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The Chief Justice Donald R. Wright Memorial Symposium on the California Judiciary, Proceedings and Papers

Senate Office of Research

The Chief Justice Donald R. Wright Memorial Symposium on the California Judiciary

Proceedings and Papers

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Senate Office of Research
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THE CHIEF JUSTICE DONALD R. WRIGHT

MEMORIAL SYMPOSIUM ON THE CALIFORNIA JUDICIARY

Proceeding and Papers

Sponsored by:

The Judiciary Committee
of the California State Senate

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of the University of Southern California

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California Legislature

SENATE COMMITTEE ON JUDICIARY

SENATOR BILL LOCKYER
CHAIRMAN

INTRODUCTION

Senator Bill Lockyer

Chairman, Senate Judiciary Committee

It was the intent of the sponsors of this Symposium to provide a balanced and scholarly discussion of a governmental phenomenon that is a source of great pride to this nation as well as continuing controversy: The delicate balance between judicial independence and judicial accountability. It is especially appropriate that the event was dedicated to our former Chief Justice, Donald Wright. Appointed by then-Governor Ronald Reagan, who clearly has strong notions on the role of the judiciary, he nonetheless struck out on a course that epitomized that role of the court as an arbiter between societal impulses and our basic dedication to constitutional principles.

The role of the court in our social and governmental structure is a subject of debate dating well back to the founding

of this Republic. As Judge Hogoboom states in his introductory remarks, the actions of royal judges were a source of discontent that contributed to the public's rise to the call for revolution. Yet this on-going controversy, though it taxes our best thought as citizens and scholars, should not be a cause of dismay. There is a useful dynamic to the debate itself, for its very existence leads to a continual reassessment by those who serve our bar and bench of their motives, philosophies, and aspirations for the perfection of justice. It inspires a continual act of renewal that repeatedly brings us back to the center course, without the radical disruption of institutions that plagues so many other nations.

It is my sincere hope that this record of the proceedings of the first Donald R. Wright Memorial Symposium will serve as a useful tool to those in government service, members of the press, academia, and the public in general, in their review of present court controversies and their consideration of the fundamental place of the judiciary in our society today.

SESSION ONE

SESSION ONE

Chief Justice Wright and the Development of the California Judiciary

JUDGE WILLIAM P. HOGOBOOM: I would like to welcome you here today on behalf of President Zumberge who sent his regrets that he is unable to be with you.

My name is William Hogoboom. I am General Counsel for the University of Southern California. It's a great pleasure for me to be here because I know personally so many members of your distinguished panels; but more importantly, I think, if you'll pardon me, just a personal aside, because any program that's dedicated to the memory of Chief Justice Wright is a program that I would like to be identified with.

I first met Don Wright shortly after my graduation from law school when he interviewed me for a job in his then two-man law firm in Pasadena. He showed then the kind of wisdom he's always shown. He didn't hire me. But over the next several years I became personally acquainted with him and we became good personal friends, and Don and Margo and Betty and I have had many wonderful evenings together. He went on, as you know, to become a Municipal Court Judge in Pasadena and a Superior Court Judge in Los Angeles. He was later elected the Presiding Judge of that court. One of the high points of my life was when I was appointed a judge of the superior court and Don Wright swore me in. It's been a wonderful experience knowing and working with Don over the years, and I am delighted that the program is dedicated to his memory.

The issues which you discuss here relating to how we maintain an independent judiciary and yet maintain an accountable judiciary have been with us and have been emotional issues for more than 200 years. Certainly our own founding goes back in large part to the discontent of the colonists with the actions of royal

judges. They were probably the epitome of judges who were not independent but that decided their cases by executive direction. And twice in our own national history, discontent with our United States Supreme Court has led extremely popular presidents to attempt to interfere with judicial independence by attempting to add members of their own political persuasions to that court. Both times the intelligence of the legislative branch goaded on by the popular will has indicated even to such popular executives, that we in this country do need to maintain an independent judiciary.

So, the topics you're going to discuss today are timely. They're certainly in the forefront of the issues that will be mainly discussed heatedly over the next twelve months in this State. But I think we should not be parochial and think that these are issues related solely to an individual or to an individual state. They are issues which have been a part of our founding heritage; they have been issues that have been with us all through our more than 200-year history.

It's my great pleasure to introduce to you, now, Bill Lockyer, Chairman of the Senate Judiciary Committee. Senator Lockyer was first elected to the Assembly in 1972 and was elected to the Senate in 1982. He came to the Legislature as one of its very few teachers; and so far as anyone can tell, its only former school board member. Anyone who wants to be on a school board must have a certain element of masochism in his personality, although at least one member of the school board in this area went to almost as great heights as his famous father. I am very happy to introduce to you Bill Lockyer who will introduce your panel at this time. (Applause)

SENATOR BILL LOCKYER: Thank you. I think I am technically not the one who will introduce the panel. I think this is a panel of welcoming folks, if you'll tolerate that.

It's my pleasure, as the Chairman of the Senate Judiciary Committee, to welcome you to this symposium. In that context I should both apologize or brag -- I'm not sure which is the case -- about being the first nonlawyer in recent memory to chair that Senate Committee. This event is one which is jointly sponsored by USC, by the Senate Office of Research, and the Senate Judiciary Committee. We're pleased to welcome each of you today to our first Donald Wright Memorial Symposium. We hope this will evolve into an annual event where we would bring together academicians, political leaders, journalists, and jurists to discuss the vital issues of our legal system in a dispassionate and thoughtful forum.

I need not dwell on the fact that the subject of today's forum is a timely one. During this next year, a political campaign year, we will observe the most rigorous examination of an American court since the Supreme Court "packing" controversy during FDR's presidency. All modern forms of campaigning will be wheeled into play to convince the public of the propriety or impropriety of retaining currently seated justices. Of course, we today are not to guarantee the quality of that debate, nor are we advocates of one position or another necessarily. But we can at least establish in our minds, and for the public's benefit, appropriate standards whereby performances for judiciary may be judged.

I'm especially indebted to Dr. Larry Berg, the Director of the Institute of Politics and Government here at USC; to the faculty and staff of the University who have been helpful in

arranging the Symposium; Tim Hodson and Les Kleinberg, both from the Senate Office of Research, and to the Judiciary Committee staff, for their assistance. Thank you also to the panelists such as our distinguished former Governor, the one that many of us wish were still there so our bills wouldn't get vetoed so often -- that's an advertisement, Pat. Anyhow, we're delighted that they have been able to join us also.

So, for the next two days we hope to focus on what is a mutual commitment to excellence in our judiciary, regardless of our particular political view. Hopefully, there is some consensus we may come to as to how judges are appropriately judged. Added to that deliberation is some discussion of the historical nature of judicial elections. If that is accomplished, we can return to our respective communities with a reliable and legitimate template by which we might assess the arguments that we'll be subjected to over the coming months. Thank you all for your participation. (Applause)

MR. DANIEL H. LOWENSTEIN: Good Afternoon, my name is Dan Lowenstein and I am the chair for this panel. Having just arrived in time to fulfill that function, I didn't think that there would be so many people moving in the direction from UCLA to USC today.

I think that any time one wants to consider any significant and serious social question, certainly one good way to go about it is to look at the past and to see how we have gotten to the place that we've gotten to. So, it seems to me that this is a very appropriate orientation for the first panel of this ongoing inquiry into the subject of California Judiciary.

The title of this panel, I would say, is an artful exercise in consumer fraud. It's not exactly a lie, but it is surely

misleading. It is entitled "Chief Justice Wright and the development of the California Judiciary." Now that might lead you to believe that we're about to hear about the relationship between Chief Justice Wright and the development of the California Judiciary. This is not true. What we are going to hear about is one paper about Chief Justice Wright and another paper about the development of the California Judiciary.

However, I think that in itself makes a point. It is one thing to look at the past and try to draw lessons from it, and it's another thing again to determine how to look at the past. There are so many ways to look at the past and so many lessons to draw from it. What we have to look forward to this afternoon are two such approaches, quite different, and I believe, having had the opportunity to read the papers in advance, quite valuable, each in its own very different way. We have one paper looking at how we got started in our present system of electing California judges, and another paper looking at a model of former Chief Justice Wright, a very highly regarded model for the role of Chief Justice of California Supreme Court.

So without further ado, let's turn to the papers. The first speaker will be Professor Leo Flynn, who is a professor of Government at Pomona College. I might say that for a law professor such as myself one of the great pleasures of coming to interdisciplinary conferences of this sort is that the papers tend to be so much shorter than we get in legal academia. I think I've read footnotes in law reviews that are longer than Professor Flynn's paper. Yet sometimes those footnotes and those articles they are attached to have less to say than Professor Flynn's paper. I think you will find that what he has to say is not only informative and extremely interesting, but in some respects quite surprising. Professor Flynn.

PROFESSOR LEO FLYNN: Thank you Dan. A month and half ago I was asked to write a paper on the origins of the provision of the California Constitution, which provides for the current method of selecting and retaining appellate judges. The method is now found in Section 16 of Article VI in the State Constitution. Originally Section 26 was added to the Constitution in 1934 by a vote of the California electorate.

Since original intent is very much in fashion these days, thanks to the current Attorney General of the United States, I thought I would do the broadest possible research, archival as well as literary, concerning the origins. I've got to start with a disclaimer lest I get accused of consumer fraud. I have attempted to do archival research. I wrote to the California State Bar Association and to the California Chamber of Commerce, which are particularly important as will become clear as I continue with my paper. I received no answer from either. These are events that took place 52 years ago, and they may be having difficulty locating any materials that may exist.

As you know, by August we will know how many of the current justices of the State Supreme Court will be before the voters in November of 1986 for, essentially, a judicial referendum; a retention election. We could have as many as five, had Justice Kaus not retired. We could have six of the seven justices subject this year to a judicial retention election. This is the second system for selecting appellate judges in California.

The original State Constitution adopted in 1849 provided for a three justice supreme court. It stipulated that the justices would be elected for terms of six years. However, curiously enough, the first three justices of the supreme court were appointed, not elected.

In 1879, we adopted a second Constitution and maintained the same system for selection: election in contested electoral contests though the terms were extended to twelve years and the size of the supreme court enlarged from three to seven, with a provision allowing the court to split into two separate branches to hear cases.

The origins of the judicial referendum was the tremendous growth in Los Angeles County after the turn of the century. As early as 1914, the prestigious Commonwealth Club of California, a San Francisco-based organization, had a subcommittee undertake a study of the selection of trial court judges in Los Angeles County. In 1915 that committee brought to the general membership a proposal for merit system selection whereby a panel, rather than the electorate, would select trial court judges to sit primarily on the superior courts throughout California. The voluntary bar association of Los Angeles County supported that in 1915, and the issue remained alive until 1936.

When the state bar became a legal institution in 1926, it established a committee under the chairmanship of a former Superior Court Judge, John Perry Wood, which committed itself to placing a variant of the Commonwealth plan on the statute books. It was a plan, before the Legislature in 1928, which would provide for commission selection. The proposal apparently died in the Legislature, so far as I can tell. From 1929 through 1932, there was a great deal of maneuvering and the Bar actually established a committee to lobby the Legislature.

In the 1933 session of the Legislature, after a great deal of negotiations, the Bar achieved a constitutional amendment, establishing a new variant of merit system selection. It called for nominees for any open judgeship to be made by a commission

consisting of the Chief Justice of California, the presiding judge of the district court of appeal, the second appellate district, and the State Senator from Los Angeles County (at the time it was only one State Senator). Apparently, aiding the State Senator was a necessary condition for getting legislative support. The issue of adding the State Senator was the most controversial element and provoked the most direct controversy outside of legal circles. It was argued that this would establish a political machine for the State Senator and would tend to make judges political appointees.

Because Los Angeles Superior Court Judges were state judges, it was necessary for the voters of the entire state to approve this constitutional amendment although it would affect only the judges of the Superior Court of Los Angeles County, which by this time was the largest trial court in the state, having gone, according to one lawyer who wrote on this issue, from two judges at the turn of the century to fifty judges by 1930.

The provision adopted by the Legislature, Assembly Constitutional Amendment 98, was designated as Proposition 14 for the General Election of 1934. The Bar undertook a wide publicity campaign which consisted of lining up organizations such as the American Legion, the Chamber of Commerce, the California Manufacturers Association, various public officials, and local bar associations to support ACA 98. The evidence is overwhelming that they expected this to be the solution to what they saw as the problem. Now let me go back and indicate what they saw as the problem.

The initial proposal by the Commonwealth Club, which by 1933 had been changed substantially, was consistent with the general ideology that was then current among professional and business

groups in this country and which was particularly strong in California, as evidenced by the political victories of Hiram Johnson. The political philosophy of Progressivism tended to be suspicious of elective partisan politics on grounds that it resulted in a great deal of irrationality in voter selection, and that it was not very useful in producing good public policies necessary to the public interest. The general preference among the Progressives was for effective managerialism, a belief that professionalism, systematic businesslike technique would produce good government. This general ideology was expressed in the debates and the reports of the Commonwealth Club and by the supporters of what was to become ACA 98.

Specifically, their complaint was first, that there were too many judges in Los Angeles County. Los Angeles County was too large and too diverse for anyone to have personal knowledge or even an effective way of measuring the productivity or competence of trial court judges. Secondly, that the process of campaigning was distracting from judicial duties; that is, judges spent their time campaigning and fund raising in order to effectively campaign, and that this gave the appearance of corruption which was inconsistent with both the Bar and the progressive view of good government.

To document this, there were two sets of evidence that the Bar and the proponents of change offered: One, we will know that we don't have the highest type judges on the court. This is a theme that runs from 1914: that the better lawyers do not want to sully themselves with electoral politics. Secondly, in 1930 and 1934 the Bar Association sent out questionnaires to the judges who were going to be up for election and asked them how much time they spent campaigning and did they like it. They answered, no, they didn't like; and they said they spent on an average of

from 1 to 2½ days a week on political business. There was no effort made to assess the accuracy of this. Generally, it was accepted as biblical truth.

In the debate over ACA 28, there were some attempts to assess the real nature of the judicial selection process that was in place in Los Angeles County. If you're interested in the details of this, you can read my paper; but the bottom line is that the vast majority of judges of the trial courts; with differences between counties, had in fact been selected by governors. They were appointed rather than elected. In fact, original election to the superior court was unusual. On the intermediate appellate court, the Court of Appeals, selection had been overwhelmingly the means of choosing judges.

For instance, the District Court of Appeal was established in 1905. There were 39 justices who had served on that court from 1905 to 1934; 39 of them had gained office through appointment and 12 through election. In the case of the 71 justices who served on the California Supreme Court between 1849 and 1933; 30 had been appointed with appointment being more frequent in the 20th century. Of the supreme court justices serving in 1933, 3 had been appointed by the Governor; 4 had been elected. This led one commentator to conclude that since elected judges tend to be retained slightly more than appointed judges, that the voters preferred election to appointment, but there's not a lot of statistical evidence the support that. The realties of the trial court bench was that we had a system of appointment. Because of the inordinate advantage that incumbent judges had, in name recognition, in raising funds and getting support, the critics as well as the proponents of the reform system, agreed that appointed judges were retained and usually retained their office until they retired or died in office.

The great complaint seemed to be that the uncertainty of facing a challenge, produced all of the bad effects and kept away the most competent and deserving lawyers. Unfortunately, I have no way of documenting or measuring this.

When the Bar met at the State Convention in Pasadena, California in September of 1934, there were reports about the Bar's activities to gain voter approval for ACA 98, now Prop. 14. The tone of the address delivered by the president of the State Bar, Hubert Wycoff, was one of self-congratulations. They felt that they had solid support because they had lined up notable organizations. Yet he reported that at the last minute, unknown to the Bar, a separate initiative -- that is, a voter initiated proposal -- to reform the judiciary had surfaced. It was a new formulation of the old Commonwealth Club proposal, qualified for the ballot through the activities of the California Chamber of Commerce. This was designated Proposition 3.

In several articles appearing in the bulletin of the Los Angeles County Bar Association and in the Journal of the State Bar, there is evidence that there was intense negotiation before the proposal by the Chamber of Commerce was submitted to the Secretary of State. Apparently, the important change made was an agreement to attack trial court judges, to make it possible for trial court judges to be covered at all by the proposal. I'm saying this is one of the things that came as the greatest shock to me in my research. I had assumed that the purpose for reform was to deal with the problems of appellate court judges who were more frequently elected in California than were trial court judges. I found that there was practically no discussion at any time and that, in fact, the Bar had chosen not to cover appellate court judges in their proposal. Yet, the proposal that surfaces from the Chamber of Commerce is a proposal that originally

covered only appellate court judges and made no provision for trial court judges. As I said, before being submitted, the concession that the California Bar Association obtained from the Chamber of Commerce an agreement to permit the voters in any county to adopt the system for appellate court judicial selection and apply it to that county.

The election was held. I looked at seven of the leading newspapers in California, found that they had all supported both Proposition 14 and Proposition 3. The coverage was mostly matter of fact. I could find not even the advertisements in the newspapers of lawyers in favor of reform or citizens in favor of reform. There does not seem to have been a lot of public controversy.

The only organization that took an opposition position against both Proposition 3 and Proposition 14 was the Central Labor Council of San Francisco. The spokesman who represented that Council at the Commonwealth Club debates in 1933, took a slightly ideological turn, a preference for allowing the people some opportunity which they exercised a little infrequently enough to work their will with the judiciary to make them accountable and that giving this up would represent a loss for the working people and the common people of California. Much of the criticism among lawyers was different. The criticism among lawyers was simple that there was no significant case for changing the system.

Proposition 3 changed the provisions recommended by the Bar Association. Instead of having a committee which would make three nominations to the Governor, the Governor was to make the nomination and a Commission of Judicial Qualification consisting of the Chief Justice, the Presiding Justice of the District Court

of Appeals, and instead of the State Senator, the Attorney General of California was added. This seems to have been as a result of the criticism of Proposition 14.

I had hoped to find out what the proponents of these two provisions expect the voters to do when subsequently voting to retain a judge? Under both proposals, judges appointed would serve for a period of one term of six years at which time the voters would have an opportunity to vote yes or no on their retention. The answer is, that there was practically no debate, except among the opponents, on the question of how the ratification election would work. The assumption seemed to have been that the important concern was changing the selection process because that was where the civil law. At least so far as I can tell, the implicit assumption was that once judges were on, they would remain just as the current situation had been prior to 1933, unless they became figures of notoriety or unpopularity which would be unlikely.

What happened? Well, in 1934 the voters voted. By a very narrow vote, they voted to approve Proposition 3. By a smaller vote, but equally narrow, they rejected Proposition 14. So we adopted the provision in the State Constitution which gave the Governor the power to appoint the justices of the appellate court subject to the approval of the Commission on Judicial Qualification (today called the Commission on Judicial Appointments) and provided these judges would be subject to a confirmation/ratification election after they finished some portion of a term.

In 1936, the Bar made another effort. They went to the Legislature. They got William Knowland, then a State Senator from Alameda County, to carry legislation authorizing the largest

counties -- San Francisco, Alameda, San Mateo, and Los Angeles County -- to hold an election on applying this process to the trial courts in those counties. As far as I can tell, the measure died because, although it passed the Legislature, the Governor did not sign it, using a pocket veto which was possible prior to the 1960s.

There had been several other later attempts that I know of which the Bar Association has attempted to institute judicial reform.

My conclusion is that it is clear that the method of judicial selection which now prevails in California was certainly not any plot among elites in California. It seemed to have been an amazing lack of coordination among the different elements. They seemed to share a general ideological preference that is consistent at least with the tenets of progressivism. There does not seem to be marked evidence that they could demonstrate bad judges, although it may have been true. Most of the debate, at least among the lawyers, was we all know what's going on. It may have been that lawyers in Los Angeles were tired of being shaken down for campaign contributions every four years (under the system that prevailed before 1934, judges had to run in both primary elections and in general elections).

The interesting thing is that it has made so little difference. No appellate judge has ever lost office under this new scheme. There does not seem to be a marked change in judicial selection from what existed before. So the origins don't really tell us very much about what the people who drafted what is now Section 16 of the State Constitution intended to be the basis for ratifying judges based on their record. Throughout, there is reference to judges that they will only have to run on their record.

A number of the proponents said if this means anything, it means that judges will not be forced to stand on their individual decisions. But beyond that, the record, at least the proponents and drafters and supporters, shows a marked lack of concern with this aspect of the system. Thank you.

MR. LOWENSTEIN: Thank you, Professor Flynn. Our next speaker, paper presenter, is Professor Julian Levi. Professor Levi has had so many very distinguished careers that it would be quite tedious to recount them in any detail, but he was a successful lawyer for many years in Chicago, was a professor of urban studies at the University of Chicago for a couple of decades or so, and since 1978, has been a professor of law at the Hastings College of Law in San Francisco. His paper is not quite as short as Professor Flynn's. On the other hand, it has the equally important virtue of not having any footnotes. It is a delightful paper on a delightful subject.

PROFESSOR JULIAN LEVI: I must begin with two acknowledgements. The first goes back to a story describing a teacher, who said he learned much from his parents, more from his teachers, but the most from his students. What you will hear this afternoon would have been completely impossible without the services and the assistance and, I might even add the guidance of students at Hastings College of the Law, particularly those concerned with the Public Research Law Institute who gathered up most of these materials.

The second comment is a personal comment. As a new immigrant so to speak to this state, it's a privilege to speak about what is, I think, a legend. It is even more a privilege to speak in the presence of a Governor who, in my judgement, is a legend.

Donald R. Wright served as Chief Justice of California from 1970 to 1977. As successor to Chief Justices Roger Traynor and Phil Gibson, he was the third Chief Justice leading and maintaining the California Supreme Court as the preeminent State Supreme Court in the nation for more than half a century. Such a heritage should not be cherished but it should analyzed to determine how such leadership came about.

At the outset, we must acknowledge that in Donald Wright we did not have a jurist with the unparalled judicial craftsmanship of literary skills of Benjamin Cardoza, Learned Hand, our own Roger Traynor. Among Judge Wright's opinions we do not find a Meinhard v. Salomon. What we do find is a Chief Justice who in fact was Chief by force of character, intellect and personality, and who at the same time would be referred to repeatedly by his colleagues as a "warm, compassionate, and caring human being."

Donald Wright came to the office of Chief Justice with superb credentials. Following an undergraduate education at Stanford University culminating in a cum laude degree, he earned his law degree at Harvard and then at this University both with distinction.

For a decade he engaged in the general practice of law as a private practitioner in Pasadena; and then in World War II entering the armed services, he rose to the rank of lieutenant colonel, squadron commander, and chief of intelligence of the 11th Air Force Service Command. After World War II, he returned to the practice of law in Pasadena.

Then in 1953 he accepted appointment to the Pasadena Municipal Court and served until 1960 when he was elected to the Superior Court of Los Angeles; and in 1967 he became the Presiding Judge of the Court.

Governor Reagan appointed him to the State Court of Appeal in 1968, and then in 1970 appointed him Chief Justice of California.

Hence, Chief Justice Wright came to the Chief Justiceship after twenty years of experience as a private practitioner of the law, after fourteen years of experience as a trial judge in a busy metropolitan court of general jurisdiction, and two years of full experience as an Appellate Judge. His opinions demonstrate that he understood the difficulties and the frustrations of private practice; that he knew at first hand the responsibilities and problems of the trial judge made evident by his own practice of laboriously reading trial court records time after time; that he understood both the limitations and opportunities of appellate and supreme court service.

More significantly, bench and bar as well as the general public understood that here was a Chief Justice who had earned that title. As one of his colleagues remarked from the very beginning of his term, "the Chief fit in well."

Chief Justice Wright, in accordance with the Constitution and Statutes of California, had major responsibilities in the administration of the judicial system of the State. His skill as an administrator was a bright point of his tenure. The Chief has been described as a politically moderate justice with high intellectual abilities, but even greater administrative skills. He was a judge's judge. Professional, quiet and undramatic in demeanor, he seemed to exude dignity, open-mindedness, fairness and compassion.

The Chief understood that he administered best by persuasion, rather than by force of will or the powers of his office. He was an experienced and tactful administrator who maintained the traditions established by Chief Justices Phil Gibson and Roger

Traynor. Retired Associate Supreme Court Justice Raymond Sullivan has described Wright's administration of the judicial branch as "masterful". According to Justice Sullivan, the Chief's leadership was uniquely effective because of his warmth in dealing with his colleagues and with those outside of the judiciary. Of course, the fact of years of prior skill and experience and service was all important. In most cases the Chief was working with judges whom he knew in prior years, and who themselves knew that the "Chief had been there himself and understood their problems."

During Judge Wright's tenure, the courts of appeal were in trouble as their workload had increased repeatedly. The traditional means of dealing with a growing backlog is to add judges. With the appointment of more appellate judges, however, it is difficult to maintain the quality of appointments and uniformity among decisions. To avoid appointing numerous appellate judges, Judge Wright instituted several important administrative reforms. He created a central staff which could relieve the justices of some routine work. He introduced the use of memorandum dispositions for routine cases. He changed the criteria for publication of opinions of Courts of Appeal. The success of these reforms is demonstrated by the increased productivity of the justices and the consequent elimination of the need to add authorized positions to the Courts of Appeal for ten years.

During the tenures of Chief Justices Gibson, Traynor, and Wright, the power to select judges for the appellate department of the superior court, for all practical purposes, had been transferred from the Chief Justice of the California Supreme Court to the presiding judge of the superior court in the larger counties. Justice Wright reformed the existing process of assignment to the appellate department by meeting periodically

with the presiding judges and suggesting to them that assignments to the appellate department be rotated with a new judge added each year who would serve for a total of three years and then return to other assignments.

Removing Associate Justice Marshall McComb was one of Justice Wright's most sensitive administrative accomplishments. In light of the fact that Justice McComb was conservative and the court at the time was liberal, Justice Wright did not want his removal to appear to be politically inspired. Therefore, he helped engineer a constitutional amendment that provided an avenue whereby Justice McComb's removal would not appear political. The amendment provided that, if a justice of the Supreme Court was involved, the recommendations of the Commission on Judicial Performance would be referred to seven randomly selected court of appeals judges. As a result of the creation of this special tribunal, Justice McComb's removal did not appear to be politically inspired.

Justice Wright is remembered for being accessible and thoughtful. He returned phone calls. He put out a press release on every case in order to establish a public information office. He made special efforts to ensure that research attorneys were treated fairly. He made their pay comparable to civil service lawyers of equal seniority. As it has become evident, his administrative reforms were acceptable because he instituted them after consultation and in a way that was acceptable to the majority of judges and his colleagues.

With the petition for hearing system, the California Supreme Court under Chief Justice Wright retained control over its docket. From 1970 to 1977, the total number of filings increased by less than two percent.

The quality and depth of opinions written by Justices of the California Supreme Court are especially remarkable in the number of cases per justice on the merits. For example, during the terms of 1974-75 and 1975-76, each justice of the California Supreme Court wrote 27 opinions for cases decided on the merits. This ratio becomes more meaningful when contrasted to the fact that, during those terms, each United States Supreme Court justice wrote only 17 opinions for cases decided on the merits.

During his eight years of service, Chief Justice Wright wrote the opinion for the majority of the court in 196 cases. These opinions throughout are remarkably consistent. There is always the meticulous and even methodical exposition of act so carefully done that while policies or statements of law might be questioned in dissent, the accuracy of fact summaries were largely unchallenged. There is always the careful exposition of law and prior case authority plainly and clearly stated. Throughout there is the insistence on judicial duty and function expressed by the Chief Justice himself in his landmark opinion in People v. Anderson dealing with the constitutionality of the death penalty no less under the California Constitution:

> (5) Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility. It is a mandate of the most imperative nature. Called upon to decide whether the death penalty constitutes cruel or unusual punishment under the Constitution of this state, we face not merely a crucial and vexing issue but an awesome problem involving the lives of 104 persons under sentence of death in California, some for as long as eight years. There can be no final disposition of the judicial proceedings in these cases unless and until this court has decided the state constitutional question, a question which cannot be avoided by deferring to any other court or to any other branch of government.

I suspect the subsequent comment by then Governor Ronald Reagan, who had appointed the Chief Justice, that this was his "worst appointment" came as no surprise to the Chief. Whether a particular decision would be a popular decision or not was irrelevant when measured against the core of judicial responsibility.

Analysis of those decisions of Chief Justice Wright most widely cited reinforce these observations.

In Vesely v. Sager, Chief Justice Wright speaking for a unanimous court permitted third persons to sue vendors of alcoholic beverages for serving alcohol to an obviously intoxicated customer who, as a result of intoxication, injured the third person. That ruling overturned prior California judicial precedents based upon concepts of proximate cause. The defendant in Vesely argued in light of these precedents change in judicial doctrine should be left to the Legislature. The Chief responded that the precedents were judicially created and were patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law. Vesely was controversial and was eventually overturned by the California Legislature after a wave of public protest.

Similarly is the opinion in People v. Beagle where Chief Justice Wright again speaking for a unanimous Court imposed severe restrictions on the ability of prosecutors to discredit a defendant by referring to prior felony convictions. Before Beagle, the majority view in California was that a trial judge had no discretion under the California Evidence Code to exclude evidence of a prior felony conviction offered for purposes of impeachment where the lawfulness of the conviction was established or uncontested. In a methodically written opinion, the Chief rejected the majority view and held that by reading several

sections of the California Evidence Code together, the trial judge had discretion to exclude evidence of prior felony convictions where the probative value of the evidence is outweighed by risk of undue influence. This year Beagle was overturned by the California Supreme Court in a decision holding the 1982 Victim's Bill of Rights had introduced an easier rule for the admission of such evidence.

In 1973, in Legislature v. Reinecke, the Chief Justice led a unanimous Court in laying down a blueprint for reappointment after then Governor Ronald Reagan and the Legislature could not agree on a single plan. The court appointed several Special Masters to devise and recommend a reapportionment plan which recommendations were adopted by the Court.

Finally, the Chief Justice in Birkenfeld v. City of Berkeley wrote the opinion again for an unanimous court upholding the legality of residential rent controls.

During his eight years of service the Chief Justice wrote the opinion for the majority of the Court in 196 cases. Of these 196 opinions, dissents were filed in only 54 cases. In these 54 cases, 16 of the dissents were filed by lone dissenters. Thus, in only 38 cases out of 196 was there significant disagreement among the Justices.

On this data alone, it is thus clear that here was a Chief Justice who led his Court.

Closer examination reinforces this conclusion. Of Wright's 196 opinions, 126 were criminal cases and 70 were in other areas of the law. The latter figure may be subject to some adjustment in that some matters such as juvenile criminal issues or habeas corpus proceedings are classified as noncriminal. Of the 54

dissents, 46 were in criminal cases and only 8 were in civil cases.

During Wright's tenure as Chief Justice, eight justices served with him. The dissenting activity among these justices can be broken down into categories.

Justices Clark, McComb and Peters dissented along lines of idealogy and broad policy.

Justices Mosk, Richardson, Sullivan and Burke when they disagreed did so on specific factual determinations or on narrow technical grounds.

Most remarkably, Justice Tobriner, who served throughout Wright's tenure, never wrote a dissent to an opinion authored by his Chief Justice. This record from a justice of Tobriner's competence and deeply felt convictions is a strong indication of how the Chief Justice time after time found a basis upon which he could unify the court.

During these years Justice Clark was unique in the vehemence of the language of his dissents. He believed that the California Supreme Court not only was not following the United States Supreme Court as to defendant's rights, but on occasion intentionally attempted to avoid review by shifting the ground of its decision to provisions of the California State Constitution rather than the Federal Bill of Rights.

Justice Clark, during his years on the Wright Court, wrote 16 dissents to the 75 opinions of Chief Justice Wright on behalf of the majority of the Court. In these dissents, Justice Clark charged his colleagues "with incompetence," being "altogether unreasonable," their rulings "completely unrealistic," their

conclusions "inexplicable" and "(un)supported by reason or authority." On one occasion, he charged that the judiciary is "developing a messianic image of itself."

In contrast to Justice Clark, Justice Peters was more liberal than the Wright Court. He wrote 6 dissenting opinions; one of these dissents opposed extension of the felon-murder rule; two dissents concerned procedural rules of the Court regarding acceptance of guilty pleas; the other three dissents turned on search and seizure.

Justice Richardson wrote dissents in four cases.

Justice Sullivan wrote only four dissenting opinions, all involving criminal law issues. Two of the cases concerned his disagreement with the majority's application of the exception to the hearsay rule in cases of co-conspirators; in the third case Justice Sullivan was outraged by policy conduct which he saw as an attempt to circumvent rules of criminal procedure; in the fourth case Justice Sullivan felt the majority had unnecessarily addressed a constitutional issue. Additionally, Judge Sullivan concurred without opinion in dissents in six other cases.

With the exception of the opinions of Justice Clark, the dissents throughout were characterized by civility and respect among the justices. These justices were strong men with deeply held convictions, but their Chief held them together in mutual respect for one another and the institution of the law which they served.

In the final analysis, the Chief Justice's colleague, Justice Stanley Mosk best summarized:

> Perhaps his most noteworthy characteristic was afforce independence. Don Wright bowed before no master; not the

bench, the bar, the Governor, the press, or public opinion. He marched to the beat of no drummer, only to an ethical and compassionate conscience. (Applause)

MR. LOWENSTEIN: Thank you, Professor Levi. When I made the switch six or seven years ago from government to Academe, there were some surprises, some pleasant and some unpleasant. One of the unpleasant surprises was to learn that at academic meetings, they have a role played by people and denominated discussions. This was an act of violence against the English language with which I had previously been unfamiliar. We will, during this session, refer to them as commentators.

I am reliant from my introductions of these speakers on the list of biographies that I was handed when I arrived, and one of the speakers is not in that list. Fortunately, however, in this case that's entirely irrelevant. When I run into students, as I occasionally do, who hold the view that successful politicians are all either crooks or sell-outs or wishy-washy or whatever, I like to hold up as one of the primary exhibits against that point of view Pat Brown. Unfortunately, some of my students now are young enough so they don't know who I'm talking about; but for those who know anything about Pat Brown, it's a very persuasive exhibit indeed. So it is my pleasure to introduce to you the former District Attorney of San Francisco, the former Attorney General of California, and the former Governor of California, Pat Brown.

HON. EDMUND G. "PAT" BROWN: Thank you very, very much. I am very, very surprised to hear that there are students at the School of Law, the University of California at Los Angeles that haven't heard of Governor Edmund G. Brown, Sr.

MR. LOWENSTEIN: They're getting young enough so pretty soon they won't have heard of Jr. either. (Laughter)

GOVERNOR BROWN: Oh, he'll be back -- don't worry.

My remarks are going to be nonchronological. I want to complement the two previous speakers on their excellent discussions on the relevancy and the history of the Supreme Court of the State of California.

I had the great privilege of appointing, I think, nine members to the Supreme Court of the State of California. And I'm going to quickly go over their names just so you'll get a little idea of the philosophy of a governor in making appointments to the highest court in this state.

But you have to go back a little bit with me, because I was admitted to the Bar in October of 1927. I didn't have the privilege of going to college at all. I went directly from high school into law school. I suppose it was because I was always a young man in a hurry. However, not having gone to college gave me somewhat -- somewhat, I underline that -- of an inferiority complex; and I always felt that there were -- I'm not so sure now, but I always felt that there were people that were much smarter than I and I was willing to call upon other people for advice in legislative matters and the tremendous importance of a governor in making appointments.

But, I practiced law for a period of 17 years before I ever held a public office of any kind. I would appear before judges in various counties around the Bay Area, and I was impressed with some who were so courteous to a young lawyer and some that were so, I'll use the term, ugly. When I became Governor, I tried my level best to get a real background on the appointment of all of the judges that I made. But when you appoint, and I think any governor serving a period of 8 years will appoint 700 or 800 judges, you can understand that all of the men or women that you appoint are not going to be great jurists.

The fact is, however, that I think those 17 years of practice in the civil courts before the municipal court, the superior court, appellate courts, and occasionally in the Supreme Court of the State of California, never in the Supreme Court of the United States, and as District Attorney, you would run into the many judges that you appeared before or your deputies would make reports upon them. And one of the things that impressed me very much in my appointments was Earl Warren. When I was District Attorney in San Francisco, Governor Warren appointed two young men who were extraordinarily able lawyers in my office -- a man by the name of Al Weinberger and a man by the name of Charles Perry -- both of whom were Democrats. Now, I mentioned that only to show you that here was a Governor that had appointed judges because of their ability -- not because of their political affiliation. He had to get their legal reputations from other lawyers and judges in San Francisco. And, Warren's method impressed me very much. I wanted to have a bench of able people of able men and women. But, the Warren appointments impressed me very, very much.

You have to remember, too, that I became Governor after twenty years of Republican Governors; Earl Warren was Governor, I think, for a period of three terms, almost twelve years. It was sixteen years -- no, it was three terms of Earl Warren and a term and a half of Goodwin Knight. But before that, Governor Olson had appointed four judges. He had appointed Chief Justice Phil Gibson. He had appointed Roger Traynor. He appointed Justice Carter. And I can't think of the other judge that he appointed. So here was a Democratic Governor appointing four justices. Then Earl Warren, serving eleven years, appointed only one; and Governor Knight only appointed one. And I came along -- they had been in office for along period of time, so there was a natural change in the Supreme Court in the State of California.

I'm pointing this out to you to show how the appointments of a Governor, how they can change, how important they can be. I think that Governor Reagan only had two appointments. And I think Jerry -- I think my son had five or six. Now the importance of that is that I've observed in some of the discussion the question whether there should be a change in the method of the appointments to the appellate courts.

I might say, weighing it all and watching the Governors going back to Culbert Olson -- Olson, Warren, Knight, myself, Reagan, Jerry, and now Governor Deukmejian -- I do think that Govenors are really trying to appoint people that will do a good job in their appointments.

And I think that the fact that the Supreme Court of the State of California has been regarded as one of the best courts in the United States. Some of the Law Review writers, some of the other jurists throughout the state feel that it was -- during my administration that the appointments not only made by me, but the appointments made by Warren made the California Supreme Court the best court, even better than the Supreme Court of the United States.

I want to just name the people that I appointed so you get an idea of the kind of people I appointed and the source of the recommendations to me. The first man I appointed was Ray Peters who had been a law secretary to the court after he left law school. In addition to that, he gave a Bar review course; and, he was regarded as a truly brillant lawyer. I might add that when I was District Attorney of San Francisco, I appointed two men and someone sued me, sued me because I made these two appointments illegally. There were two war veterans. They were both San Franciscans. But they worked in the Alameda District

Attorney's office. They came to me and sought an appointment and I appointed them. But they had not had two year's experience. The charter of the County of San Francisco provided that they had to have two years' experience. Well, someone sued me for making an illegal appointment and got a judgement against me for $10,000. I can only tell you that when the salary of the District Attorney of San Francisco was only $8,000 a year and to get a judgment for $10,000. So after I lost it, I had to put up a bond of $20,000 -- $20,000 so they wouldn't execute upon my property. And then it went to the appellate court, and I'm not going to go into what happened; but Ray Peters, writing the opinion, reversed that opinion of the Superior Court. So the first appointment that I made to the Supreme Court of the State of California was Ray Peters.

Now, if you think that was really the motivating force, I think the lawyers will agree that Ray Peters was truly a great jurist. Now, I'm not going into all the others. Tom White had started in the justice court of Los Angeles. He's been in the municipal court; he's been in superior court, the appellate court. And I appointed him. He was an elderly man when I appointed him. I think he was 68 years of age. And when I appointed him, he agreed to resign upon reaching the age of 70.

The next ones were Matt Trobiner, Paul Peek, Stanley Mosk, Louis Burke, and Ray Sullivan. And then I had the great opportunity of appointing Roger Traynor as the Chief Justice of the Supreme Court of the State of California.

In all of these appointments, of course, you had to get the qualifications committee approval, consisting of the Chief Justice, the senior presiding justice, and the Attorney General of the State of California. I didn't want any jurist or any person

I appointed disapproved. There was no formal way of asking for this approval. There was no formal way in the Constitution or any of the Codes. So, I would call the Chief Justice. I would tell him that I intended to appoint blank, what do you think about it? And, going further, I would ask the Chief Justice for his recommendations. I can tell you that when Chief Justice Gibson resigned I spoke with him, and he highly recommended Roger Traynor to be his successor. And when Roger Traynor became the Chief Justice, it was my practice to call him and ask him about the appointments. He would then confer with the other members of the Qualifications Commission (the senior presiding justice and the Attorney General). I knew before the appointment was announced whether there would be approval.

I really feel that the State of California has the best system of making appointments to the higher courts in the United States. The appointments, of course, to the Supreme Court of the United States must be confirmed by the Senate of the United States. But, you don't have that real Qualifications Commission of people that are working in the law every day -- the Chief Justice, the presiding senior justice, and the Attorney General. The Attorney General is really the only political figure in the group. And you will observe, I'm not commenting or criticizing in any way at all, you will observe that when Governor Deukmejian was the Attorney General, that he disapproved of several of my son's appointments to the Supreme Court. I can't pass on the reasons why he did. But I would call attention to the fact that in the statements made by -- in the paper prepared by yourself, that you pointed out the tremendous difference between Associate Justice Clark on the Supreme Court and the other appointment made by Governor Reagan, Chief Justice Wright. Two appointments by Governor Reagan, an absolutely philosophically different. And there's no way in the world you're going to avoid the philosophy

of the Governor in the making of the appointments to the various courts in this state. I'm not talking about the appellate court because I haven't had the time to research the appointments that were made.

I can only tell you that I was tremendously proud of my appointments. In the making of appointments, the questions that I would ask was the legal ability of the lawyer. In Southern California I didn't know the ability of too many lawyers. I had a group of lawyers whom I respected and I would ask them for recommendations. They were lawyers in large firms and individual practitioners. I think I had six Democrats and two Republicans in this group from whom, I sought their opinions. They would give their recommendations very, very objectively.

I'm not trying to personalize these remarks, but you have to look at the character of the Governor and his political philosophy in trying to find out whether the system that we now have is a good one or a bad one. I really wanted judges that were humane. I wanted people that knew the law but were gentle and understanding. In the 17 years that I was in private practice, I appeared in courts all over the state. Sometimes the judges were really mean and intolerant, particularly during the first two or three years of my practice. With one of the judges before whom I appeared in a preliminary hearing in the municipal court in San Francisco, I started to put in my case and the judge said, "Counsel, I want you to put your case in this order." This was in a preliminary hearing. And I said, "If the court pleases, I prepared this case and I'd like to put it in the way I planned." He says, "You put them on in the way that I tell you to put them on or we will not hear anything further in this case." I said, "If the court pleases, I'm through." And I stopped the case. The person was held to answer. I might say, this man came up

recommended for appointment to the Supreme Court later on. (Laughter) He had been appointed to the appellate court by another Governor. He came highly recommended to me by one of my large contributors. I could not forget the mean way that he treated me when I was a young lawyer.

The other things that were important were the opinions of other lawyers. I would confer with Roger Traynor after he became the Chief Justice. And, I might say that he made several recommendations. I accepted every one of them. I made recommendations and he accepted mine, of course, or they wouldn't have been approved by the Qualifications Commission. But, he recommended me to Ray Sullivan, who was in San Francisco. He had been an associate of William Malone who was the Democratic chairman. And I was a little bit, a little bit afraid to, not afraid, that's not the word. I didn't want to appoint a political figure. But Roger Traynor called me, came up to Sacramento, and he told me that Ray Sullivan was a great jurist. And as a result of that, I appointed him. And I think that the bench and Bar of California recognize Ray Sullivan as one of the best judges that I had the privilege of appointing.

I'm calling these things to your attention so that you'll be able to see what a Governor does in trying to make good appointments. Governor Reagan, in his appointment of the Chief Justice, later said he was disappointed. He spoke critically of the Chief Justice, later said he was disappointed. But I think the bench and Bar agree with Stanley Mosk's opinion of this great Chief Justice.

There are so many other things that I could say about the appointments to the supreme court, but let me conclude by saying that the appointments by the Governor, with the approval of the

Qualifications Commission (the Chief Justice, the senior presiding judge and the Attorney General), resulted in excellent appointments to the appellate court and the supreme court. This is true, whether it happens to be a Ronald Reagan or a Jerry Brown or a Governor Deukmejian. I think we have a good system. I'm sure that any system could be improved upon. But, as I look back on the appointments to the appellate courts (and I'm not talking about the superior courts -- it would take too long to get into that) that are here today, looking at the origins of the present system of appointments that I think as an old Governor that it's a good one. Thank you. (Applause)

MR. LOWENSTEIN: Thank you Governor. If there are any lower court judges in the audience hoping for a promotion, if anyone comes into your courtroom who looks like a possible future governor, watch your step. (Laughter)

Governor Brown had asked if he could go first of the two commentators because he might have to leave early for some other business. He described himself in 1927 as a young man in a hurry. I guess things don't change too much. It seems to me a young man in a hurry is still a pretty good description for Governor Brown.

Our last commentator is also someone whom I could have introduced without the biographies, and also I would say very definitely an example of how, cynical popular opinion to contrary, one can be a very successful politician and be a person of integrity, a person of talent, and a person of considerable accomplishment on behalf of the public. Barry Keene was first elected to the Assembly in 1972. He moved over to the Senate. He served as chairman of the Judiciary Committee and is currently the Majority Leader of the State Senate. Barry Keene.

SENATOR BARRY KEENE: Thank you very much. It's a great honor to be able to take off the garb of a political thug, which is the role I'm told I'm supposed to be playing in Sacramento to be the anchor discussant on so distinguished a panel as this one.

MR. LOWENSTEIN: Commentator

SENATOR KEENE: Commentator. I am the commentator, okay. I'm always confused in my role. I try to learn the script, but it's usually the wrong one. The tribute to Chief Justice Donald Wright by Professor Levi serves as an important backdrop to a debate of national and historic proportions. And this is a good time to begin launching it.

Whether you believe that the upcoming judicial election will more likely approximate an earnest test of judicial accountability or an exercise in judicial intimidation (and certainly one person's accountability can be another's intimidation or terrorism) we have to ask ourselves whether the outcome of that campaign will result in a judicial environment that could accommodate a Chief Justice of the creative instincts and caliber of a Roger Traynor, a Chief Justice of the competence of Phil Gibson, or a Chief Justice of the astounding independence of a Donald Wright, who was so intimately characterized by Professor Levi. And if not, Professor Levi and Governor Brown gave us some indication, because of their personal closeness and the research that went into that paper, if the extent to which California today would have been materially different and California tomorrow might be materially diminished by the absence of a judicial environment that could accommodate people like them.

I've learned a great deal from the other paper by Professor Flynn as well that provides a second kind of backdrop to the great debate that starts now and moves through next year. Thanks

to the meticulous research of Professor Flynn we can approximate the same level of understanding of public purpose and motive, with respect to judicial elections, and the initiatives on judicial elections, as we have with respect to more recent measures such as Proposition 13. Now that statement is only semi-facetious. It's ironic that we're embarking on this debate of constitutional dimensions that was triggered by a mechanism born of a Whoopie Goldberg type childbirth. That metaphor is much too mixed, but it reflects the message that I got from the presentation.

What is important that we all understand with respect to Professor Flynn's paper, is there was probably little public grasp of the complex issues raised in the two judicial election initiatives. There was quite likely no real consensus on direction, as evidence by the passage of Prop. 3 in 1934 and the defeat of Proposition 14 in 1934, and very possibly the whole issue of judicial accountability versus judicial independence was never even raised in a definitive way.

The search for some criteria to help voters make their decisions because those criteria are not known historically means we have to go beyond the California constitutional amendment debated and adopted in 1934. I personally believe it requires a deeper understanding of the origins of questions about judicial independence and judicial accountability. These are the kinds of things that can only be found in early Anglo-American political genetics. It's a kind of DNA that resides in our political constitution.

The second point, resulting from the papers that were presented, is that there is an absence of criteria, that the criteria are not spelled out in the Constitution or in the

debates that took place or in the statutes that followed. There is no real direction; there are no tangible guidelines; but that does not imply an absence of responsibility for voters to try to select rational criteria, and to apply those criteria to the sitting justices before making a determination as to what's appropriate on the retention question.

We live sometimes with the myth that judges ought to operate in a judicial vacuum, a kind of germ-free bubble free of political considerations. We all know that that's not very realistic, that appointments are made by Governors who are less intensely political. So there can't be that kind of total insulation. In dealing with this judicial election process we're faced with questions about how much political contamination ought to be permitted. We have in California a tradition of well-spaced retention elections. They give the public some recourse in the form of a safety valve, but not so much that a justice who performs his or her duties will have to be concerned with either a spirited campaign and all that involves financially, or a conscious or subconscious anxiety that it might mean the end of a professional career.

If you go back to the founding parents, even Thomas Jefferson who feared the kind of monarchical majesty that was referred to by Professor Lowenstein, came to believe that a judiciary should be relatively free from responding to the passions of the times. The fact that California with a very limited system of judicial elections gives little guidance to those who will be voting, doesn't mean that people are free in a moral context from acting responsibly. It's certainly permissible as a matter of law, and it's certainly permissible as a matter of political activity either for them to act cavalierly or for them to act in ignorance without studying the issues, the background, and the judicial

styles of those involved. But no one would seriously defend the fact that that is socially desirable or responsible.

So the issue becomes what kind of criteria can one use? I think we're really looking at the scales of justice. We're faced with a balancing question. We're looking on the one hand at whether the justices are performing their functions adequately. On the other hand, even if they are not up to a standard one might desire, one must also ask, are the effects of a defeat of sitting justices too great a blow to the principle of judicial independence to justify a vote for removal? In other words, will it catalyze many more judicial contests, contests that will necessitate fund raising from those who have matters before the court, divert the time and energy of sitting justices from their duties, create an atmosphere of intimidation, prevent good people from accepting judicial appointments, and cause the impression of corruption of the bench? All of these things were debated in 1934. All of that has to be taken into consideration on the other side of the scale because they are potential effects of casting a vote against justices with whom one doesn't agree.

Finally the least socially justifiable consideration in my judgment is whether the courts are complying with the will of the people at any given time. And you will hear constantly that -- they are failing to comply with the will of the people. But that's the job of elected officials. The job of appellate justices is different. It is to stand for other things that are more durable and of higher importance. Only in one sense ought the courts to specifically pursue the will of the people, and that is, not the will of the people as expressed in the public opinion polls today, but the longer and more considered will of the people that is embraced in the Constitution and expressed in the statutes.

These are some of the things I believe ought to be taken into consideration. And the papers that were presented and the comments of Governor Brown provided an excellent context for doing that. Thank you. (Applause)

MR. LOWENSTEIN: Thank you very much.

GOVERNOR BROWN: I just want to say one thing in connection with Rose Bird. I know this isn't a political meeting, but I don't think people realize that during the eight years that I was Governor, I had 62 capital cases where they had exhausted all of their remedies before the court and it was up to me as Governor. I had 62 cases, I let 40 die and I commuted 22. I'm not going into whether I did the right or the wrong thing, but I want to point out there was 62 cases during the eight years I was Governor. Before Rose Bird ever came along, during the eight years that Ronald Reagan was Governor, there was only one person executed; and there were three years before Rose Bird was appointed by my son, and that there were none executed. So for eleven years after I left the office, there was only one person executed, and that's before Rose Bird ever came along. What I'm trying to point out is that with a Governor that believed in capital punishment, Governor Reagan, and only one person was executed during that period of time. I don't think people realize that when they are criticizing Chief Justice Bird for not having any executions during the years that she's been, I think the five or six years she's been on the Chief Justice Supreme Court. I just wanted to pass that on.

MR. LOWENSTEIN: I'm going to abuse the prerogative of my office posing a question of my own to each of the paper presenters. I'll start with Professor Levi because in a way my question to you is connected to the comment that Governor Brown just made.

I ask this question assuming the role of the devil's advocate, because I agree with your very favorable account of Chief Justice Wright's tenure on the court. But in the role of devil's advocate, might one argue, as you point out in the paper, Chief Justice Wright authored the opinion striking down the death penalty, a decision that was later overruled by the voters. Justice Wright presided over a court which certainly began in a serious way going down the road of adopting or finding safeguards for criminal defendants more rigorous than was provided under the United States Constitution, another decision or path that was overruled by the voters.

In short, for all of his extremely impressive virtues, might one argue that Chief Justice Wright and his colleagues sowed the whirlwind that Chief Justice Bird and her colleagues are now facing?

PROFESSOR LEVI: I think the answer to that might very well be yes. I think there is a second comment I would like to make, and I hope it does not sound impertinent. I have never heard a more impressive statement of what I regard as the essential function of the Court and the essential function of the Legislature than the one that was made by Senator Keene a few moments ago. As a Californian, I'm proud of that.

Now, the point is this: It's not the job of the court to legislate <u>per se</u>. It is the job of the court to apply what the court regards as fundamental and significant principle to the solution of the problems of the particular case that is before it. I shudder at one kind of picture. It would be a very, very unfortunate thing if any Chief Justice, and I think in the case of Donald Wright it wouldn't have made any difference, who in effect would be told if you decide a particular issue that is

going to be unpleasant to some particular single issue group, get ready to raise $2 million to hold onto your post. I think what this calls for is the kind of sophistication and understanding on the part of the electorate. I think it's an understanding in two points particularly, and I think they were made in the comments by Governor Brown and Senator Keene. First, character. Second, the understanding that the fundamental job of the court is the administration of justice, an abstract goal often sought, not always achieved, but certainly not related to the latest opinion poll.

MR. LOWENSTEIN: Professor Flynn, I found the conclusion of your paper and your remarks today a little bit surprising. I am referring to your conclusion that history doesn't tell us too much about what the role of the voter is supposed to be in these elections or at least we can't tell too much about what the framers of the system thought. I think that it's implicit if not explicit in Senator Keene's remarks that although history may not give a direct answer to that question -- history very rarely does -- and it does seem to me that the supporters of a "yes" vote on these justices would be likely to take more comfort out of that history than supporters of a "no" vote. The framers of this system seem to have had in mind a notion that the judiciary should be and could be nonpolitical, a notion as you say that goes back to the views of the progressives.

My question is not so much that, although I would certainly welcome comments on that. We have this debate going on as you alluded to about whether the judges in applying the law are supposed to go back to the views of the founders or are they supposed to be doing something different (Ed Meese is saying they should, and Justice Brennan saying they shouldn't or they can't). But aside from that debate, as a debate about what the judges

should do, does that apply to the voters? Do you feel as a voter that you have an obligation to use the criteria that the framers of this system intended? Or is the voting process different from the judicial process so that when you go into the ballot box to vote on this or anything else that you have a right to apply whatever criteria you may think are pertinent regardless of whether whoever set this system up thought they were good criteria?

PROFESSOR FLYNN: Well, I think you have to try to derive some criteria from the explicit decisions made by the framers here, and let alone what the public in ratifying this thought. I think you overstated the case. I think you probably can. The central concerns of both groups, for whatever motives, seem to have been that they didn't want the judges raising money; spending their time campaigning. That does not seem to have been an activity given the fact that most judges were appointed. But nonetheless, people face the prospect. There were, for some Los Angeles elections, as many as 104 candidates that the voters faced. So people thought you'd get a more rational system, that you'd have a system which the judges could act free from these forces. But this didn't tell people what were the standards by which retention was to be measured. Not it may be that we don't want the negative. We don't want all these bad things which follow from judges having to go out and raise money, and $2 million is, I think, probably a reasonable figure for an appellate judge. But even a superior court judge, should he become the object of the hostility of some organized and well-financed group, would face this problem. We have a system that says that voters are supposed to ratify. Now, I believe that voters would have to come up with some criteria that takes into account that we want the judiciary to be different than legislators. But there are obviously arguments in between judicial independence

and judicial accountability that makes that a very complex problem. If I accept the legitimacy that the voters are supposed to have a choice, then that means that I have to decide what that choice should be. Personally, I would think it would be incompetence, outrageous criminal conduct, but probably something more than that; for instance, the allegations against Rose Bird are not that she's incompetent or that she's been criminal or even malfeasant, but that she has ignored and perversely interpreted the law, that she ignored the clear statutory intent. Those are charges that I think have to be met on the merits, not just you can't raise that issue. The question is the merits. The question is, is her conduct so far out of bounds that they should be rejected--that she should be rejected? And I think that that's what's the difficult problem.

MR. LOWENSTEIN: Okay, at this time let me throw it up to the audience -- questions, comments, brickbats. Please give your name if you don't object.

MR. PETER SCHRAG: My name is Peter Schrag. I'm the editorial page editor for the McClatchy Newspapers.

There is in fact a recall process for the kinds of things you're talking about -- malfeasance, criminal conduct, and so on. So presumably, that being in place, the intention of the reconfirmation process is something less than that, isn't that correct?

PROFESSOR FLYNN: Presumably.

MR. SCHRAG: Doesn't that give you some kind of further light as to what presumably one can infer about the intention of the people who framed the confirmation process?

PROFESSOR FLYNN: I may be dense, but I assume that it is something less than the actions that a recall would require. But that may be simply because of the difficulty of the recall. This provides for periodic assessment. Presumably that would mean that the judicial record would be brought automatically before the electorate, rather than having to mobilize to get the signatures to have a recall. I think it may be procedurally different rather than necessarily substantively different.

MR. SCHRAG: You know, you might argue that that would work the other way. When you have a justice whose problem is not ideological, being beyond the pale, but the problem is simply incompetence or something of that sort as many people believe was the case with Justice McComb at the end of his career. It may be that the recall process is not likely to be generated over that kind of concern, because people may be concerned about it, but it doesn't create the kind of passion that is needed to start a recall. So it may be that the recall lends itself better to the kinds of problems that some people seem to have with the present justices and that the periodic review lends itself better to the competency problem.

PROFESSOR LEVY: That may be, but I think you all agree that obviously the confirmation process presumes something less than the extreme kinds of transgressions that a recall --

MR. SCHRAG: I think so, yes.

GOVERNOR BROWN: May I turn your, sir

MR. LOWENSTEIN: Mr. Schrag

GOVERNOR BROWN: May I turn your question back on you yourself to this extent? When the voter goes into the booth to

vote recall or no recall, the criteria which are going to be applied are those to which the voters have been educated. The profession that you're part of I think carries a very heavy responsibility towards the education of the voters under those circumstances. It doesn't mean that it ought to be pro or con as much as that there ought to be a reexamination and reaffirmation of those principles which really ought to be the ones that voters ought to look at. And that we can't do in any other way except by education.

MR. SCHRAG: That's why I want you to educate me. Thank you. (Laughter)

GOVERNOR BROWN: I just want to say another word. These things -- oh, you don't have to go.

MR. SCHRAG: Oh, I didn't want to filibuster here, Governor. I mean

GOVERNOR BROWN: Oh, no, I was going to ask you a question. I was going to say something. I'm going to leave in five minutes. But I was just thinking as you were talking and as the other panelists were talking -- if Justice Rehnquist were now running here in the State of California, running similar to the justices that are running, very frankly I would vote against him. Even though he was the No. 1 man at Stanford Law School, he's unquestionably a brilliant man, but his political views or legal views, and maybe you can define the, are some completely opposite to mine that I'd like to see someone else in the Supreme Court.

Now, that bothers me a little bit with Rose Bird, between you and me and the lamppost. (Laughter) It concerns me, but I don't think the same philosophic differences are there. But I had to pass it on. Because as you were talking, that's what was suggested to me.

SENATOR KEENE: One additional thought, may I? If, as you point out, the ceiling is somewhat lower than the requirements for impeachment, for example, I would suggest that the floor is somewhat higher than. I just disagree with these justices as a matter of politics and I don't like the way the decisions came out. They're not obeying my will. If they're failing to deliver on the public opinion polls, I think that ought to be okay. If they're failing to deliver on the Constitution and the laws, that's another issue. And that is where the criteria is, I think.

PROFESSOR FLYNN: Well, I think in the educational process, as you point out, the interest that can't be divorced from the fate of the individual justices is the institutional impact that contests elections which will be fought on issues of individual performance comes very much like, in the final analysis, like judging individual cases, the one thing they said they wanted to get away from. I think that's the problem. What's going to be the impact of rejecting this judge on the system? Will this go back to a sense of fear? Obviously, people are going to argue that the judge should have no greater guarantee than Governor Brown or Senator Keene, that they should stand for their principles and the hell with what may come in six years.

MR. LOWENSTEIN: Thank you. Bill. Will you go to the microphone?

SENATOR LOCKYER: I was hoping to catch Governor Brown before he moved on to inquire as to the selection process for those supreme court appointments and particularly those that didn't make it.

GOVERNOR BROWN: That what?

SENATOR LOCKYER: That didn't' make it. Without obviously naming any names, there probably were people that you considered at various times that for a variety of reasons didn't ultimately get appointed. Would you comment on that process? What kinds of considerations persuaded you not to make a particular appointment? Was there any pattern to that in the way that operated?

GOVERNOR BROWN: Well, you know, under the Constitution, you have your qualifications commission only on the appellate judges and the supreme court judges. On the superior court judges, the State Bar of the State of California gives recommendations. It's been the practice of the Governor to ask the State Bar Board of Governors to give recommendations on appointments to the superior court. They give recommendations well qualified, qualified, not qualified -- three recommendations. I think there were one or two judges -- well, maybe more than that -- where they came up with the recommendation not qualified, but I appointed them anyway. I might say that several of those they said not qualified were -- this is only the judgement of a Governor -- were very, very highly regarded as jurists. I can think of one person,as I'm talking to you now. But there were several that I appointed that were not qualified that turned out horribly. If I had been in office later, I don't think I would have appointed anyone that the Bar said was not qualified. In the Supreme Court justices, the practice I had was, I don't think it was the practice of Ronald Reagan or Jerry or Deukmejian, to talk with the Chief Justice. Of course, I knew Phil Gibson very, very well during my Attorney Generalship; and he was a man that would call you and tell you why "I'd like to have so and so appointed." And Roger Traynor was exactly the same way.

Let me tell you, if you're a Governor and the Chief Justice or an associate justice of the quality of Roger Traynor or Phil

Gibson tells you not to appoint this person or to appoint this other person, well knowing they were on the qualifications commission too, you're not going to appoint them. That was my practice. I don't know what Ronald Reagan's practice was. He appointed one judge that was very highly regarded -- the man we we're talking about today, Wright.

SENATOR KEENE: Clark and Richardson were the other two.

GOVERNOR BROWN: Richardson was a tough judge but well regarded, but Clark was never regarded as a great lawyer. I think the consensus of the Bar was that he was a poor lawyer. A good human being and everything else, and I don't mean to comment upon him -- but as a lawyer I think that was the opinion of the bench and bar of the State of California.

But you're not going to reach perfection in this business. The thing to do is to elect good Governors and then you won't have any problem. (Laughter and Applause)

MR. LOWENSTEIN: Any other -- we have a few minutes left. Any other comments? Yes.

UNIDENTIFIED: I agree with Professor Flynn that apparently the objective of the 1934 provision was to get judges out of politics. If we assume that hasn't worked, and what we're looking at now is contested retention elections in which the judges are going to be politically involved in major campaigns, I'm really wondering whether retention elections are better than contested elections or whether we couldn't run a campaign with greater control over the issues if we actually had two candidates running for the office. And I'm curious, Leo, whether you got into what kind of campaigns were actually conducted when we had contested elections. Did they turn into referendums on the

popularity of particular decisions, or were they political contests in which each party put up a candidate and they went at it pretty much along party lines?

PROFESSOR FLYNN: Well, I must confess my ignorance on this, but I can tell you I'll attempt to find out. It's certainly an intriguing question.

The only thing I know about is looking at the 19th and early 20th century supreme court elections. Down about the turn of the century, there were strong partisan ties in the contested elections of the state supreme court. I believe they became nonpartisan about the turn of the century. But they were actually partisan offices. And going back to the most famous of all animosities on the supreme court that made the Clark and everybody else a contest with mild, and that was between David Smith Perry and Stephen Field of In re Nagel fame. You know it went all the way back to their joint service on the state supreme court. And that was two men from different parties and two perspectives.

MR. LOWENSTEIN: Let me make an observation intended to be somewhat provocative in response to some of the things, particularly that Professor Levi and Senator Keene have said today and also in the thought that surely some of these ideas are going to carry over into the discussions tomorrow.

It seems to me that there are two places that cross each other in this whole debate. The simpler one is the one that Pat Brown alluded to when he said if it was Rehnquist, he'd be voting against him. Some of us like Rose Bird's ideology; some of us like Rehnquist's ideology. If that's the standard we want to apply, it's not too difficult. We just look and see what the ideology is and compare it with out own and we act accordingly.

The other place is this notion that the judge should follow the law, the judge should be independent, not be responsive to the public opinion polls, but follow the law. Now, we're here in 1985. Around the time that Professor Flynn is talking about, there was something known as legal realism. The legal realist said that it really doesn't make any sense to talk about judges following the law because there's no law there. The question that there's no text, there's no history, there's nothing that determines the answer to these difficult questions. There's a lot of different views about how these questions should be resolved. If they're important enough, those views come down to being different political views. Now that doesn't mean that there's no such thing as craftsmanship; it doesn't mean there's no such thing as integrity. But it does mean if you accept that view, that it's some illusory to say that a judge should simply follow the law.

Now, the question I'd like to put to you, gentlemen, and as I said, I assume that this will go over into tomorrow, do you think the legal realists are wrong? Is Ed Meese right? Is Warren Berger right? That all you have to do is follow the text, or all you have to do is to figure out what the framers intended? Of, if the legal realists are right, then how do you take into account and mix it up with ideas like judicial independence and so on?

PROFESSOR FLYNN: Then you pose for use the most extreme position. (Laughter) One doesn't have to have either Ed Meese or Carl Llewellyn. In fact from a political scientist's point of view, we've always been intrigued with those polar models. We have a lot empirical evidence that in fact judges don't behave as the legal realists. For a while in my profession there were a number of scholars who used to argue, using mathematics, that you

can prove that voting for certiorari, the special lists, and things of those kind, are pure exercises of ideological predilection. The judges, how they voted was their political philosophies of the breakfast food they are, not the kinds of the law.

We now have, I think, almost overwhelming persuasive evidence that in fact judges are bound by something more than their philosophy, how they want the case to come out politically, or even their breakfast food. So a case can be made clearly the other way or empirical grounds.

SENATOR KEENE: Well, I would only add that because you don't have anything so perfectly tangible called the law that is applicable in all situations with a clear fit, doesn't mean you don't have something sufficiently tangible affecting judicial behavior that the judges feel constrained to be consistent. Inasmuch as their behavior is therefore to some extent predictable, you do have something that binds them. It may be something as elusive as magnetism. But in my judgement it is there.

PROFESSOR FLYNN: Or duty. That the judge's own view of the obligations of the judicial process. I find a lot of evidence to believe that's quite real and compelling.

PROFESSOR LEVI: Of course, Professor Lowenstein, you're aware that the question you really were asking is best being asked in Cambridge these days, at the Harvard Law School where you have part of that Law School espousing what they call "critical legal studies." The assumption of critical legal studies is that law as such is a system of repression developed by those who have to suppress those who have not. And of course, if you take that as the takeoff point, there isn't an awful lot to talk about thereafter, which is what is making our colleagues at Harvard very uncomfortable.

There is another thing, however, and one of these days I hope I have time to do something about it. There is a curious fact about judges who are appointed to the United States Supreme Court. Charles Evans Hughes was a good example. At the time that Justice Hughes was appointed, the second time, there was all kinds of opposition on the basis of what his practice was, who he was representing, the amount of money that he had made in New York, etc., etc. But once Charles Evans Hughes got on the Court, he was behaving the way Charles Evans Hughes would behave at the time that he was thirty.

One of the interesting things that happens with judicial appointments is that if you really want to see, and I think this is particularly true when you're talking about people in positions as important as the California Supreme Court and the United States Supreme Court, that the best predictor in some ways about the way your justice is going to be is what was he as he emerged as a maturing adult. In other words, it's an awfully, awfully difficult test. It's the one that in one sense that Governor Brown talked about before he began to talk about Justice Rehnquist; and that is, when you appoint a man to a position of this kind, the last and the overwhelming criteria is what kinds of human being is he, what kind of character, understanding and compassion does he have.

MR. LOWENSTEIN: Other than to assure Professor Levi that I do not want to be identified with the critical legal studies, I will avoid the temptation to abuse my prerogative again and have the last word. I intended that statement to be provocative and I think that it is an important theme that should be part of the discussions tomorrow and probably over the next year.

I thank the panelists, those who are still present and those who are absent. (Applause)

PROFESSOR LARRY BERG: I'd like to make on announcement. We've had a bit of trouble in scheduling the United States Senate. Over the years we've had a number of Senators here from Washington, and toward the end of the time of the session, which is where they now, we find that they frequently don't come. This is also the case with an ex-Senator Birch Bayh, who will not be our dinner speaker tonight. However, I am pleased that Fred Graham, the CBS News Correspondent, winner of numerous awards and one of the leading legal reporters in the country, will be our speaker. We hope that you will join us at the Bonaventure Hotel.

I would also like to express my appreciation to Senator Lockyer and to Senator Roberti, Senator Keene and the other members of the California Senate and their staff with whom we've been working for really providing the impetus to get this conference going. We are delighted and I think this is the kind of forum with which the Institute and the University are proud to be associated. Thank you very much, Senators.

SESSION TWO

SESSION TWO

Judicial Elections: Fundamental Issues

PROFESSOR JOHN R. SCHMIDHAUSER: Good morning. I am John Schmidhauser of the Department of Political Science here at the University of Southern California. As the chair of this morning's panel, it is my distinct pleasure to welcome all of you and to introduce our distinguished panel. Our papers have been written by Professors Gerald F. Uelman and Gideon Kanner, both of Loyola Law School. Our discussants include Michael Bradury the former president of the California District Attorneys Association and currently the District Attorney of Ventura County; the Honorable Dorothy Nelson of the United States Court of Appeals and, I might add, a distinguished former member of the USC law faculty; and Professor Carl Pinkele of the Department of Political Science at Ohio Wesleyan University.

We will start with Professor Uelmen's paper. Professor Uelmen.

PROFESSOR GERALD F. UELMEN: It's especially appropriate that this conference was convened in memory of Chief Justice Donald Wright. Chief Justice Wright provides a wonderful example of the ability of California voters to separate their strong feelings on an issue like the death penalty from their evaluation of whether a judge should be retained. After he wrote the opinion striking down the death penalty as cruel and unusual punishment in 1972, the voters overruled his decision within 6 months, amending the constitution by a margin of 56%. Yet two years later they retained Chief Justice Wright for a 12 year term by a margin of 70%. Apparently, they didn't agree with Governor Reagan's assessment of Donald Wright as his "biggest mistake." Today, we are once again hearing suggestions that we should vent our frus-

tration about implementation of the death penalty by removing Chief Justice Wright's successor. Whether that's an appropriate suggestion largely depends upon what model or standard we utilize to evaluate judges in retention elections. This afternoon I'd like to examine three competing models, and analyse the support for each in terms of history, in terms of judicial ethics, and finally, in terms of practical politics.

But let me start by at least outlining for you what the three models are. The first model I would describe as the political model. After having read Gideon's paper, I will give it a new title so we will call it the "hot kitchen model." Under this model, what we are doing in a retention election is simply deciding whether we like the decisions judges make. We evaluate judges just like legislators and governors. We decide whether we like the decisions they've made. And if we don't like them, we throw them out of office. It's a very result oriented model in terms of what is relevant.

The second model I would offer is the "impeachment model." Now some of you may have read the paper published by Professor Michael Moore, USC, in the L.A. Times several months ago, in which he suggested either a political model or an impeachment model. But his definition of the impeachment model was somewhat broader than the definition I would offer. I think the impeachment model really means that we limit ourselves to the question of whether the judge acted improperly in office. The type of actions that could result in impeachment. And that means a misfeasance, doing something that the judge shouldn't do; or nonfeasance, not doing something the judge should do. but very seldom is malfeasance grounds for impeachment. Doing what a judge should do, but doing it slowly or sloppily or stupidly ordinarily does not qualify one for impeachment.

Professor Moore expands this model somewhat to say that his impeachment model would include a judge who acts outside the proper role of a judge by "taking the law in her own hands." And I have a little bit of trouble with that because as I read what the Professor is saying, he's suggesting that if a judge, for example, refuses to follow precedent and says, "I think that precedent is wrong and I'm going to continue to dissent," that judge would be "taking the law into her own hands. And if we applied that standard, then the chief candidates for impeachment would certainly have to include Justice Holmes, Justice Brandeis, Justice Brennan, Justice Marshall, and now, as of Monday of this week, Justice Malcolm Lucas.

I don't think that would be grounds for impeachment. I don't even think that is acting outside the proper role of the judge. But I think it does raise an issue that can be considered in terms of a third alternative model.

I would suggest as an alternative to the political model and the impeachment model a simple competency model in which the standard we apply in evaluating judges in retention elections is simply whether they conform to accepted standards of judicial conduct. And I think accepted standards are available in the canons of judicial ethics that were drafted by an American Bar Association committee headed by Chief Justice Roger Traynor fifteen years ago. Those standards have, for the most part, been adopted in California as the California Code of Judicial Conduct.

Now, let me look at the competing claims of these three models. First of all, in terms of history. Now, I'm not going to go over the same ground that Leo Flynn went over yesterday. He went over it very thoroughly. But there is one very troubling argument for the political model in the silence of the California Constitution. Clearly the Constitution says that judges shall

stand for retention elections and the only question to be presented to the voters is, shall justice so-and-so be elected to a twelve-year term on the California Supreme Court?

On the other hand, the Constitution also contains a provision for impeachment of justices; and in that respect the standard is defined. It says a judge may be removed by impeachment for misconduct in office and essentially it applies what I refer to as the impeachment model. We also have within our Constitution a body known as the Commission on Judicial Performance which is empowered to recommend the removal of judges. And again, a standard is set forth in that provision which is roughly equivalent to what I have described as the competency model.

Now, in light of that constitutional structure, wouldn't it be a redundancy to have retention elections and apply any standard other than a political model? I think to answer that question, we have to look to the history; we have to look at the context and the intent with which the retention election was put in place. Now, in suggesting we look to the historical intent of the framers, I am not advocating the position of Ed Meese, that we look no further. I simply suggest that this is a good place in start, and it's helpful to look simply beyond the mere silence of the Constitution to see what was intended. The silence certainly is not an explicit constitutional standard.

Now, then we go back to 1934, what's especially interesting to me about the political activity that led to this initiative appearing on the ballot was the committee that was put together to promote this venture. It was really what you'd call a good government committee. But it brought together some very interesting elements of California politics. It brought in the Chamber of Commerce. It brought in the League of Women Voters. The Chief of Police of San Francisco and Los Angeles were on the

committee. And a very politically ambitious young district attorney from Alameda County was on the committee -- Earl Warren. And that struck me as curious because I knew Earl Warren had always been an advocate of life tenure for judges. And I thought what was he doing on this committee that put together this proposal for twelve-year terms and retention elections. And it turns out that Earl Warren was consistent. He had actually urged the committee to adopt a program of life tenure for judges. What dissuaded the Committee from taking that position was the fear that they would then "blanket in" all of the judges then sitting in California for life tenure. And that prospect frightened them a little bit, because the level of quality of the judiciary in California in 1934 was nothing like it is today. And again, that requires that we look at the context of the times in which this proposal was made. And that context is really at startling one. We were rocked in California by series of astounding judicial scandals, starting in 1929 when the California State Senate actually sat as a court and tried the impeachment of Judge Carlos Hardy, a Los Angeles Superior Court judge who was accused of using his influence to affect the investigation of Aimee Semple McPherson's disappearance during the twenties.

Shortly thereafter, Los Angeles was shocked by the scandal of numerous superior court judges being accused of rewarding their political campaign managers by appointing them as receivers in bankruptcy or receivership cases. That actually led to an unprecedented effort by the L.A. County Bar to bring about the recall of three superior court judges which succeeded.

And then a year later, the United States Senate ends up spending three months sitting in trial of the impeachment of Judge Harold C. Louderback, a federal district judge from San Francisco, who was accused of continuing the same practice he had engaged in as a superior court Judge. He came from the Superior

Court in San Francisco where, incidentally he presided over the trial of Fatty Arbuckle during the twenties. He was then appointed to the federal bench and just kept doing the same thing. He was rewarding his political henchmen with receivership appointments. And after a three month trial by the United State Senate, he was acquitted by a vote of 45 guilty to 37 not guilty.

Now, it's in that context that this ballot proposal appears in 1934. And it's clear, I think, from that context that at that time, the remedy of impeachment and recall was seen as a very cumbersome, inefficient and ineffective way to remove judges who were incompetent. So I don't think that there's really any redundancy in terms of putting in the retention election despite the existence of impeachment and recall at that time. Because the retention election was really perceived by its drafters as a kind of a safety valve, a way to get rid of the judge who isn't competent without having to go through all of the rigamarole of an impeachment.

Now, when you look at the arguments that were presented pro and con for the ballot measures, not just Proposition 3, but Proposition 14 as well, because they both essentially suggested the same pattern of twelve-years terms with retention elections, it's quite clear to me that what they thought they were proposing was some sort of safety valve that would use the competency standard. They repeatedly referred to the need to get judges out of politics, suggesting that the political standard was not really what they had in mind.

Let me quote from a couple of those arguments that went back and forth that were published at the time of this debate in 1934. One of the leading proponents of both Proposition 3 and Proposition 14 argued as follows:

> ...long experience has shown that life tenure is occasionally conducive to deterioration in some form. Can we find a remedy for this? The proposed periodical submission of the incumbent to a limited form of popular election is designed to correct this imperfection and it is indeed an ingenious adaptation of the life tenure system to a reasonable and almost entirely nonpolitical control.
>
> ...(This) is a practical method of removing the bench from politics. It combines the best features of the federal appointive system and of the elective system and eliminates the undesirable elements of both. It will enable the people ... to make the careful selection of judges ... It places a wise and very necessary check upon the appointing power. It will effectively control judicial arrogance and laziness which occasionally go with life tenure by periodical submission of the incumbent's record to the people. It will enable the judge to devote his entire time and energies to judicial work free from the fear of the political consequence of his decisions.

Now that suggests to me that what they really had in mind was a competency model. And even two years later, after Proposition 3 was enacted and they were still seeking to apply the same system of retention elections to trial court judges, both the opponents and the proponents of that measure assumed that what they had accomplished in 1934 was to give roughly the equivalent to life tenure to judges in California. The 1934 initiative two years later was criticized as a hollow mockery and a mendacious pretense because the incumbent simply runs against his own shadow. And at the same time, the measure was defended for virtually the same reasons because it does give the judge tenure during good behavior. This has always been deemed by the great weight of authority to be the chief safeguard to a politically independent bench.

So these are the arguments being made in the context of the times, and I think they strongly suggest that this measure was indeed perceived as simply a safety valve in which incompetent judges could be removed.

The problem which immediately presented itself in California, however, was that this safety valve was only available every twelve years. What if the incompetence of a judge became apparent when he still had six or eight or ten years to go in terms of the term that he or she was elected to? And that problem was quickly presented in another judicial scandal when a second district court of appeal judge in Los Angeles by the name of Gavin Craig was hauled across the street and convicted in federal court of soliciting a bribe to fix a case in federal court. And the outcome of that proceeding was he was actually convicted, but he refused to step down from the bench, and judicial proceedings had to be initiated to try to remove him. But there was no constitutional provision for removal short of impeachment or recall. So what happened in 1938 is the Constitution was amended to allow the supreme court to remove a judge who has been convicted of moral turpitude. And it wasn't really until 25 years later that we succeeded in broadening that standard to include removal of a judge for incompetence, inability to perform the duties of his office. When that amendment came in 1960, the suggestion could be made, and it was made -- in fact, it was made by a very perceptive young law professor by the name of Dorothy Nelson -- that with the enactment in 1960 of a provision for the Commission on Judicial Performance: "...a vote of the electorate is no longer needed to provide a check on judicial appointments... With an effective and practical means to remove an incompetent or corrupt judge, an ideal system of appointment may be considered that need not necessarily involve 'a vote by the people'."

But the suggestion has up until now really gone nowhere. There's a current proposal before the Legislature, SCA 23, authored by Senator Lockyer that would eliminate the retention election and allow judges life tenure after the appointment process is completed. But the appointment process would include not

only review by the Commission on Judicial Appointments, but confirmation by the Senate and then a vote of the people. But the vote of the people in that context would be a prospective vote in terms of whether the judge has the qualifications and would eliminate the danger that judges would have to stand for election based on the results of the cases that they have decided.

Now that leads me to the second perspective I wanted to offer with respect to these three competing models and that is the perspective of judicial ethics. I think the question is presented for us of whether judges can conduct the kind of campaign which the political model demands. The canons of judicial ethics require that whatever model their opposition might use against them, judges are stuck. They are essentially limited to responding on the issues of competency or misconduct in office. And I think that poses not just the problem of fairness to judges in terms of what kind of campaign they can conduct, but it also imposes a serious question with respect to how judges actually perform the duty of judging. Are we creating the situation in which we inject considerations into the process of actually deciding cases that we don't want to be there.

What I've done is look at the canons of judicials ethics and identify four particular constraints that we impose on judges that I think present a problem in this context. The first is the requirement that a judge be unswayed by partisan interests, public clamor, or fear of criticism. I think that requirement that we impose on judges is the quintessential difference between a judge and other politicians. And that is why criticism of judges for flouting the public will really betray a basic misapprehension of what the role of a judge is. In effect, we tell judges in the canons of ethics you must flout the public will, you cannot be swayed by what the public wants in terms of how you decide a case. And then if we subject judges to a political contest, to

apply a political model, we say to them, "You may be thrown out of office because the decisions you rendered are not popular with the public will." So we set the judges in kind of a double bind.

The second judicial constraint that I find of particular relevance is the requirement that a judge must abstain from public comment about a pending or impending proceeding in any court. Of course, a legislator running for office can make promises about what he or she will do. If they're elected, they can offer explanations of what they've done in the past. But a judge really can't do either, at least in terms of the decisions they have rendered as a judge because the judge cannot comment on a pending proceeding. The judges opponents are free to take pot shots at their decisions and mistake their holdings, but the judges must remain silent or respond only with banal generalities about their decisions.

I found a couple good examples of this problem in a mailer that recently went out to millions of California homes from the Californians to Defeat Rose Bird. What this mailer suggests is that people engage in a citizens' review of death penalty cases in which the holdings of three death penalty cases are presented and then the citizens are asked, well, do you agree with the Rose Bird court in this decision? And if you look at how those decisions are characterized -- let me give you a couple examples: "People v. Anderson. The facts: Anderson broke into the house of an 81-year-old women at midnight to burglarize it. When he entered the woman's bedroom, she sat up in bed and Anderson shot her head at point blank range. Anderson claims that he did not intend to kill the elderly woman, but only shot at her because she threatened him. Anderson was convicted of murder and sentenced to death. Ruling: Death penalty reversed. Reason: The Court rules that Anderson's intent to kill had not been proven. They believed Anderson's story even though the jury did not."

Now, when I read that, I thought, my God, if they actually rendered a decision like that -- I don't agree with them. I think the Rose Bird court was wrong. So I went to 38 Cal 3d and pulled out People v. Anderson to see if that is actually what the court held. I discovered that indeed, it was not. They made no finding whatsoever as to what Anderson's intent was. They simply held that the jury had not been properly instructed that they had to find intent to kill before they could return the verdict of death. Very different than the way the holding is characterized here.

Another example: People v. Easley. Easily is a paid assassin hired to kill Mr. Youngham in a corporate power struggle. The jury found Easley stabbed Youngham and his wife to death with an ice pick and sentenced him to death. Ruling: Death penalty reversed. Reason: The jury was told to, quote, "consider" various aggravating and mitigating circumstances in deciding what punishment to choose. They should have been told to, quote, "weigh" the aggravating and mitigating factors. And when I read that, I was astounded. You mean the California Supreme Court actually reversed a death penalty because the judge used the word "consider" instead of the word "weigh" in the jury instructions. That's an astounding result. I wouldn't agree with that. So I went to People v. Easley and found that's not what the court held at all. The issue in Easley was whether the 1978 Briggs Initiative should be applied or the 1977 death penalty law. Indeed, one uses the word "weigh" and one uses the word "consider" but that had no effect on the court's decision. The court decided that the trial judge had erroneously applied the 1978 law to a murder that was committed three weeks before the 1978 law was even adopted. So the problem was that it was being applied ex post facto.

Now obviously, the citizens of California aren't going to go to 38 Cal 3d and look at what these cases actually held. What do the judges do in that situation? Should they hold a press conference and say, well, this is what we really meant in Anderson or this is what we really held in Easley. Of course, they can't do that because both of those cases are still pending in the courts as indeed every death penalty case is still pending in the courts. So the judges are really left in a position of wearing a muzzle while their opponents are free to characterize and mischaracterize their holdings.

The third ethical constraint that I think has relevancy is that a judge cannot convey or permit others to convey the impression that they are in a special position to influence them. And this calls to mind the political model for most elections in California of appealing to particular constituencies, the particular special interest groups, because they are a dependable source of campaign funds. Judges can't do that. Yet we see in the political model judges subjected to the criticism that their decisions are bad for a political group, they're bad for business, or they're bad for crime victims. Judges can't respond to that kind of criticism by saying, "Our decisions are good for this group or good for that group," because that's not how we want judges to render decisions, or to characterize the decisions.

The final constraint, the judge must avoid the appearance of impropriety, I think presents a serious problem in terms of campaign financing for judges. I'm not going to have time to get into that, and I know our panel this afternoon is going to address that in much greater detail.

But I think, ultimately, when we look at the constraints under which judges must operate, imposed by the California Code

of Judicial Conduct, we see two consequences of using the political model in retention elections. One, although I have very little use for aviary analogies in this campaign, it turns judges in sitting ducks. They really are sitting ducks in terms of the kind of campaign that they can conduct. But our even greater concern, I think is that it has to affect how they perform their judicial function. Now, I know Gideon is going to say I'm an alarmist about this, that we can rely on the moral fiber of judges. But I think the truth is that judges are human and human beings are more responsive to perceived consequences than they are to pious exhortations. And our sordid history of judicial scandals of fifty years ago suggests that it is not an unrealistic possibility that using the political model is going to create an aura in which judges are going to take into consideration the political consequences of their decisions when they render them. And that I think is the greatest risk we face.

Now, the question we're debating is not really a moot question. It was debated between Thomas Jefferson and John Marshall. Thomas Jefferson thought that we should subject judges to the popular will of the people via the impeachment process. And that same debate, more recently was rendered as Fred Graham reminded us, with the billboards "Impeach Earl Warren" reflecting the unpopularity of one of the most famous decisions rendered by the Warren court, Brown v. Board of Education. We create an aura by means of the political process, that suggests to people that the way to deal with decisions that we don't like is to remove the judges. Then, in effect, what we're suggesting is court packing. What we're suggesting is those decisions can be changed by simply putting in a new crop of judges to decide cases the other way. There is an alternative and that alternative is frequently used in California. Many of the decisions we don't like or didn't like from the California Supreme Court have been changed by the

initiative process. I've already offered you the example of the astounding speed with which People v. Anderson was overruled. In the adoption of Proposition 8, we reversed over fifty decisions of the California Supreme Court; and the court subsequently upheld that initiative and, in effect, kissed off fifty of its own precedents. That's how we change decisions. That's how we change results that we don't like. When we start suggesting that the way to change results is to change judges, then we are indeed inviting a different form of justice in California. Thank you. (Applause)

PROFESSOR SCHMIDHAUSER: I don't know whether Loyola Law School has the equivalent of Harvard's division over critical issues in law, but I'm trying to avoid a minor division over equal time. Please go ahead Professor Kanner.

PROFESSOR GIDEON KANNER: Contrary to my nature I'll try to be brief. First of all, I absolutely must utter what is expected of a speaker in these circumstances and the other to tell you how pleased I am to be here, but not because of this seminar. Rather, I am experiencing a wave of nostalgia. It so happens that approximately a quarter of a century ago, I transferred from another law school to the University of Southern California law School. One of my first professors was indeed Dorothy Nelson. So this is really a wonderful kind of a homecoming and an honor for me to be sharing the lectern with her now, as a distinguished federal judge and former dean of a great law school.

Now, having said that, I must be mindful that Dorothy is a federal judge, and it seems to me that suggestions of antitrust are being leveled here against Loyola Law School, so I have to offer some disclaimers. We do not have a monopoly on these things, although Gerry and I have crossed swords on this issue in public before. What you're really seeing here is the understudy

from Peoria whose great break came when the star broke a leg. Remember that line from show biz? It seems that Professor Preble Stolz, a fine gentlemen, I understand, and a member of the faculty of Boalt is recovering from surgery and was unable to attend. So, as the black sheep of the family, I have been asked here as his understudy, so please bear with me. That also accounts for the sudden appearance of Loyola as the dominant force here.

I am indebted to Gerry for one thing. As I said, we've discussed these matters before. This time, I see he has reformed, so it won't be necessary for me to address the problem of disclaiming or rejecting the notion that this debate should be compared with the antics and excesses of a variety of clowns who are taking advantage of an emerging problem in society for political purposes. Let there be no mistake where I stand. There is an effort by the political right to unseat some California judges. Having said that, I also must recognize, and I do, that the political right is not a group of magicians. They didn't create this problem. They didn't manufacture it. They are simply exploiting it. They're exploiting some perceptions and possibly misperceptions that the public seems to be dealing with.

But, as I say in my paper, whether we want to be here or not, we are here. And so we have to address what seems to me as a remarkable notion. It is novel, it is alien to American democracy; namely, that there is some "right" away of thinking before exercising the franchise by the people. There are some disturbing consequences that flow from that notion, notwithstanding that everybody agrees that the idea is simply not enforceable, that we can't impose our notions of standards of governance on the people. I think it's even disturbing that this idea is being seriously advanced. People go to the polls, and they have the right, the power, and the ability to vote for anyone or not to vote for anyone for any reason or for no reason. And it seems to me that

if we start moving in the direction of questioning that concept, we are raising some very, very difficult problems that need not be raised.

So, with that out of the way, let me move to the crux of my remarks. I began my paper, which you have, with that idea which I want to explore. Besides I assume some of you have not read the paper, which is after all a familiar experience of professors when the class doesn't read their assignment.

I juxtaposed the way we conduct elections for ordinary politicians with the way we do it for judges. Of course, we know, as you folks of the press know very well, political campaigns are just awful. They're dirty, scurrilous, full of character assassination, mud-slinging, and so on. And the courts have nevertheless in effect said, "Well that's the way it goes folks. That's the First Amendment. That's the cost of freedom." I agree that we need to be considerably more fastidious when it comes to voting for judges. But as I pass over that point, why is it that we permit such depravity to permeate the electoral process? Why is it? Why do we take otherwise fine people who would provide fine leadership in a democratic society and subject them to these scurrilous tactics, thereby discouraging them from seeking public office. Well, the answer is clear, of course. Because it is a free society. Because we have freedom of speech. Because free people who contest who is to govern them, who is to lead them into the future, certainly should have the broadest possible latitude to elect their leadership. Well, okay, I understand that part, but what if the judges start marching in the front rank of that leadership taking us into the future? To what extent is it now legitimate to turn around and to say, well, when it comes to judges, you mustn't do any of that even though -- this is the critical phrase -- even though the judges may behave in a way similar to the politicians in terms of policymaking,

societal reform, and so on. Now that's a tough question, and I sure wouldn't want to debate that with our friendly cynic. But let's at least recognize that he does have that point.

Well, I've also listened to Gerry here and elsewhere. I've read his paper, and I find some amusement in the notion that the defenders of the California judiciary who by and large are politically left of center, and what we tend to describe as liberals, find themselves marching right alongside good old Ed Meese in arguing that in applying a provision of the State Constitution, we must apply not the language of that Constitution, nor indeed the popular perception of it today, but rather the original intent of its framers of a half a century ago. I find that amusing. Beyond that there's no need to dwell on it, because the Constitution simply doesn't say any of the things that its framers supposedly had in mind. I would think that Gerry quite properly focuses on their motivation, but their motivation, their hopes that they would achieve certain things when adopting that constitutional position are not necessarily what we lawyers and judges would call a legislative intent that must be applied in the enforcement of that constitutional provision.

I seem to hear Gerry saying something that was said by Professor Higgins in My Fair Lady. "The French," he said, "actually don't care what they say as long as they pronounce it correctly." And it seems to me that Gerry is saying that we as a society should not care what the judges do as long as they do it competently and diligently. I demur. I think that before we start talking about the model of judging judges in the context of this election, we have to do a little bit of talking about some other models. And I want to talk about the model of a judge. And I see three models of a judge. There is the judge as umpire. There is the judge as legislator. And there is the judge as social reformer or social engineer. And I, with the utmost

respect, suggest that the role of the judge will also determine which model of judging him or her we can legitimately apply. And so to the extent that judges act as umpires, they deserve our total and unqualified defense. Let me see, I'm not a court reporter and I hope I wrote it down correctly; Gerry said that we tell the judges "you must throw out the public will." No, that's not what we tell them. What we tell them is, you must apply the law even if it flouts the public will. And I suggest that there is a world of difference between those two ideas.

And so, to the extent the courts apply the constitution, and to the extent they apply statutes, and to the extent they apply precedents -- and by that of course I mean precedents as understood in common law, meaning that the process incorporates changes, modifications, the breaking of old precedents and the making of new ones -- fine, we have no problems.

But what are we to say when we are confronting a judge who says: I'm out to reform society? What are we to say when we are confronting a court which simply rewrites constitutional provision? I have a great example. It is an ancient one. It is not passionate. It doesn't stir any popular controversies. The 11th amendment of the United States Constitution. It very, very plainly says that a citizen of a state may not sue another state in the federal courts. The clarity is total. And yet the United States Supreme Court has construed that to mean that a citizen of a state cannot sue his own state in the federal courts either. Was that court applying or modifying the 11th Amendment? This is a rather major policy decision that affects the recourse of citizenry to the courts, even if it's not the sort of thing that inspires passion. By the way, the U.S. Supreme Court may be changing its position. I understand the last decision on that one was 5 to 4, adhering to the rule which I just stated. So maybe they will start reading the 11th Amendment the way it is written.

What if the court decides not to enforce some constitutional provision, such as the 9th or 10th Amendments? Or, dare I say it, in California, if our supreme court chooses not to enforce the constitutional provisions which protect property rights? What if the court invents entirely new constitutional provisions which aren't there? Such as the rights of privacy, contraception or abortion. Again, I'm not commenting now on the substantive soundness of all that. But what I am saying is that when we're dealing with judges like that, then suddenly appearing social, ideological giants who take it upon themselves to decide basic ideas of right and wrong, and decide what ought to be in the constitution or the laws rather than what is, it seems to me that their decisions may be good for society or they may be bad for society. But surely that society is legitimately entitled to make a judgement whether the judicial handiwork is good or bad. And to the extent a segment of that society, like California, has enshrined in its own Constitution a provision for election of judges and a provision for a referendum, if you will, or a veto power by the public, then it seems to me that our respect for the Constitution requires us to take that provision seriously as well.

So, my point is really quite simple. The courts, it seems to me, will have to withstand the sometimes harsh judgements of what they and the First Amendment cases like to call the marketplace of ideas. It is beginning to look to me like our courts will have to withstand that market scrutiny, because people can no more be compelled to buy judicial governance they don't approve of, than they can be compelled to buy new Coca Cola. It's that simple.

Now, I have said some things here that you may find partisan, and specifically I have referred to the California Supreme Court -- its failure or rather refusal to enforce constitutional provi-

sions insofar as they effect property rights. Those of you who know me, know that that's my field and you may dismiss my comments as those of a sore loser; and I hasten to point out that I am a sore loser because I think all parts of the Constitution ought to be respected.

But the reason I chose that subject to tell you about, is because by an interesting coincidence a new book just hit my desk. The book is published by the Lincoln Institute of Land Policy. Its authors are Richard F. Babcock and Charles Siemon. I don't know if there are any land use attorneys in the audience. Yes, there is one. Would you go with me, Rich, that Dick Babcock is the dean of the nation's land use bar? His credentials, believe me, are sterling. Beyond that, he is a frequent defender of the substantive rulings of the California Supreme Court, both on the lectern and in writing.

Let me read you a few passages from his new book, The Zoning Game Revisited: "Anyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests under sound governmental practices." Page 251. Contrasting moratorium legislation in San Antonio, Texas and in California: "But there's a difference. That was Texas and this is a story that took place in California. In the former jurisdiction, the courts would have thrown it out with no second thought. In California the courts have elevated governmental arrogance to a fine art." Page 253. "What can one say about the California courts other than that one has to be a madman to challenge a governmental regulation in that bizarre jurisdiction." Page 257. And finally, "California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community

when it would cost a lot less and save much time if he simply slit his throat." Page 293. (Laughter).

It seems to me, without passing judgement on Mr. Babcock's judgement, that when a practitioner of the first rank with a true national reputation takes to the printed page with harshness like that, maybe we ought to stop and think. Is that a court which is just applying the law? Is that really the umpire calling balls and strikes? Well, we have to think about that.

And finally, of course, to the extent that we admire so much the federal model, let me remind you all the price that we pay for it. I mean, the stories about the wacko federal judges are legendary; present company excepted. (Laughter). I hasten to point out that the example which I am about to use took place right here in Los Angeles, when I was an apprentice appellate lawyer and Dorothy was an apprentice dean. I want to read you a passage from a transcript of proceedings before the United States District Court here in Los Angeles, Monday, February 28, 1966. You will recognize the name of the sore loser at once.

> The Court: (skipping some preliminary remarks) At the present time I know of no law that gives him any remedy. I don't think this statute that you are relying on here---as a matter of fact, this statute has already been stretched beyond all---stretched beyond all sanity.
>
> Mr. Kanner: Yes, Your Honor.
>
> The Court: Anyone who reads that who takes the time to read that knows it was passed to protect because of race or color. It was passed during Reconstruction times. It wasn't passed to cover these things at all. But the Court has been broadening and rewriting all law, and I don't think it is up to me.
>
> Mr. Kanner: Your Honor, so was the 14th Amendment.

The Court: As a matter of fact the 14th Amendment was never approved. Did you know that? Never approved.

Mr. Kanner: May I make one statement?

The Court: The Secretary of State, I guess it was, proscribed this proclamation. When it was in effect both two northern states, New Jersey as I remember and the other, Ohio, and one other state after first approving, withdrew their approval. They did not have the required number of votes to approve the 14th Amendment, so it never actually became effective as a matter of law. But we have a habit, I guess, of skipping over things. (Laughter).

Well I have a fine cigar here which I offer as a prize to anybody in the audience who can name the judge and who can tell me what happened when this transcript went up to the Ninth Circuit. Don't worry about it if you win and you don't smoke; I'll smoke it for you. (Laughter).

Well now, the interesting part about that is that we're dealing here with a wacko, right? Am I offending anybody by saying that when a federal judge says on the record that the 14th Amendment never became law as a matter of law he deserves the characterization? But, he lived and died, and went out with his boots on. In addition to his other charming characteristics, I understand he was also a racist and a bigot. He was also a very bright man. And we paid a price for having him on the bench. Well, let's think about it.

Fortunately, we have been most fortunate that no charges of such personal conduct have been lodged against any of our judiciary. And we do have a very good judiciary in California by and large. Possibly have a better judiciary than we deserve.

So I close on the last point in my paper. I think that the alarmists who defend the present judges standing for election really underestimate two things: (1) the quality and fiber of

the people who occupy the bench, and (2) the wisdom of the people. I do not believe for a second that the people are going to be tossing out judges in wholesale numbers anymore than they do so with other politicians. The second thing is I do not believe that the courts are going to turn to what is sometimes called Gallup Poll justice. I think that is a hyperbolic picture which has no foundation in reality.

And so, in conclusion, you have set out on a course of reforming society, of making the law. You have, to some extent, chosen to make public policy and equivalent legislation. In a free society you are, therefore, subject to public scrutiny and you are going to have to sell the wisdom of your governance to the public. I see no other way out. Thank you. (Applause).

PROFESSOR SCHMIDHAUSER: Now, I think it's very appropriate that I ask Judge Nelson to provide a judge's perspective.

JUDGE DOROTHY NELSON: You mean that wacko federal judge. (Laughter). Well, Gideon and Gerry, it's an honor to be on the same platform with you. And I wish that I had the 19 hours that I would like to have to respond to you. I think your papers are excellent. I think you've raised the issues.

I'd like to establish the fact that I was appointed for life, by President Carter, and I'm glad I'm a lifer. My husband was appointed to the state court by now President Reagan after having served as a deputy district attorney before he was an oil and gas lawyer and then went on the bench. So I have experienced both systems; and again, I repeat, I'm glad I'm a lifer. I can decide whether the Oakland Raiders shall be permitted to come down here, or settle Indian dispute rights in the State of Washington or wherever, without fear or reprisal.

I guess, as you might tell from Gerry citing to me in his paper, I probably fall down on the side of saying that the real issue is how we select judges in the first place, and that a lot more effort ought to be going into that issue than how we retain them. But if I had to make a selection, on the basis we do have an election in California and we have to deal with this, let me first say, that the judge Gideon talked about now would be subjected to a very strict procedure in our federal court. Complaints could be filed against that judge, be taken before our Judicial Counsel, and a special investigatory committee would be selected. And since my students, as a matter of fact, when I was at USC, wrote the bill that brought about the commission that was first the Commission on Judicial Qualifications now called the Commission on Judicial Performance, and are now working with Senator DeConcini, who proposed the same thing for the federal courts, I think federal judges and state judges should be held to account. The question is how they should be held to account.

I think with an appropriate initial selection, and that's a subject for another day, that judges should have life tenure and should be subject to answering to removal commissions. However, since we do elect, the questions now is, how do we decide how we should vote? I think one of the most important parts of our Constitution is the doctrine of separation of powers. And then indeed, when Gideon talks about judges should be held accountable if they act as legislators, I think that we have to understand how complex the issues are that come before judges. In the first place, if we had a provision of the Constitution or provision of a statute that we said clearly covers the case before a judge, I think that would be a very simplistic statement. As Gideon recalls, in our course on legislation, we said judges can act by not acting, in the sense that if an issue comes before a judge and the judge says it's not clearly covered by the Constitution,

it's not thoroughly covered by a statue, therefore, I'm not going to act, that judge has acted by not acting. In many cases, I'd say in all the difficult cases that come before a judge, there is uncertainty as to the meaning of these very plain words, in the words of some. Take the 11 Amendment, for instance, that you cannot sue another state. If you look to the legislative history of that 11th Amendment, about what was meant by it, you will find that there were legislators that said, of course, you can't sue your own state. So if the public looks at the plain words of the 11th Amendment without looking to the background of the 11th Amendment or do what Gerry has done in terms of deciding what the decision was in People v. Anderson, they can be misled. This leads me to the second problem that I have with election and how we should be judging the judges and how judges define themselves. If you say that judges should have to define themselves from a political perspective, that what they're saying is correct as opposed to whether or not they are competent, how do they go about that defense?

I think Gerry's point is very well taken, about the canons of judicial ethics. For instance, a given judge is said to be against capital punishment. Now without mentioning who that given judge is, and I'm not taking one side against another -- [as I say, my husband was appointed by Reagan, I was appointed by Carter; I hope that places me right in the middle] -- that given judge has publicly stated on numerous occasions that that judge would enforce a system of capital punishment that is appropriately applied equally to minorities and to all people in the system. Who defends the judge?

When my husband was first appointed to the bench and his election time came up, his bailiff brought in $750 from an attorney who had just appeared in his court. My husband said, "What is this?" He said, well, the attorney, you know, wants you to

put it in whatever trust fund you have for your election. Now, of course, he knows that you don't want to know who he is -- of course, his name was on the check -- but, hand it to whoever is in charge of your trust fund for your election and good luck, Judge. During the next three weeks, my husband had over $3,800 deposited with his bailiff by various law firms to go into his trust fund for his election. All, which I might add, was returned. But interestingly enough, he was told by the Registrar of Voters if he wanted his biography to be published, he had to pay $14,000 to have his biography put in the Registrar of Voters booklet that goes out to all the voters. This is a very serious problem when you're talking about an arm of government, the judiciary that is supposed to protect the rights of minorities. You say to them that they must defend themselves, they must raise the money, but they must remain impartial. I don't think there's any system that can be defended unless you say the state will pay for these judicial elections. But then if you say the state will pay for these judicial elections, how do you enforce that? And then what do you reply to the electorate when they say, why did you vote the way you did in 27 cases or 173 cases?

I have been asked numerous times by the League of Women Voters to come and tell then how to vote for various judges on the trial level and on the court of appeals level. I don't think there's a lawyer in this town who can advise you particularly when we have 27, 37, 47 names on the ballot at a given time, both trial and appellate judges. Because my reading of People v. Anderson, I'm sure is going to be different than Gideon's or Gerry's or anyone else at this table, as we sit down and analyze what each of these cases mean, how do we translate that to the general public? How do we communicate it to the general public in the electronic age, when how you come across in television may well determine whether or not you win or lose an election? Well,

if you can't stand the heat, get out of the kitchen is often the response.

But I shall never forget Roger Traynor, former Chief Justice of California. After he had been reelected, sustained in retention election, he met with the law students at the USC Law Center and said that he would never have accepted appointment to the supreme court had he known what he would be subjected to in terms of this kind of retention election. You may say, well, if he doesn't want this kind of public exposure, then he shouldn't be a supreme court judge. I would want a Roger Traynor or a Donald Wright to want to be on the bench of what is viewed as one of the most prestigious supreme courts in the nation.

I think I've probably touched on just two or three points here. I'd be happy now to turn to my colleagues, and perhaps we can engage in some discourse on some of these issues.

PROFESSOR SCHMIDHAUSER: If the two paper presenters will hold their peace briefly, I'll just go down the line in order to let all the commentators make their comments; then perhaps you will want to engage in an exchange; and then, hopefully, we will have time to permit questions or dissenting opinions from the audience itself. Carl Pinkele, Professor of Political Science at Ohio Wesleyan, is next.

PROFESSOR CARL PINKELE: Allow me initially to say that I am happy to be a part of this important symposium. It is an honor to be a participant along with the host of distinguished individuals the Institute of Practical Politics and Government at the University of Southern California and the California Senate Office of Research have assembled. Second, allow me to say that I am equally happy to be a political scientist and neither a practicing lawyer nor a judge.

In fact, after sitting and listening for two days I am taking increasing pride in my profession and in politics itself. In short, we political scientists may have our jargon and frequently enough are wrong; but in contrast to many who practice and especially to those who preach "THE LAW", political scientists generally pose no great danger to democracy. As is apparent, I am not one of legalism's priests who speaks in a mystical language code designed, I'm afraid to distract and conceal. I shall engage presently in law bashing, not the politics bashing which I have heard so much of during the symposium.

In that vein I'll start out by saying 3000 cheers times 3000 cheers for the political system and not too many for the legal system. Now, that statement is not necessarily an attack upon the legal system. It is designed to make right the record and set the legal system within the political system where it belongs. Indeed, my following commentary is an elaboration of this last point.

Allow me one small digression: this symposium takes place within the context of the November 1986 California judicial election, especially that surrounding Chief Justice Rose Bird. And, incidentally, if I could vote in California I would be a supporter of Ms. Bird. Being from Ohio, however, I don't have to worry directly about that particular judicial election. I have my own rather weird, although unexciting, state supreme court to be concerned with if I so choose. For the most part I in fact choose not be be very concerned with the comings and doings of the Ohio Supreme Court. The judges of my state's loftiest court are presently engaged in wondering which of the "brethren" have spied on which others. Many in Ohio apparently find some relief in this intramural bickering because so long as the justices are so engaged they will have to leave us citizens well enough alone.

My digression has a telling point to it I believe -- following the old saw that "if it ain't broke don't fix it" for the most part Ohioans can relax with the knowledge that their supreme court will not bother them too much. You folks in California, however, are convinced that your situation is different. Many Californians obviously are upset at the policy positions adopted by their state's highest tribunal and Chief Justice Bird in particular. The proper first question for both states' citizenry is: should citizens be equipped with an electoral remedy for what is perceived to be a judicial error? I believe that the answer is an unequivocal YES!

Yesterday, Governor Pat Brown mentioned that while he would grant Associate Justice Rehnquist was a brilliant attorney and legal mind that he would neither appoint nor vote to reappoint a person with Rehnquist's views to the supreme court. The governor's statement raised a large number of eyebrows in the audience because assuming the legitimacy of Brown's position then what is the difference between the stance he maintained and of those who oppose Chief Justice Rose Bird? There is no difference, save for matters of values, ideology, and partisanship. In other words one's political position is what counts; and I say that is good!

Democracy must rest upon the process capacity of the electorate to measure, either positively or negatively, the performance of those who make policy decisions for them. Frequently enough some of us fear the voters and are concerned they have or might well make a mistake. I'll be the first to grant you that "crap shoot" dimension is a bothersome nuisance and a nagging particularistic though not a theoretical dilemma for a democracy. However, we cannot take the franchise away from citizens out of fear; the fear of what happens once the voter is subtracted from the governing equation is far, far worse. The bottom line is that a democratic system should be made for the people not the people for democracy.

I'm puzzled by our judicial friends and protectors who argue there is something so crucial about the legal system and its guardians (judges, in particular) that others should be kept at arm's length. It cannot be the case that judicial decision making is unexplainable or impenetrable to interested citizens. It cannot be the case that judicial decisions, no matter how far reaching, carry with them more baggage than those made by other political actors. If we can vote about who will decide matters of war and peace, then why can we not participate in selecting judges?

The problem is not unwashed, stupid voters. The relevant problem concerning judicial elections, rather, is that elites like to mystify their activities so as to keep outsiders on the outside. The guardians of the law have been successful at manipulating within just such a symbolic game. When they are confronted, as they now are in California, with pressures to open up to and confront the voters their horror is unbounded and also humorous, if you enjoy sick humor. Rough and tumble, open, contested judicial elections blast holes in the mystical shroud covering judicial policy-making. I believe this blasting is wholesome, even when I end up on the side with the fewest votes.

I cannot tell you how unsympathetic I am to find out that judges who must stand for election worry about it. Good! Why should citizens care when their representatives must be accountable to them? Indeed, we should care when they (the representatives) are not fearful and are not accountable! In this fear of the voters on the part of judges I find a ray of hope for democracy. It is the same sort of optimism I generate whenever I remember that <u>all politicians, including judicial types,</u> become anxious, undergo stress, and perhaps are thereby molded into better representatives by being brought into focus through their constituents' looking glass.

I reject the notion that judicial independence means members of the judicial decision-making community are not directly responsible to the people. Judicial independence has more to do with the separation of judges and judicial decision-making from the whims and interests of other public policy makers than it does legitimizing their immunization from electoral monitoring. Like all other representatives of the people those in the judicial community must be called to the bar of public opinion for judgement. Why should they be any different from senators, mayors, presidents, or members of school boards?

I also reject entirely the notion, always lingering not too far from center stage, that judges are best measured by other members of the extended judicial community-- especially lawyers. We don't want other members of the United States Senate being the measuring rod for senators, or physicists being the primary constituency to assess "Star Wars." Indeed, if anything, I might be more inclined to not allow members of the legal profession from being involved in the election of judges because they are too closely associated with judges and the law to find a dispassionate, uninvolved point of view.

It is important to set the judicial community where it belongs in the context of representation schemes. There is no doubt that no one would be satisfied for long if judges and judicial decision-making were viewed as "delegates." Judges are not to measure the political winds and decide accordingly. Rather, the proper form of judicial representation is that of the "trustee". That is, judges are to make decisions as they best read the law, the facts, and all those things the legal guardians say they do when looking at a case. But having looked and acted over a period of time sitting judges must bring their record of behavior before the people for reaffirmation of the people's original choice. I simply find no substance to the arguments made by

those who would deprive the people of this absolutely necessary step in the performance of a democratic policy. And, if and to the extent that such a process makes judges uneasy or cautious because they must be accountable beyond their "brethren," then I say we are the better for it.

In closing, and I am sure many of you are waiting anxiously for this moment, I want to suggest that politics is about more than elections. Politics has to do with the representation of interests, including those in the body politic. Politics also has to do with the structuring of the kind of society which one wants. It is an activity of the noblest kind; although like other things of noble virtue politics can often have its darker, down side. The activities of the judicial decision making community are set firmly within all of these political contexts; so why should we treat them differently than our other public servants? Other than members of the judicial and legal elites, who else believes judicial decision makers are so special as to be exempted from the backbone of the democratic process -- getting elected and running for reelection?

PROFESSOR SCHMIDHAUSER: Mr. Bradbury.

MR. MICHAEL BRADBURY: Thank you. I, too, am honored to be here and to participate in this important discussion in memory of Chief Justice Wright. It brings back some memories for me, as well. In 1972, Chief Justice Wright ruined one of my best trial suits (laughter). As Leo Flynn will recall, we were at that time building a new courthouse in Ventura and were trying cases in trailers converted into temporary courtrooms. I was trying a death penalty case and it was raining cats and dogs. There were buckets to catch leaks all over the courtroom, including one balanced precariously on the rail of the jury box. At the first opportunity after the Chief Justice issued his opinion declaring

the death penalty unconstitutional, the trial judge announced it to the jury. A woman in the front row jumped up and said, "Thank God," and knocked over the bucket. I was soaked. Thereafter I wasn't quite as thrilled about the D.A.'s privilege of sitting next to the jury. (laughter)

In the interest of truth-in-advertising, I am not the president of the California District Attorneys Association. I am the immediate past president. So I am not speaking on behalf of that association. If I say anything worthy of remembering, to paraphrase Senator Sam Irwin, it is merely the ramblings of a simple country lawyer.

There are two principles which I believe we should take with us from these discussions. I'll open with one and close with the other. The first is that if we accomplish nothing else, hopefully, these discussions will clearly point out that we must understand and accept the fact that there is more than one legitimate point of view regarding the 1986 judicial elections. And just as the Court's supporters are not wild-eyed, out-of-touch liberals, or self-interest lawyers, neither, as Professor Phil Johnson of Boalt Hall says, are all those opposed to the Chief Justice linked to McCarthyism right-wing extremism, sexism, and so on.

I think that the debate over what the drafters intended in the '34 change is interesting, but relatively useless: Interesting because there is such a dearth of information that it is easy for us to shape that part of history according to our own philosophy; useless, because the voters could care less what we think of this or that "voting model."

Clearly the framers of the 1934 initiative were concerned about judicial independence. And perhaps we have not given enough attention to the fact that supreme and appellate court

justices in California have substantial independence from improper influences: First, they serve 12-year terms. Twelve years is a long time. Twice as long as any other elected officials' term in California. Those of us that hold elective office would love to serve 12-year terms. Second, there can be no reduction in salary during their term of office. So, a Governor or a Legislature could not, through threat of financial sanctions, force a justice from the bench or affect decisions. And third, of course, justices don't run in contested elections.

Historically, these provisions have provided virtually life tenure for California's justices. It's also clear, with due deference to Judge Nelson, that the framers were mindful of the potential dangers of giving too much independence to judges, i.e., "life tenure." The framers gave the people of California the unqualified right not to reelect a justice. They put a great deal of faith in the people, a subject to which too little attention has here been given. And, history bears out this confidence. No sitting justice has ever been removed from the Bench. So the framers, at least, believed that the people would not vote against justices for the wrong reasons.

It is "useless" to promote the impeachment model suggested by Professor Uelmen. The voters won't buy it for at least two reasons. First, from the time we enter grade school, we are imbued with the idea that we have not only a constitutional right, but a God-given right to vote our conscience when we enter the polling place. No one may look over our shoulder, especially the State Bar of California. Under the impeachment model, that is precisely what occurs. Lawyers try to tell the people how to vote.

The public has a marked distaste for lawyers. On the way here yesterday, I saw a bumper sticker that said, "Save California -- Outlaw the Lawyers" (laughter). And you've all heard the

cocktail circuit jokes such as: "Why are we not using lawyers instead of white rats for scientific experiments?" They have the same biological properties, there's more of them, and you don't get attached to them" (laughter). Certainly, it is amusing, but there's a point to the humor. And it is a very sharp point. The general public does not like lawyers -- with some justification. Since, by necessity, lawyers would be doing the majority of the "educating" under this model, it sounds its own death knell.

And second, the impeachment model won't work because of human nature. If you don't like a public official or they aren't doing what you believe they should, then the ballot box is the place where you express that concern. This point has already been eloquently made by Governor Pat Brown, who said Justice Rehnquist may be a well-qualified U.S. Supreme Court Justice, but Brown would vote against Rehnquist if he were on the ballot because Brown doesn't like him. The public rightly or wrongly believes that the Chief Justice is damaging the court and impeding justice.

I believe the public has a special sense about their responsibility in electing judges. It is not something that one can easily articulate, but instead of tinkering with the method of selecting and retaining judges or adopting life tenure, I believe we must rely on the public's sense of what's right and fair to maintain the integrity of the system.

Now for some crystal ball gazing. What's going to happen if the justices are removed during the '86 elections? Will the best judicial candidates no longer seek appointment to the Bench? How dramatically will this judicial chapter affect California's future? Will the '86 election in fact politicize the judiciary? I believe that the answers are the judiciary will not only survive but improve; and that no, the judiciary will be neither

politicized nor made dependent. We have only to look at the trial court judges who are elected in rough-and-tumble elections to see this argument lacks merit.

There have been frequent judicial elections in the past few years. And no one can seriously suggest that the trial bench as an institution in California fails to follow the law, fails to adhere to high ethical standards, or renders politically motivated decisions. And the Bench continues to attract candidates of the highest quality.

I was talking with John Van de Kamp, our Attorney General, recently. He serves on the commission which reviews all appellate court appointments. He told me that he was uniformly impressed with the appointments of this administration, not only to the appellate courts, but also the trial courts. So, the best are in fact still seeking appointment in spite of the controversy surrounding the courts. Governor Deukmejian's list of prospective supreme court justices underscores this point as does the recent appointment of Justice Panelli. There will always be qualified candidates for the bench.

I will not try to quickly provide you with some insights into how and why the District Attorneys Association (CDAA) arrived at its decision to oppose the re-election of certain justices and how it intends to conduct itself in the judicial election campaign. First of all, what is the California District Attorneys Association? It consists of the states' prosecutors: district attorneys and their deputies, deputies of the Attorney General, city prosecutors and their deputies. Its mission is to train prosecutors, be a resource center, and influence legislation. Approximately 1,900 of the state's 2,500 prosecutors are members of CDAA.

Historically, the California District Attorneys Association has remained uninvolved in judicial elections. There was some concern over the Chief Justice's appointment, but no organized opposition. There was neither institutional opposition to her last reelection nor support for her recall.

There was formal opposition to Justice Reynoso's appointment. After lengthy discussions and a meeting with Justice Reynoso, the Board of Directors voted to recommend against his post-appointment confirmation. Interestingly enough, however, neither the executive director nor an elected district attorney appeared at those proceedings to voice our opposition. A statement was delivered before the Commission by a deputy district attorney. So even that venture into supreme court politics was modest. This, to some degree, sheds light on the intensity of the present feelings about certain supreme court justices.

I don't intend, at this time, to discuss the justification for the position of the Association. Suffice it to say that there has been a growing concern about the court that can be summarized as a belief that the majority is not impartial, has overstepped its legitimate bounds and abused its power. As a result, towards the end of 1984 and the beginning of 1985, whether or not the Association should take a position became a hot topic of discussion. A full debate, however, was deferred until a membership poll could be taken. Approximately 55% of the members responded. The results were an overwhelming rejection of the Chief Justice and to lesser degrees each of the other justices that are up for election with the exception of Justice Lucas (the poll was taken prior to the appointment of Justice Panneli).

I was President of CDAA when CDAA's debate began in earnest. The issues that were discussed included, among other things, such topics as the independence of the judiciary, the risk of its

further politicization, and how the voters should consider a judicial election. Although we did not talk in terms of models, we discussed many of the same concerns that have been discussed here today. In addition, we considered who should be opposed? Mosk, at that time, had not indicated that he would seek an additional 12-year term. Lucas was favorably viewed by prosecutors although he had been on the court only a short time. There was some discussion concerning whether, if we decided to oppose certain justices, we should develop a political strategy to help defeat them. The decision, as you know, was to oppose Bird, Reynoso, and Grodin. The decision was premised, however, on the understanding that the role of the Association would be educational. We overwhelmingly rejected participating as an Association in a traditional political campaign against the justices.

Did our decision place our tax-exempt status in jeopardy? Possible. This concern was noted early on by one of the members of the Board, who is now a judge. To digress, a number of the then Board members are now on the bench. We realized that we placed our exempt status in some jeopardy, but felt strongly enough about taking a position to go forward. We later formed the "Prosecutors Working Group," a separate legal entity which has continued our efforts to educate the voting public.

It is important to reemphasize that we, as prosecutors, view our role as encouraging and contributing to the judicial elections debate and to do so in a professional, ethical manner. A primary goal was to elevate the debates since liberties had been taken on both sides of this issue. One news correspondent who is perhaps most knowledgeable on the subject of the court and the election told me that about 75 percent of the cases cited by both proponents and opponents of the court do not stand for the avowed proposition. That reporter is now doing her own research to determine what those cases actually say. Which leads me to my

closing remark, the second of two "principles" I hope that we take with us.

Clearly, California lawyers will set the tone for this election. I believe we have an ethical and moral responsibility to keep to the high road. If we lose sight of this and descend into the dust of the arena, it may be difficult later to shake the dust from our boots. We have to be concerned about not only the integrity of the court in future years, but that of our profession as well.

PROFESSOR SCHMIDHAUSER: Thank you very much. I'm going to try now to do a couple of things. I believe that we can take a few liberties with the time frame and end, perhaps, a little later than 11:30 so that there will be ample opportunity for members of the audience to respond.

At this stage, the members of the panel have not really had an opportunity to respond to each other. And I'm going to take the chair's prerogative to ask a couple of what I hope are cross-cutting questions that cut across some of the issues that all of you touched upon in one way or another. I will not, however, except for one brief remark, fulfill the image of wild mid-western populist that my former student, Carl Pinkele, bestowed upon me except to say to Mr. Bradbury I do want to know where I can get a bumper sticker. (laughter) But other than that, let's get down to some of the serious issues.

What I'm going to talk about appear to me to be the possible contradictions which cut across the presentations that all of you have made. At the state level itself, if on the basis of, say, the organization that Mr. Bradbury described, the Rose Bird Court's record was so diametrically different from that of its predecessors to warrant the adverse reaction that your organiza-

tion and others have taken, if these issues involve major differences of opinion over matters like capital punishment, why didn't these organizations take action against Chief Justice Wright, whose record from all of the evidence that has been discussed here appears to be very similar? And how did your organization or others address the proposition that it's quite conceivable that Chief Justice Bird was in effect often applying precedents from the distinguished courts headed by the Chief Justices that preceded her, those of Justices Traynor and Wright.

On a national issue, dealing with the same kind of theme, I'm going to refer to a couple of scholars who historically had done what we might call prestige readings of the highest appellate courts of all the states of the Union and the United States Supreme Court. The first of these studies was done in the 1930s, so you might say, well, it really doesn't have anything to do with what is done today. But I mention it because the modern study completed in the early part of the 1980s carried this up to date. And what was really very significant is that prestige-wise from the period of the '30s to 1983, when this second study was completed--and I might add both of these scholars had really nothing to do with California politics or judicial politics whatsoever--the Supreme Court of California had moved into first ranking in reputation and prestige of the very highest level. The earliest study in the '30s had evaluated the Supreme Judicial Court of Massachusetts and the Court of Appeals of New York, which is the highest appellate court of that state, as the two most prestigious courts in the nation at that time; and they were ranked at a level approximately that of the United States Supreme Court at the time. But in the modern study, the Supreme Court of California had moved up into the top ranks.

Now, what was very interesting about this study is that this included all of the modern Chief Justices in California. What is

the criteria for evaluating prestige? Number one, a very carefully designed random sample of the leading law professors in major universities and their evaluations of the quality of work of those courts. This was not an issue oriented question. It was a quality of judicial workmanship or craftsmanship kind of measure.

The other measure, in my estimation at least, I think is an even more decisive one, and that is, the extent to which the highest appellate judges of brother or sister courts, whichever gender terminology you prefer to use, cited approvingly the decisions of the highest appellate court in question. Now, all 50 state supreme courts or their equivalents were evaluated; all 48, in the 1930s, because obviously there were not 50. And what really came out of this is the fact that this is a remarkable contradiction of the severe criticism of the so-called Bird Court in California. I don't know whether it's a universal criticism, but in California certainly it is designed to capture a good deal of public attention; while at this national level, these scholarly kinds of analyses seem to indicate that the highest court of California under the last three or four Chief Justices apparently is very highly regarded and is evaluated in the very highest rank. And I wonder if any of you want to address this apparent contradiction? Is there something strange going on within California that we within the state don't notice in terms of what is going on nationwide? And is the criteria for the Bird Court and its performance in these issue-sensitive areas different from the criteria applied against the Supreme Court of Wright and Traynor, etc.? That's one set of considerations. Perhaps that's enough at this point.

PROFESSOR UELMEN: Well, I think clearly something is going on that is quite unusual. And I'm sure we can identify a lot of elements within the political scene in California that are caus-

ing it to go on. But that to me should heighten our concern, because it is going on in California. In California, we have such an unrestrained political climate that I think all of the dangers that we talked about of applying the political model and subjecting judges to the heat of the political kitchen are magnified.

I don't agree that the voters couldn't care less what standard we apply to judges. I think the voters will recognize the cost that we have to pay once we start using an unrestrained political model in evaluating judges. True, we can't follow people into the voting booth. People can go into the voting booth and vote someone out of office because they're black or because they're female. Voters can behave as racists and sexists and there's nothing we can do about them. But I don't think the answer to that is to throw up our hands and invite voters to do those sorts of things. I think there is some sort of responsibility and much of that responsibility is going to fall on the Bar to suggest that there are limits that are appropriate to judicial contests that may not be appropriate to other contests.

I mentioned one of the first tests of the system we had in California was the case of Gavin Craig, a judge of the Court of Appeals, who was convicted of taking a bribe to fix a case. It turns out that the prosecutor who put Gavin Craig in jail and achieved great renown, who was later appointed to the federal bench largely because of that, was Charlie Carr, the judge that Gideon was referring to. And as a result of Gavin Craig going to jail, the new judge who was appointed to fill his place was Marshall McComb. A couple of very interesting ironies of history.

But I think it gets back to Dorothy's point. In terms of whether we want judges on the bench like Gavin Craig or Charlie Carr or Marshall McComb, or whether we want judges on the bench

like Donald Wright and Roger Traynor and Earl Warren, the process we subject them to has something to do with what kind of judges we're going to get on the bench. And ultimately, the price we're going to pay for using the political model is, we may see fewer judges of the caliber of Wright and Traynor.

Now, I just can't relate to Professor Pinkele's vision of our governmental system. I'm sure it's very similar to the vision that Thomas Jefferson had. But if Thomas Jefferson's vision had prevailed, I don't think we would have seen courts in the United States that take positions like the United States Supreme Court took in Brown v. Board of Education. That wasn't a popular decision when it was rendered. If it had been put to a vote of the people, it would have been a very close question and it might have gone the other way. And if we had judges deciding that question, who were deciding it simply in terms of whether a majority of the people would agree with what they were saying or holding, we probably would never have seen that decision. So I think Professor Pinkele's vision of our system of government really leaves out of the equation the role that courts have come to play today in terms of being protectors of the minority against the majority.

And my final point is to dissent from what Pat Brown said. I do not think it would be appropriate to vote no on Justice Rehnquist simply because I disagree with Justice Rehnquist's political philosophy. I think we have to start from the premise that all judges have a political philosophy, and we have to concede that ultimately that political philosophy is going to affect how they decide cases. I think Justice Cardozo put it best in his Nature of the Judicial Process when he said, "We all have a philosophy. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes but our own." Granted. But that does not mean that because a judge has a

philosophy and that philosophy affects his decisions or her decisions, that that judge is incompetent or that that judge is not impartial. When we talk about being biased or being partial, that's not what we're talking about. We're talking about a predisposition to decide all cases in a given way, and that kind of predisposition could actually result in the judge being disqualified from sitting on a case. The standards of judicial conduct set forth when a judge should be disqualified because of prejudice. Can you imagine going into the court and saying, "I move to remove Justice X from hearing this case because Justice X is too liberal." We've never even seen a motion made by the prosecution in any case decided by the Supreme Court of California where they've gone in and said, "Rose Bird, I don't think you should sit on this case because I think you're biased against the death penalty." Such a motion has never been made. And the reason it's never been made is because we're not talking about bias which would disqualify a judge from sitting on a case. And I think that's the kind of bias we should be talking about if we're applying the competency standard.

PROFESSOR SCHMIDHAUSER: Any other comments?

PROFESSOR PINKELE: I have two brief rejoinders to Professor Uelman. Before stating those I must, however, reiterate my earlier observation that I have been around lawyers and legal protectors too long; and I say this after only two days.

First, my image of the desirable American political system is not exactly similar to Jefferson's; although, Professor Uelman, I should argue Jefferson's beats the pants off elitist alternatives. Basing a political calculus jointly upon fears of popular sovereignty and reverence for an entrenched "quasi nobility" -- judges -- is more frightening to me than suffering through a bad decision or two based upon a worthy principle.

Second, I am now more certain than I was a few moments ago that Professor Uelman has little or no comprehension of the connections between the legal subsystem and the political systems of which it is a part. Of course, courts occasionally protect minorities and bravo for them when they do, but what about when they do not? How are we to measure their independence, objectivity, and courage in the face of such telling facts as the more than half-century which passed between Plessy v. Ferguson and Brown v. Board of Education, or the freedom of speech cases, or the Japanese internment cases? The point is that we all, or at least most of us, prefer judges -- and people to be judges -- not for their legal esthetics and legal propriety but for their political dispositions. One should be for the protection of and enhancement of minority rights because it is correct politics, not because it makes "legal sense", whatever that is. The fact that we have not found the actual usage of the terms "liberal" or "conservative" utilized to remove judges from cases does not in fact mean that: (a) it is what we think about when we assess our ideals chances of prevailing before the supreme court; or (b) it would be less healthy were we to be honest about it and point out to one and all that judges, especially at state supreme court and federal levels are political animals -- though to me many seem closer to political fossils.

Third, I realize I am a harsh critic of the legal system, but I do not like entrenched, self-righteous, closed decision making aristocracies. I do like the notion of law and constitutions as the symbols and conveyors of our most profound political values. I do not like at all the notion that only some (a few) can tell us about what the law and constitution means. If we immunize law and judges against public discourse, debate and measurement, then the disease we will inherit is worse that the one we try to prevent.

PROFESSOR SCHMIDHAUSER. Mr. Kanner.

PROFESSOR KANNER: Yes, I seem to be the only one here who wants to respond to our moderator's inquiry about the prestige rating of courts. There is no question that the California Supreme Court, over a period of decades, had enjoyed a period of rising quality; and that quality was rightly perceived throughout the country. Insofar as the court in recent years has been concerned, I have not conducted any polls; but from what I hear from other lawyers on both sides by the way, people that I deal with are not necessarily enamored of the court. I hear more unkind comments than I used to hear, say, ten years ago. That may be anecdotal and visceral. But I offer it for whatever it is worth.

I also suggest that polling law professors to determine the quality of the courts is a dubious endeavor because it presupposes that the law professors are immune from their own political and ideological beliefs. And if you believe that, then see me after this speech. I have a wonderful bridge to sell you.

The campuses and law schools are of course a hotbed of dearly and fervently embraced idealogies of all sorts. And I think it's certainly fair to say that if we were to make some kind of quantitative judgment, it would be that the prevailing ideology on the campuses of law schools would be undoubtedly left of center. So certainly people like that would have a more admiring view of the courts that are on the cutting edge of the law and are advancing the frontiers of the law, as they see it, in the right direction. My concern that I voiced in the paper has been that there are a number of areas -- and by the way, let me digress here. Everybody in this debate tends to talk about criminal law. As my friend Gerry frequently charges me in public, and I plead guilty to, I don't know diddly about criminal law. I mean, in order to understand what's going on in the death penalty, you

don't have to know any criminal law. The numbers speak for themselves. The court is simply opposed to the death penalty. It's that simple. The way they were long before its present composition. This is a process that's been going on since I started practicing law in the mid-sixties, okay? There's nothing new about it. They just don't like the death penalty. Now, if the people are sufficiently aroused on that, they will lose. If not, they won't. But that's all there is to that.

But it seems to me that this kind of an inquiry gets to be a little sticky because I've identified in my paper a number of topics on which the results reported by the California Supreme Courts seem to be preordained. That really gets to be a tough problem. Can you envision great prospects for defendant victory in a controversy between an insurance company and its insured, possibly the the exception of some technical matters of coverage. Landlord-tenant? Land regulator and landowner? I mean, the death penalty is not the only field like that. That's the field where statistics have been kept, but there are others.

I commend to you, for example, an article written in 1979 by my former partner, a man named Michael Berger, in the State Bar Journal, in which he tracked the record of the California Coastal Commission in the courts up to that time. And he made the astonishing discovery -- I don't know if the nonlawyers here will understand what I'm saying, so I'll come back and embellish it -- he made the astonishing discovery that the California Coastal Commission up to that point had enjoyed a record in the appellate courts of about 90 percent victories as an appellant; as an appellant! Think about it. Nine times out of ten, they reversed the trial judge who ruled against them. That, for the benefit of nonlawyers, is the equivalent of running a 37-second mile. An appellate lawyer who has any kind of a career record of, let's say, 30 percent reversals is considered a magician. The great majority of cases are affirmed, of course.

So, there are areas of concern. I think one also ought to take a look at the rate of citation that our moderator mentioned. We don't know what that means. We have to know something about the citing courts. The raw numbers may or may not be indicative. You have to know something about the courts and the kind of an ideological millieu in which they operate.

Now, a few random remarks after this. Gerry, I really have to take you to task for the juxtaposition of racism and sexism in the ballot booth with the question of whether or not free people are entitled to pass judgment on the quality of governance by one branch of their government. I'm sorry -- it is not fair to compare the two. One is very unworthy; subject to widespread social condemnation. And the other one is at most subject to a legitimate debate.

Dorothy, I'm now reminded. My nostalgic euphoria came to a crashing end when I listened to you because I remember that you gave me a C in Legislation. (Laughter.) It was always my understanding that it is the Legislature which can decide not to do anything about a problem. But on the other hand, when a court has its jurisdiction properly invoked, it cannot refuse to decide. Of course, the United States Supreme Court and other courts of last resort can refuse to exercise their discretionary jurisdiction and thereby never acquire substantive jurisdiction over the case, and thereby say to the parties, "Go away." But they cannot just not act, like a Legislature. So I understand that this is a source of judicial problems, because we have been able to force issues on the courts that perhaps shouldn't have been forced on them, but that's another story way beyond the scope of this gathering.

Yes, Professor Pinkele, I do worry about how people are going to vote. I worry a lot about that. I think a lot of us worry

about that, and I think every single one of us has his or her private collection of votes in which in our judgment in retrospect, the people exercised incredibly bad judgment. And we ought to worry about it, but I think that comes with the territory. I don't know of any other system. I think we can -- I will embrace Churchill's position that a democracy is probably the worst system of government imaginable; it's just that I can't think of a better one. And we're just going to have to live with that.

Well, anything else that is to be added to the remarks? No, I don't think so. I'll stop here.

PROFESSOR SCHMIDHAUSER: Anyone else on the panel? Judge Nelson.

JUDGE NELSON: I didn't remember what I gave you in Legislation. (Laughter.) Again, I just wanted to say that the process of judging is not as simplistic, I think, as some people would like it to be. It's not just a question of what is right or what is wrong. We have lots of cases coming through where it's pretty clear what we ought to be doing. But we have a large number of cases, for instance, where we might have a statute that was passed in the early 1900s dealing with motor vehicles, to wit automobiles, motor bikes, and so forth. And we have a case involving an airplane. I don't think Gideon is suggesting that we should wait until the --maybe he is -- until the Legislature gets back and updates all of the laws covering other kinds of motor vehicles which may have been invented since the time 1900 to 1985, but we do as judges--

PROFESSOR KANNER: For the record, I'm not.

JUDGE NELSON: All right, thank you. We look for the purpose of the statute, and whether the purpose of the statute applied to

this particular motor vehicle even though it wasn't invented at the time the statute was passed and so forth. These are not simplistic kinds of things with which to deal. And when we talk Professor Schmidhauser in having academics or so forth to judge judges, I think -- I know my faculty at USC oftentimes when there was a vacancy on the United States Supreme Court, my faculty and the faculty at UCLA were asked to analyze fifty opinions of a particular nominee. Now we didn't analyze them from a political perspective. We analyzed them from the perspective of were these cases what the opposition was purporting to say they were, very similar to what Gerry has done with People v. Anderson. People were saying this judge had held such and such. We sit down, and it's a very boring job, to read through thousands of pages of cases to decide and set out what these cases actually held. It was that kind of scholarship that we used to assist the United States Senate, a popularly elected body, to deciding whether or not to advise the President to proceed to appoint a particular nominee. So I think that academics have their place; academics do not and should not purport to decide whether the decision was right or wrong. And when we analyzed opinions of supreme court judges or nominees who are for the supreme court or so forth, to my knowledge we never purported to say whether the decisions were right or wrong. We purported to analyze them from the perspective of scholarship and how they were written and so forth.

But this is a long way of saying that in a democracy, and I am a firm believer in a democracy, I think it gains strength when we know that the right of every member of that democracy will be preserved. Gideon in his paper, and I am very pleased that he kept saying that he was very concerned about the constitutional rights of minorities, and he was not purporting to say that we should begin to judge judges when they're upholding the rights -- the constitutional rights of minorities. But I find it very

difficult to distinguish between the constitutional rights of minorities and the statutory rights of minorities, and the common law rights of minorities, when I sit and function as a judge and ask myself how to decide a given case. I do not look to see what the latest poll said. I sit and do the very best with what limited endowments I have, to decide what is fairest under the circumstances in light of the materials that I have before me, whether they be the United States Constitution, a statute, a city ordinance, or prior case law. And therefore, I cannot say that I want the majority will to dictate to me what my job should be in that given endeavor.

PROFESSOR SCHMIDHAUSER: Thank you very much. I think at this point we should let this long-suffering audience have at us as they would. And let me just lay down this groundrule: Anyone -- raise your hand if you have a question and address it specifically to the individual or individuals on the panel, to whom you think it is relevant.

UNIDENTIFIED: Professor Uelmen, would you elaborate a little bit at what point you believe that an acceptable political philosophy crosses the line and becomes unacceptable?

PROFESSOR UELMEN: All right. That's certainly a fair question. Within the competency model that I'm espousing, for example, I think if the claim were substantiated that a particular justice had a hidden agenda to frustrate the application of the death penalty altogether in California, if that claim were substantiated, that would be a legitimate ground for removal of the judge. I think that judge would be incompetent because the judge would not be functioning in an impartial manner.

Where I have trouble with that argument, however, is that it is not substantiated in the way that a claim of bias would have

to be substantiated to remove a judge from actually hearing a case. The claim is simply being made on the basis of an inference being drawn from results. And Gideon just drew that inference. He said the death penalty, the numbers speak for themselves as though all we have to do is total it up. This judge voted 41 times against the death penalty and 0 times for it; therefore, this judge has a bias against the death penalty. I suggest that that process is not appropriate. That is not an appropriate measure of whether a judge is biased or impartial. What is appropriate is to look at the reasoning offered by the judge in each case. That's why judges write opinions. They're not simply playing out their preconceived notion of how the case should come out. At least we hope they're not.

I think if we demand with respect to a claim of bias or prejudice, that it be substantiated in the same way that it would have to be under the Code of Judicial Conduct in terms that would require a judge to disqualify himself or herself from sitting on a case, then we're talking about the kind of bias that's relevant.

PROFESSOR KANNER: I think I'm entitled to a rebuttal here. Yes, the numbers do speak for themselves. Let me remind you, Gerry, that when Bradbury's cohorts get hot under the collar and lose their cool and utter the cry, "The Court is soft on crime," you stand up and say, "au contraire", and then you produce statistics indicating that -- what is it? -- 97% of convictions are affirmed, etc., etc. Why? Because the courts are not soft on crime, because the judges on the trial bench know what they're doing, the prosecutors know the rules of evidence, the system is served, fair play is observed, and convictions are fairly obtained. I thereupon ask: how is it possible to have such

statistics only in the case of non-capital cases (I hasten to digress and point out to the nonlawyers, that when a case goes into trial, we don't know yet that it's going to be a capital case, right? Because it is only after the death penalty is imposed at the very end that it becomes a capital case). Why is it that only in capital cases the statistics are the other way around? 93 percent of trial judges don't know what the hell they're doing, they're making errors, prosecutors are offering tainted evidence, juries are misinstructed, etc., etc., etc. I'm sorry, folks. It won't wash. I am not a death penalty junkie, but there comes a point where the statistics become overwhelming. It's kind of like what I said about the Coastal Commission. When you start talking about nine out of ten trial judges being wrong in every case, I mean, then if those people, if those judges really are that bad, then they ought to be swept out of office, because they're incompetent. Doesn't that follow? Nine out of ten?

PROFESSOR UELMEN: Come on, Gideon.

PROFESSOR KANNER: No, it doesn't follow. (Laughter.) It doesn't follow because of what the California Supreme Court has done and has been doing, as I said, for thirty years. It is not only the present justices. That is, they have essentially been fighting a guerrilla warfare against the penalty. And they have been imposing rules of increasing complexity and refinement and exquisite...whatever, you make up your own word; so that it becomes possible in virtually every case to decide it either way. And given the predisposition of the court historically (again I repeat, not the present court necessarily), given its predisposition against the death penalty, they are quite free therefore to overturn the penalty phases. It's as simple as that.

PROFESSOR UELMEN: I'm sorry, but the issue presented to the California Supreme Court in a death penalty case is not, is Trial Judge X an idiot?

PROFESSOR KANNER: Well, if he's wrong nine out of ten times?

PROFESSOR UELMEN: The issue is, was the law followed? Okay? Now, we have a new initiative which drastically changes the law with respect to when the death penalty can be imposed. Every penalty case must be reviewed by the California Supreme Court. They can't avoid deciding these cases. So the issue comes before them, was this initiative measure properly applied in this case? Now, most of the death penalty reversals have been because the court looked at that initiative and said it was not properly applied in this case, it was misinterpreted. As we read the initiative, the initiative requires showing an intent to kill before we can sentence someone to death. Therefore, every case in which the jury was not so instructed now has to be reversed. So a lot of the reversals are simply because the court is following its precedent and applying the same rule in every case. Now you can't just look at the numbers and say, 20 reversals, that must mean that Judge so-an-so is opposed to the death penalty. Up until last Monday, we could have looked at Judge Lucas's record and said, "Judge Lucas must be opposed to the death penalty." Apparently, that's what led him to change his position from concurring reluctantly to dissenting, but his position is essentially the same. The result is compelled by a prior precedent of this court.

PROFESSOR KANNER: It's this kind of reasoning, folks, that causes people like Pinkele to want to go after lawyers with a bat. (Laughter.)

The point is that however you look at it, we simply have not had the death penalty for decades. And beyond a certain point, the arguments of why that is so cease to have meaning. Because beyond a certain point, the result becomes so overwhelming that it can't be justified. That's my point.

PROFESSOR UELMEN: Let me say one thing.

PROFESSOR SCHMIDHAUSER: We have another person with a question...

PROFESSOR UELMAN: There are thirty other states where that statement can be made. They have not had an execution in ten years. Is anyone pointing the finger at the Supreme Court of Arizona or Maryland or any of these other states and saying there's where the blame lies. That's not happening in any other state. It's only happening in California. And that gets back to what we started with. What's going on in California is something other than simply frustration over the death penalty.

PROFESSOR PINKELE: Most of the cases in those other states are tied up in federal courts, not their state courts.

MR. PHILIP L. DUBOIS: I'm Phil Dubois. I'm a political scientist from the Flagship Campus of the University of California at Davis. (Laughter.)

I have three comments; two directed to Gerry Uelmen and one to Judge Nelson. The first has to do with the history of the debate over the retention elections. I think Professor Flynn addressed this in part yesterday. This debate has been repeated in about 20 to 25 states that have adopted retention elections in one form or another since California adopted its retention system. I think that history makes it clear that there is no clear agreement about why we have these elections. In fact, the lead-

ing study on this by the American Judicature Society suggests that everybody agrees that they were adopted as a political necessity because of fear that the elections would, if taken away from the voters, in fact result in voter rejection of the reform package. So there's a sense here that the voters themselves would have objected radically to the idea of being taken out of this process. I think there is a little bit of a danger, as Professor Pinkele suggested, in telling voters that they can vote, but they have to vote a certain way, namely, for affirmation and for the right reason.

The second one is your characterization, Gerry, of these judges as sitting ducks. The national experience of these judges is that they are sitting pretty. They enjoy about a 99.9 percent success rate. Even where they are opposed by Bar Associations on grounds of competence, they win. That may say something about the elections themselves. Their campaign funds almost become the retirement funds of the judges. They build up a lot of service credit with these elections. They are very secure.

And finally, Judge Nelson, I enjoyed your comment about the difficulty lawyers have in evaluating judicial candidates and gave me a new perspective on the biennial endorsements issued by the Los Angeles Bar Association and other bar associations. It's very difficult and there's a sense, I think, that the voters rely, or will rely, on the lawyer's perception about the quality of the candidates.

JUDGE NELSON: Let me just respond. I think that's quite right and I think there's something wrong with those bar polls in the sense they have become very political just as most elections become political.

As past chairman of the Board of the American Judicature Society, I quite agree with you. The retention elections were thrown in as a compromise because it was a move in the right direction, but they were so opposed by people who did not want to take it directly away from the voters. There are all sorts of other kinds of proposals that have been made -- in Alaska, Puerto Rico, Hawaii. Other states now have adopted some very fine and new and different systems.

It may be very true that judges win even when they are opposed by the Bar, but that doesn't say that the elections are necessarily good or that the polls are necessarily bad. It's estimated that to have a contested superior court election in this county, you need a minimum of $50,000 -- it's better to have $75,000. As for the supreme court justices, I was at a dinner with the supreme court justices at Hastings College and talking to some of them about their current campaigns. They estimate it's going to take $500,000 or more just to engage in a retention election. And the time expense is for TV time, media time of all kinds, which tends to me to indicate what it takes to win a kind of election now as opposed to 1934 when we had this retention elections system put in, or back to the time of Jefferson and Jackson who said that anybody is qualified to be a judge; therefore, all the people ought to be able to vote for a judge. Now that may be true. It may be that the trend should be back to the people's courts, neighborhood courts, where everybody in the community participates in the justice system. So I think that when we're talking about elections, we really should be talking about what kind of a judge do we want and what should be the qualifications for a judge. But as the qualifications are defined today, it is very difficult to have people who cannot analyze opinion trying to make the decision as to whether this person is qualified to be retained on the supreme court of this state or of any state in my opinion.

PROFESSOR UELMEN: Granted -- can I respond to that? The retention elections are a compromise, but look at what they are a compromise between. On the one hand, contested elections; and on the other hand, life appointments, okay? I think what they had in mind in setting up retention elections was to go further toward the model of life appointments without really calling them that. I think they knew damn well that retention elections would function in 99 percent of the cases as an affirmation that very few judges would be removed by means of the retention election. That's the way it was intended and that's the way it has functioned up until now. But we're seeing a new dimension added to the picture. When we start politicizing the retention election, I think we end up with a system that's actually worse than contested elections because everybody's free to take potshots at the judge and there is no alternative being presented, no other candidate who is going to be responsible for the kind of campaign that's conducted.

PROFESSOR SCHMIDHAUSER: We have time only for one more question. I've gotten the signal and, unfortunately, that'll have to be it.

MR. SCHRAG: Peter Schrag. I'm the editorial page editor of the McClatchy Newspapers. I'd like to follow up on Gerry Uelmen's statement with a two-part question. The first part is really directed to Michael Bradbury. You said that you and the CDAA, the District Attorneys Association, are concerned about educating the public to raise the level of this campaign, to stay out of the dust, as you said, and so on. What you are going to do -- obviously, the campaign has already started. You have one of your colleagues, Gene Tunney, who is announcing a set of commercials, attacking the court for "dismantling Prop. 8," which I think even you believe isn't the case, said that if the justices aren't removed, there may be some vigilantism in California and

so on. What are you and CDAA doing to counter that kind of inflammatory discussion, not to mention the inaccuracies of the commercials themselves? And beyond that, again to follow up I think with the panel as a whole, how -- at a time when we have a technology in place -- I'm not just talking about television, but the whole money raising machine that's represented by outfits like Butcher-Ford and so on which trade on perhaps very legitimate public concerns about the court and its own excessives, by their very nature are going to create enormous misperceptions on the part of the public and are going to trade on those misperceptions so that the system itself is not attenuated by what I suppose is an ancillary system in which the fundraising, direct-mail machinery almost defeats any kind of attempt of this sort of responsible discussion that you're talking about. Does anybody want to respond to that?

MR. BRADBURY: Well, since part of that was directed to me, I'll try. I'm not familiar with comments by Mr. Tunney to which you referred. But accepting what you say at face value, I would liken it to the comments by Warren Berger who gave prepared remarks prepared by the Chief Justice's campaign director. Intemperate, and inappropriate for this kind of election. I would hope that my colleagues who are concerned about maintaining a high quality of debate will be able to discuss their concerns with those individuals, and that would have a salutory effect.

Again, I can't field the specifics because I'm not aware of the situation with the District Attorney of Sonoma County's comments. But certainly, if that's the case, I would personally discuss his remarks with him.

PROFESSOR SCHMIDHAUSER: Well, I want to thank all of the paper presenters, the panel members, and the audience for what has been a lively and I hope, generally, an informative discussion this morning. Thank you very much.

SESSION THREE

SESSION THREE

Judicial Elections: Practical Realities

MR. JAY MATHEWS: Ladies and gentlemen, I think we're ready to start. I apologize for our tardy opening.

My name is Jay Mathews. I'm the Los Angeles Bureau Chief of the Washington Post. I'm here to chair this session. I want to start as quickly as we can. Our plan is to have each of our speakers here speak in turn on their subjects, then give our two discussants a chance to reflect some concerns and questions, and as quickly as we can, open it up to the floor for general discussion. And I hope we'll all be as provocative as possible.

To begin, I'm going to turn to Ben Bagdikian, to my right. Ben is the Dean of the Graduate School of Journalism at the University of California at Berkeley. He is also in my view one of the most distinguished press critics this country has ever had. His reputation as a press critic is so great that some of us, I think, forget what a remarkable journalist he was before he assumed this academic mantle and began to tell reporters what they were doing wrong.

With a brief personal note, I joined the Washington Post---I started work on one of the blackest days in the history of the Washington Post, June 13, 1971. There was this story on the front page of the New York Times about something called a Vietnam Archive, later known as the Pentagon Papers. We had been beat to bloody hell by the competition and there was a great deal of moaning in the newsroom and I was learning things very quickly. And Ben became the hero that week by leaving Washington -- editors rarely did this, and Ben was a very important editor on the paper -- leaving Washington and coming back with the Pentagon

Papers just in time for us to do part of the court case, a part of history, etc., etc. That's something that those of us who love the Washington Post will always be grateful to Ben for.

He later became, in my view, one of the best if not the best ombudsman our paper has ever had and has continued that role to my edification and delight---writing for several journals now in his position as head of the journalism school at Berkeley.

Ben is going to talk today about "Journalism and the California Judiciary: Political Reporting or Court Reporting". And I'll just turn it over to him. Ben.

MR. BEN H. BAGDIKIAN: Thank you, Jay.

It is common knowledge that the Chief Justice has a dramatic hair style that shows evidence of a conscious coiffeur. Periodically, it provokes comment, especially among enemies of the Chief Justice.

This describes, of course, Chief Justice Warren Berger of the United States Supreme Court. It also happens to apply to Chief Justice Rose Bird of the California Supreme Court. But Justice Berger seldom has stories of his judicial philosophy and personality interrupted by stories about his hair style. But this is not the case with Justice Bird. And one is tempted to say that some California journalists have a hair fetish. But the more serious possibility is that many California journalists apply a different standard to their reporting on the California Court and its chief than they do to other serious subjects.

I think this is more than just a journalistic oddity. Performance of the California news media in reporting on the state supreme court will, of course, help determine the outcome of the critical elections in November of 1986. It could estab-

lish for years to come the basis on which judges in this state will be selected and retained, and it could have a wide national impact.

My paper today is not based on a systematic or comprehensive study of the 119 daily papers and 450 weeklies and 500 broadcast stations. It is based instead on what I believe are the proper criteria for journalists covering the courts, especially this kind of highly politicized public issue.

There are minimal standards of good journalism that apply to all public affairs reporting, including judicial controversy and elections. Responsible journalists owe the following obvious things to the public:

First, a fair and balanced picture of the issues and of the candidates;

Second, an accurate and fair picture of the significant claims and counterclaims during an important campaign;

Third, competent and fair reporting of the relevant and undisputed facts when those are known to be significantly different from the claims on either side;

Fourth, an emphasis on the basic, relevant issues in the election, no matter what the rhetoric may be among the contestants; and

Fifth, application of these standards undistorted by personal opinion.

Too often I think, in the claims and counterclaims about the California Supreme Court in the last several years, most of these standards have been violated by some of the important media in the state, and violated in a way that these same newspapers and broadcast stations would not do with other serious subjects.

In all fairness to the media of this state, the emergence of highly politicized and heavily financed campaigns against retention of judges has created a novel problem in coverage. Suddenly, heated public controversy has surrounded the inner working of a subject --- and appellate court --- that is not only a largely unknown subject for the average reporter and editor, but a subject that law and legal canon forbid justices from discussing in public.

It has been central to the American system of the judiciary that it not only have power separate from the executive and legislative branches of government, but that it must be removed from political passions. We have assumed that money or access to money should have nothing to do with a judge achieving appointment or remaining on the bench. Suddenly in the fierce campaigning to unseat judges, these traditions have been contravened. We have assumed that judges will be reserved in their public discussion of issues before them or which they can reasonably expect to come before them. Now we are confronted with a growing practice of demanding precisely this kind of a commitment before a judge or a nominee for judgeship has heard evidence in a case. The inner deliberations of individual trial judges and the collective arguments and counter arguments of appellate justices in their traditional weighing of cases are not treated as partisan political loyalties rather than the application of legal precedent and constitutionality.

In brief, the public and the journalists, are suddenly confronted with the collapsing into one political transaction two formerly operate and deliberately insulated activities in our democracy. One of those activities, the judiciary, is supposed to be as removed from partisan politics as possible.

Nevertheless, this is hardly an insurmountable problem for journalists, even if it is a new one. Judges are constrained from speaking publicly about their cases. Yet for journalists, the opinions of these judges are a public record and so are the analyses of these opinions by informed legal scholars -- scholars on both sides of the current controversy. There is a wealth of information about the procedures, opinions, and precedents of the courts that apply to the present controversy. Far too often, uninformed journalists have felt no obligation to study the facts or to exercise normal care and study of a new and complex subject.

As the state's newspapers and broadcast stations approach this new phenomenon of combining courts and electoral politics, they are not helped by some institutional weaknesses of all the mass media, weaknesses that predate the court controversies, but contribute to it.

For example, imbedded in the current judicial elections is the relationship of courts to crime rates. Crime is still treated by most news operations as a series of isolated incidents without looking for best known causes, which they would do, for example, with a medical epidemic. It is seldom reported with recourse to the most reliable data. Crime does not have neatly defined causes, but some factors are clear, unindisputed, and available. One, for example, is the relative size of the age cohort within the population that has always been the age range of highest commission of crimes. The post-World War II baby boom, for example, came into this crime-committing age range in the 1960s and thereafter. And in addition to whatever factors may have applied as well, this clearly was a major factor in the rapid increase in crimes per 100,000 in our society in the last fifteen years.

Though this factor is known and undisputed by the best authorities, the general public would have little way of knowing this from their news media. By ignoring the best known causes, the news media have left the field open for speculation and manipulation, including the notion that courts are somehow responsible for increased crime rates, a theory that has little reliable data to support it and much reliable data to refute it.

A similar zone of silence in most news organizations, particularly those that stress crime reporting, has been the best known data on the effect on crime rates of different kinds of punishment. Much is known by reliable authorities. Yet, punishment by the courts and incarceration has been dealt with by most news organizations as though nothing were known on the subject except political rhetoric and conventional wisdoms. Ironically, the legislative research arm of the State of California, decades ago, including during the Administration of Governor Reagan, produced some of the most careful studies that raised doubts about the efficacy of lengthening prison sentences as a way of reducing crime. Another irony is the lack of basic perspective in reporting of the state's continuing controversies over the court and criminal justice. California has among the longest prison sentences in the Western world, and has for many years, while simultaneously there exists a widespread notion that California courts are soft on crime. No matter what opinions may exist and may justify news coverage, responsible news organizations are obligated to add undisputed neutral information that sheds light on controversies of this sort. Yet, news media treatment of the issue in this state and elsewhere has proceeded as though there is no history and there are no data on this urgent issue. As a result, the lack of solid information has helped create a vacuum filled with rhetoric and ineffective public policy.

The California news media are not alone in this failure. But the California media have a special obligation because this issue has created profound controversies of public importance within the state, not only with the courts, but in taxes, crime, and prison building.

Now the central process of the courts has become the subject of public controversy. Ordinarily, competent reporting of court decisions would be sufficient in the news. But when a whole segment of the judiciary and its working become and intense public issue, that is no longer enough. At that point, any reasonably competent journalist who presumes to report on this issue has to understand the workings of courts.

Perhaps there is a useful analogy here. If the court system is a clock, normally the only general public interest is in knowing what time it is, or in this analogy, what is the product of the court -- the decisions in trials and appeals. But now there have been accusations that the doctrinaire attitudes by some judges have led them to depart from normal procedures and precedent, and have caused them to behave in improper ways; and these improper ways have caused a major increase in California's crime rate. So now the issue before Californians is not just decisions of the court, but the nature of the court workings themselves. It isn't just reporting what time it is, but now it requires looking at the gears and levers inside the clock. Unfortunately, too many journalists have approached that clock as though blindfolded and wearing mittens.

The need to understand court procedures is hardly novel in American journalism. Major papers like the New York Times, the Washington Post, and others have sent experienced reporters to law school and insisted that they be as competent in their field as science and business reporters are supposed to be in theirs.

The best journalism schools insist not only that students study journalism law but the basic philosophy and procedures of the courts. At the very least, among careful journalists there is a realization that if a reporter must cover a specialized subject in which he or she has no depth, that a certain modesty is required when coming to conclusions.

One would assume that a basic mission of journalists would be to see whether the workings of our courts depart from the standards regarded as proper in other jurisdiction. To do this, of course, they need to learn the nature of courts, especially appellate courts, and the prevailing opinions on proper design and procedures nationally. Ideally, they would do this with the appreciation that they are undertaking an examination of a profoundly important institution, and that this clockwork is the balance wheel of democratic government and civil liberties. Too often they have not done this during a controversy that has wrecked the California courts. In too many instances, including crucial stories by some of the major papers in the state, the subject was treated with a capriciousness that would be unthinkable in reporting other serious fields like science or business.

So it's impossible not to conclude, on reading and hearing some of the news treatment of the court and the Chief Justice, that this has been placed in a category not requiring standard journalistic fairness and balance and that this has been done by some of the more important news organizations in the state. I do not mean by this that criticism of the Chief Justice is bad journalism or the criticism of the court is bad journalism. Of course, that is not true. When figures of significance criticize the court, that criticism obviously needs to be reported. When there is controversy about decisions of the court or its organization and performance, that, too, must be reported as a public service. But this is no different from reporting on a governor

or a mayor or a school system. The problem is not the existence of criticism. It is the requirement that beyond reporting the criticism conscientiously, there is also the need to report the reply to criticism. When replies by the court are forbidden by the canons of law, journalists are free to take the initiative to examine the basic facts that are known and that may go beyond campaign rhetoric. And when they do this, it should be with fairness and balance just as that should be true with any field.

Perhaps the most damaging neglect in journalistic treatment of the judicial controversy has been the failure to emphasize the known undisputed and relevant facts as something apart from the claims and counterclaims in campaign rhetoric. This, of course, should be no different from good political reporting in the electoral process elsewhere.

The same indifference to known information appears in another issue of the campaign, which is the accusation that when dealing with the death sentence, the court has been politically doctrinaire instead of conforming to law. I think it would come as a surprise to even the most careful readers of the newspapers and viewers of television news to learn that a majority of the supreme court's reversals of death sentences have included the votes for reversal by one or more of the so-called conservatives on the court. Affirmations of death sentences have also included some of the so-called liberals. Even when a so-called conservative writes the majority opinion reversing a death sentence, it is not reported as the opinion of a conservative justice; but if a justice labeled a liberal writes a majority reversal, this is noted as the opinion of a liberal.

It might also come as a surprise to the California voters that all the states in this country with populations comparable to California have a pattern of death penalty decisions similar

to this state; and that there seems therefore, nothing mysterious or strange about this particular court on that issue.

The judicial elections in this state have become heated and often bitter. And there have been and there will continue to be emotional and passionate exchanges in the coming campaign. It is proper and necessary, of course, that these be reported. But beyond the campaign charges and countercharges, the news media have an obligation to address the basic issues. For example:

One, what are the proper criteria for removing judges from the bench? There is law, precedent and legal canons readily available to the media.

Two, what are the most significant claims and counterclaims in the present court elections? On other issues the better news media have learned how to present these alongside with the best-known neutral information. They seldom do it with this issue.

Three, what are the most reliable facts about the administrative and decision-making activities of the Chief Justice? Here too there is voluminous factual information, plus respected authorities, some of whom disagree with the court and some who agree. But all should be used as a source of useful information beyond slogans and rhetoric.

Four, since the death penalty is a major issue in the election, what are the best data on the history of the death penalty in other jurisdictions and the specific issues in California law? Here, too, there's a large amount of factual, authoritative information that is largely untapped by the news media. Good science and business reporters would not dream of dealing with controversies in their fields without becoming knowledgeable about the best known information. The court issue deserves the same.

Five, since another issue is the status of an independent judiciary, what is the background and rationale for and against a judiciary that is above politics? This is not a simple subject in a state that gives the voters power over a retention of judges. But precisely for that reason the voters deserve the most careful information and reasoning if they are to exercise their franchise with intelligent self-interest.

One does not have to be romantic to expect that responsible newspapers and broadcast news can deal with a serious issue of this kind as something more important than a shouting contest between angry opponents or a routine political cat-and-dog fight. In 1957, after the Soviets put Sputnik into space and science became a serious national issue, the better newspapers in the country stopped treating science stories as fun, games, and quackery and began treating it as a serious issue. They recently have begun to do the same with business and finance. The nature of the courts and criminal justice in this state deserve at least the same degree of competence, care and balance. Thank you. (Applause.)

MR. MATHEWS: Ben, thank you very much. I hope we'll all make note of our thoughts and questions about each speech and hit everybody when we finish all three.

We're going to move now to Larry Berg. Professor Berg, as most of us know, is the director of the Institute of Politics and Government at this university. He is a renowned expert on the question of judicial politics. His articles and books on this subject are legion. And I think it's clear that he's the principal reason why we're here at this university discussing this subject today. So I'll turn it over to Larry, who is going to talk about "Campaign Financing in California Judicial Elections: 1972-1984".

PROFESSOR LARRY L. BERG: One thing about it, Jay, it'll be quick since I don't have a paper. I apologize for that. I spent the last few days in Washington and was unable to finish it. I did hand out some tables, and I think my distinguished colleague, Professor Dubois, will get into more detail in terms of the issue of financing judicial elections.

I'd like to take a minute or two and perhaps put another hat on, one of political consultant, siting I am sitting in for Eileen Padberg, colleague of Joe's and mine in the political consulting business, and say that it's that practical side of judicial elections that interests me. Some years ago Judge Weil, my colleague here on the right, and Dorothy Nelson, who was here this morning, and another colleague from the District Attorneys Association and I went on what Judge Weil labeled in one event a traveling road show on the question of financing judicial elections, and indeed, whether or not there ought to be judicial elections. We had a variety of views. Judge Nelson, if I recall, at the time was urging something similar to the federal system. Judge Wiel, I hesitate to speak for you, seems to have somewhat modified that to an appointment system. Our friend from the District Attorneys liked elections. And at the time, I thought maybe that elections was the way to go. However, for the second time this year after longitudinal research, I am forced to admit that perhaps I might have been wrong in some of the I wrote a good number of years ago. I did a similar turn about at the American Political Science Association regarding the initiative process, and shocked my good friend, Joe, by saying that perhaps we don't need it anymore.

I'm beginning to think that in terms of judicial elections, no matter how strongly I feel about the need for accountability to voters, I am increasingly disturbed as an observer with the nature of judicial elections. If we're going to have elections,

we've got to be better informed. If the voters are going to make decisions, they've got to have some basis for making them. I look at judicial elections and I don't see the basis for making those kinds of decisions.

If you look at the tables that I've handed out, there's been a steady increase in judicial election costs. As a matter of fact, it goes up in multiples of $7,000 startig in 1974. But what of the judicial race in Los Angeles County where you spend $50,000, $60,000, or even $100,000? In a county of nearly 8 million people that doesn't get you alot of public information. That doesn't get a lot of facts out to the voters. How does a voter in this county make a decision on the number of superior court judges and perhaps an even greater number of municipal court judges.

Some years ago, Professor Flynn and I did a study of voter turnout in municipal elections and, not surprisingly, we found that the smaller the municipal district the greater the turnout. I suspect we probably could have inferred from that that a greater amount of information was available about that municipal court judge.

So I have been thinking, I don't know whether we ought to have judicial elections at all. As a practical political fact, I don't see anyway to change that at the present time. Something that Phil wrote some years ago made a very distinct impression on me. If we're going to have judicial elections and cannot raise enough money to finance them in a way to provide adequate information to the electorate, the only other factor that has some value to the electorate is a partisan label. My inherant suspicion is that a voter who looks at one of those candidates whom they do not know and he sees Democrat or she sees Republican down the person's name, will know much more about that particular

individual than they do at the present time. I think one of the real contributions that Phil has made is in raising that issue, a kind of hearsay among political scientists--promoting partisan elections.

So I've really come full circle to the point where, based on my data, of the last twelve years, I cannot justify or voice support to the continuation of the present system. I would suggest that we've got to fine some way for a voter to be informed and I don't know any way to do it.

We have tried a ballot pamphlet. I'm not so sure that anybody reads the ballot pamphlet, and if we have a large number of contested elections, I know they're not going to read the ballot pamphlet. When we have 10, 12, 14, 15 ballot initiatives and an equal number of judicial races, plus all of the other candidates running, I think it's unrealistic to suggest that voters are going to spend any amount of time. So where does it leave us? Let's take a good little hard look at some of the reform proposals. The ballot pamphlet is a classic example. I think it's had some good effects, but it's been largely ineffectual. Also, as a political consultant, I'd say it's a lousy way to spend campaign money. If I were going to spend that amount of money, I'd certainly spend it on something more effective and I think that's one of the reasons that some don't do it. So what are our options?

We're disturbed by the increased cost which are clear in my tables and in Phil's paper. It's very clear that the cost is going up. Money must be raised. That's an unpleasant system. Well, then we have suggestions that we ought to limit the size of the contribution, to $100, $200, $400, $500. Where does that cut-off line come? Does a $500 contribution have more of a negative impact than $100? Or is it the fact that it's money at

all? Or is it the fact that the judicial person has to use people to raise money for it? Is that where the issue is? If we limit the amount down to $100 or less, we're going to have trouble raising the amount of money that is necessary to finance a competitive judicial election and, therefore, the voter will be denied that kind of information. There have been suggestions that we put a ceiling on the amount that could be spent. I suspect that would have the same negative effect that it does when you put it on to legislative campaigns and in congressional races.

On the other hand, we could perhaps require something in the way of mailings to voters. Who's going to pay for it? How are we going to finance that? I can't imagine that the voters would be amenable to raiding the public treasury to finance judicial elections. My old and late dear friend Ed Koupal from the People's Lobby used to call that the "politicians welfare program." Well, I don't know whether Ed was right or not, but I suspect a majority of the voters would agree with it.

So, when you look at all these numbers and I sit here and tell you that the costs are going up every year, most judges aren't defeated no matter what the cost is, voters don't understand judicial elections, they don't know enough about the candidates, what in the world do we do? It seems to me we could spend a little time this afternoon as we end, to try and figure out some way of dealing with what in my opinion is a very undesirable situation today. Not only at the supreme court level, but perhaps even more importantly, at the trial court level. That's where most of the legal business takes place -- at the trial court level, not at the supreme court level. I would suggest that we ought to focus a lot more of our attention on how to have the best possible selection system at that level. There are enough checks and balances that come into effect at the supreme

court level, and Phil might want to say more on that because I know he's written extensively at that level. But something is wrong somewhere.

The final comment I would make is I think it's directly correlated with the skeptical and sometimes negative attitude that voters have toward the entire judicial system. I think it's kind of a bum rap. But nevertheless, voters have their way of expressing themselves.

So I apologize for not having the paper. And Judge Weil, though I'm a slower learner, perhaps I'm coming around to the position that you and I talked about many years ago. I have more comments, but I'll leave those until after Phil talks about his paper. Thank you. (Applause.)

MR. MATHEWS: Thanks very much, Larry. Third and last, Phil Dubois. Phil is Associate Professor of Political Science and also Assistant Vice Chancellor for Academic Programs at UC Davis. His research has also been detailed and extensive on the question of judicial politics in this state. I think his work is one of several examples of what is happening at Davis and turning that institution into a very broad-based university, far different from the one that all of us have an image of. And I'll turn it over to Phil.

PROFESSOR DUBOIS: Thank you very much. I'm very glad to be here. I noticed everybody is particularly attentive given that we had the difficult position of coming in after lunch when everyone had had wine. It's a traditionally disadvantaged position. I'm not unmindful of the fact that I'm the last formal speaker in the program, and I'm reminded of Sergeant Preston's Law of the Yukon which is that the scenery changes only for the lead dog. (Laughter.) Since I'm the last dog, I'll try to make it interesting.

The paper I prepared is a third in a series that I've been working on in a major research effort to look at California's superior court elections. Specifically, I was looking at the contested primaries and runoffs for the superior court in California from 1976 to 1982, a little bit narrower research window than Larry's work, but stimulated originally by his early work on this topic. My data consists of 153 contested races involving over 400 candidates statewide, not just in any particular county.

I'd like to say a word about those two earlier studies because they set the context for the paper I've prepared for this symposium. And I brought some copies if anyone's available. I'd even be willing to make a music video if there was a lot of demand for it.

The first paper was an attempt to understand the role of various factors that are thought to be important in influencing the results of superior court elections. I looked at things like candidate ballot labels, that is, whether the candidate was an incumbent of a municipal court judge seeking elevation to the superior court or just an attorney seeking to be elected. I looked at campaign spending. I looked at the role of newspaper and bar endorsements. And I looked at appearance in the voter information pamphlet. That research relied on a pretty complex statistical analysis which was required because these elections typically involve anywhere from two to nine candidates and also primary and then subsequent runoffs. I don't need to go into the details here and I'd be happy to discuss it with anybody who is interested. But that research tended to show, as you might expect, that the ballot labels were the most influential factors; that is, whether the person was an incumbent or a municipal court judge, they were very much advantaged over other kinds of candidates.

The next most influential factor though was campaign spending. And I had to measure campaign spending as the differential in spending between different types of candidates, because raw spending data from Los Angeles County cannot be equated with raw spending data for Alpine County, as you might expect. So I did that kind of research initially. And interestingly, campaign finance turned out to have the most influence upon the vote in the smallest counties. It was virtually insignificant in Los Angeles County where ballot labels, at least by my research, seemed to be the most influential. We could talk about the meaning of ballot labels later, if you wish.

I then became interested in a series of general questions about campaign finance in these races, particularly in the difference between the smaller counties and the larger counties like Los Angeles. First of all, how much was being spent? Second, what kind of variation might you find among different counties in the state and different parts of the state and between different kinds of candidates? And finally, who gives money to these kinds of elections and in what kinds of amounts?

I didn't enter this research without my own preconceptions. I think I was influenced quite a bit by newspaper reports and some television that the role of money had really increased in California trial court elections significantly. And I really had several things I expected to find. First, that campaign costs were increasing and rapidly growing higher every year and in many jurisdictions so high a to be prohibitive for any candidates. Secondly, that these increasing costs were forcing candidates to seek out more contributions in ever larger amounts. And third, that these contributions originated primarily with attorneys who were the most likely financial supporters of these campaigns. They are the people who pay attention and who care and who the judges know and go to for money. This, of course, then created

the associated problem of conflict of interest, that judges would be going out and getting money from lawyers who would appear before them while they were sitting on the bench.

My initial paper on campaign spending focused on the spending side of the aisle. and I've gathered many of the same statistics that Larry has. I was surprised, I think, by what I found. First, the cost per contest and cost per candidate did increase over that 1976 to 1982 period. I don't have the 1984 data and I'm too tired of this stuff to go collect it. In real dollar terms, the cost had increased per candidate in 1976 about $6200; by 1982, it had climbed to $17,000 statewide. But the bulk of that increase came between 1976 and 1978 which prompted Professor Berg to write a paper shortly thereafter called, I think, "1978: Year of the Big Money" because it really was by comparison of what we had always seen before. Since that time though, since 1978, there's been a very marginal increase, at least up through 1982. And 1984 may be another matter.

The second thing I found was that costs had not increased when you control for inflation. In fact, costs had decreased below the 1978 levels. This may be only of interest to political scientists because the candidates still have to raise real dollars. It's not any comfort to tell them that you're really spending less than you would have in 1978. But, as sort of a reflection about the intensity of the elections, generally, the dollars had not increased.

Also, costs were not great in per vote terms. If you measure it in per vote or per capita terms or however you want to measure it, only about a dime per vote is being spent in most judicial elections. And that's compared to over $2 per vote being spent in legislative and gubernatorial elections. I couldn't find any comparative data for other county-wide races like sheriff or

district attorney, but I'm sure they're higher than a dime per vote. So, judicial elections are, on the whole, very low by comparison. In fact, so low in many places that made me wonder about whether it was worth spending any money at all. The average race in Los Angeles (about $17,000 for a primary) still amounts to well less than a penny per vote. You wonder in an electorate of 5 million potential voters in Los Angeles if you're doing much good at all trying to throw $17,000 at 5 million voters.

I did find an inverse relationship between county populations and spending effort, if you want to define it that way. In the smallest counties of California, those with less than 50,000 voters, their spending was up to a shocking 20 cents a vote; and then it gradually went all the way down to less than a penny per vote in L.A. This seemed to me to suggest that in Los Angeles County one of the reasons I found that campaign spending had no effect was that it had no effect. They're not spending enough for it to have an effect. And I guess the people who are actually involved in political campaigns could speak to what the most effective ways might be to spend the money.

So the paper I prepared for this symposium focused on campaign contributions and specifically interested in the questions of who gives to these campaign and whether in fact lawyers are the primary givers, what kinds of contributions are made, and how large do they tend to be. Can these data in any way contribute to analyzing some of the proposals that have been put forth about regulating campaign contributions in judicial elections?

Early this year, Assemblyman Stirling introduced a bill, AB 2565, which would have limited attorneys, judges, bail bondsmen, court reporters, and court reporting firms from giving more than $250 in a calendar year to any candidate for a superior or a

municipal court position. And I was interested in whether or not that was really a problem in the first place.

I decided to take one particular year, 1980, to do this. I picked 1980 because it had the largest number of races that we've had in a recent number of years. The superior court had 36 primary races with 100 candidates, and then 11 runoffs. And the total raw number of dollars spent in that year was very large compared to other years -- $2.2 million. I examined the campaign finance reports and I looked at monetary contributions, nonmonetary contributions, loans, and other sources to these campaigns. This is one of the most painful scholarly exercises I think anyone could possibly imagine. People differ in their sophistication in filling out the forms. There were lots of errors. I might point out that one-third of the candidates I looked at in 1980 were violating the law because they failed to file the campaign finance reports in Sacramento. They filed them only in their counties and yet superior court candidates are required to file them in Sacramento as well. I didn't go chasing them down, but I did have to get on the phone a lot and call county clerks. I had a couple county clerks who refused to send me the reports at all because of their Xerox charges, even when I was willing to reimburse them. So it's not something I want to repeat, and I certainly don't recommend it as a hobby.

But I did examine these reports, and I specifically wanted to make a computerized data file of all the people who gave big money; namely, the contributions that are itemized in the reports of over $100 in a calendar year. I recorded their occupations and put them into my computer file, and there were 3100 of those people when all was said and done. I run across the people at cocktail parties now and then and I can say, oh, you gave in the 1980 superior court race. (Laughter.) They're really thrilled -- pleased to know that I know that. (Laughter.) Public disclosure has its benefits.

The first thing I wanted to do was to understand the role of monetary contributions generally to these elections. And I first looked at nonmonetary contributions. There are the in-kind contributions that candidates get from various people for stationery, mailing, printing, and so forth. I found that nonmonetary contributions constituted about 5 percent on the average of all the resources that go into these campaigns.

I also found that small contributions, un-itemized contributions of less than $100 cumulatively in a calendar year, made up about 40 percent of the monetary contributions. In looking at the large contributions, I found that about 30 percent of them came from the candidates themselves or from members of their family. I used a very crude index of members of family. I basically tried to match up last names. If Joe Cerrell also got contributions from Angie, Josephine, Mary, Louie, and Andy Cerrell, I made the assumption that those were members of the family. And I don't know --- are those in your family Joe?

I also found out that nearly 20 percent of the campaign budgets consisted of loans, and loans were almost entirely from the candidate themselves or from the members of their immediate families. One of the interesting things that campaign finance reports require is for candidates at some point to tell what happened to the loan the received. Did it get forgiven? Did it get repaid? Did you just forget about it? Did it get commuted into a contribution? Most of those are never reported on. There's a good news story there somewhere. (Laughter.)

In all, when considering the total campaign budget, only a third of the total resources available to candidates to running their campaigns came in the form of cumulative contributions of $100 or more. So two-thirds of the money is coming from other sources, and heavily from the candidates and their families, which I think is a serious consideration.

Then I looked at those large contributions. As you might expect, I found that lawyers and law firms were most frequent givers but they only gave 40 percent of the "large dollars," if you want to call them that. A substantial proportion to be sure, but 60 percent of the dollars are still coming from other kinds of people -- business persons, homemakers, even some political groups. Surprisingly, little of the money came from police groups, law enforcement groups, sitting judges, bail bondsmen, court reporters (less than 5 percent of the total). And very little from political interest groups. I know there's a concern that legislative candidates may take extra funds that they have and dish them over to the judicial candidates, but I could identify no more than 4 percent of the total coming from all those what you might call political sources.

I then looked at the lawyers and what they were doing and contributions generally from all kinds of contributors. The largest average contributions come from the people who give least frequently, and the smallest average contributions come from the people who give most frequently. Over all, the average contribution was about $176; that's cumulative in the calendar year. Eighty percent of the gifts, cumulatively, were less than $250; 15 percent of the gifts were in amounts from $250 to $499; and only 5 percent of the gifts were over $500. Lawyers, just by way of comparison, made average contributions of $160. This is a mean, an arithmetic average, which is in effect pulled up by the large contributions. The median contribution is just $100. Only 5 percent of the lawyer contributions were over $500.

The final part of my paper attempts to look in a preliminary way of whether or not there are any particular patterns in all of this giving to judicial candidates. And I thought it would be important to see whether or not there were any patterns because this would have implications for reform. Reforms are rarely

neutral with respect to how they affect different kinds of candidates. And I simply divided my candidates into three types of candidates: Incumbents; municipal court judges seeking elevation to the superior court judge; and other kinds of candidates.

And as you might expect, incumbents and municipal court judges rely most heavily upon third-party monetary contributions; two-thirds of their money comes in the form of actual money; two-thirds of their resources in monetary contributions and 40 percent of their dollars in large contributions of $100 or more. The other kinds of candidates have trouble raising money. Less than half of their campaign support came in the form of monetary contributions, and only 20 percent came in large contributions of more than $100. Very heavy reliance on loans, very heavy reliance on family and relatives to help them manage their campaigns -- about half of their dollars.

I also looked at different sources of contributions. As you might expect, incumbents get about half of their dollars from lawyers. Municipal court judges and the other kinds of candidates got just about a third of their contributions from lawyers.

So, when all was said and done, I was pretty unconvinced about the need for reform, at least in the ways usually proposed. In the case of the Stirling proposal to limit contributions from particular kinds of groups, I'm not sure it would make a heck of a lot of difference. If you limited campaign contributions to prohibit amounts of $250 or more, you're only going to affect only 20 percent of all large contributions. And if you limit the contributions that come from lawyers, judges, court reporters, and bail bondsmen, you can only reach 10 percent of the large contributions, and only 3 percent of all the resources that candidates need to run their campaigns.

So I guess I can close just briefly, and I guess I mean to be a little provocative. The actual evidence on this funding as it's presently practiced is that the conflict of interest problem amounts basically to average contributions of $176. I wonder whether that's a real serious problem, real or perceived. Maybe the problem, as Larry suggested, in judicial campaigns as we now know them is that it's not that too much money is being spent, but too little. And that for candidates who want to run for office, particularly for open slots, it's very hard to get started. (Applause.)

MR. MATHEWS: Before we unleash our discussants, Larry had a comment.

PROFESSOR BERG: I want to make one comment on the 1984. One of the values of looking at this long period of time as both of us have, but the 1980 --- the escalation and average expenditure in contested elections in 1984 showed the largest increase of any of the twelve election years that I looked at. This --- once before and after '78, led me to suggest that maybe it will continue. I don't know. But there is a very large percentage jump in the last election. No I haven't controlled for the cost, the increase, or the devaluation, I guess we want to say, of the actual dollars, but it is very evident. And it's the largest of any I saw during that whole period. What '86 will bring, I don't know. But '84 certainly made a big jump.

MR. MATHEWS: Thanks very much, Larry. I appreciate our panelists brevity. We now have plenty of time for our two discussants. I'm going to start with Joe Cerrell. Joe, as most of you know, is one of the most prominent political consultants in this state and, in my view, the most multi-talented of the bunch. He's played key roles in presidential campaigns back to that of JFK. He's president of both the American Association of

Political Consultants and the International Association for Consultants. He's also a senior lecturer at the Institute of Politics and Government at this university. Joe.

MR. JOE CERRELL: Thank you very much. The introduction might be loaded with remorse. One of the things I was told as a discussant was to be available for questions and answers and the comments. I've read Professor Bagdikian's remarks ahead of time. I had no disagreement with his or any of the other comments so far. I've jotted down some notes, though I prefer to use the time in terms of questions and answers. I apologize for people from outside the County of Los Angeles. The average cost was $17,000 per campaign in the superior court, for 5,000 voters, but it's 8 million constituents. That's a constituency larger than 84 members of the world's most exclusive club, the United States Senate. We're averaging $17,000 in a constituency of 8 million people. It's an impossible chore.

You might keep this in mind when they talk about those ballot pamphlets. The procedure of putting in a ballot statement of 200 words into that which the registrate or county clerk sends out to all the voters. That as you all know, is $22,000. So if one participates in that procedure in the County of Los Angeles, they've already gave over the average expenditure of the campaigns to try to reach the voters in this area. Even if it's in the City of Los Angeles, they're getting $8,000 or $10,000. And that's up front. God forbid if the campaign peters out or doesn't take place, it takes six months to get the money back. There's no line of credit. It's very expensive to try to communicate. We think nothing of Senator Lockyer's colleague Senator Torres, and his opponent spending a million dollars in East Los Angeles in one-fortieth of the State of California. You don't have to be a math major to know if you divide one-fortieth into the 24 million people in California, that's a 600,000 constituency.

That one election, a primary, is a million dollars. And yes, there's a lot of noise made about it; but again I come back to the 8 million people in the entire County of Los Angeles where judicial candidates average, maybe, $17,000. It is an impossible task, even geographically. The county ranges from Gorman in the northwest, for those of you who are not familiar with our geography, to maybe down in the southeastern part of the county. Maybe you'll have a request to speak to the Bar Association in Long Beach and the Chamber of Commerce in the Antelope Valley and trying to figure out how you're going to do those things because, in fact, direct one-on-one contact is absolutely and utterly useless in the county. You can start today, the 22nd day of November, trying to shake hands with voters not for the 1986 election but for the 1988 election and still not come in contact with as many people as that $22,000 voter insert comes in contact with.

The point is that we have these little minor horror stories because it's an absurd situation to try to discuss. I heard that we're supposed to hop around and talk about the group, pick out little items about eliminating funds and talking about limiting where the money comes from. Can you imagine that --- they can't raise enough money right now to try to communicate with voters, and that's what the whole political campaign process is about is communicating. They can't raise enough right now. They say well they're taking in too much money from the attorneys and they shouldn't take any money from attorneys. Well, if it weren't the attorneys, I can't imagine who else would want to participate in the campaigns other than the families, and they're the ones, by the way, who come up with talking about the loans. When you take away the attorneys and the families with the possible exception of the neighbors, I can't think of anybody else interested in a judicial campaign. I don't mean to offend the sitting judges

here. Justice Weil doesn't have to go through that procedure; they simply vote yes or no with him.

I want to conclude my very brief, and as I said, hopefully, interesting remarks. There was nothing else particularly to comment on because it was so well done. But we have another interesting situation. Everyone talks about now where the supreme court is going. We're really talking about the chief justice and those remarks which I had read earlier about the hair style of the chief justice. There weren't enough laughs down there in talking about Warren Burger's hair. They all talked about the chief justice, the supreme court election being up and down, yea and nay, yes and no. Occasionally somebody will talk about her colleagues. I hope they're amending the campaign to acknowledge the fact that Justice Panelli will now fall to that. So now you already have the five that they have been discussing, they add four, the one new guy and then Justice Panelli, so now you're really talking about six people who will be on the ballot in 1986, at least a minimum of six.

But now that the appellate court, the district court of appeal, the people questioning while when everybody is voting no on the supreme court, will they know the difference between the supreme court and the court of appeals? The funny thing about it is that if you try to discuss this with a group of people who are neither attorneys, nor professors, nor political scientist, and you realize that the audience themselves don't know what you're talking about. I learned a long time ago about the trial courts and the appellate courts, but they don't know where to draw that line. So for those people who worried about Justice Bird and then the other two --- Grodin and Reynoso --- and then you get down to Mosk and then to the current appointments. The real question is, will they know when to stop voting no? I recall in the last election the District Court of Appeals where the vote

was in the very low 50s, not much over 51 percent. I won't mention the judge's name, but he's a Republican and a conservative, but the people didn't stop, they were voting no on all the appellate courts.

What does that have to do with what we're talking about? Are we now going to have justices on the court of appeals conducting campaigns simply to say, "Vote yes on me" and all this sort of stuff? It's very difficult to try to educate the public as to what this is all about. We do have a very dramatic person at the very top. Somebody came along and said, how many can you vote yes on and how many no to. They don't even understand what whole procedure. It's going to be a real donnybrook come November. I was late coming to this position because I've always agreed with Weil, going back in the late fifties. You just have to take it off the ballot. Else you go the other way. You go the other extreme, Senator Lockyer, and make it partisan the way it is in other parts of the country. You can't expect the judges, and I said this on television, but you can't expect the judges to be beholden to political supporters and absolutely strip them bare of everything. At least in other parts of the country, they can fall back on the political party. Here, they fall back on some attorney friends and some relatives, and I know some that are still in hock. I know some that are in hock from 1978 because we want to make it pure so we take it out on normal politics, and there's no organization to fall back on. Judge Weil and I spoke before about a mutual aid society for just the fellow judges and even other judges out there. That's not the right thing to do. So either make it partisan or just take it out of the realm of politics. These poor bastards, and that's the only way I can describe them, are really standing stripped naked, absolutely in the world of politics because we don't allow them to be partisan and yet there's no place to fall back upon. Therefore, I say,

just take the whole judiciary out of the political arena and make it like the federal system, whatever the system they're now using, or even yes or no.

MR. MATHEWS: Thanks very much, Joe. (Applause.) Our second discussant is Superior Court Judge Robert Weil. As Joe indicated, Judge Weil has not had to face this question although he has some concerns with the general issue because he's not been opposed and has not had to be on the ballot and has not had to spend a dime, he inform us.

His experience is extraordinary for a judge, any judge I've ever encountered. Very few, in fact, no judge I've ever encountered is a graduate of the Columbia School of Journalism, which is probably one of the reasons why no one wants to oppose him for his seat. My wife once dabbled with the law and then went on to journalism. Judge Weil started with journalism and went on to the law; and I think that's probably the better course. He is also president-elect of the California Judges Association and will let us know what he thinks of these topics.

JUDGE ROBERT I. WEIL: Thanks, Jay. Like Joe, I didn't come prepared with a speech, but I have jotted down some notes as I've been listening to all this. First will be a general comment, then I have a little reaction to what each of the prior speakers have said in inverse order.

If I were writing this thing up as a side bar for the Washington Post or the L.A. Times, I'd begin with a human interest element. You have been deluged with numbers and statistics, but you haven't thought about Ann Ramirez. Who was Ann Ramirez? Ann Ramirez is a fictitious municipal court judge who got appointed to a municipal court somewhere up in the San Joaquin Valley back in, let's say, 1976. She was probably the

first person of Hispanic origin who had been appointed to that bench. The reason that she had been a lawyer long enough to be considered for that appointment was the fact that she had gotten a job in the public defender's office in that county very early on because that was the first place where they were hiring women Hispanics and the first place where minority people were getting a chance to get into public service. Certainly they weren't getting a chance to do in the large law firms. And Ann Ramirez gets appointed to the bench in 1976. In 1978 she has an opponent; and for the first time since she resigned her job in the public defender's office, she has no place to go back to if she loses. It's going to cost her $25,000 or $30,000 to run for her office. She was never in private practice. She didn't have a law firm that she can go back to. She didn't have clients that she could go back and get money from. And if she does get defeated, she doesn't go back to a job in public service anymore. Why should Ann Ramirez want to be a judge? And that was in 1978. Joe says, poor bastard. Yes, that's true. And this year it's even worse because among other things, there's a Gann initiative that's out being circulated, hopefully not to come on the ballot, which will reduce all the salaries of judges in California.

MR. MATHEWS: And pensions.

JUDGE WEIL: And pensions. And also of the district attorneys in California.

Today I had lunch with Mike Bradbury, who spoke to us this morning and whose salary is the third highest paid district attorney in California --- $85,000. His salary will be reduced by approximately $21,000 if the Gann initiative is approved. But suppose he takes the honor of leaving his job and going on the bench and taking a salary cut of about $8,000 or $9,000 to the superior court. Why would he want to do that? And how could he

go out and decently find the money that you have to find if you're going to be an opposed judge? The system is just crazy.

I have heard the political scientists on the panel sort of fence around with it and talk about the concept of accountability and how are the people going to know what the judges are doing and maybe the political parties should do it. Let me tell you something about the political parties. Senator Lockyer knows and others of you, I am sure, are aware that there is a supreme court decision, called Unger, where the supreme court held that the state central committees of the respective parties have the right, even though the Constitution says that judicial positions are nonpartisan, to endorse for judicial contests. And the supreme court opinion said that perhaps this can be cured by acts of the Legislature and the Legislature is out now trying to pass such a bill.

Let me tell you what it's like when you have political parties endorsing judges. I'll take a couple of eastern states. There was a little piece in the Daily Journal about a year ago which said that two judges who had been judges in New York City in the Bronx for fifteen years, Justice O'Brien and Justice Goldberg, were not going to be supported by the local Democratic machine in the upcoming election despite the fact that there had been nothing wrong with their service. The stated reason for this non-support was that the local Democratic machine decided it was now time to put a Black and a Chicano or a Puerto Rican on those courts, and so goodbye Justice Goldberg and goodbye Justice O'Brien. Well, that's one thing you get with political parties.

Another thing you get with political parties, in Philadelphia, and I read this article in Philadelphia, which is the city magazine of Philadelphia, there the political parties endorse and finance the judicial campaigns and the judges are

expected to attend all the political dinners and the judges are expected to kick in a portion of their salaries to all of the political parties that endorse them and support them. And of course, none of the parties wanted return. Well, according to the author, it's very simple; we want access. All we want to know is that when one of our people has trouble we can come in and talk to the judge about it, that the judge will understand the problem of his constituent. Well, judges don't have constituents; that is, everybody is the judge's constituents. But that's what you get when you get political party.

If you really look at it, the only answer is the federal model.

Now, whatever else you've heard here today, I don't think you've heard anybody saying that the federal court system is a poor or a bad system. As far as I personally am concerned, it's probably the one thing that's going to stand for the ultimate security and safety and saviour of this country if it ever comes to that. We have a federal court system where the President appoints with the advice and consent of the Senate, the judges are appointed for life, the justices are appointed for life; and anything short of that is an uneasy compromise that can't really be justified. They can dabble with it. They can, say, send out campaign pamphlets, have public financing. And yet, do we really have a bad brand of justice in the federal court system? Is there anyone who says we don't? The real problem is the political scientists say to us and the practical politicians say to us, you know, once you get the people to vote, you can't take it away from them. And maybe that's the reality of life. But you then have to think about the reality of what kind of people you're going to get who actually want to be the judges who are going to decide on your future, every one of you. If you end up in a traffic court, if you end up in some kind of another situation, what kind of people do you want to have judging?

Now, those are just a couple of random thoughts in that area. Let me just check a note that I had here on a couple of other things. I'm glad that my good friend, Joe Cerrell, used my number. He sort of multiplied it, but what it really means is that if you run for --- well, I'm not sure if you understand the system. If you're a trial court judge, whether it's municipal or superior, you have to stand for election once every six years beginning with the first general election year following the year of your appointment. If no one files opposition against you, then your name does not appear on the ballot. If someone does file opposition against you, then your name and the opponent's name appear on the ballot and there's an election. Fortunately, no one has ever filed against me. My name has never appeared on the ballot; and with any kind of luck, I have one more election and that's the end of that. But to the extent that your name does appear on the ballot, then you've got to go out and start raising the kinds of money that everyone's been talking about here, and again, where do you get it from?

I had the dubious privilege of testifying on AB 2565 --- I testified at that hearing. And someone on the panel, I don't remember if it was Mr. Stirling, said, "Well, you know, judges should go out in the community and sell themselves. You know we've got to do. We're Assemblymen; we've got to go out and sell ourselves every time. You should go and sell yourself." I was tempted to say, "How much should we sell ourselves for?" (Laughter.) But he said that. It wasn't my statement; that was his statement. And I have a picture, you know, the judge standing with a sandwich board and a little Salvation Army kettle outside the courthouse saying, "Help a poor judge; put money in the kitty." Is that what people really want their judges to be doing? I hope not. But in any event, enough of that.

Contribution of attorneys. Conflict of interest. Dr. Dubois, $176 will not buy me, try a larger fee. (Laughter.) Campaign finance. Accountability, I think I've talked about that.

MR. CERRELL: But tell them what I said.

JUDGE WEIL: Joe said, How much?

MR. CERRELL: I said, how about $200 then.

JUDGE WEIL: $200. (Laughter.)

MR. CERRELL: I said I'd pay $200.

JUDGE WEIL: I said I'd think about that. The federal judiciary, I've talked about that as an example. And you know, people talk about autocratic judges, but I think if you talk to the average lawyer and you talk to the average citizen, you know, I always look at Watergate and Judge Sirica and other heroes in the judiciary and other heroes in the supreme court. I have to reemphasize that the future of the country lies there, as far as I'm concerned. The one reason is that those people don't have to stand up against the winds that blow. And if you think it is not a good idea, well, I probably don't agree with you.

Interesting statistic, and I assume this applies to the appellate elections as well to the trial court elections. If you do have the misfortune of going on the ballot, there is an automatic 33 percent no vote built in without spending nickel one. That means, now, the one thing you have to pay is you have to pay a filing fee and the filing fee is equal to one percent of the salary and the superior court judge presently makes about $77,000 and one percent is $770. Your opponent pays $770, doesn't spend another penny and he's going to get one-third of the vote. If he

(or she) can only pick up that remaining 17 or 18 percent, you're already starting, you being the incumbent, are starting with one-third of the voters against you. I don't know if that's true statistically for the appellate courts; but maybe from the numbers that Joe was talking about; it is. I know it's true in the trial courts and that's a disaster.

Now, let me move back finally to the gentleman on my left for whom I have the greatest of admiration, professor Bagdikian from Stanford. He began with a coiffeur.

PROFESSOR BAGDIKIAN: Stanford?

JUDGE WEIL: Berkeley, excuse me. (Laughter.) He began with the wonderful quote about the coiffeur and that reminded me of the marvelous story that Bob Musel wrote in the United Press many years ago. And he started his story by saying, "Winston Churchill stood up before a group of London businessmen today and said, "You Norman bastards.'" He was quoting Shakespeare.

As far as how the California courts are reported on, I share all your comments. And as judges, we are concerned more than anyone else with the accuracy of media reporting, and I'm not talking solely about this with the 22-year-old rock-and-roll radio station reporter that I had the pleasure of sharing a room with up at Manville Hall at UC. Let me tell you what I'm talking about and then I'll stop.

Every two years the California Judges Association has sponsored a media workshop on the California courts. If any of you have never heard about it or want to talk to me about it after the program, come up and take a look. What we do, and we do it now thanks to a grant that we received from the Gannett Foundation, is we have a two-day workshop session --- actually I think it's a little longer, it starts on a Thursday evening and it runs

until Saturday noon --- to which are invited at very low subsidized rates all of the media, reporters from newspapers, from radio stations from television stations throughout the state to come and study with us for two days on how the courts works, how appellate courts work. We have workshops where they actually sit in with us and we go through probation reports. We say, OK, how will you sentence this guy? What kind of things should the judge take into account in determining this sentence? We show them how the civil courts work. We show them how appellate decisions are reached. And when I talk about the 22-year-old reporter from the radio station --- we room in the dorms up there. It's sort of like going back to college. Very uncomfortable. We all share the same bathroom facilities. I roomed with a 22-year-old young man. He was from Stockton. He said, "I came because I cover the courts for the local Stockton rock-and-roll radio station." I said, "That's interesting. Tell me about your background. What experience have you had in understanding...?" He said, "I took one semester of communications at the local junior college and I learned how to turn the switches on and off and how to play the turntables and how to put the commercial breaks in. And I got this job. it's better than the one I had up in Garden Grove, Oregon because up there I also had to do the weather reports and the bowling scores. And now I just go by the courthouse and city hall and I also do the deejay shot at night. And I figured I ought to know something about the courts, so this is why I'm here." (Laughter.)

Well, it's marvelous to have big newspapers like the Los Angeles Times or the Washington Post or the other places that have the resources, the finances, and the ability, although I see CBS has just cut out Fred Graham, to finance having specialized law reporters. But believe me, I don't think that in the vast majority of the California media that's the case. You've got a

general news reporter who covers the beauty contest, the dog show, the Lions luncheon, and the local murder trial; and they do them all in the same day and they get all the copy in and you've got a desk editor who then puts some heads on it and away it goes. Maybe I'm being unduly pessimistic, but in the smaller communities, I feel that's the case. And that's why the judges of the state are trying as best we can to help educate the people who help the public understand what the courts are doing. And the only people we can do that with is the media. And we're trying and we hope you help us.

So, those are all my comments and I'll get into questions too. (Applause.) One last comment --- we have a book that was edited, thankfully, by the Professor Bagdikian's predecessor at Berkeley called The Courts and the News Media, which has been published by the California Judges Association. I think, I'll say very modestly, it's the best thing in the field. Professor Bagdikian says he requires all the students to buy it. At least it gives some insight into things that they really ought to know.

MR. MATHEWS: Thanks very much, Judge. I have some questions, but I think we're going to open it up first and I might just have time in as the occasion permits. Do we have any questions right off the bat, or perhaps I should address a few? Anyone at all? Ah, the gentleman right there.

UNIDENTIFIED: I wanted to share an insight I gained from getting into the judicial canons of ethics that I was previously unaware of. When the American Bar Association prepondered the Canons of Judicial Ethics, they put in a specific provision that while judges were allowed to accept contributions from lawyers, they had to do it through some sort of a trust arrangement where they were not informed of the identity of the lawyers who were contributing to their campaign. This was actually adopted in

California and then repealed as soon as the Political Reform Act of 1974 went into effect, because the Political Reform Act requires judges to report their contributions the same way that other political figures do, so there was no way in California to insulate judges from the knowledge of who was contributing to their campaigns.

Now, I bring this up because I anticipate that a major feature of the supreme court election campaign in 1986 is going to be press reports recounting who has contributed to the justices' campaigns and what particular cases these people were involved in that were before the court. I don't see any way to avoid that. I think that's a reality that we're going to have to live with. But the question I want to raise is since everyone seems to agree that judicial elections are different than other elections, is there any way to treat contributions to judicial campaigns different than contributions to other campaigns and to build in some difference within the disclosure laws that would treat those contributions differently so that judges perhaps could be insulated from knowledge of what lawyers were contributing to their campaigns?

MR. MATHEWS: Larry, do you want to try that?

PROFESSOR BERG: I'd be happy to. I think it's very useful to know who contributes and I would be unalterably opposed to that. Once again, what is our reference? I want to know who's supporting this judge or that candidate for this judicial office. That provides me a bit of a frame of reference. If the groups who are supporting or opposing a candidate are the ones that whose position or views I tend to value, I find that very useful. But more importantly, when I look on the other side and see those with whom I disagree on a variety of things, that gives me a bit of a frame of reference.

I don't see how we can treat judges any differently if we're going to have them in election. I think part of the problem we've got with the whole process is trying to devise ways to treat them differently, so we have half of this and a third of that; and it doesn't work. I would be opposed to that. I think that we need more information about them, not less; and I don't believe that the size of the contributions that Phil was talking about have that much of an impact.

MR. MATHEWS: Joe.

MR. CERRELL: Do they have an impact? If you see that somebody's given $176 to Candidate A, is that going to tell you that he's your kind of person?

UNIDENTIFIED: Well, if I see a whole bunch of 176s and they all tend to be in political parlance on the other side of the spectrum from me, I might.

MR. CERRELL: I have two quick comments. First, I believe if we want to isolate the judge from knowing about the contributor, why don't we isolate Senator Lockyer from knowing about his contributors? What difference is it with regard to these people --- the judges knowing where the contributions came from, and then the congressman, the state senators, the state assemblymen, the state's constitutional officers, etc.?

Second, I am very concerned, not as a manager, because if we never have another judicial election, I'd personally be very happy, I am very concerned that the judges don't have enough funds as it is now. Wednesday I met with a member of the Los Angeles Superior Court who was concerned that he's going to be challenged. When I said, "What do you intend to do about financing, are you going to have a fundraiser?" Are you going to do direct mail? How do you plan to raise the money then?" His

answer was, "I'm selling my apartment building after the first of the year to finance the campaign." I mean, I felt awful about it. I don't think that's right.

Now, final item, short of the County of Los Angeles, the City of Los Angeles, without sounding too boastful, in a small constituency, you give me enough money, and I'm not talking about an outrageous sum of money, you give me enough money with an attorney, let's say, a personal injury attorney, a PI attorney who's made a big killing somewhere, or some corporate attorneys got a lot of money behind him, and I'll knock off a superior court judge in a medium to small size county. I'll knock off a municipal judge in just about any city in this state. You know why? Because the judge has no money and I know how to do a couple of direct mail hits, a little bit of newspaper advertising, anywhere in the State of California. And if that's the kind of a system you want where money is going to buy the judiciary, why that's a bad one.

JUDGE WEIL: Let me add just one comment. There are two possible reasons why you might want to know how much the judge received from whom. One, of course, is the one that Larry talks about which is so you know who you want to vote for at election time. The other, of course, is the concept that a lawyer who goes to court wants to know how much the judge might have received from his or her opponent. But remember, unlike the Legislature, if you've got a matter that's going to be heard before a certain committee, that matter is going to be heard before that committee regardless of who contributed what to the members of that committee. If you've got a case that's coming to court, and you're a lawyer and you think that judge has received money from someone that you just don't like there is a marvelous thing called a 170.6. Every lawyer has the right to file an automatic disqualification for imagined prejudice. There doesn't

have to be any affidavits supporting it. You've got the absolute right to kick the case out of that judge's court. So it seems to me that that's half the problem or more and that's a solution for it.

MR. MATHEWS: I saw a lady way in the back row. Come on up.

UNIDENTIFIED: I want to direct my question to Ben Bagdikian. To become more informed and therefore provide more accurate and balanced reporting of the courts, especially at the appellate level, you have suggested that news organizations send reporters to law school, for example, they're more experienced reporters. And further, that they avail themselves of some of the state and national studies and attendant statistics that may be available on the judiciary system.

I was wondering if there might be other more specific vehicles or mechanisms that
you would recommend for improving reportage in this regard, especially apropos the Judge's comments in his concluding remarks. And also, given that in regard to the appellate courts as you pointed out in your paper, for example, appellate court justices themselves are prevented from talking about the internal procedures of the court at that level in public.

PROFESSOR BAGDIKIAN: Well, I think there are things that any competent reporter can do whether it's a reporter on the L.A. Times or on the Petaluma Argus. And I think that we're fortunate that the distinction between good reporters in the large papers and good reporters in the small papers is diminishing. We have a much better generation of reporters. As Judge Weil said, not every paper is going to send a legal reporter to law school, nor do they need to. But they can go to things like that conscientious disk jockey, as Judge Weil described it. Even without

that, a good reporter having to handle the court issue in his or her jurisdiction, who works for a broadcast station or a newspaper that permits a half a dozen in-state long-distance calls can call the deans of a couple of law schools to ask, "Turn me over to someone who can tell me some background." And if the reporter can make four long-distance phone calls, he can talk to four deans so that in case that begets a particular perspective from one, he has a chance to compare it to others. So I don't think it's an impossible task to reach an acceptable level of care and prudence. I think the big problem is that a lot of reporters don't take pains to discover that they don't have to reinvent the wheel. There are authoritative people who know generally accepted undisputed facts.

What can be done on a general level? The things that the Judges Association does. The good journalism schools require teaching enough law so that a person isn't totally lost in a legal situation. I think there's an enormous responsibility on editors and news directors to recognize that this is a serious subject. You don't assign someone six hours to get a definitive story on all the judicial races and the pros and cons in a whole metropolitan area.

Every competent reporter should be able to cover court decisions, of course. Then when you get into the conflicts over whether the courts are run properly, at the very least recognize that you approach this subject with a certain amount of humility because it's a complex subject. We've learned that you don't write about the universe or the nature of nuclear fusion off the top of your head. You respect the need to find somebody who really knows something about it. All I'm saying is, any minimally competent reporter can acquire basic data about the courts. I think it's quite plausible, and I don't think it depends on an experienced reporter who has been to law school, but it does

depend on the news organizations taking this as a serious subject and approaching it with care.

MR. MATHEWS: I saw a hand form this bearded gentleman on the aisle here.

MR. SCHRAG: Like Professor Dubois, I haven't been through the campaign spending reports in Sacramento, but rather than looking at superior court judges, I've been looking at the current race for the California Supreme Court, and on that the numbers are very different. And my question---the numbers on the---and they're very different in character between the two campaigns as you might imagine. But on the side of the Chief Justice, the contributions come primarily in large amounts, meaning amounts over $100, and almost entirely from lawyers and, in some cases, in amounts as large as $5,000 to $10,000 for a lawyer or law firm. Now, I have a feeling that's a rather unique situation. I think this whole race may be a unique situation, but does that concern you and does that create a somewhat different--generate a somewhat different light on the situation from the one that you're talking about with respect to superior court judges?

PROFESSOR DUBOIS: Well, it wouldn't concern me because I'll never run. (Laughter). In a sense, it really wouldn't concern me. I have some faith, I guess, in the notion of public disclosure that those things will be disclosed at the appropriate times if people are attentive to them. I'm not particularly concerned about it. I guess, again, you're right, it may be a unique situation because these particular appellate and court races is so unusual and the amounts of money being spent are so unusual that it may be a once in a generation problem. I'm not sure that we need to be concerned over the long term about it. We'll have to see whether it's a trend.

I think you could look at the campaign finance reports for almost all the other appellate court judges in California and find big goose eggs as to what they had spent, or raised for that matter, because they don't need to.

MR. CERRELL: I'll tell you what concerns me. I got concerned about the integrity of the court. I don't care if it's the municipal court or the supreme court or everything in between. If decisions are going to be handed down based on political considerations, not just all contributions, I'm not saying it's being done, but I would hate to think that somebody is saying, "Oh my God, that's the law firm that made a $5,000 contribution to my campaign. Wow!" That's the reason I'd like to take the whole thing out of politics. You'd say, what's the difference in the partisan races? We look to the judiciary above it all in that whole thing. Maybe it'd be fine if you took that whole problem away from public officials.

MR. MATTHEWS: Ben, you had a question?

PROFESSOR BAGDIKIAN: I'd like the opinion of Professor Dubois. Looking at your numbers, '76-82, six years, in real spending it's relatively flat and it's a period of inflation. Looking at Larry Berg's numbers, '82 to '84, it doubles in two years. Just from looking at the six months' statements in this year's campaign, it's going to more than double in two years. Do you think that means that we may have had a relatively flat or a modest increase in the six years up to '82? Do you have a hunch whether we are now seeing a semipermanent radical increase in contributions to judicial elections given this doubling in a very short period of time?

PROFESSOR DUBOIS: Well, it might be a spillover effect from the appellate court race. I don't know. But I'm not even sure

that it's a real increase yet, because I would have to look at the distribution of races across the state to be sure whether the average race is, in fact, costing more. When you break these down by population of where the races are, that's where you see the flatness occurring. If all of the races are occurring in L.A., you would expect overall the average cost to go up. But if all of the races are occurring in Alpine County, which they won't of course, the average cost will go down. So even though it's a $46,000, I'm not sure what it means until I know where the races were held. That's one of the problems doing this kind of research, you get exhausted by doing it.

A partial response, I guess, is that I see superior court races different than these appellate court races. They strike me as being so incredibly feeble in terms of fund raising. I noticed one thing. I looked at the people who gave in the primary and then went back and gave to the same candidate in the run-off and there was only a 20 percent overlap. You'd think the people who were having trouble raising money would go back and hit the same people up again, but they don't. Now, I don't know if they're embarrassed or they don't read their own campaign finance reports or they filled them out so poorly they can't read them. But that was really astounding to me. And the number of one-time givers is just phenomenal. I'd say 98 percent of the people give one time to one candidate. There just aren't a lot of lawyers in the state who are giving to ten or fifteen different candidates.

PROFESSOR BERG: I'd like to toss an idea out just for response. I'm trying to figure out why 1978 looks the way it does in data with the expensive races and the large number. We're talking now about '86. I have an idea that if you went back long enough, you'd find cycles of appointment; and in 1978 find the Brown Administration appointees going in, and being

perceived as being vulnerable by a sizeable part of the Bar in many cases because there were a number of appointees, such as Judge Weil, who had not been on the bench before. I think there also was some thought among some elements at the Bar that goes: "the only way I'm ever going to get on the court, I've go to run because Jerry will never appoint me." I think there was some of that.

We're now in the end of the first term of the Deukmejian Administration. I haven't followed his judicial appointments as closely as I did the previous two Governors. I just wonder if there might be a relationship to a change of parties or Governors and move into a different type of appointee. I think most Democratic Governors appoint Democratic attorneys and most Republican Governors appoint Republican attorneys; and that's an empirical fact. I think you may get some feedback among people who would like to be judges. You go eight years with one type of judge, and then eight years with another. I don't know, I'm just tossing it out because I haven't seen any good reason as to why this works.

JUDGE WEIL: I think that if you look at the incumbents defeated schedule that you've attached to your paper or the data for your paper, you'll see a little bit of Ann Ramirez in here in 1978. Because if you look at the one, two, three, four, five, six, seven names that were defeated, and I'm not necessarily talking about the ones who got through by the skin of their noses, you'll notice that we had Judge Gonzales, Judge Sanchez, and Judge Lucero. Now that means that three out of seven who were defeated were Hispanic.

PROFESSOR BERG: I think there also may be one Black in there -- I'm not sure.

JUDGE WEIL: There were at least two Blacks. So remember, Jerry Brown brought a new dimension to the bench in California and I will say that although it's in a reduced percentage, I think Governor Deukmejian has followed that lead. Because before Jerry Brown, the California bench was primarily white and male. Jerry Brown changed that, probably forever. And the shock of that original impetus is something which produced this great wave of contested elections back in 1978. That's starting to recede, according to these statistics. But that was the reason for it.

MR. MATHEWS: A quick point of information for maybe Phil or Judge Weil. It strikes me if one is annoyed at the courts, one is usually coming from the right. You've mentioned the third automatic no vote you get. If you are listed as a prosecutor, are you tending to get more votes in challenging a sitting judge than some other occupation?

JUDGE WEIL: I think Joe Cerrell can answer that better than I can. Or weren't you listening Joe?

MR. CERRELL: No, I was listening, but I don't know the answer.

JUDGE WEIL: I've been told it's helpful; but of course, that's the year when the crime thing is big and people think prosecutors may do better than judges. It's certainly true that there was a year, and I guess it was either '78 or '80 when the prosecutors sort of banded together to put up prosecutorial opponents. They figured those were best kind to defeat this new breed of judge. And if you look at '78 you'll find that there was probably a higher percentage of prosecutors doing that than now.

One reason why the prosecutors have dropped is that their salaries are getting better than the judges. So you stay in the

prosecutor's office. You stay in the prosecutor's office. You stay in the prosecutor's office and not only does your salary get better, but you don't have to run for election every six years.

PROFESSOR BAGDIKIAN: I have a question for Joe Cerrell. Joe, you said that you think that the state ought to discontinue judicial elections. You know as much as anybody about the practicalities of California politics. Do you see that as a possibility in the near future or in the distant future?

MR. CERRELL: Judge Weil would tell you all it takes is an act of the board of supervisors.

PROFESSOR BAGDIKIAN: But that's ducking the issue.

MR. CERRELL: No, it's not going to -- I don't see it as happening. There'd be a big outcry on it.

JUDGE WEIL: Let --- you quoted me, let me make it accurate. There is a provision in the Constitution as it stands right now which says that to any court that has county wide jurisdiction, and that means, for example, Los Angeles County would be the Los Angeles Superior Court -- there are some counties I think like Ventura where the municipal court also has county-wide jurisdiction -- but in any county where there is county-wide jurisdiction, either by a vote of the board of supervisors or by petition, there can be placed on the ballot a provision which will say that all elections of judges in that county thereafter will be on a retention basis. Shall Judge so and so be retained in office? Yes or no. And that there would be no contested elections. And it's always been believed up at least until this time, until the supreme court race, that a retention election, nobody would give money to a retention election. You might give money to a candidate if you know that candidate was going to beat someone else. But leaving aside the unique supreme court that we

have this time, who's going to give money to a campaign to say that judge x shall not be retained in the local municipal court? The answer is probably no one. And that provision is in the Constitution right now. There hasn't been a county around that's had the guts to try it yet, but it's there.

MR. MATHEWS: We have a member of the bench here with a question.

UNIDENTIFIED: Yes, you were asking about the year 1978. that's when the DAs put together a slate and a tear-out for all the judges that are up for election, vote against these judges and their association. And that's what made '78 a banner year. We don't see this coming up despite the retention election. I don't hear anything about it. Therefore, there's been a dwindling of elections. Prosecutors are tough candidates.

MR. DUBOIS: I looked a little bit at the label of prosecutor in that research I was doing. Of course, those '78 races, especially the ones in Orange County where a couple of deputy DAs managed to bump off incumbents, were cited as being ominous for the future. But elsewhere in the state, and in other election years, it does help to be a prosecutor, but it's not as helpful as being an incumbent and it's not as helpful as being a municipal court judge. So it is better than being a plain old "attorney at law' or the other label that candidates can come up with to describe themselves like consumer advocate, criminal law specialist, and any number of other three-word combinations to make themselves appear attractive.

MR. MATHEWS: Yes, the lady right there. It looks like a little more than five minutes to go.

UNIDENTIFIED: One question perhaps someone would like to comment on is whether there's been an increase in the amount of

time the judges have had to dedicate to campaigning year-round or around election time, and whether there is an impact upon their ability to carry out their judicial functions by having to devote their energies to campaigns?

JUDGE WEIL: Well, Joe, what do you advise your clients to do when they come to you and say "I'm in the campaign," your judicial clients?

MR. CERRELL: One of the few concerns we would have is that they'd get caught out of the courtroom. And so, as I said, in Los Angels County, or even the City, we tell them it's not necessary to go door to door. There's just too many people, so don't worry about it.

JUDGE WEIL: In a small county, we tell them to take a vacation and even a leave of absence.

MR. CERRELL: But what I was leading up to, but we say at the very end, build up some vacation time toward the end and if you feel the necessity to be doing a few more things. Do things at lunchtime, do things in the evening, do things at breakfast. I don't think it's serious.

But if you get into that situation of an incumbent being challenged, it is. Those phone calls coming in and everything. It's not healthy, but there's no choice about that. And again, it's no different than any other political office.

MR. MATHEWS: Yes sir.

PROFESSOR LEVI: Julian Levy. I find this discussion much more alarming than I think the panel even acknowledges. First of all, generally, nothing, despite whatever the good intentions are, is available to the press to control the content of televi-

sion, direct mail, or advertisements which are going to be used. That content will be determined by experts, consultants, or to be more accurate, hired guns whose standard will be what will sell, not what is the appropriate discussion considering the factors so ably enumerated by Professor Bagdikian. High costs as a matter fact insure that result. If you've got a limited amount of dollars, you're going to want the maximum bang. Whether what is said is accurate or inaccurate, it's just a question of what will sell.

There's a question that I'd like to ask about that. I'm afraid I know the answer to it, because it's the kind of thing that turns live politicians into dead statesmen. I'm wondering what would be the value of the equivalent of a royal commission under the jurisdiction of the legislative judiciary committees now? This commission if properly organized need not endorse one view or another, but would meet the need for the information enumerated by Professor Bagdikian. And I would emphasize that if that were to occur, the last people in the world that I would want to see on this committee dominating it would be lawyers and least of all law professors. This is probably difficult, maybe impossible. But I think this is what we are confronting.

And finally, I don't think there's quite the comfort that we can see in the federal judiciary as the place of last refuge. If a notion gets abroad in this country, and I'm afraid it will, that given sufficient money, sufficient motivation, a judge can get knocked off, the federal bench will be next.

MR. MATHEWS: Thank you. I don't think that needs a reply. Any other question? The gentlemen back here. This may be close to our last question.

Unidentified: Yeah, I was wondering in reference to Assemblyman Stirling's proposed bill, Assembly Bill, I was wondering first to Professor Dubois, whether given the distribution of large third-party contributions to incumbent judges, incumbent superior court judges, incumbent municipal court judges, if you interpreted that pattern of giving to indicate that in fact these people who are contributing expect some benefit. I mean, there's a pattern that does correspond to the pattern one would expect, if some benefit were to be derived from the giving of campaign contributions.

And what I want to ask the whole panel is whether they think that it would be valuable to offer judges free space on the voter pamphlet if they would voluntarily restrict self-contributing contributions of their family to their campaigns to some set amount, let's say, $5,000; $10,000. If they would volunteer the limit of self contributions and get free space on the voter pamphlet, that in coordination with something like Assemblyman Stirling's bill which would limit the contributions from third parties, would result in low cost judicial campaigns that through the voter pamphlet would have larger exposure than judicial campaigns do now and whether the people on the panel....

MR. MATHEWS: Larry, why don't you try that? Oh, Phil, you want to try it?

PROFESSOR DUBOIS: I'm not sure I understand the first part of your question. I guess my point was if you bill is to restrict contribution s from specific contributor groups in amounts of over $250, there isn't anybody in those groups; that is, there's nobody in those groups giving--or hardly anybody giving money--that much money to these campaigns and that in fact they're underfunded, not overfunded.

UNIDENTIFIED: I was looking at Table 5.

PROFESSOR DUBOIS: What page is it on?

MR. MATHEWS: I think the judge has an answer on No. 2 while Phil's checking the table.

JUDGE WEIL: Well, on No. 2 the idea of giving free pamphlet space to the incumbent judge providing that that judge will restrict his or her fund raising---

UNIDENTIFIED: I meant all candidates.

JUDGE WEIL: You meant all candidates. If you mean all candidates, that means anybody who files gets free space; and if everybody who files gets free space, you're going to have 35 lawyers filing for every open position and you're not going to have anybody worth his or her salt volunteering to be appointed to the bench. If that's the bench you want, God bless you, that's what you're going to get.

UNIDENTIFIED: No, I was--the impression that most of the losing candidates--most of the current losing candidates are primarily self-funded candidates. So by restricting the amount that candidates could self-fund, that that would counteract and reduce the number of candidates.

JUDGE WEIL: Well, once you start giving away the ballot pamphlet, there will be no reason why anybody--any lawyer who needs the job tomorrow shouldn't spend the $770, run and take a shot at winning.

SENATOR LOCKYER: I might add another practical problem which is our State Constitution. It would require that the state appropriate all the funds necessary as a state mandate for all those ballot materials--it won't happen.

MR. MATHEWS: Phil.

PROFESSOR DUBOIS: I guess your questions is, are the attorneys who are contributing to superior court judges expecting something in return. I mean, that's why they're giving to incumbents and not giving to other people.

PROFESSOR DUBOIS: Well, that's kind of the classic question about campaign finance. Are people giving to candidates because they expect something or are they giving to candidates because they know them and are easily contacted or are they merely giving to people who share their ideological and political beliefs? And I don't have the answer from this perspective. My guess is that judges know more attorneys.

MR. MATHEWS: Thank you very much. That ends our discussion. Before we turn it over to Senator Lockyer, I think we ought to give the panel a hand. (Applause). Senator, it's all yours.

SENATOR LOCKYER: This is a one-minute close, so don't move. I want to thank Professor Bagdikian for not recommending licensed politicians. (Laughter). Secondly, I'm grateful that Professor Dubois did not look at the 1984 specific reports because you'll find that in my particular district that I was a donor of a $5,000 contribution to a municipal court candidate who happened to be the first woman ever elected to the municipal court in Southern Alameda County. And I'm kind of proud of that; that's why I did it, frankly. But I'm afraid it would distort all of the statistics if you were to look at that.

PROFESSOR DUBOIS: Well, it's out in the open now. (Laughter).

SENATOR LOCKYER: In closing, I want to--well, one other thought. Earlier people have mentioned my Senate Constitutional

Amendment 23, which was an attempt to blend the federal and California system that is -- of appointment of judges; that is, we would have a Senate confirmation of requisite before an appointment took effect. And then there would be at the next election the yes/no kind of election on the appellate appointments and then there would be life tenure thereafter. Well, I found just proposing that and then seeing three editorials in my local newspapers that described it as the Rose Bird protection act even though it was going to be taking effect prospectively and have nothing to do with Rose, I decided that perhaps that amendment should be reconsidered a different day. And it's now gone. I think that's the latest effort by anyone to propose in the Legislature at least something approaching the lifetime tenure.

I hope that you all feel that this has been informative and thought provoking. I certainly do. And I did want to thank Larry Berg and USC, the Senate Office of Research, and all of our marvelous participants who contributed to this effort. Thank you very much. (Applause).

DINNER -- KEYNOTE ADDRESS

PROFESSOR LARRY BERG: Senator Roberti asked me to say two sentences on the introduction. But first, I want to thank all of you for coming. I think what we're doing here is very interesting and something that has been talked about since -- before the Constitution was signed. As Professor John Schmidhauser tells me, Is that right, John?

The debate that we started today in the context of independence and accountability is one that will carry throughly to the election. Now, I've used up my two sentences. I am very pleased to introduce Senator David Roberti, who is the Senate pro Tem and the leader of the California Senate; and Senator Lockyer, I would like to thank you for being involved in setting this up.

SENATOR DAVID ROBERTI: You've done it very well. (Applause.)

PROFESSOR BERG: I'm going to add a third sentence, Senator. I live in the Senator's district. Senator Roberti has the distinction of living in and representing a district very close to where he frew up. All of us who live in that area really do appreciate it.

SENATOR ROBERTI: You're welcome. Thank you.

PROFESSOR BERG: Thank you. (Applause.)

SENATOR ROBERTI: Representing the most transient district in the State of California, my main claim to fame is I've probably lived there longer than anybody else. (Laughter.) But we're very happy, and I want to thank the Institute of Politics and Government at the University of Southern California for sponsor-

ing, with the Judiciary Committee, chaired by Senator Lockyer, and the Senate Office of Research, many of the staff of which are here, this really very excellent conference.

We have a real treat tonight. We are very fortunate in having with us Fred Graham, a man whose education, experience, and judgment makes him uniquely qualified to address the question which we're studying -- that of judging judges. As the correspondent of The New York Times, Fred wrote extensively on the battles over the Haynsworth and Carswell appointments to the United States Supreme Court . As the law correspondent for CBS News, he covered the judicial aspects of the abuses of presidential power, collectively known as Watergate, and in the process won three Emmy Awards. He also won the George Foster Peabody Broadcasting Award. As a Yale graduate and a holder of law degrees from both Vanderbilt and Oxford Universities, Fred is more than a journalist. He is a scholar, which is evidenced by his books, including a study of the Miranda decision, The Self-Inflicted Wound, which won the Gavel Award from the American Bar Association.

I'd like to also note, considering the co-sponsors of the symposium, that Fred has served as a consultant to the Judiciary Committee of the United States Senate. And so it's our pleasure to have you with us this evening, and we would like to hear a little bit of your experiences in this area that we're discussing this afternoon and tomorrow. Ladies and gentlemen, Mr. Fred Graham. (Applause.)

MR. FRED GRAHAM: Well, thank you very much, Senator Roberti, and thanks to all of you. I want to start off by assuring you all that in the grand tradition of television and show biz as it really is in these days, Tim Hodson has a long hook. And at nine o'clock, I get it. So you can be reassured that my remarks will,

I hope, be relevant and interesting as David said, but long-winded they will not be.

If you look on your programs, you will see that the person who's supposed to be standing here is former Senator Birch Bayh, who for reasons unexplained, was unable to make it. It happened that I was going to be here and Tim called me, and I was so pleased because I've been following the Rose Bird controversy and the upcoming election. I was fascinated that the opportunity presented itself for me to talk a little bit about some of the things that have come to my attention as a professional observer of the legal scene, but also in a bit broader sense that really does key into what you're discussing. When you think about it, the roots of the election that will come up here next year go back at least as far as Plato in the ideas that he expounded in The Republic, and they're as modern as a modern television technology and the power that that creates in elections and what some people might call the over-lawyered society; the litigious age that affects all of us so much.

It seems to me that it is only natural that those factors and others, which I'll mention in a minute, would be finally reflected in the thing that brought you here. It seems almost unthinkable, seeing President Reagan briefly on the screen tonight giving his report from the summit, but it was really only a year ago that he was in his reelection. If you'll recall, one of the dominant issues at that time was very relevant to what has brought you all here. You'll recall that Walter Mondale was saying that if Ronald Reagan gets four more years, the far Right is going to get five justices. It was reasonable at that time to believe that if Ronald Reagan did win a second term that a concomitant of that would be that he would have the opportunity to remake the supreme court of the United States in his own conservative image. After all, five of the nine justices were then 75

years old or older. They're now 76 years or older. You didn't have to count very far to realize that at the end of Ronald Reagan's second term, if indeed he was to be elected to a second term, a majority, five, of the justices of the supreme court would be in their 80s, and a sixth, Byron White, would be in his 70s -- by far the oldest Court ever in the history of our country. We only had thirteen justices who ever served into their 80s. To have five at once was obviously something, human mortality being what it is. There was an assumption that if President Reagan was reelected that, indeed, would have this opportunity. A kind of ghoulish death watch developed in which you'll recall Jerry Falwell said that if Ronald Reagan is reelected, we, he said, will get two more justices. "We" was not defined; but apparently, it meant the Moral Majority.

What happened was a curious thing. Although those of us who were professional observers of the supreme court pretty much accepted the mathematics of the claim that a reelection of Ronald Reagan would mean a remaking of the supreme court, very shortly after that campaign, four of those five -- Brennan, Blackmun, Marshall, and then later, Powell -- began to put out signals, some subtle and some not very subtle at all that they were going to outlast Ronald Reagan. (Laughter.) They were pretty old, but he was no spring chicken either. (Laughter.) It was in a sense of reflection, which I'll discuss in a minute more, of the forces that are in play in this State today with regard to your supreme court. It was interesting to see what happened.

Justice Brennan, who made no statement, who is 79, is the only newlywed on the supreme court. He eloped with his secretary. She was a young thing of about 65, and they eloped to Bermuda. You'll recall, they left little notes on the other justices' desks saying that they had done this romantic thing. He has come back with just a glow of youth and vitality. (Laugh-

ter.) There is a lot of life in the old boy now, let me tell you, you can really see that he's in there for the long haul. (Laughter.)

Thurgood Marshall made a statement. He said, "I was elected for life, and I intend to serve my full term." (Laughter.) That means that they're going to have to carry him out feet first as long as that man is in the White House. I read last month that Thurgood Marshall has instructed his clerks that if he dies, they're to have him stuffed and to continue to cast his vote. (Laughter.)

Harry Blackmun has been a little more subtle in that. In his private conversations, he loves to hold forth about the almost legendary longevity of the Blackman family in that part of Minnesota. he claims the males lived vigorously well into their 90s. He's obviously dug his heels in too.

Louis Powell, I thought was going to retire. He had always talked about in terms of being a justice for ten years. He was ill, as you know, and had a prostate operation, cancer of the prostate, back last January. He is the key really to what has happened in the light of this -- all of the talk during the campaign of a year ago last summer about replacing these doddering old fellows once the President gets four more years. Somehow it rubbed him the wrong way, the idea that these people should admit their mortality, passing the scene and have some young right-wing professor appointed in their place. (Laughter.) In private conversations, he has been heard to talk about how professors don't necessarily make good judges, that an ideological cast is not necessarily the best for being a judge and for even-handed decision making. He now says, not publicly, but he tells people who pass it along, that he is going to stay indefinitely.

So only one of those five septuagenarian justices, Warren Berger, really is going to retire during the next term of this President. Now, human mortality being what it is, of course, some other force may intervene. But if things go as they are now, Warren Berger will retire in 1987, I believe, after he has presided over the celebration of the bicentennial. I have a hunch as to what will happen, and it's simply a hunch. I don't think this has been thought through enough in the administration to be more than a hunch on anyone's part, but I do believe that Warren Berger, having presided over the bicentennial, will want to step aside and have a Republican President appoint his successor. To me it would make a lot of sense in many ways. I know the Chief Justice would like it if, and he's not shy about letting his thoughts be known about these things, the President would name in his place the first woman Chief Justice of the United States, Chief Justice Sandra Day O'Connor. She's a protege of Berger's. There's said to have been a gender gap in the Republican Party. Presidents love to do historic firsts. It would leave him another seat, a two-fer to fill, associate justice. How about Associate Justice Ed Meese? Do you like that? Does that sound good to you? (Laughter.) I hear, maybe, Associate Justice Robert Borg, maybe Antone Scalia; and would you think of a liberal? How about a liberal? They're talking about Orrin Hatch, the one liberal. (Laughter.) That's right, of the whole bunch.

But however that goes, it probably would not really change the cast of the United States Supreme Court . In a fundamental way, Warren Berger would leave, but a person very much in that cast would come in his place. So you would not have a cataclysmic effect on the supreme court that everyone took as a given a year and a month ago. By the way, the fascinating prospect here is that the future direction of the United States Supreme Court

will not be decided as everyone has more or less assumed by the last election, but by the next election, because those four septuagenarian justices, then in their 80s, will surely in any case then be ready to go. The next President will have a housecleaning to make and recast the Court for decades. It will be important if the person who does that is someone who really inherits the mantle of Ronald Reagan, say, a Jack Kemp; we then would see the judicial revolution that's been predicted. I would say any Democrat would continue pretty much in the mainstream that we've seen, and I consider the Berger Court generally in the mainstream of our constitutional traditions. The real question would be George Bush. I cannot take him seriously as a real right-wing, right-winger. He insists he is, but it's hard -- he's too preppy to me to get it in. (Laughter.) But with a second term ahead, maybe he really would, and that's one of the interesting things of the future to see.

What's fascinating about this is to see the supreme court as the light has dawned that the court is not going to be transformed in the ideological image of the President, to see this odd phenomenon really that has taken place in Washington in the last three or four months that is really a parallel to what brought you here. The almost infantile, I think, public quarrel between Attorney General Meese and some elements on the court in which the Attorney General has apparently had nothing better to flail at the court about than two really irrelevant theories: one, as you know, the question of incorporation of the various provisions of the Bill of Rights through the 14th Amendment and make binding upon the State something that most of us thought was really settled if not in about the mid-1920s, surely by the 1950s; and the other being, as the Attorney General calls it, the question of original intent, interpretation of the Constitution only, as he puts it, according to the original intent. Of course, the origi-

nal intent is important; but to me there is no answer for the cases which come with increasing frequency in which there is clearly no original intent. The obvious one is wiretapping. What was the original intent of the Founders about wiretapping? In some permutation or another, that question confounds the Attorney General, at some point in the question of original intent. What it makes you realize is that God must have really loved the supreme court of the United States to have the Berger Court there at the time that this Administration, in these times, and under these circumstances came to office with the instincts that appear to be there to strike back at the federal judiciary. Because where would you have found a court that would be really less vulnerable to the kinds of resentments, pressures that I presume and that it's the only thing that I can see is really inspiring the Attorney General and others to make the attacks they have? Chief Justice Warren Berger is essentially conservative. He has indeed voted with the majority in some of the more criticized decisions, such as Rose v. Wade. He does not like to be in the minority in cases like that. And that is an extra shield for the court. The liberals, who would be the brunt of any attack of this kind, or people such as Harry Blackmun, John Paul Stevens, Louis Powell. What it makes you really appreciate is the depth and the strength and the inevitability, I think, of the forces that have brought this group together to consider what's happening in this state in a situation in which the court and the Chief Justice are not at all as impervious to attack as the United States Supreme Court .

It really goes back to a dilemma of our constitutional democracy, which does have its roots in Plato; in the idea of guardians, the ideal governors of a society being wise guardians. This has been diluted and rejected as our democracy has evolved. But we do have our platonic guardians, to some extent, in the judici-

ary in this country. It simply is a dilemma which we have to admit, that in the greatest democracy in the world, the final decisions of many issues are laid down by nonelected, sometimes appointed for life, generally appointed, but tenured members of the judiciary. That is a tension with the democratic system that can't be ignored.

With its ancient roots, it seems to me that in more recent times, at least two factors that I confront daily in my work as an observer of the legal scene are now coming down with almost crushing force on the other side of that equation. One is the increasing legalization of American society through the litigiousness that is rampant in this state far beyond any other state. It's one of those cases where this state, as one of the bellwether states -- the bellwether state in a country is not setting a very hopeful example. I think the public resents it and is fearful of it and that the criticism of judges in the concern about the role of the judiciary is in many ways key to this question, this matter of litigiousness.

Those of you who have visited Washington, say ten years ago, may remember that there's a building in Washington near the center -- half a mile from the White House, one of those narrow buildings that comes to a point and it's very reminiscent of Times Square. About ten years ago, an environmentalist group had put up one of those digital clocks, big sign, and it said, "World population." There was a clock that turned, and it spun upward and upward to try and show how the world population was growing to instill some sort of public concern about population growth and the ecology. It didn't take; the sign disappeared. But I've always thought that it would have been a lot scarier if, instead of listing people, they had listed lawyers. If they had, it would have shown, according to the American Bar Association, that it would spin upward in every 16 minutes, a new lawyer, night and

day, 24 hours a day...(laughter)...until in the year 1998 all of the nines would line up and they would move forward and there would be one million lawyers. There will be according to the projection in the United States now. It's pretty chilling to think that any country, particularly your country, will have one million lawyers. That's like every man, woman, and child in the City of Kansas City. (Laughter.) Nobody knows what effect that will have. When I went into the practice of law, there were about 630 people for every lawyer. Well, we're told that when there are a million lawyers that the projection will be 263 million Americans, well, you can see that ratio. It doesn't take high math to see what's happened. It's not numbers; it's ratio and impact. I think that that is part of the equation of what's going on.

The other, pretty obviously, is a combination of my business, the media, and what it has been able to do in the sense of creating a universally, almost instantaneously shared experience among all of us and to the 263 million people. That is, you can make an issue now. You can make an issue against someone as dull as a judge which you couldn't do a few years back. Nobody had paid any attention to those judges and there probably were a lot of good issues to be made. There's been resentment against lawyers since Shakespeare's time, and Dickens' and before, and against judges, I'm sure. But now, with enough money, you can go on television and you can get across and you can make an issue.

I remember twenty years ago when I used to see Earl Warren all the time. The world was innocent in those days. But we lived in the same neighborhood, and he walked to work, walking down the street, and he'd walk along, and I'd see him a lot. I'd seen him around the supreme court. There were no bodyguards in those days. I asked him one day, "You know, what do you think about these big sign billboards that I see out on the highway

that say "Impeach Earl Warren.'" The John Birch Society was doing that in those days. It was 1966. And his eyes got like that, and he had a way -- I never knew if it was true naivete or if we was one of the biggest country slickers I've ever seen in my life. He says, "You mean they're doing that?" And I said, "Yeah, they're doing that." Either he was putting me on with his naivete or they really hadn't made enough impression to get to him, but the fact was that he knew that the billboards were not going to really affect the position of the supreme court and the Chief Justice and the Judiciary. But television is different, and I think the consensus in this room would be that Rose Bird is in trouble. Television is going to carry the message, it's going to be a simple message; it's going to play on the kind of resentments, the tension that I think is inherent in the issue of the platonic guardians, and on the tensions about litigiousness and the fact that this is not the Berger Court.

Rose Bird, at least in her early times where my perception as a non-Californian, got a rocky start as doing injudicious things. I think that the death penalty issue, that the United States Supreme Court backed away from quick enough, came down hard against the death penalty, but seven or eight years ago, that one was too tough for them. They backed off. And the fact that this is a woman. And an unmarried woman, for Christ's sake. Can you believe that? The nerve of her. And I think that there are currents there that might cut both ways. She might say, wait a minute, they're picking on a woman here.

But the broad forces that have produced the rather insignificant standoff between the Attorney General and the supreme court of the Unites States are going to play out clearly in a different way in this State with a different Chief Justice with different issues in a way to bring the issue before the people which, of course, the supreme court of the United States doesn't have.

I've been surprised that politicians elsewhere haven't resurrected some of the issues that have been presented in the past.

Back in the fifties, you may remember, there was some agitation in Washington for amendment to the constitution, to place a fifteen-year limit on the tenure of the United State supreme court justices; and I'm not sure it's a bad idea. I don't think we know yet what the superannuation of the American public is going to do to our relationships with our institutions. When people can live vigorously into their 90s, and they get appointed to the court in their 40s, 50s, 60s, maybe fifteen years wouldn't be a bad idea. I asked Earl Warren that too. I asked him, "What do you think about an amendment to place a 70-year mandatory retirement age?" and he gave me that big grin and he said, "Well, you know, I'd really be for that just as soon as Congress puts a mandatory 70-year retirement age on congressmen" and finessed that one very neatly.

But it seems to me that what is being played out here is the inevitable result of the tensions, the tensions inherent in a democratic society with judicial review. Exacerbated now by the legalization of our society and the power of our medium. Where it's going to take us is the reason why you're here. What will it do to the independence of the judiciary? I think that's one that's been discussed a lot. I wonder what it might do to the qualifications of the judiciary. What will happen -- I mean, the thing that made people want to be judges, good lawyers who could make so much more money in the private practice was not being attacked, not losing your job, but what will that do? How are you going to get people to take a low-paying job to go into a buzz saw like it. That's a question, and we don't have the answers. I think we're going to confront the question. I sense that this vote is going to throw that question right in our teeth. The answers, that's further down the road; but I do think

that as we go into the middle years of the 1980s, we're going to have an occasion to recall that the ancient Chinese did in fact sometimes use it as a curse when they said, "May you live in interesting times."

Thank you very much. I've enjoyed this... (Applause.)

SENATOR ROBERTI: Thank you very much, Fred. And may we have an interesting conference. It starts at nine o'clock tomorrow morning. Good evening.

APPENDICES

Politics, Independence and Accountability
The Origins of The
Judicaial Retention Election In Califoirnia

Leo J. Flynn
Pomona College

In the November 1986 Election, California voters may be called upon to vote "yes" or "no" on the question of whether or not Chief Justice Bird and Justices Mosk, Reynoso, Grodin and Lucas will retain their seats on the State Supreme Court .[1] Hence, five of the seven members of the Court will face the voters on their record. The practice of having the electorate vote on the retention of appellate judges; rather than the voters selecting among competing candidates, was authorized by a Constitutional Amendment adopted in November of 1934.[2] Because these forthcoming judicial contests promise to be very heated[3], the question of how the electorate should determine if an appellate judge is to be retained is highly important. The following discussion examines the origins of the judicial retention election in California. It also attempts to determine how the voters were expected to assess incumbent judges in retention elections.

Background

The California Constitution of 1849 provided for contested election for all judicial offices for six year terms.[4] In the Second California Constitution adopted in 1879, the Supreme Court was increased in size to seven members and the terms lengthened to twelve years; but judges continued to be selected in contested elections.[5] However, by the early years of the Twentieth Century, the practice of electing the judiciary was increasingly criticized by many reformers, academics, members of the judiciary and by the legal profession.[6] Much of this criticism became embodied in the progressive movement, which was influential in California in the first decades of this century. The most important aspect of this criticism was a suspicion, and sometimes a distain, of partisan politics, which the critics associated with corruption and inefficiency in government. The progressives favored good government which they associated with "scientific" and "professional" approaches to public management. They extolled the virtues of professionalism and expertise. This general spirit of progressivism, with its emphasis on professionalism and middle class morality, seems to have given impetus to movement to shield the judiciary from electoral politics.[7]

In 1914, following a study of judicial elections in Los Angeles County, the Commonwealth Club of California went on record favoring an appointive system for state judges.[8] The same year, a lead article in the *California Law Review* proclaimed that:

> Periodic elections and short terms have obvious faults. No matter how satisfactory the service of a judge may be he is required to run the gauntlet every four or six years. If he were merely required to submit to the electors the conduct of his office at periodic elections, so that they could exercise the option of declaring the office vacant, there would be sense in the system.[9]

Following the passage of the State Bar Act in 1926, the California Bar Association joined the Commonwealth Club in the effort to reform judicial elections.[10] At the first convention of the State Bar after gaining legal status, a former Los Angeles Superior Court Judge, John Perry Wood who remained chairman of the Judicial Selection Committee until 1938, set the Associations agenda for reforming judicial elections. For Wood, and for the State Bar, preoccupation with reforming judicial elections would last throughout the next decade.[11] Judge Wood declared that:

> An ideal system is not created at once. It comes in slow process, by steps, not always in proper order. Let us see these measures safely through and then work out and promote the adoption of Constitutional Amendments whereby every judge may be selected without regard to politics or popularity and solely upon character, learning and administrative ability.[12]

The spectacular population growth of Los Angeles County in the first decade of the twentieth century made its Superior Court the largest in the State. However, this growth was viewed as a source of serious difficulty in the efficient operation of the Court and in the selection of judges of the highest quality.[13] All available evidence suggests that dissatisfaction with judicial elections to the Superior Court in Los Angeles County, rather than dissatisfaction with the election of appellate judges, was the major driving force for reform.[14]

The major complaint about Los Angeles judicial elections was that they diverted a judges' energies from his judicial responsibilities thus forcing them to occupy themselves with campaigning and with fund raising. To the critics of an elected judiciary, this situation created an appearance of injudicious favoritism toward donors and supporters. Contested elections also were condemned for discouraging many of the finest attorneys from service on the bench.

Dissatisfaction with the method of selecting judges in Los Angeles and the general quality of the judges appears appears to have been a widely held view among the lawyers of the County. In each election after 1920, the County Bar Association held a plebiscite among among its members on qualifications of judicial candidates.[15] Yet, the Los Angeles Bar remained dissatisfied and, from 1915 on, supported efforts of the Commonwealth Club to reform the selection of all California judges.[16] A widely held view of the deficiencies of the system of electing trial court judges in Los Angeles was expressed by one of them, Judge Frank G. Tyrrell, in statement frequently quoted in the debate over judicial reform in the 1930's.[17] He said:

> The present elective system politicizes the office of judge and drives him relentlessly through two campaigns, the nominating primary, and the election. Because of that the judge is running for reelection every day of his term. He must attend weddings, funerals, parties, receptions, rallies, indiscriminately and cheerfully. He must respond to the social beck and call of everybody. His time is encroached upon and his strength consumed in keeping up his political fences. ...[I]t renders the judge unfit for service. ... That we should cling to a system which defeats this high purpose is incomprehensible.[18]

To document the consequences of the prevailing system of judicial elections, the Bar sent a questionaire to each of the 18 superior court judges up for reelection in 1934. The judges reported spending between 1 and 2 1/2 days a week on "political matters."[19] Little effort, however, was made to demonstrate any qualitative inadequacies among the Superior Court judges in Los Angeles[20] William H. Anderson, President of the Los Angeles County Bar Association in 1934, thought the deficiencies of an elected judiciary so obvious that he queried, rhetorically, , "[i]s there any question but what every right-thinking citizen should do everything possible that would tend to rescue our judges from this foul pool of practical politics?"[21] A further serious criticism of the system of electing judges in Los Angeles was that the voters were overwhelmed by the number of candidates. How could the voters be expected to access the competencies of so many judicial candidates? For example, in one election there were 109 candidates for the superior court.[22] Los Angeles attorney Byron Hanna estimated that in 1934, if there were 3 candidates for each of 16 judgships, voters spending 10 minutes to assess each candidate would have to invest 8 hours on judicial elections.[23] He concluded that "as a result a great many voters in Los Angeles County vote for a judge as the average citizen buys a bar of soap."[24]

Paradoxically, at the same time critics were condemning the undesirable consequences of the system of contested election for judicial office, there was substantial evidence, that, in practice, the Los Angeles judiciary was primarily chosen by the governor.[25] In 1933, of 50 superior court judges, 35 originally had been appointed, whereas 10 had been elected. Although appointments were not as frequent in other California courts, they were nevertheless numerous and very few incumbent judges were defeated by challengers.[26] In San Francisco, for example, 10 judges were originally elected and 6 appointed; but in Alameda County all 9 judges had been appointed.[27]

At the appellate court level, 30 of the 71 Justices of the California Supreme Court who served between 1849 and 1933 had been appointed. On the Supreme Court as constituted in 1933, 3 Justices had been appointed by the governor and 4 elected. Two of the elected Justices had defeated incumbents. On the District Court of Appeals since it had been established in 1905, 39 Justices gained office through appointment and 12 through election.[28] Although electoral defeat for incumbent judges was exceedingly rare before 1934, the prospects of defeat may, nevertheless, have been significant for incumbents and others who may have considered judicial office. The opponents of judicial elections undoubtedly concluded that, even if the likelihood of defeat appeared small, nevertheless, the consequences of defeat were enormous.

The State Bar Proposes Reform

After having supported a Commonwealth Club plan for reform of the entire system of selecting judges Statewide in 1928, the State Bar sized the initiative in 1933.[29] Under the leadership of Judge Wood, the Board of Governors lobbied the Legislature for a Constitutional Amendment. The major thrust of this proposal was to reform the judicial selection process in Los Angeles County[30] Assembly Constitutional Amendment 98, authored by Assemblyman Lawrence Cobb of Los Angeles, would establish a commission consisting of the Chief Justice, the Presiding Justice of the District Court of Appeals and the State Senator from Los Angeles County. The commission would select 3 candidates for each vacant superior court office and the Governor would appoint from among these candidates. After serving for four years, the appointees would stand for reelection on their record.[31] ACA 98 was supported overwhelmingly by the lawyers participating in a special plebiscite conducted by the State Bar. The measure won among the lawyers in 57 of 58 counties.[32]

Although, the members and the leadership of the State Bar strongly supported ACA 98, there was nevertheless significant dissent within the Bar. For example, Robert A. Morton, a Los Angeles lawyer, protested in a March 1934 article in the State Bar Journal that "[t]he proposed plan, by eliminating competition at the polls, would merely extinguish the present slight possibility of the defeat of an incumbent unless a campaign of the recall type should be waged by organized effort."[33] He believed that because of the high percentage of incumbents reelected, the provision for the voters to pass judgment on an incumbents record after 4 years was "a mere gesture to the electorate."[34] According to Morton, ACA 98 would establish "a feudal system of county courts controlled by State Senators."[35] A San Francisco attorney, J. Edward Johnson, sought to determine empirically whether or not an appointive system would produce better judges than the prevailing elective system. His comparison of elected and appointed judges in California form 1849 onward led him to conclude that there was little qualitative difference between judges whether they were first elected or appointed. Finding that on the Supreme Court, Justices who were originally elected were more likely than those judges who were originally appointed to retain their seat in subsequent elections, Johnson concluded "it would seem the people have done even better in the matter of the original selecting of Justices of the Supreme Court than Governors have done."[36] Perhaps the most strident criticism of ACA 98 came from Saul Klein, a member of the Los Angeles Bar. Klein asked:

> Would it not be most unfortunate if, at the time of selection, we had a Chief Justice of the Supreme Court who was a cold, heartless reactionary; a Presiding Justice of the District Court of Appeal who had a Victorian mind and a stone heart, a State Senator who was a shrewd, cunning representative of special interests, and a Governor who was a better parade leader than a chief executive? Would it not be better to acept the decision of an ignorant public in the hope that a few of those selected would have a social vision and a soul of equity.[37]

ACR 98 was designated ballot proposition 14 for the 1934 general election.[38] Seven leading newspapers, from throughout California, endorsed Proposition 14, most of the newspaper coverage reported the benefits promised by supporter, principally the Bar. For example, it was suggested that the taxpayers would receive substantial savings from increased judicial efficiency and from the elimination of two elections for judicial offices.[39] There appears to have been no organized opposition to Proposition 14 and criticism seems to have been limited to some dissident lawyers and some labor spokesmen. On the other hand the measure was endorsed by a large number of organization throughout the State.[40] When the State Bar met in convention in September of 1934 at Pasadena, there was a mood of optimism and self-congratulation. The committee managing Proposition 14 reported that 688 addresses, 20,000 inches of newspaper space and 9 radio talks had been given in support of it.[41]

A Second Reform Measure Appears

After two years of effort, President Wycoff reported to the Bar with genuine surprise, that an initiative based on a Commonwealth Club proposal had qualified for the ballot through the efforts of the California Chamber of Commerce. Apparently, the bar was unaware of the measure until just before it was submitted to the Secretary of State prior to the gathering signatures of voters. President Wycoff reported that the Chamber had agreed to make several changes in their initiative and the request of the Board of Governors. The Bar Convention voted to support the Chamber's measure designated Proposition 3.[42] This measure also amended the State Constitution; but it differed significantly from the Bar's plan. Proposition 3 would establish a 3 member commission on judicial qualification consisting of the Chief Justice, Presiding Judge of the District Court of Appeals and the Attorney General. This commission would approved judicial appointees of the Governor, rather than make nominations as in the Bar's plan. Proposition 3 applied to the appellate courts in the State and its provisions could be adopted by an affirmative vote in any county to apply the provisions in that county. Proposition 3 appears to have enjoyed the same broad support as Proposition 14 and also faced no organized opposition.

On Tuesday, November 6, 1934 the voters approved Proposition 3 by a vote of 810,320 to 734,857.[43] Thus Section 26 to Article VI was added to the California Constitution. Yet, Proposition 14, which embodied the long efforts of organized bar was defeated by a vote of 639,355 in favor and 733,075 against.[44] Although there were fewer votes cast for Proposition 14 than for Proposition 3, there is no readily apparent reason why the ballot measure making sweeping changes passed, and the measure where changes would be confined to individual counties failed to gain voter approval. At least one critic, a former three term assemblyman, attributed voter approval of Proposition 3 to the complexity of the measure, to the voters' misunderstanding of the changes being proposed and to deceptive and extravagant promises made by the supporters of Proposition 3.[45]

During the 1935 Session of the Legislature, the State Bar persuaded Senator William Knowland of Alameda to introduce legislation permitting Los Angeles, San Francisco and San Mateo Counties to adopt the provisions of Section 26, Article VI for the selection of superior court judges.[46] The next year, the State Bar once again considered initiating a major effort to extend the selection process approved in Proposition 3 to trial courts of the largest counties in the State.[47] The Pages of the State Bar Journal and the Los Angeles County Bar Association Bulletin were filled once again with arguments regarding the merits and liabilities of the reformed selection process. However, no vote to adopt the merit plan for the trial courts was held in 1936

THE LEGACY OF JUDICIAL REFORM AND THE 1986 ELECTION

Examining the surviving records of the debate over judicial reform from 1914 through 1936, does not provide any clear understanding of how the voters were expected to exercise their judgment in voting to retain or to remove incumbent judges. Instead, the concern of the proponents and opponents of reform focused almost exclusively on the extent to which the reform measures would rescue the judiciary from the "corrupting influences of electoral politics."[48] Proponents of reform believed that providing selection by a commission or by the Governor and subject to confirmation by a commission, would improve the character and professional quality of the judges. And they also believed that reform would eliminate the distracting and distasteful necessity for judges to campaign and fund raise in their quest to achieve and to retain office.[49] In the words of one proponent, after reform, there would be "no political scramble for judicial office..."[50]

Although, the practice of making incumbent judges subject to periodic ratification by the electors based on their record in office was part of every reform proposal in the 1920's and 1930's, there was no detailed specification of how the voters were to assess that record. Ratification through voter approval appears to have been adopted because it retained some measure of judicial accountability and also because supporters perceived this to be politically imperative for adoption of the reformed selection procedures. In general, the advocates of reform believed that in ratification elections, an incumbent judge would not have to defend himself against any attack on his decisions in individual cases.[51]

The reform of judicial elections adopted in 1934 was not the culmination of a careful orchestrated campaign by the elites in California business, industry and the legal profession. Proposition 3, which was adopted by the voters, was the product of two parallel efforts, conducted independently of one another. These efforts shared fundamental ideals of good government in the administration of justice. Both groups believed strongly that the demands of competative elections were incompatible with fair and effective justice and with the goal of elevating the most distingished and learned lawyers to the bench. On the other hand, both groups believed that a selection system emphasizing professional standards would achieve the desired goals. The electoral approval of incumbent judges was not considered a significant aspect of reform. The implicit assumption of those who drafted and supported the reform proposals of 1934, was that elimination of electoral contests and the need for incumbents to campaign was sufficient in itself. Hence, the reform movement of the 1920's and 1930's provides no guidance to the voters as to how they should assess the "records" of the incumbent Supreme Court Justices in 1986. The preliminaries to the 1986 judicial ratification elections have already proved the reformers of 1934 wrong. The elimination of contested elections cannot guarantee that incumbents will be freed from the distraction of campaigning and fund raising. Nor can it guarantee the insulation of the judiciary from partisanship.[52]

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[1] Each justice must file a declaration of candidacy for reelection before August 16, 1986. Justice Broussard is not required to run in 1986 and Governor Deukmejian has nominated Justice Edward A. Panelli of the District Court of Appeals to succeed Justice Kaus who has retired. Morain and Jacobs, *Moderate Picked for High Court*, L.A. TIMES, Nov. 3, 1985 at 1, 24, Col. 1 (Sunday Final).

[2] CALIF. CONST. ART. III, SEC. 26 (added Nov. 6, 1934).

[3] *Supra* note 1 at 24.

[4] Pedrotti, THE CALIFORNIA JUDICIAL SYSTEM 3 (1967). The first three justices of the California Supreme Court were chosen by the Legislature.

[5] *Id.*

[6] *See* Mason & Leach, IN QUEST OF FREEDOM (1981) 288-295; Mason, FREE GOVERNMENT IN THE MAKING (3D. ED., 1965) 640-649; Croly, THE PROMISE OF AMERICAN LIFE (1909).

[7] by the 1920's the American Bar Association, the American Judicature Society, and the American Academy of Political and Social Sciences had all gone on record as opposing judicial elections, Wilkin, *The Judicial*

Function and the Error of Electing Judges, 11 CAL. ST. B.J. 180 (1936).

[8] *Judicial Elections,* XXII TRANSACTIONS OF THE COMMONWEALTH CLUB OF CALIF. (No. 5) (1927).

[9] *A Model County Court,* 3 CALIF. L. REV. 3 AT 8 (1914).

[10] *Report of the Judicial Selection Committee,* 1 CAL. ST. B.J. 50 (51).

[11] Judge Wood remained the Chairman of the Committee throughout the next decade remaining a leading figure in the movement to reform judicial elections in California. Wood was also Chairman of the Committee on the Administration of Justice of the Los Angeles County Bar Association. 9 CAL. ST. B.J. 19 (1934).

[12] *Supra* note 10 at 51.

[13] *Supra* note 8; Simmons, *The Selection of Judges,* 2 CAL. ST. B.J. 246 (1928).

[14] *Id.*

[15] The Los Angeles Bar also raised funds to aid those candidates it endorsed. In 1924 it raised $4,000 in campaign contributions. Overton, *The Responsibility of Bar in Selecting Judges,* 1 CAL. ST. B.J. 159 (1927). According to the Bar, candidates endorsed by the County Bar were generally elected to the bench. In the June 1934 primary election, the Bar endorsed 19 candidates, of these only two, non-incumbents, failed to win the voters' approval. 10 LOS ANGELES B.A. BULL. 19 (1934)

[16] Originally, the Commonwealth plan called for an appointed judiciary. Later, the Club supported various forms of commission selection and systems whereby judges were retained or removed by the electorate on the bases of their judicial record. *Supra* note 9; **[illegible] Transactions of the Commonwealth Club of California 621 (1934).**

[17] Rhodes, *Appointment of Judges Return to American First Principles,* 11 CAL ST. B.J. 59 (1936).

[18] *Id* at 64-65.

[19] No effort was apparently made independently to verify these assertions, nor did anyone question whether or not they might be self-serving. *Id* at 64.

[20] On the basis of comparative productivity of the judges in disposing of cases, a State Bar committee concluded that "[i]n Los Angeles County there is little uniformity in judicial ability." 9 CAL. ST. B.J. 37, AT 39 (1934).

[21] Anderson, *Selection of judges,* 9 CAL. ST. B.J. 136 AT 159 (1934).

[22] *Id.* The President of the Los Angeles County Bar noted that in one election there were 105 candidates for the superior court. Anderson, *Selection of Judges, Supra,* note 21, 157.

[23] Hanna, *The Selecting of Judges,* 8 CAL. ST. B.J. 105 (1933).
[24] Hanna concluded that name recognition, exclusive of qualification, was the most important determinant of election to the bench. *Id.* at 106.
[25] Los Angeles attorney Robert Morton estimated that in 1934, 90% of the California judiciary had been originally appointed by the governor and subsequently reelected. 9 CAL. ST. B.J. 57 (1934).
[26] Johnson, *Should California Change its Present Method of Selecting Judges?,* 8 CAL. ST. B.J. 82, 87 (1933).
[27] *Id,* 102-103. In 1936, of 158 Superior Court judges in California, 97 had been appointed originally. Woolsey, *Our Judges Should be given Some Security of Tenure,* 11 CAL. ST. B.J. 66, 68 (1936).
[28] *Id.* 84-86.
[29] *Supra* note 8.
[30] This seems to have been a tactical decision by the State Bar, choosing incremental rather than State-wide reform. Presumably, success in Los Angeles would bring support for further reform. It was necessary to win the support of the voters state-wide because judges of the superior court are State officers. Wycoff, *A Message from the President,* 9 CAL. ST. B.J. 37 (1934).
[31] Initially, the State Bar favored an elected commission of 3 laymen to select judicial nominees, but this plan proved politically infeasible in the legislature. Crump, *A Message from the President,* 8 CAL. ST. B.J. 88-89 (1933).
[32] In Imperial County the bar voted 10 to 10 on the measure. 40% of the members of the Bar participate, 3,342 voting for and 1,252 against. *Plebiscite on Judicial Selection, ACA 98,* 8 CAL. ST. B.J. 124, 125 (1933).
[33] *Supra* note 25 at 57.
[34] *Id.*
[35] *Id.*
[36] *Supra,* note 26 at 87.
[37] Klein, *Answer to Proposed Plan of Judicial Selection,* 8 CAL. ST. B.J. 113 AT 126 (1933).
[38] The author was unable to locate much surviving campaign materials from the campaign for adoption of Proposition 14.
[39] One member of Committee for ACA 98 suggested a $1,500,000 annual saving. Bates, *Eliminating Political Appointments,* 8 CAL. ST. B.J. 301 (1933) But see, Gelder, *Shall the System of Selecting Superior Judges Remain Democratic?* 11 CAL. ST. B.J. 39 (1936).
[40] Woolsey, *Supra* note 27.
[41] *Report of the Committee on ACA 98 to the State Bar Convention,* 9 CAL. ST. B.J. 37-42 (1934).

[42] *Id.*

[43] In Los Angeles county the measure was approved 243,699 to 322, 128, in San Francisco 76,235 to 70,759 and in Alameda County, 92,738 to 49,362. CAL. SECRETARY OF STATE, *Statement of the Vote for November 6, 1934.*

[44] In Los Angeles County the yes vote was 243,679 and the no vote 536,213, in San Francisco 25,376 yes and 153,089 no and in Alameda County the vote was 32,500 yes to 125,147 no. *Id.*

[45] Gelder, *Shall the System of Selecting Superior Court Judges Remain Democratic?* 11 CAL. ST. B.J. 39 (1936). To Gelder proposition 3 exemplified "[h]alf-baked schemes, commonly promoted by dreamers and even intolerants ... put upon the State; and before the great good-natured public is aware, it has been placed in leading strings and its rights circumscribed and its natural priveleges abolished." *Id.* at 41.

[46] Although approved in both the Senate and Assembly, the measure died when the Governor failed to approve it within 30 days after the Legislature adjourned on June 16, 1934, *Cal. Senate Journal*, 51st Leg. 1935.

[47] No legislation appears to have been introduced in the 1937 Legislature to effectuate these efforts.

[48] *Id.* 80.

[49] *Supra* note 17 at 60-62.

[50] *Supra* note 21 at 141.

[51] *E.g. Id* 141-143. The State Bar and the Commonwealth Club seems to have accepted ratification elections as a tactical necessity for securing reform of selection, although the appear to have perferred a pure appointive system since they frequently praised the superiority of the federal system of staffing the courts. The proponents of reform were well aware that even under the prevailing system of contested elections incumbents were overwhelming reelected and they probably concluded that eliminating competitive contests, in most instances, would make the retention of a sitting judge a mere formality.

[52] Balzar, *And Now A Word From Justice Bird*, L.A. TIMES, MARCH 9, 1985 PT 1; Morain, *"Massive Executions' in State's Future, Bird Says*, L.A. TIMES, NOV. 9, 1985 PT 1; Shuitt & Gillam, *GOP Strategists Hoping for Votes From Bird Foes*, L.A. TIMES, NOV. 7, 1985 PT 1, 26; Shrag, *The Campaign Against Rose Bird*, L.A. DAILY J., NOV. 7, 1985.

CHIEF JUSTICE DONALD R. WRIGHT --

The Culmination of a Half Century of Excellence

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Donald R. Wright -- the Culmination of a Half Century of Excellence"

Donald R. Wright served as Chief Justice of California from 1970 to 1977. As successor to Chief Justices Roger Traynor and Phil Gibson he was the third Chief Justice leading and maintaining the California Supreme Court as the preeminent State Supreme Court in the nation for more than a half century. Such a heritage should not only be cherished but it should be analyzed to determine how such leadership came about.

At the outset we must acknowledge that in Donald Wright we did not have a jurist with the unparalleled judicial craftsmanship or literary skills of Benjamin Cardoza. Learned Hand, or our own Roger Traynor. Among Judge Wright's opinions we do not find a Meinhard v. Salomon. What we do find is a Chief Justice who in fact was Chief by force of character, intellect, and personality, and who at the same time would be referred to repeatedly by his colleagues as a "warm, compassionate, and caring human being".

Donald Wright came to the Office of Chief Justice with superb credentials.

Following an undergraduate education at Stanford University culminating in a cum laude degree, he earned his law degree at Harvard and the University of Southern California both with distinction.

For a decade he engaged in the general practice of law as a private practitioner in Pasadena, and then in World War II entering the armed services he rose to the rank of lieutenant colonel, squadron commander, and chief of intelligence of the 11th Air Force Service Command. After World War II he returned to the practice of law in Pasadena.

Then in 1953 he accepted appointment to the Pasadena Municipal Court and served until 1960 when he was elected to the Superior Court of Los Angeles. In 1967 he became the Presiding Judge of that Court.

Governor Reagan appointed him to the State Court of Appeal in 1968, and then in 1970 appointed him Chief Justice of California.

Hence Chief Justice Wright came to the Chief Justiceship after twenty years of experience as a private practitioner of the law, after fourteen years of experience as a trial judge in a busy metropolitan court of general jurisdiction, and two years of full experience as an Appellate Judge. His opinions demonstrate that he understood the difficulties and frustrations of private practice; that he knew at first hand the responsibilities and problems of the trial judge made evident by his practice of laboriously reading trial Court records time after time; that he understood both the limitations and opportunities of appellate and supreme court service.

More significantly bench and bar as well as the general public understood that here was a Chief Justice who had earned that title. As one of his colleagues remarked from the very beginning of his term; "the Chief fit in well".

Chief Justice Wright in accordance with the Constitution and Statutes of California had major responsibilities in the

administration of the judicial system of the State. His skill as an administrator was a bright point of his tenure. The Chief has been described as a politically moderate justice with high intellectual abilities, but with even greater administrative skills. He was a judge's judge. Professional, quiet and undramatic in demeanor, Wright seemed to exude dignity, open-mindedness, fairness and compassion.

The Chief understood that he administered best by persuasion, rather than by force of will or the powers of his office. He was an experienced and tactful administrator who maintained the traditions established by Chief Justices Phil Gibson and Roger Traynor. Retired Associate Supreme Court Justice Raymond Sullivan has described Wright's administration of the judicial branch as "masterful". According to Justice Sullivan, the Chief's leadership was uniquely effective because of his warmth in dealings with his colleagues and with those outside the judiciary. Of course, the fact of years of prior service and experience was all important. In most cases the

Chief was working with Judges whom he knew in prior years, and who themselves knew that the "Chief had been there himself and understood their problems".

During Judge Wright's tenure, the courts of appeals were in trouble as their workload had increased greatly. The traditional means of dealing with a growing backlog is to add judges. With the appointment of more appellate judges, however, it is difficult to maintain the quality of appointments and uniformity among decisions. To avoid appointing numerous appellate judges, Judge Wright instituted several administrative reforms. For example, he created a central staff which could relieve the justices of some routine work. In addition, Judge Wright introduced the use of memorandum dispositions for routine cases. The criteria for publication of opinions from the Courts of Appeals also was changed that less opinions would qualify for publication. The success of these reforms is demonstrated by the increased productivity of the justices and consequent elimination of

the need to add authorized positions to the Courts of Appeals for ten years. "While the number of dispositions per judge in the Courts of Appeals increased by approximately three percent during Judge Wright's tenure, the percentage of published opinions dropped steadily: 39 percent were published for the 1969-70 term, and only 16 percent were published for each of the last two terms during Judge Wright's tenure. Judge Wright instituted this structural reform by quiet persuasion and coaxing his fellow judges into acceptance.

During the tenures of Chief Justices Gibson, Traynor and Wright, the power to select the judges for the appellate department of the superior court, for all practical purposes, had been transferred from the Chief Justice of the California Supreme Court to the presiding judge of the superior court in the larger counties. Judge Wright reformed the existing process of assignment to the appellate department by meeting periodically with the presiding judges and suggesting to them that assignments to the appellate department be

rotated with a new judge added each year who would serve for a total of three years and then return to other assignments. Before Judge Wright's tenure, the assignment to the appellate department had, through the seniority system, become more or less permanent. Judge Wright got this reform accepted by discussing it thoroughly with the presiding judges, deferring to their judgment, and soft persuasion.

Removing Associate Justice Marshall McComb was one of Judge Wright's most sensitive administrative accomplishments. In light of the fact that Judge McComb was conservative and the court was liberal at that time, Judge Wright did not want his removal to appear to be politically inspired. Therefore, Judge Wright helped engineer a constitutional amendment through the legislature that provided an avenue whereby Judge McComb's removal would not appear political. The amendment provided that, if a justice of the Supreme Court was involved, the recommendations of the Commission on Judicial Performance would be referred to seven randomly selected court of

appeals justices. As a result of the creation of this special tribunal, Justice McComb's removal did not appear to be politically inspired.

Judge Wright is remembered for being accessible and thoughtful. He returned phone calls from other judges and from the press. He put out a press release on every case in order to establish a public information office. Judge Wright also made special efforts to ensure that the research attorneys were treated fairly. He made their pay comparable to civil service lawyers of equal seniority. As it has become evident, Justice Wright's administrative reforms were successful as he instituted them after consultation and in a way that was acceptable to the majority of judges.

With the petition for hearing system, the California Supreme Court under Chief Justice Wright retained control over its docket. From 1970 to 1977, to total number of filings increased by less than two percent. The percentage of petitions for hearing granted of cases

previously decided by the Courts of Appeals steadily decreased during that time: 9.3 percent of the petitions for hearing filed were granted during the 1970-71 term, while only 7.9 percent of the petitions for hearing filed were granted during the 1976-77 term. The quality and depth of the opinions written by the justices of the California Supreme Court are especially remarkable in light of the number of cases per justice on the merits. For example, during the terms of 1974-75 and 1975-76, each justice of the California Supreme Court wrote 27 opinions for cases decided on the merits. This ratio becomes more meaningful when contrasted to the fact that, during those terms, each United States Supreme Court justice wrote only 17 opinions for cases decided on the merits.

During his eight years of service Chief Justice Wright wrote the opinion for the majority of the Court in 196 cases. These opinions throughout are remarkably consistent. There is always the meticulous even methodical exposition of fact so carefully done that while

policies or statements of law might be questioned in dissent, the accuracy of fact summaries were largely unchallenged. There is always the careful exposition of law and prior case authority plainly and clearly stated. Throughout there is the insistence on judicial duty and function expressed by the Chief Justice himself in his landmark opinion in People v. Anderson dealing with the constitutionality of the death penalty under the California Constitution:

> "(5) Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility. It is a mandate of the most imperative nature. Called upon to decide whether the death penalty constitutes cruel or unusual punishment under the Constitution of this state, we face not merely a crucial and vexing issue but an awesome problem involving the lives of 104 persons under sentence of death in California, some for as long as eight years. There can be no final disposition of the judicial proceedings in these cases unless and until this court has decided the state constitutional question, a question which

> cannot be avoided by deferring to any other court or to any other branch of government." People v. Anderson 6 C.3d 628 at 640; 100 Cal Rptr. 152; 493 P.2d 880. (1972)

I suspect the subsequent comment by then Governor Ronald Reagan who had appointed the Chief Justice, that this was his "worst appointment" came as no surprise to the Chief. Whether a particular decision would be popular decision would be popular or not was irrelevant when measured against the core of judicial responsibility.

Analysis of those decisions of Chief Justice most widely cited reinforce these observations.

In Vesely v. Sager 5 C.3rd 153 (1971) Chief Justice Wright speaking for a unanimous court permitted third persons to sue vendors of alcoholic beverages for serving alcohol to an obviously intoxicated customer who, as a result of intoxication, injured the third person. That ruling overturned prior California judicial precedents based upon concepts of proximate cause. The defendant in Vesely argued that in

light of these precedents changes in legal doctrine should be left to the legislature. The Chief responded that the precedents were judicially created and were patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law. Vesely was controversial and was eventually over-turned by the California Legislature after a wave of public protest.

Similar is the opinion in People v. Beagle 6 C.3d 441 (1972) where Chief Justice Wright again speaking for a unanimous Court imposed severe restrictions on the ability of prosecutors to discredit a defendant by referring to prior felony convictions. Before Beagle, the majority view in California was that a trial judge had no discretion under the California Evidence Code to exclude evidence of a prior felony conviction offered for purposes of impeachment where the lawfulness of the conviction was established or uncontested. In a methodically written opinion, the Chief rejected the majority view and

held that by reading several sections of the California Evidence Code together, the trial judge had discretion to exclude evidence of prior felony convictions where the probative value of the evidence is outweighed by risk of undue influence. This year Beagle was overturned by the California Supreme Court in a decision holding the 1982 Victim's Bill of Rights had introduced an easier rule for the admission of such evidence.

In 1973, in Legislature v. Reinecke 10 C.3rd 396 the Chief Justice led a unanimous Court in laying down a blueprint for reappointment after then Governor Ronald Reagan and the Legislature could not agree on a single plan. The Court appointed several Special Masters to devise and recommend a reapportionment plan which recommendations were adopted by the Court. These recommendations avoided preserving the status quo and gave nonincumbant candidates a fair chance at election.

Finally, the Chief Justice in Birkenfeld v. City of Berkeley, 17 C.3rd 129 (1976) wrote the opinion again for an unanimous court upholding the legality of residential rent controls.

During his eight years of service the Chief Justice wrote the opinion for the majority of the Court in 196 cases. Of these 196 opinions dissents were filed in only 54 cases. In these 54 cases, 16 of the dissents were filed by lone dissenters. Thus in only 38 cases was there significant disagreement among the Justices.

On this data alone, it is thus clear that here was a Chief Justice who lead his Court.

Closer examination reinforces this conclusion. Of Wright's 196 opinions, 126 were criminal cases and 70 were in other areas of the Law. The later figure may be subject to some adjustment in that some matters such as juvenile criminal issues or Habeas Corpus proceedings are classified as non criminal. Of the 54 dissents 46 were in criminal cases and only eight were in civil cases.

During Wright's tenure as Chief Justice, eight justices served with him. The dissenting activity among these Justices can be broken down into categories.

Justices Clark, McComb and Peters dissented along lines of ideology and broad policy.

Justices Mosk, Richardson, Sullivan and Burke when they disagreed did so on specific factual determinations or on narrow technical grounds.

Most remarkably, Justice Tobriner, who served throughout Wright's tenure, never wrote a dissent to an opinion authored by his Chief Justice. This record from a Justice of Tobriner's competence and deeply felt convictions is a strong indication of how the Chief Justice time after time found a basis upon which he could unify the Court.

During these years Justice Clark was unique in the vehemence of the language of his dissents. Clark evidently believed that the California Supreme Court was too liberal and too favorable to defendants. He believed that the California Supreme Court not only

was not following the United States Supreme Court precedents as to defendant's rights, but on occasion intentionally attempted to avoid review by shifting the ground of its decision to provisions of the California State Constitution rather than the Federal Bill of Rights.

Justice Clark during his years on the Wright Court (1974 to 1977) wrote sixteen dissents to the seventy five opinions of Chief Justice Wright on behalf of the majority of the Court. In these dissents Justice Clark charged his colleagues with incompetence, being "altogether unreasonable", their rulings "completely unrealistic", their conclusions "inexplicable" and "(un)supported by reason or authority". On one occasion he charged that "the judiciary is developing a messianic image of itself".

In contrast to Justice Clark, Justice Peters was more liberal than the Wright Court. He wrote six dissenting opinions; one of these dissents opposed extension of the felony-murder rule; two dissents concerned procedural rules of the Court regarding acceptance of guilty pleas; the other three dissents turned on search and seizure issues.

Justice Richardson wrote dissents in four cases. Two of the cases reflect disagreements on narrow, technical points of law; in the other two cases he felt the majority was limiting unnecessarily the discretion of the trial court. In all four dissents Justice Richardson was joined by Justices Clark and McComb. Additionally, Richardson concurred without opinion in the dissents in four other cases.

Justice Sullivan wrote only four dissenting opinions all involving criminal law issues. Two of the cases concerned his disagreement with the majority's application of the exception to the hearsay rule in cases of co-conspirators charged with pre-meditated murders of spouses; in the third case Justice Sullivan was outraged by police conduct which he saw as an attempt to circumvent rules of criminal procedure requiring the presence of defendant's attorney at a line up; in the fourth case Justice Sullivan felt the majority had unnecessarily addressed a constitutional issue. Additionally Justice Sullivan concurred without opinion in dissents in six other cases.

With exception of the opinions of Justice Clark, the dissents throughout were characterized by civility and respect among the Justices. These Justices were strong men with deeply held convictions but their Chief held them together in mutual respect for one another and the institution of the law which they served.

In the final analysis the Chief Justice's colleague, Justice Stanley Mosk best summarized;

> "Perhaps his most noteworthy characteristic was a fierce independence. Don Wright bowed before no master: not the bench, the bar, the Governor, the press, or public opinion. He marched to the beat of no drummer, only to an ethical and compassionate conscience".

STANDARDS FOR JUDICIAL RETENTION ELECTIONS IN CALIFORNIA

Gerald F. Uelmen

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By Gerald F. Uelmen*

Introduction

It is most appropriate that this conference has been convened in memory of Chief Justice Donald Wright. No better role model for the virtue of judicial independence could be found. As we reflect on the appropriate standards to apply in judicial retention elections, and ask whether California voters are capable of separating their strong feelings on political issues from their assessment of Supreme Court Justices, Don Wright's record gives cause for hope. Chief Justice Wright faced the voters to be confirmed for a 12 year term in 1974.[1] Just two years before, in 1972, Wright had authored a very controversial opinion declaring that the death penalty was both cruel and unusual under our state constitution.[2] As a result, 105 prisoners were released from death row, including Charles Manson and Sirhan Sirhan. The decision was not a popular one. Governor Reagan declared that the appointment of Donald Wright was his "biggest mistake." A constitutional amendment was quickly enacted to restore the death penalty, supported by 67% of the voters.[3] Nonetheless, in 1974, 70% of California's voters elected Chief Justice Wright to a 12 year term on the Supreme Court. In an era when Justices are being evaluated by reducing their opinions on complex issues to a box score of results, one sobering comparison is worth noting. The record of Chief Justice

Donald Wright in death penalty cases was 172 reversals, 0 affirmances. Those numbers really tell us very little about the kind of Supreme Court Justice Donald Wright was, just as box scores offer little illumination for the task of evaluation we face today.

Three Models for an Evaluation Standard

In the first part of his three-part analysis which appeared in the Los Angeles Times in July of 1985,[4] Professor Michael Moore posited two "models" which might be utilized to evaluate a judge facing a retention election. The "political" model would apply the same standard to judges which we apply to legislators, governors and presidents: if we disagree with the positions they espouse, we vote against them. Their survival in office becomes simply a question of the public popularity of their decisions or the charm of their personalities. As an alternative, he describes what he calls the "impeachment" model, in which we vote against a judge only for improper conduct in office. If we were to apply a true impeachment standard, however, we would require a showing of actual "misconduct in office,"[5] which means a misfeasance (doing something a judge is not supposed to do) or nonfeasance (not doing something a judge should do). Doing what a judge should do but doing it slowly, sloppily or stupidly does not ordinarily qualify one for impeachment. Professor Moore fudges a bit by expanding his "impeachment" model to include a judge who "acts outside the proper role of a judge" by "taking the law in her own hands."[6] Under this recipe, a judge who disagrees with a prior decision, and continues to dissent even in

cases in which that prior decision is binding precedent, is committing an impeachable offense which merits our disapproval at the polls. I have never heard of a judge being impeached under such a standard,[7] and if such a standard were applied to the impeachment process, the leading candidates for impeachment would certainly have included U.S. Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis,[8] as well as current Justices William J. Brennan and Thurgood Marshall.[9] The chief problem I have with Professor Moore's fudge is that it obscures the difference between his two models. Whether one regards a judge's opinions as "taking the law in her own hands" is profoundly influenced by whether one agrees or disagrees with the outcome of those opinions. I would prefer to limit the impeachment model to impeachable offenses, and offer a third model, which we can call the "competency" standard. Under this model, we evaluate a judge only in terms of whether the judge's performance measures up to accepted standards of judicial conduct, as specified in the California Code of Judicial Conduct.[10]

I would like to evaluate the competing claims of these three alternative models in terms of history, in terms of ethics, and in terms of practical politics.

A Historical Perspective

Probably the greatest authority the "political" model can claim is the silence of the California constitution. It provides that the only question to be presented to the electorate if a sitting Judge of the Supreme Court or Court of Appeal files a declaration of candidacy is "whether the candidate shall be

elected."[11] It provides no standards to be applied by the electorate. By contrast, standards <u>are</u> specified for the impeachment of Judges[12] and the removal of Judges by the California Commission of Judicial Performance.[13] The standard for impeachment is, of course, the "impeachment" model of "misconduct in office." The standard for removal by the Commission is roughly comparable to my formulation of the "competency" model. In light of this logical constitutional structure, would not the application of an "impeachment" model or a "competency" model to retention elections be a redundancy? The answer to that question can largely be found in the history of the initiative measure which added the current confirmation procedure to the California constitution in 1934.

The 1934 initiative was drafted and sponsored by a statewide "good government" committee which included leaders of the California Federation of Women's Clubs, the League of Women Voters, the State Chamber of Commerce, the American Legion, the Chiefs of Police of Los Angeles and San Francisco, and the man who was then serving as District Attorney of Alameda County: Earl Warren.[14] What motivated them was concern about rising levels of crime. They reasoned that efforts to reduce crime depended on the honesty and competence of persons administering the law, and argued that abolition of <u>contested</u> elections would ensure that more qualified persons would stay on the bench. Although most of the Committee members agreed with Earl Warren that executive appointment with lifetime tenure was the ideal method of selecting judges, they were concerned that their

proposal not "blanket in" all of the judges then sitting for lifetime tenure.[15] The competence of judges then sitting in California was not uniformly high. Ultimately, the Committee concluded that a compromise plan for 12 year terms, proposed by the Commonwealth Club of San Francisco, stood a better chance of gaining public acceptance. An extensive campaign in support of the initiative was mounted by the Chamber of Commerce. Its basic thrust was that the measure was needed to remove Judges from the political fray, and eliminate the dangers of corruption from Judges having to seek votes and solicit campaign funds.

The "good government" proposal, which appeared on the ballot as Proposition No. 3, was limited to appellate judges, however. On the same ballot was a proposal sponsored by the State Bar to provide an identical retention election procedure for trial judges in Los Angeles County. The arguments in favor of that measure, A.C.A. No. 98, further illuminate the standard intended for retention elections. One of the leading sponsors of the measure wrote a thoughtful analysis in the midst of the 1934 campaign:

> . . . long experience has shown that life tenure is occasionally conducive to deterioration in some form. Can we find a remedy for this? The proposed periodical submission of the incumbent to a limited form of popular election is designed to correct this imperfection and it is indeed an ingenious adaptation of the life tenure system to a reasonable and almost entirely nonpolitical control.
>
> In conclusion it would seem that Assembly Constitutional Amendment No. 98 is a practical method of removing the bench from politics. It combines the best features of the federal appointive system and of the elective system and eliminates the undesirable elements of both. It will enable the people, through

> agents chosen by them, to make the careful selection of judges which, in large communities, they cannot make for themselves. It places a wise and very necessary check upon the appointing power. It will effectively control judicial arrogance and laziness which occasionally go with life tenure by periodical submission of the incumbent's record to the people. It will enable the judge to devote his entire time and energies to judicial work free from the fear of the political consequence of his decisions. It will constantly supply properly selected judicial material to fill vacancies caused by removal, death or resignation and, lastly, it will make the office attractive to the right type of lawyer.[16]

Thus, the authors and advocates of the present retention election system clearly contemplated application of a "competency" standard, allowing removal of judges who have "deteriorated," or become arrogant and lazy, but not subjecting them to the ordinary political fray to defend their decisions.

Obviously, the proponents of this measure did not regard the retention election process as a superfluous protection, even though the remedies of impeachment and recall were already available. In this connection, it is important to put the 1934 measure in the context of the times. In 1929, a Los Angeles Superior Court Judge named Carlos Hardy was actually impeached and tried by the state Senate. Accused of attempting to improperly influence the investigation of the circumstances surrounding the mysterious disappearance of Aimee Semple MacPherson, (he was an active member of her church), Judge Hardy was acquitted by a narrow vote.[17] A subsequent effort by the State Bar to discipline Judge Hardy was dismissed for lack of State Bar jurisdiction over judges.[18] In 1932, the Los Angeles County Bar Association spearheaded a successful recall of three

Superior Court Judges accused of accepting bribes to influence the appointment of receivers in bankruptcy cases.[19] And in 1933, a San Francisco federal judge named Harold C. Louderback was impeached and tried by the United States Senate. The vote of 45 guilty to 34 not guilty fell short of the necessary two-thirds. Louderback had been a Superior Court judge before his elevation to the federal bench, and was accused of carrying on a former practice of appointing his political friends as receivers.[20] Each of these widely publicized cases presented an example of the dangers of combining judicial office with political activity. And the ineffectiveness of the impeachment remedy supported a strong public perception that a "safety valve" was needed to permit the public to remove incompetent judges.

In the 1934 general election, Proposition No. 3 was adopted by a vote of 810,320 "Yes" to 734,857 "No." A.C.A. No. 98 was narrowly defeated, by a vote of 733,075 "No" to 659,355 "Yes."[21] Two explanations have been offered: (1) Proposition No. 3 was strongly linked to three other initiatives as an "anti-crime" package, and all four measures were adopted by similar margins of success; (2) A.C.A. No. 98 was at the end of the ballot as Proposition No. 14, immediately following a very unpopular proposal for local option prohibition of alcohol sales.[22]

Thus, California was left with the anomaly of uncontested retention elections for appellate justices, while trial court judges remained subject to contested elections. Proposition No. 3 did include a provision, however, still contained in our constitution, which permits a majority of the electorate in each

county to make this system of selection applicable to judges of that county's superior courts.[23] An effort was undertaken to convince the voters of San Francisco and Los Angeles Counties to take that step at the next election in 1936. The debate over that 1936 measure also illuminates the original understanding of the initiative adopted in 1934. The 1934 initiative was attacked for giving virtual life tenure to incumbents, since the retention election was perceived as a "hollow mockery and a mendacious pretense," with no means of comparison: "The incumbent runs against his own shadow."[24] At the same time, the measure was defended for virtually the same reasons:

> "The amendment gives to the judge substantially a tenure during good behavior. This has always been deemed by the great weight of authority to be the chief safeguard to a politically independent bench . . . In conclusion, it would seem that the adoption of section 26 [now section 16] article VI of the Constitution is a practical method of removing the bench from politics."[25]

The 1936 ballot measures were defeated, as every subsequent effort to convince any county to adapt the system of retention of judges to the trial courts has been.

During most of its subsequent fifty year history, however, Proposition No. 3 operated as it was intended to operate: as a safety valve which never had to be activated. No incumbent judge ever faced a serious campaign to urge disapproval. Appellate Judges were removed from politics, and no Appellate Judge was ever removed from office in a retention election.

The ineffectiveness of impeachment or recall to remove incompetent or dishonest judges still presented a problem,

however. The "safety valve" of a retention election was only available every 12 years. What if unfitness became apparent long before a judge was due to stand in a retention election? This dilemma was presented in short order, when a Justice of the Second District Court of Appeal was convicted in federal court of soliciting a bribe to quash a federal indictment[26] Justice Gavin Craig refused to resign from the Court of Appeals, even when the Attorney General filed an action in quo warranto to declare his seat vacant.[27] The state constitution was again amended in 1938, to allow the Supreme Court to remove a judge who is convicted of a crime involving moral turpitude.[28] Proposals for broader disciplinary authority over sitting judges went nowhere, however, until 1960. With vigorous backing from the State Bar and many civic organizations, Senate Constitutional Amendment 14 was placed on the ballot and adopted by a 3-1 margin in the election of November 8, 1960.[29] Clearly, this measure specified a broader test of competency than the "impeachment" model offered:

> Proponents of Proposition 10 (SCA-14) believe the present system for removal of judges is inadequate. There is no workable provision for removing a judge unable to perform his duties because of a lengthy disability which is not of sufficient gravity or notoriety to warrant impeachment proceedings.[30]

This provision has only been utilized to remove an appellate Justice once. After an amendment to provide for an alternative procedure when the competency of a Supreme Court Justice is in issue,[31] the new procedure was employed to remove Supreme Court Justice Marshall McComb for senility in 1977.[32]

It has been suggested that the creation of the Commission on

Judicial Performance rendered retention elections superfluous. Since retention elections were perceived as a "safety valve" for the removal of incompetent judges in 1934, the implementation of a more efficient means of monitoring the competency of sitting judges on a continuing basis eliminated the need for the safety valve. As then Professor Dorothy Nelson concluded in 1962:

> The claim that a vote of the electorate is needed to provide a check on judicial appointments need be made no longer. With an effective and practical means to remove an incompetent or corrupt judge, an ideal system of appointment may be considered that need not necessarily involve a "vote by the people" . . . Tenure of judges should be during good behavior. An adequate check on appointing power is now provided by the existence of a Commission on Judicial Qualifications, in addition to the traditional remedies of impeachment, recall, and concurrent legislative resolution.[33]

Suggestions to eliminate retention elections have engendered little action, however. One measure currently before the legislature which would improve the situation is S.C.A. No. 23.[34] This resolution would require Supreme Court and Court of Appeal nominees to be confirmed by the Senate as well as the Commission on Judicial Appointments, and would still require their appointment to be approved by the electorate at the next general election, but once approved, a judge would hold office for life. While not totally removing judges from the electoral process, it would minimize the extent to which judges would be called to political account for the decisions they rendered. The electoral confirmation would focus on the judge's prospective qualifications, rather than retrospective performance.

An Ethical Perspective

The conduct of Judges is subject to a number of ethical

imperatives which do not constrain the holders of other political offices. The existence of these restraints requires that retention campaigns be conducted differently than other political contests. A campaign might be waged on the issue of whether a Judge's performance meets a "competency" or "impeachment" standard without running afoul of these restrictions. The use of a "political" model, however, subjects the judicial candidate to a cruel dilemma, in which he or she must choose between responding to political attacks or adhering to the ethical imperatives of judicial office. Unfairness to the judicial candidate is not the consequence which should give us greatest concern, however. Of even greater concern is the message a double standard delivers to those who hold judicial office. On the one hand, we exhort our judges to guide their conduct in office by the ethical standards spelled out in our code of judicial conduct. On the other hand, we announce that their performance in office will ultimately be measured <u>not</u> by their adherence to those standards, but by the public popularity of the positions they espouse. You don't have to be an astute ethnician to predict the outcome. Human behavior is generally more responsive to perceived consequences than to pious exhortations.

Let us examine the ethical imperatives which distinguish judges from other politicians:

(1) <u>A judge must be unswayed by partisan interests, public clamor, or fear of criticism</u>.[35]

This ethical imperative is the quintessential difference between judges and other politicians. A legislator called to vote on an

issue carefully consults the latest polls to assess the amount of "heat" his or her position will generate. A judge called upon to decide a case is told that such considerations cannot sway his or her judgment. Criticism of judges for "flaunting the public will" betrays a basic misconception of the role of a judge in our system. The renunciation of partisan interests also means that judges must eschew any loyalty to the governor who put them where they are. No designation of their political affiliation appears on the ballot. Although California law currently allows political parties to endorse judges,[36] a judge can do little to seek such endorsements. A judge must "avoid political activity which may give rise to a suspicion of political bias or impropriety."[37]

By subjecting judges to popularity contests, the "political" model of retention elections encourages judges to hold a wet finger up to the wind before rendering a decision. By pasting labels on them, such as "Jerry's Judges," the "political" model may even subject judges to the unpopularity of partisan interests they are required to renounce.

(2) A judge must abstain from public comment about a pending or impending proceeding in any court.[38]

A legislator seeking office can promise to vote in a particular way on a specified issue. When seeking re-election, the legislator can offer public explanations for his position. A judge can do neither. By publicly committing himself to a position in advance, a judge would be required to disqualify himself in a proceeding raising that issue, because "his

impartiality might reasonably be questioned."[39] Broader generalities, such as a promise to "take the handcuffs off the police" or "reactivate the gas chamber," would hardly "promote public confidence in the integrity and impartiality of the judiciary."[40] Once a decision has been rendered, an appellate justice can anticipate that dozens of cases still pending in the courts may be affected, so an "explanation" of the decision will necessarily concern a pending proceeding.

The "political" model of retention elections turns a confirmation contest into a referendum on legal issues such as the death penalty. The judges' opponents are free to take pot shots at their decisions, but the judges must remain silent, or respond only with banal generalities.

(3) A judge has no "constituency."

Legislators and other elected officials frequently nurture an identification with particular constituencies. Thus, we have politicians who are strongly identified with the labor movement, the environmentalist movement,the feminist movement, the gay rights movement, the gun lobby, and even the "animal rights" movement. A judge, however, cannot "convey or permit others to convey the impression that they are in a special position to influence him."[41] Thus, a judge cannot decide a case in terms of whether the decision will be "good" or "bad" for one movement or another. The main reason politicians seek to cultivate such constituencies is because they are a dependable source of campaign contributions. The lack of such constituencies is a significant obstacle to major campaign fund-raising by judges.

Subjecting judges to the need to finance state-wide campaigns puts enormous pressure on them to cultivate "constituencies."

The "political" model of retention elections accelerates this process, by attempting to mobilize particular "constituencies" against a judge. The decisions of a court are characterized as "bad for business" or "bad for crime victims" in blatant efforts to enlist the aid of such special interest groups in targeting particular judges for defeat. There is a grave risk that judges may respond to such pressures by considering how pending decisions will impact upon those constituencies, or by attempting to mobilize opposing constituencies.

(4) A judge must avoid the appearance of impropriety.[42]

The solicitation of campaign funds occupies an ever-growing proportion of every elected official's time. The targets for solicitation are carefully selected. Major contributions are sought from those most directly affected by the day to day decisions made by the committees or boards on which the official sits. Those who have ambitions for appointive offices might also be likely targets for contributions or service as "volunteers" on the candidate's behalf. What would be universally condemned as an outright "bribe" in the absence of a political campaign achieves respectability as a "political contribution" in the midst of an electoral contest. The expectations of the contributor may be identical: he expects to gain "influence." As long as the ordinary politician complies with campaign disclosure laws, he need have little concern with the appearance of propriety. "How it looks" is simply a problem of public

relations, not a problem of ethics.

For the judge faced with financing a multi-million dollar statewide campaign, the problem is more complex. The judge must be just as vigilant in avoiding the appearance of impropriety as the impropriety itself. The most serious risk of the appearance of impropriety is contributions from lawyers who frequently appear before the judge, or who represent clients frequently engaged in litigation before the judge.

The American Bar Association Code of Judicial Conduct directly address this concern. While the solicitation of contributions from lawyers is not prohibited, the judge is required to solicit all funds and support only through "committees of responsible persons to secure and manage the expenditure of funds for his campaign."[43] And a commentary admonishes that, "unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate."[44]

The A.B.A. provision was originally adopted as part of the California Code of Judicial Conduct, but was suspended on September 21, 1976, after the Political Reform Act of 1974 was enacted. The Political Reform Act fully applies to judicial candidates, including those who run unopposed.[45] Full disclosure of the identity of donors is required, so it is impossible to insulate judges from the knowledge of who is contributing to their campaign. This presents a sensitive problem for judges who accept contributions from lawyers. Obviously, direct contributions should be declined from lawyers with cases pending

before the judge. Should this extend to all members of a law firm with a case before the Court? When the Court is the State Supreme Court, with over 4,000 filings per year, that would eliminate a lot of lawyers. It can certainly be anticipated that those opposing judicial candidates will take full advantage of the disclosure lists, to suggest that some contributors have something to gain in cases pending before the Court. Regardless of how unfair that suggestion might be, a judge must be concerned with "how it looks."

The dilemma for judges will be essentially the same regardless of whether we utilize a "political" model, an "impeachment" model, or a "competency" model as the standard. Unquestionably, though, the problem achieves the greatest dimension under the "political" model in terms of the breadth of issues that must be addressed and the concomitant size of the campaign fund which must be amassed.

Public accusations that candidates have evaded or manipulated the disclosure reports required under campaign reform laws have become a regular part of the menu for all political contests. Judicial contests will be no exception. Simply shrugging our shoulders and saying "it comes with the territory" is no answer, unless we are ready to accept a public perception of judges which is indistinguishable from the perception of other politicians. When one reflects on the California judicial scandals of a half-century ago, one is struck by the common thread running through every case. Gavin Craig was soliciting "campaign contributions" for his mentor, Senator Sam Shortridge.

Harold Louderback and all three of the recalled Los Angeles judges were rewarding their campaign helpers with appointments as receivers. Carlos Hardy was giving legal advice to an important constituent. When we immerse judges in the process of raising campaign funds and enlisting campaign workers, we make the appearance of impropriety inevitable, and impropriety itself ineluctable.

The ethical imperatives which distinguish judges from other politicians make it clear that the use of a "political" model for retention elections has two significant consequences. First, it makes the retention election process itself a one-sided contest, in which the judge is literally a "sitting duck."[46] The judge is severely limited in responding to attacks, while the opposition is subject to none of the restraints of judicial decorum. While retention elections were conceived as an improvement over contested elections, the current California campaign will certainly test that assumption. A lawyer challenging a sitting judge is subject to some of the same ethical restraints as the incumbent judge.[47] In retention elections, with no identifiable challenger, no one is accountable. Secondly, the use of the "political" model can ultimately affect the way a judge carries out the duties of his or her office. We cannot call judges to public account for their decisions, without affecting the decision-making process. It is no answer to this argument to say that judges are already politicians, or that they are deciding political questions. Once they don judicial robes, we expect and exhort them to stop behaving like other politicians. The nature

of the questions we present to them always had and will continue to have political overtones. The process by which those questions are decided, however, always has been and must continue to be different. The difference is worth preserving. As an American Bar Association report concluded:

> "There is no harm in turning a politician into a judge. He may become a good judge. The curse of the elective system is that it turns every elected judge into a politician."[48]

A Practical Perspective

Having concluded that our retention election process was originally designed with a "competency" model in mind, and that the "political" model will produce disastrous consequences from an ethical perspective, I must approach the most difficult questions of all. Assuming we are stuck with an election process, how do we agree on what competency means? If we do agree on what competency means, how do we enforce a competency standard?

The search for an acceptable standard of competency need not detain us long. Formal standards of judicial conduct have existed for more than fifty years. In 1969, a special Committee of the American Bar Association, headed by former California Chief Justice Roger Traynor, was appointed to revise and update those standards. The product of their labor was adopted by the ABA House of Delegates on August 16, 1972 as the Code of Judicial Conduct. The Conference of California Judges adapted the ABA Code and promulgated it as the California Code of Judicial Conduct on January 1, 1975. While the Code has never been given

the force of law by statute, it has been utilized by the Supreme Court in exercising its constitutional power to discipline judges upon recommendation by the Commission on Judicial Performance.[49] Thus, the Code creates standards which judges themselves look to for guidance. To avoid a double standard in the electoral evaluation of a judge's competence, we should look to the same source.

The Code establishes, as the primary duty of a judge, upholding the integrity and independence of the judiciary.[50] Clearly, then, competency has nothing to do with whether we agree with the outcome of a particular case or series of cases, or even whether a majority of the electorate agrees with that outcome. Suggestions that judges have "flaunted the public will" have no place in an electoral contest to determine competency. That does not mean that all criticism of particular decisions is out of bounds, however. One relevant standard of competency is diligence. "A judge should dispose promptly of the business of the court."[51] A judge's competency might be challenged on the grounds that a case or cases took an inordinately long time to decide, if the delay is attributable to the judge's lack of diligence. A judge is also required to "be faithful to the law and maintain professional competence in it."[52] Poorly drafted opinions which inaccurately state the record or miscite precedent are grounds for objection under a competency standard. Faithfulness to the law does not mean that a judge may not criticize precedent or urge its rejection, however. In the light of our common law tradition, we cannot legitimately label a judge

who does not blindly follow precedent as incompetent. Competence is not less likely to appear in a well-reasoned dissent, just as incompetence can appear in a majority opinion.

Another issue relevant to competence is impartiality. The charge that a judge had a personal bias or prejudice in a proceeding and did not disqualify himself or herself from deciding the case is within bounds if it can be substantiated. One must carefully distinguish between a charge of personal bias, however, and a disagreement with a judge's philosophy. A charge of bias should be supported by the same kind of allegations that would support a motion to disqualify a judge from hearing a case:

(a) The judge has a personal bias or prejudice concerning a party.[53]

(b) The judge has personal knowledge of disputed facts.[54]

(c) The judge previously represented a party or gave advice on a matter involved.[55]

(d) The judge or a close relative has a financial interest which could be affected by the proceeding.[56]

(e) A relative is a party or a lawyer in the proceeding.[57]

(f) The judge's impartiality might otherwise be reasonably questioned.[58]

It is not grounds to disqualify a judge that the judge is "too liberal" or "too conservative." Every judge, of course, has a personal philosophy which will ultimately affect how he or she decides cases. In The Nature of the Judicial Process, Justice Benjamin Cardozo aptly described the impact of a judge's personal philosophy upon the decision-making process:

> . . . every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them--inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in Jame's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[59]

The judge's underlying philosophy cannot accurately be characterized as a "bias" or "prejudice" that renders him or her incompetent as a judge. On the other hand, a claim that a judge "prejudges" a case, and decides it in accordance with some unexpressed "hidden agenda," would clearly relate to the issue of impartiality, and hence, competence. Viewed from this perspective, the explanation offered by Professor Moore for his opposition to Chief Justice Bird falls well within the scope of the "competency" standard I am expounding. While he characterizes his charge as "stepping outside the judicial role," I would characterize it as simply a charge of bias. He contends that she has "apparently" decided "never to allow an execution," and "has invented whatever arguments are available to achieve that result."[60] Like any other charge of bias, we should demand it be supported in the same way a motion to disqualify the Chief Justice from hearing a death penalty case would be supported. Curiously, such a motion has never been filed by the prosecution

in any case the Chief Justice has heard. Perhaps that's not curious, because nothing the Chief Justice has ever said or done would lend the slightest support to such a charge. The charge is simply based upon an inference. The inference is drawn from the consistency of her voting record, ignoring the fact that in 92% of the cases, she was one of four concurring votes, and in the other 8% she was one of two or three dissents. The Chief Justice has responded to this charge in the only way she conceivably could, by publicly stating that she is absolutely prepared to affirm a death penalty judgment which passes constitutional muster.[61] Thus, although the charge falls within the "competency" standard, the attempt to support the charge only by inference from the results in particular cases leads us outside the range of "competency" back to the "political" model: a position is taken based on whether one agrees or disagrees with the results of those cases.

Once we've agreed on a standard of competency, the question of "enforcement" remains. Obviously, we cannot prevent voters from applying whatever standard they choose, even to the extent of voting against a candidate on the grounds of race or sex.[62] That should not dissuade us from active exhortation, however. The media, the politicians, and the public at large should be exhorted to apply a "competency" standard. The limits of that standard should be explained, and those who present public arguments outside that standard should be chastised. I believe the organized bar can most effectively fulfill this role, and they can do so without choosing sides. To a limited extent, such

a role was undertaken by the Los Angeles County Bar Association in the Supreme Court confirmation election of 1982. A set of detailed "Principles and Policies to Guide Public Discussion" was adopted and sent to newspaper editors, television news commentators and public officials throughout the state. (See Appendix). A State Bar Committee headed by former Court of Appeal Justice Robert S. Thompson recommended that a similar effort be undertaken by the State Bar:

> "The State Bar should undertake the project of developing and circulating to relevant organizations objective criteria by which the performance of appellate judges should be evaluated . . . The media, local bar associations and others can use the standards in connection with their activities at the time of retention elections. At a minimum, publication of appropriate standards will aid those who seek to counter electioneering founded on inappropriate tests."[63]

Conclusion

I began by referring to Chief Justice Donald Wright as a perfect role model for the virtue of judicial independence we admire. I would like to close by summoning another role model from California's gallery of heroes. One of the chief architects of our system of retention elections was Earl Warren. Earl Warren was a veteran of 30 years of California politics, and as a politician, he kept his ear close to the ground, and his finger to the wind. He responded to the "will of the people." But once he put on the robes of Chief Justice, he demonstrated his appreciation of the concept of judicial independence. He shares with Don Wright the distinction of being repudiated by the President who appointed him as his "biggest mistake." I submit

that the only mistake Governor Reagan and President Eisenhower made was in assuming that the judges they appointed would behave the same way as other politicians. They didn't, and we are the richer for it. If we measure our judges by a "political" standard of contemporary popularity, however, we can only expect their performances as judges to meet that standard. How many Wrights and Warrens will grace the bench of California if we apply that standard? That may be the truest measure of our loss.

FOOTNOTES

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1. Chief Justice Wright resigned before completing his term, and Chief Justice Rose Bird was appointed to the remainder of his term, which expires in 1986. While California appellate judges serve 12 year terms, a judge elected to an unexpired term serves the remainder of that term. Cal. Const., Art. VI, § 16(a).

2. People v. Anderson, 6 Cal.3d 628 (1972).

3. Uelmen, A Concise History of Capital Punishment in California, CACJ Forum, Sept.-Oct., 1981.

4. Moore, "Politics Is Not the Basis for Judging the Judges," Los Angeles Times, July 29, 1985, Part II, p. 7.

5. Calif. Const., Art. 4, § 18(b).

6. Moore, "Rose Bird Should Go," Los Angeles Times, July 31, 1985, Part II, p. 7.

7. Cf. the impeachment of Justice Samuel Chase of the United States Supreme Court, acquitted by the Senate in 1805. He was charged with engaging in an "intemperate and inflammatory political harangue" in charging a Baltimore grand jury. Proponents of his removal urged the use of impeachment as a means of "keeping the courts in reasonable harmony with the will of the nation." Opponents insisted that an indictable offense be established. The failure of Chase's impeachment only established one principle, however,

as far as President Thomas Jefferson was concerned: impeachment is "a bungling way of removing Judges." Kelly & Harbison, The American Constitution: Its Origins and Development, pp. 234-36 (Rev. Ed. 1955).

8. See, e.g., Gitlow v. New York, 268 U.S. 652, 672 (1925), in which Justices Holmes and Brandeis dissent, refusing to follow Abrams v. United States, 250 U.S. 626 (1919) because their "convictions" were "too deep."

9. Justices Brennan and Marshall have dissented in every affirmance of a death penalty since 1976. See Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J. and Marshall, J. dissenting). Cf. Wainwright v. Witt, 469 U.S. ____, ____ (1985), (Brennan, J. and Marshall J., dissenting).

10. California Code of Judicial Conduct, adopted by Conference of California Judges, effective January 1, 1975:

> "The Conference adopts this Code of Judicial Conduct as a proper guide and reminder for justices and judges of courts in California and for aspirants to judicial office, and as indicating what the people have a right to expect from them." (Preamble).

11 Calif. Const., Art. 6, § 16(d).

12. Calif. Const., Art. IV, § 18.

13. Calif. Const., Art. VI, § 18.

14. Smith, The California Method of Selecting Judges, 3 Stan. L. Rev. 571, 579-80 (1951).

15. Id., at 581, 582.

16. Rhodes, Basic Reasons for Retrogression of the Bench and the Remedy, 9 Cal. State B.J. 161, 186 (1934).

17. Senate of State of California sitting as a High Court of Impeachment, In the Matter of the Impeachment of Carlos S. Hardy (Calif. State Printing Office, 1929).

18. State Bar of California v. Superior Court, 207 Cal. 323, 278 P. 432 (1929).

19. Uelmen, Recalling 1932: The Bench Preserved, Los Angeles Lawyer, Feb., 1983, p. 14.

20. Proceedings of the U.S. Senate in the Trial of Impeachment of Harold Louderback, 73rd Cong., 1st Sess., Doc. No. 73 (U.S. Gov. Printing Office, 1933).

21. Wittschen, Message From The President, 11 Cal. State B.J. 79, 80 (1936).

22. Smith, supra n. 14, at p. 586.

23. Calif. Const., Art. VI, § 16(d).

24. Winterer, Objections to Self-Perpetuating Judiciary, 11 Cal. State B.J. 70, 71 (1936).

25. Rhodes, Appointment of Judges a Return to American First Principles, 11 Cal. State B.J. 59, 65 (1936).

26. Craig v. United States, 81 F.2d 816 ((th cir. 1936), 83 F.2d 450 (9th Cir. 1936). See Uelmen, Tales From the Federal Courthouse, Los Angeles Lawyer, Nov., 1981, p. 10, 12-14.

27. People v. Craig, 92 Cal. 561, 61 P.2d 934 (1936); People v. Craig, 9 Cal.2d 615, 72 P.2d 135 (1937).

28. Cal. Const., Art. VI, § 10a.

29. Cal. Const., Art. VI, § 18.

See Frankel, Judicial Conduct and Removal of Judges for Cause in California, 36 So. Cal. L. Rev. 72 (1962) for the

history of the enactment of this provision.

30. Arata, Report of Commonwealth Club Section on Administration of Justice, 32 L.a. Bar Bull., 99, 105 (1960).

31. Cal. Const., Art. VI, § 18(e).

32. See McComb v. Superior Court, 68 C.A.3d 89 (1977); McComb v. Comm'n on Judicial Performance, 19 Cal.3d Spec. Trib. Supp. 1 (1977). Ironically, McComb presided as a Superior Court Judge over the State Bar attempt to remove Justice Hardy in 1929, and had been appointed to the Court of Appeals to fill the vacancy created by Justice Gavin Craig's removal.

33. Nelson, Selection and Tenure of Judges, 36 So. Cal. L. Rev. 4, 7-9 (1962).

34. S.C.A. No. 23, Introduced by Sen. Lockyer, March 7, 1985.

35. Calif. Code of Jud. Conduct, Canon 3(A)(1).

36. Unger v. Superior Court, 37 Cal.2d 612 (1984), holding that partisan endorsements of judicial candidates are not precluded by the constitutional declaration that judicial offices are nonpartisan. (Cal. Const., Art. II, § 6). A bill to prohibit such endorsements passed the Assembly but died in the Senate during the 1984-85 legislative session. A.B. 434.

37. Calif. Code of Jud. Conduct, Canon 7.

38. Id., Canon 3(A)(6).

39. Id., Canon 3(C)(1).

40. Id., Canon 2(A). See Culver, Politics and the California Plan for Choosing Appellate Judges: A Lesson at Large on Judicial Selection, 66 Judicature 151, 158 (1982).

41. Calif. Code of Jud. Conduct, Canon 2(B).

42. Id., Canon 2.

43. A.B.A. Code of Jud. Conduct, Canon 7(B).

44. Id., Commentary.

45. Calif. Gov. Code, § 84207.

46. While I deplore the use of aviary analogies in the current campaign to unseat the Chief Justice (E.g., Stuffed Turkeys, Bird-Watcher Societies, etc.), the analogy to "sitting ducks" has achieved a respectable scholarly gloss. See Cheit & Golze, Are Sitting Judges Sitting Ducks? The Case for Abolishing Judicial Elections, Cal. State B.J., Oct., 1980, p. 414.

47. Calif. Code of Jud. Conduct, Canon 7(A); A.B.A. Code of Professional Responsibility, DR 8-103. Compare Proposed Rule 9-101, Rules of Prof. Conduct of State Bar, submitted to the Supreme Court in December, 1975 but later withdrawn. The Rule would have precluded lawyers running against judicial incumbents from "publicly criticizing any judicial decision made by the incumbent judicial candidate." Calif. CEB, The Law of Politics, § 12.45, p. 629 (1977).

48. ABA Section of Judicial Adm., The Improvement of the Administration of Justice, p. 45 (1971).

49. Cannon v. Comm'n on Jud. Qualification, 14 Cal.3d 678 (1975); Spruance v. Comm'n on Jud. Qualifications, 13 Cal.3d 778 (1975). See Cal. Const., Art. VI, § 18.

50. Calif. Code of Jud. Conduct, Canon 1.

51. Calif. Code of Jud. Conduct, Canon 3(A)(5).

52. Id., Canon 3(A)(1).

53. Calif. Code of Jud. Conduct, Canon 3(C)(1)(a); Calif. Code of Civ. Proc., § 170(5).

54. Id.

55. Calif. Code of Jud. Conduct, Canon 3 (C)(1)(b); Calif. Code of Civ. Proc., § 170(4).

56. Calif. Code of Jud. Conduct, Canon 3(C)(1)(c); Calif. Code of Civl Proc., § 170(2), (3)(b).

57. Calif. Code of Jud. Conduct, Canon 3(C)(1)(d); Calif. Code of Civ. Proc., § 170(3).

58. Calif. Code of Jud. Conduct, Canon 3(C)(1).

59. Cardozo, Selected Writings, pp. 109-110 (1920).

60. Moore, Rose Bird Should Go, Los Angeles Times, July 31, 1985, Part II, p. 5.

61. Through her authorized spokesman, Anthony Murray, the Chief Justice recently repeated the assurance she had given during her confirmation hearings, that she is "absolutely prepared to vote for the death penalty. If it passes muster, she will vote for it without any question. But she will not retreat from her responsibility to make certain it is constitutional." Balzer, Prosecutors Assail Bird and Two Fellow Justices, Los Angeles Times, May 1, 1985, Pt. I, p. 3.

62. Evidence suggests that many voters do vote on the basis of sex or ethnic background, using a judge's surname as the only clue. In the 1978 elections, Justices Puglia and Reynoso, both then sitting on the 3rd District Court of

Appeal, received the lowest level of support although they hold strongly divergent views. See Cheit & Golze, supra n.44, at p. 417. Again in 1982, Reynoso badly trailed Broussard, a result largely attributable to his name. This led former Justice Frank Newman to quip, "The only hope for Cruz is to use his first initial and hope people think he's Italian." California Lawyer, Sept., 1985 at p. 39.

63. Report of State Bar Ad Hoc Committee Concerning Whether to Implement an Appellate Justices Evaluation Commission, June 15, 1984, at p. 3-4.

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APPENDIX

PRINCIPLES AND POLICIES TO GUIDE PUBLIC DISCUSSION OF THE RETENTION ELECTION OF CALIFORNIA SUPREME COURT JUSTICES

1. EVALUATION OF SUPREME COURT JUSTICES SHOULD BE BASED ON THEIR OVER-ALL PERFORMANCE.

In 1972, the Conference of California Judges adopted a Code of Judicial conduct to serve as a guide and reminder of "what the people have a right to expect from them." These standards are based on a code of Conduct formulated by an American Bar Association Committee headed by former California Chief Justice Roger Traynor, and have been widely adopted throughout the United States. Thus, they provide a broad general concensus of the criteria which should be used to evaluate judicial performance. The first three Canons of this code define ideals of official conduct for every judge:

(1) A Judge should uphold the integrity and independence of the judiciary.

(2) A Judge should avoid impropriety and the appearance of impropriety in all his activities

(3) A Judge should perform the duties of his office impartially and diligently.

The performance of each Justice of the Supreme Court in terms of integrity, independence, avoidance of impropriety, impartiality and diligence is a matter of public record. The quality of each Justice's work product can be evaluated on the basis of his or her published opinions. Public discussion of their retention should focus on the quality of their overall performance.

2. EVALUATION OF SUPREME COURT JUSTICES SHOULD NOT BE BASED ON AGREEMENT OR DISAGREEMENT WITH A SINGLE DECISION UPHOLDING OR STRIKING DOWN PROPOSITION EIGHT.

In the wake of Proposition Eight, some have urged that the November elections be utilized to express the popularity or unpopularity of a decision upholding or striking down the Initiative on constitutional grounds.

We believe it would be a tragic mistake to reject or retain Justices of the Supreme Court solely on the basis of how they voted in this single case. Constitutional questions cannot and should not be decided on the basis of the potential popularity of a decision. To turn judicial elections into a "referendum" on a particular decision would infect the integrity of the judicial process, making it even more difficult for conscientious judges to maintain the independence required of them.

Each month, hundreds of cases are decided by the Justices of the California Supreme Court. To make a single decision in one case the focal point of an election will greatly distort the public perception of the judicial process.

3. THOSE WHO PUBLICLY CRITICIZE OR PRAISE PARTICULAR DECISIONS OF THE COURT SHOULD DISCLOSE ANY PERSONAL INTEREST OR INVOLVEMENT IN THOSE DECISIONS.

Justices of the Supreme Court are called upon to decide cases in which earnest advocates appear on both sides. Every decision produces a winner and a loser. The winner invariably feels the result was compelled by the merits of his or her cause, while the loser's disappointment is frequently expressed in criticism of the Justices. Many candidates for public office have appeared before the court as parties or counsel in particular cases. Still others were actively involved in the drafting or enactment of the very laws being scrutinized by the Court. While they have every right to praise or criticize the results in particular cases, the public has a right, in evaluating such praise or criticism, to know of any personal interest the speaker may have had in the outcome of that case.

4. THE POSITION OF JUSTICE OF THE SUPREME COURT IS NON PARTISAN, AND EVALUATION OF JUSTICE'S PERFORMANCE SHOULD NOT BE AFFECTED BY PARTY LINES.

Under the California constituion, appointments to the Supreme Court are made by the Governor, and must be approved by the Commission on Judicial Appointments, a non-partisan Commission consisting of the Chief Justice of the Supreme Court, the Attorney General and the senior judge of the Courts of Appeal. No designation of a Justices political affiliation appears on the ballot.

Once an Appointee to the Supreme Court has been confirmed as a Justice, he or she is generally precluded from engaging in political activity. The separation of powers forbids judicial participation in the activities of the executive and legislative branches of government. The position of Justice of the Supreme Court is non-partisan, and a Justice is not answerable to the governor who appointed him or her. Thus, a Justice should be evaluated on the basis of his or her own qualifications and performance, without regard to the identity or popularity of the appointing governor. Public identification of Justices as appointees of a particular Governor or by their party affiliation should be discouraged.

5. THE FACT THAT JUSTICES CANNOT DEFEND THEMSELVES IN PUBLIC DEBATE SHOULD BE UNDERSTOOD AND RESPECTED.

Judges are in a unique and difficult position when they stand for election or reelection. Unlike other candidates for office, their public commentary is limited by well defined limits of ethical propriety. The California Code of Judicial Conduct, Canon 3, Standard A.(6) provides:

> "A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

Justices are also precluded from public comment on questions which may come before the court. If a Justice publicly commits himself or herself to a position on an issue which may come before the Court, that Justice may be disqualified from deciding a case in which that issue is raised. In view of the wide range of issues which may come before the Court, the Justices must be guarded and circumspect in all public commentary. A case frequently remains pending for a substantial period of time after a decision is publicly announced, while petitions for rehearing are heard, or applications for review by the U.S. Supreme Court are processed. Many other cases may be pending which raise similar issues. Thus, Justices who are candidates for election this November will find that decisions announced during the coming months will be widely scrutinized and

criticized, while they are precluded from responding to such criticism. We believe the necessity for their silence should be recognized by critics, and should be respected by the public and the press. The written opinions of the Justices, explaining the reasons for their decisions, should be widely disseminated.

6. THE DIGNITY AND DECORUM OF JUDICIAL OFFICE SHOULD BE RESPECTED, AND PRESERVED.

The administration of justice requires judicial adherence to the highest ideals of personal and official conduct. Just as public confidence in the judiciary is eroded by improper judicial conduct, it can also be eroded by irresponsible criticism which demeans the dignity of judicial office. While the use of epithets and name calling is deplorable in any political contest, it is indefensible in any discussion of the retention or rejection of a Justice of the Supreme Court.

August 27, 1982

STANDARD FOR JUDGING JUDGES: THERE IS NO SUCH THING AS A FREE LUNCH

Gideon Kanner
Loyola Law School

STANDARD FOR JUDGING JUDGES:
THERE IS NO SUCH THING AS A FREE LUNCH.

By Gideon Kanner
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As even a casual observer of the American political scene knows, efforts to elevate the "standards" used in political appeals to the voting public, bear a striking similarity to the formulation of "rules" for a knife fight as depicted in the movie "Butch Cassidy and the Sundance Kid." (Perhaps for the benefit of readers whose preoccupations may be legal rather than cinematographic, I should explain that the movie makes graphically clear that there ain't any -- rules, that is).

This, we are told, is in the best American historical tradition. In the vivid words of Justice Gardner in Desert Sun Publishing Co. v. Superior Court, (1979) 97 Cal. App. 3d 49, 51-52, footnote omitted:

> Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson a blackguard, a knave and insane (Mad Tom), Henry Clay a pimp, Andrew Jackson a murderer and an adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul. Theodore Roosevelt was castigated as a traitor to his class, and Franklin Delano Roosevelt as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist Conspiracy.
>
> Perhaps the low point in irresponsible political vilification occurred in the Cleveland-Blaine contest where an entire presidential campaign was waged on two deathless bits of doggerel based on allegations that Mr. Blaine was dishonest, and Mr. Cleveland had sired an illegitimate child -- "Blaine, Blaine, James G.

> Blaine, the continental liar from the State of Maine," versus "Ma, Ma, where's my Pa? Gone to the White House. Ha! Ha! Ha!"
>
> "Obviously, no rational person can approve any of the above. We merely note them as an unpleasant fact of our political background -- a history of rough, crude, brawling, mudslinging, muck-raking, name-calling attacks upon those in or seeking political office. In America, one who seeks or holds public office may not be thin of skin. One planning to engage in politics, American style, should remember the words credited to Harry S. Truman -- "If you can't stand the heat, get out of the kitchen."

All such rough and tumble of a free people, contesting for their governmental leadership, may be well and good for ordinary politicians--the price of freedom--but when it comes to electing or judging judges most of us will agree that a greater degree of fastidiousness is called for. This is apparently where agreement ends. The questions of just what degree of fastidiousness, and exactly how the judging of judges should differ from the judging of other government leaders, and why, is what brings us here today.

It seems plain to me that the answer to the issue thus raised, depends on the role that we envision the judge as properly playing. Let me illustrate. The Chief Justice, and more recently Justice Broussard, have in their public utterances articulated the model of a judge as an umpire who, armed with a rule book, has no alternative but to call the balls and strikes as they come (or at least the way he sees them), oblivious to the roar of the fans rooting for one team or the other. But however appealing such a model may be to the beleaguered justices facing the oncoming election, it is not an accurate model as applied to

the Supreme Court. It is a more accurate model, or at least desideratum, in the case of trial judges, and possibly even intermediate appellate courts. As the court put it in Myers v. Carini (1968) 262 Cal. App. 2d 614, 620:

> "As intermediate appellate judges we make up the Light Brigade in the army of the judiciary. We look down for the facts and up for the law. Where the rule is specific, as it is here it is not ours '. . . to reason why.' Brillian concept or grievous blunder we must accept it as it is given to us by higher authority. Indeed, we have no jurisdiction to do otherwise."

Accepting, if only for the sake of argument, such a limited role even for the intermediate appellate courts, it does not conform to reality when sought to be applied to the California Supreme Court. As Justice Richardson, formerly of that court, put it: "We are a court of precedent, not a court of error." And by that distinction, between precedent making and error rectification, hangs a tale.

It is simply not an accurate depiction of reality to say that the courts, particularly the California Supreme Court, are mere umpires sworn to do naught but to enforce a rule book handed them by others. Certainly the California Supreme Court has been at the forefront of rule making, and perhaps more importantly for our present purposes, of formulation of the social and public policies upon which rules of law must be based.

It is not my intention to discuss here whether or not the rules and the social policies formulated by the California Supreme Court are sound or unsound. That task must be left to others, at another time and place, although unquestionably reasonable minds can, have, and will differ as to whether or not

the efforts of the court have been desirable or undesirable.

The more limited thesis which I wish to develop here is that in a democratic society it is perfectly legitimate to raise the inquiry whether or not a particular public policy is desirable or undesirable, and the legitimacy of such inquiry is independent of whether that policy is formulated by the legislative, executive, or judicial branch of government. I further suggest that to the extent the courts would assume the role of policy makers, they cannot escape into some sort of antidemocratic splendid isolation in which to enjoy immunity from the scrutiny of a free society seeking a consensus as to whether the judicial handiwork of governance is sound or unsound. It also follows that in a democratic society, the ballot box is a singularly appropriate instrument of voicing the people's perception -- if that is what it is -- that they deem themselves misgoverned by the judiciary.

It should go without saying, but in the charged atmosphere in which this topic was being debated it must be said, that the foregoing remarks of mine are not directed to questions of enforcement of explicit constitutional provisions. To the extent that the courts have done so, they have done no more than to discharge a basic duty of obedience to a judge's oath. They surely deserve the support of all of us for so doing. People called upon to make unpopular decisions mandated by the organic law (or even statutes) have a strong claim to protection from popular clamor.

But there is a snake in paradise. Not all constitutional decisions of the courts can be said to constitute enforcement or

application of clear or explicit constitutional provisions, and some judicial decisions simply do not enforce some rather explicit constitutional provisions. Some court opinions are highly interpretational, and influenced, if not dominated, by the judges' ideological notions of what values the constitution ought to enshrine. There is nothing basically wrong with that, but only up to a point; the notion that the interpretation and application of the Constitution should vary with the changing conditions, is by now a settled, if indeed not enshrined, part of American jurisprudence. Up to a point policy-based interpretational efforts of the courts do not pose too great a difficulty. But it is obvious that at least in some areas the courts have gone so far as to raise legitimate questions as to the propriety of the extent of their ideologically colored interpretation of the Constitution. To take two obvious examples -- which fortunately are provided by the United States Supreme Court whose "iron rice bowl" puts its judges beyond the sort of discussion we are engaging in today -- where in the U.S. Constitution does one find anything about privacy, contraception, or abortion? I do not intend by this rhetorical question to digress into any kind of substantive debate as to the wisdom of Griswold v. Connecticut or Roe v. Wade. As I said before, that is for another time and place, and we can rest assured that many will gladly enlist in the ranks of contenders to engage in that intellectual battle -- certainly with regard to Roe v. Wade. I must make it clear that I express no substantive view on either of those decisions; at least for the purposes of the present

discussion I am willing to proceed on the assumed premise that they are both simply wonderful. But even so, their critics have a point. For even assuming that those cases have given us desirable rules, was it a proper function of the judiciary to do so? After all, we operate under a constitutional concept of separation of powers, that also commands respect.

And so, it seems to me that there is a legitimate area of discussion with regard to two things: First, the propriety of imposition of social policies on a democratic society by judges, and second, the wisdom of those decisions.

So far, I have dealt with an easy, academic, problem. After all, the judges of the United States Supreme Court and other federal judges, are not subject to retention or recall by the electorate. As I said, they enjoy the privilege of what the Chinese call the "iron rice bowl."

Thus, if Justice Brennan and Justice Marshall believe that the death penalty is under all circumstances "cruel and unusual," they are free to voice that belief without fear or concern that they may be removed from office. Their interpretation or misinterpretation of the Constitution, as the case may be, is no impeachable offense. One can add parenthetically, that there is nothing in the federal Constitution which explicitly authorizes a death penalty, although it does make reference to capital cases. Thus, federal Supreme Court judges can do pretty much what they want by way of interpreting the Constitution, at least on that point, without concern that their interpretation can stray so far from public mainstream understanding of the meaning of words of

the rightness or wrongness of concepts as to jeopardize their continued service on the Supreme Court. Put another way, the federal Supreme Court judges' principal source of restraint in self-restraint.

But that is not true of the California Supreme Court, or any other California courts. It seems to me that as we turn to the California judiciary's present predicament, we must begin where I left off with regard to the federal judiciary: the Constitution. Unlike the federal Constitution, our state Constitution quite explicitly provides for election of Supreme Court judges, even if that election is conducted in a different way than the more frequent, contested elections for other elected, political and nonpartisan offices. It therefore follows that our duty of obedience to the Constitution now compels us to treat the provision for election of the judiciary, that it provides for, with the same degree of respect that we give to the rest of the organic law.

But, we are met at the outset by a impassioned argument that this is wrong; that it was the intent of the framers of Article VI, Section 16 of the California Constitution, to provide the electorate with a veto over a judge's further service on the Supreme Court only in cases of malfeasance or incompetence. The Constitution, of course, contains no such language, and the proponents of this thesis direct us to the events surrounding the drafting and adoption of that constitutional provision to understand and appreciate the framers' intent.

The resulting irony is supreme. The most fervent defenders

of the California Supreme Court judges, who can safely be characterized as by and large a constituency which is predominantly politically liberal, or left of center, thus find themselves marching cheek by jowl with conservative Attorney General Meese who is fond of insisting that the federal Constitution ought to be interpreted by the United States Supreme Court in accordance with its framer's original intent--a view harshly contested by that very constituency when Mr. Meese advances it. However amusing this spectacle may be, I believe that it is unhelpful to our decision and it would be fruitless for us to debate it. Whether the Attorney General is theoretically right or wrong, history has spoken, and it is by now the revealed constitutional wisdom that the courts must reinterpret the Constitution from time to time, in order to keep it in harmony with existing social conditions, beliefs, and mores, whose development the original framers could not have foreseen, nor indeed conceived of. As the U.S. Supreme Court put it in Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 387:

> ". . .[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

But, back to California. As I said, our state Constitution does provide for judicial elections, and as all must agree, there is no practical way of keeping the people from using the ballot box to voice their approval or disapproval of the way they deem themselves governed by the judicial branch of government. No

doubt, it would be better if we did not have to face these problems. But we are facing them. The political Right is, of course, exploiting popular feelings of discontent with the judiciary, but the Right did not create those feelings.

A less elegant way of making my point is to recall what the farmer said to the lost city slicker: "Mister, if I wuz goin' to town I wouldn't start here." But we are here, and that is just the problem. The Constitution of California -- as all agree -- is silent on the question of what "standards" are to be applied to judicial elections, and rightly so. After all, any attempt at enforcement of any such "standards" would be doomed to failure, and would be capable of far greater mischief than the voting out of judges, because of its potential of impermissible intrusion into the balloting process. And so, we simply have to agree that the Constitution itself provides no "standards" for the electorate in the upcoming judicial election.

At this point, I submit that it is simply silly for the various organized groups which have appeared on the scene, to argue that in spite of all that, we, the bar, the legal establishment, the high priests and priestesses of the law, should now undertake a great effort of instructing the Great Unwashed in the intellectual and moral obligations which must be -- or at least ought to be -- discharged before entering the ballot box and voting; namely, not to judge the judges on what they have done, but only on how well they have done it. Not only is that an endeavor doomed to failure, but I fear that it may be counterproductive. The legal profession, with or without

justification, does not enjoy the best of images with the populace. It therefore seems to me that any such urgings on behalf of lawyers run the risk of being seen simply as efforts of lawyers to curry favor with the judges in front of whom they appear.

Beyond that, I see here what I sometimes like to refer to as the "pre-Prop 13 syndrome." By that I mean the situation which prevailed before the passage of Proposition 13. There was then abroad a perceived and loudly voiced popular dissatisfaction with the condition of property taxation. Nonetheless, the Establishment pooh-pooh'd such concerns. The legislature dawdled and toyed with the problem of tax reform, but not much came from it session after session. The ill-fated Watson initiative seeking to change things faltered. And so, it was generally taken for granted in the environs of Sacramento at least, that the tax reform business was a basically conservative agenda item that would somehow be taken care of in due course. But we all know what happened. The due course didn't wait. A demagogue appeared on the scene and saw to it that Proposition 13 became history, and with it the many headaches which the Supreme Court now has to face. Once again, let me make it clear that I do not by these remarks tend to imply either approval or disapproval of the substantive provisions of Proposition 13. We have enough to argue about here as it is. I simply observe that whether one sees its effects as good or bad, Mr. Jarvis' persuasive endeavors where at times demagogic. The fact that he was so successful is merely indicative of the lesson to be learned as to what may

happen when loud and clear signals of public dissatisfaction with the operation of a facet of government go unheard and unredressed. Which brings us to the problem at hand.

What has the California Supreme Court been up to? Has it been a mere umpire calling balls and strikes? Or, has it taken a hand in the writing of the rule book? We may differ here today as to whether or not the court's rule writing and ball and strike calling have been good or bad for society, but it seems to me that there can be no serious debate over the proposition that the answers to both of the above rhetorical questions must be affirmative. The California Supreme Court has been a "activist" court. I hasten to add, that the word "activist" is not an insult. It simply describes a type of judicial decision making. Some people think it is wonderful; others disagree. Still others view it as a matter of degree -- like garlic in a stew. Nor am I to be charged with suggesting -- as I have been in the past when I made the same point -- that I am somehow plumping here for return to some nonexistent good old days, when old fashioned, rigid, fuddy-duddy judges supposedly sat on the bench, and like automatons applied ancient precedents, whether they fit modern social problems or not. Such suggestions are pure rhetoric, to put it charitably. As we all know, the essence of the common law tradition has been the making, breaking, and modification of precedents, at times with considerable novelty. But to say that the courts have always contributed to the making of social policy, and have always changed the law, while perfectly true, is to beg the more difficult question; namely, how much judicial

policy making is too much, so that a democratic corrective may be justifiedly applied through the ballot box?

There does not appear to be much controversy over the fact that the California Supreme Court has been a busy, busy court in terms of policy making. From my vantage point, two phenomena have been at work. First, there evolved a theory some time ago that since the legislature was not doing its job, and was not addressing serious perceived social problems, it became somehow appropriate for the courts to fill that vacuum and to address those problems. This theory enjoyed considerable currency in some circles, and no doubt still does. The second notion went far beyond merely doing the job left undone by the legislature. Its foremost proponent, the late Justice Tobriner, quite explicitly set it out as a task for the courts to reform society. He was by no means alone.

There are obvious problems with these notions. The first one, however appealing it may sound in terms of addressing perceived urgent problems, raises enormous separation of powers problems. Perhaps the point can be best made by asking the rhetorical question of what would the reaction have been if the legislature had decided that the courts were not doing <u>their</u> job well, and set up committees to try important cases?

Similarly, the business of reforming and remaking society is a difficult and controversial one. To begin with, who is to say how society should be reformed? Here courts very quickly leave the area of their traditional strength and competence. To address the task of building the legal cathedrals, the legal

Westminsters of tomorrow, as Justice Tobriner put it, one must have some sort of blueprint. And that is just the problem. With all due respect to Justice Tobriner's memory, who is to say that we are to have a legal Westminster? What if the people are more enamored of, say, the legal equivalent of Reverend Schuller's Crystal Cathedral? What if they want no cathedral at all?

What I am suggesting here is that once the courts enter avowedly the area of pure social policy making, they instantly lose their claim to protection from political ire of those coming out on the short end of the judicial rulings, by taking refuge in the role of the umpire. Umpires simply don't make policy. People who make policy, on the other hand, ought to be accountable to someone in a democratic society.

I cannot overemphasize that I am no longer talking about the Constitution. Decisions of the California Supreme Court have gone far beyond enforcement or application of explicit constitutional provisions, or even constitutional interpretation. Some of the court's forays into statutory interpretation have certainly left the readers of the statutes in question gasping in disbelief. Cases such as Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, or Marina Point Ltd. v. Wolfson (1982) 30 Cal.3d 721, leave no doubt of that. Even without statutes to do radical surgery on, the Supreme Court has been known to fashion a legal earthquake out of the common law; see e.g. Gion v. City of Santa Cruz, (1970) 2 Cal.3d 29.

Beyond that, there are more serious problems. The court is increasingly perceived as not merely making policy, but

inevitably choosing ideological sides on policy issues which are enormously controversial, and on which -- to use the old legal expression -- reasonable minds can differ. A disturbing pattern has emerged from the decisions of the California courts, such that it is quite clear that the courts have chosen to espouse one side of enormously controversial issues, to the exclusion of the proposition that there might be merit to the other side. The death penalty provides an obvious example, but by no means the only one. Controversies involving, for example, landlords and tenants, landowners and land regulators, insurance companies and their insureds, and to a lesser extent tort plaintiffs and defendants, seem preordained in terms of results.

The question thus inevitably arises as to whether or not the court is making the right policy decisions, whether it is taking us as a society in the right direction. Beyond that, entirely apart from the ideological inclination of the judiciary that seems to emerge from the pattern of decisions, there is another troubling question: How much change and destabilization of the law can a society absorb in a short period of time? I recognize that by even raising this question I may be uttering what in some circles is deemed a heresy. After all, goes the refrain, the future lies ahead and we must step boldly into it, prepared to deal with it. That means that things must change, progress much be made, etc. etc. Assuming the validity of the basic concept underlying such a theory, the question still remains how much progress? Made in which direction? How quickly made? Made by what institutional arrangements? Implemented by what

institutional and economic forces in society? And perhaps most important for purposes of present discussion, accomplished in accordance with whose ideological predisposition?

In sum, it seems to me, that once we get away from the inaccurate model of the Supreme Court judge as umpire, we begin prying open the lid on a political Pandora's box. The further the courts get away from the umpire's role the greater the opening. The more judicial policy making, the more legitimacy conferred upon the arguments those who invoke the ancient but enduring concept that government derives its just powers from the consent to govern, and the judiciary is, after all, no more than one branch of that government.

And so, I reach the conclusion that what has become the current Establishment argument (i.e., that in the context of the coming election we must not examine the judge's handiwork for its substantive soundness) is simply wrong. Not only is it an unworkable approach to the balloting process, but more importantly, it seeks to gloss over some fundamental questions that a democratic, free society is entitled to ask, and to have answered.

Does all that, however, mean that if we raise such questions and seek answers, we will have (as the most outspoken defenders of the California judges like to describe it) a judiciary by Gallup poll? Almost certainly not. The heat of the rhetoric going on at the moment seems to overlook the fact that unlike other politicians, judges have enjoyed an enormous degree of tolerance from the electorate. After all is said and done, and

in spite of recent rumblings, holding the office of a judge is still far more secure than holding any other elected political office. No appellate judge has ever been denied another term by the voters. Challenges to judges are both fewer and less successful than to other politicians, and rightly so. It may be that the contending parties really underestimate the people's wisdom.

Another point which needs to be made in conclusion, is that concerns with "Gallup poll justice" underestimate the moral fiber of the men and women who make up the California judiciary, whatever their ideological inclination. I suggest that even if in the context of this election we all agreed on the legitimacy of substantive public inquiry into whether the courts govern us well or poorly, this would not cause wholesale judicial abandonment of principle in favor of expediency. Many public and private positions of power and importance are held by people who either directly or in some larger, indirect sense hold those positions at the pleasure of others. Yet, the Republic and its institutions have endured, and bid fair to continue doing so. Leadership, statesmenship, and courage are commodities not unknown among practicing politicians. At least not among those who are a cut above average. I close then with the observation that the people who occupy our benches in this state are, by and large more than a cut above average. Many of them have become judges as an act of profound commitment to public service, accomplished at considerable personal sacrifice. People like that have been with us from the inception of the country, and I

dare say will continue to be with us in the future, irrespective of whether or not we agree that it is an appropriate thing for a democratic society to look at the substantive handiwork of its judges and then decide whether it represents good or bad governance.

Those individuals who went on the bench as a political gesture -- whether their own or that of the appointing authority -- will also continue to be with us, as will be those who decided upon a judicial career in the face of, shall we say, only moderate success in pursuit of other forms of practicing law. It may be that some people of that ilk will give in too readily to the perceived popular discontent with their work, and threat to their rice bowl, that might be manifested at the ballot box. But this is an argument that may prove too much. For people who occupy the bench as a political act, are already ideologically beholden to the philosophies and urgings of others. As to those, could it be that a prospect of an aroused electorate may serve as a check on potential excesses?

My point then is very simple: Judges can be umpires or they can be legislators. If they would be the latter, they cannot claim for themselves the comfort and prerogative of the former.

As the courts themselves have told us, they are the weakest branch of the government. Lacking either the power of the sword or of the purse, and dependent as they are on the other branches of the government for enforcement of their decrees, the courts are in the final analysis dependent on the widely perceived popular image of them as institutions that administer justice

that conforms to society's mainstream notions of right and wrong. Like it or not, to that extent the courts must partake of the social and moral values of the society which they govern. Indeed, when the courts choose to create or change a major precedent, they claim legitimacy for their governance by telling us that they are doing so to bring the law into harmony with modern society's values and moral beliefs. See e.g. Marvin v. Marvin, (1976) 18 Cal. 3d 660, 683-684.

In the final analysis, the point I make here is well summed up in the words of two of my distinguished friends and colleagues:

> "Materially courts are the most impotent branch of the government. If, through lack of restraint and by attempting to increase their powers unnecessarily, they lose the respect which makes them effective, they may soon find that, as a practical matter, even powers that are now conceded to them, are unenforceable." Kaus, J., in Younger v. Smith (1973) 30 Cal. App. 3d 138, 156.

> "When the public perceives its courts as simply a Legislature in disguise, lacking the ability of the Legislature to anticipate the effects of its new laws, then the judges can expect to be treated as legislators are: being voted out of office and tossed into the river when their bridges collapse." Gerald F. Uelmen, Judicial Reform and Insanity In California -- A Bridge Too Far, Prosecutor's Brief, May-June 1979, 17, at 21.

JOURNALISM AND THE CALIFORNIA JUDICIARY

By

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It is common knowledge that the Chief Justice has a dramatic hair style that shows evidence of a conscious coiffeur. Periodically it provokes comment, particularly by enemies of the Chief Justice.

This describes, of course, Chief Justice Warren Burger of the United States Supreme Court. It also happens to apply to Chief Justice Rose Bird of the California Supreme Court. In the 16 years that Justice Burger has headed the Supreme Court of the United States and the sometimes bitter controversies about his judicial philosophy and personal attitudes, his coiffeur has seldom been the subject of news stories. That has not been the case with Chief Justice Bird whose hair style has sometimes become the focus of news stories concerned with debates over the court, to the exclusion of the important news about the court issues.

One is tempted to say that some California journalists have a hair fetish. But the more serious possibility is that many

California journalists apply a different standard to their reporting on the California court and its Chief than they do to other serious subjects.

This is more than a journalistic oddity. Performance of the California news media in reporting on the state Supreme Court will help determine the outcome of the critical elections in November 1986 when the Chief and a number of justices are before the voters for retention. Results of the election could significantly alter the court for decades. Furthermore, it could establish in the public mind the basis on which all judges in the future will be appointed and continue to serve in this state. And, finally, it could have an impact on the courts throughout the United States since a major group in the judicial campaign has said that they regard this as a prelude for extending their campaign to the country at large. Regardless of which side is correct, both sides of this issue deserve serious news treatment by careful journalism.

My paper today is not based on a systematic or comprehensive study of the state's 119 daily newspapers, 450 weeklies and 500 broadcast stations. It is based on what I believe are the proper criteria for journalists covering the courts, especially, this kind of highly politicized public issue.

There are minimal standards of good journalism that apply to all public affairs reporting, including the judicial controversy and elections. Responsible journalists owe the following to the public:

1. a fair and balanced picture of the issues and of the candidates;
2. an accurate and fair picture of the significant claims and counterclaims during an important campaign;
3. competent and fair reporting of the relevant and undisputed facts when those are known to be significantly different from the claims on either side;
4. an emphasis on the basic, relevant issues in the election, no matter what the rhetoric may be among the contestants; and
5. application of these standards undistorted by their personal opinions.

Unfortunately, in the claims and counterclaims about the California Supreme Court in the last several years, most of these basic standards of good reporting have been violated, violated by some of the most important media in the state, and violated in a way that these same newspapers and broadcast stations would not do with other serious subjects.

In all fairness to the media of the state, the emergence in this state of highly politicized and heavy financing of campaigns against retention of judges has created novel problems in coverage. Suddenly, heated public campaigns have surrounded a subject -- the inner workings of an appellate court -- that is not only a largely unknown subject for the average reporter and editor, but a subject that law and legal canon forbid justices from discussing in public.

It has been central to the American system of the judiciary that it not only have power separate from the executive and legislative branches of government, but that it must explicitly be removed from political passions. We have assumed that money or access to money should have nothing to do with a judge achieving appointment or remaining on the bench. Suddenly in the fierce campaigning to unseat judges, this has been contravened. We have assumed that judges will be reserved in their public discussions of cases and issues before them or which they can reasonably expect to come before them. Now we are confronted with a growing practice of demanding precisely this kind of commitment before a judge or a nominee for a judgeship has heard evidence in a case. We ask judges to be unemotional and impersonal in their application of constitutional principles to the cases before them, but now we make public demands, often from

high places, for a prejudgement or passionate public issues like the death sentence and abortion. The inner deliberations of individual trial judges and the collective arguments and counter arguments of appellate justices in their traditional weighing of cases are now treated as partisan political loyalties rather than application of law, precedent and constitutionality.

In brief, the public and with them journalists, are suddenly confronted with the collapsing into one traditional transaction two formerly separate and deliberately insulated activities in our democracy.

Nevertheless, this is hardly an insurmountable problem, even if it is a new one. And it has to be said that too many large news organizations have approached this new phenomenon as though it were a public joke rather than a central institution in the American system of government. Too often, the journalists covering the court controversy appear to have felt no obligation to study the facts or to exercise normal care and study of a new and complex subject.

As the state's newspapers and broadcast stations approached this new phenomenon of combining courts and electoral politics, they are not helped by some institutional weaknesses of all the

mass media, weaknesses that predate the court controversies, but contribute to it.

For example, imbedded in the current judicial elections is the relationship of courts to crime rates. News operations in the United States have inherited a tradition of reporting crime as a spectacle. Crime is still treated by most news operations as a series of isolated incidents without looking at the best known causes, which they would do with, for example, a medical epidemic. It is seldom reported with recourse to the most reliable information. Crime does not have neatly defined causes, but some factors are clear, undisputed and available. One, for example, is the relative size of the age cohort within the population that has always been the age range of highest commission of crimes. The post-World War II baby boom, for example, came into this crime-committing age range in the 1960s and in addition to whatever factors may have applied, this clearly was a major factor in the rapid increase in crimes per 100,000 in our society. It is also clear, that social-economic status of major groups in society is a significant indicator of what groups will most often be found committing crimes, groups that differ as their economic and social status differ, from the English, Germans, Irish and Italians making up most of our prison population in the 18th and 19th centuries, and a disproportionate number of black and brown ethnic groups in the 20th.

Though these factors are known and undisputed by the best authorities, the general public would have little way of knowing this from their news media, even though crime is a constant presence in the news, and in the last 20 years has been a major American social and political issue. It is a genuinely frightening public issue, yet by ignoring the best known causes, the news media have left the field open for speculation and manipulation, including the notion that courts are somehow responsible for increased crime rates, a theory that has no reliable data to support it and much reliable data to refute it.

A similar zone of silence in most news organizations, particularly those that stress crime reporting, has been on the best known data on the effect on crime rates of different kinds of punishment. This, too, like the causes of crime, are not simple factors, and have a large number of individual and social variables. But much is known by the most reliable authorities. Yet, punishment by the courts and incarceration has been dealt with by most news organizations as though nothing were known on the subject except political rhetoric and conventional wisdoms. This, too, has become an impassioned subject of public debate whose treatment by the news media is a sorry record. One of the ironies of this is the fact that in the state of California, two decades ago, including during the Administration of Governor

Reagan, careful legislative studies were made with some clear and striking conclusions that raise doubts about the efficacy of a simple lengthening of sentences and incarceration rates. Another irony is the existence in California of the longest prison sentences in the Western world while simultaneously there exists a notion that California courts are soft on crime. News media treatment of the issue has proceeded as though there is no history and there are no data on this urgent issue. And as a result it has created false impressions in the public mind.

These two factors, the known influences on crime rates, and the best known data on the impact of criminal justice on crime rates, obviously underlie the political dynamics of the present campaign of the courts. And despite the existence of this as an electoral, judicial and political issue of dominance in this state for several years, few news organizations have bothered to look at the basic information, or informed the public of the best known information about the relationship of the courts to the rate of crime and the relationship of the sentencing to the rate of crime.

Now the central process of the courts is a strident public controversy. Ordinarily, competent reporting of court decisions would be sufficient in the news. But when individual judges and

when a whole segment of the judiciary and its workings become an intense public issue, that is not enough. At that point, any reasonably competent journalist who presume to report on this issue has to understand the workings of courts.

Perhaps there is a useful analogy here. If the court system is a clock, normally the only general public interest is in knowing what time it is, or in this analogy, what is the product of the court -- its decisions in trials and appeals. But now there have been accusations that doctrinaire attitudes by some judges have led them to depart from normal procedures and precedent, and have caused them to behave in an unconstitutional or at least an improper way and that this has been a major factor in the crime rate in California and elsewhere. The issue before Californians now is not just decisions of the court, but the nature of the court workings themselves. It isn't just reporting on what time it is, but now it requires looking at the gears and levers inside the clock. Unfortunately, too many journalists have approached that enterprise as though blindfolded and wearing mittens.

The need to understand court procedures is hardly novel in American journalism. Major newspapers like The New York Times, The Washington Post and others have sent experienced reporters to

law school and insisted that they be as competent in their field as science and business reporters are supposed to be in theirs. The best journalism schools insist not only that students study journalism law but the basic philosophy and procedures of the courts. Among good journalists and careful news organizations there is a realization that if a reporter must cover a specialized subject in which he or she has no depth, that a certain modesty is required when coming to conclusions.

One would assume that a basic mission of journalists would be to see whether the working of our courts depart from the standards regarded as proper in other jurisdictions. To do this, of course, they need to learn and comprehend the nature of courts, especially appellate courts, and the prevailing best opinions on proper design and procedures nationally. Ideally, they would do this with the appreciation that they are undertaking an examination of a profoundly important and historically complex institution, and that this clockwork is the balance wheel of democratic government and civil liberties. With only a few exceptions they have not done this during the controversy that has wracked the California courts. In too many instances, including crucial stories by some of the major papers in the state, the subject was treated with a capriciousness that would be unthinkable in reporting other serious fields like science or business.

And because initial careless and partisan reporting was done by influential journals, it seems to have created a pattern followed by other news organizations. In 1978, shortly before Chief Justice Bird faced voters, a seriously flawed story in the Los Angeles Times seems to have set the tone for much of the rest of the state press, even though that story has been shown to have been based on an ignorance of the procedures of the court.

It is impossible not to conclude, on reading and hearing some of the news treatment of the Chief Justice that she has been placed in a category not requiring standard journalistic fairness and balance and that this has been done by some of the more important news organizations in the state. I do not mean by this that criticism of the Chief Justice is bad journalism. When figures of significant criticize the court, that criticism obviously needs to be reported. When there is controversy about decisions of the court or of its organization and performance, that, too, must be reported as a public service. But this is no different from reporting on a governor, or mayor, or school system. The problem is not the existence of criticism, it is the requirement that beyond reporting the criticism, it is the requirement that beyond reporting the criticism, there is also the need to report conscientiously and fairly the reply to criticism and -- and perhaps this is the most obvious void in the

reporting -- when journalists take the initiative to examine the basic facts that go beyond campaign rhetoric, that they do it with competence, fairness and without prejudgement.

The lack of seriousness and fairness in some reporting on the court and its justices appears also in the much-too-familiar phenomenon that people tend to find what they are looking for. For example, the Chief Justice on September 29 gave the annual State of the Judiciary speech at the annual meeting of the state bar. It was a notable convention because it was inevitable that the attitude of the bar would be an important indication of the legal profession's attitude toward the issues in the coming judicial elections. A story in a major state paper, hostile to the Chief Justice, printed the day before the state bar voting, said in its lead paragraph that normally the state bar has stood behind the state's judiciary but, it added in the second paragraph, "she is getting only lukewarm support from lawyers at the State Bar of California's annual convention..."

The next day most of the papers in the state reported that delegates overwhelmingly voted for an independent judiciary and the Chief Justice was given a standing ovation. A leader of the campaign against the Chief Justice termed the voted for an independent judiciary "awfully close to an endorsement." If one

ignores for the moment the irony of that statement, it is at least clear that the attitude of the state bar, long considered a major credential in judicial appointments, has been under reported as a factor in the campaign. My point is not so much that a prediction by a reporter was wrong, but that when there is prejudgment, one tends to find what he is looking for.

Perhaps the most damaging neglect in journalistic treatment of the judicial controversy has been the failure to emphasize the known undisputed and relevant facts as something apart from the claims and counterclaims in campaign rhetoric.

The same indifference to known information appears in another issue of the campaign, which is the accusation that some liberal members of the court have personal repugnance with the death sentence and therefore reach appellate decisions that ignore the law. I think it would come as a surprise to even the most careful readers of the newspapers of the state and viewers of television news to learn that a majority of the Supreme Court's reversals of one or more of the so-called conservatives on the court. Even when a conservative writes the majority opinion reversing a death sentence it is not reported as the opinion of a conservative justice. If a liberal, of the Chief writes the majority reversal, this is noted as the opinion of a liberal.

The judicial elections in this state have become heated and often bitter. There have been and there will continue to be emotional and passionate exchanges in the coming campaign. It is quite proper that these be reported. But beyond the campaign charges and countercharges, the news media have an obligation to address the basic issues.

1. What are the proper criteria for removing judges from the bench? There is law, precedent and legal canons readily available to the media.

2. What are the most significant claims and counterclaims in the present court election?

3. What are the most reliable facts about the administrative and decision-making activities of the Chief Justice?

4. Since the death penalty is a major issue in the election, what is the best information on the history of the death penalty in other jurisdictions and the analysis of the specific issues in the California law?

5. Since another issue is the status of an independent judiciary, what is the background and rationale for and against a judiciary that is above politics?

One does not have to be romantic to expect that responsible newspapers and broadcast news can deal with a serious issue of this kind as something more important than a shouting contest between angry opponents, or a routine political cat-and-dog fight. In 1957 after the Soviets put Sputnik into space, and science became a serious national issue, the better newspapers in the country stopped treating science stories as fun-games-and-quackery and began treating it as a serious issue. They have recently begun to do the same with business and finance. The nature of the courts and criminal justice in this state deserve at least the same degree of competence, care and balance.

Money and the Judiciary:

Campaign Contributors to California Superior Court Elections

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I. Introduction

California's trial court judges have been formally selected by popular election since the state was admitted to the Union. Yet it has only been within the last ten years that judicial candidates have had to worry about raising money to conduct election campaigns./1/ Prior to that time, most of the state's judges, initially appointed by the governor to fill mid-term vacancies on the bench, ran for election unopposed with little or no need to worry about having to stock a campaign war chest.

Since 1976, however, there has been a marked upswing in the number of contested elections for the trial court bench. In the case of the Superior Court, for instance, the average number of contested primary and run-off races per year from 1976 to 1982 was 38.5 compared to 17.4 from 1958 to 1974 (see Dubois, 1986: 7; see also Stolz, 1978; and Bell and Price, 1982). Similar changes have been observable in Municipal Court races.

The specific reasons for the increased competition do not require extended discussion here, but arguably they include such things as growth in the number of judicial positions to be filled and rising public and professional discontent with the courts (Turney, 1981; Schotland, 1985: 75-79). Regardless of why it happened, however, there seems to be no disagreement that the increased competition has also been accompanied by changes in the character of these elections. Judicial races are increasingly intense and more frequently acrimonious, and have brought heightened involvement by a variety of citizens' groups, bar associations, and even partisan organizations (see Schotland, 1985: 67-72, 79-80; Turney, 1981).

This changed environment for judicial elections has brought reports of dramatic increases in the money being spent by candidates seeking to win or

retain trial court judgeships (Cal. Common Cause, 1978; Berg, 1980; Cochran, 1981; Slead, 1981; Schotland, 1985). And with these reports have come a variety of concerns expressed about the high cost of running a judicial campaign. Some have worried that judicial campaign costs have become so high that promising candidates are discouraged from seeking the bench by the prospect that they will incur substantial personal financial debt in doing so. Indeed, some prospective appointees to the bench might be quite reluctant to assume a judgeship after having observed lawyer colleagues who have suffered not just the loss of personal income that goes with judicial salaries but the financial hardship of maintaining that position in a competitive judicial campaign (Schotland, 1985: 114, 120).

Other observers have expressed the view that the entry of large amounts of money into judicial election campaigns may irreparably do damage to the integrity and independence of the judiciary. Incumbent judges have lamented the difficulty of reconciling the need to raise funds with the need to maintain the dignity of their positions (see, e.g. Schotland, 1985: 155-161). Concern has also been registered about the potential for real or perceived conflicts of interest when judicial candidates accept contributions from those individuals who are the primary users of the courts—lawyers. As one judge so pointedly put it: "What would you think if you were a litigant in my court and you knew the opposing counsel had contributed to my campaign? . . . Wouldn't you worry about the fairness of my decision if I had ruled in his favor?" (Cochran, 1981: 220).

California's experience with respect to judicial campaign finance is not unique. A number of other states have experienced an apparent increase in the role of money in their judicial elections and have responded with a

variety reform efforts. These have included attempts by local bar associations to encourage candidates to adopt voluntary contribution and spending limits in exchange for endorsements and/or financial assistance; changes in the state Code of Judicial Conduct to limit the amount of money judicial candidates may solicit from attorneys; and the establishment of blind trusts through which attorneys may contribute to their preferred candidates while severing the explicit tie between lawyer contributors and judicial candidates (see Schotland, 1985: 96-107, 121-132; Cal. Fair Political Practices Commission, 1985: 4-9). Similarly, in California, a recent legislative proposal (AB 2565), introduced by Assemblyman Larry Sterling, would prohibit attorneys, judges, law firms, bail bondsmen, court reporters, and court reporting firms from contributing $250 or more in a calendar year to a superior or municipal court judge or to a candidate seeking such a position.

Such proposals, however well-intentioned, have often been based on anecdotal accounts of particularly expensive judicial campaigns or reported troublesome situations involving the sources of campaign contributions (see, e.g., Schotland, 1985: 58-72). There have been recent laudable attempts to collect more complete information about the level of campaign spending and the contributors to judicial campaigns (see Schotland, 1985: 107-120, 133-154; Cal. Fair Political Practices Commissions, 1985: 2-3; Berg, 1980; Slead, 1981), but these too tend to be selective in the elections and candidates studied/2/ or lacking the appropriate statistical controls necessary to a meaningful interpretation of the data collected/3/.

When all of the state's judicial elections are examined and some attempt is made to impose such controls, however, a slightly different

picture emerges. A recently-completed examination of the spending by all of the candidates in all of the contested Superior Court elections in California from 1976-1982, for instance, has demonstrated that total campaign spending and average spending by individual candidates have not in fact increased since 1978 once the effects of inflation have been held constant (Dubois, 1986: 8-10).

Similarly, the average campaign cost for a Superior Court candidate has been shown to be quite modest, particularly when considered in a comparative context (Dubois, 1986: 10-11). Although there have been reports of candidates spending more than $75,000 or even $100,000 for a Superior Court position (see, e.g. Cochran, 1981: 220), these campaigns are very much the exception and not the rule. The average race in 1982 cost each candidate just over $17,000, with a similar amount required in the unlikely event of a run-off. Even in the largest counties where 500,000 or more voters must be reached, Superior Court campaigns typically involve only from $17,000 to $25,000./4/ As Table 1 demonstrates, on a per vote basis, total expenditures for all judicial campaigns have been dwarfed by expenditures made in connection with the state's major executive and legislative races. Even if comparable data were available for other countywide offices, such as district attorney or sheriff, it is doubtful that the reported costs would be as low as those associated with judicial contests./5/

Despite this evidence on judicial spending, some of the concerns many observers have with respect to judicial campaign financing cannot be addressed with data pertaining to expenditures. Rather, when dealing with fears of real or potential conflicts of interest, the focus must be upon the sources of the funds that candidates do spend. Who are the individuals and

Table 1

Total Primary and General Election Spending Per Vote
For Major Elective Offices and the Superior Court /a/
in Current and Constant (1958) Dollars /b/

Year	Governor	State Senate	State Assembly	Superior Court
1970	$0.42 (0.31)	$0.35 (0.26)	$0.35 (0.26)	Not available
1972	—	$0.28 (0.20)	$0.38 (0.26)	Not available
1974	$0.92 (0.55)	$0.42 (0.25)	$0.72 (0.43)	Not available
1976	—	$0.66 (0.33)	$0.69 (0.35)	$0.04 (0.02)
1978	$0.97 (0.42)	$0.79 (0.35)	$1.07 (0.47)	$0.12 (0.05)
1980	—	$1.00 (0.33)	$1.82 (0.62)	$0.14 (0.05)
1982	$1.83 (0.52)	$1.75 (0.51)	$2.55 (0.74)	$0.11 (0.03)

a. The figures for gubernatorial and legislative spending for the years from 1970 to 1978 were taken from the California Fair Political Practices Commission Report (1980: 27), updated for 1980 and 1982 by the author using annual FPPC reports of campaign spending.

b. Data on the California Consumer Price Index (CPI) were taken from the Cal. FPPC Report (1980: 8) which utilized the CPI as computed by the California State Department of Finance. Figures for the CPI for 1980 and 1982 were obtained directly from the Department of Finance.

groups that donate money to judicial candidates? Are lawyers, law firms, bail bondsmen, court reporters and other regular users of the courts the primary benefactors of judicial candidates? How large are the contributions made? Do the patterns of contributions suggest the need for regulatory measures? The purpose of this paper is to attempt to address these issues.

II. Data and Method

The empirical evidence that serves as the basis for this study consists of the contributions to all of the candidates in contested elections held in 1980 for positions on the California Superior Court. This particular year was chosen because the number of candidates (100) was large and because the total amount of money expended in the 36 primary and 11 run-off contests was the most in recent years, approaching $2.2 million (Dubois, 1986). The data were gathered from the campaign statements filed by candidates and campaign committees under the provisions of California's Political Reform Act. The analysis required an examination of the summary data provided by candidates on contributions received (including monetary, nonmonetary, loans, and pledges) and the creation of a computerized data file of all of the contributors listed as having made monetary contributions of more than $100 to each candidate. For the purposes of this paper, analysis was limited to reports filed in connection with the primary elections held in June, although a preliminary examination of the 11 run-off elections held in November suggests no major differences in the patterns of campaign financing between the primary and run-off contests.

The task was not an easy one. One-third of the candidates failed to file one or more of their required reports with the Secretary of State in

Sacramento as required by law (Cal. Govt. Code S.81005 (b)). These reports (over 100 in all) had to be requested from county clerks and election officials who, it is assumed, had complete reports within their own files. It was also observed that reports were frequently completed incorrectly, with errors ranging from the arithmetic to the incredible. The most common error--the failure to carry over cumulative receipt and expenditure totals from one report to the next--was easily corrected. Other errors, including inconsistent or incomplete information, could not be corrected.

As a result of these difficulties in data collection, nine of the 100 candidates had to be removed from consideration. Three candidates' reports were simply unavailable, in two cases because county election officials would provide only some of the basic summary information over the telephone and would not provide xeroxed copies of the detailed reports. Four other candidates were excluded when they reported expenditures in the absence of reported receipts. As will be noted later, it can only be presumed that these candidates covered these campaign costs with personal funds. Finally, two candidates were excluded because they reported receipts and expenditures of less than $200. Under the provisions of the Political Reform Act (Cal. Gov't Code S. 84212), such candidates are not required to file detailed campaign finance statements. For the remaining 91 candidates, the reports filed were considered to be in sufficiently good order to permit some detailed analysis. These 91 reported total contributions received (including monetary, non-monetary, pledges, and loans) of $1,680,046, representing 96.6% of the sum of reported receipts for all candidates.

The computerized data file of monetary contributors to all primary and run-off elections consisted initially of nearly 4800 individual contributions. Because some candidates' reports included an itemized listing of individual contributors of less than $100 while others did not, it was decided to purge the file of these contributors unless they also had made other contributions to the same candidate that cumulatively amounted to more than $100. Although these itemized "small contributors" accounted for about 10% of all contributors, they accounted for but 2% of all dollars contributed.

Additionally, regardless of the number of separate contributions made by any one individual, each contributor's donations to each candidate were combined into a cumulative total for the calendar year. Although candidates are supposed to report cumulative amounts received, this method was judged to be more complete and accurate. Finally, in limiting this analysis to the primary races only, those contributions associated with the run-off election were excluded. The resulting data base consisted of 3,172 individual "large contributors" donating a total of $760,962 to the 91 candidates. These dollars represent 85.4% of those collected in the primary and run-off elections combined.

For the purpose of understanding the sources of judicial campaign money, each contributor was assigned to one of sixteen occupational categories depending upon the occupation listed on the schedule of contributions contained in the campaign finance statement. Contributions made by the candidates themselves, by members of their immediate families,/6/ or transfers made between a candidate and a separate campaign committee (if any) were segregated and are dealt with in a separate section of this paper.

What remained, then, was a data file of what we may call "third-party contributors" to California's trial court campaigns. The sixteen occupational categories are:

1. Individual Lawyers
2. Law Firms
3. Active Judges
4. Individual Law Enforcement Officers (police, sheriffs, etc.)
5. Police and Other Law Enforcement Organizations
6. Individual Members of the Business Community (including those in banking, insurance, sales, manufacturing, real estate, etc.)
7. Business companies
8. Labor Unions and Employee Organizations (not including #5)
9. Professionals (architects, physicians, dentists, etc.)
10. Political Party or Candidate Campaign Organizations
11. Political Interest Groups (e.g. Law & Order Campaign Committee)
12. Court Regulars (bail bondsmen, court reporters, court clerks)
13. Homemakers
14. Retired Persons (including retired judges)
15. Other occupation (including self-employed)
16. Occupation not listed

III. The Context of Campaign Contributions

Before the role of large contributors to judicial campaigns can be examined, the larger context of judicial campaign support must first be understood. Just how important to the entire judicial campaign effort are these large contributions?

First, it must be recognized that monetary contribtutions are only one of the reportable sources of campaign support. Non-monetary contributions of services and goods donated to the campaign must also be reported at their estimated fair market value (Cal. Gov't Code, SS. 81011, 82015). Non-monetary contributions typically include donated printing or graphic arts services, the provision of secretarial support, or donated supplies such as envelopes, stamps, and paper. For the 91 campaigns examined here, non-monetary contributions were reported by just about half of the candidates (47.2%), ranging in total value from just $30 to $13,157 and constituting on average 8.2% of these candidates' reported campaign receipts. For all 91 candidates, the total non-monetary contributions amounted to $79,132 or 4.7% of all reported receipts.

Second, small contributions also play an important part in the funding of judicial campaigns. Although every candidate must report the sum of all dollars received, only contributors donating more than $100 cumulatively to a candidate's campaign during the calendar year must be specifically identified by name and occupation. However, of the $1,209,983 in reported monetary contributions, more than one-third (37.1%) came from contributors who donated cumulative amounts of less than $100. Large contributors, then, provide a majority of the monetary contributions received by judicial candidates, but their importance is hardly overwhelming.

Third, the extent of candidates' personal support of their own campaigns must be recognized. Indeed, of the $760,962 in itemized contributions exceeding $100, 25.2% ($192,101) came from candidates contributing money to their own campaigns. Another $13,979 could be identified as contributions to candidates from members of their own

families. In all, these personal and family contributions accounted for 27.5% of the large contributions exceeding $100. It is impossible to know what proportion of the small contributions of less than $100 also came from candidates' personal sources.

These direct contributions are supplemented by loans made by the candidates or members of the family to their own campaigns. Although reported on the campaign finance reporting forms as "loans," most of these dollars are never recovered by contributions and must therefore be forgiven or absorbed. Of the 91 candidates whose reports were examined in detail, 36 (or 39.6%) reported one or more loans that were either outstanding or forgiven, ranging in total amounts from $1,198 to $39,750. The sum of these loans to all candidates was an astounding $299,791, constituting 17.8% of all campaign receipts.

The vast majority of these loans originated with the candidates, their spouses, or other family members; 28 of the 35 candidates for which detailed information was available (or 80%) received all of these loaned dollars from themselves or family members, and all but three of these candidates received more than half of these funds from themselves or their families.

When combined with the dollars directly reported by the candidates and their relatives as contributions to their own campaigns, the importance of personal financing of judicial campaigns is seen clearly. Loans and contributions by candidates and family members totalled $506,871, an amount nearly equalling the amount of large third-party contributions ($552,057) and providing a third (30.1%) of all campaign receipts.

Finally, the matter of campaign debt must be noted. Although most candidates reported total receipts equal to or exceeding their expenditures,

14 of the 91 candidates reported expenditures in excess of receipts, ranging from a low of $79 to a high of $9,250. Additionally, as noted earlier, four other candidates were excluded from this analysis because they reported expenditures with no reported receipts whatever. Some of these candidates undoubtedly covered these debts from their own pockets but did not list themselves as campaign contributors; in other cases, these debts may have remained unresolved within the calendar year covered by this study or may have never been repaid. Whatever the explanation, for these 14 candidates the total amount of campaign expenditures not matched by receipts was $47,799 or approximately 22% of their total expenditures. These are dollars for which no accounting is possible.

This entire discussion points to the fact that large, third-party contributions are only one part of the financial structure of a judicial campaign. Table 2 makes the point most clearly. Large third-party contributions constitute the single largest source of funds to support judicial election campaigns, but amount to only 32.5% of the total receipts which include non-monetary contributions, small contributions of less than $100, and candidates' contributions and loans to their own campaigns./7/

IV. The Contributors to Judicial Campaigns

With this more complete understanding of the many sources of judicial campaign support, it is possible to look more closely at the "large contributors"--those individuals who contributed cumulative amounts of more than $100 to a Superior Court campaign. Table 3 displays the total amounts of these contributions according to the occupations of the donors, excluding

Table 2

The Sources of Judicial Campaign Support
in Contested California Superior Court Primary Elections, 1980

Source of Funds or Support	Total Contributed	Percent of Total
Large Third Party Contributions (More than $100 cumulatively)	$546,405	32.5%
Small Third Party Contributions (Less than $100 cumulatively)	$448,821	26.7%
Contributions from Candidates or Members of Immediate Family	$207,080	12.3%
Outstanding or Forgiven Loans	$299,791	17.8%
Non-Monetary Contributions	$ 79,132	4.7%
Other Sources (pledges, unaccounted funds, etc.)	$ 98,817	5.9%
Total Receipts: All Sources	$1,680,146	99.9%*

*Does not sum to 100.0% due to rounding.

those contributions from the candidates themselves and members of their immediate families.

As might have been expected, lawyers and law firms were found to have supplied a substantial proportion (39.2%) of the dollars contributed in larger amounts. Aside from lawyers, the other large contributor group consisted of individuals and companies in the business community who together donated 31.0% of the dollars contributed in larger amounts. A wide variety of other types of individuals, ranging from professionals to retired persons, contributed about a fifth of the dollars received but no one group accounted for much more than 5% of the total. When combined, however, individual contributors from the "non-legal" community account for just about half of the dollars received from large third-party contributors.

The most surprising part of Table 3 is the relatively small amount of money contributed by those individuals and groups that might be supposed to have a particular interest in the outcome of judicial elections. Individuals employed in law enforcement, police organizations, various court regulars, and sitting judges together accounted for only 5.0% of the large contributions. Similarly, various political interest groups, political party organizations, candidate campaign committees, and employee organizations contributed just 3.6% of the total.

In sum, when speaking about the dollars contributed in larger amounts, it is fair to say that lawyers are the single largest source of campaign funds. However, the contributor base for judicial elections is actually quite varied, with more than half of all the dollars contributed in larger amounts originating with groups and individuals who are outside the legal community.

Table 3

Contributions of More than $100 to Contested
California Superior Court Primary Elections, 1980
By Occupation of Contributor

Occupation	Dollars Contributed	Percent of Total
Individual Lawyers	$171,534	31.4%
Individ. Businesspersons	$104,260	19.1%
Business Companies	$ 65,149	11.9%
Law Firms	$ 42,731	7.8%
Other Occupations	$ 29,502	5.4%
Retired Persons	$ 26,677	4.9%
Homemakers	$ 21,841	4.0%
Not Listed	$ 20,980	3.8%
Professionals	$ 16,505	3.0%
Active Judges	$ 16,056	2.9%
Political Interest Groups	$ 8,165	1.5%
Party or Candidate Comms.	$ 8,070	1.5%
Law Enforce. Organizations	$ 5,445	1.0%
Court Regulars	$ 3,470	0.6%
Unions and Employee Organ.	$ 3,250	0.6%
Individual Police Officers	$ 2,770	0.5%
Total: All Sources	$546,405	99.9%*

*Does not sum to 100.0% due to rounding.

V. Contributions in Judicial Elections

Table 4 contains information on the cumulative amounts contributed by each of the major occupational groups. These data show that, although lawyers may be the largest donor group in terms of the total dollars given, they do not make particularly large contributions. The mean contribution from individual lawyers was just $160 while the average law firm contribution was $176. Moreover, approximately 80% of these lawyer contributions totalled less than $250, while less than 5% amounted to $500 or more.

The largest individual contributor amounts came from those groups which contributed relatively little to judicial campaign treasuries. Police and law enforcement organizations made average contributions of $389, with about 70% of their contributions being in amounts of $250 or more and with more than 40% of their gifts in amounts of $500 or more. Similarly, political interest groups averaged $355 in their contributions, nearly half (47.8%) of which totalled $250 or more and more than one-quarter (26.1%) of which equalled $500 or more.

Despite the occasional large givers, one must be struck by the modest amounts given by most contributors. For all 91 candidates, the average contributor gave just $176, with about eight of every ten contributors making cumulative gifts in amounts of less than $250. Only a fifth of the contributors made contributions of $250 or more, and just 5.9% gave as much as $500 or more.

Of course, it remains true that some judicial contests are not decided in June but must be resolved through a November run-off election. These campaigns also require financial support and candidates may naturally look

Table 4

Size of Large Contributions to Contested California Superior Court Primary Elections, 1980, By Source of Contribution

Source	No. of Contribs.	Average Contrib.	Percent of Contribs. in Range: $100-$249	$250-$499	$500 & More
Law Enforce. Organ.	14	$389	28.6%	28.6%	42.9%
Pol. Interest Grps.	23	$355	52.2%	21.7%	26.1%
Party & Cand. Comms.	28	$288	64.3%	21.4%	14.3%
Unions & Employee Org.	12	$271	41.7%	41.7%	16.7%
Individual Police Off.	12	$231	75.0%	8.3%	16.7%
Business Companies	305	$214	65.9%	24.6%	9.5%
Court Regulars	18	$193	72.2%	11.1%	16.7%
Occupation Not Listed	114	$184	78.9%	11.4%	9.6%
Retired Persons	148	$180	81.8%	13.5%	4.7%
Indiv. Businesspersons	588	$177	81.0%	13.6%	5.3%
Law Firms	243	$176	77.8%	16.0%	6.2%
Other Occupation	177	$166	85.4%	10.7%	3.4%
Active Judges	100	$161	86.0%	8.0%	6.0%
Individual Lawyers	1,069	$160	81.2%	14.0%	4.6%
Homemakers	140	$156	81.4%	15.7%	2.9%
Professionals	114	$145	86.8%	10.5%	2.6%
Total: All Sources	3,105	$176	79.2%	14.8%	5.9%

again to some of the contributors who supported their primary campaigns. By the end of the run-off campaign, perhaps some candidates have come to rely for substantial amounts of money upon particular contributors.

Actual analysis of the contributor data, however, show that these fears are largely unfounded. Of the 3,664 third-party contributors to the 1980 Superior Court elections, only 102 (or 2.8%) gave to the same candidate's primary and run-off campaigns. Put another way, of the 590 third-party contributors to run-offs, only 17.3% had also supported the same candidate in the primary. And the cumulative amounts contributed by these "double givers" are alarming in only rare instances, with just one contributor giving as much as $2,000 and only five others donating more than $1,000. On average, these "double givers" gave $430 cumulatively to both campaigns.

VI. Variations in Contributor Patterns

To this point, the analysis of California's judicial campaign finance has been based upon the contributions made to all of the candidates seeking a Superior Court post in 1980 without regard to possible differences among candidates that might be supposed to affect their ability to successfully solicit campaign support. Nevertheless, such differences should exist. For instance, it might be expected that incumbent judges would be in a much better position than non-incumbents to build a campaign treasury from third-party sources and would therefore be less dependent upon funds from their own pockets or those of family members. Similarly, given their greater visibility and more frequent contact with lawyers in the community, incumbent Superior Court judges and even those lower trial court judges

seeking elevation to the Superior Court bench should be more successful than other kinds of candidates in raising funds from the legal community./8/

Table 5 presents the differences among incumbent judges, municipal or justice court judges seeking elevation to the Superior Court, and other kinds of candidates in their reliance upon different forms of financial support. As hypothesized, incumbent judges relied most heavily upon monetary contributions, receiving three-fourths of their total campaign support from third-party contributors. Contributions to their own campaigns, contributions from family members, and loans accounted for but 14.8% of their reported campaign receipts.

Municipal and justice court judges seeking election to the Superior Court enjoyed a similar funding profile dominated by monetary contributions. Nevertheless, compared to incumbents, these judges were able to rely slightly less upon money contributions (67.9%) and were forced to look more to loaned dollars (20.0%).

Major differences are seen in the campaign funding of other kinds of candidates. These candidates, not enjoying the fund-raising advantages of incumbency or of some other judicial position, drew less than half (44.4%) of their campaign support from contributions and had a particularly small proportion (21.1%) of contributions in the larger amounts over $100. Without the ability to secure third-party contributors, these candidates were apparently forced to rely upon personal or family contributions and loans, and actually received as much money from these sources as from contributors.

Table 6 displays differences among incumbent judges, other judges, and other kinds of candidates in the sources of the large third-party

Table 5

The Sources of Judicial Campaign Support
in Contested California Superior Court Primary Elections, 1980
By Type of Candidate

Sources of Funds or Support	Type of Judicial Candidate: Incumbent Superior Ct. Judge (N=18)	Municipal or Justice Ct. Judge (N=22)	Other Kind of Judicial Candidate (N=51)
Large Third Party Contributions (More than $100)	43.4%	40.6%	21.1%
Small Third Party Contributions (Less than $100)	31.2%	27.3%	23.3%
Contributions from Candidates or Family Members	6.7%	2.2%	21.1%
Outstand. or Forgiven Loans	8.1%	20.0%	23.6%
Non-Monetary Contributions	3.7%	5.6%	5.0%
Other Sources (pledges, unaccounted funds, etc.)	6.9%	4.2%	5.9%
Total Receipts: All Sources	100.0% ($534,649)	99.9%* ($374,581)	100.0% ($770,816)

*Does not sum to 100.0% due to rounding.

Table 6

Differences in the Sources of Contributions
in Contested California Superior Court Primary Elections, 1980
By Type of Candidate

Sources of Funds or Support	Type of Judicial Candidate: Incumbent Superior Ct. Judge (N=18)	Municipal or Justice Ct. Judge (N=22)	Other Kind of Judicial Candidate (N=51)
Lawyers and Law Firms	49.3%	33.5%	30.1%
Business Individuals and-Companies	22.7%	39.0%	35.4%
Other Individual Contribs. (Professionals, Retired Persons, Homemakers, etc.)	15.9%	22.1%	27.7%
Court Regulars, Sitting Judges and Law Enforce.	7.1%	3.1%	4.0%
Unions, Party and Candidate Comms., Pol. Interest Grps.	4.9%	2.3%	2.8%
	99.9%*	100.0%	100.0%
Total Dollars Received	$231,825 ($534,649)	$152,030 ($374,581)	$162,548 ($770,816)

*Does not sum to 100.0% due to rounding.

contributions received. Incumbent Superior Court judges are seen to have relied most heavily upon lawyers and law firms for these contributions; nearly half (49.3%) of the large contributions received by incumbents came from the legal profession. In comparison to the other kinds of candidates, incumbents were also more likely to receive contributions from those who work in and around the courthouse (i.e. court regulars, law enforcement, and sitting judges) and from various politically-active groups and organizations.

In contrast, non-incumbent municipal or justice court judges seeking election to the Superior Court relied for lawyers for only about a third of the large contributions and placed much greater reliance than incumbents upon members of the business community and other individual contributors. Other kinds of non-incumbent candidates were similarly situated as they were able to obtain less than a third of their large contributions from the legal community.

In sum, candidates are differently situated when it comes to raising campaign funds. Incumbent judges are best able to tap the largess of the lawyer community, but the amounts solicited are quite modest. Non-incumbent judges also can successfully obtain substantial financial support from the legal profession, but must also rely upon personal sources and loans to put together a suitable campaign treasury. Other kinds of candidates are severely disadvantaged by the need to solicit financial support and are just as likely to match every solicited dollar with one from their own pockets or those of family members.

VII. Conclusions and Implications

Caution must always be exercised in attempting to draw generalizations from data gathered from just one state in one particular election year (see Schotland, 1985: 135-149). This study of the campaign contributors to California's Superior Court elections in 1980 necessarily must observe such caution. Nevertheless, the data collected for this study are probably the most complete yet assembled and there is every indication that 1980 was a typical year in California for the conduct of these major trial court contests./9/

One must also be careful in attempting to use these data to support particular prescriptions for reform. Some of the calls for reform have been stimulated by those who hold the subjective perception that the amount of money being spent in judicial elections is "too much" and that judicial candidates are "too dependent" upon campaign contributors. As Professor Schotland (1985: 111) has recognized, however, data alone cannot answer the key questions of whether the amounts received and spent are "too high," "too low," or "just right." Nevertheless, such assessments can be aided by full knowledge of just how much is being collected, in what amounts, from whom, and how judicial election finance practices compare to the financing of non-judicial elections. These data may also be profitably employed to speculate about the likely consequences of particular reform efforts.

One of the major concerns about recent judicial elections is that that costs of these races have been going up, thereby increasing the reliance by candidates upon contributors. In particular, increased campaign costs are seen as increasing candidates' reliance upon lawyers, thereby exacerbating the potential conflict of interest problem when judges seek financial

assistance from those who appear before the bench. The actual data on spending and on the sources of judicial campaign funds, however, tend to suggest that these problems may not be as serious as many have supposed.

The amount of spending by judicial candidates was not directly addressed by this paper. Prior related research has shown, though, that judicial campaign spending is, by all comparative measures, very low. In the state's largest counties containing populations of more than 500,000 eligible voters, the amounts spent have been less than $0.03 per capita. Moreover, the increases in spending since 1976 have not been great and, in large measure, can be attributed to the effects of inflation (Dubois, 1986: 12-13).

It must be conceded that the amounts spent by judicial candidates have increased in real dollar terms over the last decade. An important question, then, is whether candidates rely to a significant extent upon contributors in general and lawyers in particular for campaign support.

The data analyzed here show that the sources of campaign support are quite varied, including monetary contributions from third parties and the candidates themselves, non-monetary contributions, loans, and other sources. Perhaps surprisingly, only a third of all campaign resources came in the form of large contributions from third parties, including lawyers. Lawyers constituted the single largest contributor group, but more than 60% of the dollars contributed in larger amounts originated with non-lawyer groups and individuals.

This research has also shown that the amounts contributed in larger amounts are not particularly large. Of course, this requires a subjective judgment about when a contribution may be considered "large," but one may

wonder whether there is a serious conflict of interest problem when the average contribution is just $176 and 80% of the contributions are under $250 and an additional 10% are exactly $250.

Finally, it has been demonstrated that different kinds of candidates have different bases of financial support. Incumbent judges have relied most heavily upon contributions, while non-incumbents relied most heavily upon loans and personal and family resources. Incumbent judges were also most successful in attracting contributions from lawyers. Indeed, it may be incumbents' superior ability to attract contributions that explains why incumbents far outspend their challengers. In 1980, incumbents outspent challengers by an average margin of two to one. By 1982, the average incumbent was spending two and a quarter times more money than his opposition (Dubois, 1986: 18).

These various findings may be helpful in evaluating proposals to reform judicial campaign finance practices, such as the one proposed by Assemblyman Sterling which would prohibit contributions of $250 or more in a calendar year to Superior and Municipal Court candidates by lawyers and others who regularly do business with or before the courts.

First, it is clear that this proposal (AB 2565) would affect only a fraction of the funds being utilized in judicial campaigns. Only one-fifth of all contributions over $100 regardless of source fall into the prohibited category and well less than 10% of the prohibited large contributions originate with lawyers, judges, court reporters, bail bondsmen, and other court users. Additionally, it must be remembered that large contributions generally account for only about a third of all campaign resources. In sum,

limiting campaign contributions from these specific categories of contributors would have a very limited impact.

The limited impact that such a proposal might have would appear to be with respect to most incumbent judges who rely to the greatest extent upon monetary contributions from these particular kinds of contributors. Assuming that these are dollars that incumbents cannot afford to lose from their campaign treasuries, they would be forced to rely more upon a larger number of small contributions and other sources of funds, such as contributions or loans from themselves or members of their immediate family. It is difficult to see how forcing candidates to go more into debt to defend their judicial positions could be considered a net benefit of such a reform. As Schotland has so correctly noted, "much of the campaign funding problem may lie not in abusively large sums occasionally contributed by individuals, but rather in the fact that serious candidates, including worthy incumbents engaged in the defense of their seats, have too little money with which to mount viable campaigns" (1985: 95).

NOTES

1. California trial court judges were originally selected in partisan elections. The state adopted the nonpartisan ballot for judicial races in 1904. See Martini (1978a, 1978b).

2. Professor Schotland, for instance, studied elections with "substantial" contributions or those otherwise considered "lively" or "competitive" (1985: 108). With respect to California, this meant that his examination covered only 21 of the approximately 320 candidates who competed in contested Superior Court races from 1978 to 1982 (Schotland, 1985: 113, 134). Similarly, the 1985 study by the staff of the California Fair Political Practices Commission examined the reports of incumbent judges only and not those of other candidates. Moreover, only 26 of the 142 incumbents had reportable receipts and/or expenditures (Cal. FPPC, 1985: 3).

3. Professor Larry Berg (1980) made the first attempt to look at the level of spending in California's trial court elections. Nevertheless, his analysis relies upon raw spending figures and little is done to account for some of the factors known to affect spending, such as inflation and variations in the populations of the counties in which the elections are held. Schotland (1985) also presents spending data from a variety of states with little or no attention to the factors that might explain or perhaps justify differences in spending levels.

4. In counties with voting age populations of less than 500,000, judicial candidates' spending averaged about $12,000 (Dubois, 1986: Table 4).

5. Campaign finance reports for the other countywide offices are filed with the county clerk and not with the Secretary of State in Sacramento. Without a centralized source of campaign finance information, it is not possible to offer a comparison of the spending in the Superior Court races with that in the countywide non-judicial races.

6. The method used here to determine whether a contribution originated with a member of the candidate's family was a simple, albeit imprecise, one. Contributors sharing the same last name as the candidate were deemed to be family members. Admittedly, this may inadvertently include those unrelated individuals who share the same name while failing to capture those in the same immediate family who do not share surnames.

7. This point seems to have been ignored in previous judicial campaign finance studies.

8. These hypotheses are suggested by Schotland (1985: 113-114, 116-117, 134-135), but his exploration of them was severly constrained by the limited number of candidates' statements examined. See note 2, supra.

9. Of course, these results do not apply to California appellate and supreme court elections.

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Pattern of Campaign Expenditures for Superior Court Position 1974-1984 (cont.)

TABLE EIGHT

Average Campaign Expenditure by Superior Court Candidates According to Occupation
Contested Elections 1974-1984

	1974	1976	1978	1980	1982	1984
J of Sup Ct	$7542	$14139	$21862	$28862	$33375	$46011
J of Mun Ct	12966	7123	36365	28974	26768	86564
D.A. & Dep.D.A.	7679	16837	9935	12846	13577	44544
Attorney	6717	11481	11680	19661	15460	20076
other occup.	5704	5246	12582	13539	16042	14447

Cost Per Vote in Contests for Superior Court 1974-1984

TABLE NINE

Increase in the Cost per Vote
Contested Elections 1974-1984

1974	1976	1978	1980	1982	1984
6.5¢	7.7¢	9.4¢	12.1¢	16.4¢	41.4¢

TABLE TEN

Average cost per Vote
Contested Elections 1974-1984

Incumbents	9.9¢
Non-incubents	13.6¢
Winners	12.3¢
Losers	13.0¢

Relationships Between Expenditures and Votes
Superior Court Contributions 1974-1984

These correlations measure the relationship, controlled for each individual contest, between the proportion of the money spent and the proportion of the votes received. In other words a perfect correlation would include a race where the candidate who spent 50 percent of the money received 50 percent of the vote, a candidate that spent 30 percent of the money received 30 percent of the vote, and the candidate who spent 20 percent of the vote received 20 percent of the vote.

TABLE ELEVEN

Expenditures and Votes--Controlled for Contest
Contested Election 1974-1984

	1974	1976	1978	1980	1982	1984
Pearson's r	.7936	.6560	.7673	.6674	.7634	.5001
Sig. of r	.0001	.0001	.0001	.0001	.0001	.001

Here only direct mail expenditures are considered:

TABLE TWELVE

Proportion of Direct Mail Expenditure With Vote
Contested Elections 1974-1984

	1974	1976	1978	1980	1982	1984
Pearson's r	.6826	.4018	.6851	.5594	.7051	.4693
Signif. of r	.0001	.01	.0001	.0001	.0001	.01

Here only printing and print advertising expenditures are considered:

TABLE THIRTEEN

Proportion of Printing and Print Advertising Expenditures
With Vote
Contested Elections 1974-1984

	1974	1976	1978	1980	1982	1984
Pearson's	.7483	.3729	.6671	.3352	.6884	.5645
Signif. of r	.0001	.01	.0001	.01	.0001	.0001

Relationships Between Expenditures and Votes
Superior Court Contributions 1974-1984 (cont.)

Here only TV and radio advertising expenses are considered:

TABLE FOURTEEN

Proportion of TV and Radio Expenditure with Vote
Contested Election 1974-1984

	1974	1976	1978	1980	1982	1984
Pearson's r	.2908	.3199	.6607	.3689	.4800	.3992
Signif. of r	.05	.05	.0001	.01	.01	.05

TABLE FIFTEEN

Effect of Campaign Expenditures on Proportion of the Vote
Contested Election 1974-1984

	Total Expen	Direct Mail	Print & Pr. Ads	TV & Rad. Ads
Winners				
Pearson's r	.5257	.4024	.4020	.3081
Signif. of r	.0001	.0001	.0001	.01
Losers's				
Pearson's r	.6372	.4844	.5178	.4037
Signif of r	.0001	.0001	.0001	.0001
Incumbents				
Pearson's r	.6011	.4362	.3914	.3783
Signif. of r	.0001	.0001	.0001	.01
Non-incumbents				
Pearson's r	.6538	.5430	.5414	.4351
Signif. of r	.0001	.0001	.0001	.0001

Pearson's r is a measure of correlation. It ranges from 1.0 to -1.0. If for every one percent of the expenditures in a contest the candidate received one percent of the vote, the Pearson r score would be 1.0. (A negative correlation would have shown that the larger proportion of the expenditures spent, the smaller proportion of the vote received.)

INCUMBENTS DEFEATED

1974		
Glickfeld	SF	003
1976		
Gillespie	IM	001
Gumpert	LA	001
Kennedy	LA	028
Takasugi	LA	040
Moscowitz	SO	002
1978		
Sparrow	AL	012
Gonzalez	LA	003
Sanchez	LA	015
Best	MA	003
Lucero	SC	003
Cooney	SD	014
Thompson	VE	005
1980		
Koford	AL	001
Calhoun	CC	001
Rodriguez	FR	004
1982		
Gafkowski	LA	080
Brigance	SI	001
1984		
Pesoner	CC	006
Jourdane	MY	003

Pattern of Competition for Superior Court Positions 1974-1984

TABLE ONE

Superior Court Contested and Open Seats: 1974-1984

	1974	1976	1978	1980	1982	1984
Seats up for election	191	183	205	276	258	254
No. of seats contested or open	23	22	39	36	31	28
Percentage of potentially contested seats contested	12%	12%	19%	13%	12%	11%

TABLE TWO

Incumbents Challenged

	1974	1976	1978	1980	1982	1984
Incumbents up for Election	188	176	195	260	245	236
No.of incumbents Challenged	20	15	29	20	18	10
Percent of incumbents Challenged	11%	9%	15%	8%	7%	6%

TABLE THREE

Challenged Incumbents Defeating Opponents

	1974	1976	1978	1980	1982	1984
No. winning	19	9	21	16	16	7
No. losing	1	6	8	4	2	3
Percentage winning	95%	60%	72%	80%	88%	70%

Pattern of Campaign Expenditures for Superior Court Position
1974-1984

TABLE FOUR

Mean Average Raw Expenditures
Contested Elections 1974-1984

1974	1976	1978	1980	1982	1984
$8061	$11255	$18386	$22210	$23090	$38780

TABLE FIVE

Average Expenditures of Candidates
Contested Elections 1974-1984

Incumbents		
	Winners	$22,270
	Losers	26,652
Non-incumbents		
	Winners	33,940
	Losers	13,336

TABLE SIX

Average Expenditures of Candidates
Controlling for Incumbency
Contested Election 1974-1984

	1974	1976	1978	1980	1982	1984
Incumbent	$7542	$14139	$21862	$28862	$33375	$40257
Nonincumbent	$8308	$10248	$16775	$19801	$18785	$39155

TABLE SEVEN

Average Exenditures of Candidates
Controlling for Winner
Contested Election 1974-1984

	1974	1976	1978	1980	1982	1984
Winner	$9725	$17679	$28977	$28308	$33287	$46011
Loser	$7072	$ 8124	$12085	$18410	$15515	$34417