PANEL

Judicial Elections:
Current Threats to Nonpartisan Elections and Are Retention Elections Safe?

Gayle A. Nachtigal, Roy A. Schotland, and Jeffrey Rosinek

The second panel discussion at the National Forum on Judicial Independence reviews the pressures to judicial independence that can come through the election of judges. The discussion was led by then-AJA president-elect Gayle Nachtigal, a trial judge from Washington County, Oregon. Panelists were Roy A. Schotland, professor of law at Georgetown University in Washington, D.C., and Jeffrey Rosinek, a circuit court judge in Miami, Florida. The National Forum on Judicial Independence was supported by a generous grant from the Joyce Foundation of Chicago, Illinois.

JUDGE GAYLE NACHTIGAL: "Judicial Elections: Current Threats to Nonpartisan Elections, and Are Retention Elections Safe?" That is a topical discussion given the tenor of the times and where we are in the political election scene in this year of 2004. . . . I am the president-elect of the American Judges Association, and I just successfully waged a campaign for reelection in the state of Oregon.

Of course, I had no opponent. It was an easy election. I think it cost me $50, which was the cost of the filing fee, but if I had drawn an opponent, we were prepared in my small county to spend in excess of $50,000 to retain my seat, so I was very glad that I only had to spend $50 of the $50,000 we had set aside.

In Oregon it's unique in the sense that we're not allowed to raise any money to have our own elections. I can't know who donates to my campaign. I can't ask the campaign committee to form. It's supposed to just happen, and I have to sign off all the forms and certify that they are in fact accurate over something I'm not allowed to have any knowledge of, so I was glad to only have to certify for $50, and that came out of my checking account. . . .

[Conference attendees then viewed some recent television commercials from judicial election campaigns, including ads for and against members of the Ohio Supreme Court.[1]]

PROFESSOR ROY A. SCHOTLAND: . . . It is a special pleasure and privilege to be with you. Taking off from what you just saw from Ohio—and let me just note I hope it will please you—that the ads against Alice Resnick backfired; whether she would have won anyway, who knows? But she did, in fact, win with a very handsome spread, and just about everybody thought those ads were counterproductive.

Two years later, if anything, Ohio looked worse. Happily, thanks to the fact the bar association has done much more than it did back then, this year it's looking pretty good. The bar association got centrally involved in 2002 and I think that changed the culture, and when all is said and done, there's a great deal here about the local culture and the expectations and the level of tolerance.

Let me go back to 2002 two days after the election that included two seats on the high court. Chief Justice Tom Moyer said this about the ads run that time by interest groups on both sides, and the ads that kept running despite very strong all-out efforts by the candidates on both sides to get the ads stopped. The chief said this: "Candidates were outraged. Citizens were outraged. I am outraged. Anybody who places his or her trust and confidence in a constitutional democracy should be outraged."

Now, traditionally political campaigns for judicial posts have been about as exciting, it has been said I think by a Florida judge, as a game of checkers played by mail. They have been low-key affairs conducted with civility and dignity. Now what has changed and how widespread is the change? Well, in the how-widespread note, if you haven't had it in your state, don't think you're safe, because it spreads. It has constantly spread and we're getting, because of what's been happening in the spread, unprecedented media attention.

The cover story of *Business Week* four weeks ago was, "The Battle Over the Courts: How Political and Theology and Special Interests Are Compromising the U.S. Justice System."[2] This midsummer, past midsummer, the outstanding magazine *The Economist* had an article.[3]

Yesterday's *New York Times* had a front-page story,[4] which I'm afraid belongs to the sky-is-falling school. For example, the headline is about "Partisan Battlegrounds," but you can't find

Footnotes

1. The Justice at Stake Campaign, a nonpartisan national organization dedicated to keeping courts fair and impartial, has selected television commercials that have run in campaigns in 2000 (Michigan and Ohio), 2002 (Mississippi and Ohio), and 2004 (Illinois and West Virginia) available for viewing on its website. Go to www.justiceatstake.org and click on "Resources" and then "Video for the Web" to view them.
2. *The Battle Over the Courts: How Politics, Ideology, and Special Interests Are Compromising the U.S. Justice System*, BUSINESS WEEK, Sept. 27, 2004, *available at* http://www.businessweek.com/magazine/content/04_39/b3901001_mz001.htm (last visited Sept. 24, 2005).
3. *Judicial Elections Get Freer-Speaking*, ECONOMIST, July 22, 2004.
4. Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1.

the words "Republican" or "Democratic" or "party" in the ad. By partisan they mean overheated, and the facts they have were badly overheated. They quote a source that as of October 17, a week ago, more than $8 million had been spent in judicial races on TV in contrast, the source said, to 2002, when only $1 million had been spent by October 19, but if you go to the material from that same source, they report that the total spending on TV in 2002 was $8 million, and I know you spend more at the end. I'm just having trouble believing that $7 of the $8 million spent was in the last ten-plus days, and it also left out of the fact that TV is only a piece of the picture.

Total spending in 2002 was $29 million. This time we're certainly going to be above that. We're running around $35 [million] now, but total spending back in 2000 by candidates alone was $45 million, 90-plus percent up from two years earlier, and $45 million was only a piece of the picture. For the first time we saw, and we still haven't gotten to this bad then, spending by non-candidate groups, both local and national, which totaled $16 million, most particularly from the U.S. Chamber, so we saw in 2000 $62 million.

Now the sky is not falling, and it's appalling that the *Times* didn't mention the major steps forward. North Carolina has taken one with an effort at public funding. I hope to get to that later. The Ohio Bar, as I said earlier, is entitled to enormous credit. The problems, however, are unquestionably getting worse than they had been. Let's remember Sergeant Friday and try to get the facts and see what they mean.

Start with context, but first one last opening note. Last Wednesday in Minneapolis, the Eighth Circuit had an en banc hearing on whether Minnesota can constitutionally hold nonpartisan judicial elections.[5] Now that affects only 20 states, so if they lose—and the way the questions went, I wouldn't want to put a lot of money on winning—those of you from nonpartisan states have some interesting time ahead. There was another issue in that case, whether Minnesota can constitutionally require, as 29 other states require, that judicial campaign funds be raised not by the candidates personally, but by their campaign committees.

Two weeks ago lawsuits were brought in Alaska, Indiana, Kentucky, and North Dakota by anti-abortion groups trying to knock out both state limits on pledges or promises of what you'll do on the bench. "I promise to take care of tenants." I don't know how many of you will enjoy that regime.

Now, of course, the cover is that these plaintiffs, anti-abortion groups—attacking the canons limiting campaign conduct—are trying to protect speech. That is misleading. What they're trying to do is not protect speech, but take away the protection of choice because if they can get candidates to have to say their litmus-test questions, they can decide who comes in and who doesn't.

Context. We have judges facing elections of some type in 39 states, 87% of our appellate judges and trial jurisdiction/general jurisdiction trial judges facing contestable elections. Nonpartisan or partisan are 53% of the appellates and 77% of the trial judges.

Now the difference between those percents and the 87 are retention elections. Retention elections come from the drive to end contestable elections, a drive that began in 1906 with a major speech by Roscoe Pound. That led, as probably just about all of you know, to the so-called merit plan with screening the appointments and retention afterwards, which Missouri adopted in 1940.

An awful lot of people don't realize that Missouri still has two-thirds of their trial judges running in partisan elections. A history which I'll give in one moment says that to talk about ending contestable elections is—forgive me—a copout. It is a distraction from moving forward to reduce the problems we have.

For example, Florida's appellate judges are in the merit-and-retention system. Their trial judges run in nonpartisan contestable elections. Most of them aren't challenged, but it's contestable. In 2000, Florida voters faced a ballot proposition about whether their trial judges should change by local option to appointment and retention just like their appellates. The highest vote for that change in any jurisdiction in Florida was 41% for it. . . .

Last year in Texas, the Senate voted to change from partisan elections to appointment. The House was just about to have a vote when in came the grassroots against change, again heavily motivated by the concern about a litmus test on choice, and the House did not even hold a vote.

Last year in Ohio, the chief justice opened a major effort to change the [procedure] to appointment for the supreme court only. That died at birth.

Next Tuesday in South Dakota, where just like Florida the appellates are appointed and [retained], and trial judges are in contestable nonpartisan [elections], the South Dakota voters face a ballot proposition to change their trial judges. They got nearly unanimous support for this in the legislature, and we don't know what the voters will do,[6] but we do know about opposition, which has surfaced rather recently from, and I quote, "pro-family groups"—here we are again—"Mothers

5. In *Republican Party of Minn. v. White*, 416 F.3d 738 (2005), the United States Court of Appeals for the Eighth Circuit found that the partisan-activities clause of Canon 5 of the Minnesota Code of Judicial Conduct violated the First Amendment. (The decision is excerpted beginning at page 66.) In an en banc opinion, the court also found that the Canon 5 provision forbidding solicitation of campaign contributions and support violated the First Amendment. That decision, filed August 2, 2005, was fully joined by eight of the 15 judges participating in the decision; three others joined in the holding invalidating both provisions and most of the opinion. Three judges dissented, arguing that the matter should have been remanded for an evidentiary hearing at which the state would have had the burden to prove that the restrictions were justified by compelling state interests. Another judge approved invalidating the partisan-activities clause, but did not join in invalidating the anti-solicitation provision.
6. The voters of South Dakota were similar to those in Florida—only 38 percent supported the constitutional amendment, which would have changed the state's method for selecting trial-court judges from election to merit appointment. Dirk Lammers, *Voters Reject Two Constitutional Amendments,* SAN JOSE MERCURY NEWS, Nov. 3, 2004, *available in abstract form at http://www.brennancenter.org/programs/pester/pages/view_elerts.php?category_id=4&page=24* (last visited Sept. 24, 2005).

Against Drunk Driving" and—I don't know if this is a frequent alliance with Mothers Against Drunk Driving—"bikers"—that does not mean bicyclists—"and other groups." I love what one city official said: "This is simply anti-baseball and apple pie. It's un-American."

Please don't tell him that 80 percent of South Dakota's judges initially get on the bench by appointment to fill a vacancy.

Now what does history teach? From 1906, with a national drive to end contestable elections for judges, with the American Bar and so many state bars and local bars all out with other good-government organizations for change, well, if we continue at the pace of the last 98 years, in order to end contestable elections for appellates, we need only another 160 years and for trials we need only another 770 years, so let's face the reality that we've got. We're going to have contestable elections, and the question is how we deal with the problems in them. . . .

Let me just close on the key question, which is what is to be done, with three suggestions.

Now that is an inspired step. . . . Missouri rotates the chiefs, and I knew the prior one, I didn't know the one under whom this was done, and I saw him at a conference, and he said, "What did you think of it?" I said, "Well, I had an article out in which I called it an inspired step," and he rushed over and gave me a big hug. He was just so excited. He's Rush Limbaugh's cousin.

That step supports the overwhelming majority of candidates who want to campaign judiciously. They can say look, I know what you want me to say, but if I say what you want, I will be unable to sit in just exactly the cases that you care about most.

Also the Missouri step enables a candidate whose opponent who is stretching the envelope in saying some variant of "I will hang them all." The person facing that can respond with, "My opponent has told you what he thinks you want to hear. What he hasn't told you is that by doing that, he's going to be disqualified from the cases you care about most."

Now, last week the suit by the Kentucky anti-abortion group

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– Gayle A. Nachtigal

First, we should take advantage of what the Missouri Supreme Court did in response to *White*.[7] Missouri and Minnesota were asleep, and they had this obsolete announce clause, which only six other states still had after the early nineties changed the model code, so Missouri had to repeal their announce clause, and they did that in about a page-and-a-quarter order, which ended with this: . . . "recusal or other remedial action may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct."

succeeded in getting an injunction to knock out Kentucky's pledge or promise clause and the commit quotes, but the plaintiffs—again I say this is not about speech—the plaintiffs also tried to knock out Kentucky rules on disqualification, and a federal district judge who knocked out the canons said no, no, we're not taking out the disqualification. So recusal, whether you want to call it that or disqualification, looms more important than ever. That's Step 1.

Step 2: In the 5-4 *White* case, Justices Kennedy, with the majority, and Stephens, in dissent, both urged that we need more speech to meet speech. We need sensible speech from

7. *Republican Party of Minn. v. White*, 535 U.S. 923 (2002). For a review and discussion of the *White* decision, *see* Roy A. Schotland, *Should Judges Be More Like Politicians?*, COURT REVIEW, Spring 2002, at 8; Jan Witold Baran, *Judicial Candidate Speech After* Republican Party of Minnesota v. White, COURT REVIEW, Spring 2002, at 12.

representative, credible community leaders, if any candidates are campaigning inappropriately, or outside groups—because you can't discipline the outside groups, but you can come out and say they are doing violence to our judicial system.

In 2003, the ABA formally resolved that state local bars should initiate committees to oversee judicial campaign conduct, and we already have this outstanding one in Ohio, which started two years ago. This year we have a fine one in Georgia and a number of Florida jurisdictions. We have statewide in New York and though we've had some that go way back, like Columbus, Ohio, and I think San Mateo, California. The spread of that is a wonderful step, and it's very important that you should know the National Center for State Courts has an absolutely superb new pamphlet on how to start and operate such a committee, and for that superb new pamphlet, Dave Rottman is entitled to great credit.[8]

Third and last, a very simple, very powerful change: How long are your terms on the bench? Of our appellate judges, 55 percent have more than six years, but 45 percent of elected appellates have six or less, and of our trial judges 18 percent have four years. Now I don't know what you think of that, but I don't understand having judicial independence and four-year terms. I cannot put those two things together. Fifty-five percent of the trial judges have six years. I applaud the 27 percent who are in states where they have more than six years. Fourteen percent of our state trial judges have 11 or more years. If you want judicial independence, you want to reduce problems in judicial campaigns. Let's go for longer terms.

Chief Justice Moyer, in his major effort after the 2002 mess, put as his top priority—after the appointing of the supreme court, which went down right away—the lengthening of terms. Ohio has all its judges in six-year terms. Think how many judicial election problems are reduced by that simple step. Think how much more attractive serving on the bench is made by longer terms, and after all, isn't the ultimate goal of all our judicial selection reform to attract more fine people to the bench and to keep more fine judges on the bench? . . . .

JUDGE JEFFREY ROSINEK: . . . . For those of us who are judges the question is: What do we do to keep our job? All the rest are sort of superficial. If we are in a state that has elections, then do we act as a politician? Do we set up campaigns? Can

8. NATIONAL AD HOC ADVISORY COMMITTEE ON JUDICIAL CAMPAIGN CONDUCT, EFFECTIVE JUDICIAL CAMPAIGN CONDUCT COMMITTEES: A HOW-TO HANDBOOK (2004), *available at http://www.judicialcampaignconduct.org/Handbook.pdf* (last visited Sept. 24, 2005). The handbook was published by the National Center for State Courts, which has established a specific website that provides access to the handbook and other materials related to judicial campaign conduct at http://www.judicialcampaignconduct.org (last visited Sept. 24, 2005).

we do that under the laws or the canons that we have in our state?

I just heard about Oregon's 50 bucks. Fifty dollars, that's a filing fee. Fifty dollars doesn't get you downtown in Miami by bus anymore. Our filing fee is about $6,500, so for someone to decide they'll run against me, he or she has to put up 6,500 bucks or for me to run I've got to do the same thing. And our law in Florida says something similar to that. We cannot raise funds. I cannot ask anyone for money. All I can do is set up a committee that asks everyone for money, and I am not to know who gives me the money and, of course, I have to send out thank-yous to those people who have given me money.

So these are the things, the quagmires, that we as judges are facing. In 1971, the people of the state of Florida changed our system. We had a conglomerate of judges. We had municipal judges and we had officers of the peace and we had justices of the peace. We had court-of-records judges.

We finally went to a three-tier system: the trial level and the federal level and the Supreme Court. At the trial level we have two groups of individuals, the county judges, which every county was required to have one and they were of limited jurisdiction, and we had general-jurisdiction judges, I think 20 circuits . . . had those, and five districts that handled the appellate judges and one supreme court, and then at that point in time what was set up was that the trial-level judges would run in a contested election. They could be appointed by the governor through a judicial nominating committee, but then at the next general election they would have to run for reelection, and they could draw opposition. It was nonpartisan, but they could draw opposition.

Well, that means if the governor appointed you in June, you'd be running for election in September on your record. Your record is that you know your way to the courtroom and very, very little else, and for years judges tried to change that, but of course the legislature got in its way because that's the way the system was set up. But the appellate judges, the appellate judges on the supreme court or the courts of appeal, once they were appointed, they would run against their own record as a merit retention. That was our modified Missouri Plan, and so what we had was this dual system, the contested election for trial judges and then the merit retention, and most of your states have a combination of some of these, but in Florida we try to become less political and so in between general elections when there was a vacancy, the governor would appoint based upon recommendations from judicial nominating commissions, and what was started in 1967 was that the Florida Bar would appoint three people, the governor would appoint three people, and those three would get together in each judicial commission and appoint three other individuals.

It seemed really fair until the reform took place . . . in 2001, and the reform—I don't know why they always use the word "reform" when someone is getting screwed. This time it was just judges, of course. The reform is that the governor would appoint everyone. The six people would select the three. The governor would make the appointment, but the Florida Bar could recommend.

Now this took place because for some reason there was animosity between the courts and the legislature and the courts and the governor, and I don't know if it had anything to do with election of 2000 that ended up in the Supreme Court of the United States, but apparently it did.

So in Florida we have an interesting system. We have a legislature that is basically . . . off the wall sometimes when it comes to judges. They used to use the words "liberal" and "conservative," but now they use "activists." I'm not too sure what that means, but I think it starts with the letter "L" anyway.

So the judges were becoming activist judges and, therefore, they should understand that that's not their place. I'm not too sure what that meant, but, anyhow, that was in Florida. So we have this system of selection in Florida, not unlike many of your systems. The thing that we don't have is partisan politics, political elections. We do not have Republicans who run against Democrats as judges, though for some strange reason the political parties do get involved and say that this nonpartisan Democrat is running against this nonpartisan Republican. I don't know what that means.

Generally the public gets the idea of what that means and we have limitations not of spending, but of how much a person can contribute, and it's $500, and that was by a judicial order a number of years ago in a case that took place in Florida from Miami.

So there are some limitations, but this year we've seen incredible spending. As Roy said, we've had—out of all the judges running—only three contested elections. I mean three incumbents received opposition this year in Dade County. All three lost the election, and that bodes well for those who are running in two years. I would say at this point in time most of them are very, very concerned about that and change underwear daily.

So in our communities in Florida, the judicial nominating commission can recommend, but this is what's happened in the last few years with our judicial nominating commission. The questions that these individuals are asking are somewhat intrusive.

Example: The new judicial nominating commission in a place called Broward County, which is north of us, in Montverde, one person asked a young lady who had some small children whether or not she could balance single motherhood with judicial service. Of course, was that a proper question?

Another one was, "How did you feel about the U.S. Supreme Court in 2003 striking down Texas law criminalizing homosexual activity? As a homosexual, what do you think about that?"

Another person was asked, "Are you a God-fearing person?" And the individual atheist said, "To whom it may concern."

And then another question concerning religious views: "What do you think of the Alabama Supreme Court Chief Justice directive of the Ten Commandments mounted in his courthouse?"

An individual of the Florida Bar came in with a response by the president that troubles me about these questions, but I wasn't there and I don't know in what context they were taken. I believe these were fairly new commissions. They'll probably grow in the job. Am I sorry that people were offended? Absolutely, but this isn't a perfect world and we learn from experience, so it concerned a number of judges when the presi-

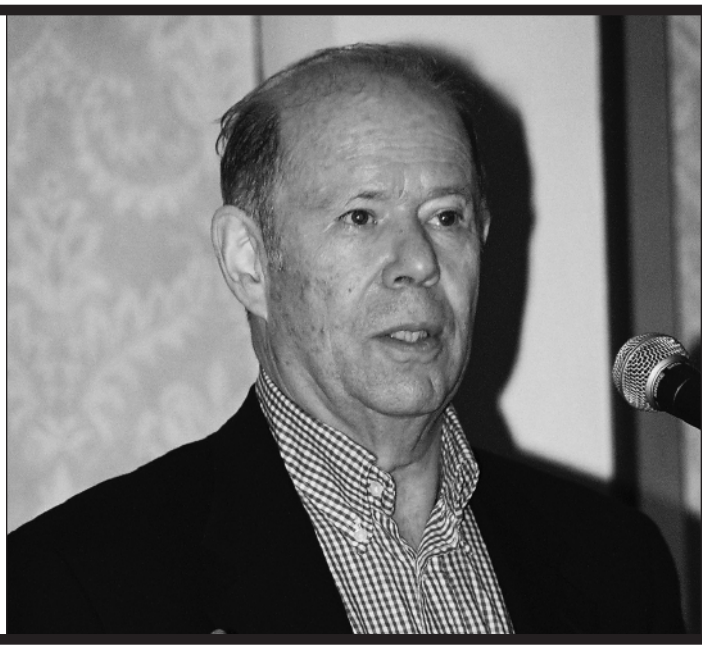
dent of the Florida Bar took such a sometimes called cavalier attitude.

Well, for judges the question is: What are the factors that threaten your judicial independence? In a survey taken and 40 percent of the judges responded [that]: (1) judicial independence [is] being eroded by excessive criticism of judges for issuing opinions that are at odds with the majority of individuals; (2) judicial reelection is too politicized; (3) judicial selection is too politicized; and (4) judges are too dependent on campaign contributions.

Well, in our state where contribution is a way of life the question is: Are judges too dependent upon them? And the answer is, well, it depends if you're able to raise money or not. We have one gentleman who raised $375,000. It didn't really matter that his wife had a TV program. She was a judge on the TV program and people recognized her that way and he raised $375,000 and he, by the way, won that election. But there is a perception that when you're taking money, it affects the way that you'll make a decision, and that is a concern that judges have. It concerns us that we have to take this money.

That step supports the overwhelming majority of candidates who want to campaign judiciously. They can say look, I know what you want me to say, but if I say what you want, I will be unable to sit in just exactly the cases that you care about most.

– Roy A. Schotland



What has changed from not only using money in elections is the individuals who call political consultants, and in our community political consultants is sort of a nasty proposition because we receive as judges letters: "We hope that you will hire our firm. If you don't, we are looking around for other places to place our candidates." So you get a letter that is somewhat extortive in nature and you have to sit and think, "Do we hire this individual?"

One incumbent judge who lost spent almost a hundred thousand dollars on consultants. What he forgot to do is spend money on the campaign. He had all the consultants, but the voters did not vote for him, and why did he lose? Well, he would not respond. He did not respond to much of the criticism, and the criticism concerned some of his decisions. We in Dade County had a major . . . I don't know. Some of you may have heard it about it. The Elian case. Elian? I don't know if you heard about it. Some of you may have heard about that, a young lad who ended up going back to Cuba with his father. He was attacked on the Elian case though he had nothing to do with it. He ruled on a similar case for somebody who went back to Jordan. They said see, he did it in Jordan. He will do it in Cuba.

Well, that logic did not help this gentleman in this election. It also did not help the fact that he handled the divorce or he was the judge handling this divorce for a former mayor who made this comment, and obviously the mayor did not like the decision in the divorce case.

I don't know if that had anything to do with his comments on radio, but this individual lost the election.

Those are the concerns that judges have. I mean the politics that's involved with politicizing of a nonelection appointment, judicial nominating committee, the election campaign, and the amount of money that we have to raise. It's totally unlike Oregon for 50 bucks. Fifty bucks. Fifty bucks does not buy you the filing fee, let alone the ads.

So those are the concerns that we have and the question asked was, "Are nonpartisan selection or retention plans in danger?" The answer is judicial judges are in danger as a result of what's happening right now throughout our country. . . .

JUDGE SAMUEL LEVINE: I'm . . . the retired past president of the Board of Judges of the District Court of Nassau County, the lower-level misdemeanor and the low civil cases in Nassau County, a suburb of New York City, and the miracle of '96. I was 67 years of age when I ran for the seventh time on a minority party line and because of seven different factors in my seventh campaign, including Clinton's coattails in '96, I became the chief judge of the District Court of Nassau County with 25 other of my colleagues.

However, I was in the minority party. Therefore, the chief judge or the president of the board was told I had no power to do anything, and the *New York Times* . . . of December 30, 1996, pointed out, "A Nassau Politician Lost Till He Won, or Did He? Partisan battle over new judge's powers in charge of 26 judges or

maybe just traffic ticket forums,"[9] and the latter was the case because my chief administrative judge of all of the courts of Nassau County, population 1.3 million, 100 judges in all, said, "Levine, you have no power to do anything. Just sit in your courtroom and your chambers and do your job. You're being replaced." Despite the fact that my predecessor had such a power.

The point I'm raising is that politics in our court system, especially in New York, is something that is challenging the very basic system of our judicial branch of government and the question is—how do we eliminate politics from our court system especially when you look at, in New York State, the chairman of each county's dominant party has the control of the selection and the appointment or election—we have both—in their county throughout the state?

And in my particular county, one man, as the chairman of the dominant party, has the control of the selection, election, or appointment of 90 of the 100 judges and judicial hearing officers in New York State, and therein lies, I think, the greatest challenge to our judicial system here in the United States.

My question to the leaders of the American Judges Association is what action can we or will we take as a body, as an organization dealing with this serious major problem for our system? . . .

JUDGE ROSINEK: . . . As long as there are elections, there's politics, and that's one of the things that I think judges should not be afraid of. I think that too often judges who do not believe that they should be prepared to run for office are called former judges because they're not prepared to run for office, and if we are elected, we have to be prepared to run an election. Now there are certain things you cannot do because of the judicial canons, but outside of that we have to take the bull by the horns and actually run.

For you who have four-year or six-year or eight-year terms and then have to run, when I ran, after my election my campaign started the next day, and how did it start? Just by going to speaking engagements, going to schools, going to churches, going to synagogues, going to condo associations and speaking, meeting with people, opening up the court, and I was prepared. If someone ran against me, I wouldn't be afraid of running a campaign.

But you can't take politicians out of it when you're running for office. . . .

PROFESSOR SCHOTLAND: Four points. First, I have to take issue with the over-lumped use of the word "politics." There's all kinds of politics in life. There's office politics, school politics. You name it. There's a big difference between the politics in partisan elections and the politics in retention elections and the politics in appointments, so the question is the kind of politics.

I think that too often judges who do not believe that they should be prepared to run for office are called former judges because they're not prepared to run for office, and if we are elected, we have to be prepared to run an election. Now there are certain things you cannot do because of the judicial canons, but outside of that we have to take the bull by the horns and actually run.

– Jeffrey Rosinek

The best thing you can do to avoid it getting worse is—if any of you knows an Eighth Circuit judge or knows anybody who knows an Eighth Circuit judge, take them to a very fancy resort as soon as you can and take them for a very long walk in the woods about what they're about to do, maybe, to the 20 states that elect some or all of their judges through nonpartisan [systems].

. . . . I think you all ought to appoint a special committee at once to be ready to talk about what to do if that one comes in wrong, because if that one comes in wrong, you're going to have suits in 19 other states. The only question is how fast.

Back in the end of 2000, . . . 17 [state supreme court chief justices] called a summit on judicial selection. Their very first recommendation was switch from partisan to nonpartisan, and now we have the federal courts telling us how to run the states. I don't want to get into the Tenth Amendment because I think

9. Bruce Lambert, *Nassau Democrat Lost Till He Won, or Did He?*, N.Y. TIMES, Dec. 30, 1996, at B4.

there are plenty of stronger reasons that the federal judges shouldn't be telling the states how to run themselves. Chief Justice Abrahamson of Wisconsin just had fits when Justice O'Connor said, "Well, if you don't like elections, just don't have them anymore." That's just flat cuckoo land.

The last point is the chiefs put an amicus brief into the Eighth Circuit case and in that they have examples of six categories of things wrong with partisan elections. And what you described, I wish we had known about that because that would have been a wonderful episode to put into the brief and I will pursue that article.

JUDGE ROSINEK: Just one other thing, too. Most people want to elect their offices, and that includes judges. They want to vote. That doesn't mean they have to know anything about the person or know anything about the individual who is running or anything about the background or the abilities, but they want to elect people, and one of the best examples for us is in the state of Florida and Roy mentioned that before. When 41 percent now is the largest group of individuals—in I think it was Manatee County—said they wanted to have merit retention for their judges, but still 59 percent of them said no, and the average [statewide] was 32 percent said yes. Thirty-two percent. So 68 percent said no, they do not want to have merit retention for trial court judges. They want to reelect their judges.

Why? Because they truly believe in the electoral process. They believe that they have a right to select the individuals who will be in office, whether it's a judge or any other individual. It doesn't mean that it's good. It just means that they wish to do it. . . .

JUDGE STEVE LEBEN: I'm . . . from Kansas. I've got a question for Roy Schotland [about] the judge from Miami that Jeff Rosinek has discussed—who lost an election, who faced the mayor in a divorce case, and faced comments about the Elian case that really weren't about that judge. After the *White* decision, what would you suggest if you were speaking to that judge, who was being attacked in an election, as to what was permissible for him to say in his campaign and how to go about it?

PROFESSOR SCHOTLAND: You need what Miami/Dade has had—I don't know where they were in this one—a campaign conduct committee, the kind of thing I was talking about on which David Rottman has that superb pamphlet on how to start it and operate it. You need the bar, and not just the bar. The bar should initiate this, but it should include non-lawyers, and they come out with a press conference and state [that] this is not an appropriate bit of campaigning in a judicial election and here's why, and if you don't have that, if the candidate is there on his own, you're in trouble.

JUDGE ROSINEK: Let me add to that, too. The *White* case is not quite in effect in the state of Florida because the Supreme Court of Florida said that there's a limitation on it, and we still have that canon that says we really cannot speak directly to certain issues. In that case, it was not another opponent saying these things. It was an independent individual saying it. So even if we had those political committees and the bar association, they can come out and say, well, this is incorrect, and the judge should be able to say a few things, but it was not a candidate who made these comments. It was a former mayor, who also lost in the election.

PROFESSOR SCHOTLAND: I wouldn't underestimate the voters. If you have a credible, highly respected group of leaders who come together and say that doesn't belong in our judicial campaigns and our court system, I think it will make a difference. You can't do anything else. . . .

There are two more questions. One is absolutely critical. The judge mentioned the three incumbents who lost. I mentioned earlier the uniquely important role of names in judicial

elections. The three winners of those elections all had Hispanic names.

For a second, the most important thing about Florida that neither of us has said yet, but back in June, the unanimous opinion of the high court of Florida, written and delivered by Chief Justice Anstead, reprimanded a judge for improper campaign conduct. . . . Chief Justice Anstead's opinion is the best thing ever written on judicial elections, and by "thing" I mean opinion, article, speech, anything.

Now, yes, there may be something out there I'm just not aware of, but I've been looking at these things for awhile and that is just an absolutely golden bantering of the risk and the opportunity that there is in judicial elections, so if you take nothing else from our moment together here today, go look at the full Florida Supreme Court opinion from last June[10] and just think of the beginning.

Judge Carmen Angel. "The first matter of the new court's docket is a public reprimand of Judge Carmen Angel. Judge Angel, would you please approach the podium and remain standing?"

And it ends, "Judge Angel, your public reprimand is now concluded and you may leave."

Just think of yourselves standing there and read this opinion. . . .

JUDGE LEVINE: I neglected to ask one question. To what extent can we as judges running for reelection or election follow and carry out Canon 3 of the Code of Judicial Conduct, and that is to engage in activities to improve the law, the legal system, and the administration of justice? How do we carry that responsibility out? . . . .

JUDGE ROSINEK: I think by doing that which we do best: that we handle our positions professionally as judges, that we respond to our communities as we add judges, and make decisions based upon the law. I think Canon 3 is pretty relevant for all of us that actually live in a courtroom and make decisions. I don't think that we can hide from it. I think we shouldn't hide from it.

I think there are a number of things. Whether we're called activists or non-activists, I think we have to do what we determine to be best with an individual case and make the rulings that we think are fair and proper. We have an independent judiciary, and if we are concerned about making comments that others may not like, then our independence is taken away by ourselves and so we can't be fearful of what we say.

The worst thing that can happen is we lose an election. So what? I mean it. Ideally, so what? The point is if we get up there generally and make comments and make rulings based upon reason and law, generally we're not going to lose the election, and all of you are examples of that. . . .

PROFESSOR SCHOTLAND: He says that so well. I just want to add that I think we need to get more serious and much more organized about outreach. We need to get Rottman to bring out the pamphlet, for example, on what do we mean by judicial activism? We need to take issues about why are the judges' jobs different? Why can't you have ex parte contacts? Why can't you make promises about what you're going to do? We need to educate, and I start again with that superb Florida Supreme Court opinion about judicial elections are an opportunity to educate the bar and the public about the role of the courts.

JUDGE ROSINEK: Just one last comment. In Sunday's *San Francisco Chronicle,* there was an article on judicial activism on the docket at a Stanford event, and I'm going to quote Justice Stephen Breyer, who said, "By judicial activism what you mean in part is a judge who doesn't decide the way I like it decided and if that's what you mean in part of an attack, then so be it."[11]

We will never have a hundred percent. You know when we make decisions, 50 percent of the time we are going the wrong way for somebody, and so we have to do what we think is right and just, and if we're to be guided by somebody's else's opinion, then we should not be wearing those robes.

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10. The oral reprimand given by the court was reprinted in Roy Schotland, *Resource Materials on Judicial Independence*, COURT REVIEW, Summer 2004, at 38, 46-47. For the court's written decision, *see In re Angel*, 867 So.2d 379 (Fla. 2004).

11. Janine DeFao, *Judicial Activism on the Docket at Stanford Event: Three Alumni Discuss a Popular Topic: Judicial Activism*, SAN. FRAN. CHRONICLE, Oct. 24, 2004, at A-7, *available at http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/10/24/MNGSA9FC5E1.DTL* (last visited Sept. 25, 2005).