

Special Session of the

**Supreme Court
San Jose, California**

December 2, 2003



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DECEMBER 2, 2003
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The Supreme Court of California convened in the courtroom for a special session at the Superior Court of California, County of Santa Clara, 161 North First Street, San Jose, California on Tuesday, December 2, 2003, at 9:00 a.m.

Present: Chief Justice Ronald M. George, presiding, and Associate Justices Kennard, Baxter, Werdegar, Chin, Brown, and Moreno.

Officers present: Frederick K. Ohlrich, Clerk; and Gail Gray, Calendar Coordinator.

CHIEF JUSTICE GEORGE: Good morning. It is my pleasure to welcome all of you to this special session of the California Supreme Court. I would like to begin by introducing my colleagues on the bench: to my immediate right is Justice Joyce Kennard; to her right is Justice Kathryn Werdegar; and to her right is Justice Janice Rogers Brown. To my immediate left is Justice Marvin Baxter; to his left is Justice Ming Chin; and to his left is Justice Carlos Moreno. We are assisted in this special session, as we are in so many endeavors, by the court's very able Clerk/Administrator, Fritz Ohlrich.

California's courts have been focusing on increasing meaningful access to the courts and improving our ability to serve the public. Statewide, courts have been engaging in a wide range of community outreach efforts to better acquaint the public with the role of the courts and to better acquaint the courts with the concerns and interests of the public.

Today's special session in San Jose continues an important part of the California Supreme Court's outreach efforts, under which the court ventures beyond the three locations in which it traditionally hears oral argument—San Francisco, Sacramento and Los Angeles. Last year we held a similar special session in Fresno and heard oral arguments in the Fifth Appellate District's courtroom. The year before we held a special session in Orange County, and heard arguments in the Old Orange County Courthouse as part of the celebration of the 100th anniversary of that historic building and of that county's bar association.

Today the court is pleased to convene a special session in San Jose, here in this historic courtroom of the Santa Clara Superior Court. I want to thank Justice Conrad Rushing, the Administrative Presiding Justice of the Sixth Appellate District, and Justice Patricia Bamattre-Manoukian, who has been instrumental in setting up today's program, for extending this invitation to our

court. They, and all of their colleagues in the Sixth Appellate District, have been gracious and energetic hosts.

This visit is being used as an extraordinary educational opportunity, and the appellate justices and the judges of the superior courts for each county in the Sixth Appellate District, as well as the bar associations in each county, have been extremely generous in contributing their time and expertise to create a curriculum that should engage and enlighten students and members of the public. This includes a Web Site containing study guides for each case to be argued, as well as a glossary of legal terms and background materials on the Supreme Court and California's court system. And the high schools and law schools in the area have been eager and innovative participants in making this a most useful learning experience.

This is not simply a courtroom exercise confined to the usual participants. In addition to the students present in this courtroom, hundreds of students from public and private high schools, as well as students from local law schools, will be viewing oral argument sessions live, televised by closed circuit directly to additional courtrooms here, or over the California Channel into numerous classrooms, electronically expanding the walls of the courtroom. In addition, the local public television station is broadcasting this morning's session, and the Center for Judicial Education and Research, a division of our court system's Administrative Office of the Courts, will be producing a videotape of the proceedings that will be made available to the school districts in the four counties comprising the Sixth Appellate District. Everyone involved in this endeavor has made an important contribution to ensuring that this oral argument session of the California Supreme Court will be truly informative, interesting, and educational.

I should note, however, that this is not the first time the California Supreme Court has heard arguments and conducted its business in San Jose. The last time, however, there were no television cameras, and much less public interest. That could, of course, be due to the fact that the last such session was held quite a few years ago: almost 150 years have transpired since the court's last session in San Jose.

The earliest connection between San Jose and the California Supreme Court dates back to the colorful history of the early days of California's statehood, when the Gold Rush was on and the institutions of governance were not yet fully settled and formed.

The first California Constitution, enacted in 1849, provided: "The first session of the legislature shall be held at the Pueblo de San Jose; which place shall be the permanent seat of government, until removed by law." Within the

first few years of statehood, the Legislature had voted to move the capital first to Vallejo, then to Benicia, and then, in 1854, to Sacramento.

Even before California officially became a state, the Supreme Court had established itself in San Francisco—where its home chambers remain today. This choice was authorized by the Legislature for a time—but in 1854, when it voted to move the capital to Sacramento, the Legislature also directed that “the sessions of the Supreme Court shall be held at the Capital of the State.”

At that time there were only three justices on the California Supreme Court, rather than the seven positions currently provided. Three days after the Legislature voted to move the capital to Sacramento—and to take the Supreme Court with it—the court convened, on March 27, 1854, in San Francisco. By a two-to-one vote, the majority rejected the Legislature’s determination that Sacramento was the seat of government and instead concluded that the lawful capital was San Jose. Acting without arguments and without issuing a written opinion, a practice I doubt the court would engage in today, the two-justice majority issued an order directing the Sheriff of Santa Clara County to rent quarters in San Jose and to move the court’s furnishings, books, and records into those quarters.

Some have suggested that it may be relevant that one of the two justices in the majority, Associate Justice Alexander Wells, was a resident of San Jose. Whatever the reason for this decision, it is undisputed that the court packed up its belongings and moved south. As colorfully reported by the Daily Alta California newspaper on March 31, 1854: “The archives, and a portion of the furniture of the Supreme Court, accompanied by the Clerk, took their departure yesterday [from San Francisco] for San Jose, in accordance with the decision recently rendered by the majority of the court. The court went off in a style in keeping with its supremacy. A handsome Express wagon of Messrs. Adams & Co., to which was harnessed the private horses of the proprietors, drew up before the door of the City Hall, and received the legal lore, handsomely bound, which has been accumulating in the court since its organization. The court went off in dashing style, and we fancied that we saw the shades of Blackstone and Coke looking out of one of the windows of the City Hall.”

The court met in San Jose on the first Monday in April and throughout the remainder of 1854. The San Jose Telegraph reported that the sheriff had provided “a large and very handsome hall, in the second story of [a] new and substantial brick building,” for the use of the court. The press account continued: “The Supreme Court will be quite elegantly and conveniently provided for here, as at any place in the state. The rooms, and the location, fit exactly.” Noting that it was still unclear where the Legislature and officers

of the state would be located, the report concluded, “We are satisfied and gratified to have the Supreme Court with us.”

The building that housed the Supreme Court in 1854 at the corner of Market and West Santa Clara Streets no longer exists. It was one of 17 locations in which the court sat between 1850 and 1923, when it finally settled in at its present home—a tenure since interrupted only by an earthquake and the ensuing need for remodeling.

The court remained in San Jose through the end of 1854, but the dispute over the location of the state’s capital continued. The Governor, John Bigler—a resident of Sacramento—filed suit in San Jose in district court, as the superior court was then known, challenging the Supreme Court’s order that San Jose was still legally the capital of the state. The trial court ruled in favor of San Jose, and the Governor appealed.

While that appeal was pending before this court, Justice Alexander Wells — the Supreme Court justice from San Jose — died unexpectedly. The Governor appointed Charles Bryan as the new associate justice. And Justice Bryan promptly joined with the dissenter from the previous decision, Chief Justice Hugh Murray, and authored a new two–one–1 decision upholding the validity of the Legislature’s actions in declaring that Sacramento was indeed the capital of California.

The court soon moved to Sacramento, where it stayed for nearly 20 years. In 1874, however, the court returned to San Francisco and began holding many of its regular sessions there. Four years later, in 1878, the Legislature expressly provided by statute that the court should hold regular sessions in Sacramento, San Francisco, and Los Angeles—a practice that continues to this day, while the Supreme Court’s home chambers remain in San Francisco.

Today, on behalf of myself and my colleagues, I can assure you that we are very pleased to return to hear arguments in San Jose once again. Fortunately, this time, no acts of the Legislature or Supreme Court decisions were necessary to bring us here. And although we arrived in automobiles instead of horse-drawn carriages, we could not be happier to be in San Jose.

During today’s session we shall be making a little history too—not only for the volumes that will contain the opinions in the cases we hear today, but also the history involved in the interaction between the court and the public in a most unusual way. Most lawyers never have the opportunity to address the Supreme Court in open court—but today we are very pleased to entertain

questions addressed to the court by students selected by their schools. This is an exciting learning experience—by no means confined to the students asking the questions.

Once again, on behalf of the court, I want to express how very pleased we are to be here and how grateful we are to all those who had a hand in bringing about this special session. And now, I would like to invite the first student to come to the podium to address the court.

STUDENT: Good morning, Chief Justice George and justices of the California Supreme Court. My name is Kalpana Rathak and I am a student at Saratoga, California. My question is: How does the the California Supreme Court choose which cases it hears?

CHIEF JUSTICE GEORGE: Well, we cannot pick every case that perhaps, in our view might not be decided correctly by the lower courts. We have standards that guide us in deciding which cases we choose. We choose cases that involve important questions of law of statewide importance and often cases where there is conflict between the way one of our Courts of Appeal—and we have six in our state—decided an issue and the way another Court of Appeal decided the same issue in another case. It has to be a good case in order to decide that precedent. So that is the way we decide which cases that we are going to hear.

STUDENT: Thank you, your honor.

STUDENT: Good morning, Chief Justice George and associate justices of the Supreme Court. My name is Hilary Brutzman and I am a student at Monterey High School at Monterey, California. My question is: How long does it take for the California Supreme Court to decide a case, and what is the procedure leading up to a decision?

CHIEF JUSTICE GEORGE: Justice Kennard.

JUSTICE KENNARD: Thank you, Chief Justice George. Before I give you my answer I simply want to remind all of you, in case you haven't seen it, of this fabulous booklet put out by, I think primarily by our Clerk/Administrator and I gather, Mr. Clerk, that it is free of charge and it has all the secrets of the court that you would like to know about.

Typically, the process for deciding a case begins when the court grants a party's petition for review of a decision by the Court of Appeal. Then the parties submit written briefs to the court. This briefing process may take three to six months.

The Justice to whom the Chief Justice has assigned the case then prepares a tentative opinion, known as a calendar memorandum, and the other members of the court each submit a written response indicating agreement or disagreement with the tentative opinion.

When a majority of the justices agree that the matter is ready to be heard, the Chief Justice places it on the court's oral argument calendar. And today pay close attention to what the Chief Justice will say. You will notice that after the parties have concluded their argument, the Chief will say these magic words, "The case stands submitted." That means that 90 days after the argument in that particular case the court will have to issue its decision.

CHIEF JUSTICE GEORGE: Thank you.

STUDENT: Good morning, Chief Justice George and associate justices of the Supreme Court. My name is Analiza Svenhaug and I am a student at Harbor High School in Santa Cruz, California. My question is: What prior experience is the best preparation for serving as a Supreme Court justice?

CHIEF JUSTICE GEORGE: Justice Baxter.

JUSTICE BAXTER: That you Chief, and that is a very interesting question and one that I've certainly given a lot of thought to earlier in my career.

And I think the simple answer is that no single experience qualifies one to serve on the Supreme Court. Instead, it is the totality of experiences during one's lifetime that is important. Some of these experiences may predate law school and occur during childhood. For example, working well with others and developing leadership qualities through student government or other activities is important.

Developing research and writing skills are essential since the court speaks through thoroughly researched written opinions. An understanding of what occurs at the trial court level is important since our task is often to assess whether the trial judge erred and to provide clearly stated direction when the case is returned to the trial court judge or trial attorney.

But if forced to choose a single experience, I suppose prior service as intermediate appellate court justice is the most helpful. The work of an appellate justice involves a review of trial court judgments and the preparation of written opinions resolving the issues raised. To that extent the work is similar to ours. Having said that, many excellent jurists, including some who served with distinction on the California and United States Supreme Courts,

did so without any prior judicial experience. And that proves my point – it is the totality of one’s lifetime experiences that is really the most important.

STUDENT: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

STUDENT: Chief Justice George and associate justices of the Supreme Court. My name is Reid Ellison. I am a student at Anzar High School at San Juan Bautisata, California. My question is: Are judges truly impartial? What does a judge do if he or she has personal beliefs on a question for the court or is faced with public opinion or political pressure to decide a case in a particular way?

CHIEF JUSTICE GEORGE: Justice Werdegar.

JUSTICE WERDEGAR: Thank you. Thank you, Reid, for your question. Judges have the duty to decide cases impartially, but of course as human beings we are going to have personal beliefs or opinions about issues that come before the court. But it is our sworn duty to put those personal beliefs to one side and to decide the case on the basis of the facts and the law. And if a judge in a particular instance feels that she cannot do that she should remove herself from the case and let someone else be appointed to hear that case. And the same is true about outside political pressure or public opinion. If a judge believes that she cannot put that to one side and just focus on the facts and the law of the case, she should remove herself. People who are very susceptible to outside pressure would be uncomfortable serving as judges and should not serve as judges.

STUDENT: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

STUDENT: Good morning. Chief Justice George and justices of the California Supreme Court. My name is Elizabeth Hamilton and I am a student at Lincoln High School in San Jose, California. My question is: Why do the Supreme Court Justices and other judges wear black robes?

CHIEF JUSTICE GEORGE: Justice Chin.

JUSTICE CHIN: Thank you. Mr. Chief Justice. Ms. Hamilton, the answer to this question is really very short. It is a tradition. It is a tradition that dates back to the founding of the nation. The black robe is consider to be a reminder of the law and this is an excellent follow-up question to the

previous question about impartiality. The robe is a symbol of impartiality. But historically, there was a dispute between the founding fathers about what judges should wear. I believe it to be President John Adams, the second president, who favored judges wearing the red robes with a wig. Fortunately, he did not prevail. Actually, it was Thomas Jefferson, on the other side, who preferred that judges wear business suits. The compromise was black robes as a symbol of impartiality.

STUDENT: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

STUDENT: Good morning. Chief Justice George and justices of the California Supreme Court. My name is Carmelo Tringali and I am a student at Monterey High School in Monterey, California. And my question is: Is the oral argument of the attorneys important, or do the judges decide the cases mainly on the written beliefs?

CHIEF JUSTICE GEORGE: Justice Brown.

JUSTICE BROWN: Well, Carmelo, I have a judge-like answer for you. I think the answer to both questions is, yes. Oral argument is important, especially for a court like ours, which is a Supreme Court, which decides not just for the particular litigants but tries to establish the laws more broadly and the court will decide the cases mainly on the basis of the written briefs. But those two things are part of the appellate process, they do very different things and they serve very different purposes. The briefing process is sort of a comprehensive statement to us of the facts and law and everything that is happening and how the litigants want us to decide in their favor. The oral argument, of course, is much more limited. Briefing can run hundreds of pages, but the oral argument will only be a specific time-limited period. But it is the opportunity for the litigants to have their day in court and the opportunity for the lawyers to speak directly to the judges to tell us what they think is important, to cut to the chase and give us the essentials about what they think is important and what they want us to know. It is an opportunity for the judges to talk to the lawyers. We get to ask them about the issues that concern us and the issues that intrigue us and we get to follow up on those questions in a way that lets us also have a discussion with our fellow judges. So all of those things are very important. Probably one of the most important things that happen in oral arguments is what we are doing right now. It is an opportunity for the public to see the court at work. So any citizen of California can do exactly what you are doing if they are interested in a case — they can come and see us work.

STUDENT: All right, thank you.

CHIEF JUSTICE: Thank you.

STUDENT: Good morning. Chief Justice George and justices of the California Supreme Court. My name is Audrey Kuo. I am a student at Lynnbrook High School in San Jose, California. My question is: Does the judges interpret or make the law? What is the difference, and what is the term “activist judge” refer to?

CHIEF JUSTICE GEORGE: Justice Moreno.

JUSTICE MORENO: Thank you, Chief. That is very intriguing question about something the legal commentators and others have debated for a long time. As you know, the responsibility of the legislature to enact the laws and the responsibility of the executive to enforce those law. Our task is to interpret the law, not to legislate or enforce the law. In interpreting the law or the constitutional provisions, we look to the actual words of a statute and apply ordinary meaning to the context in which it is used in a particular statute. We use reference works such as dictionaries and other types of sources to ascertain the plain meaning of what the statute says. As you can imagine, in many instances what the words actually say or mean can be uncertain. And in those instances, we may look to what is known as the legislative intent to see what it is the drafters intended by placing those words or drafting those words as they have done. And we try to carry out the intent, if that is appropriate.

The second part of your question deals with what is an activist judge. I think an example of that comes to mind from what the Chief describes about the history of our court. The judges who decided to move to San Jose, not withstanding a legislative enactment that the capital was in Sacramento. Certainly, it could be deen an activist in nature. Other examples might be when a judge apply his or her personal ideology interpreting the laws but doesn't follow faithfully the tasks that you must describe in interpreting the laws and that is in looking at the plain meaning of the statute or the constitutional provision. Another variation of that might be that the judge might decide a case simply on policy grounds rather than adhering to the letter of the law or a judge who might defer or decline to defer to the other branches of government, that is the legislature or the executive branches. That is not a precise answer but it gives you a general idea about what some people might construe to be an activist judge.

STUDENT: Thank you, your honor.

CHIEF JUSTICE GEORGE: Thank you.

STUDENT: Good morning. Chief Justice George and justices of the California Supreme Court. My name is Brittany Conrad and I am a student at Anzar High School at San Juan Bautista, California. My question is: Why does California Supreme Court have its headquarters in San Francisco, while the executive and legislative branches of government are located in the state capitol, Sacramento? How has the court changed over the years?

CHIEF JUSTICE GEORGE: Well, as you have heard from my opening remarks there was some dispute as to where the capitol of the state should be and once the capitol was settled in Sacramento there was resistance on the part of the California Supreme Court justices to be located there. And although it would be unfair to slight Sacramento today, in those days there was complaint about the flooding in the Sacramento River and there was also complaints that are set forth in the constitutional debates at the time for the new Constitution that was adopted in 1872 that would have required the Supreme Court to be there about the quality of the water and the quality of even the wine in Sacramento. And for a number of reasons, the court decided that it wanted to have the choice and a compromise was that the court would come twice a year back to Sacramento, but it could station itself where it wanted to, which was in San Francisco. Now in terms of how the court has changed there were many colorful characters on the court in those days. One justice always went around in a bowie knife in his possession. Some of them frankly consumed alcoholic beverages to excess. They were quite a rowdy bunch. That has changed, I can assure you. When we have disagreements, we voice them on paper and we get along very nicely. And you can also see that the makeup of the court in terms of gender and racial background is quite mix today, which it was not in those days. So, finally I would say the court went from three members to five and then up to seven, which seems to be an ideal number for deciding cases for the type that comes to our courts. Those are the changes over the years.

STUDENT: Thank you.

CHIEF JUSTICE: Thank you.

STUDENT: Good morning, Chief Justice George and justices of the California Supreme Court. My name is Kalpana Rathak and I am a student at Lynbrook High School at Saratoga, California. My second question is: How is it decided which justice on the court will author the majority opinion for the court, and how is it decided which justice or justices will write a dissent?

CHIEF JUSTICE GEORGE: Justice Kennard.

JUSTICE KENNARD: Thank you, Chief Justice George. After a majority of the court has voted to grant review of the decision of the Court of Appeal, the Chief Justice, as I mentioned earlier, assigns the case to one of the justices. In making the assignment, the Chief Justice considers such factors as the workload of the particular justice and the likelihood that the particular justice will be able to command a majority. To get a majority, the authoring justice needs the agreement or concurrence of three other justices and that is not as easy as it sounds. In gathering a majority, the authoring justice quite often will have to consider the varying viewpoints and the serious concerns mentioned in the other justices' written response. And as a result, quite often the authoring justice will have to make accommodations to bring in at least three other judges. Happiness, of course, is to get all of them to agree with you. And that decision is referred to as a unanimous decision.

With respect to the question as to how or what procedure is used in writing a dissent, there is no formal procedure for deciding which justice or justices will write a dissenting opinion. When the dissenters share essentially the same view, quite often there is some informal conversation as to which of the judges will actually write the dissent for the other dissenting judges. And again, other factors such as the workload of the dissenting judges may play a role as to who is going to take as one might call the laboring role. When the dissenting judges don't share the same view, but have a somewhat different view, then each of those dissenting judges is free to write his or her dissenting view. That is in a nutshell the procedure pertaining to your question as to how does a dissenting opinion come about.

STUDENT: Thank you.

CHIEF JUSTICE GEORGE: Thank you.

STUDENT: Good morning again, Chief Justice George and Justices of the California Supreme Court. My name is Hilary Brutzman and I am a student at Monterey High School in Monterey, California. My second question is: Why do judges sometimes disqualify or recuse themselves from participating in a particular case?

CHIEF JUSTICE GEORGE: Justice Baxter.

JUSTICE BAXTER: I think, we first of all need to look at it at context we do enjoy in America and here in California a tripartite system of government where the judicial branch enjoys and is a co-equal branch of government. But the only way the judicial branch can be effective and truly earn its stripes is by having the respect of its citizens, in particular those who actually use the court system, because without trust by those who use the court system, the

judicial branch would become ineffective. There are two areas where judges will commonly disqualify themselves from participation. One is for instance where a judge might have an actual conflict of interest. Suppose you are involved in an automobile accident and you sustain serious injuries and you file suit claiming that your brakes in your Ford automobile were defective and that is what caused the accident and that is what caused your injuries, and it turns out that the trial court judge owns \$100,000 worth of Ford Motor Company's stock. I suppose if your case was thrown out of court, you would question the impartiality of the judge, regardless of whether he was right or wrong because he would have in that instance an actual conflict of interest. Another area is where a judge has a perceived bias. An example of that would be a case where you file suit against someone, who turns out to be a long-lost distant relative of the judge. And the judge considered the matter very carefully and actually conclude in his own mind that he could be fair to both sides and your case is thrown out court, perhaps properly so. But, if the perception would be or at least a reasonable person could perceive that relationship to have caused the result, obviously the reputation and the respect for the judicial branch is diminished. So the bottom line is that it is essential for those who use the court system to view the scales of justice as being absolutely level at the time when they invoke the court system. And it only when the scales are level that the respect for the judicial process prevails.

STUDENT: Thank you.

JUSTICE BAXTER: Thank you.

CHIEF JUSTICE GEORGE: We will take one more question before the justices start asking the questions of the lawyers.

STUDENT: Good morning again, Chief Justice George and Justices of the California Supreme Court. My name is Analiza Svenhaug and I am a student at Harbor High School in Santa Cruz, California. My second question is: Why does the court sometimes overrule the will of the people by refusing to apply an initiative measure adopted by the voters?

CHIEF JUSTICE GEORGE: Justice Werdegar.

JUSTICE WERDEGAR: Thank you, Analiza. It is interesting that you mention initiative and not laws passed by the Legislature because as you know an initiative can come up from the people and be drafted by laypeople. Anyone can draft an initiative, and if they can get enough signatures to put it in the ballot, the voters vote on it. So initiatives don't go through the screening process and the legislative hearings and the editing that legislation

and the Legislature does. No court wants to “overrule the will of the people”, believe me. But under tripartite system of government which was reference earlier, the courts are the branch that has the responsibility to uphold the principles of the federal and state Constitutions. So if an initiative has been drafted in such a way that the court after looking at it and hearing the arguments from both sides concludes violates the principles of our Constitution, it is the court’s duty to strike it down. I would just conclude by saying, of course, our Constitution expresses the enduring will of the people whereas an initiative that was an inartfully drafted may just express the temporary, transitory will of the people at the time.

STUDENT: Thank you.

CHIEF JUSTICE GEORGE: I would like to thank all of the students to ask such good and probing questions and we certainly enjoy our dialogue with you and we hope you enjoy hearing the oral arguments. And now I will ask the clerk to call this morning’s calendar.