See id*. at 2274 (Roberts, C.J., dissenting) ("[O]pening the door to recusal claims under the Due Process Clause, for an amorphous 'probability of bias,' will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.").

These circumstances make it appropriate to look beyond modified recusal standards alone, and to consider additional measures aimed at reinforcing public confidence in a judiciary selected through a partisan election process. *See* Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. at 303-04.

II. Potential Responses

The committee has identified several potential responses to these issues, taking into consideration whether these responses would involve rulemaking, legislative changes, or amendments to the Texas Constitution. The potential responses are discussed more fully below. Additional responses warranting further consideration also may be suggested, such as public financing of elections and provision of voter guides.

The committee has included an appendix containing comparative information relating to other states that rely in whole or in part upon partisan elections to select judges. The primary states for comparison purposes are Alabama, Illinois, Indiana, Kansas, Louisiana, Michigan, Missouri, New York, Ohio, Pennsylvania, Tennessee, and West Virginia. The appendix presents comparative information assembled by the National Center for State Courts focusing on judicial qualifications in ***Table 1***; straight-

ticket voting in ***Table 2***; length of terms in ***Table 3***; length of initial term after appointment in ***Table 4***; contribution limits and recusal standards in ***Table 5***; and post-*Caperton* changes to court rules in ***Table 6***. The appendix also includes ***Table 7*** compiled by the Brennan Center For Justice, which summarizes proposed rule and legislative responses to the issues raised in *Caperton*.

A. Judicial Campaign Fairness Act

Attention to existing statutes governing Texas judicial elections is warranted in light of *Citizens United* and *Caperton*.

The Judicial Campaign Fairness Act limits the time frame during which a judicial candidate can accept a "political contribution"[5] and sets contribution limits for judicial races. *See* Tex. Elec. Code Ann. §§ 253.153, 253.155, 253.157 (Vernon 2010).[6] A

[5] In an election for a full term, the window for accepting a "political contribution" opens 210 days before the date an application for a place on the ballot or for nomination by convention for the office is required to be filed. Tex. Elec. Code Ann. § 253.153(a)(1)(A) (Vernon 2010). The window closes on the 120th day after the date of the election in which the candidate or officeholder last appeared on the ballot. *Id*. § 253.153(a)(2).

[6] Subject to certain exceptions, a judicial candidate or officeholder may not knowingly accept "political contributions" from a person that in the aggregate exceed the following limits: $5,000 for a statewide judicial office; $1,000 for any other judicial office if the population of the judicial district is less than 250,000; $2,500 for any other judicial office if the population of the judicial district is between 250,000 and one million; and $5,000 for any other judicial office if the population of the judicial district is greater than one million. *Id*. § 253.155(b). Under section 253.157, aggregate contributions by a law firm, a member of a law firm, or a general-purpose committee of a law firm are limited to six times the contribution levels established in section 253.155. *Id*. § 253.157(a)(2). Penalties apply if a recipient fails to timely return contributions that exceed the limits established in sections 253.155 and 253.157. *Id*. §§ 253.155(e), (f); 253.157 (b), (c).

separate provision establishes aggregate limits on political contributions from and direct campaign expenditures by a general-purpose committee. *Id.* § 253.160.

Persons other than candidates, officeholders, or certain political party officials must file a written declaration of intent to make "political expenditures" exceeding $5,000 "for the purpose of supporting or opposing a candidate for an office other than a statewide judicial office or assisting such a candidate as an officeholder unless the person . . . ." *Id.* § 253.163(a). The aggregate limit for such expenditures in connection with candidates for statewide judicial office is $25,000. *Id.* § 253.163(b).

Additionally, section 253.168 establishes expenditure limits under which a judicial candidate may not knowingly make or authorize political expenditures exceeding certain aggregate levels. *Id.* § 253.168(a). "A person who violates this section is liable for a civil penalty not to exceed three times the amount by which the political expenditures made in violation of this section exceed the applicable limits prescribed by Subsection (a)." *Id.* § 253.168(b).

If applicable expenditure limits are exceeded by a candidate for judicial office, or if the requisite notice of intent to exceed expenditure limits is not provided, then an opponent of the non-complying candidate for judicial office is not required to comply with the limits on contributions, expenditures, and the reimbursement of personal funds. *Id.* § 253.165; *see also id.* § 253.170 (addressing third-party expenditures).

For the most part, the limits discussed above do not specifically address direct campaign expenditures by corporations or labor organizations. This omission is not

surprising because, subject to certain exceptions, the current versions of sections 253.094 and 253.002 of the Election Code prohibit direct campaign expenditures by corporations, labor organizations, and other persons. As noted earlier, the Texas Ethics Commission has concluded that sections 253.094 and 253.002 of the Election Code no longer can be enforced in light of *Citizens United* to prohibit a corporation, a labor organization, or any other person from making a direct campaign expenditure. *See* Op. Tex. Ethics Comm'n No. 489 at 2. This conclusion would apply to direct campaign expenditures in judicial and non-judicial races alike. *See id.*

Available options for addressing recusal and related issues in light of *Citizens United* and *Caperton* include the following approaches.

- Focus solely on revisions to the Texas Rules of Civil Procedure, the Texas Rules of Appellate Procedure, and/or the Code of Judicial Conduct to articulate updated recusal standards reflecting *Caperton*'s holding.
- Focus solely on amendments to the Texas Election Code, leaving existing rules unchanged.
- Combine rule revisions with statutory amendments.

If statutory revisions are to be considered, available options include the following approaches to amending the Texas Election Code.

- Incorporate restrictions specifically aimed at previously prohibited (but now permissible) direct campaign expenditures by corporations, labor organizations, and other persons. *See* Op. Tex. Ethics Comm'n No. 489 at 2. Such restrictions could address specific dollar limits on, the timing of, and reporting requirements for direct campaign expenditures by corporations, labor organizations, and other persons.

- Incorporate revised expenditure limits directed at judicial candidates/officeholders.
- Incorporate revised campaign contribution limits. This approach would be a more indirect response to the concerns animating the *Caperton* majority. The majority did not focus on Blankenship's $1,000 campaign contribution to Justice Benjamin's campaign; instead, it focused on Blankenship's $2.5 million contribution to a separate political organization supporting Justice Benjamin, and on Blankenship's $500,000 independent expenditure on Justice Benjamin's behalf. *See Caperton*, 129 S. Ct. at 2257. Additionally, the Texas Ethics Commission has concluded that *Citizens United* does not affect the prohibitions that currently preclude a corporation or labor organization from making a political contribution to a candidate or officeholder. *See* Op. Tex. Ethics Comm'n No. 489 at 2. The commission will continue to enforce the restrictions that prohibit a corporation or labor organization from making a political contribution to a candidate or officeholder. *Id*.
- Incorporate recusal standards into the Texas Election Code. Such standards could be framed in terms of requiring recusal based upon certain criteria (such as specific dollar amounts, or amounts exceeding specified limits) for contributions, candidate expenditures, or third-party expenditures. Such standards also could be framed to create a presumption ***against*** recusal based upon certain criteria — for example, in circumstances in which the judicial officeholder has complied with voluntary contribution or expenditure limits.

Judicial Council members and other interested parties may have further ideas warranting discussion.

For comparison purposes, ***Table 5*** includes a summary of relevant statutory provisions from Alabama, Illinois, Indiana, Kansas, Louisiana, Michigan, Missouri, New York, Ohio, Pennsylvania, Tennessee, Texas and West Virginia. ***Table 6*** summarizes rule changes in those states. ***Table 7*** summarizes post-*Caperton* proposals being considered in California, Florida, Georgia, Massachusetts, Montana, North Carolina, Nevada, Washington, and Wisconsin.

Table 5 also references H.B. 4548, a bill filed in the Texas House of Representatives before *Caperton* was decided. This bill illustrates one approach to creating a statutory recusal standard. It would have required recusal of a supreme court justice or court of criminal appeals judge from any case in which the justice or judge had accepted political contributions in the preceding four years totaling $1,000 or more from a party to the case, an attorney of record in the case, the law firm of an attorney of record in the case, the managing agent of a party to the case, a member of the board of directors of a party to the case, or a general-purpose committee established or administered by a person who is a party to the case. H.B. 4548 was left pending in the House Judiciary and Civil Jurisprudence Committee at the end of the 81st Legislative Session in 2009. Similar proposals relying on particular dollar amounts as a recusal trigger have been discussed in California, Montana, Nevada, and Wisconsin. *See* ***Table 7***.

Consideration is warranted to address how a Texas recusal standard predicated on political contributions in a specific dollar amount would mesh with existing contribution and expenditure limits under the Judicial Campaign Fairness Act. As a practical matter, a

mechanism requiring recusal based on contributions at a specific dollar level ***below*** the current statutory limits could make those existing limits more theoretical than real. Existing contribution limits may mesh more smoothly with a recusal mechanism that creates a presumption in favor of recusal when existing statutory limits are exceeded — or, alternatively, a presumption against recusal when existing statutory limits have not been exceeded. Such an approach would give effect to current statutory limits while maintaining flexibility to address individual circumstances in individual cases by creating a rebuttable presumption rather than an absolute recusal trigger.

B. Recusal Standards Under Rule 18b

The Texas Supreme Court Advisory Committee currently is addressing revisions to Texas Rule of Civil Procedure 18a's recusal procedures and Rule 18b's recusal standards.[7] The advisory committee recently drafted revisions to Rule 18a for the Texas Supreme Court's consideration; among other things, these proposed procedural revisions address the timing of recusal motions, required specificity in setting forth recusal grounds, efforts to obtain discovery from the respondent judge, and requests to recuse the presiding judge who hears a motion to recuse. The committee also is considering changes to Rule 18b's recusal standard in light of *Caperton*. Because the advisory committee currently is deliberating on the formulation of rule-based recusal standards in

[7] The Texas Supreme Court has authority to promulgate or amend the rules of civil procedure. *See* Tex. Gov't Code Ann. § 22.004 (Vernon Supp. 2009). Proposed amendments must be filed with the secretary of state and notice to the bar must be provided before an amendment's effective date. *Id.* § 22.004(b). The secretary of state must report amendments to the next regular session of the Legislature. *Id.*

light of *Caperton*, no specific recommendations are being made to the Texas Judicial Council at this time for consideration of changes to Rules 18a or 18b.[8]

Michigan has amended its court rules to provide for recusal when "the judge, based on objective and reasonable perceptions, has . . . a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey* . . . ." *See* ***Table 6***.

C. Frequency of Campaigns

Requiring less frequent campaigns would diminish the effect of campaigning on judicial functioning in Texas.

1. Length of terms

The most direct way to reduce the frequency of campaigns is to adjust the length of terms. *See* Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1279 (2008) (increase in length of judicial terms will "reduce the frequency with which judicial tenure is put at risk"); Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1100 (2007) ("Longer terms also mean fewer elections, less need to campaign, raise funds and grapple with the ever-more-daunting questions about campaign conduct, and less concern about decisions' vulnerability to distortion."); *see also Call to Action:*

[8] The grounds for recusal of an appellate judge under Texas Rule of Appellate Procedure 16 include all of the grounds identified for recusal of a trial judge under Texas Rule of Civil Procedure 18b; in addition, an appellate judge "must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending." Tex. R. App. P. 16.2.

Statement of the National Summit on Improving Judicial Selection, 34 LOY. L.A. L. REV. 1353, 1355 (2001).

A comparison of current judicial terms in Texas — four years for district courts and six years for appellate courts — to those in other states that rely upon partisan judicial elections demonstrates that terms in Texas are among the shortest. *See* ***Table 3***. Adjusting terms in Texas to six years for district courts and eight years for appellate courts would help to equalize those terms in relation to the terms mandated in other states. *See id.*; *see also* Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. at 1100 ("[E]very judicial selection system has pluses and minuses, and every aspect of any system has pluses and minuses. But longer terms are, on balance, a clear plus."). Such an adjustment would require a constitutional amendment. *See* Tex. Const. art. V, §§ 2, 4, 6, 7.

2. Back-to-back elections

A separate approach would focus on modifying Section 28(a) of Article V of the Texas Constitution, under which a judge who has been appointed to fill a vacancy must serve "until the next succeeding General Election for state officers, and at that election the voters shall fill the vacancy for the unexpired term." Depending on the timing of a vacancy, this provision can compel a recent judicial appointee to run in back-to-back elections — first to serve out the remaining years of an unexpired term, and then to seek a full term in the next election. The frequency of campaigns would be reduced if appointed judges were allowed to serve a full term before undertaking a second election. *See Call*

to Action, 34 LOY. L.A. L. REV. at 1355 ("All judges appointed to fill a vacant judicial position should serve a substantial period in office before initial election. After initial election, all judges should serve a full term before a second election."). Pursuing this option would require revision to staggered term requirements. *See, e.g.*, Tex. Const. art. V, § 2(c).

A comparison to the practice in other states with partisan judicial elections appears in ***Table 4***.

D. Straight-Ticket Voting

Partisan sweeps have become a recurring aspect of judicial elections; for example, sweeps occurred in district court elections in Houston in 1994 and 2008, and in Dallas in 2006. "Highly qualified judicial candidates can be defeated simply because, in a particular election year, they bear the wrong party label." Anthony Champagne, *Politics and Judicial Elections,* 34 LOY. L.A. L. REV. 1411, 1413 (2001). The effects of political party identification "are especially noticeable when highly qualified judges are defeated simply because they had the wrong party label in a year when a presidential nominee of the opposing party was unusually popular . . . ." *Id.* at 1426. Working within a framework of partisan judicial elections, a statutory amendment to eliminate straight-ticket voting in judicial elections could ameliorate the most extreme sweeps arising in connection with partisan identification of judicial candidates. Legislative proposals to eliminate straight-ticket voting in Texas judicial elections date back to at least 1997, when this feature was included in S.B. 621 filed by Senators Duncan, Armbrister and

Patterson. A possible alternative approach would be to schedule judicial elections for a date other than the date of the general election.

Straight-ticket voting is not a part of judicial elections in Illinois, Louisiana, Ohio, Kansas, Missouri, New York and Tennessee. The practice is allowed in judicial elections in Alabama, Michigan, Indiana, Pennsylvania, Texas and West Virginia. *See* ***Table 2***.

E. Judicial Qualifications

To the extent that participation in the election process bears on the public's confidence in the judiciary, that confidence can be bolstered by supplementing the requirements for holding judicial office.

The justices of the Texas Supreme Court, the judges of the Court of Criminal Appeals, and the justices of the intermediate courts of appeals must (1) be licensed to practice law in Texas; (2) be United States citizens; (3) be at least 35 years old and less than 75 years old; and (4) have "been a practicing lawyer, or a lawyer and judge of a court of record together at least ten years." Tex. Const. art. V, § 2; *see also id*. §§ 1-a, 4, 6. District judges are constitutionally required to (1) be citizens of the United States and Texas; (2) be licensed to practice law in Texas; (3) be less than 75 years old; (4) have "been a practicing lawyer or a Judge of a Court in this State, or both combined, for four (4) years next preceding his election;" (5) have "resided in the district . . . for two (2) years next preceding . . . election; and (6) reside in the district during the term of office.

Tex. Const. art. V, §§ 1-a, 7. By statute, district judges must be at least 25 years old. Tex. Gov't Code Ann. § 24.001 (Vernon 2004).[9]

During the Texas Legislature's 81st Legislative Session in 2009, Representative Gattis sponsored Joint Resolution Nos. 105 and 106; these resolutions proposed constitutional amendments to change the qualifications for serving as an appellate or district court judge.

Joint Resolution No. 105 proposed amending Sections 2, 4, and 6 of Article V to require that justices on the Texas Supreme Court, judges on the Court of Criminal Appeals, and justices on the intermediate courts of appeals must be board certified by the Texas Board of Legal Specialization. Joint Resolution No. 105 was referred to the Judiciary and Civil Jurisprudence Committee, but was not voted out of that committee.

Joint Resolution No. 106 proposed amending Section 7 of Article V governing district judges to (1) raise the minimum age from 25 to 35; (2) raise the minimum required years of legal practice and/or prior judicial service from four to ten; (3) require three years of legal practice in Texas immediately preceding judicial service; (4) require completion of at least 60 hours of continuing legal education in the three years immediately preceding judicial service; and (5) require that at least five persons be willing to attest to the judge's competence in the practice of trial law. Additionally, Joint Resolution No. 106 would have set minimum requirements based on detailed criteria for the number and types of civil or criminal cases tried prior to judicial service.

[9] In 2007, Texas voters approved a constitutional amendment allowing judges who reached the mandatory retirement age of 75 to finish their terms in office.

Joint Resolution No. 106 was referred to the Judiciary and Civil Jurisprudence Committee, but was not voted out of that committee.

The number and complexity of the revisions proposed in Joint Resolution No. 106 may have affected its progress towards passage during the 81st Legislative Session. Consideration should be given to selecting a subset of the qualification criteria set forth in Joint Resolutions Nos. 105 and 106 for application to district court and appellate judges during the 82nd Legislative Session.

Additional criteria that have been suggested for consideration include requiring (1) an absence of disciplinary actions or suspensions while practicing law during a set number of years before going on the bench; (2) appearances as counsel of record in a certain number of cases in the court for which election is sought; and (3) prior judicial service by candidates for election to an appellate bench.[10]

Potential alternatives to the board certification requirement referenced in Joint Resolution Nos. 105 and 106 would include (1) a statutory requirement for district court and appellate judges to become board certified within a set timeframe ***after*** going on the bench; or (2) a statutory incentive for district court and appellate judges to become board

[10] This proposed requirement would not apply to appointed appellate judges during the interim period between appointment to a vacancy and the first required election after appointment to fill the unexpired term. *See* Tex. Const. art. V, § 28(a). According to statistics from the Office of Court Administration, as of March 2010, one justice went directly from private practice to the Texas Supreme Court; two judges went directly from private practice to the Court of Criminal Appeals; and at least 23 intermediate court of appeals justices went directly from private practice to the bench. Another justice joined the Texas Supreme Court after serving in the Attorney General's office.

certified in the form of additional compensation or retirement benefits. *Cf.* Tex. Gov't Code Ann. § 24.001 (Vernon 2004) (establishing minimum age requirement for district court judges by statute).

A further alternative approach would be the creation of a Judicial Qualification Commission to establish criteria for judicial service.

Selection of any of the options outlined above would result in judicial qualification requirements exceeding those in other states that select their judges through partisan judicial elections. *See* ***Table 1***.

Conclusion

Continued reliance on partisan elections to select Texas judges does not foreclose adjustments to the current process. Issues raised by *Citizens United* and *Caperton* warrant discussion of potential responses within a framework of continuing partisan judicial elections. States are exploring a wide array of responses to these issues. The variety of responses reflects the variety of existing circumstances — including, in some states, an absence of well-defined contribution limits, disclosure requirements, or recusal procedures. These important components already are in place in Texas. The next step for the Texas Judicial Council is to weigh potential responses against this backdrop in conjunction with other interested parties, and to explore whether a consensus can be reached that achieves an appropriate balance among the important interests at issue.