SUBJECT: Judicial campaign finance revisions

COMMITTEE: Elections — committee substitute recommended

VOTE: 7 ayes — Danburg, Madden, Crabb, Denny, Ehrhardt, Hill, Staples

0 nays

2 absent — J. Jones, Muñoz

SENATE VOTE: On final passage, May 2 — 30-1 (Brown)

WITNESSES: For — George E. Christian, Texas for Judicial Election Reform; Tom Smith, Public Citizen; George Strong; Ashley Smith, Texans for Lawsuit Reform; Suzy Woodford, Common Cause—Texas

Against — None

BACKGROUND: Texas judges are elected through partisan ballots, usually in the general election. The system has been criticized for the amount of influence that campaign contributions play in the election of judges.

As of January 1, 1995, an addition to the Code of Judicial Conduct bars judges from receiving campaign contributions from a time 210 days before the filing deadline until 120 days after the election. This rule applies to all judges except judges of constitutional county courts and municipal courts and justices of the peace.

Members of the Supreme Court and the Court of Criminal Appeals are also barred from receiving contributions 30 days before or during the legislative session.

DIGEST: CSSB 94 would enact the Judicial Campaign Fairness Act. The act would be applicable to the justices of the Supreme Court and Court of Criminal Appeals, appeals court judges and judges in district, statutory county or statutory probate courts. The act would set mandatory limits on campaign contributions and voluntary limits on campaign expenditures.

Campaign contributions

CSSB 94 would prohibit a judicial candidate from knowingly accepting contributions until 180 days before the filing deadline to 120 days after the election for opposed candidates or 120 days after the primary election for unopposed candidates. Violations of these restrictions would result in a civil penalty of up to three times the amount of the contributions received in contravention of the restrictions.

The bill would limit aggregate individual campaign contributions to:

• $5,000 for a statewide judicial office;

• $5,000 for a non-statewide office for a district of more than 1 million people;

• $2,500 for a non-statewide office for a district of 250,000 to one million people;

• $1,000 for a non-statewide office for a district of less than 250,000.

Contributions to specific-purpose committees would be considered contributions to the candidate. A member of a law firm could not contribute more than $50 to a judicial candidate if the aggregate contribution of the law firm, or a general-purpose committee controlled by the firm, exceeded six times the amount of campaign contribution limits listed above. (For example, if the members of a law firm contribute individually to a statewide judicial candidate more than $30,000 altogether, individual members would then be limited to contributing $50.) A law firm that shares members with another law firm would be considered one law firm.

Contributions to a candidate from general-purpose committees could not exceed 15 percent of the applicable voluntary limits on expenditures. (For statewide offices, those limits are $2 million, 15 percent of which would be $300,000.) An expenditure made by a general purpose committee would be treated as a contribution to the candidate unless the treasurer of the committee filed an affidavit with the officer with whom the candidate's

treasurer must file, stating that the committee has had no direct or indirect contact with any part of the candidate's campaign.

Contributions made by the candidate's spouse, child or a member of the candidate's immediate family (defined as the second degree of consanguinity) would not be limited.

A candidate receiving campaign contributions for a nonjudicial office would be prohibited from using those funds for a judicial office election.

A judicial candidate who made a personal expenditure could only reimburse those expenditures with campaign contributions of up to $100,000 for statewide races or five times the individual contribution limit for other races. A candidate who received loans or extensions of credit from members of the candidate's immediate family could not use political contributions to repay the loans.

If a candidate accepts any of the prohibited contributions in this bill, that candidate would be required return the contribution to the contributor no later than the last day of the reporting period in which the contribution is received or the fifth day after the contribution is received. Failure to do so could result in the imposition of a civil penalty that could be as high as three times the amount of the contribution received in violation of the statute.

Campaign expenditures

CSSB 94 would establish a voluntary campaign expenditure system. When a person became a candidate for judicial office, the person would have to file either a sworn declaration of compliance promising to comply with the expenditure limits set by this bill or make a written declaration that the person intended to make expenditures beyond such limits. Candidates who comply with the restrictions would be allowed to state on any political advertisement that they comply with the Judicial Campaign Fairness Act. A non-complying candidate would be required to state on any political advertisement that the candidate "has rejected the voluntary limits of the Judicial Campaign Fairness Act."

These requirements would also apply to expenditures by specific-purpose committees or general-purpose committees that have had any contact with the candidate's campaign. Expenditures by these committees would be treated as if they were expenditures by the candidate. Expenditures made to, or a direct expenditure on behalf of, a candidate made by the principal political committee of a political party would be considered an expenditure by the candidate. An expenditure made as a generic voting campaign or an unbroadcasted (including television, newspaper or magazine or billboards) list of more than two candidates that does not include any reference to the judicial philosophy of a candidate or a position on an issue would not apply to the candidate.

The expenditure limits would be set both for candidates and persons other than the candidate. A candidate would be limited to spending $2 million for a statewide judicial office. Court of appeals judges would be limited to spending $500,000 if their district contained more than one million persons or $350,000 if fewer. All other judicial candidates would be limited to $350,000 for districts greater than one million, $200,000 for districts of 250,000 to one million people, or $100,000 for districts with fewer than 250,000 people. If a candidate made a declaration of compliance and subsequently exceeded the campaign expenditure limits, that candidate could be assessed a civil penalty of up to three times the amount of expenditure above the limits for that candidate's office.

Individuals other than candidates could not expend more than $25,000 for statewide judicial races or $5,000 for other judicial contests. If a person intended to spend more than these limits, that person would have to file a declaration of non-compliance no later than the earlier of the date the expenditure was made or 60 days before the election was held. Such declarations would have to be filed with the records of the judicial candidate. Expenditures made by associations solely for the purpose of contacting members could not be included in these limits. An expenditure made that benefits more than one judicial candidate must be apportioned to each candidate, based on the benefit received. A person who violated these limits could be assessed a civil penalty of up to three times the amount expended over the limit.

If one candidate exceeded the prescribed limits for expenditure by the candidate, or if a person other than the candidate exceeded the expenditure limits on individuals, the other candidate in the race would not be required to comply with the expenditure limits.

A candidate who filed a declaration to comply with spending limits could not later file a declaration of intent to exceed those limits more than 60 days after filing the declaration of compliance. Violation of this rule could result in a civil penalty up to three times the amount spent over the limit.

A candidate who complied with expenditure limits could still be considered a noncomplying candidate if that candidate solicited or entered into an agreement with another person to enter into the race as a noncomplying candidate. The candidate could also be considered noncomplying if the candidate knowingly misrepresented that candidate's opponents as not complying with this act.

Judicial Campaign Fairness Fund

CSSB 94 would establish a judicial campaign fairness fund, consisting of penalties assessed for violations of the Judicial Campaign Fairness Act and any gifts or grants. The fund would be used for voter education projects and the payment of costs in assessing penalties. If practicable, the voter education project will include the publication of a voter's education guide listing candidates for judicial offices, their backgrounds and other information. The voter's guide would only include those candidate who complied with the expenditure limits; noncomplying candidate would only have their name listed.

Filings and disclosures

The bill would require that the filings made by a judicial candidate, in addition to requirements imposed on other candidates, include:

• the total amount of contributions, including interest earned on accounts into which those funds are deposited;

• for each person who contributed more than an aggregate of $50 that had been accepted, the principal occupation and job title of the donor, including the full name of the employer or of the law firm of which the individual or individual's spouse was a member. If the contributor was a child whose parent or parents were members in a law firm, the name of the law would have to be listed;

• a specific listing of each asset valued at $500 or more that was purchased with contributions and is on hand as of the last day of the reporting period

• for each person for whom a contribution had been accepted but not received as of the last day of the reporting period, the full name and address of the donor, the amount, and the date of the contribution; and

• for each outstanding loan as of the last day of the reporting period, the full name and address of the person or financial institution making the loan, the full name and address of any guarantor of the loan other than the candidate.

The bill would also add a new chapter to the Election Code requiring financial disclosure by county judicial officers (statutory county courts or statutory probate courts). A county judicial officer would have to file a statement that the officer is in compliance with the conflict of interest provisions required of all state officials under Government Code, Chapter 572. The financial records filed would be available to the public. A criminal penalty of a Class B misdemeanor, maximum penalty of 180 days in jail and a $2,000 fine, could be assessed against a county judicial official that knowingly failed to file such a statement.

Other provisions

The civil penalties assessed for violation of the Judicial Campaign Fairness Act could only be imposed after a formal hearing before the Texas Ethics Commission. The penalty assessed would be based on the severity of the violation, the history of past offense, the amount needed to deter future offenses or on any other matter that justice may require.

For purposes of contribution and expenditure limits based on the population of the judicial district, the bill would require the secretary of state, by June 1 of each odd-numbered year, to deliver to the ethics commission the population of the judicial districts and deliver those populations to county clerks for the districts comprising all or part of those counties. Additionally, the secretary of state would be required to deliver that information within 15 days after the effective date of the Judicial Campaign Fairness Act (section 1).

The provisions of the Judicial Campaign Fairness Act relating to contribution limits would not be severable, or if severed would be invalid.

If approved by two-thirds of the membership of each house, the Judicial Campaign Fairness Act, including the provisions related to contribution limits and voluntary expenditure limits, would take immediate effect. If approved by two-thirds of the membership of each house, the provisions regarding filing by judicial candidate (other than the filings required by county judicial officers) would take effect July 1, 1995. If not approved by two-thirds of the members of each house, those provisions would take effect September 1, 1995.

The provisions relating to filing requirements of county judicial officials would take effect September 1, 1995

SUPPORTERS SAY:

The current Texas judicial campaign finance system has undermined public respect for the judiciary and created an appearance of impropriety and conflict of interest. The system has been the subject of numerous criticisms in recent years, most notably an exposé by the CBS television program *60 Minutes* called "Justice for Sale," which examined the use of political contributions to members of the Texas Supreme Court by attorneys who had cases pending before the court. One of the most telling examples of the problem is that, under the current system, it is perfectly legal — though unethical — for an attorney to go into a judge's chambers during a recess in a trial and give the judge a campaign contribution for any amount. Such a system is directly opposed to the need for judges to remain impartial arbiters of the laws of the state.

While it may be ideal to eliminate campaign contributions entirely, they will remain necessary so long as judges are chosen by partisan election. But there is an elemental contradiction in the way that judicial elections are run. There are too many judicial elections for newspapers or other media to report adequately on the positions of the candidates. Candidates must rely on name recognition and advertising in order to get the votes of the general public. However, almost the only people who contribute to judicial campaigns are those with a stake in the judicial system, but when such people make contributions, it is perceived as inappropriate. SB 94 attempts to work within the current system, accepting that candidates must advertise in order to get the name recognition to be elected and that lawyers and law firms are the primary contributors to judicial campaigns. The bill seeks to minimize the appearance of impropriety resulting from attorney contributions and level the playing field for judicial contests.

The mandatory contribution limits are the heart of the reforms. By setting limits that are high enough realistically to allow a candidate to run a campaign and get elected but low enough to minimize the influence that very wealthy individuals or powerful law firms can gain, these limits would strike a balance that would help every candidate. The contribution limits would be mandatory and could be enforced with strict civil penalties to ensure compliance.

The U.S. Supreme Court has ruled that expenditure limits must be voluntary, as this bill specifies. Yet the bill would create strong incentives to comply with the voluntary limits and discourage spending over those limits. Chief among the incentives would be the statement that would have to be included in campaign advertising identifying a candidate as either complying or noncomplying with the voluntary spending limits. Because advertising is the chief method for a candidate to achieve name recognition, this disclaimer would be very effective in persuading candidates to follow the limits. Noncomplying candidates would pay a price in appearing politically tainted as beholden to special interests or relying on family wealth.

Limiting the time in which campaign contributions could be received to a 20-month election season would curb the power of lawyers to influence judges outside of the context of judicial campaigns. This limitation is very

similar to one imposed by the Supreme Court in the Code of Judicial Conduct, but putting it in law would enhance its authority.

The strict reporting requirements for judicial contributions were included to ensure that law firms and other people who have business before a court would be closely monitored in their contributions to judicial candidates and would not be able to contribute in the name of someone else in order to evade the contribution limits.

OPPONENTS SAY:

The judicial campaign finance system proposed by this bill would overly limit the ability of many legitimate candidates to compete for judicial seat. Many poorer, grassroots candidates would have to start fundraising months before the filing deadline in order to get enough money to campaign, especially against incumbents who could more easily raise funds in a short period of time. Additionally, some independently wealthy candidates would be able to fund their own campaigns rather than having to rely on contributions.

While there might be a few examples of the campaign contribution system fostering judicial corruption, there is no proof that it is as pervasive as the supporters of this legislation claim. Most judges keep their political lives completely separate from their judicial lives. The fact that a particular attorney or law firm contributes to a judge's campaign does not affect the decision of the judge in a case that the attorney might have before the judge. Additionally, judges often receive campaign contributions from both the plaintiffs and defense bars, so they could not be swayed to always rule for one side.

The very strict reporting requirement placed on contributions from law firms might discourage these people from contributing to judicial campaigns. This could be a serious problem because lawyers are the primary source of contributions for judicial campaigns.

OTHER OPPONENTS SAY:

CSSB 94 would not sufficiently limit the damaging influence that campaign contributions have on the Texas judicial system. The limits proposed represent a substantial amount of money, which could still be used to persuade a judge to rule for one side over another. Additionally, the time

limits would still allow a 20-month window in which a judge may accept campaign contributions while deciding cases from those contributors.

The voluntary limits on expenditures would be too easy to evade. A candidate could simply wait for an opponent to go over the limit, then do the same.

What is needed for true reform of campaign contribution influence on the judiciary is a complete reform of the way that judges are selected. As long as there are partisan elections for judges in Texas, campaign contributions will still have an influence on how the Texas judicial system works.

NOTES:

The committee substitute incorporates portions of the House companion bill, HB 262 by Madden. The primary changes in the substitute include:

• broadening the definition of member of a law firm to include of counsel or of the firm;

• providing that contributions from members of one firm who are all members of another firm count as only one firm;

• removing a voluntary limit on the use of personal funds;

• exempting contributions from immediate family members from contribution limits; and

• prohibiting agreements to evade contribution limits and penalizing candidates for misrepresenting the compliance of their opponents.

Other judicial campaign finance reform measures introduced this session include:

• HB 262 by Madden, the House companion to SB 94;

• HB 483 by Denny, passed by the House on May 7, which would require special reporting for judicial candidates;

• HB 926 by Duncan and its companion SB 13 by Montford, which propose contribution limits on judicial candidates;

• HB 1110 by Greenberg, which would provide public financing for judicial campaigns, essentially prohibiting private contributions; and

• HB 1883 by Solomons, which would prohibit attorney contributions to judges in whose courts they may practice.

SB 313 and SJR 26, both by Ellis, which passed the Senate on April 26, proposes a nonpartisan judicial selection method. The House Judicial Affairs Committee has reported committee substitutes for both measures.

SB 309 by Ellis, introduced in the 73rd Legislature, is similar in many respects to CSSB 94. SB 309 passed the Senate but died in the House Calendars Committee.