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THE WAY FORWARD:

LESSONS FROM THE NATIONAL SYMPOSIUM ON JUDICIAL CAMPAIGN CONDUCT AND THE FIRST AMENDMENT

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I. PREAMBLE

A. *Preface*

A National Symposium on Judicial Campaign Conduct and the First Amendment took place on November 9-10, 2001. Indiana Chief Justice Randall Shepard chaired the Symposium under the general direction of a steering committee consisting of Chief Justices Shirley Abrahamson of Wisconsin, Norman Fletcher of Georgia, Thomas Moyer of Ohio, Thomas Phillips of Texas, and Judge (and former Chief Justice) William Ray Price of the Missouri Supreme Court.

Two problems shown to be acute in recent judicial elections motivated the gathering. First, several court decisions over the last decade have limited the scope of the ethical canons that have traditionally regulated judicial candidate conduct. Second, unprecedented levels of participation by non-candidates in judicial campaigns threaten the extent to which judicial elections are different from races for legislative and executive positions. The relationship between these two problems, and the complexity of each, are the reasons for this Symposium.

This document records the deliberations at the Symposium and the four guiding principles and eight recommendations for action distilled by the steering committee from those deliberations.

B. The Symposium

The Symposium was a continuation of efforts by state judicial leaders and others to improve the process by which state judges are selected. The Symposium was recommended in the *Call To Action* issued in January 2001, after the December 2000 National Summit on Improving Judicial Selection, convened by seventeen state chief justices. The recommendation noted the above problems and urged that: "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." The *Call To Action* also specified that the Symposium should 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. Clarification of those issues was seen as a prerequisite to fundamental reform of the judicial election process. The task of advancing that goal was assigned to a Symposium of "distinguished scholars, lawyers and judges."

The steering group of state chief justices guided preparation of the Symposium with the cooperation of Professor Roy Schotland of Georgetown University Law Center. The Symposium was organized by the National Center for State Courts.

Attending the Symposium were seventy-five state chief justices, other judges, legislators, law professors and other constitutional law experts, lawyers, political scientists, and others concerned with the relevant issues. Participants represented a broad spectrum of views and interests revolving around judicial campaign conduct and the First Amendment.

Despite the weight and complexity of the issues addressed, the focus was practical. Participants sought to fine-tune existing methods and devise others that, without infringing on the First Amendment, ensure that judicial campaign activity does not compromise the people's right to an impartial judiciary.

Four main themes were addressed at the Symposium:

- *The implications for the Canons of recent First Amendment decisions*
- *Constitutional issues in disclosure of interest group activities*
- *Judicial campaign conduct committees*
- *What conditions, if any, might be attached to public funds or publicly funded benefits for judicial candidates*

The Symposium followed a dual track, with the key topics being debated in both plenary and small working-group discussions. Over two days, participants attended ten plenary sessions and three working group meetings. The sessions were informed by briefing papers and by comments on those papers circulated in advance of the Symposium.

C. The Changing Environment of Judicial Campaigns

The Symposium deliberations were prefaced by a review of the role television advertisements played in the 2000 judicial elections. Experts Anthony Champagne (Professor of Political Science, University of Texas-Dallas) and Shanto Iyengar (Professor of Political Science, Stanford University) identified a number of trends:

- In the 2000 elections, non-candidates as well as candidates were heavily involved in broadcasting judicial campaign ads.
- Television ads appear to be effective in influencing voters at least in the short-term. The long-run effect is likely to be greater voter apathy.
- More than half of the ads were run by outside interest groups, who were more likely than candidates to run hard-hitting attack ads.
- Such ads are on the rise because of changes in campaigns generally and because of the escalation in use of political consultants who import the tactics used in legislative and executive campaigns.

The growing prominence of television advertising is associated with a sharp rise in judicial campaign spending. Spending in the 2000 judicial elections for supreme court positions was sixty percent higher than ever before, with sharply higher records set in ten of the twenty states with supreme court contests. The average funds per judgeship in 2000 nearly doubled the average for the 1990s and was sixty-two percent higher than the average in 1998.¹ Although all elections' campaign spending has increased for years, no other category of elections has ever seen as sharp or as sudden a change as that recorded in judicial elections.

II. THE WAY FORWARD: FOUR PRINCIPLES AND EIGHT RECOMMENDATIONS

The purpose of the Symposium was to identify constitutionally permissible and feasible opportunities to improve judicial election campaigns so as to assure protection of judicial impartiality and public confidence in that impartiality. While some participants expressed dissent to or disagreement with some of what is set forth below, the steering committee believes the following four principles and the eight recommendations are consistent with the views of most judicial and other Symposium participants. No individual statements of concurrence or dissent are set forth. The recommendations have not been endorsed by the Conference of Chief Justices or any other organization.

Although it is not the purpose of this report to fully record the various and

1. The average candidates' funds per supreme court judgeship in 2000 was \$995,999 (forty-six judgeships); the prior peak national total was in 1998, \$27,842,016 (nineteen states), with an average of \$618,711 (forty-five judgeships). These figures exclude candidates who raised no funds. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 1, 2 n.6.

diverse views expressed at the Symposium, the working group discussion reports, noting points of agreement and disagreement, are available upon request.

A. Principles

Principle 1: Judicial elections are different from other elections because of the differences between the role of judges and the role of other elective officials. At least three fundamental characteristics make the judicial role unique.

First, in judicial processes, due process rights and the rule of law predominate; in contrast, in legislative and executive processes, the rights of association, assembly, and petition govern. The exercise of those latter rights produces the political organizing, pluralist struggle and compromise that characterize the political branches.

Second, the separation of powers doctrine yields three different kinds of relationships between the electorate and decision-makers: (a) legislative, with dispersed power and representing diverse constituencies, the body that is most directly accountable and responsive; (b) executive, with centralized power responsible to the broadest constituency; and (c) judicial, the body that is most insulated and least accountable, therefore responsible for the most principled decision-making.²

Third, the state constitutional history of judicial elections shows that such elections were initiated only in part to give popular control—and even then, care was taken to constrain elections. States that have judicial elections also have constitutional provisions that are unique to the judiciary.

Principle 2: There is a compelling need to ensure that judicial campaigns remain different. In the American political system, government would never regulate legislative or executive candidate speech. Indeed, campaign speech is part of a constant open, public, and unrestrained debate to shape policy. But communication with judges about the decisions they will make is limited to the

2. In sixteen of the thirty-nine states with an elective judiciary, elections are retention-only following judicial appointment and in three more, retention-only after election. In all elective states but one, judges have longer terms than any other elective officials (in Nebraska, the university regents have similar terms). Of appellate judges, thirty-eight percent have terms of ten years; another sixteen percent serve eight-year terms; of trial judges, thirteen percent serve ten-year terms and another sixty-two percent serve six years. In addition to this very long-standing and widespread constitutional structure, even when judges do face contestable elections, about half are not contested and even when there are contests, few are competitive.

In addition to the differences noted above, most elective states combine judicial elections with constitutional provisions, unique to the judiciary, that emphasize how different judges are from other elective officials: e.g., in thirty-seven of the thirty-nine elective states, only judges are subject to both impeachment and special disciplinary process; in thirty-three, only judges must meet training or experience requirements (except that ten states require the same of the attorney general); in twenty-three, only judicial nominations go through nominating commissions, even for interim appointments in six; and in eighteen, only judges cannot run for nonjudicial office without first resigning.

most structured mode of communication we know: evidence, briefs, arguments, and limits on *ex parte* contact.

Principle 3: That some judicial campaign speech can and should be regulated does not mean that all can or should be regulated. Therefore, there is a need for a thorough revisiting, by scholars and practitioners of broad and diverse representation and perspectives, of the limits on judicial campaign speech.

Principle 4: Efforts to ensure that judicial campaigns remain different depend ultimately on the success of steps to assure candidate professionalism and to strengthen the norms and culture that enable judicial elections to fulfill their proper role in the balance of electoral accountability and judicial independence.

The Canons, campaign conduct oversight committees, education of candidates and of the press, etc. all draw upon the deepest traditions of the role of the courts and of the bar. Political campaigning places most judicial candidates in unfamiliar situations, and involves challenging time pressures and incentives. The goal is to strengthen the norms and the culture of judicial campaigns so as to protect the ability of state courts to meet their responsibilities in our federal system and under the rule of law.

B. Recommendations

Based on the briefing papers, plenary discussions, working group deliberations, and the preceding principles, the steering committee of state chief justices concludes and recommends:

1. Judicial campaign conduct by candidates can be constrained. Some current provisions aimed at such constraint may warrant reconsideration. Therefore, we urge the Conference of Chief Justices to work with the American Bar Association to reexamine Canon 5 in light of the recent court decisions, and in light of the papers produced by scholars for this Symposium.

We find that the need to prevent unrestrained judicial campaign conduct is a compelling public interest; that the necessity of restraint is strongest where the statements commit or appear to commit a candidate with respect to cases or controversies that are likely to come before the courts; that the necessity does not extend to speech that is merely undignified or misleading; and that the terms of the Canon should draw lines between proscribed and permitted speech as clearly as possible.

2. Any court that must decide a case involving constraints on judicial campaign conduct should take into account both that the foremost duty of a legal system is to render justice with due process and that our courts have the unique responsibility of impartial decision-making based on the rule of law. America's system of justice depends on state and federal

courts that possess and appear to possess the ability, integrity, impartiality, and public confidence that are indispensable to rendering justice.

3. Courts in deciding cases or formulating Canon provisions, and legislatures, bar associations, disciplinary bodies, and others who become involved in formulating or applying constraints on judicial campaign conduct, should take into account the purpose for such constraints, and should take special care to avoid applying constraints to conduct that may be distasteful but whose restraint is not necessary to achieve the desired purpose.
4. Judicial campaign conduct by non-candidates is not subject to similar constraints because of values of free speech and free association embodied in the First Amendment. However, we believe that there is a compelling public interest in narrowly-tailored disclosure to assure that when major campaign efforts are mounted with large sums of money, the public is informed as to the identity of the large contributors. To be clear: we encourage the broadest possible participation by all manner of interest groups in the judicial election process. The problem we address is the confusion that unattributed advertisements sow. Voters need the information disclosure provides to intelligently evaluate claims and counterclaims made by participants other than the candidates themselves, and to distinguish the views of such participants, which tend to promote candidates as likely to behave a certain way if elected.

Further, without such disclosure the efforts to prevent excessive campaign contributions that are made in many states' statutes, and that are the subject of 1999 amendments to the Model Code of Judicial Conduct, could be evaded. Any such evasion of disclosure is directly contrary to not only the very reasons for contribution limits, but also the reasons for disqualification of judges if contributions exceed prescribed limits. Thus, any such evasion jeopardizes, at the very least, public confidence in the judiciary

We stress that the variety of campaign spending practices experienced in different jurisdictions calls for different spending levels to "trigger" disclosure requirements. Also, on the question of what trigger levels will protect constitutional values of free association and unchilled speech, advice should be secured from practitioners, the public, and scholars who are experts on campaign finance law, and all of whom represent a diversity of views. Taking into account such advice and the differences among jurisdictions (their size, history, and political culture), we recommend state legislation or court rules providing that if an effort (or associated efforts) in a judicial campaign involves spending more than a prescribed dollar amount (this might be \$10,000 or \$25,000), then

the sponsor should disclose the sum spent and the names and substantial amounts contributed by any entity that gave over a prescribed amount (this might be \$10,000) and any individual who gave over a prescribed amount (this might be \$5,000)

5. We recommend establishment of both official and unofficial campaign conduct processes to help assure appropriate campaign conduct.

Official disciplinary processes are needed for instances of clear abuse or substantial charges of abuse. (That may be a single process for all judicial candidates, both incumbent judges and others; or it may be one process for judges and a different one for lawyer-candidates. If there are separate processes, we recommend that every effort be made to coordinate both procedures and criteria used for evaluating campaign conduct.)

At the same time, non-official citizens' committees can be very effective. Jurisdictions might consider the Ohio Supreme Court rule providing that its official disciplinary process will defer, when feasible, to non-official committees, in matters involving judicial campaign conduct.

Non-official campaign conduct committees are particularly well-positioned to help assure appropriate judicial campaign conduct. If inappropriate conduct occurs and corrective efforts fail, such committees have the independence and prestige to explain to the public why, in judicial elections, "win at any cost" campaigns damage our courts' ability to render justice.

We further recommend that non-lawyers be included as members of conduct committees and that retired but not sitting judges be included.

In issuing these recommendations, we urge all jurisdictions to consider the steps Illinois and New York have taken to build unofficial or quasi-official mechanisms for monitoring and responding to improper campaign conduct.

Illinois has charted a path to positive change that relies on the application of more speech and more resources for candidates, their supporters, and the voting public. The sponsoring body, the Judicial Advisory Council (JAC), is empowered by state statute and Cook County ordinance to make recommendations to effect improvement to the administration of justice in Illinois. The JAC's Task Force on Illinois Judicial Elections is an unofficial body that seeks to persuade candidates voluntarily to raise the level of campaign conduct.

In New York, the Administrative Board of the Courts last year amended

the Code of Professional Responsibility to make clear that lawyer-candidates for the bench are subject to the same ethical rules as sitting judges; and adopted a resolution supporting the creation of conduct committees.³ The Board went on to urge local bar associations to attend a statewide convocation to implement this goal. Such convocations were held in October 2001 and February 2002. A special committee of the state bar has issued a sixteen-page guide, and committees have been formed in many of the largest counties.

6. Since early 2000, when work began on the seventeen Chief Justices' Summit on Judicial Selection and continuing with this Symposium, the problems posed by judicial elections have drawn unprecedentedly active attention from the Conference of Chief Justices.

We urge that each supreme court designate a "point person" (justice, judge, lawyer or layperson) on judicial elections, for two reasons: to help encourage and support implementation of these recommendations and the Summit's recommendations in the January 2001 *Call To Action*; and to serve an information clearinghouse function to take advantage of the fact that different states take different approaches. All states will benefit from having a network of people who are particularly knowledgeable about the problems of judicial elections in general, and their own state's experience in particular.

7. We agree with and re-adopt the recommendation of the *Call To Action* produced after the December 2000 Summit, that "state and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters," and that "Congress should provide a free federal mailing frank" for such voter guides.

The four West Coast states have, for generations, sent "Voters' Guides" to all registered voters. Voters' guides have proven effective in ensuring that voters are informed about judicial candidates.

8. We also agree with and re-adopt the other pertinent recommendations of the *Call To Action*:

— "Educational programs . . . should be conducted for all judicial candidates, together with their campaign staff, consultants, and

3. Chief Administrative Judge Jonathan Lippman wrote that these actions were a direct "respon[se] to the [Summit's] Call To Action." Jonathan Lippman, *Electing Judges Should Be More Dignified*, N.Y.L.J., Jan. 22, 2002, SB1, SB6. Detailed reports on developments in Illinois and New York are available on request to the National Center for State Courts.

interested family members. The legislature or judiciary, as appropriate, should mandate attendance at such programs and ensure that they are adequately funded.”

- “‘Hotlines’ should be established . . . to respond expeditiously to questions about campaign conduct”

C. Conclusion

By “meeting speech with more speech” and by providing voters with additional information, we will enhance First Amendment values and protect the ability of state courts to render justice. If we fail to meet the challenge that is posed by recent developments in judicial elections, we risk severe erosion of the role of state courts in the American system of justice, and of the rule of law.