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CALL TO ACTION

STATEMENT OF THE

NATIONAL SUMMIT ON IMPROVING

JUDICIAL SELECTION

PREFACE

The National Summit on Improving Judicial Selection was convened under the leadership of Texas Supreme Court Chief Justice Thomas R. Phillips and Texas Senator Rodney Ellis for the purpose of discussing how to best improve judicial selection processes, focusing on those states in which judicial selection is subject to popular election. Ninety-five persons attended the Summit in Chicago, Illinois on December 8-9, 2000. Participants included teams of judicial, legislative, and other leaders selected by the chief justices in the seventeen most populous states with judicial elections, together with invited representatives from national organizations that are among the leading proponents of judicial election reform.

The participants discussed options for reform in four key areas:

- Partisan elections and terms of elective office
- Judicial election campaign conduct
- Voter awareness and participation in judicial elections
- Campaign finance in judicial election campaigns

The Summit proceedings culminated in this Call To Action. The twenty recommendations set forth below were endorsed by an overwhelming majority of judicial and legislative leaders and other Summit participants, but several participants expressed dissent to some, and one participant to all, of the recommendations. No individual statements of concurrence or dissent will be set forth. The recommendations have not been endorsed by the Conference of Chief Justices, or any other particular organization.

INTRODUCTION

Eighty-seven percent of state appellate and trial judges are selected through direct or retention elections. But, judicial elections differ in many ways from elections for other offices. Ethics canons prohibit judicial candidates from making campaign promises, and limit what judicial candidates can say on their own behalf. The position they seek requires that decisions be made based on the facts presented and the applicable law in specific cases. Judicial candidates cannot reward their supporters, nor, if elected, work with those supporters to advance shared objectives. Finally, because judicial candidates do not run on platforms, judicial races generally attract little media attention, affording the public scant information by which to weigh the candidates' qualifications.

Yet judicial campaigns are becoming more like campaigns for other offices, not less. Judicial candidates are frequently required to hire campaign consultants and raise large sums of money for paid advertising to communicate their qualifications and experience to the voters. The increased recognition of the judiciary's policy-making role has resulted in massive independent campaign activity by organized groups, sometimes from outside the jurisdiction. All this makes judges appear like ordinary politicians to many voters.

As currently conducted in many states, judicial election campaigns pose a substantial threat to judicial independence and impartiality, and undermine public trust in the judicial system. Unregulated issue advertisements and independent expenditures by special interests present a particularly grave and immediate threat. Many observers have concluded that moving to a wholly appointed judiciary is the best answer to these problems. But movement away from systems providing for contested election of judges has not occurred in most states. Too little attention has been given to incremental changes in the judicial election process to address some of the most serious threats to judicial independence and impartiality, and to appreciably enhance public trust in the courts. For example, the Conference of Chief Justices previously adopted a resolution in support of amendments, since adopted, to the American Bar Association's (ABA) Model Code of Judicial Conduct with regard to judicial campaign finance. And an ABA Task Force is presently reviewing public funding of judicial elections.

We are aware of the difficulties inherent in regulating election campaigns, even those involving the judiciary. But we reject the notion that nothing can be done. We believe that norms can be established, through both positive law and informal standards that will both aid candidates and their supporters and enhance public confidence in the administration of justice. While some of the following recommendations require statutory or constitutional change, most can be implemented through action by state courts, bar associations, or private groups.

CALL TO ACTION

We therefore recommend that all states with elected judges consider the following initiatives to improve their judicial elections:

Judicial Election Structure

1. All judicial elections, whether direct or retention, should be conducted in a nonpartisan manner.
2. States with relatively short judicial terms of office should consider increasing the length of those terms. Term limits, whatever their merits for representative positions, are not appropriate for judicial office.
3. 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.

Campaign Conduct

4. Educational programs on state election laws, judicial canons, and sanctions for violations should be conducted for all judicial candidates, together with their campaign staff, consultants, and interested family members. The legislature or judiciary, as appropriate, should mandate attendance at such programs and ensure that they are adequately funded.
5. "Hotlines" should be established by the legislature, the judiciary, or the appropriate judicial discipline body to respond

expeditiously to questions about campaign conduct, campaign finance, judicial ethics, or related issues. A judge, candidate, campaign worker, or contributor who adheres to the advice provided by this procedure should be accorded a prima facie defense to any subsequent legal action or disciplinary procedure.

6. Nongovernmental monitoring groups should be established to encourage fair and ethical judicial campaigns. Such groups should include respected and diverse individuals representing state and local bar associations and other credible community organizations. These monitoring groups should take all appropriate means to secure voluntary compliance with high standards of conduct, exceeding those mandated by law. For example, they should be willing, if requested, to conduct advance review of paid advertisements to ensure accuracy and fairness. They should offer mediation and arbitration procedures for campaign disputes. They should develop processes for informing the public about the degree of cooperation and compliance they receive from the campaigns. They should endeavor to secure cooperation in all their endeavors from independent advocacy groups as well as from candidates and political parties. Finally, if necessary, they should be available to comment publicly on the conduct of candidates, political parties, or outside groups.
7. Canons of judicial conduct and state laws regarding judicial campaign activity should be reexamined to assure that they promote fair elections while safeguarding the right to free speech. To advance this process, one or more organizations committed to judicial integrity, impartiality, and independence should convene a Symposium on Judicial Campaign Conduct and the First Amendment composed of distinguished scholars, lawyers, and judges to consider these issues. In addition, the ABA should consider revising the provisions of the Model Code of Judicial Conduct regarding inappropriate activity by judicial candidates.

8. Procedures should be studied for resolving professional discipline complaints arising from campaign conduct before the election. Expedited procedures cannot come at the expense, however, of limiting the due process rights of the parties involved.

Voter Awareness

9. State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election at no cost to judicial candidates. Such guides should provide information that will be useful to voters in comparing the candidates.
10. Congress should provide a free federal mailing frank to any voters' guide sponsored by a state or local government.
11. Bar associations, either alone or working with a larger and balanced group of concerned citizens and organizations, should conduct evaluations of judges. Evaluation results should be disseminated as appropriate.
12. The judiciary should consider establishing independent and objective judicial performance evaluation processes with appropriate safeguards. Participation in these evaluations should include members of the bar and community. Such evaluations have been used in states with retention elections. Evaluation results should be disseminated as appropriate.
13. Media outlets should broadcast debates between judicial candidates and should sponsor such debates if other appropriate groups are not doing so.
14. The judiciary, the bar, and other interested groups should devise ongoing programs to educate the public about the judicial process. Special attention should be given to informing educators, students, and media representatives about the judicial process. Judges should increase their efforts to explain the judicial role to the public. Where permitted by law,

court should be held in venues other than the courthouse, particularly in schools. When feasible, appellate courts should conduct occasional sessions away from their regular sites.

15. Courts should use their Web Sites to explain the judicial role to the public. Courts should make as much public information available online as possible, consistent with legitimate privacy concerns. In particular, court dockets and court opinions should be published online as contemporaneously as is consistent with accuracy.

Campaign Finance

16. States in which candidates compete for judicial positions should consider adopting public funding for at least some judicial elections. Even in states that reject public funding for representative officials, the nature of the judicial function makes public funding particularly appropriate for judicial elections. Any public funding system should be sufficiently generous to encourage participating candidates to forego all other sources of campaign funds. The system should be designed to discourage frivolous candidates and to restrict overall spending while allowing appropriate response to independent expenditures.
17. States should adopt systems for disclosing campaign contributions and expenditures that provide timely and ready access to relevant information without being unreasonably burdensome.
18. By statute or judicial conduct code provision, states should set appropriate limits on the size of campaign contributions to judicial campaigns.
19. States should consider adoption of the 1999 amendments to the ABA Model Code of Judicial Conduct respecting judicial campaign finance, as appropriate in each jurisdiction.

20. Some activities of special interest groups in recent judicial elections, particularly those groups located outside the state where the election is being held, have been pernicious. The Symposium on Judicial Campaign Conduct and the First Amendment called for in recommendation number 7 above should also include discussion of creative ways, consistent with the right of free speech, in which state rules as to contribution limits and financial disclosure can be applied to outside groups and individuals as well as candidates and political parties.

