NATIONAL SYMPOSIUM ON JUDICIAL SPEECH - POST WHITE

AT THE NATIONAL JUDICIAL COLLEGE

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THURSDAY, FEBRUARY 24TH, 2005

National Judicial College

Reno, Nevada

Reported by: KATE MURRAY, CCR #599

RENO, NEVADA; THURSDAY, FEBRUARY 24TH, 2005; 8:31 A.M.

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JUDGE DRESSEL: Morning all. Thank you. We'll get you back in the feeling that you're now back in school, and you are in a building that exists for one reason and that is to serve the educational needs of judges.

For almost 40 years now, judges from all across the country have been coming and taking these same seats that you are in now and taking a course for new judges or taking a course for judges looking at scientific evidence, court management, a real variety of topics.

I first had the pleasure to come here in 1979. I was very, very young then, as a new judge to sit down with my colleagues from across the country and try to figure out what this profession of being a judge is all about.

I want you to know that when you send your judges here for a course at the NJC, as anyone will tell you, we work and we get them in their seats at 8:00 o'clock and we keep them from between

4:00 and 5:00 depending on what they have to do as far as homework and other exercises to prepare for the next day.

Now, one of the pleasures they have, and some of you who been here know, is that one of the ways and about the only way, we have found out, to really keep this moving is a bell system. The bells would ring right before the session was going to end, two minutes to tell people like myself who are up here talking, you have two minutes to wrap up.

When the bell rings, you have your break and then once again, very Pavlovian, before it starts, it rings to get you back in.

If you're moving 30 to 60 judges back and forth, you need to have a little prompting to do it and it works well.

We know that you have risen to the positions you're in because you don't need prompting, and so we have shut the bells off, and the faculty, you are on your honor and best behavior to have sessions end and get back so you don't have to put up with that clanging and ringing.

I'm Judge Bill Dressel. I'm the president of the National Judicial College. It's my

privilege to be here at the college, which is a resource to each and every one of you as judges in America.

That's why we exist. Our mission is to serve justice through judicial education. This program here, we believe, is a good example of how to meet that mission and serve justice through an education program.

This symposium came about when we identified that there was some Bureau of Justice Assistance funding, and the issue came up of, Okay, we know this money is there. What can we do that is needed?

Roger Warren and Chief Justice George of California and I sat down and talked about what could be done within the next eight months because that was the one hitch to it. The money was there but it had to be used in eight months. The issue came up of judicial speech.

Everyone agreed that this was something that was really important, worthy of bringing you out of your very busy lives to sit down for a day and a half and examine the subject.

This came off as a collaborative effort

of the National Center for State Courts, the Judicial College and the Conference of Chief Justices.

We had originally set a date to hold this in December but because of some of the very important material that we felt was key to this symposium, we moved it to this date to allow some members here from the ABA to take their time and to work on the drafts of the canons and so that you could have that at this symposium.

Chief Justice Abrahamson had been put on the schedule to be here, but when we had to change the date, we couldn't find a date that was compatible to her schedule. We welcome you here and apologize for her not being here.

Once the concept was put together, we had to have somebody take charge and really outline and pull together the necessary presenters and subject matters.

I used sort of my privilege as president, went up to the office of Gary Hengstler, and I said, Gary, you don't have a lot to do in the next six months, do you? In which I thought he was running for the exit, but I was standing in front of the

door and he couldn't get out, and I outlined this symposium.

Gary, very willingly, undertook this, and it is not something that he was prepared for, but in a way was prepared to do because this entity is known as the Reynolds National Center for Courts and Media.

It has been in existence now for five years, and one of the projects it undertook last year, and what is called the Roland Melton Chair, was to have someone take a look at judicial speech and what was occurring, so he had the research in place and was looking at what was occurring.

Gary, at the center, said yes, we'll do it, but Gary also wisely knew that it wasn't going to be really pulled together in the manner that would be appropriate unless he got two key people on board. Both of them very quickly said yes, and that's David Rottman from the National Center for State Courts, and Professor Roy Schotland from Georgetown.

They belonged to the real backbone in helping encourage the other presenters that you are going to be hearing from today and tomorrow.

The funding side, as indicated, we had from the Bureau of Justice Assistance, but there are limitations on what that money can be spent for.

I know some of you, in your airfare, wanted to have a little bit better route, but we have to use the federal regulations in reasonable amounts we have to spend, and the hotel, we had to get at the federal rate.

The reception last night and dinner couldn't really fall under that because it wasn't going to be a working dinner. I thought the last thing you wanted was to have a speaker and work session at dinner tonight.

I was in Las Vegas putting together all the law education in the state of Nevada, what programs existed in other states and put together a concentrated effort to create an office on law-related education.

There is a lawyer in the state of Nevada, Sam Lionel; Sam is an energetic 87 years old who acts like he is younger than I and he is very energetic. He and his cohort, a fellow named Irwin Molasky, who had just finished a project for the governor in getting work release senators on the

bill in the state, I told them about this program. And they said, How much do you need, on the spot.

They, along with Judge Bill Nell, who used to be in California but lives here, the three of them wrote checks and said, If you need more, let me know because we want the justices and the other participants to be treated well when they come to Reno.

It's that type of response to the subject from the very beginning with all the people I named that told us when we were putting this together that this was really an important and very timely presentation.

The next group of people that is very important to make this meeting meaningful are you. If you had not given the commitment to come here, this symposium would not have occurred.

More importantly, it would not lead to what we believe is the information that needs to be shared among the various states, so you, the participants, are a very important element, and we want to thank you.

Another parcel was other attendees. We started looking around and seeing who else could we

invite and bring here.

One of the first persons that came to mind, David Rottman said, You have to see if Larry Hansen, the vice president of Joyce Foundation can come. Larry is here.

Larry's foundation funded the National Summit on Improving Judicial Selection, and I think some of you got material on that. In the back, there is an expanded edition. If any of you want, it's in the back available for you.

Cynthia Gray from the America Judicature Society agreed to come. I don't have to really introduce or say why she is here. If any of you have looked at ethics in this area at all, you have seen her name. Ms. Gray has been a real asset to the events in justice in this country for many years through her work in writing and receiving many awards.

Other persons -- the problem is when you start recognizing people, I know there's a lot of people that I'm not going to recognize.

Another one that is real important is the chair of the board of trustees of the National Judicial College that I went to and talked about

what we need -- it's going to take a lot of resources, it's going to take a lot of my time that I know you want me to do and staff and embrace this. We did this for a good reason, and that's Judge Procter Hug. He's the past presiding judge of the Ninth Circuit.

While in that position, he put together a committee that deals with public outreach and this subject of speech was very important to him and one that he did as the presiding judge of the Ninth Circuit.

The other guests that are here include members of some exciting entities that we'll be meeting tomorrow, and that is the Reynolds National Center for Courts and Media, and the National Advisory Council.

That is a group of people that work in the media field and work in the justice field. They will be coming together after this meeting to really look at what the past board did to help create this center.

We're very lucky because we have this group of people who came together five, six years ago now and said, What should we do? We have moved

on with this new board and picked up and moved forward, so those of you on that board, we welcome you here.

Now, all of you have received by e-mail this Call to Action. If you brought it with you, what we would like you to do is before the end of the day, is to take a look at it.

There is a series of recommendations, and the people who are making the presentations tomorrow would very much like to have any questions, recommendations, agreements or disagreements about it, suggestions or your reactions to the various topics set forth in that Call to Action.

As I said, if you want and you didn't bring this with you, there are some in the back, so you can look up and see what those various sections are about and jot down -- you have all met Heidi who is back there.

Please pass on your thoughts and reactions to these very important recommendations because tomorrow's presentation will say, Where do we go from here with these recommendations, and this is your opportunity to have some input to it.

I would like to go through the booklet

that all of you have here. It's broken down fairly clearly.

We have the table of contents. The next session is your agenda. Take a look at the agenda so you can see what is going to be happening throughout today. After I finish, there will be a keynote address by Professor Schotland and depending on the address, we may take up the issue before or after the break.

The issues being ones that you raised and we'll have Professor Schotland kind of respond to it and then we'll ask if you have other issues or responses. We'll finish up the morning on regulating judicial campaign conduct, post-White.

After lunch, as you'll see from 1:00 to 5:00, we will talk about revising the Code of Judicial Conduct. This will be an interactive session with the members of ABA commission.

If you turn the page, you can see how there will be a presentation from 1:00 to 2:00, and then at 2:00 o'clock, you'll break into discussion groups, and you'll have assignments, tell you where the groups are and which group you're a member of and where to go.

We'll then come back from those groups at 3:30 and we'll talk about what was discussed.

Now, in that regard, you'll note that we do have a reporter here taking down the proceedings. The reason we're doing that is that after this symposium is over, David Rottman and Gary Hengstler will get together and pull together a report.

In that report, we will not attribute directly to any of you the comments you made. You are free to be open with your questions, your comments, your thoughts, your criticisms, whatever they might be.

If there is a quote that will honestly be used, it will only be used with obtaining your prior permission, so please feel free to speak throughout the session in a very candid and open way.

With that, that is what we always tell the judges here. When you come here, we just ask that you come here with one thing, an open mind, to listen to what people have to say, to challenge them, and then in the process of what they say, decide how you can be a better member of the judicial profession.

The next section of the book has the

rosters. It has a listing of the faculty and then likewise the listing of the participants.

One of the things we do ask you to do is to wear your name tags so that as you move around the building, someone, like myself, who is not good with names, it helps. I am terrible with names. Working here makes it easy because if someone comes up to me, I can say, Yes, Judge. If I'm not right, they can say, Geez, I always wanted to be a judge, so either way I say it, it comes across really well.

Likewise, you do have those tags in front of you. As members of the panel are presenters, if you have a response, they can recognize you by name.

I would ask that members of the faculty, when you come forward to make a presentation, please bring that sign with you so that you can put it in front of you here on the table and be recognized.

The next section is a POWERPoint presentation of your responses to the questions. We tried to group similar questions together. We'll cover that after Professor Schotland's presentation and then we have a divider on the various subjects.

There's a lot of material here. We don't expect you to read all this material at this time.

We look at this material as being a resource.

The presenters will cover some of them, and that which they don't, you will be able to take back with you and use in your state as the issues come up as to what should you be doing in your code in your specific state.

The last and next to last item divider are some handouts that came in late. I ask you to take a look at that.

There is also some material that is relevant to the subject, and lastly, just some information about NJC and the University of Nevada Reno.

A lot of work went into putting this book together, but it seriously could have been two, three times the size that it is.

The people responsible for putting together the agenda really tried to cull down the materials so that you weren't completely overwhelmed with this presentation.

I think we have talked about the importance of it, and I was trying to think of a way to make an analogy to the importance of this, and to remember -- perhaps all of you can think back to

when you went to law school and you had that one professor whose whole purpose in being was to make you sweat and to stare you down and to strike the fear in you about this profession. They said take a look to your left and look to your right. One, maybe two of you won't be here three years from now.

This symposium is to give you some resources for you judges. Some of them who may not be here after the next election, not just in what can they say whether it's a contested action or retention, but what they can say throughout their term in office.

I came from Colorado as a judge and we were a retention state and we did an informal experiment. There were three of us who were coming up for retention election. Two of us during the four-year term went out and talked to every Rotary club, hospital board meeting, civic group that you could think of.

We even talked our way on the election panel of the American Association of University Women and others that held forums. We said, We want to be on there. We said, We're on the ballot and they said, You don't have an opponent, and I said,

Yes, I do, public opinion.

It was interesting when the retention election was over. The two of us who did that received high 80 percent. I think I had like 86 and the other fella had 89. It must have been my looks. I don't know what the three percent difference was, but the fella who did very little received 58 percent.

So this symposium has to be not just about election speech, but to help define speech throughout the term in office. Everything that is said here today applies equally to whether you're in a point system, up for retention or you're running a contested election.

When I did my last retention election, I got questionnaires sent in. I had to go before a commission that asked a lot of questions, a lot of questions that I didn't think were really proper.

I had the benefit of hiding behind the canon and I had that shield, and you better believe I used that shield very well.

You have to now define in your respective states, Is there going to be a shield? If so, what is it? Come up with guidelines for your colleagues,

the men and women of the judiciary in your state.

As I close and move on, I just want to pick up a couple housekeeping matters.

If you have a car, make sure you have a parking permit. Because if you don't, when you go out to get it, it will be gone. College campuses have a bad attitude about parking, and they give us no slack.

If you have a cell phone, please turn it off.

Remember that you're at 4,500 feet in elevation in a very dry climate even though we have had a lot of moisture. That is why we put out water for you. Please consume the water during the days that you are here.

Remember also, this is a public building so if you do have cell phones, PDAs or other valuables, don't leave these laying around in the room. We do have security people coming and going, and that is why you wear your badge. They will know who you are as you come and go, but please don't go and leave your stuff in the room.

If you have not filled out that yellow registration slip and given it to Heidi, please do

so before noon and give it back to her.

Lastly, also, in the back of the room. There are other materials. We have materials from Justice at Stake on campaigns, and their brochure of materials at the back table. Please stop by and pick them up.

I know that we would appreciate very much that you take a look at the materials and take them with you. As indicated, there was also the expanded version of this as well as some other materials.

At this time, I would like to ask Professor Schotland to come forward and get ready to put the mic on.

I'm going to say, quite frankly, he needs no introduction and his bio is in the book. You can read it. We are very pleased to welcome to the National Judicial College and this symposium, Professor Roy Schotland.

PROFESSOR SCHOTLAND: Thanks. Many of you know that I'm out of step. I failed to pick up my name tag, don't have a car.

There is only one way to open this keynote; to thank you all for the privilege. I hope the notes I'll strike are helpful and that none

turns out flat or sour. Some may be jarring.

You may have read recently about our most outspoken union leader, Andy Stern, last month's New York Times long article about him. It quotes his saying when his daughter died, "It was like I'm 52 years old. How many more years am I really going to do this? Why am I so scared to say what I think?"

Well, thank God my kids flourish, but I'm far beyond 52, and the odds are this is my last hurrah, so I think it's time to air the notes that I think need airing. I beseech your tolerance.

There seem to be failures of most state Supreme Courts and most of the bar. I'll be specific. For example, the White case would not have arisen but for the fact that for over a decade after the model code was amended in 1990, to delete the announce clause precisely because of concern of constitutionality. The Minnesota Supreme Court, an undeniably fine court, did nothing.

I'll note the second failure of that court. I know firsthand how good they are. Chief Justice Glass is not just good, she's excellent.

Anybody who was at the Summit of Seventeen Chiefs remembers the unforgettably

impressive Justice Alan Page, and with us today is Justice Paul Anderson whose super caliber will become clear, and later, I'll give two examples of how legally valuable he is.

Though I may have some jarring points, I will try to have no harshness. I try to emulate our greatest stylist, Alan Greenspan. To hear his recent gem, the voice of fiscal restraint, barely audible a year ago has at least partially regained volume.

I offer three points and subpoints. First, notable events in last year's campaign in the most notable states. Second, before White, a little on White itself and on the canons. Last, where might we go from here.

At the outset, I stress that you have gotten our notebooks. A Florida Supreme Court decision from last June at tab 2, page 95, 97, reprimanding a judge for campaign misconduct. That speaks to judicial elections better than anything written by anyone in any format.

If you double task reading that while I speak, then you're bound to get great value out of these moments, but whenever, read that opinion.

Everyone here is mused about methods of judicial selection. Along ago, a chief said, There isn't a single method of judicial selection that is worth a damn. More ink and more sweat have been spent struggling over judicial selection than any other single subject in American law.

The latest event is what South Dakota's voters did in November, which has drawn zero attention, which is why I'll go into it. Instead, we suffer the usual, Sky is falling lamentation. More campaign spending than ever, which did not happen. Worst campaigns ever, which also did not happen.

We are getting more attention on judicial elections than ever. Business Week's front page story last fall and two stories in the highly regarded magazine, the Economist, one last July and another in this year's first issue.

Let me start out with key facts. Chief Justice Amestoy of Vermont quotes the Nobel Prize physicist Leo Szilard, who told a fellow physicist that he was thinking of keeping a diary to record the facts for the information of God. His friend asks, Don't you think God knows the facts? Szilard

replies, Yes, he knows the facts, but he does not know this version of the facts.

South Dakota voters had before them a proposed constitutional amendment which had passed their legislature all by unanimously. Their appellate judges, since 1980, are in the merit system with retention elections. Their trial judges run in nonpartisan elections.

The state has been lucky, no troubled election, but with the White case arising right next door and with several states' judicial races having been invaded by outside the parties' roots, the South Dakota trial judges who had been split 50-50 back in 1980 about whether to change, now were literally unanimous that they wanted to change before trouble hit.

The judges association and their bar worked hard. They spent about $25,000, which is a fair bit there. They had speakers all over the place. All the speakers were well received.

The proponents worried that they had two very hot races for congress that would leave the issue off the screen.

The opposition summed up strikingly by

one candidate, a city official, quote, "This proposal is against motherhood and apple pie. It's un-American."

I don't know how that official would react in reality. Most of South Dakota's judges get to the bench by appointment, and since 1982, with 109 judges up, only 21 have been challenged.

Why not change to merit retention in which every judge faces the voters? The voters said, Hell no, two to one. What happened?

Well, there is consensus about those who led the effort. First, they underestimated how uphill would be the struggle. They feel they overreacted to the legislature's overwhelming support.

The people will not give up their vote. The proposal's leaders feel now that the national political climate makes any such change impossible.

One believes they might have done better in 2006 when the governor will be up. He was not only for the change, he even did ads for it.

The other leaders of the proposal say maybe that might have helped but not enough.

Second, the opposition was different from

and worse than they had expected. The key bad event was a speech to almost 100,000 people, I guess the streets and roads were empty, by Dr. James Dobson, who the New York Times called, "The nation's most influential evangelical leader."

He was in South Dakota because for a few years, he has been crusading against Senator Daschle.

In 2003, he went to a rally for Alabama Chief Justice Roy Moore, where Dobson said he discovered, "The death of popular resentment of liberal court decisions."

Dobson's South Dakota talk went out all against the usual, activist judges, and he explicitly urged and encouraged voters to vote down Amendment A. Also explicitly urging that was at least one church bulletin.

South Dakota's two to one defeat is exactly the same margin as Ohio's defeat in 1987, the Mississippi defeat in 2000 when Chief Justice Pittman was (inaudible) the Bell proposition to lengthen trial judges terms from four years to eight.

Also in 2000, Florida voters defeated the

same proposal as South Dakota, to change their Florida trial judges to the same system as their appellate judges.

The highest affirmative vote in any Florida county was 39 percent. The average Florida county affirmative was 26 percent.

Should judges be elected at all rather than appointed? Back in 1906, Roscoe Pound started a campaign to have judges appointed by saying, "Putting courts into politics and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench."

When he spoke, eight in ten American judges stood for election. Today, the figure is 87 percent. Despite the organized bar's massive effort for almost a century, 98 years, at that pace of change as some of you have heard me say, to end contestable judicial elections we need another 160 for appellate judges, 770 years for trial judges. I know that judicial reform is not for the short winded, but --

When South Dakota's vote came in, David Rottman and I were sad, and I said, I keep

predicting it but I keep hoping I'll be wrong.

Point number one, let me be blunt, there are judicial elections of some type in 39 states. With 89 percent of the judges facing voters, that includes contestable for 53 percent of the appellates and 77 percent of the trial judges, with no changes for the last generation.

We are not getting rid of contestable elections. It is understandable that when people call for it, we get endless bills and endless editorials, but it is not only a wheel spin, it is not only a waste of time, it is injurious because it deflects energy from what we can do.

It's easy to say that what we can do is mere tinkering. In the first place, it is more than tinkering, and in the second place, it is what we can do, so let's please not be distracted in our little time together about whether there should or shouldn't be judicial election, or whether there should be partisan or nonpartisan.

Let's work together on what we can start here to reduce inaction, reduce the problems, change the judicial election culture.

A few more sentences on last year's

judicial elections. More states than ever had TV ads but only four states set new spending records as compared to ten in 2000. Also, last year's spending by outside groups was way behind 2000.

Illinois, as probably everyone here knows, set a new national record for total spending by judicial candidates. The real heat is in that strange state, the supreme justices appoint to fill vacancies in trial courts.

The District of South Illinois has been labeled one of the hell holes of American litigation, so there was a lot more at stake there than one more vote on the Supreme Court.

In fact, though nobody notices it, that is not the record for judicial elections. The record is still 1986 California retention battle over Rose Bird (inaudible).

In West Virginia, as everybody here probably knows, the incumbent was defeated by a Republican. That hadn't happened in over 80 years. The winner was supported by one CEO who kicked in over $2 million, some reports say over $3 million. The previous record for any individual contribution or spending was $250,000, San Antonio 1982.

Two states had notable advances. Ohio, for three elections, has been either the hottest in the nation or one of the three or four or five of the highest. Last year, they set new record spending by candidates but much less spending than by non-candidates back in 2000.

Ohio's 2002 elections were so ugly that two days after the 2002 election, Chief Justice Moyer, who was to be with us, but unfortunately couldn't come, gave a talk. "Candidates were outraged. Citizens were outraged. I am outraged. Anybody who places trust and confidence in a constitutional democracy should be outraged. This is the dark side of democracy."

Now, that year, Ohio had ads by plaintiffs' lawyers on one side and business groups on the other that were awful. They were protested strongly by the candidates themselves, all of them, and by a new bar-initiated campaign conduct committee that blew a loud public whistle.

In dramatic contrast, in 2004, with three hotly contested Supreme Court seats, there was not one single ad that was problematic. How come?

Tom Moyer can't be sure. Rick Dover

can't be sure, and unfortunately, I can't be sure, but it is undeniable that on the scene, ready to blow the whistle was that campaign oversight committee with its diverse representative community leaders including non-lawyers.

Another state with good news, North Carolina. Their elections could have been terrible because their Supreme Court deviated from every other court in the country by repealing the pledge promise clause that counsel for groups in the White case said is necessary. And also, repealing the limit on candidates' personal soliciting of funds.

That invitation to become a jungle was protested formally by the two organizations of their lower court judges, and in the event, the candidates conducted themselves well.

After the lower court judges' protest, the court appointed an advisory commission on the canons and we're lucky to have with us its chairman, Justice Bob Edmunds.

North Carolina's public funding worked well but those of us who do work on campaign finance find that reforms work best in their first sight. There is even a book out, The Day After Reform, and

its goes like this.

There are notable differences between the North Carolina statute and the Wisconsin statute. Wisconsin is the only state that has public funding for judicial races. Though, the North Carolina reformers and others never want to talk about Wisconsin because it works fine for several cycles, and has been a complete flop for a decade.

The difference in the statutes don't ever come to the fact that once you have a statute like that, the money can flow into independent spending. I am not, for a second, saying that public funding doesn't have gains in it. I am saying it is remotely the cure that it's painted as.

There's a handout, I think, in the miscellaneous tab of several pages about what I call key points about public funding.

Another part of North Carolina's new statute is a clear plus. They mailed four million voter guides to every registered voter with info about the appellate candidates.

You all have the Call to Action that Bill Dressel just mentioned. In that, it strongly recommends voter guides, and North Carolina is the

first state east of the Mississippi River mailing info about candidates to the voters, which five western states have been doing with enormous support for generations.

By the way, North Carolina spent on the voter guides more on postage than on printing. Who here will help us get a bill introduced in Congress to carry out another recommended Call to Action to mail out info voter guides.

You automatically have the California delegation, which is half the Congress, and then the Oregon, Washington, Alaska, Colorado delegations with you because this will pass off to the federal taxpayer, something that will be carried either by candidates or their own taxpayers, so if we get the bill, I can't imagine it's not going pass.

All we're trying to do is say that voters should have some information. I remember Representative Howard Baker saying, That's a real campaign reform.

Now, while you're working toward mailing voter guides, don't overlook using a web site as Ohio and Illinois did last year successfully.

One other state is particularly notable.

We have got to get time to hear from Judge Michael Wolff about the Missouri retention battle, his fascinating tale.

Come to White. When it came down, ABA President Robert Hirshon put it perfectly. "This is a bad decision. It will open a Pandora's box."

In my own view, White will change judicial election campaigns. It will downgrade the pool of candidates to the bench, reduce the willingness of good judges to seek reelection, add to the public's cynical view that judges are merely another group of politicians and so directly hurt state courts and indirectly hurt all our courts, but let's be realistic about what campaigns were like before White.

A few examples; Florida ad 1998, "Mike Burns is a tough, no-nonsense prosecutor who believes in law and order."

Houston, 1998, "Maximum Marion Bloss. You do the crime, you do the time." She ran against a fine trial judge and she put his picture in her ads. Why would she do that? He's black. She lost.

Two California ads, 1980s, quoted, "Sent more criminals -- rapists, murderers, felons -- to

prison than any other judge in Contra Costa County history."

Another California quote. "Over 90 percent convicted criminals sentenced. Prison commitment rate is more than twice the state average."

Nevada, 1997, a Supreme Court Justice campaigned around the state arm and arm with the AG candidate for reelection, the justice up for reelection, with ads that he had quote, "a record of fighting crime," specifically mentioning his voting to uphold the death penalty 67 times.

After the election, another justice wrote in dissenting from the court's refusal to require the crime fighting justice to withdraw from a capital case, quote, "Judges are supposed to be judging crime, not fighting it."

Last, Michigan 2000. In a few minutes, we'll see two ads from last year which have elemental touches about pedophiles. In 2000, and we're lucky to have with us, one of the winners, Justice Robert Young.

The Michigan GOP ran an ad attacking a challenger running for the Supremes because the

challenger had joined in upholding a light sentence for pedophiles. In the ad, the word "pedophile" in huge type flashed close to the judge's name.

The GOP's defense was, We don't call him a pedophile.

The Michigan Dems ran ads with trees shuttering, shuttering about the incumbent justices and a voice-over said, "The Court ruled against families and for corporations 82 percent of the time."

Detroit Free Press' review of that ad found it, quote, "borders on the bogus," because in 14 of the 43 "anti-family" cases, all Democratic justices had agreed with the result. The Dems' defense was, to define the family of corporate entity is not an exact science.

Yes, some of these bad ad examples were not run by candidates, but some were. Where were the enforcers?

So far as I know, and I think I have consulted the people who do know, we have no state-by-state study of the enforcement of the canons, or should I say non-enforcement.

I have a sense of random observation that

Kentucky and Washington State are active enforcers. I'm not sure of that. Do you know whether your state's canons are real or charade? We need a state-by-state study.

My point too is this bit of skepticism about the candidates, at least the limits on campaign speech. Campaigns are being shaped by the non-candidate.

Also, for the candidates, the canons raise acute problems of line drawing. In Scalia's opinion, he noted with disfavor that at oral argument, the state's counsel said a candidate is free to assert he is a strict constructionist, but he is not free to say whether a particular statute runs afoul with any provision of the constitution.

Now, in my front page handout on White, because I didn't want to take the entire day speaking, I hope you'll find striking the slightly more than page of excerpts, other excerpts from the oral argument.

I would be interested in your reaction. Don't they show impossible line drawing problems?

One of the leading authorities on the canons, Jim Alfini, wrote this with a coauthor.

"The code falls short of achieving the goals of electoral process and maintaining the appearance of judicial impartiality."

Alfini and coauthor went on, "The problems with judicial elections may be more appropriately dealt with with local direction than through the application of statewide ethics rules.

"A local (inaudible) ground rules in individual campaigns and then monitoring those campaigns would appear in a much better position to fashion appropriate responses to questions about campaign conduct and financing than a statewide body applying statewide rules. The latter approach has proven woefully inadequate."

Happily, Jim is here to correct if I misread.

One of the most important tasks that we have here together is a discussion of pending ABA revision. Starting with this afternoon's wonderful panel led by Justice Shepard of Indiana, who is the nation's best on this and on much else, but the canons cannot do the job, and as Alfini suggested and I'll treat explicitly, other steps are crucial.

My skepticism about the canons doesn't

matter, but Scalia's matters. For the majority, his fourth sentence noted that Minnesota canons were not binding until 1974. Of course, that is only two years after the '72 canons first called for being binding.

Later, Scalia added, "The practice of prohibiting speech by judicial candidates on disputed issues, however, is neither long nor universal."

In his fifth sentence, he noted that the canons were promulgated by the court, and then he later called that judicial fiat.

Maybe this skepticism has something to do with why since White, canons have been stricken by panels of the 11th and 6th circuits and federal district judges in New York, Ohio and Kentucky.

There is another key group, the state Supreme Courts. I noted at the outset, the White case would not have arisen, if the Minnesota court would not have failed to adopt the 1990 Model Code.

After White came down in June of 2002, the Minnesota court had to revisit the canons but it took them until December 2003 to even appoint a committee to study the matter, and that was in the

face of the pending remand in the 8th Circuit on two issues that the Supremes hadn't reviewed at all.

Now, right here, I want to note loud and clear that Justice Paul Anderson who is with us, went out of his way to assure that the US Supreme Court argument was well mooted, and last year, he did the same thing. He argued at the 8th Circuit en banc.

Please don't think I'm picking on Minnesota. Wisconsin's Shirley Abrahamson is a marvel, but look at her court's record on canons.

In 1997, they amended their 1968 code, but didn't touch the canons on political activity. For that, they appointed a study commission that reported six months later.

After a while, the courts sent some more questions to the study commission and got a second report in 1999. This past November, after a hearing, the Wisconsin court adopts the new provisions. That is eight years after starting.

Please don't think I'm picking on two states. Consider the national record on the canons. We're here because of the problem in judicial elections, and one of the most acute problems --

perhaps the most acute of all has been campaign finance.

The ABA, with great effect, moved on that before the explosion of spending in 2000. The model code was amended in 1999 to update the treatment of campaign finance.

In 2000, Tom Phillips and I worked on the report that led to the amendment. What do we do to get the courts moving? That was the origin of the idea of what turned out to be the Summit of Seventeen Chiefs.

The whole point of that was to try to get the Supreme Courts looking at the '99 amendments. In fact, the only action has been this. Mississippi has amended their canons. Texas worked hard at it, and 37 other Supreme Courts with judicial elections have not even considered it in six years.

Point 2A, the defense against downsliding in judicial elections has been unduly passive.

Point 2B is this. To be skeptical about the canons is not at all -- I'll say again -- to suggest they don't matter, they do matter.

The point is this. The canons are only part of what we need, and other steps are at least

as necessary.

Before I close with those steps, and because there is so much to say about the White opinion itself, I put a few comments on White into that five-page handout including oral argument excerpts.

Where might we go from here? Just a dozen sentences to cover five steps. Leaving details for discussions or for exchanging e-mails later. I list the steps only alphabetically.

Step one, campaign conduct committee. We have had a fine one as I indicated in Ohio, and we have a fine new one in Georgia thanks to Judge Ben Studdard who is here with us and his colleague, Counselor Bill Ide, one of the best ever ABA presidents.

Let me just tangent off. It is Bill, three or four years ago, who first stated the obviously best description of our target, our goal which is to change the culture of judicial election campaigns.

Tomorrow morning, Chief Justice Joe Lambert leads a session about conduct committees and a few other things, and don't let Lambert hold back

on what he has done already preparing for next year when, believe it or not, all of more than 220 Kentucky judges will be before the voters.

The all-time best description of conduct committees comes from Kentucky's Jim Decker. "There are people rising like phoenixes from the ashes of the White decision."

Step two, educating judicial candidates. Ohio, for a decade has had a program that requires candidates to come in before the campaign goes for sessions.

Florida Judge Charles Kahn, who is on our panel today, is responsible for making the nation's best program and material to prepare candidates for appropriate campaigns. We have to hear from him about it.

You have the materials near the end of the tab, mini versions of their POWERPoint screens or slides.

Think bigger. Think beyond just educating candidates and focusing on elections. What about educating new judges?

Ohio has, for at least a decade, had a program to educate new judges, and they have a

pending rule out that would turn that mandatory. But again, think bigger. Think beyond just educating new judges. What about a program that might aim good people or prepare them for aiming to become judges.

Step three, outreach. As hard as it is to educate the public about the role of the courts, there is nothing as needed as this.

The best move the ABA and state bars can make is to increase their good, but too limited, work on this. We must have organized constant work to educate the people about what judges do.

California has had wonderful judges' nights when a posse of judges has filled high school auditoriums to describe what judges do. What do your judges do? What does your bar do? Educate the public.

Step four, recusal. The best response to White was the Missouri Supreme Court whose immediate order was repealing the announce clause. This was one of the total of eight states that still had it. Their order closed with this.

"Recusal which in Missouri includes disqualification may nonetheless be required in any

judge in cases involving an issue about which the judge has announced his or her views as otherwise may be appropriate under the code of conduct."

Now, something like that helps a candidate who doesn't want to stretch the envelope but is opposed by somebody who is stretching the envelope to say, he is telling you what you want to hear but what you're not being told is just because he is doing that, he is probably unable to sit on those cases, and I don't want to be unable to sit on cases, and that's why I'm doing it the way it has been done all along by all our candidates.

Tomorrow, we'll talk about recusal again including that disqualification, and of course, recusal is not simple, but I will never recover from one chief justice telling the Special Conference of Chiefs, "In our state, we don't do recusal."

Now, we must do more recusal to meet the problems raised not only by aggressive campaigning but also by excessive campaign contributions.

Last week in Florida after a trial judge won a unanimous ruling that she did not have to withdraw from a case because of a campaign matter before the case, the chief judge of the intermediate

appellate attached an opinion saying, "We unanimously agree you don't have to step aside, now step aside." He said it very well about why it would be the right thing to do. Once again, Florida leads the way.

Step five, term length. Tom Moyer has made it a priority of lengthening Ohio's terms from six to eight years, and another state is about to try. Of the nation's trial judges, 18 percent have four-year terms. Where does that put judicial independence?

Are the six-year terms that most judges, trial and appellate, have enough for independence, or don't overlook the crucial point. Are six years enough to bring to the bench just the people we want to have there and keep the people we want there.

The whole point of all our efforts is to preserve the caliber of the state judiciary.

I close with one step that is not about judicial elections. It is probably more important to the caliber of the bench than any other step and though it does get the attention, the attention is poorly informed. You have a two-page handout about judges' pay.

Only last week, this was the subject of Chief Judith Kaye's impassioned plea. Now, the usual pitch for state judges is that they have been falling further behind federal judges and magistrates, falling behind even first-year associates.

That has been true for a long time. What hasn't been true for a long time is how it is getting worse, and we are in crisis.

Fact one, in 200 years, 1789 to 1989, 69 federal judges left for other jobs. That is substantially less, two-thirds of a judge per year. But in the last 15 years, '90 up, 75 federal judges quit.

We have no such data on state judges, but I don't know if you agree with me, it seems it's going to be notably worse.

Fact two, the most written about judicial resignation was 1950 New York's Simon Rifkind. At the time, federal judges earned only half as much as New York state judges. Federal judges earned 25 times Harvard Law School tuition.

Now, federal judges' pay is well ahead of the New York state and other judges. But come

beyond the federal-state comparison. Instead, of federal judges getting 25 times Harvard Law School tuition, now federal judges earn only five times. That is directly pertinent, not because of academia at Harvard, but because of what happened, for example, in the Indiana Supreme Court.

They were the first to suffer, and more and more others are suffering from what is becoming called mal-tuition. Justices and judges are leaving because their pay does not take care of their kids' education.

Judges are falling behind other public employees. Arizona's chief earns less than the Maricopa County Director of Parks, or the Phoenix Fire Chief.

Fact three, from 1995 to 2004, state judges' pay increases were better than federal judges' increases, but the state judges' rose less than half as much as first-year associates, less than one-third as much as professors.

Judith Kaye, as always, pointed to this solution; a permanent mechanism. One of Jimmy Carter's best moves ever was to have Georgia start the first salary commission. Today, 23 states have

commissions. In eight states, they set the pay unless overturned by law.

For anybody that wishes, that two-pager has data that takes the National Center's fine annual reports by one of David's colleagues, and shows how much better off are the judges in states with pay setting commissions.

I wish I could end on how to get rich, but at least I'm ending on how to do better. Thank you.

JUDGE DRESSEL: We have a little bit of time so what I would like to do is take up the issues that you raised and go to our break.

These are issues or questions that you asked and would ask the professor to respond to.

You have talked a little bit about post-White revisions in the Code of Judicial Conduct. What else can they hear about during this session?

PROFESSOR SCHOTLAND: Whether we should do it now or whether it will come up in the session that is about to occur, we need to look at, and I believe the panelists will be looking at the 11th Circuit panel's hyperactivists', not just

activists', decision in the Weaver case from Georgia.

I say hyperactivists not just activists because knocking something out of the Constitution is something (inaudible).

But while they had an important speech canon that had been argued that was what the whole fight was about, there was also another canon that hadn't been attacked by plaintiff, hadn't been argued at the District Court, hadn't been written to by the district judge, hadn't been argued or briefed at any point, and they decided on their own that Tjoflat (inaudible), to hold unconstitutional the canon against personal campaign contributions, which has been law in only 34 states, but why wait for argument or why cite the three opinions, one from the Third Circuit, one from the Oregon Supreme Court and one from the Maine Supreme Court, which said, It's not unconstitutional. We know, we're federal judges.

JUDGE DRESSEL: The next question is, they want to know and would like to have addressed, what are other state courts doing to define speech?

PROFESSOR SCHOTLAND: Well, there are

people here who can answer that better than I. Cindy Gray and Eileen Gallagher and some of the other, but I would rather put the stress on the fact that every other single court or judicial discipline body except for the North Carolina Supreme Court has done nothing beyond -- that's the wrong way to say it.

It has taken out the announce clause, if they had it, and that's a little bit more than a handful and they said that the pledge-promise clause and the commit clauses are not touched, and has gone forward.

As many of you know, we have had very significant decisions out of the New York Court of Appeal, and out of the Florida Supreme Court going forward with disciplining judges.

The one deviant is Beverly Lake and the North Carolina Supreme Court, which to my astonishment, essentially out of the blue, repealed the pledge-promise, repealed the limit on candidates personal solicitation.

JUDGE DRESSEL: I think you meant one deviation, not one deviant.

PROFESSOR SCHOTLAND: I chose the word.

JUDGE DRESSEL: The next question was, what can judges say in response to surveys, questionnaires and interviews? How is that going to be covered during the next day and a half?

PROFESSOR SCHOTLAND: Oh, boy. That's tough, and fortunately, we have Gary Hengstler and the panelists, and I would rather yield to them.

JUDGE DRESSEL: Another one is, are we going to be covering the issue of judges responding when non-judge opponents test the edge of the envelope?

You have a contested election. One is a sitting judge and one is not.

PROFESSOR SCHOTLAND: Well, the most important thing that should happen is that is where the campaign conduct committee comes in.

To have one candidate say (inaudible) doesn't have anything like the power as if a group of diverse community leaders say that is isn't the way it's supposed to be, and here is why this isn't the way it's supposed to be.

Let the candidate that is suffering with an opponent who is testing the envelope, let him (inaudible) his campaign or her campaign, actually

more and more her campaign.

There's a three to five percent edge. I was actually at the North Carolina Supreme Court last year (inaudible) who really thinks the higher scheme is rigged. Jesse Rutledge who is here, was saying the (inaudible) is to take away their vote. He ran against a woman who was incumbent and beat her.

JUDGE DRESSEL: What about limitation on states by judicial candidates to the press? Where does that fit in?

PROFESSOR SCHOTLAND: There again, I'm going to defer to Gary Hengstler.

JUDGE DRESSEL: They're going to be taking that up in their panel.

Appropriateness of personal opinion letters. First of all, if they're on a justice system issue or a community or public interest issue. What do you have to say about that?

PROFESSOR SCHOTLAND: Well, we have some disciplinary proceedings, and Cindy might be able to come up with some specifics.

We have discipline proceedings against judges writing letters to the editor, not in a

campaign. We have some grave problems how to enforce and what judges can do.

We have a very interesting problem in the State of Arkansas where a judge who was doing kind of lobbying, I guess you would say, and was proceeded against for going beyond the limits on judicial conduct, and in a superb opinion by Justice Bob Brown of the Arkansas Supreme Court, what he did was not to be disciplined.

JUDGE DRESSEL: Cindy, do you want to add anything to that?

MS. GRAY: Well, there are instances of justices being sanctioned for making comments on pending cases because that is clearly a violation of the Code of Judicial Conduct.

PROFESSOR SCHOTLAND: But this is a judicial system issue, public interest issue.

MS. GRAY: That is generally allowed. A letter to the editor explaining a court reform or in response to a criticism of a court reform or court system issue, I don't know that there are any instances of judges being sanctioned for that.

PROFESSOR SCHOTLAND: I wish Mary McQueen were here because she is so marvelous in describing

a lightning drawing case in the State of Washington, in which there would be all kinds of trouble but the judge did a superb job with his opinion in explaining why the law called for this unpalatable result, and that just refused the whole thing.

JUDGE DRESSEL: How about statements about sitting judges?

PROFESSOR SCHOTLAND: Well, can one judge endorse another judge who is running? We have a marvelous former chief trial judge in Marion County in Indianapolis who said, What do you mean I can't say that so and so is a good judge and should be returned?

I can say I'm against choice. I can say I'm against gun control, but I can't say that Judge so and so should be returned?

JUDGE DRESSEL: How about the next issue posed by one of our attendees, the reach of White, the issues of limitations on judicial speech beyond those addressed in the opinion.

How are you going to take the opinion and make it a living source?

PROFESSOR SCHOTLAND: Unfortunately, we are making a living as Robert Hirshon called opening

a Pandora's box.

Essentially, that's the pending cases in Kentucky, Indiana, Alaska and North Dakota, in which counsel who was for plaintiffs in the White case where he said the pledge-promise was necessary, it was not under attack there as Scalia explicitly notes, now has challenged exactly that, the pledge, promise and the commit. He is lead counsel, nationally, against choice.

What this is all about as plaintiffs in the Minnesota case admitted was getting a litmus test on judges via respect to the choice and other birth control issues. That is really what is here.

JUDGE DRESSEL: The next issue talked about was the effect of the exercise of your rights of speech on your ability to later decide issues that the judge has spoken on publicly, a key matter that you talked about earlier.

PROFESSOR SCHOTLAND: In the handout that you have on White, I have quoted Scalia commenting about, A judge must have other opinions. It wouldn't be fit for the bench if it didn't.

It's just appalling that a former administrative law teacher has such a simplistic

view of the issue of judicial bias, and I have set forth there a little bit of Cardoza and a little bit of someone you may remember named Davis who lays out the five different kinds of bias.

The idea that a judge is disqualified from a murder case because he has strong views about murder is just preposterous. What he was doing there was just setting up a straw person and saying why that wouldn't work.

So of course, there are opinions. You have spent a career. John Marshall Harlan literally voted for the government once in an antitrust case, and though (inaudible).

JUDGE DRESSEL: How about defending or responding to attempts by special interest or single interest groups to attack judicial independence, especially these attack ads in campaigns?

PROFESSOR SCHOTLAND: Let's assume that Sierra Club or NRA attacks a candidate. Do you want to say that the Sierra Club or NRA are a bunch of terrible people when you're running for election? I doubt it.

That's where the campaign conduct committee comes in. That is why they were so

significant in Ohio, and they were still on the beat in '04.

JUDGE DRESSEL: The implications of White for states with merit selection and retention elections.

I think this is a very important subject for many people here today.

PROFESSOR SCHOTLAND: It sure is, and the time would be better spent, if we have it, if Judge Wolff would talk about the retention fight in Missouri.

JUDGE WOLFF: Good morning. One of my colleagues, Judge Richard Titleman, was on the ballot this past cycle.

Seventeen days from the election, there was a campaign that started accusing him, and by the way, the e-mail is both a good thing and a bad thing because some of our friends got the e-mails and passed them on to us, so we actually had a memo that outlined the seventeen days of the campaign, so we knew what was coming.

The other thing was that there were automated phone calls started to, and I don't know exactly how they were targeted, but the speaker on

the phone calls was somebody named Phyllis Schlafly, who you may have heard of.

I think they might have been targeted into districts, into legislative districts where there were contested races because some of the people I know who came up to me who said, I don't know this fellow Titleman, but I got a call from Phyllis Schlafly, and by God, I'm going to vote for Titleman.

There were some that -- their targeting wasn't particularly good, but it activated a number of strategies around getting the newspapers engaged.

The Kansas City Star and St. Louis Post Dispatch, most notably, got very engaged and very active right off the bat.

There was a fund that had not been touched for about 12 years that was called Citizens for Missouri Courts. There was a little money left, about $100,000 or so.

Some lawyers went out and raised a bunch more money for that. A web site was up. Boring newspaper ads were put out. About $85,000 was spent on radio ads countering this, and probably another few thousand dollars in these rollover automated

calls from a former United States attorney talking about these are unfair slanderous ads and all that.

I'm not sure that in a state as big as Missouri -- the best I can figure, the other side spent about $150,000, and the side fighting back spent about the same amount of money. I'm not sure in a state of 5.4 million people that that moves many numbers, but it's kind of a wake-up call.

The Citizens for Missouri Courts will then, I think, be active in the future and probably be wanting to have more money, but the retention vote -- my retention vote in 2000 was about 69 percent. In 2002, the judge who was on the ballot from our court was about 68 or 69 percent. Titleman's was 62.3. So it probably got knocked down a little bit, but I'm not sure about the effect of it.

Professor Schotland mentioned the Illinois Supreme Court race was surpassingly ugly, and it was in the District of Illinois where the major media market is St. Louis, Missouri.

There were about $8 million, as best I can figure. Ads, about four or five million from each side, portraying the other fella as a child

molester or something of that nature. They were really graphic. He lets child molesters out and that kind of thing.

Our retention percentages in our Court of Appeals on the eastern side of the state were depressed ever so slightly, and I think Titleman's might be have been depressed ever so slightly.

Having watched those ads as a consumer of television, I must say, I thought all judges were child molesters. Oh, wait a minute. The atmosphere was somewhat poisoned.

A lot of what you have said, I think, is important in terms of we don't have -- not yet -- a campaign conduct mechanism. What we have are the editorial boards of the major newspapers.

Well, as newspapers become less important, it seems to me that becomes more important because you really need to be able to quote as we did in -- I shouldn't say "we" because we keep our hands off this stuff, but the radio ad supporting Titleman quoted one of the newspaper editorials so that you build acceptability by showing this is a smear and that it has been labeled a smear by the newspapers. You need to have some

independent, it seems to me, group that is going to say, This is not a fair attack ad.

By the way, the web site, Missourians Against Liberal Judges, nicely named, was actually activated and supported by a physicians group that was mad at Judge Titleman for a decision he made when he was a Court of Appeals judge.

It was linked to in many respects -- I forgot the name -- some group that is affiliated with the Reverend Donald Wildman of California, which is of the conservative groups, and so there was a fair amount of stuff.

I might say, by the way, as a postscript to it, one of the people activating this campaign is now speaker of the house of the legislature.

My colleague Judge Ray Price invited the speaker designate to dinner with some of us to his house, and Titleman said, I want to go.

I don't know if any of you have met Rick Titleman. He is legally blind. He is very affable and brilliant fellow, and my reaction was, Indeed.

In fact, as a director of legal services, in his earlier career, he had built his career having dinner with people who were his adversaries,

so I figured he was pretty good at it.

At the end of the dinner, he had totally charmed this guy, and the speaker is quoted in the paper as saying that Titleman is a fine fellow, we get along famously, he's just a wonderful guy, so don't underestimate the value of a little contact.

I don't know how that ended up as a front page news story in the Post Dispatch, but that was sort of how it ended.

It is a wake-up call, and it is something you have to be ready for. I don't mean to take up all your time.

PROFESSOR SCHOTLAND: That is better than anything I could have said.

Let me just note, two trial judges in Kansas, as Judge Breen could expand, were challenged for retention, and two or three others, I think one in Arizona, and all who were challenged for retention won.

There were two who lost retention but that is where losing retention is most likely in Illinois, where you have to get 60 percent.

The most important thing to get from the Missouri episode is they have this pot of roughly

$100,000 just sitting idle in the bank and are able to bring it in right away and raise more.

JUDGE DRESSEL: He said it simplistically, but it really is about having these kind of views.

There's a town in southwest Colorado called Cortez. It's a very rural area with one newspaper, one radio station.

Lo and behold, about ten days before the elections, there was this group that came up, Citizens for Family Justice. Well, what it was was a wealthy rancher who had lost a divorce case. They bought up all the radio ads, put these big ads up, and they got these prominent people to sign.

When they were asked afterwards, What were you signing, they said, Well, gee, this guy has a big account in my bank and he got all these community people to sign.

Here was one of most wonderful jurists you ever saw. He lost based on that. He did not have an opportunity to respond. There was no mechanism in the state. There was virtually nothing, no funding or anything else, so it's really not simplistic, but there needs to be something like

that.

Do any of you have other issues? Did we cover the issues that you wanted to have raised and addressed during this day and a half? Anything else?

QUESTION/COMMENT FROM AUDIENCE: Going back to this Arkansas case that you talked about, seven justices said what the judge did was wrong. They said that the candidate came forward.

I was wondering if there was anything in the proposals of the new canons that is going to address interests?

PROFESSOR SCHOTLAND: I think that's a super question, and I think it really should come to the afternoon session when we have several people who are so engaged in the pending revision, but I'm so glad you brought that in.

In a sense, it goes to what I was calling the line drawing problem. You can do this but not that. If it's vague, of course, we don't know how to draw the lines.

For example, if you look at the excerpts I have from the White case oral argument, you see twice and I didn't have to reach for this "laughter"

indicated in the transcript, and the laughter was not at the justices' questions. The laughter was in the responses because what essentially were being described were impossible for candidates to know or the disciplinary people to know.

I thought Bob Brown's decision was just terrific. I don't know what else you would do with that. The canons are a tough problem.

QUESTION/COMMENT FROM AUDIENCE: Specifically, the problems we have talked about, justices' speech on interests or acting pro se in a matter involving judges or judge's interest.

The question was, what was the judge's interest? He indicated anything he had an interest in, he could talk about.

PROFESSOR SCHOTLAND: That matter involved the basketball coach who had been dismissed and the judge is a very energetic, engaged black judge and he said, This is a very bad thing, and that is what provoked complaints.

JUDGE DRESSEL: Yes?

QUESTION/COMMENT FROM AUDIENCE: It seems to me there is some tension in what you suggest that Minnesota did not remove the announce clause, and

yet in looking at what North Carolina did in removing the pledges and promises clause, which many of us, I think, are very uncomfortable with the validity of that clause in view of some of the rhetoric in the Supreme Court decision.

It seems to me if Minnesota had acted, that case might not have come up.

On the other hand, if we don't remove these pledges and commit clauses in view of some of the rhetoric, are we going to get another 8th Circuit appellate decision?

I think there is some tension there. Do you wait until someone sues you or are you proactive?

PROFESSOR SCHOTLAND: Well, the announce clause is a sitting duck. That is why it was taken out in 1990.

Certainly, you have a fine article by Columbia Law Professor Richard Briffault, who goes into excellent analysis of why the pledge-promise and the personal soliciting are constitutional. I think they are constitutional.

My problem is the one just mentioned. There is a kind of vagueness. What is a pledge or

promise?

The North Carolinian who I mentioned earlier who ran against an incumbent Supreme Court justice, three times in his little write-up in that wonderful voters guide, "Family." Explicit, marriage is between a man and woman.

Now, is he making a promise about how he is going to vote in those kinds of cases? Well, you don't need to make a promise. When Roy Moore puts up the Ten Commandments, he doesn't have to say anything else.

That's the problem I have, it's not the constitutionality of the pledge-promise. I think it clearly stands up.

QUESTION/COMMENT FROM AUDIENCE: Another issue is the money issue, and I understand that the 11th Circuit took it up on its own and didn't have to, but if you follow the line of reasoning of Justices O'Connor and some of the others that say, You have to inform the public, indeed it takes money to inform the public; therefore, you are entitled to raise money.

PROFESSOR SCHOTLAND: But the three cases that upheld that limited 3rd Circuit Oregon case are

completely in line with the McCain-Feingold decision on Bicker. That is, you can regulate campaign contributions and solicitation.

They're not -- I forget whether it's the 3rd Circuit or Oregon that said explicitly, there are not any regulations. The funds can still be raised. You just can't put the bite on somebody.

I remember talking to Lee Cooper, the Alabama former ABA president and I said, given the 11th Circuit decision, does counsel get a question from the judge before argument or after argument about size of contribution, and Lee Cooper said, Why not during argument?

JUDGE DRESSEL: Okay. It's time for a break.

(Break taken at 10:12 a.m.)

RENO, NEVADA; THURSDAY, FEBRUARY 24TH, 2005; 10:36 A.M.

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JUDGE DRESSEL: I would like to introduce the Chief Justice of the State of South Carolina who will moderate this session. Chief?

JUSTICE TOAL: Thank you. I won't spend time on introductions, but let me say as we begin this section of the program, this program on judicial speech is a long time dream of some great friends of the judiciary who have labored in these vineyards a long time.

One of the most significant you heard from in the keynote, Roy Schotland. He is really our go-to guy on this issue. The Conference of Chief Justices have worked and labored about what positions we should take in the post-White versus Minnesota era.

We have often turned to wise counsel's advice and representation to Professor Roy Schotland so a special thanks, Roy, for a terrific keynote. We just hope this panel can prove worthy of the high standards you set.

It's a great panel, y'all. Charles Kahn, Mark White, Ben Studdard, Bert Brandenburg and Rick Dove are all folks with a tremendous amount of expertise to bring to this topic.

What I'm going to do is begin with a short film clip that Dave Rottman has put together of some of the more notable ads from recent years in judicial elections. Then we'll begin our discussion. What we propose to do is to go through our panel, each of us has a designated portion of the program, and we would like to run through it as quickly as we can, and as we finish, we will then ask you to interact with us.

This will give you a chance to get a good overview of the whole presentation. With no further ado, roll 'em.

(Whereupon the video played)

JUSTICE TOAL: Pretty strong medicine, huh?

Bert Brandenburg from Justice at Stake will begin our presentation with 2004 judicial elections. How much has changed. Bert?

MR. BRANDENBURG: Thank you. It's an honor to be here.

I was asked to talk about the political environment going forward that your work is going to be carried out in.

I should say a little bit about my organization. Justice at Stake is a national nonpartisan partnership. We have more than 40 partners around the country. Our partners include the American Bar Association, National Centers for Courts and the American Judicature Society.

We have a number of groups like Common Cause as well as a lot of state groups around the country. All of them came together in 2000 to work on this involving judicial integrity. Our work really focuses on what we think is the intersection of law and politics, and we do public education and political organizing.

Our communication work focuses in large part -- we have worked very hard in the last few years to put state court issues on the national media map, and you heard reference today to some of the pieces that came out the past year, the Business Week cover, and the Economist pieces and the New York Times piece last fall.

I'm actually pleased to say that every

one of those articles was an example of work that we had done. (Inaudible).

A lot of our work involved lifting the tie for everyone to get more national attention to those problems that the national media does not pay much attention to. (Inaudible) at the state and national level to help them understand things better.

We also do a fair amount of polling in this area, both of the public and of judges. And as I mentioned to you, we do a lot of work on political organizing.

We really believe we have helped forge a national network of organizations that care about the issues that you care about, and in particular, we have worked to go to a lot of national groups that are campaign reform groups and put judicial issues on their map.

We have also worked quite a bit in the states like North Carolina, Ohio, Illinois and kind of rollover states and some of the state groups and activists who have been promoting some of the reform we're hearing about and we are supportive about.

We come a little bit differently than I

think most of the panelists here, a bit more political background, so some of my thoughts and comments about what we see ahead for you come with some sense of how political trends and movements move and what it may mean for your issue area.

It is always just about impossible to follow Roy Schotland on these matters. I was at dinner last night when somebody turned to me and said, Why don't we just let Roy do all these panels? It would be a lot easier for us.

I think that's right. I would agree with him that in terms of the facts before us, there are sometimes different interpretations and rather than citing a physicist, I would cite President Clinton, who, in disagreement with Jesse Jackson, noted they were both Baptists and they both grew up with different interpretations of common text.

We actually, I would say, agree nearly entirely with a lot of what Roy said today, but I had a few points where our interpretations may be a little different, and I guess what I would say is that the sky may or may not be falling, but what we would recommend to you looking ahead is that you pray for sun and prepare for storms.

I'm going to review some of the data and I'll try to be quick about it. I'm going to review it in light of what may be a grimmer scenario.

If 2000 was a turning point in the money and ads and speech in the last elections, we really believe that 2004 may very well have turned out to be the tipping point, and that the problems may well just get worse and worse and worse and not better.

The amount of money raised by Supreme Court candidates, for example, was at this count at the moment something like $42 million. It is true that is not the $45 million raised, but it is getting pretty close to a statistical high.

We had the most expensive judicial contested election in American history in Illinois. There was $9.3 million raised by the candidates alone. That, just by way of comparison, was more expensive than 19 US Senate campaigns last year. One judicial race in the district.

Four out of the five most expensive contested races ever have come in the last four years. The ad situation is also really metastasizing in a way that we believe is worth notice.

The TV ads are often the primary pull lines in terms of what comes afterward.

In 2000, four states saw broadcast television ads in Supreme Court races. In 2004, 15 states saw that. By way of comparison, that means that in contested elections in 2000, one in four states saw these ads. By 2004, three in four states saw these ads.

The ground is shifting under our feet. $21 million was spent on these ads as compared to only $10 million just four years before.

In terms of the speech issues, this is what you're going to be talking about, and I will not pretend to know more than you. I would say that we too believe White has turned into the driver's license for a lot of groups that want to do a lot more to pressure candidates to rule in their interest rather than the public interest.

We do see more questionnaires springing up. We do see more judges having to look over their shoulders at interest groups and questionnaires that are sort of coming after them.

I would second the terrific success of the conduct committees Ohio and Georgia has had in

terms of some of the speech issues, but I would also note that in Illinois, when they set up a committee as well, it was overcome by the amount of money that came in.

I would agree that conduct committees are important and worth supporting. There may be situations where they can't keep up with what is really a rising tide of money.

It has been noted here that there were merit challenges in, I believe, four states: Arizona, Missouri, Kansas and Iowa. There has been more talk of some appointed states' efforts to (inaudible) and go to an elected situation.

In 2006, according to charts we have, no fewer than ten states will have two, three, four or five candidates up at the same time on their Supreme Court ballots, and what that means to us since we watch interest groups and we watch what political (inaudible) is if there are five seats up in Alabama or if there are three seats up in Oregon, that is a very efficient way to win.

We could have a road map of what could be a very contentious year coming up in 2006.

I would kind of finish off by saying,

what we really believe we are seeing is not just sort of a bad year here, a bad year there, but really our work, in large part, is tracking what are much more systematic common culture attacks on the courts at the state and federal level and on the actual role of the courts.

For example, we have done a fair amount of work on the federal side where in Washington DC right now, there are an enormous number of efforts underway to engage in court stripping: Reducing judicial discretion in criminal sentencing, throwing out entirely the ability of courts to even hear cases about the Pledge of Allegiance, certain church and state issues.

One of these (inaudible) measures just came out with, It's a great new political opportunity to limit the role of the courts. This is very much an effort at political intimidation.

They have been working hard at impeaching federal judges for statements and cases that people don't like.

A judge up in Minnesota, Judge Rosenbaum, federal appointee, was subjected to kind of a Star Chamber for comments he made about sentencing

guidelines and intimidated within an inch of his life, and whether or not he would have ever been impeached is another tactic.

I have now talked to federal judges who said, Absolutely, we saw what happened and we know Congress is looking over our shoulder much more than they have in the past.

At the federal level in January, we see a lot of the same groups that have been pouring million of dollars into state judicial elections are now poised to do the same at the federal level with federal judicial nominations.

For example, you have the National Association of Manufacturers saying that we are going to have formal alliances with a lot of the social conservative groups, who for years, have tried to strip jurisdiction from the courts and have not been able to muster the money that it takes to mount a political campaign federally. That's about to change.

We see this at the federal level. Obviously, we have seen it at the state level. We are concerned that there may be some of this going on at the county level. Frankly, I'd like to learn

about that if you know of an example.

We have also tracked what we believe is a spike of talk of impeaching state judges through media accounts. I don't want to call it definitive. It's not data that we're releasing at this point.

From what we can gather, there has been data (inaudible) when talk of impeaching state judges, the spike, go down, spike, go down. We believe we're in a spike right now. We see this common cultural attack, a lot of the same tactics, a lot of the same goals.

I don't think it's an accident that you're hearing names like Donald Wildman and Phyllis Schlafly. These people are active absolutely in what they see as court issues. They don't distinguish between state and federal.

Their idea generally is to pull back what the courts can do, and per their historical role, I would add as well that in our experience, while the problems that have been happening, have been increasing at whatever level they're increasing, you can call it gradual, but political change can happen fast.

I worked on Capitol Hill in 1992. Nobody

there that I ever talked to would have ever thought that in 1994, Congress would look radically different than the way it had the last 40 years.

There was a time when no one had heard about PACs. Suddenly, everybody is talking about them. There was a time when nobody had heard of 527s, and within a year, everybody in politics was talking about them.

Tsunamis happen in politics as they do in real life, and I am not going to say, flat out, that that is going to happen here. I would warn you, based on what we believe we're seeing, that there's a real possibility it could happen, so therefore, as you go forward with your work, I would encourage you to keep this in mind as you think about a framework for your work and the problems you're trying to address and hopefully get ahead of, the unfortunate fact is when you come back to the state level, elected judges, public opinion is already somewhat cynical.

The polling we have done and what some other groups and the ABA have done show that three in four Americans already believe that campaign contributions affect the outcome of cases. That is

the public that may be hearing more and more about judges out of control and hearing about more and more multi-level campaign (inaudible).

The political ground could be changing under our feet.

I will not talk that much about the other solutions that are on the table, but I would agree with everything that Roy was saying about a lot of the (inaudible).

I would just add that we believe that as you prepare for the storm, we really believe that the sleeping giants in this debate are the judges themselves.

The polling we have done indicates that judges are respected by the public in terms of when they hear about judicial issues, they trust the message from a judge more than any other single actor and that is a good reason why judges have been historically reticent with the exception (inaudible) the courts and there are good reasons, but I would just caution within the limits that you have to obey, the more you can do, the more you will help yourselves because it really is a situation where if more judges are not able to do more, they may really

regret it in five, ten, fifteen years the court system that has occurred in the threat of the rising tide of special interest pressure.

The Call to Action, for example, we see as a real launch pad. From our perspective, there isn't a reason that more judges couldn't do more for reform.

The final point I will put in is one of the things we have done at a number of Conference of Judges, we have our communications director, Jesse Rutledge here, who actually had a video camera. We have had a success asking them two or three questions about judicial issues, and we put together some fairly interesting videotapes that have been very well received when we get to other states.

People really want to hear from you as judges, so there may be a situation where I ask if I could take five minutes of your time and ask you two or three questions.

I apologize for the length of profile here, but we do really worry about that the problem is getting a lot worse in a hurry.

JUSTICE TOAL: Thank you, Bert.

The second topic we want to outline for

you briefly is the 8th Circuit remand of the famous Republican Party of Minnesota against White case.

Let me introduce this discussion by calling your discussion to the brief file of amicus curiae on behalf of the Conference of Chief Justices, which we have included in your notebook.

The focus on this brief is to urge the 8th Circuit in this remand situation to preserve for the states the ability to regulate the conduct of judicial elections and to declare that judicial elections are different.

The holding in the United States Supreme Court case was meant to, we contend, (inaudible) to the announce clause. But where does that leave us with respect to two big issues?

One, are nonpartisan elections able to be mandated by the states now or does this speech-based ruling by the United States Supreme Court prohibit states from putting restrictions on party labels in judicial elections.

Many states feel that their nonpartisan judicial elections are now tailored to try to avoid the problems that partisan elections would present for judicial candidates, but there's a real

overarching and broad question here.

If nonpartisan elections, that restriction in the judicial context is a no-no from the standpoint of the First Amendment in the view of the 8th Circuit or the US Supreme Court, what will that mean in this country for the many other types of elections that are conducted by state or local ordinance nonpartisan?

There are many states that have a variety of different kinds of elections from school boards to county council to municipalities to a whole panoply of public elections that are conducted nonpartisan.

Where are we in the White case in that regard? This brief urges that those kinds of restrictions are very appropriate for the judicial elections, and I guess the thing that undergirds it, something that Roy comments on frequently and is lifted from Ruth Bader Ginsberg's dissent in the White case is that judicial elections are different. It's not simply an election is an election. (Inaudible) as Ruth Ginsberg denominated it.

The other big issue in that regard is campaign financing. The Weaver case sent shock

waves throughout the judicial community. The notion that there could not be restrictions on the solicitation of campaign funds by judicial candidates has led to all kinds of wild scenarios, but that's another thing that potentially the 8th Circuit will have to take a look at in the White case.

Are there parameters narrowly tailored to achieve the objective of an independent and unbiased judiciary that can be used to restrict how judicial candidates solicit campaign contributions, or are judicial candidates simply in the mix with all the other candidates.

Randy Shepard calls that phenomenon of completely open-ended, the sky is the limit, no holds barred, no restriction partisan elections and solicitations of campaign contributions a phenomenon that forces highly respected judges to join the race to the bottom, and it's well known how you proceed.

It's phone lists of different types of lawyers, it's solicitations in the midst of adjudication by the judge. It's a culture and a scenario that leads, at the minimum, to the appearance of impropriety.

Probably the most dramatic things written along those lines is the Texaco Pennzoil case that the Texas Supreme Court decided now a good many years ago, but that decision occurred in the context of a good many members of the court running for reelection with a lot of campaign contributions and a lot of public discussion about whether decisions were being influenced by those campaign contributions.

We will wait and see, but in the context of this remand, I asked first for Judge Kahn to start us out with a reaction to Weaver versus Bonner.

JUDGE KAHN: Thank you very much, Justice Toal.

It's not a coincidence that we have Mark here from Alabama. We have Ben from Georgia and me from Florida here because we're Weaver country.

We have all followed, even though two of us are not from Georgia, we have followed this case from the beginnings in the District Court all the way up.

I want to talk to you about it briefly because it was, I guess, the first significant

post-White decision, and one of the most surprising decisions I think that any of us had read.

The issue at the District Court level for those of you who may not have followed quite as closely, it was pretty straightforward, at least the issue that the District Court addressed in the summary judgment opinion.

This was a summary judgment case involving facial challenges to three rules that Georgia enforced. Two of them were part of their Canon 7, (inaudible) and Canon 5.

The main challenge was to their Canon 7B(1)(d), which Georgia had adopted along with Michigan, you may recall, that prohibited statements that a candidate knows or reasonably should know are false or misleading, et cetera. You all know the language. It was a negligence standard.

A lot of us were looking at judicial conduct issues pre-White back in the mid to late 90s and were a little concerned about that, that a negligence standard could be used as a prior restraint on judicial speech, but Georgia in their wisdom forged ahead, adopted the standard and then defended the lawsuit, and then the District Court,

to the surprise of very few, the Northern District of Georgia found that standard facially unconstitutional because a negligence standard -- I think most anyone, no matter what your feelings are about judicial elections -- negligence when applied to campaign statements would be extremely chilling.

It's pretty hard to argue that it would advance to useful debate or the useful dissemination of information to the public. Not a surprise.

The District Court, however, gave very short shrift to the other arguments, and there's really not an analysis at all if you look at all the District Court opinion on the challenge to what is known as Georgia's 7(B)(2), which is common in many states, certainly common to Florida, which prohibits direct solicitation of either funds or endorsements.

It seems like the solicitation of endorsements has fallen into the background now, and we're talking about solicitation and direct fundraising by candidates.

The appellants in Weaver, at that point who became the appellants, were the plaintiffs that had won the case at the District Court level.

If you look at the opinion, the issue

actually arose because of some accusations that a candidate for the Georgia Supreme Court had made against a Justice Leah Sears, and some very distasteful accusations against Justice Sears, whether they were legal or illegal.

I have no opinion on it. The court has already ruled that they couldn't be prohibited, but they're very distasteful on things such as sexual orientation in a death penalty and that sort of thing, and I use "distasteful" in kind of a common way. It was kind of race to the bottom type of thing.

The plaintiffs were smart, though, and they appealed to the 11th circuit after they won the case because they wanted another shot apparently at 7(B)(2) and it took everybody by surprise on the fundraising.

The 11th circuit gives a very thorough analysis when they uphold the District Court on (inaudible). You talk about Brown versus Cartledge, which, of course, the Supreme Court relied on in White, and they talk about White, and they say that it's pretty clear to us that this negligence standard is not going to fly.

They go on for several pages. There were some fairly unassailable analysis in striking that down, but then, and I can't emphasize enough that this is literally at the very tail of the opinion.

There has not been any introduction to this whatsoever. There has not been any intimation that the court is going to get into this fundraising thing, and if you are reading this opinion, and I'm sure a lot of us did, unless you're reading it fresh off the press, you would have had no inkling of what was coming at the end of this opinion.

Out of blue, Judge Tjoflat writing for the court says, "Canon 7(B)(2), direct solicitation of campaign monies, also fails strict scrutiny because it is not narrowly tailored to serve Georgia's compelling interest in judicial impartiality."

That is the analysis. That sentence I just read you is the sum total of the strict scrutiny analysis of direct fundraising.

There was an assumption on the part of the court, it may be correct or it may not be correct. I would at least argue that it should be developed through the adversary process that strict

scrutiny is going to apply in every aspect of the restrictions on the judicial campaign. The 11th Circuit assumed that to be the case.

He went beyond that sentence, though, and made two observations that for the life of me -- I'm an appellate court judge, so something I'm very, very sensitive to is making findings of facts. We just do that. It's not like what you see on TV. Well, do I get a retrial on my appeal?

Well, what the 11th Circuit did unanimously and astoundingly was to go into what I think are two -- very clear to me -- not conclusions of law but factual (inaudible) on a summary judgment case that only involves facial overbreadth type of challenges to these three provisions to Georgia's code.

Impartiality concerns, if any, are created by the state's decision to elect judges publicly. There is no evidence about that. There is no evidence that election of judges, without anything more, affects impartiality and leads to corrupt-type decisions, but that is exactly the inference that the 11th Circuit makes.

Then they go ahead and say, This really

is a factual determination. Successful candidates will feel beholden to the people that helped get them elected regardless of the support.

There is no factual basis for that at all. It may be correct -- for purposes of our little exchange here, let's assume it may be correct, but certainly that would be a topic that should have been delved into by the District Court when the District Court decided this case on summary judgment.

There was no remand for further proceedings. The order was that the canons were struck down.

I go back to Florida and several of us go back to Florida. White has come down and Weaver has come down, and we have got a couple election cases pending.

This is in 2002, 2003. We have a couple of fairly high profile election cases pending, one of them, McMillen, was just so bad that the judge in McMillen did all of us a favor.

He was being proceeded against by some statements and campaign literature in a county court election in the Bradenton area.