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Maximizing Intellectual Engagement Between Bench, Bar, and Academia: An Introduction to the 2002 Tenth Circuit Judicial Conference

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The 2002 Tenth Circuit Judicial Conference took place June 26–29, 2002, in Santa Fe, New Mexico. Gauging from the strong positive reactions of the speakers, panelists, and attendees, the Conference was an unqualified success. Notably, this Conference continued a trend begun in the Tenth Circuit a few years ago to maximize the intellectual content of the Conference. We have continued the enthusiastic efforts of the last Conference, and Judge Henry wants to express his appreciation for the strong support of the entire court in making the Conference more than a mere opportunity for obtaining Continuing Legal Education credits into a gathering for social and intellectual interaction between bench, bar, and academy. Both of these functions—continuing legal education and interaction—are very important purposes in their own right, but they need not be separated—as this Conference clearly shows.

Beginning with the opening session—which focused on “Life After 9/11”—and continuing through the Conference Luncheon, which offered brief addresses on the topics of Law and Feminism, Law and International Relations, Law and Literature, and Law and Science, the Conference was a wealth of intellectual engagement, offering participants a smorgasbord of cutting-edge issues, ideas, and expertise.¹ This was all in

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1. Evidence of the intellectual importance of the topics discussed at the Conference is reflected in the numerous symposia around the country centered on the topics discussed in Santa Fe. See, e.g., Symposium, *Our Civil Liberties After September 11th: A Closer Look at Detention Powers*, 34 CONN. L. REV. 1143 (2002) (focusing on the impact of September 11th); Symposium, *Terrorism's Burdens on Globalization*, 36 INT'L. LAW. 1 (2002) (same); Symposium, *Native American Sovereignty Issues*, 35 TULSA L.J. 1 (1999) (focusing on Native American sovereignty); Special

addition to the sessions that still focused on the nuts and bolts of practice within the Circuit, and the most recent developments in Circuit and Supreme Court jurisprudence. Thus, a new emphasis was placed on challenging participants to think about the big picture—about the ideas and policies behind the rules and case law—and to consider the variety of perspectives that can be brought to bear on the important topics of the day.

Though not all sessions of the Conference are reprinted here, for a variety of reasons including transcription difficulties, what follows are some of the most important and we hope intellectually engaging sessions. Indeed, the bulk of what is being published is precisely the “big picture” sessions. Part of the purpose in publishing these proceedings is to better inform members of the bar within the Circuit of the nature of the Conference, with the hope that even more attorneys will choose to attend future Conferences.

Another purpose for publishing these proceedings is to preserve and share the intellectual firepower that was brought to bear on some of the most important and complicated issues of the day. The *Kansas Law Review* is honored to publish these proceedings, which include remarks from federal judges, distinguished academicians, government attorneys intimately involved in these issues, and practitioners in the Tenth Circuit.

The first item following this essay is an eloquent tribute by Mr. Andrew G. Schultz and Judge David M. Ebel to Justice Byron White, native Coloradan, former Tenth Circuit Justice, and the man for whom the Tenth Circuit’s courthouse is now named in Denver. To put it mildly, Justice White was an extraordinary American² who had unparalleled fondness for and loyalty to the Tenth Circuit. We hope that you enjoy the tribute, which moved some in the audience to tears.

The keynote panel on the Conference’s opening day consisted of Viet Dinh, Assistant Attorney General for Legal Policy, United States Department of Justice; Erwin Chemerinsky, Sydney M. Irmas Professor

Issue, *Indigenous Nations Law Issue*, 50 U. KAN. L. REV. 431 (2002) (same); Symposium, *Women and the Legal Profession: The Past and the Future*, 49 U. KAN. L. REV. 719 (2001) (focusing on women in the legal profession); Symposium, *Law and Literature: Examining the Limited Legal Imagination in the Traditional Legal Canon*, 30 RUTGERS L.J. 569 (1999) (focusing on law and literature); Symposium, *DNA: Lessons from the Past—Problems for the Future*, 67 BROOK. L. REV. 1 (2001) (focusing on the interface of science in the law); Symposium, *Globalization and Sovereignty*, 50 U. KAN. L. REV. 629 (2002) (focusing on globalization and international law); Symposium, *Method in International Law*, 93 AM. J. INT’L. L. 291 (1999) (focusing on international law and relations).

2. For the entire story of Justice White’s remarkable life, the authors encourage you to read Dennis P. Hutchinson’s magnificent biography of White, *THE MAN WHO ONCE WAS WHIZZER WHITE* (1998).

of Public Interest Law, Legal Ethics & Political Science, University of Southern California Law School; Chris Stone, Director, Vera Institute for Justice; and Jeffrey M. Rosen, Professor, George Washington University Law School. After an introduction by the moderator, Stephen R. McAllister, Dean, University of Kansas School of Law, each panelist took 10–20 minutes to address some aspect of the general topic, “Life After 9/11.”

Assistant Attorney General Dinh addressed the federal government’s anti-terrorism efforts, including both the legal and policy issues and their implications. He also gave some historical context for the various measures that the federal government either is taking or has considered taking. Professor Chemerinsky then discussed the potential threats to civil liberties that such measures may pose. He, too, offered historical context, drawing particularly from the Supreme Court’s decisions and actions during World War II. It is fair to say that Assistant Attorney General Dinh and Professor Chemerinsky do not necessarily share the same views on the current anti-terrorism efforts.

Mr. Chris Stone raised and addressed the fascinating question of whether the courts are an essential public service in the nature of, for example, police and fire protection. He used the events of 9/11 in New York City as a basis for discussing how the local and federal courts functioned on that day and during the immediate aftermath of the tragedy, resulting in an intriguing critique of the role and importance of courts in our daily lives. Lastly, Professor Jeffrey Rosen discussed some of the civil liberties issues raised by modern technology.³ Expanding upon some of his earlier reflections on privacy matters in the *New York Times Magazine*, he discussed in particular the proliferation of surveillance cameras in Great Britain, suggesting that there was no concomitant increase in security. He argued that the courts have a fundamentally important role to play in resolving these important issues, and argued that significant invasions of privacy needed to be shown to be both justified and effective.

Also included in the published proceedings is a panel session on Native American Law, which always has been and remains a very important topic in the Tenth Circuit. Each of the panelists centered their comments on the jurisdictional complexities that tribal courts face following contemporary Supreme Court decisions.

3. For further scholarship by Professor Rosen, see Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117 (2001), and Jeffrey Rosen, *Privacy in Public Places*, 12 CARDOZO STUD. L. & LIT. 167 (2000).

Professor Chemerinsky returned to present his much anticipated and greatly enjoyed review of the Supreme Court's most recent term.⁴ Court watchers and members of the Circuit have come to rely on Professor Chemerinsky's analysis of the Court's term, which is set out in full.

Another highlight of the Conference is the Symposium Luncheon, which provides a somewhat unique opportunity for all members of the Tenth Circuit bench and bar to join in listening to the remarks of some of the leading academicians and authors in the country. This format encourages the speakers to relate their expertise to the law, but to feel free to move outside of the more traditional inquiry used in legal conferences. For the past two Conferences, the topics have been of the "big picture" nature and that trend continued this year. Indeed, the 2002 Conference's Symposium Luncheon topics included Law and Feminism (addressed by Professor Ann Scales); Law and International Relations (addressed by Lt. Colonel Jeffrey K. Walker); Law and Science (addressed by Professor Jane Maienschein); and Law and Literature (addressed by Mr. Richard North Patterson).

Professor Scales is a noted scholar (and practitioner) of feminist jurisprudence, who practices law and also teaches at the University of New Mexico.⁵ Rejecting the aphorism of philosophers like Nietzsche that there "are no facts, only interpretations," she argued the need for interpretation in judging and hence raised the dual questions of the legitimacy of the interpretation and its method. She discussed four traits of feminist legal practice (its recognition of law's purposiveness, its experiential grounding, its sophisticated empiricism, and its rejection of indeterminacy) in her effort to demonstrate that feminist legal method is not only not at odds with judicial legitimacy, but that it is, in fact, a hallmark of good judicial practice.

Lt. Colonel Walker, who appeared at the Conference due to the efforts to focus on international law, which have been led by Justice Sandra Day O'Connor and the American Society of International Law, argued that traditional legal responses might in fact be adequate to deal with many of the problems of post-9/11 terrorism.⁶ He also encouraged

4. Professor Chemerinsky is a noted constitutional and Supreme Court scholar. See, e.g., Erwin Chemerinsky, *A Grand Theory of Constitutional Law?*, 100 MICH. L. REV. 1249 (2002); Erwin Chemerinsky, *Supreme Court Update*, 31 N.M. L. REV. 31 (2001) (reviewing the Court for the 2000 10th Circuit Judicial Conference).

5. For further scholarship by Professor Scales, see Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986);

6. For further scholarship by Lt. Colonel Walker, see Jeffrey K. Walker, *Old Laws and New Wars*, N.Y.L. SCH. J. INT'L & COMP. L. 1 (1993).

continued dialogue with Muslim nations in the Middle East to further common jurisprudential inquiry.

Dr. Maienschein, perhaps in the role of Greek philosopher, raised question after question about how the legal and political systems were relating to science.⁷ She explained that in her breakout session she would clearly explain some of the latest forensic techniques, and argued for more dialogue between the scientific community and the legal/political community. Responses to her breakout were uniformly praising of her efforts. This sort of discussion will clearly be a part of future Conferences.

Internationally best-selling novelist Richard North Patterson delighted the Conference with his observations about writing legal best sellers. He explained why law and legal metaphors are so popular with audiences, and engaged in a lively question and answer session in his breakout session covering both his experiences as a practicing attorney and his writing techniques and preferences.

In conclusion, we hope that the articles and discussions that follow will both help the practitioner in his or her day-to-day practice of law in this Circuit, and also promote deeper thought and inquiry "outside the box" as well. The Tenth Circuit Judicial Conference has evolved into a Conference that has re-integrated the law schools of the Circuit into its structure and hence continues to make use of the tremendous resources these fine schools offer judges and lawyers in our part of the country. In addition to welcoming the communities of scholars (some of who are also regular practitioners), the Conference has also stressed interaction between judges and lawyers about things that, well, "work." By emphasizing the practical, and by getting judges, lawyers, and scholars together, the Conference provides a valuable service for the bench and bar. We are most appreciative that the judges of the Circuit, its wonderful Circuit Executive Ms. Betsy Shumaker, and its talented staff allocate the resources sufficient to provide this service.

7. For further scholarship by Professor Maienschein, see Jane Maienschein, James P. Collins, & Daniel S. Strouse, *Biology and Law: Challenges of Adjudicating Competing Claims in a Democracy*, 38 JURIMETRICS J. 151 (1998).

