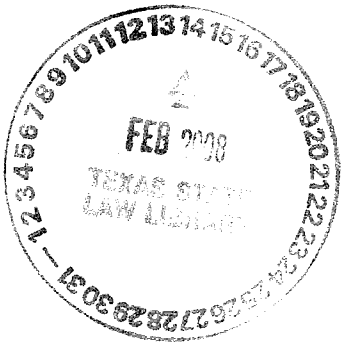

STATE OF THE JUDICIARY

Address to the Seventy-Seventh Legislature

February 13, 2001

Chief Justice Thomas R. Phillips

Supreme Court of Texas

DISTINGUISHED MEMBERS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE SEVENTY-SEVENTH LEGISLATURE:

I appreciate the honor of appearing before you again, in this historic room, to discuss the state of the Texas judiciary. This formal address is only one of many

opportunities that we will have during the Seventy-Seventh Legislature to exchange information and ideas about ways to improve the administration of justice in Texas. But preparing and delivering a written report helps me consider thoroughly and systematically the needs of all our courts, and it helps to make you aware of my conclusions. By making this report available to the public through the Internet, we also gain the opportunity to learn whether my observations are inadequate, erroneous or insightful. At any rate, I have tried to prepare remarks that will meet the statutory goal of "promot[ing] better understanding between the legislative and judicial branches of government and promot[ing] more efficient administration of justice in Texas."[1]

While people might regard courts and the legal process as traditional and slow to change, in fact we are changing as rapidly as the society we reflect and serve. Today's American legal system is much different from that of just twenty years ago, when I first became a judge. In 1981, there were eight big accounting firms, but law firms were local; perhaps only two or three firms in the country had less than half of their lawyers in one city. Today, law firms are not merely national, but international; and Texas firms have offices in such distant venues as Hong Kong, Singapore, and

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[1]TEX. GOV'T CODE § 21.004.

even Almaty, Kazakhstan. Globalization has strained our traditional notions of licensing lawyers to practice in a single jurisdiction, and multijurisdictional practice is an urgent topic among law reformers. Even the notion of law as a discrete discipline is under attack, as customers opt to obtain, for example, legal, accounting, and financial services from one provider.

Courts have changed dramatically as well. For today's judge, a computer and a conference room may be more important than a courtroom. New roles as docket manager, document reviewer, mediator, case worker and therapist are supplementing and often supplanting the traditional adjudicative function. While judges need highly developed "people skills" to meet these new challenges, they also need greater knowledge and sophistication than ever before to deal with the complex and novel issues that come to the bar of justice. Both federal and state courts require trial judges to be "gatekeepers" of expert testimony to ensure its scientific reliability.[2] Moral and philosophical issues arising out of the genetic and technological revolutions will come to the courts for resolution, with profound implications for all society.

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[2]*See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

At the same time, more and more private litigants are bypassing the courts, opting for private judging, arbitration and mediation. Some of our best judges have left the bench to seek higher pay, better hours and more challenging work in that "parallel universe," leaving the real possibility of a two-tiered system of civil justice - one for the rich, one for the poor. Our state and county courts will see more and more civil litigants attempting to appear pro se, especially in family law cases.[3] They will also see more persons who need accommodations for disabilities or who need interpreters, legitimate needs which further strain scarce local resources. And as our society continues to become more diverse, they will see more persons who either don't understand the basic underpinnings of our judicial system or who don't believe that justice is available to persons of their nationality, ethnicity, race or gender.

Time precludes my dealing with these challenges in any detail, except to say that our judges are, as never before, engaged in anticipating and planning for the future. Consistent with the statutory requirement that this speech "evaluat[e] the accessibility of the courts to the citizens of the state and the future directions and needs of the courts of the state, "[4] I will devote the balance of my remarks to four

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[3]Texas Judicial Council, *Performance Measures: Texas District Courts* 40, December 14, 2000.

[4]TEX. GOV'T CODE § 21.004.

issues: proper provision for indigent criminal defendants, legal assistance to the poor in civil cases, developments in our foster care and adoption system, and the urgent need to improve the way we select our judges.

Representation of Indigent Criminal Defendants

For the last few years, national and even international attention has been focused on whether Texas provides adequate legal representation to indigent persons accused of crime. While most courts have done a commendable job of appointing competent counsel to represent those who cannot afford to hire their own attorney, there have undoubtedly been some severe lapses. Some appointed counsel have been unwilling or unable to represent their clients vigorously or effectively; others have been appointed after unreasonable delay; and still others have been markedly underpaid for their services. It is time to make certain that these problems do not occur again.

The bench and bar of Texas are committed to improving the system. After

issuing a much-publicized report on the issue,[5] the State Bar Committee on Legal Services to the Poor in Criminal Matters is now preparing formal recommendations to the Bar Board of Directors on improving the appointment process, training appointed counsel, and securing additional resources. Last year, the Judicial Section of the State Bar of Texas adopted a resolution calling for minimum proficiency standards for appointed counsel, time deadlines for appointments, and state funding and compensation standards for appointed counsel.[6] The Judicial Section was also the largest financial supporter of the Symposium on Indigent Criminal Defense, held in Austin last December. Two weeks ago, the Judicial Council unanimously called for meaningful legislation in this area.[7] Furthermore, Presiding Judge Keller of the Court of Criminal Appeals is working with the nine regional presiding judges and the Texas Criminal Defense Lawyers Association to develop a mandatory statewide education program for counsel seeking appointments. Their model is a Harris County program initiated by the local criminal district judges in 1992. Finally, the Judicial Committee on Court Funding has urged state funding for indigent criminal defendant

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[5]Allan K. Butcher and Michael K. Moore, *Muting Gideon's Trumpet: The Crisis of Indigent Criminal Defense in Texas.*

[6]Judicial Section of the State Bar of Texas, Resolution, September 27, 2000, attached as Appendix A.

[7]See Appendix B.

representation as one of its legislative priorities for this session.

Taken together, these activities demonstrate a genuine commitment by lawyers and judges to improve indigent representation. We stand ready to work with the other branches of government to ensure that all indigent defendants are accorded full and fair legal representation.

Civil Legal Services for the Poor

The bench and bar have also intensified their efforts to provide better legal services to the poor in civil matters. The Fund for Basic Civil Legal Services to the Indigent, established by the Legislature in 1997 from increased court fees, has added more than $3,500,000 to the annual budget of the Texas Equal Access to Justice Foundation, which also distributes about $5,000,000 each year from the Interest on Legal Trusts Accounts (IOLTA) program.

This year, the State Bar has called for legislation extending state purchasing contract provisions to legal service providers and extending loan forgiveness programs to law graduates who are employed by legal service grantees. The Attorney

General has asked that legal services for crime victims be funded under the Crime Victims Compensation Act. The Supreme Court has revised the State Bar dues statement to include a voluntary $65 annual contribution for civil legal services from each lawyer, an innovation that dramatically increased attorney support in South Carolina. We have also revised the attorney pro bono reporting forms to gather more comprehensive information about the charitable and reduced fee work that lawyers are now performing. Those forms, accompanied by a letter from all the justices of the Supreme Court, will be mailed in the next few weeks.

In addition, the Supreme Court, the state's nine accredited law schools, and several other interested groups are co-sponsoring a colloquium entitled "Legal Education and Access to Justice" on February 23. There we will explore how law schools can enhance the use of pro bono activities in their curricula, thus further inculcating a spirit of service into Texas' next generation of lawyers. Finally, the Supreme Court is planning, in cooperation with the State Bar of Texas, to create the Texas Equal Access to Justice Commission, modeled on a similar initiative in Washington State. The Commission will oversee the work of a variety of legal service delivery groups, and will develop integrated and coordinated programs to ensure that all Texans have meaningful access to legal assistance.

Foster Care and Adoption

The Texas judiciary has made substantial progress in complying with both federal and state mandates on improving foster care and speeding adoptions. Since 1994, our Foster Care Task Force, chaired by Judge John Specia of Bexar County, has worked to identify problems, improve judicial training, and establish supplementary courts in Child Protective Services cases. Using associate and visiting judges, the new "cluster courts," which serve clusters of smaller counties across the state, assist all areas of the state in meeting your mandate of restricting temporary foster care to twelve months, with one good cause extension of six months.[8] The expansion of this program, along with continued technology funding, is the top appropriations priority of the Texas judiciary.[9]

Much of the progress in child placement has come not from statewide programs, but from the individual initiative of local judges. In El Paso County, the 65th District Court was designated in 1997 as one of twenty model courts by the

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[8]TEX. FAM. CODE § 263.401.

[9]The complete priorities of the Judicial Committee on Court Funding as attached as Appendix C.

National Council of Juvenile and Family Court Judges. Judges Alfredo Chavez and Patricia Macias have won national recognition for that court's dramatic increase in adoptions, reunifications and permanent placements, as well as for the innovative family drug-treatment program for parents.

Judicial Selection

While many aspects of the Texas judicial structure could be improved, the greatest systemic problem with Texas courts remains the way our judges are selected. The current system has long outlived its usefulness, and now dangerously impedes public respect for the administration of justice.

Texas first embraced popular judicial elections in the mid-nineteenth century, in the vanguard of a national reform movement to separate politics from the bench. As a prominent scholar has noted: "Proponents of popular election insisted that the appellate judiciary had suffered because governors and legislators had distributed judgeships on the basis of 'service to the party' rather than on the 'legal skills or

judicial temperament' of appointees."[10] Popular elections perhaps yielded more qualified and more independent judges as long as the judges were few, the candidates were all of one color, class, gender and political party, the electorate was informed, and the campaigns were inexpensive.

Those days are gone. Hundreds of judicial races are contested across the state each year; the winners do not adequately reflect the diversity of the state; all the candidates are virtually unknown to the public; and the only practical way to inform the electorate is through costly paid media. Is it still a reform to make judges raise thousands, hundreds of thousands, or millions of dollars from the bar or other interested persons to run for office? Is it still a reform to ask more than two million registered voters in Harris County to decide 55 contested judicial races, as they had to do in the 1994 general election? If opinion polls are to be credited, few people think so.

Some have answered that change really isn't needed anymore, because the pitched battles of Texas judicial politics are behind us. They note that special interest

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[10]Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920,* 1984-85 American Bar Foundation Research Journal 345, 348.

groups have moved on to wage judicial election battles in Alabama, Ohio, Michigan and Idaho, and surely won't return here. This is wishful thinking. Since 1980, 207 district and appellate judges have been tossed out of office, more often than not simply because of their party label. That trend will accelerate if we do not change the system. The 2000 general election saw Republicans win seats on the Austin and Beaumont Courts of Appeals for the first time in history, while Democrats nearly won judicial races in Dallas and Harris Counties.

As many of you know, I have long favored the adoption by constitutional amendment of an appointment-retention election system for all courts of record. In my past addresses I have made my best case for the so-called "merit selection" plan, as I truly believe it would decrease partisanship, minimize fundraising, and increase diversity on the bench.[11] This year, Senator Duncan has once again proposed a constitutional amendment to adopt such a plan for our appellate courts, S.J.R. 3. I hope you will allow the voters to resolve this issue.

But other remedies short of merit selection are also possible. Last December,

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[11]See, e.g., State of the Judiciary Addresses of February 14, 1989 (pp. 9-16), February 23, 1993 (pp. 3-7), April 3, 1995 (pp. 7-9), February 24, 1997 (pp. 5-7), and March 29, 1999 (pp. 9-15).

Senator Ellis, Senator Duncan, Representative Gallego, and I attended a national Summit on Improving Judicial Selection in Chicago, where representatives from seventeen large states discussed incremental improvements to electoral systems that would enhance public confidence in the courts. Many of those suggestions were directed to courts, bar associations, print and broadcast media, and interested citizens, but some may be accomplished only by state legislatures. Among the proposals endorsed in the Symposium's Call to Action[12] are these:

- *Public funding of judicial elections.* H.B. 4, by Representative Gallego, would dedicate the amount of money raised by the attorney occupation tax to fund campaigns for serious candidates for Texas' two highest courts, where candidates currently are either criticized for raising too much money from special interests (Supreme Court) or are unable to raise sufficient sums to communicate effectively with voters (Court of Criminal Appeals).

- *Improve judicial campaign finance laws.* H.B. 167, by Representative Gallego, would prohibit unopposed candidates from accepting campaign

[12]See Appendix D.

contributions after the filing deadline.

- *Voter information guides*. H.B. 59, by Representative Puente, would require the Secretary of State to prepare a judicial voters guide for dissemination on the Internet. Voter guides have been maintained on the Internet in recent years by the State Bar of Texas and the Texas Civil Justice League, but neither has been supported by extensive publicity. The Judicial Council recommends that print copies also be prepared for voluntary free distribution in the state's daily newspapers, as has been done in Washington State.[13]

Other interesting ideas have also been advanced in Texas. Among those that I hope you will consider are:

- *Retention elections*. Leave initial elections as they are, but subject all incumbent judges who have been elected and who seek re-election to a

[13]A 1996 survey by the Division of Governmental Studies and Services at Washington State University showed that more primary voters in judicial races in the state's two largest counties regarded voters' pamphlets as important and actually used them before voting than any other source. The complete question is attached as Appendix E.

retention or "yes/no" ballot, as is currently done in Illinois and Pennsylvania.

- *Cross-filing.* Amend the Texas Election Code to permit judicial candidates to file for the nomination of more than one party, as has been endorsed by the Texas Judicial Council. This would encourage judicial candidates to be non-partisan without depriving either the parties or the candidates of the benefits of organized parties. Candidates who won both major party nominations would have dramatically shorter and cheaper campaigns.

- *Signature requirements.* Frivolous campaigns could be discouraged by extending the petition requirements currently in place in the four largest counties for judicial candidates[14] to other counties and to statewide judicial elections, as recommended by the Texas Judicial Council.

Any one of these changes would improve Texas judicial elections, and enacting several of them would be a major step in restoring our judiciary's now-tarnished

[14]TEX. ELECTION CODE § 172.021.

reputation.

Conclusion

Across the world, citizens of emerging countries recognize that the rule of law is essential to self-government, and that the surest guarantors of the rule of law are respected, independent courts. The separation of judicial power from legislative and executive was one of the boldest innovations of the American experience, and it is the one part of our governmental structure that has been emulated by emerging governments ever since.[15]

But these new nations, like ours, have found that maintaining allegiance to the rule of law is no easy thing. When a Philadelphian asked Dr. Franklin in 1787 what form of government the Constitutional Convention had just formed, he replied: "A republic, if you can keep it."[16] The great philosopher knew how hard it would be,

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[15]For a brief discussion of the comparative frequency and success of parliamentary and presidential systems in emerging countries, see "The hobbled cheerleader," *The Economist*, May 8, 1999, page 25.

[16]*Documents Illustrative of the Formation of the Union of the American States* 952 (Washington, GPO 1927), *quoted in* Eugene C. Gerhart, *Quote It! Memorable Legal Quotations* 643 (New York, Clark Boardman 1969).

even for freedom-loving Americans, to keep faith in the institutions of democracy in times of stress and danger. The courts, with neither the purse nor the sword to enforce their rulings, are especially dependent on the confidence and good-will of the people.

Because the courts are at once both so important and so fragile, they must be upheld and maintained by the best efforts of all Americans, whether judges, lawyers, jurors, court personnel or citizens. As Chief Justice Harlan Fiske Stone once opined: "The law itself is on trial in every case." But the rule of law is also on trial when our Court promulgates rules of evidence or procedure, or when you pass laws governing the funding, organization, and operation of the judiciary. While the judicial branch may only be a minuscule part of the state government's budget, it is absolutely essential to every person in the state. As you consider the many ways to improve our state government, I hope that your verdict on the courts will be wise and just.

Resolution

WHEREAS, the Committee for Indigent Defendant Representation was created by the Judicial Section of the State Bar of Texas to study and make recommendations to the membership at the Annual Conference 2000 regarding policies and procedures to accomplish the goal of quality representation to indigent persons involved in criminal matters;

WHEREAS, this Committee conducted public meetings around the state, and surveyed the Texas Judiciary;

WHEREAS, it is inherently right and just that a person shall not be deprived of access to legal counsel by reason of indigency,

BE IT RESOLVED that the following resolution be adopted:

1. Appointment of counsel for indigent defendants should remain the duty and responsibility of the judiciary.

2. The Legislature should require the detaining authorities to advise the judge of competent jurisdiction within 72 hours that an individual has been incarcerated. Thereafter, the court should determine the need for the appointment of counsel for an indigent person in custody within 72 hours of notice, but not later than 20 days after incarceration or written request.

3. The appointment of criminal defense counsel for indigent defendants and the amounts paid to counsel should be reported to an appropriate state agency.

4. Appointment procedures should be reduced to writing and copies sent to an appropriate entity for dissemination.

5. Minimum standards for proficiency in criminal law should be established in each local jurisdiction as a prerequisite to eligibility for placement on a list of attorneys eligible for appointment.

6. A judge's willful and persistent non-compliance with adopted procedures for the appointment of counsel for indigent defendants should be reviewed by existing judicial oversight committees.

7. Funding for appointed counsel and related services should be appropriated by the Texas Legislature from state funds, and the Legislature should adopt compensation standards.

8. The Chair of the Judicial Section may establish a Committee on Access to Justice for Indigent Representation.

The Resolutions Committee adopts the above report of the Committee for Indigent Defendant Representation as amended and recommends it to the membership for approval.

Adopted September 27, 2000

Honorable Diane DeVasto
Chair, Resolutions Committee

STATE OF TEXAS

RESOLUTION
of the
TEXAS JUDICIAL COUNCIL

Whereas, The procedures currently used by the court system in Texas to provide indigent criminal defendants with legal representation can sometimes fail to safeguard the fundamental "right to counsel" protections that are guaranteed by both federal and state constitutions and by state statutes; and court-appointed defense counsel may sometimes earn less than "reasonable attorney's fees" for their legal services;

Whereas, District and county courts that are required to appoint counsel to indigents are allowed to meet those constitutional and statutory requirements in various ways; where the most commonly used method is the judge-assigned counsel system, some courts use a public defender or contract with one or more attorneys;

Whereas, The cost burden for providing representation to indigent criminal defendants is carried solely by county governments in noncapital cases; the absence of funding from the state diminishes a county's ability to approve the purchases of basic support services needed by counsel to provide a more effective defense, thus adding to the perception among the system's critics that a lack of money results in a lower standard of justice for the poor;

Whereas, The lack of statewide rules and standards for the appointment of counsel and the low levels of compensation they receive for their work can affect the quality of representation received by an indigent;

Whereas, at their Annual Conference in September 2000 the state judiciary approved a resolution calling for improvements in the system and state funding for indigent criminal defense representation;

Whereas, Judges and advocates for the indigent continue to study these issues, and changes must occur in the indigent defense system to ensure that access to justice is available to indigents;

Now, Therefore, Be it Resolved, That the undersigned members of the Texas Judicial Council view with great concern the issues surrounding the indigent criminal defense system and duly encourage the 77th Legislature of the State of Texas to make improvements in the system with meaningful and effective legislation.

Honorable Thomas R. Phillips
Chief Justice, Supreme Court of Texas
Chairman, Texas Judicial Council

February 1, 2001

Appendix C

JUDICIAL FUNDING PRIORITIES

2002 - 2003 BIENNIUM

JUDICIAL COMMITTEE ON COURT FUNDING

Priorities Adopted April 27, 2000

Cost Estimates Revised as of January 29, 2001

Priority Item		Biennial Amount
A. Continue Current Funding Level for:		
1. Judicial Committee on Information Technology (includes $3,864,563 for Appellate Courts*)	$	9,768,678
B. Priorities for New Funding		
1. Foster Care		2,000,000
2. Judicial Conduct Commission		1,153,034
3. Uniform Pay for Statutory County Courts at Law (2003 revenue proposal pending)		18,000,000
4. Judicial Pay Raise		8,224,000
5. Judicial Retirement		14,000,000
6. Full Day's Pay for Visiting Judges ($1.4m/yr.)		2,800,000
7. Appellate Court Legal Staff and Salaries		
Legal Staff FTEs		2,676,097
Enhanced Attorney Salaries		7,416,608
8. State Law Library		450,594
9. Indigent Representation		Legislation Pending
10. Court Reporters Certification Board	$	132,162

* Plus Appellate Courts exceptional item request of $2,096,936

Appendix D

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 election. 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 recommendation 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. **Non-governmental 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 websites 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 opinion should be published online as contemporaneously as is consistent with accuracy.**

Appendix D

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 provisions, 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 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.**

The summit was organized by the National Center for State Courts with assistance from Professor Roy Schotland of the Georgetown University Law Center, and funded by grants from the Joyce Foundation and the Open Society Institute.

For further information on the Summit, please contact Lynn Grimes at the National Center for State Courts.

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E-mail: lgrimes@ncsc.dni.us

Appendix E

PRELIMINARY REPORT ON JUDICIAL VOTERS IN KING AND SPOKANE COUNTY 1996 PRIMARY JUDICIAL ELECTIONS
and
A Comparison in Spokane County of before (1994) and after (1996) Voter Information Reforms

Charles H. Sheldon
Claudius O. and Mary W. Johnson Distinguished Professor, Political Science

Nicholas P. Lovrich
Director, Division of Governmental Studies and Services
Professor, Political Science

Washington State University

> In most of our population centers and rapidly-growing rural areas, voters are less and less likely to have knowledge of the [judicial] candidates. . . . Voter frustration seems due partly to unfamiliarity with how the judicial system works and what judges do, and partly to a lack of information about the qualifications, experience, and performance of judicial candidates. (Walsh Commission, 1996)

In order to confront the paucity of information on judicial candidates and the lack of familiarity with courts as reported by the Walsh Commission, several new information sources were made available in the 1996 primary which were absent in previous elections. As we know, the Secretary of State's Official Voters' Pamphlet is not issued in primary election when most of the judicial races are decided. However, upon recommendation of the Walsh Commission and the Supreme Court, and as arranged by The Office of the Administrator for the Courts, an agreement was reached with the state's numerous daily newspapers to distribute a special Judicial Voters' Pamphlet insert with information on all candidates in contested state and county court races. In addition, the Secretary of State offered three new sources of information on primary election races, including judges: a home-page on the Internet, a special video shown on the state version of C-Span (TVW), and special Kiosks located in supermarkets, malls, and convenient public places which permit voters to access candidate information on touch screen monitors. For judicial candidates the Kiosk information (WIN–Washington Information Network) replicated what was published in the Judicial Voters' Pamphlet. Also, during the campaigns it appeared that newspapers devoted more print to judicial races than had previously been the case. The hope was to provide more sources of candidate information which would lead to a considered vote, and in turn, stimulate more interest and familiarity with the judiciary.

We undertook, through the Division of Governmental Studies and Services at W.S.U., a mail survey of registered voters in King and Spokane counties in order to ascertain voter responses to Washington state and local judicial races. This preliminary report is based on nearly completed returns of voters in the 1996 primary elections.

Appendix E

Table 1 reports how registered voters in Spokane County and King County viewed the importance of various sources of information and whether they actually used those sources in the 1996 primary.

Table 1

THE IMPORTANCE TO VOTERS OF SOURCES OF INFORMATION ON JUDICIAL CANDIDATES AND SOURCES ACTUALLY CONSULTED: SPOKANE AND KING COUNTIES (1996)

	Percent Regarding Source as Important n=366	Percent Actually Used Source
Judicial Voters' Pamphlet (distributed in newspapers)	71%	43%
Discussions with Family and Friends	57%	27%
Voters' Meetings with Candidates	43%	8%
Newspaper Articles	42%	31%
Results of Bar Polls (lawyers' surveys)	40%	16%
Results of Law Enforcement Ass'n Polls	38%	9%
Door-to-door Contacts with Candidates	36%	6%
Endorsements from Special Groups	35%	12%
Mailings from Candidates	27%	13%
Washington Information Network (WIN) (in Supermarkets, Malls, etc.)	25%	1%
Recommendations from Attorneys	24%	6%
Sec. of State's Internet Home Page	14%	2%
Sec. of State's Video Voters' Guide on Cable TV (TVW)	14%	1%
Newspaper Advertisements	8%	9%
Lawn Signs and Billboards, etc.	7%	6%
Telephone Contacts and Canvassing	6%	1%
T V Advertisements	4%	7%
Radio Advertisements	4%	7%
Other Sources	8%	3%

It is clear that the Judicial Voters' Pamphlet was regarded not only as an important source, but was actually used by over four out of ten voters. This percentage coincides with the findings of the GMA Research Corporation's survey which found that 45% consulted the new pamphlet. The GMA report concluded:

> Voters across the state acknowledged [that] The Judicial Voters' Pamphlet is helpful to them. . . . [and they] would like to continue to receive this type of guide for future judicial elections.

Our data confirm this favorable response to the pamphlet on the part of Washington voters.

However, the voters' responses to the Secretary of State's extra efforts to inform are troublesome. Only one out of eight respondents regarded the home-page and cable video sources as important. One out of four thought the WIN Kiosks an important source. Few voters report having made use of any of these channels of information. Their low rate of use suggests that most voters were unaware of these sources, or they did not have ready access to them. From another perspective, as voters become familiar with these sources, their use should increase over time. The print media, discussing candidates with friends and family, bar polls, endorsements, and mailed materials-brochures constituted those remaining sources which were used to some extent by the voters to evaluate candidates.