1986

Backgrounder: The Biltmore Debate. Should the Justices be Retained?

The Supreme Court Project

Backgrounder

On May 29, 1986, the Los Angeles County Bar Association and Town Hall of California sponsored a debate at the Biltmore Hotel in Los Angeles on the resolution: "That all justices of the California Supreme Court appearing on the November 1986 ballot should be retained." The Supreme Court Project is proud to publish in this Backgrounder the transcript of that lively, informative encounter.

A much larger debate has been raging, of course, throughout California for more than a year about the state Supreme Court and November's judicial elections. The Biltmore meeting was unusual, however, in bringing together four exceptionally well-informed and articulate spokesmen for and against changing the membership of the Court next November. Gerald F. Uelmen, dean of the Law School at Santa Clara University, and Steven H. Shiffrin, law professor at the University of California, Los Angeles, Law School, argued for retention of all the justices on the ballot.

Phillip E. Johnson - familiar to Backgrounder readers as the author of *The Court on Trial*, also published by The Supreme Court Project - and Stephen R. Barnett, both law professors at the University of California's Boalt Hall School of Law at Berkeley, opposed retention of Chief Justice Rose Bird.

"The existence," Professor Uelmen said at the Biltmore, "of a serious debate about the retention of Supreme Court justices is unprecedented in California." That debate involves many of the most important issues confronting the citizens not only of California, but of the entire United States. To choose wisely in November, voters must consider those issues thoughtfully and carefully. *The Biltmore Debate* will help them do so.

We wish to thank the Los Angeles County Bar Association, Town Hall and the four debate participants for making possible this Supreme Court Project publication of *The Biltmore Debate*.

The Supreme Court Project

211 15th Street Santa Monica, California 90402

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Backgrounder

The Biltmore Debate

Should the Justices be Retained?

Phillip E. Johnson
Stephen R. Barnett

vs.

Gerald F. Uelmen
Steven H. Shiffrin

A Publication Of

The Supreme Court Project

Who's Telling the Truth?

Once again, through a strained and unrealistic statutory construction, the majority has thwarted the obvious intent of the framers of, and voters for, Proposition 8 [The Victims' Bill of Rights].

- California Supreme Court Justices Malcolm Lucas and Stanley Mosk in a recent dissent.

If I couldn't follow the law, I wouldn't sit here.

- Chief Justice Rose Bird, quoted the day after the Proposition 8 decision was handed down.

Who is right? Have Supreme Court decisions strayed from following the clear intent of the law? Or are the controversies involving California's Supreme Court merely disagreements as to what the law really means? To answer these questions, The Supreme Court Project is publishing the research, ideas and opinions of California's top experts on the major issues involved in the 1986 judicial elections.

The Supreme Court Project's purpose is to provide opinion makers, educators, the business community and ordinary Californians with timely and concise, yet thorough, information on these critical issues. Our Backgrounders are designed to insure that responsible voices are heard throughout California in the public debate on our state's highest court. They emphasize up-to-date research and analysis on the most important questions of the day.

Phillip E. Johnson's *The Court on Trial*, our first Backgrounder, published last December, has been widely read and debated in California's law schools, among judges and practicing attorneys, at public fora and in the news media. *The Court on Trial* figures prominently, as it happens, in the discussions we transcribe here. It's publication helped bring about the debate reproduced in this volume.

Readers who wish to obtain a copy of *The Court on Trial*, or additional copies of *The Biltmore Debate*, should contact The Supreme Court Project directly (please see back cover for our address). To help cover our printing and mailing costs, we request a $2 donation for *The Court on Trial* and $4 for *The Biltmore Debate*.

The Supreme Court Project was founded in 1985 as a nonpartisan organization dedicated to publishing research relevant to California's 1986 judicial elections. Individuals, corporations, companies and political committees are eligible to support the Project through their donations.

The Biltmore Debate

Should the Justices be Retained?

Phillip E. Johnson
Stephen R. Barnett

vs.

Gerald F. Uelmen
Steven H. Shiffrin

This volume contains the transcripts of a one-hour debate on the resolution: "Resolved: that all justices of the California Supreme Court appearing on the November 1986 ballot should be retained." The debate was sponsored by the Los Angeles County Bar Association and Town Hall of California. The debate was held on May 29, 1986, at the Biltmore Hotel, Los Angeles, California.

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The Biltmore Debate - *"Resolved: That all justices of the California Supreme Court on the November 1986 ballot should be retained."*

Gerald F. Uelmen

Opening Statement:

THE EXISTENCE of a serious debate about the retention of Supreme Court justices is unprecedented in California. But controversial judges who write controversial opinions are not unprecedented in California. In 1966, Chief Justice Roger Traynor was roundly condemned for concurring in an opinion holding that an initiative that declared that Californians have the right to discriminate on the basis of race in the sale of their property was unconstitutional.[1] Chief Justice Traynor was retained by a vote of 62 percent in 1966, at that time the smallest vote of affirmation ever received by a justice of the Supreme Court.

In 1974, Chief Justice Donald Wright was condemned for his opinion declaring the death penalty unconstitutional.[2] He was confirmed by a rate of 70 percent. The suggestion that Traynor or Wright be removed as Chief Justice of California was hardly taken seriously by responsible politicians or scholars. What's different about 1986? The most significant difference is that in 1966 and 1974 the governor who appointed Chief Justice Traynor and Chief Justice Wright was still in office. In 1986, the contest is fueled by the prospect of a political opportunity to reshape the Court drastically.

Let's not kid ourselves about why millions of dollars are being spent on a mail and media campaign: to create three vacancies on the California Supreme Court and three opportunities to change the results in decided cases.

As the affirmative in this debate, we contend that the current campaign threatens two fundamental principles of an independent judiciary: first of all, Supreme Court justices should not be politically accountable for the results of their decisions and, secondly, political philosophy should not be considered in evaluating the performance of justices. I'm going to focus on these two premises because I suspect that it is here we will disagree most sharply in today's debate. The

reason I suspect that is because I've read Professor Johnson's Backgrounder paper [Supreme Court Project Backgrounder *The Court on Trial*, by Phillip E. Johnson, who is also the fourth participant in this debate] - I've even read the footnotes. And it's quite clear that he believes the results of the Court's decisions are relevant, particularly the death penalty decisions. He also apparently feels that political philosophy is highly relevant since he frequently refers to particular justices as "liberals" or "liberal activists" and defines the symbolic importance of this contest as a test of public acceptance of judicial activism. I sincerely hope that at some point in this debate Professor Johnson will favor us with a definition of just what a "liberal activist" judge is and whether he would advocate the removal of all liberal activist judges; if not, which ones? We'll be waiting with bated breath for the answer.

Now let me turn to our first principle: that Supreme Court justices should not be politically accountable for the results of their decisions. There are three cogent reasons why the results of decisions should be disregarded.

First , because holding justices politically accountable for the results of their decisions will inevitably produce result-oriented justice. By using box scores to evaluate them, we're delivering a very strong subliminal message to the justices. We're saying: before you vote, you better think about how this result will look on the six o'clock news or in tomorrow's newspaper headlines. And that message directly contradicts the message that we deliver in the *California Code of Judicial Conduct*: "A judge must be unswayed by partisan interests, public clamor, or fear of criticism."[3] In 1982, a senatorial candidate announced that he would urge the defeat of justices if they voted to strike down Proposition 8. In 1986, the governor announced he was waiting to reveal his position on certain justices until he saw the results in pending death penalty cases. It has quickly become part of the political terrain in California to use support or opposition in retention elections in not so subtle attempts to influence pending cases. That, I submit, is an inevitable result of holding justices politcally accountable for the results of their decisions.

The second reason why results should be ignored is that the removal of a justice has no effect on those results. If we truly respect the principle of *stare decisis*, we don't set out to change decisions by changing the justices. There's a name for that process: it's called court packing. We have a more direct remedy available to reverse unpopular decisions. By legislation or constitutional amendment we can overrule decisions that we disagree with. In 1982, with the enactment of Proposition 8, we did precisely that. The Court subsequently upheld the constitutionality of Proposition 8, thus officiating at the interment of 50 of its own precedents.[4]

The third reason that results should not be considered is simple fairness. Very few of the complex issues that we ask the Court to

resolve every year are clear-cut. Unanimous opinions have become the exception rather than the rule, and competent justices will be found on both sides of nearly every issue presented to the Court.

The results really tell us very little about a justice's competence, but results are susceptible to distortion and misrepresentation in a political campaign. No better example of that can be offered than the death penalty cases which have unfortunately become the centerpiece of the anti-retention campaign. The Court's record in death penalty cases is simplistically reduced to a box score: 51 to three in favor of the criminals, as though the only issue the Court were deciding was whether to favor vicious criminals or hapless victims. In reality, every death penalty case involves a complex review of three factual determinations: the finding of guilt of first-degree murder, which the Court has affirmed at a rate of 67 percent, the finding of special circumstances, which the Court has affirmed at a rate of 75 percent under the 1977 death penalty law and 25 percent under the Briggs Initiative, and finally, the choice of death over life without parole, affirmed at a rate of 25 percent under the 1977 law, zero under the Briggs Iniative.

There are two startling things about these results. They demonstrate that the real problem is the sloppy draftsmanship of Briggs rather than any hidden agenda of the Court. And the vast majority of reversals have simply been remands for new hearings because the jury was improperly instructed pursuant to the Briggs Initiative. Murderers are not being turned loose in our streets. The effort to turn the retention election campaign into a referendum on the death penalty is simply a crass attempt to turn public ignorance and fear to political advantage. That too, I submit, is an inevitable consequence of holding justices politically accountable for the results of their decisions.

Let me turn to our second fundamental premise: that political philosophy should not be considered in evaluating the performance of justices. Clearly, political philosophy is not ignored when justices are appointed. Liberal governors tend to appoint liberal justices, just as conservative governors tend to appoint conservatives. We've been blessed, or cursed, with both in California on a regurlarly recurring basis.

Once we start using the retention elections to remove the liberals during conservative eras, or the conservatives during liberal eras, we've added a new ingredient which seriously threatens the constitutional mixture. It's no answer to suggest that their philosophy renders justices unfit because they are biased, especially if our goal is simply to replace them with justices with the opposite bias. Ultimately, we must recognize that political philosophy is qualitatively different from that kind of bias that renders a judge unfit.

I've never heard a lawyer go into court and make a motion to disqualify the judge because the judge was too liberal, or too

conservative. Yet today, for the first time, we are hearing a serious suggestion that judges be removed from office because they are "too liberal." We contend that the political philosophy of the justices is just as irrelevant as the results of their decisions. Thank you.
(Applause)

Notes

1. Mulkey v. Reitman, 64 Cal.2d 529 (1966).

2. People v. Anderson, 6 Cal.3d 628 (1972).

3. California Code of Judicial Conduct, Canon 3(A)(1).

4. Brosnahan v. Brown, 32 Cal.3d 236 (1982); in Re Lance W., 37 Cal.3d 873 (1985).

Stephen R. Barnett

Opening Statement:

FIRST, A point of logic. In taking the negative on the proposition that all the justices on the ballot should be retained, I am not necessarily asserting, of course, that *none* of them should be retained. In fact, my position is that only Chief Justice Bird should *not* be retained. I can't speak for Professor Johnson, but I plan to vote for all the other justices on the ballot.

In explaining why I oppose retention of Chief Justice Bird, I want to try to address in my opening and rebuttal remarks - and this may require some fast talking - three issues.

First, I will talk about California's election system for the retention of Supreme Court justices. In particular, I will consider whether the framers of the state constitution necessarily made a mistake in not providing life tenure instead, a mistake that the voters should try to remedy at the polls by voting automatically for the retention of any justice on the ballot.

Second, I will discuss what I think is the appropriate standard to apply in deciding whether to vote against a justice, and in particular a chief justice.

Third, I will apply that standard to Chief Justice Bird with respect to one telltale case.

The main argument for retaining Chief Justice Bird appears to be, not that she has performed effectively as Chief Justice, not that she has demonstrated the impartiality, the fair-mindedness, the good judgment required of the Chief Justice of California, not that she has earned the respect and trust that the people of California ought to have in their Chief Justice. The argument appears to be, rather, in the actual words of the *Sacramento Bee* editorial endorsing reconfirmation, that Chief Justice Bird and her colleagues "have committed no crimes and done nothing to violate their oaths."

An affirmative vote is therefore required, the argument goes, in the

name of judicial independence. The alternative is said to be "Gallup Poll justice," or I suppose in California we ought to say "Field Poll justice." Professor Uelmen has talked about result-oriented justice. Justice Reynoso reportedly stated recently, "It would be a tragedy if any justice is not reconfirmed because the justices would then have to look at who has political power and money and not at the Constitution."

Judicial independence is, of course, a legitimate and important concern. In response to this concern, it deserves emphasis that the California constitution, though it does not provide life tenure, does afford spacious protection for judicial independence. The constitution provides for a special type of election for appellate judges, an election in which the judge runs on his or her record against nobody, and in which the next governor - not the electorate, and not a governor whose identity is known at the time of the election - appoints the replacement for a defeated justice.

The system also provides for lengthy terms of 12 years. While appointments to unfinished terms often shorten a justice's initial term - unfortunately, in my view - Chief Justice Bird has had nine years since her appointment in 1977.

These lengthy terms protect judicial independence in at least two ways.

One way operates in the justice's own mind. I find cause for wonder in all these assertions that if justices face the risk of non-retention after a term on the California Supreme Court, they will be led to decide cases not by looking to the constitution and to their consciences, but to who has money and political power. Is this not, as Professor Gideon Kanner has pointed out recently, a slur on the integrity and the commitment to principle of the men and women on the California bench? Are California's justices really so afraid of being thrown out into the harsh world after 12 years on the California Supreme Court that they would forsake their oaths and their consciences, and pander to public whims, in order to avoid it? I think not.

The other way lengthy terms protect the justices operates in the minds of the voters. Twelve years, or, in the case of Chief Justice Bird, nine years, is a long time. It is long enough for the public to forget many things that might be held against a justice. In Chief Justice Bird's case, for example, it is long enough for apparently everyone in the state to have forgotten her disastrous act in 1978 in calling for an investigation of the Supreme Court as a result of the election-day article on the *Tanner*[1] case in the *Los Angeles Times*. This was an act not only of monumental poor judgment on Chief Justice Bird's part, but of arrogance as well, since she did it without consulting the other Supreme Court justices.

The resulting investigation was a catastrophe for the Supreme Court, shattering to its judicial image and public respect, debilitating to its self-confidence and internal spirit. It was very possibly the worst thing to happen to the Court in its entire history (Chief Justice Bird's own

appointment possibly excepted).

I do not understand why this monumental error, this act of poor judgment and arrogance that did so much damage to the institution entrusted to her leadership, is not itself a sufficient ground for denying Chief Justice Bird a second term. But, as I say, eight years is a long time, and nobody but me seems even to remember.

California's system thus provides substantial protection for judicial independence. Under this system no appellate justice has ever been defeated. Even this year, despite all the opposition and all the provocation for it, the latest polls show that the justices other than Chief Justice Bird are running well ahead of their nay-sayers.

But the drafters of the state constitution did not provide the ultimate in judicial independence, life tenure. Was this simply a regrettable error on their part? I would like to suggest some reasons why it may not have been.

In the first place, the question is not whether life tenure for judges is a good or bad thing in general. We have life tenure in this country for federal judges. I myself think that is a good thing, but in any event it is a fact, and there is no serious proposal to change it. The question for California, then, is whether it was a mistake to deny life tenure to California judges in a system that does give life tenure to federal judges. In this system, federal constitutional rights are protected by the ultimate judicial independence that life tenure provides. Hence many of the arguments one hears in this campaign, to the effect that constitutional rights will be in jeopardy if California's justices are denied reelection, these arguments are simply beside the point.

Then, given that constitutional rights are protected by the life tenure of federal judges, there may be sound reasons for the public's desire, manifested in all but two or three states, to keep state court judges on a shorter leash. A state court like the California Supreme Court in important ways has more discretionary power, more power to create more law that has more impact on people's lives, than even the United States Supreme Court.

First, state courts, unlike federal courts, can make common law. This is, of course, a very expansive domain. Many of the most criticized decisions of the California Supreme Court have been common law decisions - the Court's famous tort decisions, for example, or the decision last year creating a right to strike for public employees.[2]

Second, the state statutes that state courts interpret cover a broader and deeper expanse of human activities than federal statutes do. The California Unruh Act, for example, applies to "all business establishments of every kind whatsoever."[3]

Third, and most relevant here - regarding the case that I hope to refer to - state courts, unlike federal courts, have as one of their major functions the refereeing of state politics. The California Supreme Court does this, for example, in its frequent decisions holding ballot initiatives valid or invalid, or in its reapportionment decisions that can determine

which party controls the Legislature for a decade.

This role of political referee requires scrupulous impartiality on the part of state court justices. Yet at the same time it offers the strongest possible temptation to a justice's partisan instincts. It is possible that some justice, some time, will succumb to the temptation. If this happens, should the people of the state be required to put up with that biased referee for his or her lifetime? Or have the people acted wisely in reserving to themselves the power in the extreme case to call that referee off the field?

For all these reasons, the decision of the people of California to give their justices very broad independence, but not complete freedom from public accountability, may not have been ill-advised.

In that framework, what is the appropriate standard to apply in deciding whether to vote against a justice? I think it is not a standard of what I call judicial competence narrowly defined. That is, it is not the standard, proposed by many, under which a justice should be confirmed as long as he or she has committed no crime, done nothing to violate his or her oath of office, and as long as the justice's chambers turn out documents that look, feel and smell like legal opinions.

I hope to finish in my rebuttal time. Thank you.

(Applause)

Notes

1. People v. Tanner, 23 Cal.3d 16 (Tanner I, 1978).

2. County Sanitation District No. 2 v. Los Angeles County Employees' Assn., 38 Cal.3d 564 (1985).

3. Civil Code Section 51. See, e.g., Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal.3d 72 (1985).

Steven H. Shiffrin

Opening Statement:

I FIRST became involved in events like this when I got a call from Jerry Uelmen, my former debate partner in college. He called me up and asked if I had "signed the petition on behalf of the California Supreme Court?" I asked, "What petition?" He said, "It's going all around U.C.L.A. Haven't you signed this petition?" I said, "Jerry, I don't know what you're talking about." He said, "Well, would you sign a petition saying that you are in favor of the reelection of the Court?" I said, "Sure." He said, "Good, then can you be down here Monday morning for a press conference in which we announce the results?" I said, "All right. I'll come."

[At the press conference] we announced that 255 law professors in the state were supporting the reelection of the Court. A "point of logic" - we knew that each justice on the ballot would be supported by what we said. Since then, I think, the number has grown to 287. The other side has at least two law professors in public [Phillip Johnson and Stephen Barnett]. Gideon Kanner here today is a third. They have yet to get their petition of the law professors on the other side. We're waiting.

There had been television cameras at the press conference and I thought, if I'm going to be on television, I ought to look at it. When I went home, here's what I saw on the various channels. I saw myself or Jerry pronouncing some half-sentence about the independence of the Court. Then on each of the television channels I saw Ross Johnson, a state legislator, who had gone out that day to a pond, with ducks quacking in the background.

(Laughter)

It was marvelous television. At his press conference, Johnson talked about a brutal murder of two young boys. He said the two little boys wouldn't be able to come there to hear the ducks quack, but "thanks to the Court" the person who had killed those boys might one day be able to hear those ducks.

End of story on television and on radio. That is what they covered.

No one thought to ask what the issue in the case[1] was. I mean - did the California Supreme Court decide to let Mr. Memro have a reversal of the judgment on the ground that there were ducks quacking and this was a brutal murder? No.

The public does not yet know what the issue in that case was because the broadcasters, the television people, the politicians and the special interests have been unwilling to talk about it. The politicians and special interests don't want that to be discussed. It is an indication, I think, of why this is a unique election. This is a unique election because, despite Professor Barnett's abstract discussion of the state constitution, this is the first election in the history of the state of California in which politicians and special interest groups have spent millions of dollars in an effort to influence its outcome. This is the first election in which corporations, insurance companies, banks and agribusiness have invested large sums in an effort to pack the Court.

Recently, a farm group - the Farm Bureau - pledged $100,000 to Crime Victims for Court Reform [a campaign committee seeking the defeat of Chief Justice Rose Bird and of Justices Cruz Reynoso and Joseph Grodin]. If you think the Farm Bureau is worried about the death penalty cases, I submit that you might have mis-analyzed the politics.

(Laughter)

Agribusiness wants new justices to make decisions about collective bargaining for workers and about the impact of agribusiness's activity on the safety and quality of the environment. Those are the kinds of things they are really interested in. But the ads will be talking about the death penalty cases.

Professor Barnett says that the state constitution authorizes all this. But the state constitution does not tell you how to vote in this election. The state constitution allows you to decide that you do not want to have a campaign, now or in the future, in which the justices of the California Supreme Court are going to be subjected to the kinds of misleading and deceptive attacks that have occurred. In other words, if you want to have elections in the future in which judges are looked at in terms of whether they are pro-environment or anti-environment, liberal or conservative, you can vote to get rid of any particular justice you like. That would be a signal to the politicians and the special interest groups that in the future they can affect elections by pouring in millions of dollars.

If you want to tell the politicians and the special interest groups to lay off the Court, to use their money, power and influence in the Legislature, but keep one branch of government independent of money, power and public opinion, then what you do is you reelect the justices.

Now it is a bit difficult to respond to Professor Barnett's remarks. For one thing, they are, I believe, laced with contradictions. He first tells you that since there are very long terms, it takes an elephant's

memory to remember things and that everyone will forget. He then stands up and announces that Chief Justice Bird is arrogant, that everyone else has forgotten (but he remembers) that she didn't consult with people and called for a public investigation of the Court, that this was outrageous, so forth and so on.

Well, everyone has not forgotten. There is a book called *Framed: The New Right Attack on Chief Justice Rose Bird and the Courts*, by Betty Medsger.[2] Here's what she says about that issue:

"Her [Bird's] request for the investigation would itself become a source of controversy....Some of the justices were enraged. Bird realizes her lack of consultation is a justifiable criticism. But at the time she wrote the letter [requesting the investigation], it was obvious that at least some of the accusations being made against the court were being made from within. It was obvious the documents that were released to establish false or half-truthful impressions probably were being released by a Supreme Court justice, for no one else had access to them. She thought it unlikely those people would want an investigation of the court."

I think her failure to consult, in Catholic theology, might be regarded as a venial sin.

(Laughter)

That there was a public investigation of the Court, given the very serious charges being made, it seems to me was a good thing. And it seems to me that it is best that the truth be aired. I challenge Professor Barnett to come back up here and explain to us why these matters should be kept in private.

Secondly, Professor Barnett tells us that it's O.K. to vote against justices on the basis of results. He has one "telltale" case - he runs out of time, conveniently, not letting us know what the telltale case is.

(Laughter)

And he says, not to worry, the federal courts are there, and the federal courts protect federal rights; therefore, the independence of the courts is not at stake. Without even finishing the sentence, he goes on to tell us about all the other things the California courts do, the vital and important issues that affect our lives. My response to that is this: independence of the courts doesn't mean just federal constitutional rights. Independence of the courts means that the courts decide cases on the merits before them; that they are not, in environmental cases, going to be worried about whether or not agribusiness will be giving contributions against them, or, on the other side, whether liberal Democratic groups are going to be campaigning against Lucas and Panelli, claiming in the next election that they're "in bed with toxic polluters" or something like that. That's the kind of election we're going to have in the future if you allow this to continue.

Independence of the courts means that justices ought to make decisions without worrying about being taunted with the suggestion that they're responsive to contributions. A prime example of this particular

form of innuendo against the courts comes from Professor Johnson, and I hope that in addition to defining "liberal activists," to telling us which of the justices he favors and doesn't favor, he will clarify this matter. The contributions issue is discussed in Professor Johnson's now famous "Blue Pamphlet" [*The Court on Trial*]. By the way, this pamphlet [holding up a copy] tells us on the cover that it is not designed to influence the election of any candidate for public office. If you read this pamphlet and believe that at the end, I submit that you also believe in the Easter Bunny.
(Laughter)

Now, what does Johnson say? He says, "Lawyers will necessarily take a leading role in the campaign. But the public should be aware that some lawyers are not necessarily disinterested. Chief Justice Bird has been raising campaign funds primarily from the trial lawyers who specialize in representing injured persons in lawsuits. These lawyers have plenty of money to contribute" - get this - "in part because the Chief Justice and her colleagues have enormously increased the opportunities for individuals to recover substantial damages from corporations, insurance companies and taxpayers. Plaintiffs' lawyers take at least a third of each judgment...."

He concludes ultimately that "Chief Justice Bird in particular has been a dedicated protector of the financial interests of lawyers."[3]

Do you get the picture? The picture is this: Bird decides the cases giving money to the lawyers. The lawyers give it back to Bird, and the circle continues. I submit there might be another interpretation. It might just be that the chief justice of the California Supreme Court wants to defend the rights of victims of unsafe products.
(Applause)

Notes

1. People v. Memro, 38 Cal.3d 658 (1985).

2. Framed: The New Right Attack on Chief Justice Rose Bird and the Courts, by Betty Medsger, 1983, The Pilgrim Press, New York, New York.

3. The Court on Trial, by Phillip E. Johnson, pp. 4, 5, 1985, The Supreme Court Project, Santa Monica, California.

Phillip E. Johnson

Opening Statement:

PROFESSOR SHIFFRIN is the attorney I'd hire to defend me in a hopeless case before a friendly audience.

I'm going to use the few minutes available to me today to discuss the death penalty issue. Although the death cases are not the most important part of the Court's work this issue has taken on enormous importance in the public debate because it stands as a dramatic example of what can fairly be called judicial civil disobedience.

The essential facts can be stated quickly. The death penalty has been upheld as constitutional by the United States Supreme Court, and the California constitution specifically states that the death penalty does not violate any provision of our state constitution. We have had valid death statutes in effect since 1977, but they have not been enforced. As of this date, the California Supreme Court has decided nearly 60 death penalty cases, and has reversed the penalty in all but three. It would be misleading, however, to say that the verdicts in even these three cases have been affirmed because the cases remain in further litigation.

For example, the death sentence in *People v. Jackson*[1] was affirmed in 1980 - yes, that's 1980 - but the Court has granted further hearings to determine whether the verdict in that case is proportionate to the penalty imposed in thousands of other homicide cases from around the state, even though the U. S. Supreme Court has held that such proportionality review is not constitutionally required.[2] This far-reaching inquiry is certain to take many years, and of course new issues will come forward by that time that will require further hearings.

The record of Chief Justice Bird in death cases is paticularly noteworthy; she has voted to reverse every death verdict without exception. We are told, however, that we may not draw the obvious conclusion from this record. The Chief Justice and other members of the current majority deny any intent to impede the death penalty. They are just trying to see that it is carried out fairly. The blame for this

situation, Court defenders insist, lies with the voters who passed the death penalty statute in 1978, commonly called the Briggs Initiative, which was poorly drafted and overbroad. This initiative measure replaced the 1977 death penalty statute enacted by the Legislature which the California Supreme Court upheld as constitutional by a four-to-three vote, with Bird dissenting in 1980. If the voters had left the law alone, this argument goes, the 1977 law would have been in effect and would have been enforced.

Now, this attempt to shift the blame to the Briggs Initiative, and to the 70 percent of the electorate that voted for it, is bogus. First, it has no application to the record of Chief Justict Rose Bird. She has voted to reverse every single death verdict under both the 1977 and the 1978 statutes, and on grounds so broad - often in opinions urging the Court to go further than it has - that no one familiar with the opinions can doubt that she would be pitching a shutout even if the Briggs initiative had never been conceived. It's possible that some other members of the Court might have voted to affirm more death sentences if the cases had been tried under the 1977 legislation. But this would mean only that these additional cases would continue being tied up in further review on the proportionality issue along with *People v. Jackson.*

I freely concede that the Briggs Initiative was poorly drafted and should never have been passed. The initiative was particularly foolish because it played into the hands of a set of justices who were already committed to preventing the death penalty from being carried out. In fact, the controversial parts of the Briggs Initiative gave prosecutors very little of any real value.

Consider the most important of the so-called "defects" in the Briggs Initiative, the provision that made killings committed in the perpetration of certain dangerous felonies eligible for the death penalty without a requirement that the jury find the defendant actually intended to kill somebody. The California Supreme Court decided in 1983 that intent ought to be required and has reversed dozens of pre-1983 death verdicts because of the absence of this intent instruction. In all these cases the evidence that the defendant intended to kill was overwhelming, and the verdicts would have been the same if the intent instruction had been given. A problem exists only because the California Supreme Court waited five years before telling the prosecutors that it was necessary to give the instruction and then applied the new rule retroactively to all the cases pending on appeal. Despite the state constitution's express command that a judgment may not be reversed for procedural error unless a miscarriage of justice resulted, the Court majority has strained mightily to find some way to justify finding that failure to give the instruction was always prejudicial. I could give any number of examples - my favorite is *People v. Fuentes*,[3] where Chief Justice Bird speculated that the robber might have shot the Brinks guard five times at short range because he wanted to make the guard drop the money bag, not to kill him.

(Laughter)

In another case, the majority speculated that a contract killer who executed three persons, pausing to reload the shotgun each time in between, might have lacked criminal intent because he used drugs.[4]

Anyone who doubts that Chief Justice Bird has been exploiting opportunities to "stonewall" the public on capital punishment should study the December 1985 decision in *People v. Brown*,[5] where the Court reversed the death sentence of a man who kidnapped, raped and murdered a 15-year-old girl on her way to school. The majority reversed because the trial court gave a standard instruction asking the jury not to "be swayed by mere sentiment, conjecture, sympathy, compassion, prejudice, public opinion or public feelings." This platitudinous instruction is on the whole to the benefit of the defense and automatic reversal on this basis is absurd, but I'm pursuing a different point.

One of the penalty issues argued in all the Briggs Initiative cases is that the standard penalty instruction is defective because it uses the word "shall" rather than "may," and thus fails adequately to convey the point that a jury has wide-open discretion to show mercy. In the seven years that the initiative has been in effect, prosecutors have repeatedly begged the Court to give a decision on the validity of this instruction and to tell them, or rather to tell the trial courts, what instruction ought to be given if the statutory one is defective. The Court has again and again put off these requests, saying it was unnecessary to reach the "shall instruction" issue because the Court planned to reverse anyway on other issues like the sympathy instruction. Finally, in *People v. Brown* the prosecutors managed to shame the majority into deciding the question and even into approving an alternate instruction that would pass muster. Because of this belated action, trial judges no longer have to guess what instruction the Court wants.

Chief Justice Bird objected to this overdue but welcome action. She asked why it was necessary for the Court to reach this instruction now. If the Court could delay giving trial judges guidance on how to instruct jurors correctly for seven years, why could it not wait seven more? No doubt Bird's supporters will tell us this is an example of her customary judicial restraint, refusing to reach constitutional questions unnecessarily. Nonsense.

(Laughter)

Bird's opinion in *People v. Brown* is the work of a justice who wants to make it as hard as possible for the trial courts to do the job right, in order to make sure the Court does not run out of excuses to reverse death sentences.

I am not offended by the Court's records in the death cases because I am an enthusiastic supporter of capital punishment. Althought I am persuaded that the death penalty is neither immoral nor unconstitutional, I am impressed by the argument that trying to impose it under present conditions does more harm than good. I respect persons who oppose

capital punishment openly and by honest means, in the Legislature, before public opinion, and even in the judiciary. What I do not respect is a justice who pretends to acknowledge the principle that it is ultimately for the public to decide whether the death penalty is legitimate in California, but who creates an elaborate obstacle course of legal trickery to make sure that the penalty is never carried out. This strategy of obstruction by sophistry has predictably brought the Court into disrepute and it has trivialized the legitimate moral case that can be made against capital punishment. Instead of debating as we ought to - whether life imprisonment is sufficient penalty for persons who commit horrible murders - we find ourselves debating whether a contract killer or a robber who fired bullets into his victim at short range lacked the intent to kill. No wonder support for capital punishment in the public is skyrocketing.

We've heard much talk about judicial independence in these days, as if independence meant the inherent right of high court judges to do exactly as they please. Our California constitution does protect judicial independence and that independence will be secure as long as the courts remember that the purpose of independence is to preserve the rule of law, not to guarantee that we will be ruled by judges.
(Applause)

Notes

1. People v. Jackson, 28 Cal.3d 264 (1980).

2. After the debate, two well-informed lawyers came to the podium to tell me that the issue currently being litigated in *Jackson* is not the broad issue of "proportionality" but the narrower question of whether there is any discrimination in the application of the death penalty based on the race of either the defendant or the victim. The essential point is that the inquiry involves comparing thousands of cases and many years of litigation, and the issues to be considered in this comparative review can be expanded at any time.

3. People v. Fuentes, 40 Cal.3d 629 (1985).

4. People v. Hamilton, 41 Cal.3d 211 (1985). Following the appointment of Justice Paneli to replace Justice Kaus, the Court granted a rehearing in this case.

5. People v. Brown, 40 Cal.3d 512, modified, 41 Cal.3d 439 (e) (1985).

Gerald F. Uelmen

Rebuttal:

IF I appear a little bit red in the face, it's because I'm still holding my breath. I'm still waiting for Professor Johnson's definition of what a "liberal activist judge" is.

Let me return to the initial premise that I started with: that justices should not be politically accountable for the results of their decisions. I indicated the first concern with holding judges politically accountable for the results of their decisions is we end up with result-oriented justice. Now the suggestion seems to be that that's really a slur on the integrity of the judges, to suggest that somehow they are going to be influenced by the fact that politicians are endorsing them or not endorsing them based on how they vote in particular cases.

I have every confidence in the integrity of the justices who are now on the Court. I think they've demonstrated their independence, but, as one of them put it recently - retired Justice Kaus, "It's hard to ignore the existence of a crocodile in your bathtub." I think even a justice who is devoted to the rule of law, even a justice with integrity cannot help but be influenced by the fact that ultimately, his or her performance in office is not going to be measured by whether they have lived up to the canons of judicial ethics. It's going to be measured simply by whether or not the results of their decisions are popular or unpopular.

Now let me turn to the death penalty for a moment. Professor Johnson suggests that the consistency of the Chief Justice's voting record - 54 reversals, zero affirmances - somehow gives rise to a legitimate inference that she is carrying out some sort of hidden agenda to preclude the carrying out of the death penalty law in California. I find great difficulty drawing that kind of inference simply from the results and I think it gets back to that question of holding the justices politically accountable for the results. Would Professor Johnson draw the same inference, for example, with respect to Chief Justice Donald Wright, whose voting record in death penalty cases was 172 reversals, zero

affirmances. I doubt that he would because anyone who takes an intelligent look at the opinions that Chief Justice Wright wrote in those cases would find that, in most of those cases, he was simply following a precedent which had previously been announced by the Court.

I submit that precisely the same thing is going on in the death penalty cases, that what the Court is doing is simply following its precedent, and that's what we want justices to do. We don't want them to ignore their prior precedent. The respect for precedent is one of the hallmarks we admire in judges and, even though Professor Johnson hasn't offered us his definition of what a liberal activist judge is, in his paper he criticizes judges who don't have respect for precedent. We have, for example, on the California Supreme Court right now a justice who is dissenting in many reversals of death penalty appeals on the ground that he simply does not agree with the precedent that the Court is applying. He thinks it's wrongly decided.[1] Does that make Justice Malcolm Lucas a liberal activist? I don't believe it does. That's not what we want in a judge, one who blindly follows precedent. At the same time we don't want to condemn a judge who is willing to take another look at a precedent.

The current California Supreme Court represents a full spectrum of political philosophies. Obviously, the Chief Justice is at one end of that spectrum. What's being suggested today is that we utilize the retention election process really for the first time in California to lop off that end of the spectrum and reshape the Court. I find much more agreement with the position espoused by the eminent law professor, Stephen Barnett, in the California Law Review of four years ago. That Professor Barnett said that the Chief Justice's dissents have notable value and advance tenable positions."The continuing intellectual contest among its three points of view disciplines its decisions and enriches its product."[2] I think we law professors will always find things to criticize in that product. We will always find footnotes to quibble over. But such disagreements ultimately should be seen as a sign of robust health, rather than a symptom calling for radical surgery.

(Applause)

Notes

1. People v. Guerra, 40 Cal.3d 377 (1985 - dissenting opinion by Justice Lucas); People v. Hamilton, 41 Cal.3d 408 (1985 - dissenting opinion by Justice Lucas).

2. Barnett, The Supreme Court of California, 1981-82; "Forward, The Emerging Court" 71 *California Law Review* 1134, 1188 (1983).

Stephen R. Barnett

Rebuttal:

I WAS saying that I thought the proposed standard of narrow competence--can the judge turn out documents that look like judicial opinions?, and so forth--is too narrow. One reason it's too narrow is that it doesn't perform the function of maintaining public confidence in the judiciary, which is what I think judicial elections are about. Such a standard is toothless and feckless. As all of us here today know, any decent lawyer can turn out competent legal arguments, and hence competent judicial opinions, for any position he or she wants to reach. Indeed, the justice doesn't have to be a decent lawyer, because he or she has law clerks and research attorneys who can turn out the opinions if the justice can't.

I think the standard that should apply is what I would call a standard of competence broadly defined. This standard includes questions such as: Does the justice have common sense and good judgment? Has the justice shown himself or herself to be fair-minded and impartial? Has the justice shown a due respect for the limits of judicial power, rather than an undue readiness to write his or her values into the law? I think for a chief justice the standard has additional elements, because of the symbolic role, and also the very powerful administrative role, of the chief justice.

All these elements come down, I think, to the question of public confidence. It's not a question, as our opponents have been suggesting, simply of agreeing or disagreeing with the results. Consider, for example, Chief Justice Earl Warren. Many people disagreed with his results. However, in a time of national crisis, after the assassination of President Kennedy, President Johnson thought that Earl Warren was the one person in the country who had the public respect and trust needed to be the head of the assassination commission.

Would anyone seriously claim that Chief Justice Bird has that kind of respect and trust? I think it's essential for the people of California,

however, that they have that respect and trust in their Chief Justice. They had it in the previous three.

Let me turn now to the one case that I think says it all. This is the 1982 reapportionment case, *Assembly v. Deukmejian.*[1]

As you recall, after the 1980 census the Democrats who controlled the Legislature passed a new reapportionment plan, the famous "Phil Burton gerrymander," and Governor Jerry Brown signed it. The Republicans, naturally enough, challenged it, with a referendum on the June 1982 ballot. The question before the Supreme Court in 1982 was which districts should be used, in the meantime, to elect the legislators in the 1982 elections - the new Democratic districts that the Republicans were challenging, the old districts, or some others?

Ten years before, in 1972, in a similar case,[2] though not exactly "on all fours," the Supreme Court under Chief Justice Wright had decided unanimously that the old districts should be used. This time, the Supreme Court under Chief Justice Bird, in a four-to-three decision written by her, decided that the Democratic districts being challenged by the Republicans should be used.

What happened then was that the Democratic districts were defeated in the referendum. But the legislators elected under them were of course heavily Democratic, and they came back to Sacramento and enacted a new plan. This time they protected the districts of enough incumbent Republicans to get a two-thirds vote that protected the plan from a referendum. Those districts went into effect, giving the Democrats a lock on the Legislature for the 1980s.

Well, what about this decision?

I think in the first place it quite arguably reflected partisanship by Chief Justice Bird. But in any event it surely reflected very bad judgment on Chief Justice Bird's part, and thus a failure of competence in the broad sense. In this case, of all cases, the Supreme Court should have remained non-partisan and even-handed and let the parties fight out the political battle in the political arena. Chief Justice Bird did not do that. By the barest majority - a four-to-three majority, with Justices Kaus, Mosk and Richardson dissenting - and with a crucial fourth vote provided by an associate justice of the Court of Appeal, who was sitting pro tem under assignment by Chief Justice Bird, Chief Justice Bird threw the Court behind the Democrats.

The result is not just Democratic control of the Legislature for the decade. The result is that almost all the incumbents in the Legislature are locked in. Therefore we don't have much left of electoral politics for the Legislature in California. Therefore we have initiatives instead. And therefore, also, we have all the attention focused on this year's judicial election. The people look for an election where they can make their will felt.

Thank you.

(Applause)

Notes

1. Assembly v. Deukmejian, 30 Cal.3d 638 (1982).

2. Legislature v. Reinecke (Reinecke I), 6 Cal.3d 595 (1972).

Steven H. Shiffrin
Rebuttal:

WE STILL wait with bated breath for Professor Johnson, even in the safety of the last rebuttal, to tell us what liberal activism is, to tell us which justices he in fact supports and doesn't support, and we're waiting for Professor Johnson to repudiate his implication that the Chief Justice has voted to uphold the rights of victims in tort suits, in response to campaign contributions.

Finally, in the fading moments of the last rebuttal, from Mr. Barnett we heard about the telltale case and we heard his standard. Here's his standard, invented purely out of his imagination. The standard you should rely on is "broad confidence in the judiciary." He says Earl Warren would have been reelected, Earl Warren was appointed to the Warren Commission, and Chief Justice Bird could not have been, therefore Chief Justice Bird must go.

Not much of an argument, I think. Chief Justice Bird has had more than four million virtually unanswered dollars poured into a campaign in an attempt to get rid of her. Believe me, if there'd been an election for Chief Justice Warren, he never would have gotten the South, and the dollars would have poured in against him. If Professor Barnett really wants to press a federal analogy, let's think about what it would be like if we had national elections over Brennan, Rehnquist, Marshall, or Burger. That would surely be a political nightmare. If it's a nightmare at the federal level, I submit it's a nightmare at the California level too.

And that's what's at stake. What is at stake is an attempt to transform California politics. Before we have operated essentially on an impeachment model. Justices have been retained. What these two professors want to do is to substitute a "broad confidence" model or something else - essentially to have an appointment model, an appointment model in which they'll tell the voters the justices have not "followed the law." We all know that the voters are not going to be reading the Court's opinions. I submit again that it will lead to a bad

elections process.

What is the "telltale case"? The telltale case is *Assembly v. Deukmejian*.[1] He does report that Justice Otto Kaus, one of the most respected justices, I submit, in the history of any state in the nation, did dissent in that case. He doesn't tell you, and neither does Professor Johnson in his pamphlet, that Justice Kaus says, "Obviously much is to be said on each side of the only issue that divides the majority and Justice Richardson's dissent which I have signed." What was the issue? The Democrats had passed a plan, joined by many Republicans in the Legislature, and the Governor had signed that plan. The choice was, do we use that plan, or do we use the last decade's plan, despite its violation of the one person-one vote rule? Professor Barnett says that the *Reinecke* precedent[2] was not quite "on all fours." He's absolutely right. In the *Reinecke* case, no plan had been adopted by both the Legislature and the governor. The governor had vetoed the plan. It would never have gone into effect; therefore, there was no new plan, and so the Court went with the old plan.

I think Justice Kaus is right; *Deukmejian* was a close case. But Professor Barnett's suggestion that the appointment of the pro tem justice was a partisan affair is unsupportable. I invite you to read an article that appeared in the *University of San Francisco Law Review*.[3] It concludes that "the charge that the Chief Justice assigns pro tem justices in order to influence the judicial process lacks any evidentiary support." The article points out that in the close cases about half the pro tem justices have gone with the Chief Justice and half against, 15 to 14 .

Now, as to the death penalty, Professor Johnson says in his pamphlet that he thinks there was no intent requirement in the the law. The district attorneys go further; they say the intent requirement was "concocted." As the *Carlos*[4] decision recognizes, however, the ballot pamphlet clearly shows the existence of an intent requirement. Johnson complains that the intent requirement was declared retroactive in *Garcia*.[5] Of course, it is retroactive; it was always a part of the law. Here is what the ballot pamphlet said in response to the opponents' charge there was no intent requirement:

"ALRIGHT, LET'S TALK ABOUT FALSE ADVERTISING.

"The opposition maintains if someone were to lend a screwdriver to his neighbor and the neighbor used it to commit a murder the poor lender could get the death penalty, even though 'he had NO INTENTION that anyone be killed.'

"Please turn back and read Section 6b....it says the person must have INTENTIONALLY aided in the commission of a murder to be subject to the death penalty under this initiative."[6]

It wasn't concocted. It wasn't invented. It was in the ballot pamphlet that every voter read. Unfortunately, the ballot pamphlet wasn't written into the penal code so judges were not instructing juries about the intent requirement. Professor Johnson says the California Supreme Court

should not be remanding these cases; the justices should make their own ad hoc judgments as to whether or not there is enough proof of intention. Some of these cases are close, but for the Court to say that before a person goes to the death chamber we want a jury to find all of the elements of the special circumstance is a reasonable determination. In fact, there will be no future cases like this because the intent requirement is now firmly fixed in the mind of every judge in this state.

All right, Professor Johnson, now we want to know: whom do you support, what's a liberal activist, and will you repudiate your statement on contributions?

(Applause)

Notes

1. Assembly v. Deukmejian, 30 Cal.3d 638 (1982).

2. Legislature v. Reinecke, 6 Cal.3d 595 (1972).

3. "A Study of Justice Pro Tempore Assignments in the California Supreme Court," by Stephanie Wildman, 20 University of San Francisco Law Review 1 (1985).

4. Carlos v. Superior Court, 35 Cal.3d 131 (1983).

5. People v. Garcia, 35 Cal.3d 539 (1984).

6. Carlos, at 144.

Phillip E. Johnson

Rebuttal:

I WILL resist the temptation to let Shiffrin define my agenda for me. You know, this a very different event from what I anticipated last Fall when the State Bar convention passed resolutions urging local bar associations to sponsor educational programs about the judicial election. I believe that what was contemplated at that time was not an educational campaign, but a propaganda campaign. Members of the public had been saying: "These opinions don't make any sense to me, and these justices are doing these things that seem irrational. I cannot understand their reasoning, but lawyers tell me that this is just because I haven't had a legal education, and if I did I'd approve of what the Court has been doing and it would all make sense to me." The bar establishment's position seemed to be emerging as: (1) The only legitimate issue is competence; (2) any justice is competent who has the ability to write an opinion that gives a legal justification for what he or she wants to do; (3) members of the public can't judge competence because they do not have the necessary education; (4) the public therefore has to rely upon the Bar leaders who will tell them that all the justices are inherently competent; (5) therefore everybody has to vote "yes" on all the justices. Today we've gotten something very different from that kind of propaganda effort. We've had a full-fledged debate on the merits. That a debate of this kind has occurred on this occassion is in itself a victory for those of us who are critical of the Court, whatever might be the vote on retention in this audience.

I felt from the start that I could not allow the kind of "educational campaign" that Court supporters originally contemplated to occur unopposed if there was any way that I could direct attention to the substantive issues that are legitimately involved in this campaign. I've been teaching law for nearly 20 years now, specializing in the subjects with which the California Supreme Court most frequently deals: criminal law, criminal procedure, torts and professional responsibility.

Over the years, I have become convinced that the decisions of the Court have been increasingly politicized and result-oriented. But even more than that, the decisions have simply been unwise. They've failed to take into account practical problems, and have loaded the system of justice with more and more hearings that accomplish little. This excess of legalism does not produce more justice; it produces more obstruction, more waste, and more inefficiency. I believe that the Court has become increasingly remote from an understanding of the experience of ordinary citizens, of victims and even of ordinary lawyers.

Some of the areas in which I disapprove of the Court's performance involve good faith disagreement, or a degree of incompetence at worst, but in other areas I believe there has been something more than that. I believe I have I have identified outright misconduct in the reapportionment cases and the death penalty cases, both of which are covered in detail in my pamphlet. If what has been done in these areas doesn't make sense to the public, it doesn't make sense to me either.

Should we consider only "competence," meaning the ability to justify a decision with a legalistic argument? A good lawyer can write a good legalistic argument to justify practically anything. I well remember the day when I was called into the office of a very, very famous judge who said: "We justices have voted to decide this case in a certain way, based on the statute, and I want you to write the opinion." I replied, "But Chief, the statute says the exact opposite of what you are deciding." He said, "I know it does, but I'm sure you'll think of something to justify our decision." And I did.

(Laughter)

A good law clerk takes pride in the ability to come up with a plausible justification for whatever a judge might want to do. He can't always tell very much about how a justice arrives at decisions by reading his or her opinions.

The crucial thing we pay state Supreme Court justices to do is to exercise judgment, and I think that the difference between good judgment and bad judgment is what this debate really ought to be about. I will not talk about the justices otherthan Chief Justice Rose Bird. I have opinions about all of them, and I'm not concealing those opinions, but for one hour one justice is enough. There are objections to be made about several justices, but Chief Justice Bird stands out, in my opinion, as having exceptionally poor judgment. The way she has managed her campaign is evidence of that, the judicial hearings that Professor Barnett referred to are evidence of that, and the pattern of her decisions provides the most important evidence. That at any rate is my conclusion, but in the end I am only a single voter, just like you. But at least we've put the issue to the voters on the substantive issues, because the performance of the Court is a legitimate subject of controversy and the constitution gives the voters the right to pass their judgment. Thank you.

(Applause)

The Participants:

GERALD F. UELMEN is Dean of the Law School at Santa Clara University. From 1970 to 1986, he was a Professor of Law at Loyola Law School in Los Angeles. From 1966 to 1970, he was a federal prosecutor in the office of the U.S. Attorney, Los Angeles. He has served as president of California Attorneys for Criminal Justice, and as a trustee of the Los Angeles County Bar Association. In 1984, he won the Ross Essay Prize, awarded by the American Bar Association, for his essay entitled: "1991: A Fourth Amendment Odyssey", 70 *ABA Journal*, Sept. 1984, page 86.

STEPHEN R. BARNETT is a Professor of Law at the University of California's Boalt Hall School of Law where he has served as a member of the faculty since 1967. He served as law clerk to Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit and to Justice William J. Brennan, Jr., of the United States Supreme Court. From 1977 to 1979, he served as a Deputy Solicitor General of the United States. He has written several articles about the California Supreme Court, including "The Emerging Court," 71 *California Law Review* 1134 (1983).

STEVEN H. SHIFFRIN, a graduate of Loyola University of Los Angeles Law School, is a Professor of Law at the University of California, Los Angeles, Law School where he has served as a member of the faculty since 1977. He is the co-author, with William Lockhart, Yale Kamisar and Jesse Choper, of one of the most widely-used case books in Constitutional Law: *Constitutional Law: Cases - Comments - Questions* (Sixth Edition - 1986). His articles have appeared in the *Harvard Law Review*, the *Northwestern University Law Review*, and the *U.C.L.A. Law Review*. He served as a law clerk for Federal District Judge Warren Ferguson and as an associate in the law firm of Irell & Manella.

PHILLIP E. JOHNSON is a Professor of Law at the University of California's Boalt Hall School of Law at Berkeley where he has served as a member of the faculty since 1968. He is the author of the course book *Criminal Law* used widely in law schools throughout the state and nation. He served as a law clerk for California Chief Justice Roger Traynor (1965-1966) and for United States Chief Justice Earl Warren (1966-1967). His writing has appeared in the *California Law Review* and in the Law Reviews of Yale, Stanford and Emory Universities and the University of Chicago.

The Supreme Court Project

John Kurzweil
Executive Director

Professor Herbert T. Krimmel
Southwestern University
School of Law
Director of Research

John Laing
Editorial Director

CONTRIBUTORS

DISTINGUISHED SCHOLARS

Professor Phillip E. Johnson
Boalt Hall School of Law
University of California,
Berkeley

Dr. William Barclay Allen
Department of Government
Harvey Mudd College,
Claremont

Dr. Ward Elliott
Political Science Department
Claremont McKenna College

Professor Stephen R. Barnett
Boalt Hall School of Law
University of California,
Berkeley

Professor Edward J. Erler
Chairman, Political Science Dept.
California State University,
San Bernardino

Dennis Mahoney, Assistant
Editor, *The Encyclopedia of the American Constitution*
Claremont Graduate School

Professor Steven H. Shiffrin
School of Law
University of California,
Los Angeles

Dr. Ken Masugi, Director,
The Bicentennial Project of
The Claremont Institute

Dr. Thaddeus E. Shoemaker
Department of Government
California State University,
Sacramento

Dean Gerald F. Uelmen
School of Law
University of Santa Clara

Dr. Thomas B. Silver, President
Public Research, Syndicated
Los Angeles

ATTORNEYS-AT-LAW

Hon. Robert F. Kane
Justice of the California
Court of Appeal, Retired
Redwood City

Richard L. Noble
Los Angeles

Michael J. Brady
Redwood City

Mark S. Pulliam
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San Diego

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Oxnard

Gregory P. Orland
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John E. Schaeffer
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Wallace J. Wade
Santa Ana

Andrew W. Zepeda
Beverly Hills

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