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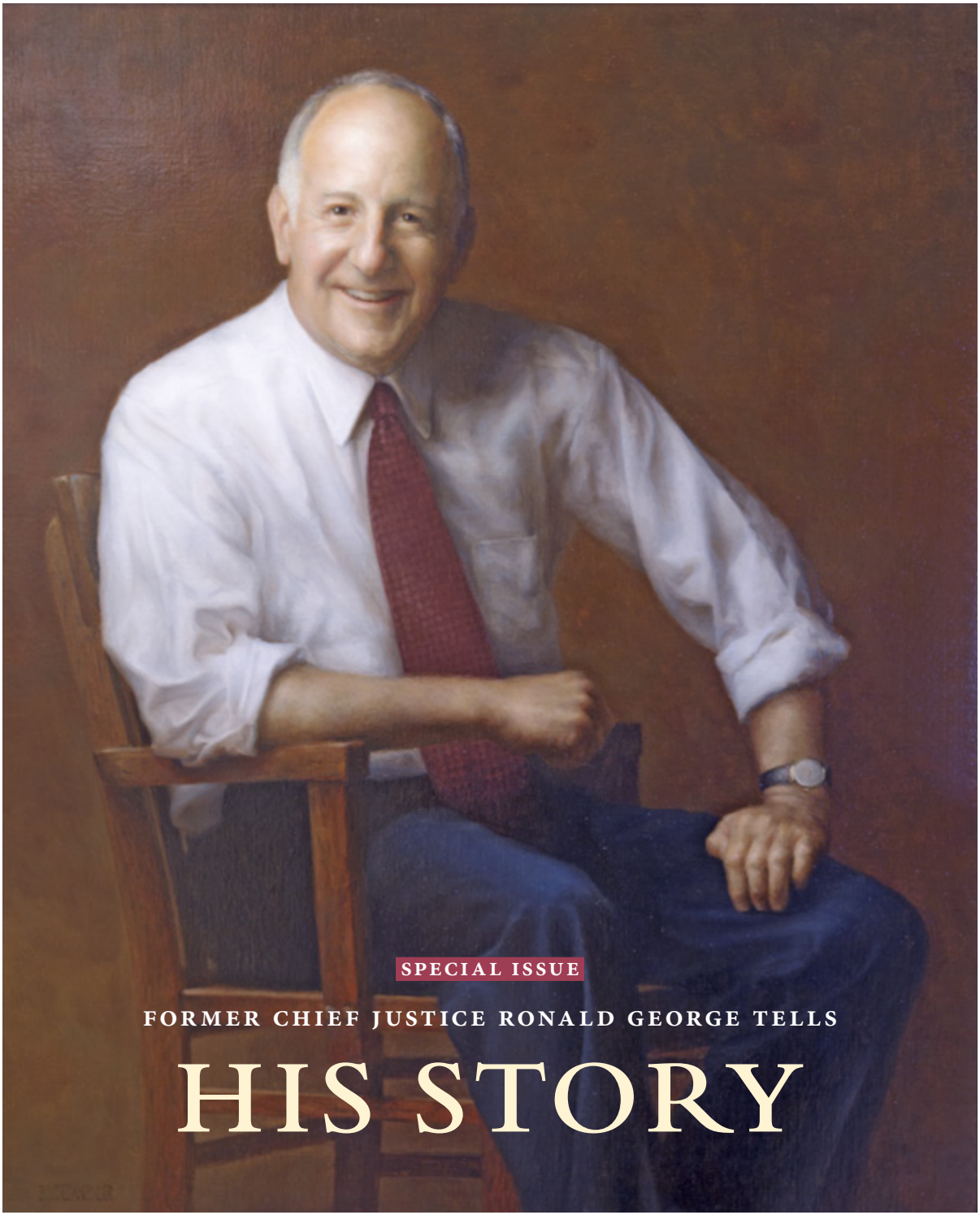


SPECIAL ISSUE

FORMER CHIEF JUSTICE RONALD GEORGE TELLS

HIS STORY

A Second Draft of History

The Retired Chief Justice Records an Oral History — and Makes It Public

BY THOMAS R. REYNOLDS

"History will be kind to me," Winston Churchill is credited with saying, "for I intend to write it." *

Surely history will also be kind to former California Chief Justice Ronald George. After all, during his career he remade the state's judicial branch by leading the charge to unify the trial courts, implement state funding, and take ownership of all courthouses — as well as serving as a judge at all four levels of the state judiciary and writing many major Supreme Court decisions, including the decision in the same-sex marriage case. But just to be sure, he has now recorded his own life's story.

Chief: The Quest for Justice in California, an edited oral history, was published by Berkeley Public Policy Press on November 6, 2013. The 808-page tome explores the many facets of Ronald Marc George's remarkable life, filling in biographical details, telling inside stories, settling a few scores. There are surprises, even for the court's closest observers. Perhaps most surprising of all is that the book exists only three short years after his retirement, published between hard covers, available at Amazon, even in a Kindle version.

He talked himself into the task years ago when he went, on behalf of the court's oral history project, to urge his predecessor Malcolm Lucas to record his own history. Lucas eventually did, but it exists only as a manuscript in Berkeley's Bancroft Library and won't be public until five years after his death.

"I admit being reluctant when the California Supreme Court Historical Society asked me more than a year before I announced my intended retirement whether I would provide a series of oral history interviews," he says in the book's preface. "But once retirement set in in earnest, my reluctance dissolved."

He reasons: "Retrospective journeys are best undertaken while memories are fresh, before time and vanity rearrange facts."

Beginning on May 26, 2011 — less than six months after he retired — the Chief expounded on his life and career in 20 interview sessions which, after a final all-day marathon on November 16, 2011, resulted in 65 hours of recorded conversation.

The resulting book is made companionable, despite its hefty comprehensiveness, by its conversational format. He was interviewed by Laura McCreery, director of the Supreme Court oral history project at UC Berkeley's Institute of Governmental Studies, who also interviewed former Chief Justice Lucas and former Justices John Arguelles, Armand Arabian and Edward Panelli.

McCreery leads the Chief through questions and answers about his early years growing up in Beverly Hills as the privileged son of a French father and a Hungarian mother, through the International School in Geneva and Princeton's Woodrow Wilson School of Public and International Affairs — when he thought he wanted to be a diplomat — and on to Stanford Law School. He became disillusioned with the U.S. Foreign Service during a college trip to Africa, but still felt the calling to public service. So he sought his first job after law school with the California Department of Justice, where he was hired by Attorney General Stanley Mosk, later his colleague on the Supreme Court.

He tells war stories from his work as a deputy attorney general, where he argued 11 cases before the California Supreme Court and six before the U.S. Supreme Court. He wanted to become a judge, and he pushed for an appointment. He got his first black robe at the tender age of 32 when he joined the Los Angeles Municipal Court.

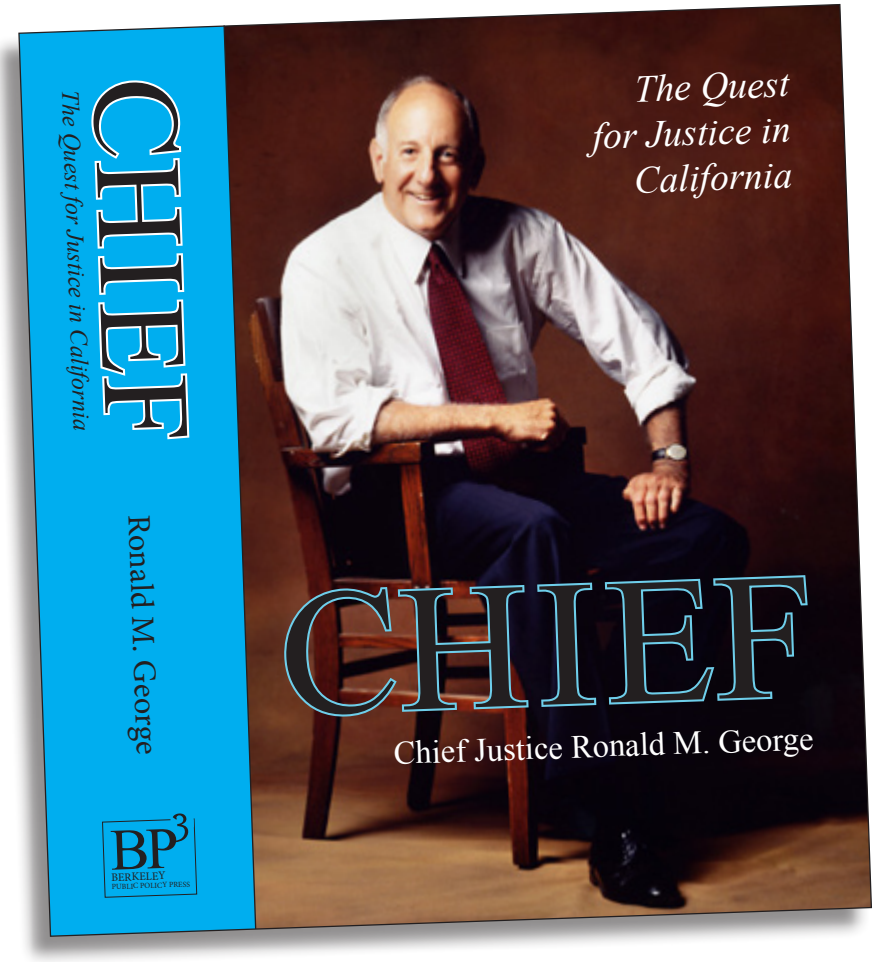
"One step in my life always seemed to lead somewhat naturally to the next stage," he writes in *Chief*. But keep reading and you learn that nothing happened by accident. He actively sought appointment to the municipal court. When a move up to the superior court didn't come quickly enough, he flew to Sacramento to ask why — and promised to pick an incumbent judge to run against unless he got a promotion, which soon came through.

"One acquires some degree of self-confidence," he writes.

When positions on the state appellate court went to others, he applied for a seat on the U.S. Court of Appeals for the Ninth Circuit, but ultimately turned down an appointment when it was offered a few months after he joined the state Court of Appeal in Los Angeles.

All of that happens in the first 222 pages, even before his friend Governor Pete Wilson — who would stop by now and then for dinner with the Georges and a cigar on the balcony — appointed him as an associate

* What Churchill actually said, in a speech in the House of Commons on January 23, 1948: "For my part, I consider that it will be found much better by all parties to leave the past to history, especially as I propose to write that history."



"Retrospective journeys are best undertaken while memories are fresh, before time and vanity rearrange facts."

justice of the California Supreme Court in 1991, then elevated him to Chief Justice in 1996.

A few days before *Chief* was released, he talked about recording the oral history and turning it into a book as he sat overlooking the Golden Gate Bridge in the living room of his San Francisco apartment atop Nob Hill. Rather than return full time to the family home in Beverly Hills after he retired, he and his wife, Barbara, expanded their stake in San Francisco by incorporating the apartment next door, which provides space for children and grandchildren to visit. It was here on Nob Hill that he sat for the oral history sessions.

"Once I retired, I was no longer a second class citizen when it came to First Amendment rights," he says. "I could speak more freely, and I thought I had a real obligation to put forth my perspective, in keeping with my philosophy of being open about government and the courts."

The Chief says there were some confidences he maintained and some names he left out — "the point of the story was what happened and not who did it" — but that he tried to be open to all questions put to him.

After retiring, "I felt I could discuss some of the court's workings and my interrelationship with the other two branches more candidly," he says.

Leaving the court and preparing for the oral history interviews gave him time and reason to reflect on his career — especially, he says, without "the day-to-day struggle to put out fires."

He says he really had three jobs: to write one-seventh of the Supreme Court's opinions, to run the court, and — "that real back-breaking part" — to be the head of the judicial branch. That part of the job became considerably more consuming as the reforms he advocated were adopted and his duties as Chief were expanded. "We've created a true judicial branch," he says. "It's a totally different set of duties than the job I took on."

He adds with a smile: "I didn't engage in any self-pity, because the wounds were self-inflicted."

He insists he came to the job with no agenda. His spontaneous vow to visit the courts in every county, made during his first State of the Judiciary speech to the Legislature two weeks after he became Chief Justice, sparked many of the ideas he would champion.

"I learned a lot," he says. "In the course of those visits it became apparent to me how woefully inadequate we were as a branch."

When he was appointed to the Supreme Court in 1991, it was widely assumed in legal circles that he was being put into position to succeed Lucas, who had righted the court, in many respects, after the voters ousted Chief Justice Rose Bird. He insists that Lucas never talked to him about becoming Chief, and neither did the Governor.

"Look, I don't want to be disingenuous," he says when pressed. "I certainly felt it was a possibility I would become Chief. But I never viewed it as a given and I

Former Chief Justice Ronald George with his official portrait, painted by Elizabeth Zanzinger from a photograph by Jock McDonald.

PHOTO: WILLIAM A. PORTER

didn't apply. And there was nothing I could do to make that come about other than do the best job I could."

Once he was Chief Justice, he found that some of his early studies as an aspiring diplomat turned out to be good training. "In many different ways, you can appreciate how people like to be treated and like to be heard," he says. "I tried to be that way in all my dealings — to treat human beings as they like to be treated." Especially in Sacramento, where legislators did not always have a keen appreciation of how an independent judiciary operates, he says he tried to take "a personal, down-to-earth approach" and "tried to show an awareness of the legislative process and how things get done."

And he had a big advantage over other supplicants seeking legislative action: "What we were asking for was not just for judges or the courts, but in the public interest," he says.

Of the opportunities that came his way, he says, "A lot of it was good fortune." But he acknowledges French chemist Louis Pasteur's observation that fortune favors the prepared mind. "It's always a question of maximizing the opportunities that come one's way," he says. "I was helping lay the path, as well as trodding over it."

Looking back, the young municipal judge who was impatient to move up to the superior court might have been "a bit brash," he acknowledges. "There are many instances when it would be wrong to run against a sitting judge. But I don't think judges should be sacrosanct and immune to challenge. Some deserve to be challenged." Still, he says, "I never had to face the reality of picking somebody to run against."

The Chief prepared for the oral history interviews with his usual gusto, reviewing files and memos, searching through photographs, even keeping a pad and pen on his nightstand. "I sat back and reflected on my life," he says. "It was a fascinating process. This rush of almost Proustian memories came flooding back. It was as close to psychotherapy as I want to get."

In many respects, he says, the oral history process was probably easier than writing a book. But with a book, he notes, you can rewrite. "There was a certain amount of pressure to get my thoughts together," he says, since he generally had only one session to discuss each phase of his life. "To that extent, it was a more difficult process."

He edited the transcript, omitting nothing of substance, he says, but sometimes adding details about topics that came up during the interviews. He did his own fact-checking. "That took a lot of work," he says. "I went out and acquired some new Google skills."

Now that the book is published, "I really feel a full and very satisfying sense of closure," he says. Dozens of opportunities have come his way, including practicing law, private judging, a law school deanship, and membership on various boards. He has turned them all down except for two part-time but high-level appointments. He serves on the Think Long Committee for California with a group of prominent past and present officials exploring governmental reform. He is also a member, with a group of international leaders, of the Commission on Global Ethics and Citizenship, which is meeting around the world to consider revisions to the United Nations Universal Declaration of Human Rights.

"There's a lot of time for reflection and reading and travel without suitcases of opinions and memoranda," he says. "It's a totally different existence from the 24/7 life I led as Chief Justice."

Before the final interview, he studied two large notebooks that contained newspaper clippings about his service as Chief Justice. "Going through these clippings has reminded me of an observation that's been made: Journalism is the first rough draft of history," he says. "I feel confident that our 20 very enjoyable and productive sessions will provide a second draft of history." ✯

Chief: The Quest for Justice in California

Highlights from the Oral History of the Former Chief Justice

BY RONALD M. GEORGE

On the influence of his parents:

I often do reflect on my father and mother and on how much in the way of values they instilled in me. They also made it possible for me — by enabling me to obtain an excellent education — to undertake some of these tasks over the years, starting with my career as a deputy attorney general and advancing through four levels of the judiciary to the position of Chief Justice of California. In reflecting on my parents, I realize how I truly did inherit traits from both sides — the intuitive, creative, and risk-taking element of my father and the more cautious, conservative, and analytical approach of my mother. I'd like to think this mix has served me well and hopefully served well the tasks that I undertook in public service.

I was — and maybe became and still am — more of a risk taker than some people might assume from a relatively quiet demeanor. However, even though, like my mother, I was a beneficiary of my father's speculation in the stock market, I shared her aversion to that type of risk taking and remained quite cautious when it came to investments. But I share my father's instinct for taking chances and seizing opportunities.

As a deputy attorney general in Los Angeles:

I remember trying several cases in Santa Maria in northern Santa Barbara County and in Imperial County, where in those days if you said you were from Los Angeles you might as well have come from the People's Republic of China. You were not welcome. [Laughter] I even remember signs on clerks' counters that read, "We don't care how you do it in Los Angeles."

On becoming a judge:

One acquires some degree of self-confidence, having survived 11 arguments in the California Supreme Court and six in the U.S. Supreme Court, and appearances before a variety of trial judges, state and federal, some of whom were pretty hard on young lawyers.

The admonition that I was expected to focus less on major cases and handle more administrative matters accelerated my interest in applying for a judicial appointment. The stars just seemed to be in the right alignment for an appointment to the bench.

I wrote a letter to Governor Reagan — and I actually mailed it from Los Angeles International Airport on my way to argue the *Aikens* case before the U.S. Supreme Court — asking to be considered for appointment to the bench. I pecked out the letter myself at home on my Royal typewriter and put it in the mail at the airport.

I had never met Governor Reagan, but I just thought, this is the right time. I received a letter in reply that was probably a form letter, but it indicated — I believe the words were — "every possible consideration" would be given to my application. Less than three months after receiving the letter from Governor Reagan, I received a telephone call from him appointing me to the bench.

Representing the State of California at the first of six oral arguments before the U.S. Supreme Court, 1969.

PHOTOS FROM "CHIEF"

He did call you himself?

He called me himself on April 20, 1972.

What did he say?

This truly sounds like vintage Ronald Reagan, but his exact words were, "I know about your fine work in the attorney general's office, and I've got some new chores for you." I felt as if I were being summoned to his ranch to clear brush or split logs.

His appointments secretary was Ned Hutchinson, with whom I had a conversation shortly after receiving the Governor's call. Hutchinson said that they were favorably impressed with my qualifications and that they had set out to appoint me to the superior court directly. Someone else also had made an inquiry on my behalf, where that possibility had been raised. When that possibility was passed on to me, I had said, "I can't be appointed to the superior court. I would love it, but the

As a Deputy Attorney General, reading the transcripts in Sirhan Sirhan's appeal from his conviction for the assassination of Senator Robert Kennedy, 1971.

California Constitution says you must be a member of the State Bar for 10 years or more for appointment to the superior court or any higher court." And the constitution provided then, "and for municipal court, five years or more." Given my youthful age, I had not been a member for 10 years.

On being elevated to the superior court:

I felt that I had learned a great deal at the municipal court level and that if I had been able to carve out my own career path I would have chosen, in retrospect, to start my judicial career on the municipal court, as I did. I thoroughly enjoyed it while I was there. After a while, though, I came to look for more challenges in terms of different types of cases, to handle the felonies and the issues I had been involved with as an advocate — as a deputy attorney general — and to preside over the significant civil cases that one is faced with as a superior court judge.

I felt somewhat frustrated, so I did something a bit unorthodox. I made an appointment to meet with Governor Brown's legal affairs secretary who was in charge of judicial appointments at that time, Anthony Kline, and who's now a presiding justice of the Court of Appeal.

Prior to having that meeting, I had organized a small campaign committee of friends, a few of whom were lawyers, and proceeded to raise some money. I then flew up to Sacramento one afternoon in the fall of 1977 and had my appointment with Tony Kline, whom I had not previously met but later came to know quite well. He asked, what did I want to meet with him about? I said, "I'd just like to have some indication of my prospects for elevation to the superior court." Kline replied, "You know, in Los Angeles County it's very hard. You have to be patient because we're finding that there's a great need to obtain more diversity on the bench, and we're really focusing on appointing minorities." There was no indication whether and when I might be elevated — and certainly he didn't owe me any explanation — but he did ask, "Why do you want to know?" I replied, "Because I'm going to run for it, and I've organized a committee." He said, "Oh, is there an open seat?" I said, "Not that I know of." He said, "Well, who are you going to run against?" I said, "I'll pick an incumbent to run against." That was the end of the conversation. It was very soon thereafter that I was appointed.

On the Hillside Strangler case:

I had had a number of significant criminal trials assigned to me, but of course this was *the* big case. It was one that, even at the time it was assigned to me, must have appeared to be a case that would involve a lot of problems and legal rulings that would be challenging. I believe some of the assignments I received, and perhaps this one, reflect the circumstance that I came to the bench with the reputation, whether deserved or not, of someone who had been given challenging assignments as a deputy attorney general and who had experience in dealing with complex legal issues.

Taking the oath of office as a judge of the Los Angeles Superior Court, with his wife, parents, sons, sister, and uncle, 1978.

Here I was having to determine whether I should, in effect, second-guess the D.A.'s evaluation of his own case, and yet I had been privy to that case through the preceding motions and other hearings. The statute governing the dismissal of criminal cases, Penal Code section 1385, states specifically that on motion of the prosecution a court may grant a dismissal "in furtherance of justice." Of course, here was a motion joined in by the defense, so I had both

sides urging dismissal. Who was I to second-guess that? Yet I felt strongly that the words "in furtherance of justice" imposed an obligation on my part, in ruling on such a motion, not to be a rubber stamp for either the prosecution or for the defense and instead to exercise my own independent judgment.

If the District Attorney was not prepared to proceed with his case — and I gave his office two weeks to absorb my ruling — I would turn the case over to the state Attorney General, who has the authority under California law to take over a case from the D.A. under unusual circumstances. In the event the Attorney General chose not to take up the case, I reserved my statutory authority to consider whether to appoint a special prosecutor. That was my ruling, and it was almost like a bomb going off in the courtroom, I can assure you.

Attorneys in the Hillside Strangler trial (1981–1983) conferring at the bench with Los Angeles Superior Court Judge George.

The irony, ultimately, was that the district attorney who relinquished the case, John Van de Kamp, ended up prosecuting it. He won the attorney general's race, and Attorney General Deukmejian moved on to be governor. When Mr. Van de Kamp became attorney general, he inherited the ongoing trial in a case that he had attempted to drop. I consider Mr. Van de Kamp in some ways to have been the eleventh victim in the Hillside Strangler case. His deputy, faced with a very, very difficult case, no doubt, failed in my view to see the forest for the trees and misadvised Mr. Van de Kamp concerning the winnability of the case.

When all is said and done, by and large jurors come to the right result. It did validate my faith in the jury system, notwithstanding the occasional odd verdict here and there. It also enhanced my confidence in my own judgment, because it was a difficult call to make, and gave me faith in my own physical endurance, I suppose, and my ability to multitask. It was a vast learning experience, and it was a case that apparently, in the eyes of some in the legal press, is still one of the defining points in my judicial career.

On becoming an appellate judge:

I had been under consideration for appointment to the California Court of Appeal, and there had been a few occasions when others ultimately obtained the appointment. Because I did not know whether I would ever receive an appointment to the state appellate court, I applied for appointment to the U.S. Court of Appeals for the Ninth Circuit. I did so because I was eager by that point in my judicial career — having spent 15 years as a trial judge — to move on to appellate work as a judge. I more or less hedged my bets by applying on the federal side as well as the state side.

The offer of a position on the state Court of Appeal did come first, from Governor Deukmejian. In fact, when I had my interview with the governor's appointments secretary, Marvin Baxter — of course, we later became colleagues on the California Supreme Court — he brought up the subject and asked me to verify that if I were to receive an appointment to the state Court of Appeal, I would stay in that position even if an appointment to the federal Ninth Circuit were to be offered to me. I said, "I have no qualms about that." I had no hesitation. I made that commitment to him and shortly thereafter was appointed to the California Court of Appeal.

Attorney General John Van de Kamp inquired of me during the [Commission on Judicial Appointments] hearing whether I was considered ambitious. My reply was that I considered ambition to be a positive trait, and that if I had not been ambitious, I would still be writing briefs in the attorney general's office.

Interestingly enough, it was only a few months after my confirmation hearing for the state appellate court that I was, in fact, offered an appointment to the Ninth Circuit, to fill the vacancy created by the appointment of Anthony Kennedy to the U.S. Supreme Court. To the obvious surprise of the U.S. Department of Justice personnel who phoned me, I turned down the appointment.

On the Court of Appeal:

I have come around to the view that I favor the nondivisional structure of the Third, Fifth, and Sixth Appellate Districts of the California Courts of Appeal — something established by the legislature and not by

the courts' own choosing. That structure allows for more cross-fertilization, if you will.

Overall, what was the quality of the advocacy you were seeing in the intermediate Court of Appeal?

It varied quite a bit, and I would say maybe there was the beginning of a trend in those years, which has continued since then, for some attorneys to specialize in appellate practice. What you frequently saw in the appellate court was someone who might have been a real hot-shot as a trial lawyer but who had absolutely no skills as an appellate advocate. He or she might have been brilliant at destroying a witness on cross-examination but totally inept in making a reasoned, policy-driven argument before an appellate tribunal that was charged with the function of laying down a set of principles to guide lower courts, lawyers, and the public in future cases. Conversely, some of the most brilliant appellate advocates are total duds when it comes to appearing in a trial court even in a simple matter, especially if it involves examining a witness.

The trend towards specialty in appellate advocacy is one that you support?

I certainly do. To analogize, I would say that someone who has a brain tumor or serious heart disease would choose ultimately not to rely solely on his or her general practitioner or family doctor.

On moving up to the Supreme Court:

One step in my life always seemed to lead somewhat naturally to the next stage. My going to law school got me interested in constitutional law. I had the idea of public service from my interest in the Foreign Service, so it became natural for me to consider going to work in the attorney general's office, and that led to an appointment to the bench. After serving on the municipal court, I wanted to try my hand in superior court with more challenging litigation in both the civil and criminal areas. Then, having had my time there, my long-standing interest in appellate practice remained, so of course it seemed natural to aspire to a career on the state Court of Appeal.

In terms of interest in the California Supreme Court, that was a court before which I had argued 11 cases as a deputy attorney general. I was familiar with the work of the court. It offered the possibility of deciding legal issues of statewide significance, as opposed to cases where there was an appeal merely as a matter of right. So that was a challenging prospect. Of course, having established a relationship with the appointing authority, now-Governor Wilson, an opportunity existed that wouldn't just be pie in the sky but one that I thought was realistic. He was familiar with my career and with the work I had done in the judicial selection process, and we had developed a warm friendship, so it seemed to be something that I could reasonably contemplate. What happened was that I did not formally apply. It was my view that an appointment to the California Supreme Court was one that would seek out the candidate rather than the candidate going after or applying for the position. When Justice Allen Broussard announced that he planned to retire, I was contacted by [Wilson's judicial appointments secretary] John Davies and was asked to submit an application for appointment to the California Supreme Court, which of course I did.

On becoming Chief Justice:

You talked about Chief Justice Lucas' series of special assignments to you while you were an associate justice, saying he took you into his confidence and that he was sending you out as something of an emissary to the legislature at an early stage. An observer of this flurry of activity might think Chief Justice Lucas was grooming you as his successor.

We did not have discussions in which it was assumed that I would be his successor. It was only the legal press that spoke of "grooming." I tried to put a halt to it by telling a member of the legal press that I had heard this so often lately I was beginning to feel like a French poodle, something I did not relish despite my French heritage.

But speaking of the press, certainly some of its members had been thinking of you as an heir apparent right from the time you first joined the court.

It may have been an assumption made just on the basis of my having been Governor Wilson's first appointment to the high court, and assuming if he picked me for the first appointment he would also have me in mind to assume the chief's position. On the other hand, I also had had some substantial administrative responsibilities, even in the attorney general's office but certainly on the municipal and superior courts and as president of the California Judges Association. That may have been a factor in the governor's believing that I had some of the experience and skills that would be relevant to performing the duties of Chief Justice of California.

I was wondering who else he considered if anyone. You learned then that you were the sole possibility?

Yes. I learned my name was the only one he had submitted to the State Bar for evaluation as Chief Justice.

This report is fascinating. It says: "Quite simply, the candidate reflects one of those very occasional moments in time when the right person is in the right place to the great benefit of the judiciary and the public." What do you know of that comment?

That was something that was reiterated orally at the hearing by the chair of the commission, Rita Gunasekaran, and embellished upon by her. It was a very lovely, almost cosmic way of viewing the process — and a bit daunting to be viewed by her as being almost

providentially placed in the position of heading California's judicial branch. I did feel I was up to the task but still, of course, was somewhat in awe of the many responsibilities that I would be assuming and that would, I learned fairly soon, basically triple my workload.

Chief Justice George after Governor Wilson administered the oath of office, 1996.

On assigning opinions:

Unlike the procedure followed at the U.S. Supreme Court, the Chief Justice of California makes the assignment whether or not he or she is among the justices who voted to grant review. Something that has not received attention, I believe, is how an opinion can be authored on our court by a justice who is not shown in the order granting review to be among those who voted to grant review. This generally is a tip-off that the case had to be reassigned because the original, tentative author was unable to muster a majority.

I cannot speak authoritatively to this, but the understanding was — on my part and I believe on the part of my colleagues — that my predecessor, Chief Justice Lucas, relied heavily upon his chief of staff in making the assignments. Perhaps there were exceptions to that on some very special cases where Chief Lucas made the assignment himself. I can't vouch for this, but my understanding was that his chief of staff assigned the cases and that justices and staff would go to this staff member and make requests to be assigned certain cases. My approach was to personally make the assignments, to perform a lot of these seemingly ministerial functions myself rather than delegate them to my chief of staff.

When a hot-button issue was involved I frequently would assign the case to myself. I would do so partly because of my view that the Chief Justice should have the broad shoulders to withstand the strong reaction or backlash that might ensue from a ruling on a controversial issue, and also because of the substantial role that I had to play as Chief Justice in dealing with the other branches of government. I kept in mind the words of the L.A. Municipal Court presiding judge who had sworn me in, Alan Campbell, who advised me that every time I would make a decision I would make a temporary friend and a permanent enemy but — knowing that — I should forget it and go out and do my job. So, although these considerations never affected the result in any case, sometimes it was best if things came out of the chief's chambers.

On oral argument:

By the time oral argument takes place in the California Supreme Court, the justices are intimately familiar with the record — that is, the evidence — and the legal issues. The U.S. Supreme Court justices, as I understand their practice, have their first truly substantive discussion on the case only after oral argument, and consequently they may not be as informed about the case at oral argument as the justices of the California Supreme Court. I remember from cases in my own experience at the U.S. Supreme Court as a deputy attorney general, while waiting for my case to be heard, that the justices would sometimes ask very basic questions about the posture of the case. I don't fault them. It was just that they were only then delving into the case, whereas we are steeped in a case, having studied it and exchanged views on it for months preceding oral argument. That made for a style of oral argument in the California Supreme Court that caused the court to be called a "hot court," not perhaps in the current vernacular's use of that term, but one that reflected a very full awareness of all the underlying aspects of the case and an eagerness to engage counsel in informed debate.

On judicial decision making:

I don't ascribe to the analogy that we're just umpires at a baseball game — or that we otherwise merely have to dig deep enough and we'll find the one true right way to resolve the dispute by discovering what the already established — even if inchoate — legal principle might be out there, perhaps buried in eighteenth-century constitutional text. Cases fall in between various precedents, and one has to chart one's way between and among them, and choose the course that seems the most appropriate under the law and that seems the most just in the given case, and to interpret statutes and constitutional provisions by examining available indications of the intent and policy objectives underlying their enactment. The answer isn't always that easy to come by.

The California Supreme Court in its Sacramento courtoom, late 2000s: Justice Carlos Moreno, Justice Joyce Kennard, Justice Kathryn Werdegar, Chief Justice Ronald George, Justice Ming Chin, Justice Marvin Baxter, and Justice Carol Corrigan.

PHOTO: SIRLIN PHOTOGRAPHERS

I've had occasion during my 38 years on the bench to invalidate laws that I personally thought were good policy and, maybe on occasion, that I even voted for on the ballot, and on the other hand to sustain laws that I thought were silly or dumb, because there was no legal obstacle to the enactment of those laws.

On the arrival of new justices:

I would say that, even aside from the advent of a new chief, there is something about a change in the composition of a Supreme Court — just the change in one position, even if the incoming justice does not have a philosophy or approach markedly different from his or her predecessor — that changes in a perhaps inchoate way the dynamics, the chemistry, the atmosphere at the court. It's hard to describe or to quantify, but if you take one of the seven parts and change it, even with what might be a like-minded part, it's a different court.

On drafting opinions:

I met with [my staff attorneys] one on one and usually would give them no direction at the outset in terms of how I wanted a case to be written up. I would have it quite understood that their responsibility was to have the court be guided only by where the law would take us on a case. Sometimes there were opportunities to go one way or the other, because the statutory or case law was fluid and there were important policy considerations on both sides of an issue. Then I might express a preference saying, "If we can, in an intellectually honest way, proceed along this route, *x* rather than *y* would be my preference. But again, let the law take us where it must." I did tell staff that I wanted them to always be collegial in drafting the formal written responses that I would circulate to material coming out of other chambers — and in their oral interactions with other chambers, even if they didn't feel that another staff member was treating them as politely as they should. They were not to respond negatively in kind, nor take pride of authorship to the point where criticism would be resented or where one would stop trying to accommodate — not stopping to count at four votes, but aiming for seven if possible, through accommodation.

Even though there are some decisions that are, perhaps, longer than they should be, I weigh in on the side of a longer, more thoroughly explicated decision. I believe that one of the important reasons that decisions of the California Supreme Court are followed more than the decisions of any other state high court is the fact that our opinions do explain; they do set forth the reasoning for the result that's reached and the ramifications of the particular decision. They discuss pertinent authority at some length, often including authority in other state and federal jurisdictions, providing a survey, if you will. I realize that our opinions are not supposed to be law review articles, but by the same token they're not supposed to be just a thumbs-up or thumbs-down fiat either.

On "rescue missions":

There's one rarely occurring event that nonetheless is part of the picture. We referred to it informally as a "rescue mission" — which might be a situation where, strictly speaking, the case didn't meet the standard for review of being necessary "to secure uniformity of decision or to settle an important question of law," but there was such an injustice or aberration from the normal operation of the justice system that the case cried out for redress. I really don't think that you'd see the court reach out to more than one or two in a year, and I'd say there were many years in which no rescue missions

were undertaken. But I want to indicate in the interest of candor that, despite what I said about the standard for granting review, these rare exceptions would occur.

On his most significant opinions:

I consider among the opinions I'm most proud of the case of *Elkins v. Superior Court* [concerning unrepresented litigants in family court, which led to] a task force that I established to focus on access-to-justice issues in the area of family law. I would put it among the top three or four opinions I authored for the court in terms of its significance and the personal satisfaction it brought me. The others would be *Warfield v. Peninsula Golf & Country Club*, establishing gender equality in the context of right to membership in various types of organizations that come within the rule of that case — public accommodation entities. Also, in the area of family law, in addition to *Elkins* I clearly would include the *In re Marriage Cases* involving the right to same-sex marriage. Fourth is the case of *NBC Subsidiary v. Superior Court*, which clearly established the right to open court proceedings in civil cases.

On unpublished opinions:

I feel very strongly that universal publication would be a bad practice. It would mean there would be 10 times as many Court of Appeal opinions that the appellate justices and their staffs, trial judges, and lawyers would have to ferret out in deciding what is the law.

On the death penalty:

The capital caseload probably consumes 20 to 25 percent of the court's time and effort and, to the extent the court is occupied with that vital function, it is kept from performing its basic function of deciding substantial questions of statewide importance and resolving conflicts in the civil and noncapital criminal areas of the law. Although capital cases literally present life-and-death issues for both the victim and the defendant, it is a very rare capital case that contributes anything to the jurisprudence of our state outside the narrow confines of death penalty law, which largely involves procedural law unique to death penalty cases.

My ultimate concern is that we're expending a tremendous amount of effort and expense to impose death sentences and send people to death row under circumstances that almost totally undermine the deterrent effect of the death penalty. A person sentenced to death knows that he or she in effect is being given a life-without-parole sentence, because the odds are that he or she is going to die of old age behind bars. Is it worth it to maintain this fictitious system and have only thirteen persons be executed in the last 34 years since the restoration of the death penalty in 1977, the last in 2006 — and currently maintain about 720 prisoners on death row — at tremendous cost, at a time when we're severely cutting funds for education, public safety, parks, and social services?

Basically, my attitude is — fix it, or get rid of it if you're not willing to fix it. I wonder, as a matter of policy, not of law, what justifies continuing with the charade that the death penalty has become? That is the evolution of my thinking on a pragmatic basis — as a voter, not as a judge ruling on these matters. It's an empty and costly exercise in formalistic ritual to say that we have the death penalty when in fact we don't.

On resistance to death penalty reform:

Although Californians may want to keep the death penalty on the books, they don't appear to want to have it carried out in great numbers at the pace they do in Texas, for instance, which has had almost 500 executions in the same 34-year period in which California has had 13. Maybe that's why, when I went to Sacramento in an attempt to obtain some improvements in California's dysfunctional death penalty process, I had minimal success in my conversations with legislators from both major political parties. I found it rather ironic that the law-and-order folks, the real conservatives who were criticizing the courts for the

Working on a Supreme Court opinion in Ketchum, Idaho, winter of 2002.

slow pace at which the death penalty was being carried out — and I can understand and sympathize to a large degree with their frustration — were totally unwilling to appropriate any funds for the kind of reforms that I felt would truly expedite the process and eliminate much of the delay. The more liberal elements of the legislature had no problem with a 25-year delay in implementing a death sentence. They probably just wished it took 40 or 50 years to carry it out, in the absence of a total abolition. So you had this perfect storm of individuals lacking any incentive to change the system and actually feeling their respective interests were being served by maintaining the status quo.

On being head of the judicial branch:

The position is not merely Chief Justice of the California Supreme Court — which in itself is a substantial responsibility — but Chief Justice of California — of the judicial branch — which entails basically being CEO of a medium-sized entity with a budget that approached $4 billion, has almost 20,000 employees and about 1,700 authorized judicial positions — close to twice the size of the federal Article III judiciary nationwide — plus a few hundred subordinate judicial officer positions.

On the recall of former Governor Gray Davis:

I felt, and I feel today even more strongly, that recall — even though it is available under the constitution with the other progressive era reforms that came in, the initiative and the referendum — is not an appropriate tool except in the most exceptional situations. I can imagine an occurrence of gross malfeasance in office that involves corruption or a physical or mental incapacity to perform one's duties. But to recall an elected official merely because of buyer's remorse on the part of the electorate, or because of disagreement about a policy decision here or there, is a true mistake. I think the remedy in that situation should be confined to not reelecting that person — assuming the officeholder is not already barred from reelection by term limits. This was a second term for Governor Davis, and I truly believe it was a real misuse of the people's recall power to remove him from office. I voted against it.

On speaking for the judiciary in Sacramento:

When a major reform was achieved, dealing with the legislature was as gratifying as any professional experience I've ever had, implementing something I felt would benefit the judicial system and the public for decades to come. At other times, having to work with the legislature was absolutely the most frustrating and negative experience, in terms of human behavior and motivation, that I could imagine. It's been some of each, but for better or for worse, a major part was acting as chief advocate for the judicial branch in Sacramento.

Although it was always a challenge to educate the other two branches of government concerning our respective roles with each other, sometimes the greatest challenge was dealing with our own folks in that regard. This difficulty is, I believe, causing the judiciary more harm than anything being done by the other two branches of government. It brings to mind the phrase "being one's own worst enemy."

If we went back to the days that existed when I became Chief Justice, where you'd more or less have the Judicial Council going up to the Capitol with one point of view and the California Judges Association with another, and the Los Angeles court with its own agenda, and then a few other courts or individual judges who would show up as free spirits, we would be told, as we were then — pretty much in these words: "We don't have to listen to any of you guys if you can't make up your mind. We'll just do what we want."

On judicial salaries:

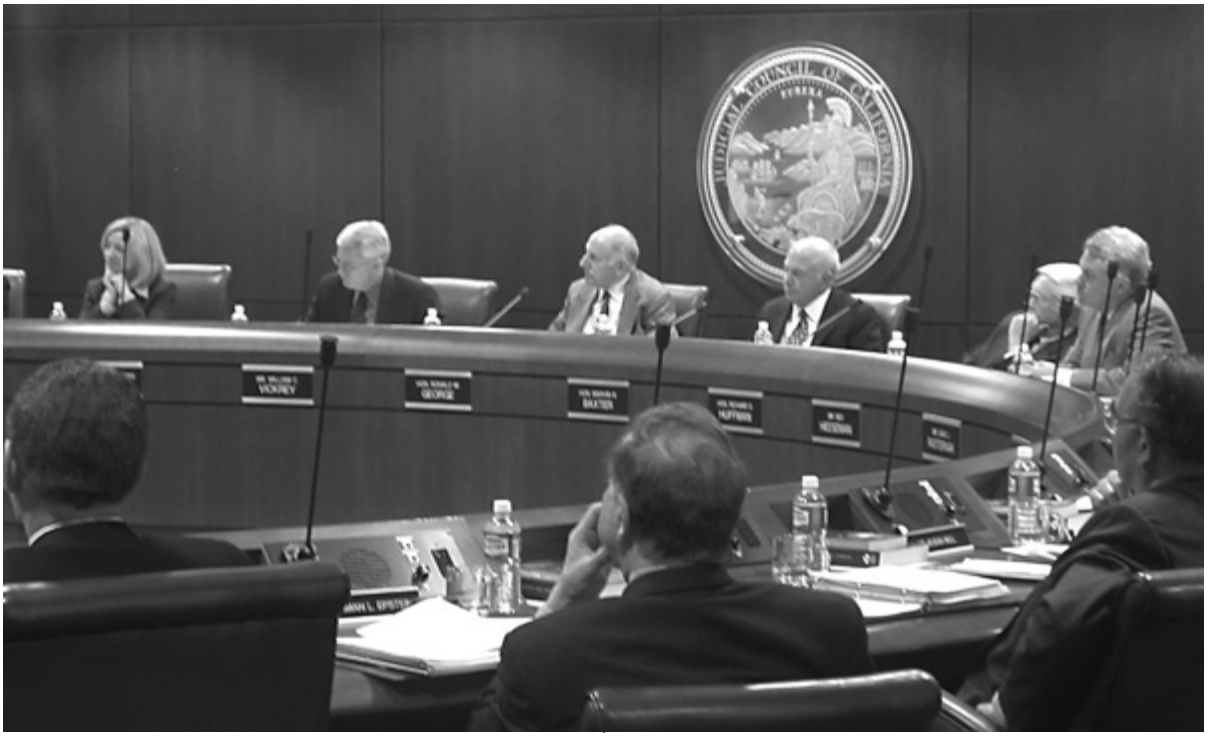
Overall, between the years 2000 and 2010 the salary of California's trial judges was increased by 45 percent — from about $122,000 to about $178,000. The higher salaries of appellate justices were similarly increased.

On electing the Judicial Council:

When there was a move in the California Judges Association to have the constitution amended to provide for an elected Judicial Council, I resisted this strongly, feeling it would be the death knell for a truly well-functioning Judicial Council. At one of the annual meetings of the California Judges Association, where I would engage in a Q&A session, I made a point of saying, with regard to the idea of an elected Judicial Council that was the topic of some discussion there, that if CJA were to endorse that concept, I would view such action as a declaration of war on the council. My comment shocked many people, because I was known for being diplomatic in my various communications with our justice system partners and with others. But contrary to the view of some who thought the remark must have been an inadvertent slip of the tongue or a heated outburst, it was made with considerable forethought, and it accomplished exactly what I intended. CJA's consideration of that proposal came to a halt.

On the Administrative Office of the Courts:

That agency originally was focused on a much narrower segment of tasks, and therefore now that legislation has vastly expanded the mission and responsibilities of the



Presiding over the Judicial Council in its boardroom, early 2000s.

Judicial Council and the A.O.C., they need far more personnel. They spend more money because they took over other functions from local courts and from the counties, so you're really dealing with a totally different subject matter. You can't just look at the technology system and fairly say, "How it's grown," or look at the A.O.C., "See how it's grown?" They are different creatures altogether from what they were in their initial inception and creation, charged with vastly expanded responsibilities.

It's very easy to throw potshots at the A.O.C. as an overgrown bureaucracy, pointing out that it used to employ 200 individuals and now it's at about 900. But what this ignores is the parallel growth of the statewide administration of justice itself, which grew from having virtually no contact with the trial courts to now encompassing the whole statewide structure, trial and appellate. Tremendous new duties were thrust upon the A.O.C. by law — especially by the legislature's passage of the Trial Court Funding Act, and then through trial court unification and the court employees act, which made court employees "court employees" as such and no longer county employees, nor state employees, and by countless other obligations imposed upon the A.O.C. by the other two branches of government — often without the provision of any funding to carry out the new tasks.

To me it's shocking that the Administrative Office of the Courts has been able to do its job and not expand more than it has. In fact, on a workload basis, on a population-served basis, we have a smaller A.O.C. than Arizona's, proportionally. We have a smaller A.O.C. than the federal A.O.C., even though California's judiciary is much larger than that of the entire United States court system. Many of the criticisms leveled at the A.O.C., for what it has done and is doing, are very unfair, inaccurate, or uninformed.

On unifying the municipal and superior courts:

The building to which I was initially assigned [as a municipal court judge in Los Angeles] was the main courthouse for both the superior court and the municipal court. Interestingly enough, there were separate lunchrooms for the judges of each court. As a municipal court judge you couldn't go into the superior court lunchroom unless you were invited by a superior court judge. It was almost like a caste system of some sort.

There was a lot of resistance among many judges to court unification. Some of it reflected, probably, a sincere belief that many of the municipal court judges were younger and less experienced, and weren't qualified to do superior court work. In some instances there may have been some truth in that. In others, it was absolutely not true. In terms of efficient use of the resources provided by the taxpayers, in terms of providing accessible justice and reducing delay in the proceedings, especially in courts that were underfunded,

After receiving the Rehnquist Award at a ceremony at the U.S. Supreme Court, with his wife Barbara and sons Andrew, Eric, and Chris, 2002.

to me the only logical course was to eliminate this duplication among the levels of trial courts.

On judicial independence:

Although we usually speak of independence of the judiciary from the standpoint of decisional independence, that's just one side of the coin. The other side is institutional independence, which implies the need for stable and adequate funding and lack of interference by the other two branches of government in the operations of the judiciary.

On disgruntled judges:

Some misinformed judges yearn for what they claim were "the good old days" of county funding — days that I and others who served in that era know were not in fact so good. A return to that discredited system would place the judiciary in an even worse condition in today's fiscal situation. The real goal of these throwbacks is to escape the accountability that comes with receiving statewide funding, and to return to the time of unaccountable judicial fiefdoms.

My reference is to those relatively few rogue judges, whether operating through their own local court or as part of what I believe they call the judges alliance, who seize upon any issue that arises — and it's a shifting target from one thing to another; they cannot be appeased — as a device to urge the dismantling of the statewide administration of justice and a return to what they view as the good old days, with no true accountability to the counties or to the state for the court's actions or for the court's expenditure of public funds provided by the taxpayers. There are judges who just have never gotten over the changes made by our structural reforms, which some of them fought.

At times, I have wondered whether the group offers reciprocal membership in the Flat Earth Society. The official directors of the group have spent countless hours composing and distributing rather strident written manifestos on one topic after another. I view them as the Tea Party element of the California judiciary. I think the tone of the criticism that they level against anyone who doesn't go along with their agenda seriously calls into question the judicial temperament of some of these critics to the extent that I would counsel a friend against having even a dog-leash violation tried in one of their courtrooms.

On the initiative process:

Much of California's dysfunctionality has resulted from the fact that initiatives have enacted spending mandates for admittedly worthwhile causes such as education — Proposition 98 — and transportation, and yet by the same initiative process the people have imposed restrictions under the constitution on their ability to raise the revenue to pay for those very same mandated expenditures. There is another factor. Unless an initiative has provided otherwise, the legislature is unable to fix or alter — even consistently with the objectives of the initiative — a problem posed by the measure, and the only solution is to seek the approval of the voters at a future election.

On former Chief Justice Rose Bird:

I have mixed feelings about that [1986 retention] election and about Chief Justice Bird. I did find it remarkable that she could vote 100 percent of the time — in more than 60 cases — to overturn the death penalty, suggesting to the opposition that she was following her own personal views rather than applying the law. That was certainly the major focus of the campaign against her, but on the other hand I'm also troubled by reports that major funding, and perhaps *the* major funding, for the campaign against her came not from persons concerned with the issue of the death penalty but rather from corporate interests who presumably did not favor her rulings in areas that affected their economic well-being.

Over the years, especially once I joined the high court, I did hear many negative reports about Chief Justice Bird's role as an administrator and the difficult relations she had with other justices and staff at the court and with persons outside the court, whether they shared her views or didn't.

On moving up to the U.S. Supreme Court:

At the risk of sounding somewhat parochial, I felt that as Chief Justice of the largest court system in the Western world and perhaps anywhere, I was in a better position to advance the cause of justice through administrative reforms than I would be as one of the eight associate justices on the U.S. Supreme Court.

I was flattered to read in the newspaper — and that was the only communication to me about this — that Senators Dianne Feinstein and Barbara Boxer had put my name forward in a public statement they released to the press, describing me as a Republican whom they could support and whom they urged President George W. Bush to consider for the Sandra Day O'Connor vacancy on the high court. It was very gracious of the two senators to make that suggestion. They never consulted me beforehand, nor did I ever have a conversation with them subsequently about it. I had no contact from the Bush administration, and of course I knew I never would, given a couple of the more controversial decisions that I had rendered. I was quite confident I would not be the type of candidate this administration would want to consider for appointment to the high court, which did not trouble me in the least since I had no personal desire to join that court.

On activism at the U.S. Supreme Court:

Sometimes, due to the multiplicity of the opinions issued in a particular case or the convoluted nature of the case combined with the inability or unwillingness of the justices to coordinate their expressed positions, a court does not succeed in providing clear rules to guide lower courts and parties in future situations.

Sometimes the problem is not just one of a lack of guidance. I believe that what occasionally occurs can truly be termed judicial activism. It's a pejorative term that perhaps is most often used by conservatives in attacking what they view as liberal jurisprudence. But I truly believe it works both ways and can apply just as well to conservative jurisprudence. Some say judicial activism is a meaningless term that exists only in the eye of the beholder, and only describes an opinion you don't agree with. But I think it is more than that. There are instances where a court exhibits no reluctance about abandoning settled precedent, or intruding upon states' rights in violation of our federal union, or disregarding the original understanding of the Constitution, and other instances where it reaches out to decide an issue when there's no need to do so, even when the parties may not have called upon the court to address the issue.

I believe the concept of improper judicial intervention in the political process does apply in some instances, and certainly *Bush v. Gore* legitimately may be viewed as an instance of the high court's reaching out into a political area. Justice O'Connor has stated that this decision was viewed by the public as political and may in part be responsible for the drop in the approval rating for U.S. Supreme Court justices from 66 percent in the late 1980s to 44 percent.

On campaign finance decisions:

Another case that in my view will have a dramatic impact on the political landscape of the United States and, unfortunately, on judicial elections is the *Citizens United* case, which held that certain provisions of the political campaign finance law are unconstitutional under the First Amendment because corporations are persons and thus are entitled to the exercise of free speech rights under the First Amendment. The court's perception of corporations led one observer to remark that he would believe corporations are people when Texas executes one. The court's opinion is an example of the sometimes unfortunate act of reaching out to decide issues that were not raised by the parties.

With former Governors Gray Davis, Jerry Brown, George Deukmejian, and Pete Wilson, at the induction of Governor Schwarzenegger, 2003.

PHOTO: GOVERNOR'S OFFICE

The most disturbing aspect to me is the basic effect of opening the floodgates to corporate donations with the resulting impact on the public's exercise of its right to vote. It is still their own vote — but if there's a deluge of expensive advertising on one side, that's likely to have an impact.

That was my preliminary concern, and here is my parochial view as a judge. I believe this decision has the potential to be devastating in judicial elections. *Caperton v. Massey Coal Company*, the West Virginia case, provides an illustration of the willingness of a corporate entity to throw millions of dollars into a relatively small race for one Supreme Court position in a small state. You need to take *Citizens United* together with the illustration provided by *Caperton* and then add on another factor, another decision of the U.S. Supreme Court titled *Republican Party of Minnesota v. White*. This decision held that the codes of judicial ethics that prevent judicial candidates, whether they're incumbents or challengers, from announcing their views on legal issues, on how they should be resolved by a court, are unconstitutional because those ethical constraints constitute an abridgment of freedom of speech under the First Amendment.

The judicial canons of ethics have in part been invalidated by this decision of the U.S. Supreme Court. So you take the ruling in the *White* case, together with *Citizens United* and the illustration provided by *Caperton*, and you have the perfect storm — a true danger posed to judicial independence, to fairness and integrity in our state courts, as a direct result of these rulings by the U.S. Supreme Court.

It's one thing for a court to come up with these abstractions and niceties on a theoretical level in terms of what is free speech and what it shouldn't include, but it's another thing to consider the practical ramifications of the court's decision. The justices in the *White* majority clearly gave the impression that they disfavor judicial elections, and that if the people of the state don't like the *White* decision, their remedy is to abolish such elections. I believe that's a somewhat arrogant justification for the high court to invoke for its ruling.

On adherence to principle:

I would also add that sometimes the rulings of the high court appear to some observers to be selective in their application of various principles of decision making. There are some commentators who view the current court majority as likely to invoke principles of federalism and states' rights when those justices apparently approve of what the states are doing or disapprove of what Congress is attempting to do. But, in the view of those commentators, the same justices on occasion appear to disregard those very same principles when the opposite is true — when the court majority seems to support the result of what Congress is doing and to not like what the states are doing, leading the court under those circumstances to find that federal law preempts state regulation.

Sometimes it is difficult for me to find consistency in the high court's approach to cases that raise issues of federalism. Of course it's very difficult — it's impossible, actually — to ferret out the motivation of a justice, conscious or subconscious, unless he or she is quite candid in expressing it, either in an opinion or in a speech or other public manner. But I don't believe it's unreasonable for commentators to have drawn that conclusion on the basis of their comparison of various rulings and it being difficult to come up with a reasoned way of reconciling the different results. All of that can give rise to a perception that the court is being selective in its approach, in its invocation of standard principles of jurisprudential decision making.

On his decision to retire:

The approach of my seventieth birthday focused my attention on a question that had recently been posed by my family. This was basically, "What more do you hope to accomplish if you file for reelection this year for another 12-year term?"

The only ones I consulted were Barbara and our three sons, no one else. They urged me to move on. They thought I had accomplished everything I might wish to accomplish and that it was time to kick back and enjoy the other aspects of life that went beyond one's work responsibilities and professional commitments. I knew that I could fill my life with many other interesting pursuits that I had to put aside. All I had to do, I realized, was pursue the existing interests in my life that I had to subordinate due to the press of my professional responsibilities. All those other things were out there waiting for me, and I knew that, for me, in the end, the transition would not be difficult. I knew that if I left, I would have no desire to sit as an assigned judge or a private judge, or to engage in the private practice of law or alternative dispute resolution.

On his successor:

I included in the binder [he prepared for Governor Schwarzenegger] some biographical information on four individuals whom I was recommending that the governor consider for appointment as Chief Justice of California. I ranked the four individuals, and number one in my ranking was Justice Tani Cantil-Sakauye, an associate justice of the Third Appellate District who, as soon became apparent, ended up being the governor's nominee.

When I met with the governor, only he, his chief of staff, Susan Kennedy, and I were present in his office.

Governor Arnold Schwarzenegger with outgoing Chief Justice Ronald George and incoming Chief Justice Tani Cantil-Sakauye, 2010.

PHOTO: LARISSA GOMEZ AND JUSTIN SHORT, GOVERNOR'S OFFICE

I told him that I was providing him and Susan with binders containing material on the procedural aspects of the appointment as well as biographical material pertaining to persons whom I thought were the most suitable and qualified in the State of California to perform the duties of Chief Justice of California. He invited me, then, to describe the background and qualifications of my first choice. I went through my impressions of Justice Cantil-Sakauye, indicating that I had focused on her because, having appointed her to the Judicial Council, I had come to believe that she was truly a star in the area of statewide court administration. I stressed her knowledge and intellectual ability, as well as her willingness to apply herself in confronting new situations, even crises, in a calm and reasoned way and to work constructively with others in a collegial manner. At the same time she had a backbone of steel and was highly articulate.

On his legacy:

I didn't come to the position of justice of the Supreme Court — associate justice or chief — with any agenda or any vision of changing the law. I think I did come with some vision in terms of administrative goals, but the cases basically were decided as they each came before us. I view the court during the time I served as Chief Justice as a moderate court guided by a pragmatic, nonideological approach.

One theme that is probably joined in both my decision-making responsibilities and my administrative responsibilities is the overall concept of access to justice. I believe if we look at the opinions I authored in the area of civil rights and constitutional rights, all of those — whether they involved public accommodations, whether they involved access to the courts or to public records, whether they involved the right to be free of a hostile work environment, and certainly the *Marriage Cases* — involve access to justice in some fashion or another. As a result, these matters all had a direct impact on people's lives. My priorities as Chief Justice of California — and in particular the steps I took to further access to justice in the area of services for unrepresented litigants, procedures to assist family law practitioners, expanding the services of language interpreters, dealing with the problem of bias in one form or another in our court system — were all basically access-to-justice issues. I suppose what has given me the greatest personal satisfaction are the efforts I was able to make both in case decision making and in administrative decision making to further the public's access to justice, which I regard as a basic underpinning of our democratic system of government. ✯

How the Marriage Cases Were Decided

Excerpt from "Chief: The Quest for Justice in California"

BY RONALD M. GEORGE

The mayor of the city and county of San Francisco, Gavin Newsom, decided that the restriction on issuing wedding licenses through the city clerk to opposite-sex couples only, although reflecting statutory law — both a statute passed by the legislature and a parallel one adopted by voter initiative — was, in the mayor's view, unconstitutional. He therefore resolved to no longer enforce these statutes or allow his subordinates or other city officials to do so. The mayor directed that wedding licenses be issued to persons of the same gender, and immediately many same-sex marriages were performed, ultimately about 4,000 of them, until the California Supreme Court, in proceedings initiated before us — through a petition for writ of mandate — temporarily brought a halt to those marriages while we analyzed the legal claims that had been raised. The court's initial order was to direct officials to comply with the statutory requirements and limitations. We stayed various proceedings in lower courts, but made it clear that the issuance of our stay order did not preclude a separate legal action in a superior court to raise a constitutional challenge.

What was your thinking there, in making that so clear?

The basic thinking, and I believe it's reflected in the ultimate decision of the court, was that — not to sound too harsh — the decision made by local officials was, essentially, a lawless act and that we cannot have each and every one of the hundreds or thousands of local officials in the state of California determining for himself or herself which laws will be enforced, which will not be enforced, which ones in the view of the officeholder are constitutional, which ones are unconstitutional.

I did not view this first of the three cases, the 2004 case of *Lockyer v. City and County of San Francisco*, as a difficult case. In a sense, it wasn't truly even a gay marriage rights case so much as it was a rule-of-law case.

Within hours of our ultimate decision in *Lockyer* invalidating the actions taken by these local officials and invalidating the 4,000 marriages, the mayor and his subordinates did what they should have done at the outset, namely proceed with a lawsuit seeking to have the superior court determine the constitutionality of the marriage statutes. We viewed the city as having basically engaged in a wholesale defiance of the law. A so-called test case could have been filed, or an action seeking a declaratory judgment. There was a means available within our judicial system to make this determination rather than the improper method that was chosen by the local officials. Of course, the legal proceedings that were pursued in the trial court were the direct result of our opinion in *Lockyer*. They culminated, after various hearings and the consolidation of several lawsuits, in a lengthy superior court trial that was held before Judge Richard Kramer of the San Francisco Superior Court. He ultimately upheld the position of the city and county of San Francisco and held that the statutes in question violated the California Constitution by limiting marriage to opposite-sex couples. There was then an appeal, of course, to the Court of Appeal, which issued a two-to-one ruling reversing the trial court. Ultimately, the California Supreme Court received a petition for review. We knew that, whatever happened, this was a case that was going to end up in our laps. That was unavoidable.

At the Supreme Court's weekly petition conference, sometimes the justices spend a lot of time, occasionally as much as 15 or 20 minutes, debating whether a particular case should be granted review, whether there's a substantial question — or is there truly a conflict in the decisional law or not? — and it might be on a very minor matter, one of much less interest to the public and to the legal community than most other issues. On the same-sex marriage case it was so obvious that we had to grant review that, as I recall, when we went around the table, I heard the word, "Grant," "Grant," "Grant," "Grant," "Grant," "Grant," "Grant," uttered seven times, with no need to engage in any discussion whatsoever.

> "We viewed the city as having basically engaged in a wholesale defiance of the law."

The usual questions were absent: Did the case meet the standards for review? Should we grant review or not? Did the case present a substantial question of statewide importance? Did a conflict in the law exist? It was obvious we had to take up this case. We would have been derelict in our duty had we not done so. These consolidated cases were captioned *In re*

Marriage Cases, the second of the three opinions I authored in the area of marriage equality.

We clearly were confronted with basic questions concerning state constitutional rights. We recognized there is a fundamental and well-established constitutional right to marry. Although this right doesn't appear in those exact words, the jurisprudence of our court and, interestingly enough, of the U.S. Supreme Court, explicitly recognizes a constitutional right to marry — I believe going back to a case from the 1920s, *Meyer v. Nebraska*. In that case the U.S. Supreme Court recognized, in discussing the liberty interests protected by the due process clause of the federal constitution, that it includes a right "to marry, establish a home and bring up children." Although we were dealing with state constitutional rights, there was precedent even in the jurisprudence of the U.S. Supreme Court for recognizing that there was in fact a fundamental constitutional right of marriage, although we were called upon to evaluate basically the scope of that right under the California Constitution and whether there had been a violation of the state constitutional right to equal protection of the laws and to privacy by virtue of the state action in adopting the statutory differentiation between opposite-sex and same-sex couples.

San Francisco Mayor Gavin Newsom brings the issue of same-sex marriage to the California Supreme Court.

THE RECORDER, 2004

Interestingly enough, our court's recognition of an equal protection violation was premised in large part upon the existence of a domestic partnership law in California, along with the conferral of many additional rights to same-sex couples. Aside from the differentiations made by federal law, virtually all the rights that one had as a gay couple were identical to the rights one had as a married heterosexual couple, subject only to the exception for the nomenclature of "marriage." Some persons, of course, have asked, "What's so important about a name?" Shakespeare observed, "A rose by any other name would smell as sweet." But our court hinged its decision invalidating the statutes very much upon the fact that the distinction was being made, in the court's view, in violation of the equal protection of the laws, based upon the gender of the couple who formed this basic primary association. The union of an opposite-sex couple was deemed a marriage and that of a same-sex couple was deemed a domestic partnership. The court concluded that the lack of demonstrated justification for this distinction was a sufficient basis for concluding that the differentiation in nomenclature did amount to a denial of equal protection of the laws. One can pose the question, "Imagine if marital relationships between a Black man and a Black woman were to be given the name domestic partnership and the same relationship between a Caucasian man and a Caucasian woman were to be called a marriage, would we find that this passed constitutional muster?" I don't think a court would uphold that.

Much of the court's analysis in *In re Marriage Cases* is based upon its landmark 1948 decision in the case of *Perez v. Sharp* that invalidated California's anti-miscegenation laws. Many states, and not just in the South, had laws barring interracial marriage. I have friends, a Japanese-American man and a Caucasian woman, who felt compelled to leave Virginia in the 1960s, knowing that their marriage would have been illegal in that state.

Shortly after the opinion in the *Marriage Cases* was filed, I received a letter from Michael Traynor, a Bay Area attorney and former president of the American Law Institute. With reference to his late father, California Chief Justice Roger Traynor, who was the author of the opinion in *Perez v. Sharp*, he wrote to me: "In an imaginary conversation with my father, we agreed with your framing of the issue, strengthening the standard of review, and expanding the class to assure equal protection. Congratulations on a magnificent contribution to the law." He added, "I remember vividly the threats and diatribes my father described having received after *Perez* was decided."

Interestingly, Virginia was the source of the case that the U.S. Supreme Court took up.

Yes, the *Loving* case. It took other states, over the years, several years to follow California's lead, but there were, I believe, about a dozen states that still had anti-miscegenation laws at the time the U.S. Supreme Court finally rendered its 1967 decision in *Loving v. Virginia*,

19 years after the California Supreme Court's decision in *Perez v. Sharp*.

One of the most important aspects of the decision in the *In re Marriage Cases* is that the court applied the standard of heightened scrutiny to laws that cover gay and lesbian individuals. Customarily courts have applied that standard — which is a standard much less deferential to legislative determinations than is normally applied by reviewing courts — only in cases involving gender, race, national origin, and religion. Our ruling was very significant in extending that special standard of review to laws that differentiate on the basis of sexual orientation.

Application of that heightened standard to gay men and lesbians will pervade all sorts of areas and questions that go well beyond the issue of whether the word "marriage" is to be applied to formal same-sex relationships.

I believe our opinion was quite influential not only in its result, but in its reasoning. The court basically affirmed that marriage must be recognized by the law as one of the most fundamental of human relationships and that therefore it is a denial of equal protection of the laws to restrict its definition to opposite-sex couples.

What options did you have in terms of the reasoning or the path to pursue to get there?

Of course, one extreme solution when there's an equal protection violation would be to say in this context that because everyone has to be treated the same, in order to achieve this objective no one can get married. [Laughter] We didn't take that possible solution seriously, but interestingly enough this is one of those areas in the law where the recognition of a right does not conflict with the rights of others and did not in any way diminish or take away from the rights of others.

"It was so obvious that we had to grant review that, as I recall, when we went around the table, I heard the word, 'Grant' 'Grant' 'Grant' 'Grant' 'Grant' 'Grant' 'Grant' uttered seven times, with no need to engage in any discussion whatsoever."

Perhaps you could talk about your decision to assign the case to yourself and how far ahead you knew that you would do so?

Although, as I do on other issues, I respect the right of reasonable minds to differ among judicial colleagues as well as among members of the public, I found it quite offensive that various groups and individuals, on occasion, would attempt to intimidate the court in the performance of its duties. Certainly that was the case on the parental consent case where there were individuals who showed up at my confirmation hearing threatening that I would be targeted for defeat at the polls should I rule a certain way. I made a point, therefore, of assigning both the parental consent case and the marriage cases to myself. I felt I should have the broad shoulders and should bear the controversy that undoubtedly would descend upon the court, whichever way it would rule, because I didn't know at that point how I was going to vote on the case. I felt I should assign the case to myself with that in mind, regardless of which way the case was going to go. I then focused very much on determining how I would resolve my own position on the case.

Again, although we don't customarily discuss, as justices, whom on our staff we worked with on a particular case, I do want to give credit — in the face of the customary anonymity that cloaks research attorneys at the California Supreme Court — to Hal Cohen, who worked with me on all three marriage cases, *Lockyer*, *In re Marriage Cases*, and *Strauss*, as one of the most brilliant minds that I've had the pleasure of encountering in any venue, and not just limited to the California Supreme Court. His analytical and research skills and his thoughtful and open-minded approach to all matters were of enormous assistance to me in resolving my own position and in preparing the opinion for the court.

Hal was open-minded about both possible outcomes in the marriage cases, and we had numerous discussions on the case. As his research progressed, he and I both became more and more receptive to the ultimate conclusion reached by the court. What I ended up doing in preparing the case was unprecedented, as far as my own experience is concerned, and rarely done in the past practice of the California Supreme Court. At least I certainly didn't encounter it during my 19 years on the court, and I hadn't heard of this being done before. I worked with Hal to prepare a calendar memorandum on the case reflecting two opposite outcomes. As I indicated before, a calendar memorandum is a draft opinion.

I made an appointment — basically, informally, I asked to drop by — with each of my six colleagues. I informed all of them, at these six separate meetings, that I was giving serious consideration to recommending that the court invalidate the marriage statutes that limited marriage to the officially recognized relationship "between a man and a woman," and that I would, in the next day or two, be circulating a draft with both options and would very much welcome and await the views of each of them before finalizing my own views. I would want to study their preliminary responses, their overall input on the issue, in formulating my own

final position. I thought, given the momentous, novel, and controversial nature of the legal issues, that this approach would be appropriate and would best serve to edify my own views. Of course, as chance would have it, I ended up having three justices in favor of one version and three in favor of the other, so I was — as came to pass on many occasions during my tenure as Chief Justice — the deciding vote, the tiebreaker, on this issue.

What can you tell me about the differences between the two?

Actually, except for the most important thing, the end result, the two approaches were basically identical.

I'm curious about your choice to go and visit each of them in person to warn them that two versions were coming. What can you tell me about the response you got?

The reason I did that was that it was highly unusual to put out alternate versions. Of course, normally the nonauthoring justices would welcome the author's taking a position. Here my colleagues didn't have that assistance, if you will, but they had what hopefully was an objective presentation of both sides. I wanted them to know what was forthcoming, instead of their just finding this in their chambers mail slot the next day. I don't recall any substantive discussion taking place at any of those six meetings. I remember a couple of the justices having their eyes very, very wide open at, I suppose, even the consideration of the outcome of same-sex marriage, notwithstanding the fact that it was only one of two alternatives being presented to them. But the reaction of my colleagues was basically one of wait and see, and "I'll be very interested to read this."

During this part of the process, what did you reveal to your colleagues about your own position or which of the drafts you hoped to send forward into the final?

I didn't communicate any such preferences or leanings. I was just soliciting their views and helpful comments and suggestions.

What happened next?

After considering the input from the six justices, their staff, and my own staff, I circulated a revised calendar memorandum finding the statutes unconstitutional in limiting marriage to opposite-sex couples and concluding that drawing a legal distinction between the relationship between same-sex persons that was officially recognized as "domestic partnership" and the relationship between opposite-sex persons as "marriage" violated the constitutional guarantee of equal protection of the laws. Underlying my position, adopted by a majority of the court, was the circumstance that, had California withheld all of the rights from same-sex couples that it provided in the form of domestic partnership and other benefits, the court could not have engaged in the same type of equal protection analysis that it did.

What swayed you, in the end?

Underlying all of this was a very basic human right, the constitutional right to marry. To affix different labels to it denoted a second-class citizenship, very much akin to letting certain persons ride on the bus but making them sit in the back, in the context of racial segregation. I tried to be influenced just by these constitutional considerations, of course, although I certainly admit that the end result comported with my own sense of justice on a personal level. Much of this is really a generational matter too. I believe — notwithstanding the narrow passage of Proposition 8, which resulted in large part from the infusion of substantial amounts of out-of-state money and a not-that-well-run campaign by the defenders of gay marriage — that ultimately the popular view will change in California, especially as members of my generation die off. The idea of same-sex marriage is very much accepted by younger generations, just as interracial marriage — although highly controversial at the time of *Perez v. Sharp* in 1948 — is now very much accepted. Many people consider gay rights to be the civil rights issue of our times.

The Chief Justice circulated a draft opinion offering alternative conclusions.

The third case was *Strauss v. Horton*. It involved the issue whether Proposition 8, which wrote into the state constitution a provision limiting marriage to persons of the opposite sex, was itself validly adopted and constitutional. Like the first case, *Lockyer*, the *Strauss* case did not pose a difficult legal question in my view. Although my colleague Justice Moreno found grounds to disagree as the sole dissenter, I did not find there were any very debatable issues here. The people of our state clearly had the right to amend the constitution upon which their Supreme Court had based its ruling in the *In re Marriage Cases*.

I went on to note that the issues in *Strauss* were entirely distinct from those involved in the two other cases and that the court was presently faced with questions arising under the state constitution as it had now been amended. I felt it was important to point out these considerations to the public in what hopefully was fairly understandable language.

As you're acknowledging, those are distinctions that might be widely misunderstood or not at all understood by members of the public, who might have viewed your decisions in the Marriage Cases *and in* Strauss *as in conflict with one another.*

Exactly. There was no conflict. There was adherence to the law, to the constitution, in each instance. ✯