

1 everything that every advisory committee does, publishes
2 a wonderful quarterly pamphlet newsletter, summarizing a
3 bunch of decisions topically, and it is absolutely
4 invaluable, as is everything else that Cindy does, to
5 tell you the truth.

6 And what advisory commissions do is they
7 offer advisory opinions on contemplated judicial and
8 nonjudicial behavior. They give opinions to candidates.
9 If you have an advisory committee, great. If you don't,
10 that's a decision to make.

11 But when you have an advisory committee in a
12 campaign you run up against problems, that is that a
13 person running for judicial office can't wait the cycle
14 of three, four, five, six weeks for an official opinion.
15 That doesn't work.

16 The local conduct committees are very helpful
17 in this regard, but we also plug that hole by having an
18 election practices subcommittee consisting of four
19 people, which is delegated the responsibility to give
20 binding ethics opinions with a turnaround time of 24 to
21 48 minutes -- 48 hours.

22 Once again, not controversial. The lawyers
23 and the judges seem to appreciate this.

24 And I guess I'll end by saying that our

1 candidates don't view -- from what I've seen, and we
2 have almost eight hundred elected trial court judges in
3 Florida, have not by and large viewed this as overly
4 restrictive, they have not viewed this program as
5 anything prejudicial to protect incumbents, or anything
6 like this. Most of them have been very appreciative
7 because we put the information in everyone's hands at
8 the beginning of the campaign, and then everybody is
9 playing with the same ball and the same rules after
10 that.

11 Thank you.

12 CHIEF JUSTICE LAMBERT: Thank you very much,
13 Chuck.

14 Next I'd like to call upon Barbara Reed.
15 Please.

16 MS. REED: Thank you, Chief Justice Lambert.

17 First of all, thank you to all of you. It
18 has been a real privilege to be here.

19 And with the discussions that we've had over
20 the last two days I know that what's come out of this is
21 going to be tremendously helpful to me in the work that
22 I'm doing with the national center, and with some of you
23 individually who I've worked with over the years.

24 Before I get into the actual background of

1 judicial campaign conduct committees, I want to start as
2 I generally do, with giving you a little bit of context.

3 We've heard a lot over the last couple of
4 days about the problems that you as judges face in terms
5 of special interest groups and attack ads and so forth
6 and coverage by the media. But I want to give you some
7 hard numbers in term of public perception.

8 There are a bunch of surveys out there, and
9 the ones that I am quoting from date back to 1998. This
10 is the first one from the Pennsylvania Supreme Court,
11 which did a survey of Pennsylvania voters, and found
12 that 89 percent of respondents believe that:

13 -- Money buys judicial favor, most, some or
14 all of the time.

15 1999, Texas Supreme Court/Texas State Bar
16 joint survey:

17 -- 69 percent of court employees -- this was
18 a bit different, this was an internal survey -- 69
19 percent of court employees believe that campaign
20 contributions significantly influence judges' decisions.

21 -- For lawyers that number went up to 79
22 percent.

23 -- And here's the kicker. Texas judges, 48
24 percent of them also believe that campaign contributions

1 significantly influence judges' decisions. None of
2 those judges of course. It was only their colleagues
3 that weren't serving.

4 1999, National Center for State Courts, and
5 David Rottman was heavily involved in this particular
6 survey, which was conducted by the Hertz Corporation.

7 -- Roughly 80 percent of respondents believed
8 that both campaign contributions and politics generally
9 influence judges.

10 -- 80 percent believe that wealthy litigants
11 receive better treatment by the courts.

12 -- 66 percent believe courts favor
13 corporations over individuals.

14 -- Almost 55 percent, regardless of race or
15 ethnicity, believe that the courts give worse treatment
16 to nonEnglish speaking litigants.

17 -- And nearly 50, again regardless of race or
18 ethnicity, believe that African-American and Latino
19 litigants receive worse treatment than do white
20 litigants.

21 2002. Justices State Campaign, and Bert
22 Brandenburg, who is here, was heavily involved in this
23 set of surveys. They did two national surveys, one of
24 voters, and an unprecedented national survey of judges

1 to get their responses to a lot of the issues that we've
2 been discussing here.

3 They found that:

4 -- 76 percent of voters and 26 percent of
5 judges believe that campaign contributions have at least
6 some influence on judicial decision-making.

7 -- 70 percent to 97 percent of voters and
8 judges -- and these were a series of questions that were
9 worded in different ways, which accounts for the range,
10 79 percent -- or excuse me, 70 percent to 90 percent of
11 respondents support corrective measures in judicial
12 elections.

13 Now the corrective measures that were offered
14 were everything from campaign finance reform, to changes
15 to merit selection, to voter guides, to campaign conduct
16 committees.

17 -- 70 percent of voters and 59 percent of
18 state high court justices supported a proposal for
19 selecting judges through some form of merit selection
20 with a retention election.

21 Now in 2003 the New York Commission to
22 Promote Public Confidence in Judicial Elections, which
23 many of us know as the Feerick Commission because Dean
24 John Feerick chaired the commission on behalf of Chief

1 John Hey, (phonetic spelling) did a survey as well, and
2 found that:

3 -- 79 percent of New York voters believe
4 believed that having to run for re-election is the
5 single largest influence on judges' decisions.

6 -- 78 percent felt that political parties
7 influenced judge's decisions.

8 They also asked who, what people influence
9 who becomes a judge.

10 -- 86 percent said political party leaders.

11 -- 78 percent said campaign contributors.

12 -- 75 percent said special interest groups.

13 -- And 74 percent said voters.

14 Those are fairly sobering statistics, I think
15 anybody would agree. And what that tells me is that,
16 somebody who works with the voters and the public, works
17 with the bench and bar, and also works with the media on
18 a lot of these issues, is that we've got a lot of
19 educating to do out there for all groups concerned.

20 And one of the ways that different states
21 have -- one of the approaches that they've taken to
22 these educational issues is to develop judicial campaign
23 conduct committees.

24 These come in various forms. They can really

1 be broken down into two overarching groups which we
2 label official and unofficial. And the official ones
3 are those that are in some way, shape, or form
4 state-sanctioned, shall we say. They may be a committee
5 that's organized by the State Supreme Court or by
6 mandatory state bar, or somehow carry the endorsement of
7 an arm of the state government.

8 Unofficial committees are those that are
9 organized by voluntary state bar associations or other
10 groups or aggregations of groups that are interested in
11 preserving the integrity of the courts.

12 Most commonly they are formed by state bar
13 associations or at the local level by county or
14 municipal bar associations.

15 At the moment -- Mark, is your committee
16 reorganized? Are you back in business?

17 MR. WHITE: No.

18 MS. REED: That's what I thought.

19 At the moment we have, I believe, 13
20 statewide committees out there. I just discovered the
21 other day that Arkansas apparently has something like
22 this, and I need to do more investigation to find out
23 which category it falls in.

24 We do know that there are state committees in

1 California, Florida, Georgia, Idaho, which has a new
2 one, as the Judge suggested a little while ago,
3 Illinois, Kentucky, Mississippi, Nevada, New York, Ohio
4 and Washington State.

5 Now within each of those states there are a
6 number of local or municipal level committees. And New
7 York has rather a unique situation in that they were,
8 the local committees were some of the first of these
9 committees in existence.

10 Erie County and Monroe County, both in
11 northwestern New York started forms of these committees
12 initially back in the 1980s. In both situations the
13 operation of the committees lapsed for a while and then
14 was reactivated again in recent years, but they have a
15 history going back now something like 20 years.

16 Since then New York has developed a statewide
17 effort backed by the New York State Bar Association.
18 And their, their approach is to try to bring this to the
19 local level.

20 What they do is to provide assistance and
21 counseling and resources to county level bars in terms
22 of setting up these committees. And then they provide
23 what they call a back stop committee. So that if there
24 is a county -- and there are many counties among the 62

1 in the State of New York who don't yet have judicial
2 campaign conduct committees -- that way if a complaint
3 arises or a particularly egregious problem, the New York
4 State Bar will field the complaint and make sure that at
5 least there's a response for the public and the media
6 and so forth.

7 They also have an unusual situation in their
8 Fifth Judicial District whereby because there are
9 counties in that district that are quite large and
10 urban, for example, in Syracuse, would normally have a
11 great deal more influence within the districts than some
12 of the smaller counties. And the district of course
13 crosses multiple county lines. What they have done is
14 to create a super committee that includes one delegate
15 from each county, and that way when there is a
16 district-wide problem or a district-wide complaint, each
17 county in the district has an equal voice so to speak in
18 addressing it.

19 With our efforts with the national center,
20 we, for I think reasons that are probably obvious to all
21 of you, endorse the use of the voluntary, the unofficial
22 committees.

23 Even when you don't have any disciplinary
24 authority on behalf of an official committee, if it has

1 the imprint, so to speak, of an arm of the state, there
2 still becomes a First Amendment question as to whether
3 this is chilling speech in a way that will not pass
4 constitutional muster.

5 Because of that we endorse strictly the
6 voluntary forms. And we also endorse a variety of other
7 factors in building these committees, one of which is
8 diversity in a variety of fronts. Obviously gender
9 diversity, ethnic diversity and so forth. But we also
10 recommend that these committees include not merely
11 lawyers but a substantial proportion of lay
12 representatives. That could be, for example, someone
13 from the local League of Women Voters, it might be a
14 member of the clergy locally who is highly respected.

15 In Franklin County, Ohio -- it is -- it is
16 Franklin County, right, the bishops' committee, Rick?

17 QUESTION/COMMENT FROM AUDIENCE: Right.

18 MS. REED: That's what I thought.

19 They have had a committee for some years now,
20 what, a decade or more?

21 QUESTION/COMMENT FROM AUDIENCE: Since the
22 late '80s.

23 MS. REED: Late '80s. So closer to 20 years
24 now.

1 -- that was originally called the bishops'
2 committee because it was chaired by the local Catholic
3 bishop. And they have done a terrific job, and in fact
4 the new Ohio State Bar committee -- I say new, it's been
5 in existence about three years now -- sort of modeled
6 their effort as I understand it on the Franklin County
7 committee.

8 They have, in addition to lawyers, they also
9 have local business people, educators, that sort of
10 thing, so that they get a wide spectrum of people who
11 are highly expected in the local community, but they
12 also get a wide spectrum of views, because of course
13 when you're dealing with complaints of judicial campaign
14 conduct, those of us who are lawyers have a very
15 specific viewpoint. We know what challenges you're
16 facing as judges, and we also know what the applicable
17 law is, and that can blinker our approach to this.

18 Whereas if you have lay people on the
19 committee, they can give you the perspective of the
20 general public. And, you know, we may not always like
21 that perspective, but at least it's going to tell us
22 what -- when somebody reads about a campaign conduct
23 issue in the newspaper, it gives us a better idea of how
24 the ordinary person is going to respond to this and what

1 they're going to think. And I think that's really very,
2 very important in terms of shoring up public confidence
3 in the courts and in the justice system.

4 Mark has the benefit of having chaired one of
5 these committees, and he has significant expertise in
6 the nuts and bolts of how these function. And so I am
7 going to defer to him on that issue.

8 But I do want to say briefly Chief Justice
9 Lambert referred to the workshop that we hosted in
10 Dallas last year. And what we tried to do is to provide
11 assistance to states that either have nascent campaign
12 conduct committee efforts, or were looking at making
13 changes, or upgrading the work that their existing
14 committees were doing. And we had, I think seven states
15 participated.

16 We are planning for another workshop later on
17 this year. And we are hoping now with the aftermath of
18 White, and also having done one of these workshops, we
19 have a little better idea of how to target some of the
20 issues and the resources that perhaps people need more
21 at this point in time.

22 And so for those of you who might be
23 interested in having people from your state participate
24 in such a workshop, please let me know. Or certainly

1 you can let David know.

2 And also I would like to refer all of you to
3 a couple of websites. These are both hosted by the
4 national center:

5 www.judicialcampaignconduct.org is the
6 website of the Ad Hoc Advisory Committee on Judicial
7 Campaign Conduct, which Mark and I co-chair. And it has
8 a listing of all of the various committees that we know
9 of out there. Actually I should rephrase. That we knew
10 of. I am currently in the process of updating that, to
11 add some new committees that, you know, that have either
12 just been added or we just discovered.

13 www.judicialectionlaw.org covers the White
14 decision, other decisions, aspects of judicial election
15 law that we need to know.

16 And I should also add that on the campaign
17 conduct committee website later on this year we will
18 have an advisory memo, advisory opinion coming out, I
19 hope, that will give you some guidance on how to deal
20 with special interest group questionnaires.

21 And I -- or as I said, for the nuts and
22 bolts, I think Mark is probably far better qualified
23 than I to talk to you about that.

24 CHIEF JUSTICE LAMBERT: Without further ado,

1 then, let's call upon Mark White.

2 And those of you who have questions, and I'm
3 sure that some of you will have, we got a little bit of
4 a late start, so I'm going to ask Mark to do his
5 presentation, and at the conclusion of Mark's
6 presentation the floor will certainly be open for
7 questions.

8 MR. WHITE: I recognize my fate with this
9 group is similar to my distant relative, Light Fingers
10 White, who worked for the circus. And his job for 25
11 years was shoveling up behind the elephants, and
12 somebody approached him from the family one day and said
13 Light Fingers, have you ever given thought to getting
14 rid of this job? And he looked at me and said, and give
15 up show business?

16 MS. REED: I think we have just been
17 insulted.

18 MR. WHITE: So let me first talk to you about
19 the '98 committee in Alabama.

20 It would be, it would be considered to be
21 official if you, if we were in litigation. It had
22 Supreme Court involvement, and, in fact, the court under
23 statutory authority appointed the committee. And I am
24 mindful of when a great gentlemen, a great chief

1 justice, Perry Hooper (phonetic spelling) called me.
2 And his words to me when he asked me to chair it were,
3 it's so bad, not even you can mess it up.

4 So understand that that actually was
5 constituting a point by the court. I am not an advocate
6 at this point of official committees. I am a hundred
7 percent advocate of unofficial committees.

8 And to the extent Alabama is now making
9 efforts, it will come from the unofficial side, I
10 predict, rather than the official side, because I think
11 that solves so many problems and additionally gives even
12 additional credibility.

13 But I hasten to say that while that happens,
14 you've got to keep the area of communication and
15 cooperation with your appellate court in place just so
16 they know what's going on.

17 Notwithstanding, we were a committee of the
18 court, at no time did any member of the court ever
19 inquire about what we were doing, critique what we were
20 doing. And the only thing, we were created, we went
21 very hard to ensure that we had in the 12 members and
22 the chairman, geographic diversity, diversity from the
23 various elements of the bar, the bench, and everything
24 else.

1 And the only other involvement with the court
2 was when we were made our report in '98, then there was
3 a subsequent report in 2000. I think '06 presents the
4 right opportunity for our state to reconsider it.

5 What I learned from that was probably a
6 magnificent education. And I learned first and foremost
7 these committees 95 percent of the time or more are
8 resources.

9 As I sat here yesterday and watched a lot of
10 you inquiring of the panel that was up here yesterday
11 afternoon I heard a lot of serious, conscience, ethical
12 people who wanted to do the right thing but wanted some
13 help. And that essentially is what this committee does.

14 Most of the time you're getting calls from
15 candidates, you're getting calls from whoever, about
16 what do I need to do to ensure I do the right thing.
17 Most of their problems are unforeseeable, and they're
18 pretty practical, and they're pretty serious to them.

19 So don't, as you consider, and when you
20 consider this process, don't get diverted into what the
21 5 percent or less part of the job, which is what I call
22 the nightmare quotient of what happens the 24 hours from
23 the campaign. First and foremost focus on can we locate
24 12, 15 people statewide who have integrity, and that we

1 can rely upon.

2 At one time I was doing one of these
3 programs, and a guy raises his hand from New Jersey.
4 And he says what if you don't have 12 people? And the
5 first thing -- I looked, when I got here, hey, is there
6 anybody here from New Jersey? No. I don't know what
7 that means. But you, regardless of your political
8 station, regardless of the position you hold, regardless
9 of who you are, can sit down and make a list of the
10 people in your state that have integrity.

11 They were in Kentucky, in Chief Justice
12 Lambert's chambers, and incredibly impressive people. I
13 think to the extent you kick it off, you're probably
14 going to have to get involved to some extent, but the
15 sooner you make it unofficial rather than official the
16 better off you will be.

17 The committee functions, frankly, depending
18 on how your state has its particular needs or particular
19 wants. The handbook that our committee put out gives
20 you the As, Bs, and Cs. It's just not that tough.

21 Chief Justice Hooper was very insightful. If
22 I can do it anybody can do it. And I think it operates
23 not only to increase your integrity and your
24 credibility, but more importantly, the overall system.

1 The questions you get from the candidates,
2 they are much more comfortable calling this committee,
3 because it's not like you're calling the police, it's
4 not like admitting that you forgot to read the Cannon,
5 and you gently have to do that more times than you
6 realize, you know, if you look at this, there's a
7 sentence that covers it, and so as a result it, it
8 functions, as I said, as an information resource more
9 often than not.

10 It needs diversity, it needs to have lay
11 members, it should have no active judges -- by the way,
12 these are my opinion -- disregard it or whatever -- it
13 should have no active judges, it should absolutely have
14 lay people on it.

15 Retired judges. They've been waiting all
16 these years to tell people how they really feel.
17 They're an incredible resource and an incredible asset.
18 And they are the best at having what I call those
19 breakout sessions where they go off with one of their
20 colleagues and all of the rest of us lawyers and lay
21 people remain inside, and the problem goes away.

22 So by all means, they're a great resource.
23 And you should look to them immediately, not only in an
24 organizational and in a leadership role but in a

1 participatory role.

2 We look to have somehow, somebody that was
3 press, whatever, related, it's difficult to get an
4 active member of the press. We had a person named Bill
5 Jones, who is a retired press guy, but he was also the
6 PR guy for the former Governor George Wallace. Whether
7 you like George Wallace or not I could care less. Bill
8 Jones is one incredible asset that we had, because he
9 knew all of the tricks. He knew every single one of
10 them.

11 I want to use him to segway slightly into
12 another area that overlaps. Bill Jones is the person
13 that taught George Wallace that you go to any where
14 you're going to be questioned with six answers. He
15 didn't give a damn what the questions were. He already
16 had six answers.

17 Part of what I'm also supposed to allude to
18 are questionnaires. And there's some nightmare examples
19 available for you to take home.

20 One of the things I can tell you as to where
21 you, sometimes helping candidates is this, why burn up
22 all this energy getting mad at the media because they're
23 lazy, shiftless, and no count? They can't help that.
24 Why spend all this energy sitting there waiting for a

1 questionnaire that you already know today is coming?
2 You spend all of your days and all of your time
3 carefully looking at issues and coming up with answers
4 after you've analyzed them, and you write them down.
5 Why don't you do that now? On all of these hot -- I
6 don't care if it's guns, I don't care if it's gays, I
7 don't care what the issue is. Why not take the time and
8 the discipline and the talent you have right now first
9 to analyze and look at that as a person and then analyze
10 and look at that as a judge.

11 Go ahead and get your answers prepared,
12 written, articulate, supported. The end result is when
13 you get confronted, you can dictate the answer. You
14 know the questions are coming, you could write ten of
15 them down. Why not go ahead and expend that energy and
16 effort? Because when you do, you will appear, whether
17 it's a reporter, whether it's an oversight committee,
18 whether it's somebody you want to vote for you, you will
19 appear comfortable and you will appear confident in your
20 answer. Any candidate that appears comfortable and
21 confident has an advantage.

22 And one of the things that strikes me about
23 judicial candidates is why wait? Why not go ahead and
24 do that analysis? It will make you a better person, it

1 will make you a better judge, and it will make you a
2 better candidate.

3 Oversight committees. There are some
4 scenarios that I have given. When we do these programs
5 for other places, and I see Tim Averill here, Louisiana
6 did it and looked at it, Kentucky has looked at it,
7 we've done it in other jurisdictions.

8 You already know that I will help up anyway
9 possible, but I do not go to dry counties.

10 MS. REED: I think that applies to all of us
11 actually.

12 MR. WHITE: So I would suggest that you --
13 those scenarios that are there are not hypotheticals.
14 They are actual circumstances that the committee had to
15 confront and had to deal with. It's a one-page handout.
16 Take those with you and look at it. Just wrestling with
17 those problems.

18 There's some others that we get, and I think
19 we wound up handling somewhere around three hundred
20 inquires in the '98 campaign. Don't get wrapped up in
21 organizational. Don't get wrapped up in by-laws. Once
22 you've got those 12 people, if you've got a couple of
23 CEOs, or if you've got some business people on there,
24 they want to get it in there, they'll get it organized,

1 they'll run it quickly, they'll move along, they'll be
2 efficient.

3 We reached out to the press. They were
4 invited to every session that we had, they participated.
5 And I guess our crowning achievement was we were having
6 a hearing between two candidates that had a dispute, and
7 a reporter raised his hand and said Mark, I think
8 they're fixing to get into personalities here, and maybe
9 you guys should go into executive session.

10 I knew then that we had credibility. That's
11 where it is in the brief time. I'd much rather you
12 educate me. We'll try to answer any questions that you
13 have about them and deal with whatever things go bump in
14 the night.

15 CHIEF JUSTICE LAMBERT: I see a question
16 coming from Professor Schotland. Roy.

17 QUESTION/COMMENT FROM AUDIENCE: Thanks,
18 Chief.

19 What a terrific, absolutely terrific
20 presentation. Just three little things.

21 The one, I saw people wince, understandably,
22 when Barbara mentioned, I forget, 48 percent of Texas
23 judges. If Tom Phillips were here he would
24 unquestionably point out that the enormous proportion of

1 the respondents were either JPs or something below that.
2 So that he would say that is a very shaky and
3 misrepresenting statistic.

4 MR. WHITE: Other than that, you thought it
5 was a good number.

6 QUESTION/COMMENT FROM AUDIENCE: Barbara
7 mentioned the problem which, on which I agree completely
8 with Barbara and Mark about having an official
9 committee. But it isn't the official committee may
10 chill because they're official. In the Weaver case at
11 the district court level, the district judge explicitly
12 held that there was nothing wrong with the official body
13 having criticized the candidate. And in Stevens
14 opinion, in paragraph 1, in White, he explicitly says
15 that the Minnesota disciplinary board can speak out.

16 So that isn't the problem. What's wrong with
17 the official is that they get a First Amendment
18 challenge, as you mentioned. And Weaver, the person was
19 able to run the Federal court and got incomparably more
20 ink out of simply filing the lawsuit than he did by
21 anything else in this campaign.

22 And I think O'Neil in Ohio, when the
23 enormously misguided Republican chairman in Tioga filed
24 a complaint against his conduct, O'Neill got an enormous

1 amount of ink, I think out of having filed a lawsuit.

2 The unofficial committee essentially can't be
3 sued. And that's the big advantage.

4 Just two last things. Or one, and then I'll
5 yield to David.

6 Mark, you've got to tell them the first
7 inquiry you got of those three hundred inquiries, the
8 one about the volunteer fireman.

9 MR. WHITE: It's on the scenario. It's the
10 first one on that scenario.

11 QUESTION/COMMENT FROM AUDIENCE: I'm sorry.
12 You can see I don't do my homework probably.

13 CHIEF JUSTICE LAMBERT: Other questions?
14 Yes, sir, Judge Averill?

15 QUESTION/COMMENT FROM AUDIENCE: Ms. Reed, I
16 have a question.

17 We have an official committee. And the
18 jurisdiction of the committee is limited to the 10
19 specific cannons. Unofficial committees, are there
20 limits placed on what they can do with regard to the
21 code, or can they just do whatever they want to do?

22 Can they say, for example, while this doesn't
23 violate the code, it is clearly constitutional, we're
24 telling you that we find it distasteful? Can they do

1 that?

2 MS. REED: A lot of the voluntary committees
3 do that. With the voluntary committees, the unofficial
4 committees, they really set their own parameters. And
5 of course we recommend that they limit themselves to
6 certain discrete areas that are sort of obvious subjects
7 for, for our judicial campaign oversight.

8 But, for example, some of those committees
9 might take on problems of judicial campaign finance
10 issues, reporting or disclosure, or what-have-you. Most
11 of them tend not to do that. But one of the advantages
12 of the voluntary committees is that they can sort of
13 take that aspirational approach where, for example, in
14 states that are within the 11th Circuit now it is
15 perfectly okay under Weaver to make a negligently
16 misleading statement about your opponent as long as you
17 don't quote, know that it is misleading or wrong or
18 blatantly false, you can get away with saying it.

19 However, if you have a voluntary campaign
20 oversight committee they can say, all right, look, under
21 Weaver, yes, you can get away with saying this, but this
22 really is not the standard that you should aspire to as
23 a judge or as a judicial candidate, and they can fulfill
24 a rapid response function of getting that message out to

1 the media and to the public so that voters know that
2 this perhaps is not an appropriate sort of behavior for
3 a judicial candidate even if it is technically
4 allowable.

5 MR. WHITE: On voluntary committees I think,
6 you can ask the question what power do they have. I
7 don't think they have any power other than the power
8 than any other citizen has. They just happen to be a
9 group of people with integrity. They have the same
10 First Amendment rights that we all do.

11 And so I think that their power,
12 collectively, in my recommendation, their power
13 collectively is no different than any citizen has
14 individually.

15 MS. REED: It's moral authority.

16 CHIEF JUSTICE LAMBERT: Justice Young.

17 QUESTION/COMMENT FROM AUDIENCE: I certainly
18 think that there is a value to having resources
19 available to candidates so that they can ask how.

20 I guess I would ask the panelists who are
21 most involved in what we call truth squads, that's kind
22 of what they do, why would, why would we want to create
23 another interest group, which is what these groups
24 simply are, why would that be a, an important thing.

1 And I guess I want to ask it from the standpoint of
2 somebody who is out of the cultural mainstream of the
3 legal community.

4 You talked about diversity in almost every
5 way except ideological diversity. I wonder how many
6 Federalists, for example, are on the Alabama truth
7 squad. So as somebody who is, who is not in the
8 mainstream of the sort of the legal culture, I guess I'm
9 wondering why I would be interested in promoting another
10 interest group.

11 HONORABLE KAHN: You know, even though I
12 didn't speak about this, Florida has actually since the
13 '80s, had local committees. And I, you and I talked a
14 little bit yesterday about this question of
15 philosophical diversity, and we know that when people
16 say diversity, they're not talking about diversity of
17 ideas.

18 QUESTION/COMMENT FROM AUDIENCE: That's
19 right.

20 HONORABLE KAHN: I will tell you that has not
21 been a problem. Now Florida, unlike Alabama, has local
22 committees. They're county based. And to the extent
23 possible, we've tried to make them community based. So
24 you may get a different group of people in Pensacola

1 that than you would in Miami or in Orlando. That really
2 hasn't been a problem.

3 But your criticism is very valid of any group
4 that goes out and purports to be objective, whether it's
5 the League of Women Voters or the Florida bar, to be
6 quite honest. If they don't brook no dissent then they
7 lose credibility.

8 Having said that, though, I'll say that
9 that's not a problem because when you look across the
10 board at lawyers in a community, we tend to get that
11 breadth. At least that's what we found.

12 And I wanted to say something briefly here,
13 talking about the limits of committees, the only problem
14 that we have had in Florida -- these committees are, the
15 local committees tend to be something of a star chamber.
16 I mean you don't get a -- they come and they go, and
17 they make a quick decision and they disseminate.

18 But I don't say that necessarily
19 disparagingly. There's a place for star chambers.
20 Where we got in a little bit of trouble in Tampa, which
21 is a good place with a good legal community, when a
22 well-intentioned committee actually took it upon itself
23 to actually start making findings where the facts were
24 in dispute.

1 Now I don't know what you do in Alabama or
2 other states, but if you're trying to set up a
3 successful committee it cannot be a factfinding body.
4 If it's a factfinding issue it has to go up to your
5 commission or somewhere else.

6 The committees, their function is this moral
7 suasion type of function. And when you find facts for
8 somebody, that means necessarily you're finding against
9 somebody, and that will destroy your credibility.

10 MR. WHITE: The most they would ever do is
11 the same right as any other citizen would have and that
12 would be to file a complaint.

13 I don't accept, and we don't go away from
14 here thinking, that I think that my scenario is either a
15 special interest group or a truth squad.

16 And I understand and appreciate that that's
17 what you want to avoid. But what I suggest to you is
18 that that's possible. As far as the composition, I
19 don't know if Jack Sell (phonetic) is a member of the
20 Federalist Society or not --

21 QUESTION/COMMENT FROM AUDIENCE: I'm
22 confident they were at least a couple of members.

23 MR. WHITE: I'm confident they were too.

24 We went real hard to get that sort of

1 diversity, and I think we had a level of comfort.

2 I'll tell you something interesting, for
3 example, we had former Congressman Jack Edwards, a
4 Republican congressman on the committee, who is just a
5 great person. If I had a criticism of him, it was that
6 I thought he was tougher on Republican candidates than
7 the rest of the committee.

8 So you really -- I'm going to tell you it's
9 pretty quick, kind of like a good jury. Whether it's
10 good news or bad news, you may get a fair trial.

11 CHIEF JUSTICE LAMBERT: Okay. Barbara has a
12 comment. Then we have questions from Chief Justice
13 VandeWalle and Chief Justice Hannah.

14 MS. REED: Responding to your question,
15 Justice Young, I, first I want to address the
16 ideological diversity. And one of the reasons why I
17 emphasize the importance of diversity of backgrounds of
18 lay membership is that lay membership is one of the
19 things that, in my experience anyway, goes the furthest
20 to ensuring ideological diversity across the spectrum,
21 not just from legal viewpoints, but cultural and
22 political viewpoints as well.

23 And those committees that do provide for a
24 significant portion of lay members, in my experience

1 tend to have the greatest diversity of ideological
2 perspectives.

3 I do, however, want to take issue with,
4 quickly, with three of your characterizations, because
5 as lawyers we know language matters. And for those of
6 us who work in the political realm as well, and in the
7 governance realm, truth squad has a very particular
8 connotation. And it is not one that is reflective of
9 what, at least the vast majority of these judicial
10 campaign oversight committees do.

11 They are not factfinding bodies. Or as
12 Justice Kahn pointed out, should not be. Their function
13 is in large part educational and to make sure that the
14 public knows, and the media, perhaps even more
15 importantly, know what the role and function of the
16 courts are and what it is that judges do, and why it is
17 that perhaps certain behaviors don't meet with those
18 standards.

19 And for the same reasons I take issue with
20 the notion of special interest group as applicable to
21 these bodies, or the notion that you representing your
22 state would be creating a special interest group. And I
23 realize that is a phrase that is subject to
24 interpretation, you know, widely, depending on one's

1 particular perspective, but the point of this -- and I
2 should have mentioned, we do have copies of the handbook
3 that the National Center Advisory Committee created for
4 forming and maintaining these committees, and we do get
5 into some of these issues as to how you can avoid the
6 perception that you are turning into that sort of
7 entity. Because what we try to do is make sure that we
8 provide judges with a layer of insulation if you will
9 against those kinds of pressures rather than just simply
10 applying yet another layer of pressure to them.

11 CHIEF JUSTICE LAMBERT: Thank you, Barbara.
12 Jerry.

13 QUESTION/COMMENT FROM AUDIENCE: I'm curious,
14 you made a remark, assuming I can find 12 people, who
15 are unsophisticated in judicial elections, my concern is
16 that their gauge will be the legislative races, and
17 they'll gauge what's happening according to that, and
18 I'm not willing to accept that that's the standard.

19 MR. WHITE: It's embarrassing, the truth of
20 it is. You ought to always make sure you have a
21 preacher and a farmer on there. And the most
22 embarrassing part is you're sitting in there, and you've
23 got the former judges and lawyers and CEOs, and day in
24 and day out the guys that usually have the right answer

1 or bring the most insight are either the farmer or the
2 preacher.

3 QUESTION/COMMENT FROM AUDIENCE: And you
4 don't think that their experience will say that this is
5 wrong according to a legislative race as opposed to a
6 judicial race?

7 MR. WHITE: (Shakes head.) No.

8 And it doesn't become a right/wrong decision
9 95 percent of the time. You've got a candidate who
10 needs some help.

11 Scenario number one, which Roy referred to,
12 when that judge called me, what he said was he said I
13 need help. I am in one hell of a spot here with this
14 idea. And, and, and, and, and trying to help those
15 candidates get out of situations or get them information
16 is truly 95 percent of the effort.

17 MS. REED: In my experience, the lay people,
18 one, take it very seriously. And they want to be
19 educated by the legal, those in the legal profession
20 about what is different and what it is that they need to
21 know. But they also have the benefit of providing -- as
22 I said, we do get very blinkered, I know what the code
23 requires, and I also know the challenges that you face
24 as the judge, not being able to respond to attacks and

1 so forth. They're the ones that tell me what it is that
2 the public is going to see here, how the public is going
3 to perceive these things -- and I cannot emphasize
4 enough how valuable their guidance has been on these
5 committees that do have them.

6 CHIEF JUSTICE LAMBERT: Our time is getting
7 away. I have a question of Chief Justice Hannah from
8 Arkansas. And David Rottman has his hand up. And I see
9 Bill over here who is telling me that the time has come
10 to bring to it a close.

11 Jim?

12 QUESTION/COMMENT FROM AUDIENCE: I have a
13 couple of questions.

14 You said that you have a procedure in Florida
15 where lawyers that are not successful in running for
16 judges are subject to the cannons, sanctions. Do you do
17 that by statute in Florida?

18 How did you do that?

19 HONORABLE KAHN: We did it by the -- Florida
20 has an integrated bar. The Supreme Court has -- lords
21 it over judges and lawyers to an equal extent. And
22 simply enacted a rule that said that anyone that runs is
23 subject to all the applicable provisions of the cannons.

24 QUESTION/COMMENT FROM AUDIENCE: The second

1 question I have, I'm very intrigued by what you're doing
2 to inform the candidates what they can and can't do, and
3 I think that's very good.

4 You said within two to three weeks after
5 closing. And I understand that. The problem is we have
6 an eight-week period there after the closing.

7 Do you have a longer period of time?

8 HONORABLE KAHN: We have eight weeks.

9 QUESTION/COMMENT FROM AUDIENCE: A lot of
10 those things are already --

11 HONORABLE KAHN: We actually had 5 to 5 and a
12 half weeks to the primary. And there was a couple of
13 reasons, this being one of them, that some of us went to
14 the Legislature two years ago and moved back judicial
15 qualifying to May instead of July. We tried it a few
16 election cycles with five weeks and there were other
17 problems, surprise candidates, that sort of thing. The
18 Legislature actually had no problem with doing that
19 though.

20 QUESTION/COMMENT FROM AUDIENCE: You had five
21 weeks from the period of time you made your presentation
22 to the election?

23 HONORABLE KAHN: Well, we had five weeks from
24 qualifying until the first primary. Which we have now

1 moved back to before Labor Day, I believe. Very early.
2 We just moved the qualifying back to May. Everybody is
3 good with that.

4 CHIEF JUSTICE LAMBERT: Final comment. We'll
5 call upon David Rottman.

6 QUESTION/COMMENT FROM AUDIENCE: The handbook
7 that Barbara referred to is in tab 5 of your notebook if
8 you want to take a look at it. It's there.

9 MR. DRESSEL: A couple of things. We have
10 run over because we know the next session we, we have a
11 little extra time.

12 We'll finish before noon. Don't worry about
13 that. This session will complete at noon, and we'll get
14 you out of here.

15 We're going to take a recess now and ask that
16 you be back at 10:30.

17 The material that you can submit back at home
18 for education, so Heidi will put a certificate of
19 attendance, it says NYV. It should say, I apologize,
20 but, so we'll put a certificate of attendance that you
21 can use however you want.

22 Once again, it's very important that you turn
23 in your expense vouchers. There are some more back
24 there. Heidi can give them to you.

1 And please get them in next week so we can
2 close this grant up.

3 In the back there's two cards that I ask if
4 you're interested that you pick up. One is a session
5 that occurs in May, and it's on the First and Sixth
6 Amendments, media training for judges. And there is
7 funding for, likewise for your judges to come here. If
8 you have judges that you think will really benefit from
9 this, pick up one of these cards.

10 Also, more important, is we do train court
11 personnel to act in connection with your state public
12 information officer, even if you want to send your state
13 public information officer here, we have in the end of
14 April a basic skills for disseminating court and public
15 information.

16 And we've had state and public information
17 officers coming here, clerk of the court or
18 administrators, someone that is designated, and it
19 really becomes important because they can kind of keep
20 the media thing on hand. So if they can get the state
21 person in or something of that nature.

22 David Sellers is going to send it out to all
23 the Federal clerks. It really is a terrific problem.
24 If you've got somebody in your state, have them come

1 here.

2 There's likewise scholarships available. We
3 will be sending you some information about the instate
4 programs that we're going to do before we start, before
5 we come into your state.

6 The one thing that the center -- we're not
7 going to come into your state unless, you know, a lot of
8 times if you get these things, it's kind of informing
9 you that it's coming on. Sometimes we may ask who in
10 your state do you want.

11 We'll take a 15-minute break.

12 See you back here at 10:35.

13 (Whereupon a recess was taken and this
14 portion of the Symposium was concluded.)

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THIRD SESSION

10:15 A.M. TO 12:00 NOON

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THE "CALL TO ACTION" FROM
THE 2000 SUMMIT ON IMPROVING
JUDICIAL SELECTION REVISITED:
DEVELOPING AN AGENDA FOR 2005-09

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CHIEF JUSTICE VANDEWALLE: This is the panel,
the last panel of the day, and of the symposium on
Reviewing the Call to Action from the 2000 Summit on
Improving Judicial Selection Revisited: And Developing
an Agenda for 2005/2009.

My name is Jerry VandeWalle. The rest of the
panel has changed from what you see on your, on your
agenda. Chief Justice Moyer is ill, Chief Justice
Phillip's wife is ill. And neither one of them could be
here.

So Chief Justice Lambert and Chief Justice
Rottman have graciously agreed to sit on the panel. And

1 I've asked David Rottman and Professor Schotland to join
2 the panel also for this purpose.

3 They particularly are very familiar with the
4 original Call to Action. Although my state is an
5 elective state it was not one of the populous 17 states
6 that originally came up, the call, the Call to Action
7 plan.

8 I'm going to ask, I'll ask David to make some
9 comments, Roy, and then Chief Justice Lambert. And then
10 what we really want to do is hear from you people and
11 hear what your ideas are.

12 The Call to Action is behind the tab,
13 which -- tab, tab 6. And it's very brief.

14 There was also a more comprehensive one that
15 was at the back. So if you need to refer to it, you can
16 refer to that.

17 David, comments?

18 MR. ROTTMAN: A bit of background.

19 The summit on improving judicial selection
20 was really, the idea came early in 2000 at a time when
21 it seemed likely that in some of the large Midwestern
22 states -- Michigan, Ohio -- being perhaps the two best
23 examples, that potential judicial campaigns were
24 underway. And that it was time to think to some extent

1 on where we stood on the agenda of reforming --
2 improving the way -- reforming is the wrong word,
3 improving is the right word -- improving how judges are
4 selected.

5 And the approach taken was to go to other
6 large states, large in the sense of population, and to
7 ask the chief, invite the chief justice of the state to
8 send a team to this summit.

9 And the team that we asked them to put
10 together was one that would include one or more members
11 of their state legislature, perhaps their state bar
12 president, perhaps a prominent businessman,
13 businesswoman, someone who had clout within the state,
14 and to ask them to join together and go over a number of
15 topics.

16 As the final session of that summit -- just
17 as we are doing now -- we had a session where an attempt
18 was made to draw together the ideas that people
19 discussed during the summit and to see if we could turn
20 them into a set of practical, concrete recommendations,
21 most of them not necessarily requiring anything other
22 than a change in the court rules or perhaps no change
23 that the courts need to be involved with at all. So
24 practical steps.

1 It was not -- was an attempt to improve the
2 kinds of elections, the way of selecting judges, that
3 states themselves had chosen, develop an agenda of
4 switching to an appointive system, but basically
5 saying -- I think the basic assumption was judicial
6 elections are here to stay, the way in which they're
7 going to change is going to vary from state to state,
8 and we ended up with 20 recommendations that came out of
9 the group that participated in the summit, and a group
10 of, a drafting group that included Chief Justice
11 Phillips, Chief Justice Moyer, Roy, went through
12 successive drafts of those recommendations, sending them
13 out to the participants, getting their reactions.

14 And the result is a document that has no
15 official status other than kind of the speaking for the
16 people who were at the summit gathering, without trying
17 to have absolute consensus, but that this was broadly,
18 and that these recommendations were broadly in line with
19 the discussion that we had and where people saw the best
20 opportunities for making improvement in how judges get
21 selected.

22 And I think Roy, perhaps you can go from
23 there.

24 PROFESSOR SCHOTLAND: Dave is articulate.

1 This means that you won't be surprised when I say that
2 he used to be a professor, he's moved up to higher
3 things.

4 The summit of 2000 actually comes out of a
5 Starbucks breakfast in Georgetown when Tom Phillips had
6 been a member of the American Bar Association Task Force
7 that wrote out a report about lawyers' political
8 contributions. And that led to the '99 amendments to
9 the model code, which, amendments that deal with
10 modernizing in a sense the treatment of political
11 contributions. And since '99, we could do a little more
12 modernizing.

13 But Tom and I, he'd been on the task force,
14 I'd worked with them, and he was the key person on the
15 task force about contributions to judicial candidates,
16 which the house of delegates had made part of the
17 jurisdiction of the task force. Thanks to George
18 Ferrazza (phonetic spelling) if you know that superb ABA
19 figure.

20 Tom and I were saying okay, now we've got the
21 '99 amendments through, do we get them anywhere other
22 than in the model code? How do we get the attention of
23 some chiefs?

24 And we ended up with David just running the

1 most gorgeously smooth session with about 90 or a
2 hundred people, and we would have had one more except
3 that the Chief Justice of Florida was distracted by
4 little events in early December 2000. And we never got
5 over the fact that he didn't cancel until two days
6 before we met. We were thinking how could he be
7 thinking he might get there?

8 That, the whole idea was to focus on, or to
9 get energy going on campaign finance. That didn't mean
10 we by any means wanted to limit the scope of the summit
11 to campaign finance, but that was one part of it.

12 So when you look at the call of action, or
13 when you have looked at it, you see that campaign
14 finance is just one piece of a number of
15 recommendations.

16 The hope is that this session might come up
17 with ideas, maybe some from the four of us, and I hope a
18 number from you all, and suggestions about what, if
19 anything, if anything, this group might, to use the
20 usual formal word, resolve, comes out of our time
21 together in the way of statements to the world.

22 Well, of course they're not statements just
23 off into the stratosphere. The best target would be the
24 Conference of Chief Justices, because Chief Justice Toal

1 for about two years has been chairing an informal
2 committee of the conference. She's the only one on it
3 who is not from an elective state.

4 We can play games about how the legislature
5 elects, but that's not what we mean by an elective
6 state. And all the others, the two leaders who are
7 right here, Randy Shepard, Tom Moyer, who didn't get
8 here, Tom Phillips, who is no longer Chief Justice of
9 Texas, so I don't know if he's still a member of the
10 committee, but he's been an absolute -- extraordinary.

11 QUESTION/COMMENT FROM AUDIENCE: A member of
12 the faculty at South Texas College.

13 PROFESSOR SCHOTLAND: I should have, I should
14 have noted his -- just as professors move up, so do
15 chief justices move up.

16 Shirley Abrahamson, (phonetic spellings)
17 Jerry Alexander, and I'm sure I'm forgetting one or two
18 people whom I'd be embarrassed to have forgotten, but
19 these are key players within the conference of chiefs.
20 They're especially highly regarded.

21 And if this group says to the conference of
22 chiefs we think you, the conference of chiefs, ought to
23 put out a resolution, or do this or that, there's a
24 decent chance that it would go forward and action would

1 be taken.

2 Action might be a resolution. Action might
3 be a project. The word that Randy Shepard kept using
4 last night, for example, he suggested we really ought to
5 evaluate how the campaign conduct committees are
6 impacting, how they're working, what difference they're
7 making.

8 And during a break this morning, T.J.
9 designed a beautiful how to study, whether, for example,
10 the Ohio committee has made a difference, what
11 difference, what did and didn't matter, and so forth.
12 Nobody has done this.

13 And because of what he said, we asked Charles
14 Kahn, how about evaluating the election of the
15 candidates? And there isn't a better, more
16 authoritative person on it than Kahn, and he said, you
17 know, it hasn't been done, and yeah, it ought to be
18 done.

19 And after the summit, I didn't even know it
20 until last night, but Shepard started kind of in
21 Indiana. And we've had Ohio for more than a decade,
22 we've had what I think are the best materials at all,
23 the Florida materials.

24 There was a little effort here in Nevada a

1 few years ago, and there may be some others in some
2 other states.

3 But we ought to be evaluating the candidate
4 education, and out of that discussion Chief Justice
5 Lambert said, you know, it's wonderful to have candidate
6 education back in let's say January or February, when
7 they've just filed, and they're full of good hope, and
8 nice ambition and meaning to do well, and then you get
9 down into the heat of October when you do what you need
10 to do to win, and he came up with just a marvelous idea,
11 I thought, and so did Charles Kahn, although the Florida
12 schedule doesn't allow it, because you start around
13 January or February, but you, they're not there until
14 November, and if you had a second session -- this is
15 Lambert's idea not mine -- if there were a second
16 session in let's say September, it might -- and then you
17 have the candidate, something I don't think Mark
18 mentioned this morning, one of the best things he said
19 happened from the committee back in '98 was they called
20 the candidates together, and they were in the same room.
21 They had the people running against one another in the
22 same room. Some of them didn't know one another, even
23 if they did, to just have them in the same place for a
24 morning or a day, had obvious civilizing values.

1 Well, I've spoken enough.

2 CHIEF JUSTICE VANDEWALLE: I, I, before Joe
3 starts, I think it's obvious, you know that the Call to
4 Action was developed before Minnesota versus White.

5 As an example, although it talks about
6 campaign finance, it doesn't even consider the idea of
7 direct solicitation by candidates because, frankly, none
8 of the states thought that that would, was in the
9 picture, I never even dreamt I think that that might be
10 a possibility.

11 So there are some issues out there that you
12 may want to take a look at in making recommendations on
13 that, or suggestions.

14 Joe?

15 CHIEF JUSTICE LAMBERT: Let me call on Roy
16 again for additional comments.

17 PROFESSOR SCHOTLAND: Jerry reminds me of
18 something that we want to know.

19 One of the recommendations in the Call to
20 Action is that there ought to be a symposium of judges
21 and lawyers and scholars and media to look at the
22 problems of speech. Now the Minnesota/White wasn't with
23 us yet. I think certainly it hadn't even been granted
24 yet, or had only just been granted -- actually, I think

1 it was granted about 10 days later.

2 The symposium occurred in November '01. And
3 it was, I mean, I think we had -- Mark talked about
4 diversity and the Federal Society. We had extraordinary
5 diversity of views at that. We had Jim Bopp, who was
6 counsel for plaintiffs and the Federal Society and two
7 absolute zealots on the First Amendment. I mean, they
8 were against stopping people from shouting fire in
9 crowded theaters.

10 So that piece of the Call to Action did
11 produce a bunch of papers that are in the Indian law
12 review about speech. And that's all pre-White.

13 CHIEF JUSTICE LAMBERT: Okay. I'm a poor
14 pinch hitter for Tom Phillips and Tom Moyer, but I'm
15 happy to be on this panel.

16 Let me tell you about a conversation I
17 participated in recently, talking with a young, in his
18 third or fourth year in the Kentucky senate, young state
19 senator who is a comer in political parlance. He's
20 young, he's very articulate, he's, he is totally
21 committed to his point of view and expresses it well.

22 We drifted into the discussion of judicial
23 selection and the best methods of judicial selection.
24 And he said I wish that we in Kentucky would abandon

1 this nonpartisan judicial election and elect every judge
2 on a political party ballot and require every candidate
3 for every judicial seat to let us know, let the people
4 of Kentucky know his views on the hotly disputed issues,
5 the abortion, the gun control, and so on and so forth.
6 And that was a statement from a young man who is an
7 opinion maker, and he's going to be around, and a
8 participant, a player in Kentucky politics for a lot of
9 years.

10 I think implicit in a lot that has been said
11 by the Federal courts for certain and the Supreme Court
12 of the United States for sure, and by a lot of opinion
13 makers in the form of editorial writers and so on and so
14 forth, implicit in all of, either implicit or perhaps
15 expressed in many cases is the idea that the election of
16 judges is somehow a fundamentally flawed process, and
17 that it can't be fixed, that it can only be changed.
18 And many of these people, many of these groups are
19 intent on the change process.

20 A good long while ago in conversations that I
21 had with Professor Schotland and others -- and I always
22 think of Roy when this comes to, when this issue comes
23 up, Roy said in substance on, on the earlier occasions
24 and has said on many occasions, those who want to

1 fundamentally change the method of judicial election in
2 this nation just need to get over it, that what we need
3 to do is work on ways to improve the systems that we
4 have in place right now.

5 The fact is it simply isn't going to change.
6 The trend in history -- and Roy just reminded me of this
7 just a few minutes ago, is that since 1906, instead of
8 moving toward an appointed system or some system of
9 so-called merit selection, instead of moving in that
10 direction, the process has moved exactly the other
11 direction. The process has moved toward more, toward
12 greater and greater election of judges.

13 Jerry's home state of South Dakota where he
14 is --

15 UNIDENTIFIED PERSON: North.

16 CHIEF JUSTICE LAMBERT: Where he is -- I'm
17 sorry, excuse me, I'm sorry. Boy, did I blow that.

18 Excuse me, Chief Justice VandeWalle.

19 Anyway, Jerry's neighboring state of South
20 Dakota, as we heard yesterday, recently went through a
21 system of attempting to go to a merit selection whereby
22 you had the proponents of that, well-financed,
23 well-organized, good professional campaign, advocating
24 that change, and it failed 2 to 1 by a vote of 2 to 1.

1 The simple fact is the people in my state, if
2 I were to stand up and suggest some fundamental change
3 in, such as an appointment, executive appointment, or
4 some such thing as that, if I were to stand up and
5 suggest that in Kentucky I would be drummed out of the
6 state. And I suspect that many of you would be drummed
7 out of your states.

8 So the facts -- so the point is this. We
9 need to get over it, this idea of fundamental changes in
10 judicial selection and work toward a method of
11 improvement. And that's what we have all been focused
12 on here for the last two days.

13 Now the idea that has emerged for some sort
14 of approach to communicating this point of view is to
15 bring this idea, or to bring this point of view to the
16 attention of the Conference of Chief Justices. Have the
17 chief justices perhaps -- and this is, we're all just
18 exchanging ideas here, perhaps have the Conference of
19 Chief Justices adopt a resolution that would be a
20 message to opinion makers in the form of editorial
21 writers and others, and perhaps even also a means of
22 communicating with the Supreme Court of the United
23 States and other Federal courts.

24 By the way, some of you have heard that in

1 Kentucky recently we were the object of one of the Jim
2 Bop lawsuits brought by an organization called the
3 Family Foundation against the Kentucky Judicial Conduct
4 Commission. And we settled the case. We settled that
5 case after we had been subjected to a 68-page tongue
6 lashing by a U.S. district judge borrowing many of the
7 views expressing hostility to the, to judicial elections
8 in general.

9 And after we appealed from that temporary
10 injunction, and that was unsuccessful in the Sixth
11 Circuit, we had no reasonable grounds to believe that
12 the final judgment of the district court was going to be
13 any different than that injunction opinion and order.
14 And that's when we came -- that's what brought about the
15 settlement.

16 In any event, the idea that has emerged is to
17 bring the attention of CCJ, the view that judicial
18 elections are here to stay, and have the Conference of
19 Chief Justices go on record to that effect, and inform
20 others who may be interested that regardless of what you
21 want, if you're a Federal judge, or an editorial writer,
22 regardless of what we want, if we happen to be a justice
23 or a judge or a chief justice in a particular state, it
24 isn't going to happen. These are the realities, and we

1 must all acknowledge those realities and try to live
2 with them and improve the system that we have.

3 CHIEF JUSTICE VANDEWALLE: All right.

4 Thanks, Joe.

5 My state also was one of the four that was
6 sued along with Kentucky by this group. Our suit is
7 pending summary motions, cross-motions for summary
8 judgment. I hope that they don't take into
9 consideration what we you settled in Kentucky. We're
10 not willing to settle for that, Joe, but we may have to.

11 Now it's time to hear from some of you people
12 with your suggestions, ideas.

13 PROFESSOR SCHOTLAND: Let me just note, Joe
14 has been a little unfair to himself. The settlement was
15 because they said we're going to reconsider the cannons.
16 And so they've got a pending motion, so rather than
17 losing a suit when they're going to work on it anyway,
18 and the ABA is doing all its work, it was a matter of
19 let's just buy some time.

20 CHIEF JUSTICE LAMBERT: That's exactly right.
21 We have, we have an ethics opinion that some of us have
22 come to regret the existence of, but it's from the
23 Supreme Court. We have now set oral argument to
24 reconsider the views expressed in our JE 106. And an

1 oral argument has been set, we, a University of Kentucky
2 law professor has, has written a brief. We've invited
3 Mr. Bopp to file a brief on, expressing his point of
4 view. And so we're going to, we're in the process of
5 reconsidering that right now.

6 CHIEF JUSTICE VANDEWALLE: All right.
7 Questions, ideas? Yes?

8 QUESTION/COMMENT FROM AUDIENCE: Something we
9 might do along those same lines, in addition, perhaps,
10 or as part of that, I think the discussion of Canon 5
11 indicated it's, it's that the proposed -- well, for that
12 matter the existing Canon 5 and proposed Canon 5 is
13 fundamentally flawed in two ways.

14 One is they don't, it has not taken into
15 account the realities that we deal with.

16 And the suggestion was made well, divide it
17 up into separate, that would be helpful. I think it
18 would be helpful.

19 I think there's another fundamental flaw, I
20 don't think, in my sense from looking at it, is the
21 drafters don't have a notion of what they're trying to
22 do.

23 Now if you go behind, it looks to me like
24 maybe there's some notion in individuals' minds that

1 they'd really like to get around this problem of having
2 elections. But that's an illegitimate goal, it seems to
3 me. So I guess what I would urge is that somehow we get
4 that message through that Cannon 5 ought to be
5 completely reconsidered, starting from ground zero, and
6 say what is it that we'd like to do with respect to
7 judicial selection, depending on the state.

8 And I would think that what we're trying to
9 do is make it consistent with our ideas of the function
10 of the judicial branch. And so if we can say look,
11 there are going to be elections, now what can we do with
12 elections that will help to foster a notion of what
13 judges do, and let's do that. And it may be that those,
14 that, that, that, that there are very few things that we
15 can do in the form of mandates but that there are many
16 things that we can do in the form of aspiration.

17 CHIEF JUSTICE VANDEWALLE: I think that the
18 committee on Cannon 5 is having the same problem all of
19 us are. They don't -- until there is more definitive
20 ruling, and they're starting to come out from lower
21 courts, perhaps Supreme Courts, when you put something
22 out there, and only six months later they have it cut
23 off, or cut down. And I suspect they're wrestling with
24 exactly that.

1 QUESTION/COMMENT FROM AUDIENCE: But my sense
2 is what they're wrestling with is well, here's what we
3 have in the old canon, now what can we do to modify?
4 When in fact what they ought to be looking at is what is
5 it we'd like this canon to do.

6 CHIEF JUSTICE VANDEWALLE: Okay. Any other
7 suggestions or comments?

8 I'm sorry?

9 QUESTION/COMMENT FROM AUDIENCE: I guess we'd
10 like to respond to Justice See's concern over our
11 lacking a sense of purpose as we draft Canon 5.

12 UNIDENTIFIED PERSON: That isn't what he
13 said.

14 QUESTION/COMMENT FROM AUDIENCE: Present
15 company accepted.

16 QUESTION/COMMENT FROM AUDIENCE: No, no.

17 I think we've all had a very clear sense of
18 purpose from day 1. And that is that we want to
19 restrict -- and that is the only word I can use --
20 certain campaign practices in, in a constitutional way
21 to preserve the impartiality, the integrity, and the
22 independence of the judiciary. And we say that over and
23 over again in various ways.

24 And those values are values that I don't

1 think anyone in this room would contest. And those
2 values are foremost in our thinking as we do this. The
3 integrity and the impartiality and the independence of
4 the judiciary.

5 QUESTION/COMMENT FROM AUDIENCE: I would just
6 encourage this group, which I just want to emphasize how
7 valuable yesterday's session was, but any more input
8 that you can give us, and the sooner the better, because
9 obviously we're on a time line to plan, I believe it's
10 still to try to have a final product within the next
11 couple of months.

12 So to the extent that you're able to -- I
13 don't know if you actually have a committee that focuses
14 on this, but if you're able to do that, we would benefit
15 a lot from that.

16 So thanks.

17 CHIEF JUSTICE VANDEWALLE: Yes.

18 QUESTION/COMMENT FROM AUDIENCE: There was a
19 reference to a Joe Bob lawsuit. I'm just wondering, I'm
20 not aware of Joe Bob lawsuits or lawsuit.

21 Is this something that's going to be
22 happening in a lot of our courts?

23 PROFESSOR SCHOTLAND: It's Jim Bopp.

24 CHIEF JUSTICE LAMBERT: It's Jim Bop.

1 B-O-P-P.

2 Mr. Bopp, and I'm certainly not one to give a
3 testimonial, Mr. Bopp is a lawyer in Indianapolis,
4 Indiana. And he was plaintiff's counsel in the
5 Republican Party of Minnesota versus White. So he was
6 plaintiffs counsel in the White case.

7 QUESTION/COMMENT FROM AUDIENCE: Okay.

8 CHIEF JUSTICE LAMBERT: He has since brought
9 similar cases in in at least four other states. And so
10 he is, quite frankly, he's the, he's someone to be
11 feared in this arena.

12 QUESTION/COMMENT FROM AUDIENCE: So, so, it's
13 his plan to bring them state by state and should we be
14 looking for them?

15 CHIEF JUSTICE VANDEWALLE: What he did, they
16 sent out questionnaires. And the questionnaires were
17 returned by a lot of judges, at least in my state, that
18 were running for election saying we won't comment, we
19 can't comment because of the code of conduct.

20 So the allegations are it's the code of
21 conduct that kept them from responding. Presumably,
22 that, that will happen. I think they picked it
23 according to the provisions that were in the code of
24 conduct.

1 The North Dakota bill has the pledge and
2 promises and, and commit clause. I was a candidate for
3 election unopposed, so I just tore mine up and through
4 it in the wastepaper basket. Some of the trial court
5 judges tore theirs up. They were unopposed.

6 Those that were opposed had a little more
7 difficult time in how they were going to answer. So
8 that's what happened in my state. I don't know what
9 happened in yours.

10 CHIEF JUSTICE LAMBERT: Our experience was
11 very similar. We had, in, in the, in the election year
12 of 2004 last year, we didn't have a lot of candidates,
13 but we had some, some vacancies that had occurred as a
14 result of resignation or death, and so we had some
15 special elections. That were elections nevertheless.

16 And so those candidates, they received the
17 questionnaires that Jerry spoke of, and many of those
18 were returned saying I can't answer this because to do
19 so would be a violation of Cannon 5.

20 CHIEF JUSTICE VANDEWALLE: In, in fairness,
21 talking about the earlier panel today, there are
22 questionnaires, and there are questionnaires. Some of
23 these questions were loaded questions. They were, you
24 know, like when did you stop beating your wife type of

1 questions.

2 QUESTION/COMMENT FROM AUDIENCE: And who sent
3 the questionnaires to the judges?

4 PROFESSOR SCHOTLAND: It's valuable you bring
5 this up because what this is all about is abortion.
6 Jim Bopp is the counsel nationally for the Right to Life
7 organizations. Now whatever you think of Right to Life,
8 whether you're for it or against it, that's what it's
9 about. It's not just my view, that's what the
10 plaintiffs in Minnesota said, that it's an effort to get
11 what many of us call a litmus test on judicial
12 candidates. And if they can knock out the pledge and
13 promise, and knock out the commit, then they can say why
14 on earth aren't you answering our questions.

15 CHIEF JUSTICE VANDEWALLE: Barbara?

16 QUESTION/COMMENT FROM AUDIENCE: To provide
17 you a little more sort of concrete background on that
18 context, Jim Bopp is a First Amendment purist. He also
19 does have a distinct political agenda. And while I
20 agree with Roy that the abortion issue was sort of the
21 genesis of all of this, we're starting to see it expand
22 into issues like same sex marriage, prayer in schools,
23 other sorts of quite often religiously based issues.

24 He also winds up sort of in a de facto sense

1 at least collaborating with groups that maybe don't have
2 an emphasis on the religious issues but have a discreet
3 emphasis on other political issues like so-called tort
4 reform or tax issues, other economic issues, that sort
5 of thing. Judicial philosophy as they call it is big
6 with them.

7 And since the White case they have been begun
8 going, and he, he serves as counsel -- he is counsel
9 Indiana Right to Life, but he also serves as counsel for
10 different groups, and he has a public interest law firm
11 that deals with these types of cases. And they send out
12 questionnaires that are, as Justice VandeWalle
13 indicated, that are just abominable.

14 I can't begin to describe how many things
15 tend to be wrong with a lot of these questions. And I
16 can get you copies of some of those if you want, but
17 they also are usually prefaced by a cover letter that
18 says words, not explicitly, but to the effect that now
19 that the Supreme Court has decided Republican Party of
20 Minnesota v. White you are required to answer any
21 question we put to you, and if you do not do so within
22 14 days or 21 days or whatever length of time, you will
23 be reported to the media and to the public as refused to
24 respond.

1 And so judges are now increasingly under
2 considerable pressure to do this, and for new candidates
3 who have never been judges before, they may read that
4 and go, okay, I know a little bit about the White case,
5 I guess I do have to answer everything they send.

6 So it's really insidious, and I do expect
7 that it will spread to every state. They're using these
8 in retention states as well not just partisan election
9 states.

10 QUESTION/COMMENT FROM AUDIENCE: We had the
11 experience in Montana that, there were five, there were
12 five judges up for election in different races, and we
13 got that questionnaire. Uniformly in our state, at
14 least the judicial Supreme Court candidates being
15 candid, uniformly, we all refused to respond to them.

16 When I got mine, I basically sent back a
17 letter telling them that they were, their questions
18 assume facts that were not true, that here was my
19 position on these issues, as indicated in the opinions I
20 wrote, and that's all I was going to say about it. End
21 of story. And I think other judges did the same.

22 But we got the same sorts of questionnaires
23 from the gun people. Their, their questions were
24 unbelievable. It was like a 15-page law school exam

1 that nobody could answer.

2 And we got them from other groups. We got
3 them from NARAL. So these sorts of questionnaires I
4 think are going to be increasingly used in judicial
5 campaigns.

6 CHIEF JUSTICE VANDEWALLE: Ellen?

7 QUESTION/COMMENT FROM AUDIENCE: For those
8 states that don't have the type of programs that we
9 discussed this morning for training and education of
10 candidates, it seems as though maybe something could be
11 done. And I haven't really thought about how exactly
12 how it would work. But I'm not sure that candidates
13 running for judge -- I'm not sure judges, but certainly
14 candidates aren't going to be familiar with the specific
15 rules regarding recusal that we do have on our books in
16 the various states.

17 The definition of impartiality that's now in
18 the code, the provision that we've been discussing about
19 committing or appearing to commit, it seems as though we
20 need to do a kind of preemptive strike with those who
21 are potentially going to be asked to fill out these
22 questionnaires, to at least ensure that we educate the
23 candidates, to know the recusal rules, to give them the
24 opportunity to explain what it is, even though White

1 says what it says, whatever it says, that they still
2 feel that they wouldn't want to be put in that position,
3 and to be able to explain to people you wouldn't want me
4 to be in that position, would you, where I can't serve
5 on a case that's so important as an issue --

6 CHIEF JUSTICE VANDEWALLE: Someplace, and it
7 wasn't in the pleadings in this case, was it, Joe, there
8 was some place that the issue of the recusal was under
9 attack. And I, as saying you, you're just attempting to
10 do indirectly what you cannot do directly, by
11 threatening that they would have to recuse. I can't
12 remember where it came up.

13 Yes?

14 QUESTION/COMMENT FROM AUDIENCE: I find
15 myself in the position of giving Jim Bopp his due, but
16 we did do that in the redrafting after White. I don't
17 know if you remember, but the ABA working group that
18 recommended provisions, revisions of the code that were
19 adopted in 2003, had Jim Bopp there on a regular basis,
20 we listened to Roy Schotland and others, so if, if you
21 think we haven't covered the waterfront on concerns, and
22 in fact he had some influence on the current, the
23 language that's currently in the code. So I think,
24 again, if you think we haven't had advice across the

1 political spectrum on this issue, we have.

2 JUSTICE VANDEWALLE: Justice Agosti.

3 QUESTION/COMMENT FROM AUDIENCE: When I was a
4 trial judge and had a juror who committed to a
5 particular view, we asked the juror whether they could
6 set that aside and follow the instructions of law, and
7 keep an open mind, and he said sure. And I don't know
8 that it has been tested that there's a mandatory recusal
9 if a judge makes a comment that is construed as aligning
10 himself with a specific view, and I'm not at all sure
11 that you'd ever see the Supreme Court, the United States
12 Supreme Court requiring that kind of recusal. I don't
13 get that at all out of --

14 QUESTION/COMMENT FROM AUDIENCE: And we have
15 the --

16 QUESTION/COMMENT FROM AUDIENCE: Yeah, and
17 that was a voluntarily recusal. I think that was a
18 little bit more -- personally, I think that was a little
19 more politically motivated than anything else to end
20 some criticism.

21 I wouldn't rely on recusal provisions as the
22 entire solution to this problem. And it is a big
23 problem.

24 CHIEF JUSTICE LAMBERT: As a practical

1 matter, a judge would always be able to say that if I
2 answered this question I would feel compelled to recuse
3 to avoid the appearance of impartiality in the case.

4 QUESTION/COMMENT FROM AUDIENCE: Absolutely.
5 And frankly, one of the big problems that we as judges
6 have is that we have not done a very good job of
7 reminding the public of what our jobs involve. And our
8 jobs are difficult to understand.

9 When you go visit a high school or the local
10 rotary, you talk about the job of a judge, when we
11 fought term limits for judges in Nevada, this became my
12 second job for two years. My motto being no group too
13 small, explaining to everybody that you don't want a
14 judge who wants to do the popular thing. You want a
15 judge who is willing to do the unpopular thing if that
16 is the law. And the, we don't make the law.

17 But the public truly, truly believes that
18 judges are free to make it up as they go along. And
19 that if we make it up as we go along in a way that the
20 public doesn't like, then that's a judge worthy of
21 getting rid of when in fact the opposite is true.

22 And so while an answer like yeah, I may have
23 to recuse myself because it creates an appearance of
24 impropriety as part of the solution, I think we are

1 overlooking another obligation that judges have to be
2 very aggressive in public education whenever possible.
3 And to solicit the support of the bar in doing so within
4 any given state. I know that's maybe a little bit off
5 the topic, but if you don't do that, it will always be
6 an uphill battle.

7 CHIEF JUSTICE VANDEWALLE: I think that's
8 part of the Call to Action plan, Deb. I think that's in
9 there, the public education of what judges are about.

10 Yes?

11 QUESTION/COMMENT FROM AUDIENCE: I've really
12 changed my mind in the last two minutes about
13 questionnaires. I think every group should send judges
14 questionnaires. And here's what I would do in response.
15 I want to develop a questionnaire to send back to the
16 questionnaires. And I want to know does that mean if I
17 answer this that I am committed to this position.

18 Does your group have, have or intend to have
19 or expect to have litigation in our courts? In the
20 state, before me?

21 I think there's a whole number of questions
22 that really need to be asked of the questioners. And
23 maybe these judicial conduct committees would be, you
24 could send them the questionnaire, and they could send

1 the questionnaire to the questionnaire people, saying,
2 you know, what's the expectation? If I answer your
3 question, am I committed to that position?

4 CHIEF JUSTICE VANDEWALLE: This is a
5 fascinating discussion, but let me try to refocus on
6 your suggestions about the Call to Action.

7 All right.

8 QUESTION/COMMENT FROM AUDIENCE: Actually, I
9 wanted to follow up with that concept, I wanted to know
10 if the ABA action committee, maybe Ellen knows, are you
11 drafting a model questionnaire as well. Because I
12 didn't know that Jim Bopp was doing these stealth bomber
13 attacks all over the country. So I think we have to be
14 ready for it.

15 And I'd just like to know as you're drafting
16 these rules if a judge could then say well, the American
17 Bar Association, I'm not going to respond to your
18 questionnaire, but the model questionnaire, the issues
19 we can respond to are here, and here it is.

20 QUESTION/COMMENT FROM AUDIENCE: We're
21 working on that at the ad hoc committee.

22 QUESTION/COMMENT FROM AUDIENCE: Okay.

23 QUESTION/COMMENT FROM AUDIENCE: I can't
24 speak for the ABA. Our committee is now working on

1 that.

2 We will have some resources on that this
3 year.

4 QUESTION/COMMENT FROM AUDIENCE: The only
5 thing we have done is we're considering a draft of a
6 comment to the political speech cannon.

7 QUESTION/COMMENT FROM AUDIENCE: No, I mean a
8 full thing.

9 QUESTION/COMMENT FROM AUDIENCE: You probably
10 will not find it entirely.

11 QUESTION/COMMENT FROM AUDIENCE: I need it
12 preprinted on a link to the ABA.

13 PROFESSOR SCHOTLAND: We're hoping to have a
14 meeting in Philly in the next few weeks with NARAL,
15 Right to Life and some others, who have indicated
16 they'll be sending out questionnaires, and if anything
17 exportable comes out of that meeting we'll export it.

18 CHIEF JUSTICE VANDEWALLE: Okay.

19 QUESTION/COMMENT FROM AUDIENCE: This touches
20 from before on your points of action educational
21 programs, and it's something Ellen talked about in
22 educating candidates.

23 I wanted to alert everybody that we just
24 wrapped up a subcommittee of the ABA standing committee

1 (inaudible) on the subject of prejudicial education. It
2 was stimulated by a in large part by Judge Mark Ama a
3 court appeals judge in Louisiana. And the subject is
4 not simply limited to campaign education, but it's the
5 whole idea of whether there ought to be some level of
6 education for people considering entering the judiciary.

7 We're not talking about what these folks do
8 here but before that even. And the current step, we
9 presented the semifinal draft to the standing committee
10 in Salt Lake, and their suggestion that was that it next
11 get set by the judicial branch. (Difficult to hear.)
12 So it's going to be coming your way, and it's still
13 pretty, necessarily pretty broad right now, and we're
14 looking for feedback. I thought this was an appropriate
15 time to point out that's coming, and we're sure looking
16 for some feedback on it.

17 CHIEF JUSTICE LAMBERT: One more quick
18 comment on the questionnaires. The suggestion was made
19 that we send our own questionnaire back or that, that a
20 careful explanation be given as to why the questions
21 can't be answered or whatever.

22 The fact is that won't make any difference to
23 any of the groups sending the questionnaires. When they
24 do not get a response that is truly responsive to their

1 questions, when they report to their membership, they
2 will say that judge so-and-so refused to answer. And
3 there's no effective way to dispute that conclusion
4 reached by the group.

5 QUESTION/COMMENT FROM AUDIENCE: Is there a
6 website that's designed or could be designed that, where
7 we can access the variety of questionnaires that are
8 outstanding, and other judges could make contributions
9 so we can have, or even connect the links?

10 QUESTION/COMMENT FROM AUDIENCE: That's going
11 to be added, isn't it, David, that's one of the things
12 that David and I have been working on. I think we're
13 going to add that to the ad hoc committees website.

14 MR. ROTTMAN: That will be available probably
15 more towards the middle of this year.

16 QUESTION/COMMENT FROM AUDIENCE: What's the
17 website?

18 QUESTION/COMMENT FROM AUDIENCE:
19 Judicialcampaignconduct.org. All one word.

20 CHIEF JUSTICE VANDEWALLE: Yes.

21 QUESTION/COMMENT FROM AUDIENCE: Yeah, to
22 Joe's observation that we should just accept the
23 inevitable and declare that elections are here to stay
24 forever and ever, for someone who really likes the

1 appointment and retention system -- we don't have that
2 in Nevada -- can't we get any traction from the
3 spectacle of money and spending that we see throughout
4 the, the various states, I mean in Ohio, and Illinois
5 and even to a lesser degree in Nevada, you've got to
6 raise seven, eight hundred thousand dollars to win a
7 seat. I've had many people say what can we do, what can
8 we do? My answer is appointment and retention. And
9 can't you get any traction in support of appointment and
10 retention from the spectacles that we've seen that I
11 think turn off a great many citizens.

12 PROFESSOR SCHOTLAND: Yes, you'll get a third
13 of the vote.

14 CHIEF JUSTICE VANDEWALLE: That was a South
15 Dakota issue, Bob. They switched because of Minnesota
16 vs. White. The trial court went for that, and that was
17 the issue, and it didn't sell. Now it hadn't gotten
18 there. I think Justice O'Connor is in fact saying in
19 her opinion if it gets bad enough you'll change. I'm
20 not sure that they'll change even if it gets bad enough.

21 QUESTION/COMMENT FROM AUDIENCE: As a
22 follow-up on that from another point of view, in 1994
23 Tennessee went from partisan election for appellate
24 judges to retention and selection process. There is

1 currently pending in the general assembly which started
2 this session about the end of January, four bills to
3 abolish the Tennessee Plan, we call it, and the four
4 bills that would return us to partisan elections.

5 All of those bills are sponsored, and they
6 have some legs to them. The makeup of the general
7 assembly is beginning to turn more and more right. So
8 the people who are pushing these bills are those people
9 who are there largely in favor of the Right to Life
10 movement and in favor of the anti-gay movement, and
11 their feeling is that the Tennessee Supreme Court has
12 become too liberal.

13 In fact, there's another bill that they have
14 in the general assembly that would require all
15 candidates for judgeship on the appointment process to
16 take an oath that they understand the separation of
17 powers. Just bizarre things.

18 And so I agree with Justice Lambert. I don't
19 think we're going to change these people, no matter
20 whether you answer the questionnaire or don't answer the
21 questionnaire. We've got to get more people out to the
22 polls to vote than they do. It's that simple.

23 CHIEF JUSTICE VANDEWALLE: Larry.

24 QUESTION/COMMENT FROM AUDIENCE: Those same

1 folks have allies like me, on the other end of the
2 political spectrum. And right now we have a bill in our
3 legislature to make our justices only nonpartisan. And
4 the Chief Justice the other day called the chairman of
5 the judiciary committee up to our office, and we got
6 that conveniently canned for the year.

7 There's people at both ends of it. I agree
8 with your last statement. We have to do something.

9 QUESTION/COMMENT FROM AUDIENCE: Just to
10 follow up on Chief Justice Lambert's and Ellen's comment
11 if elections are going to be there, the groups that send
12 out the questionnaires are not going to, you're not
13 going to win them over. But I think you do need a means
14 to let people who haven't run before, haven't been in
15 that situation before, to give them the ammunition they
16 need to deal with it.

17 You know, I find that if you explain what the
18 judicial -- you're not going to explain to these groups,
19 but to others, if you explain what the role of the judge
20 is, and you explain why it would -- why they wouldn't
21 want you to answer some of these questions, they
22 understand it. But you have to, you have to give that
23 ammunition to the people who haven't been down that road
24 before.

1 PROFESSOR SCHOTLAND: Do you think the group
2 ought to resolve that there ought to be a higher
3 priority on outreach?

4 QUESTION/COMMENT FROM AUDIENCE: Yes.

5 MR. VANDEWALLE: Yes.

6 QUESTION/COMMENT FROM AUDIENCE: I think that
7 your suggestion earlier that the Conference of Chief
8 Justices adopt these recommendations, I think we ought
9 to resolve to have the functions do that.

10 When I was campaigning I spent 98 percent of
11 my time educating the public about what I do and the
12 importance of my job. We're allowing these special
13 interest and other groups and partisan politics to
14 hijack the judiciary for lack of education of the
15 public. And I think we ought to stop it.

16 CHIEF JUSTICE VANDEWALLE: Yes.

17 QUESTION/COMMENT FROM AUDIENCE: Again, I, I
18 find myself looking at this thing from a different
19 perspective. I guess I'm curious why we believe that
20 the method of selecting judicial officers is likely to
21 induce politics.

22 I think two of you are in the Sixth Circuit.
23 We have, we have in Michigan we have four nominees that
24 have been held up since the beginning of Bush

1 (inaudible) and if anybody thinks that the, that the
2 advise and consent system is less political than any
3 other, come to Michigan. We can show you how that
4 works.

5 Now the electoral system has some
6 difficulties, but I, I think what I, I would advise
7 those of you in the systems to watch out for is when the
8 aggressive, well-financed lawyers are offended by your
9 decision, watch out, because you're in worse shape than
10 I am, because you're going to get this in the last two
11 weeks of election, and you'll have no campaign.

12 QUESTION/COMMENT FROM AUDIENCE: We had that
13 in 1996, and a newly appointed justice who was defeated
14 on a single issue of opposition that arose within the
15 last month of the campaign out of nowhere.

16 PROFESSOR SCHOTLAND: I'm so glad Justice
17 Young brings that up. First I just want to note I
18 remember Chief Justice Riley Anderson saying we were
19 able to make that change in Tennessee because we did not
20 need to go to the voters. They did that by statute.

21 QUESTION/COMMENT FROM AUDIENCE: Right.

22 PROFESSOR SCHOTLAND: And if I heard him
23 right there might be some questions about the Tennessee
24 constitutionality, that move, but you got it through.

1 The suggestion, if I understand Chief Justice
2 Lambert, is not that we say that elections are good or
3 bad or anything else, rather it's that it ought to be up
4 to the states to make the choice of the selection
5 system. And that in fact anybody who thinks that you're
6 going to get rid of the elections just doesn't
7 understand where things are. We can't get rid of them.
8 We're not saying we shouldn't get rid of them. We're
9 not saying you should get right of them. We're saying
10 we can't get rid of them whether we wanted to or not,
11 and stop making these decisions and writing these
12 editorials and let's focus on what you can do.

13 CHIEF JUSTICE VANDEWALLE: I have to agree
14 with Justice Young. I served on the committee of the
15 U.S. Judicial Conference, and there were four chiefs.
16 And we discussed this issue.

17 And my observation is that at least if it's a
18 political issue, and it's a Federal judge involved, and
19 there's a new story in there -- and Judge Hug, I
20 apologize -- within the first two paragraphs of that
21 story, you will see that judge so-and-so was appointed
22 by president so-and-so, the obvious implication being
23 that if it's a Republican President that appointed you,
24 you will vote as, if it's a political issue on the

1 Republican side, or if it's a Democratic president that
2 appointed you, you will vote on the Democrat side. I
3 don't believe that's true, but I think that's the way
4 that it cuts.

5 So I understand what you're saying. I think
6 what we have said or what Joe has said and repeated by
7 Roy is that whatever system you have in your state, and
8 I do believe what we need to do is within that system
9 work to improve the level of judicial selection to try
10 to get it higher. Whatever that may be.

11 The Call to Action says nonpartisan election.
12 You heard Larry say I don't want a nonpartisan election
13 for West Virginia. I want partisan elections. Fine.
14 Within that context, then we work to improve the
15 selection. And I think that's what we're going to have
16 to do.

17 CHIEF JUSTICE LAMBERT: Justice Anderson.

18 QUESTION/COMMENT FROM AUDIENCE: Yes, I agree
19 that one of our focuses should be on outreach, but I
20 want to step back. I'm not sure what problems the
21 public has and what the focus of our message should be.

22 There's a lot of polling and focus, and I
23 think Justice has got some good stuff, but it surely
24 would be helpful, and we're struggling with this in

1 Minnesota right now, to get a better feel of where the
2 public mind is on some of the key issues so that the
3 outreach message could be focused, and where their,
4 where their mind is opposite from where we think it
5 should be.

6 I'll give you an example in a different area.
7 Lucy's organization just worked on finding out that
8 ninth and tenth graders think that the First Amendment
9 gives too many rights. Now that information is valuable
10 to us in society.

11 I mean, you take that message to teachers,
12 you take it to us, and you say okay, we do a better job
13 of education with respect to the constitution and the
14 rights, I'd like to have that same information with
15 respect to us in the judiciary so when I take the
16 message out I can focus it better and not do it
17 anecdotally.

18 CHIEF JUSTICE VANDEWALLE: Okay.

19 QUESTION/COMMENT FROM AUDIENCE: On this
20 outreach thing, we had an election and a judge in Iowa
21 who unfortunately dissolved a civil union without
22 reading the papers. And there was a big outcry in
23 northwest Iowa, which is pretty Dutch reform, very
24 religious, defended him, and they made an all out effort

1 to get rid of this guy, including out-of-state money.

2 What we tried to do as a judiciary and as
3 lawyers, we tried to educate the people, just what you
4 were talking about -- what judges do, how they work, one
5 bad decision doesn't make you a bad judge, the whole
6 darn thing. And it ended up that the paper came out
7 with an editorial, most of the papers around the state
8 did this, about a week before that retention election,
9 saying if you don't read about the judge, you don't hear
10 about the judge, you don't see him or her out drinking
11 or carousing around, they're probably doing a good job
12 and one bad decision doesn't tell you anything about the
13 judge. And he won. He got back in, which was
14 surprising to me because I thought he was dead meat.

15 And it was a 59 percent, which is a big
16 number for you guys running these elections, but a
17 district judge in Iowa usually gets between 85 and 95
18 percent. So, so, you know, that kind of education I
19 think is important from somebody. And I don't know who
20 does it.

21 We had, we had all the reporters from around
22 the state around a month before the election come down
23 to the judicial building, and we actually put on a whole
24 seminar for them, telling them about these things, and

1 how judges work. And I don't know if that turned public
2 opinion or not, but the paper was very interested in
3 talking about what judges do not what they do on a
4 specific case and how important it was.

5 CHIEF JUSTICE VANDEWALLE: Yes.

6 QUESTION/COMMENT FROM AUDIENCE: Hawaii is
7 not an elective state. I have palpitations when I hear
8 Joe talking about the process since 1906 that has
9 (inaudible) not really America or whatever process, but
10 more of an elective.

11 Every year Hawaii has some legislator
12 submitting a bill for elective office or electing our
13 judges. I intend, and we've been doing it already, and
14 we have the articles that the folks are speaking of, the
15 horror stories, I go along with Justice Roses, I think
16 that you have to let the people know what the horror
17 stories are that goes along with electing judges.

18 I hope that any resolution out of the chief
19 justices conferences does not indicate that we're just
20 going to lay back and die on this issue, that we should
21 improve it, as Joe indicates. But we should continue to
22 fight, if you really believe in a meritorial point
23 system be less, I don't see it's without political
24 overtones, but I don't think that I'd like to see a

1 resolution if and just give up on moving in that
2 direction.

3 CHIEF JUSTICE VANDEWALLE: Yes.

4 QUESTION/COMMENT FROM AUDIENCE: If I could
5 just by way of illustration to try to, you know, flesh
6 out what I said earlier. We have here justices who have
7 indicated that members of the court got active in
8 elections involving other members of the court where
9 they thought some injustice was being done.

10 Now you know it seems to me that's
11 significant, and it seems to me that's good. And it
12 seems to me if we're an elective state then we ought to
13 be allowing that sort of thing to happen.

14 As I read the cannons it suggests we ought
15 not be doing that. And I think we should. That's my
16 concern. My concern is when we look at it, and say
17 what's going on here, what is it that we want to do that
18 is consistent with the objectives that we want to
19 achieve. And I'm all for the integrity and
20 independence, but my concern is that when we look at the
21 rules they not be in the terms of well, we don't like
22 this thing that's going on, therefore we're going to
23 stop this thing. What we ought to be doing is stepping
24 back and look at what is it that we're trying to

1 accomplish and how is it we can best accomplish it.

2 That's point that I was trying to make earlier.

3 CHIEF JUSTICE VANDEWALLE: Roy.

4 PROFESSOR SCHOTLAND: This is the second time
5 that you brought up the cannons and views about how --
6 well -- Eileen this morning, it's always wonderful for
7 me to talk with her, and there was some things I wanted
8 to say about the cannons. She said write it. As Ellen
9 said, we need it soon. And I said okay, is it okay if I
10 not only write it but broadcast it here. And maybe
11 others here would like to send things in, and if you get
12 them to David, maybe we can get them out to the e-mail
13 list. And get other, maybe some disagreement, maybe
14 some agreement, maybe get the message off more fully of
15 the reactions from this group to the current drafting.

16 QUESTION/COMMENT FROM AUDIENCE: Try to be as
17 specific as possible. Use the drafts we gave you so
18 that you can actually tell us what it is you don't like
19 about the language, and, you know, what should be there,
20 what shouldn't be there.

21 QUESTION/COMMENT FROM AUDIENCE: You
22 understand what I'm saying is that's not my problem. My
23 problem is more fundamental than that.

24 QUESTION/COMMENT FROM AUDIENCE: Well, but

1 that's where, that's where we are in the process. We
2 don't want to lose you in the process.

3 QUESTION/COMMENT FROM AUDIENCE: I think I'm
4 too late. But I made my statement.

5 CHIEF JUSTICE VANDEWALLE: Yes.

6 QUESTION/COMMENT FROM AUDIENCE: I wanted to
7 respond to Justice See because I think he's not too
8 late. And I think he's hit on something that's really
9 important. And that we were getting at yesterday
10 afternoon.

11 The code has been annotated over the years
12 with the option of depoliticizing the judiciary as much
13 as possible.

14 What I've heard here, and what has been an
15 eye-opener for me, because I come from the Federal side
16 of things where we don't have all the kinds of problems
17 you face on a daily basis, is it may not be possible nor
18 may it be the right course to try and depoliticize the
19 process for the judges. It just may not be possible in
20 the environment, the post-White environment we have now.

21 I've even been thinking, rattling around in
22 my head what the White impact might be the next time
23 there are hearings in front of the Senate Judiciary
24 Committee on the nominees where Senators might well say,

1 look, White says you got to answer these kinds of
2 questions because you're in a de facto election in front
3 of this panel and in front of the full Senate when it
4 goes to the floor.

5 I don't know what is going to happen on that,
6 and I don't know how the Feds are going to look at this,
7 because I'm no longer on that committee.

8 But I think Justice See's point is an
9 important one, and it goes back to what I urged
10 yesterday, which is it's your real world experience that
11 this commissions has to hear about. We have to know
12 what the practical real world realities are for you in
13 order to design a code that works for you.

14 If it needs to provide cover in certain
15 areas, then tell us where those areas should be. And in
16 the areas where you need liberality, you know, we can
17 discuss the inconsistencies in terms of the people four
18 years out from election so they're not a candidate, the
19 person who is a sitting judge, an incumbent doesn't get
20 to do things under 5.01, but the person who is thinking
21 about running who is not an incumbent, not a judge
22 currently gets to do those things, and that's an obvious
23 inconsistency.

24 But we need your input, and we need it on a

1 consistent basis, and we need to be able to have your
2 real world experience of playing in this thing to try
3 and draft something that meets those needs.

4 CHIEF JUSTICE VANDEWALLE: Justice --

5 QUESTION/COMMENT FROM AUDIENCE: We're also
6 very mindful of who decides whether or not these will
7 get adopted.

8 CHIEF JUSTICE VANDEWALLE: Justice Anderson.

9 QUESTION/COMMENT FROM AUDIENCE: Taking up on
10 what Justice See has said, this was a catch word
11 yesterday, and I think it's valid, he said judges are
12 the sleeping giants in that we have a lot of
13 credibility.

14 And I think when we talk about
15 depoliticizing, and I make a distinction here between a
16 big P and small P on politics. Big P is partisan, small
17 P. And so don't say politicizing means partisan
18 politics. There's a whole political arena out there of
19 education, that if it's done right, we can take that
20 credibility in the marketplace. So we are a sleeping
21 giant, and I'd like to see maybe some of that coming out
22 of this discussion.

23 CHIEF JUSTICE VANDEWALLE: Yes.

24 QUESTION/COMMENT FROM AUDIENCE: I have two

1 quick but separate points.

2 The first is just following up on Justice
3 Anderson's previous comment about poll information. We
4 do have some recent poll information available in these
5 red packets. There are a few of those left back there.

6 You will also find much more detailed polls
7 on our website, which is justiceatstake.org. One click
8 downloads. So I would encourage you to get those if you
9 don't have them.

10 Just to go back to something that Roy was
11 mentioning, I came across a poll the American Bar
12 Association did a couple of years ago. I don't know how
13 many of you remember this, but the poll found -- this is
14 a national poll of voters across America, they found
15 that 75 percent of voters across America think that
16 judges who are elected are more fair and impartial than
17 judges or appointed. Only 18 percent thought that
18 appointed judge were more fair and impartial. This is
19 just very, very sobering but realistic.

20 And my second point was, having listened to
21 some very, very engaging and interesting thoughts for
22 the past day and a half, I've been struck by one
23 omission, which is that just about nobody has talked at
24 all about the one state that has actually taken

1 state-led reform efforts in the past couple of years,
2 and that is North Carolina.

3 We talked briefly about this yesterday, that
4 North Carolina did adopt a comprehensive package of
5 reforms, primarily public financing and voter guides.
6 And I would just encourage you to look at what has come
7 out of North Carolina based on the 2004 elections there
8 and to just consider that as you go forward.

9 CHIEF JUSTICE VANDEWALLE: Yes.

10 QUESTION/COMMENT FROM AUDIENCE: I just had
11 an observation, and I've only been doing this for a
12 year, but 15 years ago I sat in a room like this
13 listening to lawyers talk about how the end of the world
14 was when the Supreme Court allowed lawyer advertising.
15 And everybody tried to have all these rules restricting
16 advertising and putting the profession back into the
17 jar, you know, put the genie back into the jar.

18 This sounds like the same thing. I mean no
19 one knows where it's going to go, or where it's going to
20 lead. The advertising area, it was a big flurry of T.V.
21 ads. And it seems to be going back to the norm. At
22 least where we're from. But I don't know if that, I
23 don't know if that was the end of the world.

24 CHIEF JUSTICE VANDEWALLE: Yes.

1 QUESTION/COMMENT FROM AUDIENCE: I'm really
2 not here to fight my good friend Ron Moon about
3 elections and appointments. I used to come to these
4 meetings because I wanted to. I see an appointment
5 purely as an elitist system. It's an elitist system. I
6 know we tend to get most of the judges where they come
7 from when they're appointed.

8 But I'm not here to fight that, because I
9 know that the selection, as everybody in this room
10 knows, that the selection of all judges is and always
11 has been political. The only real question is do we
12 want it to be the politics of many, or the politics of a
13 few. And I choose the many.

14 And I cringe when I see the ABA, and the
15 National Center for State Courts, and an ad hoc
16 committee either directly or indirectly suggesting that
17 we either need to go to the merit systems or nonpartisan
18 systems as an way of improving the judiciary.

19 I cringe at the term merit selection. It
20 suggests that I have no merit. When people ask me I say
21 I was selected by the merit system. The people selected
22 me. They decide on the merit.

23 I say what we need to do is just look at what
24 is coming, what is here, and open them up and let the

1 light shine on us. And let our work, or what we think
2 we can do, let the people judge whether or not we're
3 good judges or bad judges. And if they're a bad judges,
4 toss them out. We threw out three circuit sitting
5 judges in our state in the last election. And if I was
6 voting in those circuits, I would have voted against
7 every one of them. Let the people have that say. Why
8 do we want to be elitists?

9 CHIEF JUSTICE VANDEWALLE: All right.

10 QUESTION/COMMENT FROM AUDIENCE: Andrew
11 Jackson would be proud.

12 MR. DRESSEL: This is really a great
13 concluding discussion, and I think it was really an
14 example of what happened here in the last day and a
15 half.

16 Let's please give this panel a round of
17 applause.

18 On behalf of Mary McQueen, (phonetic
19 spelling), the president of the National Center for
20 State Courts, Conference of Chief Justice Shirley
21 Abrahamson, the college, I want to thank all of you for
22 coming here today. (Partly inaudible.)

23 I would like to ask for all of you, let's
24 give special thanks to several people who really made

1 this symposium what it was. It could not have happened
2 without David Rottman, Roy Schotland, Gary Hengstler
3 letter and Heidi Nash who is coming down here. They
4 really did a great job.

5 Please remember your reimbursement forms.

6 And the buses are, should be out there now to
7 take you back to the airport or to Harrah's.

8 (Whereupon the Symposium was concluded
9 at 11:52 a.m.)

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2 STATE OF NEVADA)
3 WASHOE COUNTY)

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5 I, DEBORA L. CECERE, a Certified Court
6 Reporter, do hereby certify:

7 On Friday, the 25th day of February, 2005,
8 at the hour of 8:04 a.m. of said day, at the National
9 Judicial College, Reno, Nevada, I was present and took
10 stenotype notes to the best of my ability, under
11 sometimes difficult hearing conditions, which were out
12 of my control, of the National Symposium on Judicial
13 Speech - Post White held before the participants in the
14 within-entitled matter, and thereafter transcribed the
15 same into typewriting as herein appears;

16 That the foregoing transcript, consisting
17 of pages 1 through 151 inclusive, is a full, true and
18 correct transcription of said hearing under such
19 circumstances outlined above.

20 DATED: At Reno, Nevada, this 14th day of
21 March, 2005.

22

23

DEBORA L. CECERE, NV CCR #324, CA CSR #8821

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