THE Texas Observer

OCTOBER 10, 2003

Robed in Secrecy

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Long before Enron became shorthand for the misuse of corporate assets, the company made a good investment. In 1994 and 1996, company executives doled out $78,700 to the election campaigns of seven of the nine justices on the Texas Supreme Court. CEO Ken Lay alone gave $24,500. Not long after, the Court unanimously reversed an appeals court decision on inventory taxes, saving Enron taxes on $15 million in oil and gas inventory.

Whether the company intended to help friendly justices get elected or thought its cash had persuasive value, the bundle of donations was clearly a business decision. And although nobody can say for sure whether campaign cash affected the Enron ruling or any other, most Texans agree that judges' dependence on large campaign donations is eroding trust in the judiciary. A 1999 poll conducted by the Texas Supreme Court found that 79 percent of lawyers and 83 percent of the public believe that campaign contributions influence judicial decisions—and 48 percent of *judges* think so, too.

Judicial elections in Texas, as in other states, have become playing fields for wealthy lawyers and litigants. By election day, 2002, candidates for the five open seats on the Texas Supreme Court had raised more than $6.5 million, even though Chief Justice Tom Phillips limited his spending to $20,000 to protest what he calls the state's "dysfunctional method of choosing justices."

While Texas law requires disclosure of all large campaign contributions, the other side of the equation—the actions the Justices take toward their donors—is cloaked in secrecy. The Texas Supreme Court refuses to reveal how the justices vote when they decide which cases to hear. These votes comprise most of the court's work, since it accepts only one out of every nine litigants seeking review.

In the uphill quest to get the high court's attention, the powerful know the right levers to pull. A 2001 study by Texans for Public Justice shows that law firms and litigants who give more than $250,000 in campaign contributions to high court justices are 10 times more successful than non-donors in getting their cases heard. "While we'll never know what's in the minds of the justices, it looks like money helps open the doors to the Supreme Court," says attorney Cristen Feldman, who led the TPJ study. "Our review of nearly 4,000 cases concluded that at every contribution level, the more you gave, the better your odds of being heard."

Perhaps the lawsuits filed by the largest donors have 10 times more merit. Perhaps their lawyers are 10 times better. But the veil of secrecy only adds to the perception of impropriety, and prevents voters from drawing their own conclusions. Justice Nathan Hecht, a conservative Republican, agrees: "If our votes on applications [for review] were always public, some would change," he wrote in a 1996 opinion. "The time has come for the Court to make public its votes on applications."

A lawsuit filed in May 2002 argues that transparency is not only a good idea, it is a constitutional requirement, and asks a federal judge to order disclosure. For decades, courts have held that the First Amendment encompasses not only the right to speak, but the right to *know*; that is, the right to an informed public debate. "The First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government," wrote Justice Brennan in a 1980 decision. Or, as a federal appeals court later put it, "[T]he freedom to speak is of little value if there is nothing to say."

Texas Attorney General Greg Abbott, representing the members of the Supreme Court, has filed a motion to have the case dismissed. Reflecting the importance of the case, San Antonio U.S. District Judge Orlando Garcia scheduled oral arguments in the suit for October 3rd to hear the merits of the First Amendment claim.

The plaintiffs—including TPJ, the Texas LULAC, Common Cause, the Texas Civil Rights Project, *The Texas Observer*, and several Texan voters and candidates—say that elections are meaningless if the official acts of incumbent justices are hidden from view. It's not as if disclosure would violate the privacy of discussions in chambers. The suit seeks only the justices' recorded votes, and all deliberations would remain confidential. And in at least 14 other states where such votes are disclosed, justices aren't crying out for secrecy. The U.S. Supreme Court justices do not reveal their case review votes, but they are appointed for life rather than elected, and are insulated from big donors looking for results.

Justice Louis Brandeis famously observed that sunlight is the best disinfectant. Transparency won't cure all the problems of privately funded judicial elections but, as Judge Hecht implied, it might make the justices more careful to ensure their votes are justified by the merits of the case rather than by the bottom line. ■

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