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DECLARATION:

JUDICIAL ELECTIONS ARE DIFFERENT FROM OTHER ELECTIONS

In recent years, several trends are greatly altering the nature of judicial elections. In thirty-nine states, some or all of appellate and general jurisdiction trial judges face elections of some type; these elections involve 86% of our appellate judges and 89% of our trial judges. These trends threaten to damage and possibly even destroy the systems that individual states have adopted to keep judicial elections different from elections for other elective officials.

One trend stems from implementation of the Supreme Court's White decision in 2002. In spite of the narrow holding of that decision, lower federal courts (contrary to state-court decisions) have stricken long standing canons of judicial conduct regulating statements by judicial candidates that pledge or promise, or commit or appear to commit to making specific decisions on cases or issues likely to come before the courts. Also stricken have been canons limiting judicial candidates' personal solicitation of campaign funds, and limiting judicial candidates' partisan campaigning. A second trend involves sharp rises in campaign spending to levels that have exceeded those for a U.S. Senate seat. Increases in television attack ads and outside groups entering and even dominating judicial campaigns are also becoming more common. A third trend involves active attacks on courts, sometimes because of specific decisions. This trend includes ill-considered legislation that would make judicial selection generally (not only judicial elections) more political.

The Conference of Chief Justices believes that these trends jeopardize the ability of the states to meet the core objective of all judicial selection systems: attracting and retaining on the bench fair and competent judges. Fair and impartial justice requires that judges act "without regard to the identity of the parties or their attorneys, his or her own interests, or likely criticism." As Chief Justice Roberts stated in his confirmation hearing, "Judges are not politicians. They cannot promise to do certain things in exchange for votes."

For almost 200 years, our states have chosen a striking diversity of judicial selection systems. State constitutional provisions in all thirty-nine states with judicial elections seek to ensure that judges are elected through a process that reflects the distinctive role of a judge. For example, in all these states, judges' terms are longer than any other elective officials' and almost all these states have constitutional provisions similarly unique to the judiciary. These thirty-nine states have recognized that any effort to treat judicial elections like other elections would undermine the judiciary's crucial independent role under their constitutions.

In enacting these constitutional and statutory provisions, the states that chose judicial elections for some or all of their judges, explicitly chose to keep judges uniquely different from other elective officials. Each state can choose their judicial selection method from the long-standing range of alternatives. As the Supreme Court said in White, "We neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."

Every judicial selection system has strengths and weaknesses. Whatever one's view of the desirability of judicial elections, a generation of experience (including recent rebuffs by the voters of Florida, Ohio, and South Dakota of attempts to eliminate judicial elections), makes it clear that elections will stay in many and perhaps all of the states that have that system. It follows that our goal must be to reduce the problems in judicial elections, as well as the problems in appointive systems that are also experiencing pressure to become more political.

Urgent action is needed in the states, supported by the bar and other organizations, if we are to keep fair and impartial courts to serve the citizens of this country. Some steps worth particular consideration include:

1. Programs of outreach by judges and civic organizations to help the public understand what judges do and why their role differs from those in the legislative and executive branches;
2. Enhanced efforts to change the "culture" of judicial elections so the public and candidates understand the importance of conducting judicial elections in ways that protect the reality and appearance of fairness and impartiality;

3. Measures that will attract and retain people who will be fair and impartial judges, including encouraging states to establish special commissions to review judges' pay and make changes if warranted.

Adopted as proposed by the Politics and Judicial Elections Committee of the Conference of Chief Justices on February 7, 2007.

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