

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PUBLIC CITIZEN, INC., *et al.*,)
)
Plaintiffs,) Civil No. A-00-CA-218 JRN
)
v.)
)
ELTON BOMER, Secretary of State,)
)
Defendant.)
_____)

APPENDIX IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

In accordance with Local Rule CV 7(b), Plaintiffs submit this Appendix in support of their motion for summary judgment. Tab A of the Appendix is a summary of facts. Tabs B through G are the declarations of plaintiffs Larry Daves, Larry J. Doherty, Charlotte Flynn (for Gray Panthers Project Fund), D.J. Powers, Virginia Schramm, and Thomas Smith (for Public Citizen), respectively. Tabs H through J are the declarations of Humberto Garcia, Yolanda Urbina Jurado, and Sandy Rollins. Tab K includes true and correct copies of articles, reports, studies, and other miscellaneous sources cited in Plaintiffs' motion.

Dated: May 3, 2000

Respectfully submitted,

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SUMMARY OF FACTS

A. THE TEXAS SYSTEM¹

Under the Texas Constitution, all state judges are elected. The terms of office of the nine supreme court justices and the 79 courts of appeals justices are six years. The terms of office of the approximately 400 judges of the district courts and the 447 judges of the county-level courts (constitutional county courts, county courts at law, and probate courts) are four years. Tex. Const. art. 5, §§ 2, 6, 7, 15 (terms of office); <<www.courts.state.tx.us/publicinfo/AR98>> (Office of Court Admin. website, visited Apr. 18, 2000) (number of courts as of Sept. 1, 1998).

Financial contributions for the election of judges in Texas may be made by any person other than labor unions and most corporations. Tex. Elec. Code Ann. § 253.091, § 253.094 (Vernon 1994 & Supp. 1999). Corporate shareholders, officers, and employees and union members are free to give. Prior to June 16, 1995, when the Judicial Campaign Fairness Act became effective, the amount a judicial candidate could accept from any contributor—including a lawyer or other person with a direct interest in a matter pending before that candidate—was unlimited. Currently, a judicial candidate may not accept more than \$5,000 per individual per election for a campaign for a statewide judicial office or a judicial office in a district where the population exceeds one million. 15 Tex. Elec. Code Ann. § 253.155. If the judicial district population is between 250,000 and one million, the candidate may not accept more than \$2,500 per individual. *Id.* If the district population is less than 250,000, the limit is \$1,000 per individual. *Id.*²

¹ True and correct copies of all reports and articles cited herein are attached at Tab K of the Appendix.

² Of Texas' 14 court of appeals districts, seven have populations in excess of one million people; and seven have populations of between 250,000 and one million people. *See* <<www.sos.state.tx.us/function/elec1/laws/JudgePopulation97.htm>> (visited Nov. 15, 1999). The populations of Texas' district court districts range from as small as 11,723 to as large as 2,818,199.

Texas law treats law firms as individuals for purposes of contributions in the name of the firm itself. Once the combined contributions of the firm and its members to a single candidate for a single election reach six times the limit imposed on individuals—for example, \$30,000, in the case of a statewide judicial office—a candidate may not accept contributions of more than \$50 from other members of the firm for that election. 15 Tex. Elec. Code Ann. § 253.157.

The 1995 Act includes voluntary expenditure limits. *Id.* § 253.164, § 253.168. A candidate may accept from PACs a combined total of up to 15 percent of the applicable voluntary expenditure limit. Thus, in the case of an election for a statewide judicial office, for which the voluntary expenditure limit is \$2,000,000, PACs may contribute a total of \$300,000 per candidate. *Id.* § 253.160. In addition, individuals and PACs may make independent expenditures of as much as \$25,000 to support or oppose a candidate for statewide judicial office (\$5,000 for other judicial offices), as long as the expenditures are not coordinated with the candidate or the candidate's campaign committee. *Id.* § 253.170.³

If a candidate does not abide by the applicable expenditure limit, the contribution and expenditure limits are suspended for that candidate's opponents. *Id.* § 253.165.

The contribution limits are calculated separately for each election, not for each election cycle. Thus, a contributor may give \$5,000 to a candidate for a seat on the supreme court for the primary election, \$5,000 for any runoff election, and \$5,000 for the general election. Tex. Ethics Comm'n Advisory Op. No. 302 (1996). The total amount of contributions an individual may make to all

Id.

³ If a PAC has communicated with the candidate's campaign about any strategic matter, the expenditure by that PAC is considered a contribution, not an independent expenditure. 15 Tex. Elec. Code § 253.160 (c).

judicial candidates and PACs combined is not limited.⁴ Contributions by litigants or lawyers to the judicial candidacy of judges before whom they have matters pending are not subject to any added prohibition or limitation.⁵

Judicial candidates may begin solicitation approximately seven months (210 days) before the deadline for filing an application to have one's name placed on the ballot and for approximately four months (120 days) after the last election (primary, runoff, or general) in which the candidate has an opponent. 15 Tex. Elec. Code Ann. § 253.153 (a). The filing deadline is January 2 of the election year. *Id.* § 172.023(a). Thus, a sitting judge may solicit contributions for 21 months (seven months before filing deadline, ten months from deadline through general election, four months after general

⁴ Texas law also does not limit the amount an individual may contribute to a political party. The 1995 Act allows unlimited expenditures by political parties on behalf of judicial candidates if the expenditure is for a written list that identifies at least two candidates, does not include any reference to judicial philosophy or positions on issues, and is not broadcast, cablecast, published in a newspaper or magazine, or placed on a billboard. 16 Tex. Elec. Code § 253.171.

Expenditures that do not comply with those requirements are deemed expenditures by the candidate for the purpose of assessing whether the candidate has complied with the Act's voluntary expenditure limits, but they are not otherwise limited. Candidates who comply with those limits are entitled to state their compliance in their political advertising. *Id.* § 253.166. The expenditure limit is \$2 million for a campaign for a statewide judicial office, \$500,000 for court of appeals judgeships for judicial districts with populations of more than one million people, and \$350,000 for districts of one million or fewer. For other judgeships, the limits are \$350,000 for judicial districts of more than one million people, \$200,000 for districts of 250,000 to one million people, and \$100,000 for districts of less than 250,000. *Id.* § 253.168.

⁵ As noted in a 1999 report prepared for the Supreme Court of Texas, "nothing in the Act would bar a judge who has accepted an excessive, illegal contribution to preside over a case involving the contributor. Nor is there other Texas law that would require recusal or disqualification in such an instance." Supreme Court of Texas, Judicial Campaign Finance Study Committee, Report and Recommendations, at 18 (Feb. 23, 1999) ("Judicial Campaign Finance Study"). The absence of a recusal requirement is particularly significant in light of concerns, expressed by the Judicial Campaign Finance Study Committee, that the Act lacks effective enforcement mechanisms. *Id.* at 18.

election) of each four- or six-year term. Judges appointed to fill vacancies may accept contributions for 60 days beginning on the date they assume office. *Id.* § 253.1541.

Canon 2 of the Texas Code of Judicial Conduct requires each judge to "avoid[] impropriety and the appearance of impropriety in all of the judge's activities." Notwithstanding this general admonition, the Texas Code omits Canon 5(C)(2) of the ABA Model Code of Judicial Conduct, which prohibits candidates from personally soliciting or accepting campaign funds and requires that a campaign committee perform these tasks. Instead, Texas is one of only four states in which judges may personally solicit campaign contributions, as opposed to fundraising through a campaign committee. ABA, Report and Recommendations of the Task Force on Lawyers' Political Contributions, Part Two, at 40-41 n.73 (July 1998) ("ABA Task Force Report").⁶ In fact, Canon 4D(1) of the Texas Code of Judicial Conduct expressly permits judges and candidates for judicial office personally to solicit funds for their campaigns for judicial office, with no prohibition or limitation on soliciting from people who have current business before them or who are likely to come before them if they became judges. And under Texas law, a judge need not disqualify him or herself from a case where one party or its lawyer has been a contributor to the judge's election campaign, no matter how recent or large that person's contribution, alone or in combination with other contributions of people with similar interests in the outcome of the case. *See Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. 1999) (no recusal required where judge received "substantial political donations from counsel and from one of the parties"); *Aguilar v. Anderson*, 855 S.W.2d

⁶ Fundraising through a committee also may not adequately insulate a judge from knowledge of contributors. *See* ABA Task Force Report, at 40-41 n.73.

799, 802 (Tex. App. 1993) (judge solicited and lawyer contributed while case pending but recusal not required).

Not surprisingly, individuals and groups with substantial interests in litigation, including lawyers, litigants, and groups with interests in cases pending before the courts, regularly contribute large amounts of money to judges and candidates for judicial office. For example:

- The parties and lawyers involved in the 12 cases heard by the supreme court in January 2000 had contributed \$788,638 to the nine justices. The parties and lawyers involved in the six cases heard in February 2000 had contributed \$826,770 to the justices. Texans for Public Justice, Dollar Docket (Jan. 31, 2000; Feb. 29, 2000).

- Lawyers and law firms accounted for 50 percent or more of the contributions received by each of the four supreme court justices who ran in 1998. Texans For Public Justice, Checks & Imbalances: How the Texas Supreme Court Raised \$11 Million, Part VI at I-2 (April 11, 2000). Business and PAC contributions accounted for another 15 to 17 percent of the money raised by each candidate. *Id.* Three of the justices faced no or no serious opposition in the primary, and each raised many times the amount raised by his or her general election opponent. *Id.*, Part IV at 2. One justice's statistics stand out, as she raised 82 percent of a total \$1,153,747 from lawyers, businesses, and PACs and raised 68 times as much money as the general election opponent. *Id.*

- Of the \$9.2 million raised by seven supreme court justices during the 1993-94 and the 1995-96 election cycles, contributors closely linked to parties on the court docket for the period January 1994 through October 1997 gave at least 40 percent. Texans for Public Justice, Payola Justice: How Texas Supreme Court Justices Raise Money From Court Litigants, at 9 (Feb. 1998)

("Payola Justice"). In fact, a contributor-docket connection was present in 60 percent of the 530 opinions that the court issued in that period. *Id.*

- In the 1991-92 election cycle, the majority of the contributions to successful supreme court candidates also came from people with interests before the court. Lawyers contributed nearly one-half of the total contributions to those candidates. PACs made substantial contributions to the successful candidates, totaling \$863,971; and one candidate received 41 percent of that total. The contributions of law firm, medical, utility, and business PACS far exceeded other PAC contributions, although the donations of insurance and finance PACs were also significant. Bragg, Political Contributions to the Supreme Court of Texas: An Appearance of Impropriety, Part II (June 28, 1993), at Appendix B.⁷

- The predominance of campaign contributions by interested parties is not limited to supreme court elections. In the Tarrant County family courts—where "judges [not a jury] decide all but a handful of cases"—lawyers with pending cases comprise the vast majority of the contributors to sitting judges. *Lawyers give, judges take, ethics experts worry*, Ft. Worth Star Telegram, June 11, 1994. "Judges said that the pattern also holds true in civil and family courts." *Id.* In 1993, of the 14 contributors of \$500 or more to one incumbent district court judge, 11 had cases pending before him. *Id.*

Judicial campaigns in Texas are extremely expensive. Thus, in 1998, the candidates for four seats on the supreme court raised a total of more than \$8 million; and each winning candidate raised

⁷ Because, prior to June 1995, candidates were not required to report in-kind contributions, the amount spent by PACs in the early 1990s was far higher than the candidates' reports indicated. For example, although the 1992 reports of Justices Enoch, Cook, and Hightower indicated receipt of \$5,000 each from TEXPAC, TEXPAC reports revealed expenditures of more than \$30,000 for each candidate, for items such as surveys, slate cards, postage, and advertising. Bragg, at Table 15.

more than \$1 million. Checks & Imbalances, at Part IV. In 1994, the candidates for three seats on the supreme court spent a total of \$9.7 million. *Judges offer opposing views on campaign-donation limits*, The Dallas Morning News, Mar. 2, 1995, at 29A.

The huge amounts of money collected by judicial candidates cannot be dismissed as necessary to pay for the costs of campaigning. In fact, the absence of a strong opponent does not seem to correlate with decreased fundraising. For instance, in the 1997-98 election cycle, three incumbent supreme court justices ran in primaries that were uncontested or practically uncontested (one opponent raised \$134). They raised 7.6 to 68 times the amounts raised by their general election opponents, Checks & Imbalances, Part IV at 2, and each won easily. See <<204.65.104.19/elchist.exe>> (visited March 7, 2000) (results posted by Secretary of State). In the 1995-96 election cycle, the four incumbent justices running for re-election each ran in uncontested primaries and "enjoyed dizzying financial advantages, raising between 14 times and 1,425 times what their main general election opponent had to spend." Payola Justice, at 25. Only one of the four justices had a close general election race. *Id.*

The Texas system for financing judicial elections has a negative impact on Texans' respect for their judicial system. A 1999 survey conducted by the Texas Office of Court Administration and the State Bar of Texas found that 83 percent of the respondents felt that campaign contributions have a "very significant" or "somewhat significant" influence on judges' decisions. Judicial Campaign Finance Study, at 4. See also Opinion, *Texas justice for sale? Judge for yourself*, Houston Chronicle, Sept. 13, 1992, Outlook at 2 ("a fair system of justice demands not only a judiciary that

is independent but also a judiciary that promotes public confidence in its independence and integrity, and both those requirements are jeopardized by a virtually unrestricted campaign finance system.").⁸

Lawyers also believe that contributions influence decision-making. *See, e.g.*, Declarations attached at Tabs B, C,, E, F, H, and I. A 1999 survey prepared by the Supreme Court of Texas, along with the State Bar and the Texas Office of Court Administration, showed that 79 percent of Texas lawyers think the influence is "significant." *The Courts and The Legal Profession in Texas—The Insider's Perspective*, at 54 (May 1999). Only one percent think that contributions do not affect decisionmaking at all. *Id.* As a result, judicial campaign contributions can be a significant factor in the choice of local counsel. Doherty Decl. ¶ 7; Garcia Decl., ¶ 4; Powers Decl. ¶ 8.

B. PARTIES TO THIS LITIGATION

Plaintiffs in this case are lawyers and others who appear before Texas courts. Some of the plaintiffs are lawyers who contribute to judicial campaigns because they feel that they must to ensure that they or their clients receive equal or preferential treatment in the courts. They appear here on behalf of their clients, most of whom do not or can not contribute significantly to judicial election campaigns. These plaintiffs believe that the system for financing judicial elections impinges on their clients' right to an impartial decisionmaker in the Texas courts.

Other plaintiffs do not contribute to judicial campaigns, either because they are prohibited from doing so, cannot afford to do, so or are opposed to the Texas system of financing judicial elections. They appear here on behalf of themselves and their clients or members, most of whom do not or can not contribute significantly to judicial election campaigns. Under Texas law, *see supra*

⁸ A national survey reported similar findings: "A full 78 percent [of those surveyed] believe that elected judges are influenced by having to raise campaign funds." National Center for State Courts, *How The Public Views The State Courts, A 1999 National Survey*, at 3 (May 1999).

pp. 4-5, these plaintiffs are unable to compel recusal of judges to whom their opponents have contributed. They believe that their inability or refusal to make contributions threatens their and their clients' or members' access to an impartial decisionmaker in the Texas courts.

Defendant Elton Bomer is sued in his capacity as the Secretary of State of Texas. He is the chief election officer of the state. Tex. Elec. Code Ann. § 31.001. He is charged with delivering the county returns to the governor and for tabulating the votes received in each county so that the governor can certify the results for the offices of supreme court justice, court of appeals justice, and district court judge. *Id.* § 67.013(a) & (b).

CERTIFICATE OF SERVICE

I, Allison M. Zieve, certify that on this 3d day May, 2000, I caused the foregoing Appendix in Support of Plaintiffs' Motion for Summary Judgment to be served by Federal Express on counsel for defendant Elton Bomer, at the following address:

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Allison M. Zieve