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**Thirty Years After a Hundred-Year Flood:  
Judicial Elections and the Administration of Justice**

**Sunday, October 2, 2016  
8:30 AM - 10:00 AM**

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**Thirty Years After a Hundred Year Flood:  
Judicial Elections and the Administration of Justice**

Sunday, October 2, 2016  
8:30 – 10:00 a.m.

**I. INTRODUCTION**

**A. Panelists**

Former Justice Joseph Grodin  
Former Justice Cruz Reynoso  
Dean Erwin Chemerinsky

**B. The Hundred Year Flood**

**“State Supreme Court Beyond Public Influence, Lucas Says”**

Los Angeles Times, May 27, 1987

Despite the voters’ unprecedented rejection last fall of three of its members, the California Supreme Court will not be influenced by “elections or polls or anything else,” Chief Justice Malcolm M. Lucas said in a newly published interview.

“What happened to us last year was analogous to a 100-year flood — a very unusual circumstance, which I do not anticipate happening again,” Lucas said in remarks printed in the June issue of California Lawyer, a publication of the State Bar. “. . . I look for a much more tranquil period ahead.”

## II. OVERVIEW OF JUDICIAL TERMS AND SELECTION

### A. History

1. Declaration of Independence: the King “has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

2. Early history in the states — no elections; many states provide lifetime tenure.

3. Mid-19th Century to early 20th Century — partisan elections, including in California.

4. Commission/merit systems and retention elections.

5. California — retention elections for appellate justices since 1934.

a. Current California Constitution, article VI, section 16

Subdivision (a): “Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term.”

Subdivision (d)(1): “Within 30 days before August 16 preceding the expiration of the judge’s term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.”

Subdivision (d)(2): “The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies. A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments.”

b. Current California Elections Code, section 13210

Subdivision (d): “In the case of candidates for Justice of the Supreme Court and court of appeal, within the rectangle provided for each candidate, and immediately above each candidate’s name, there shall appear the following: ‘For (designation of judicial office).’ There shall be as many of these headings as there are candidates for these judicial offices. No heading shall apply to more than one judicial office. Underneath each heading shall appear the words ‘Shall (title and name of Justice) be elected to the office for the term provided by law?’ ”

**B. Variety of terms**

1. Life tenure
2. Term limits, with or without reappointment possibility
3. Retention elections
4. Contested elections

### III. LIMITS — OR LACK THEREOF — IN JUDICIAL ELECTIONS

#### A. Campaign Contributions

##### 1. **Williams-Yulee v. Florida Bar (2015) 135 S.Ct. 1656**

Our Founders vested authority to appoint federal judges in the President, with the advice and consent of the Senate, and entrusted those judges to hold their offices during good behavior. The Constitution permits States to make a different choice, and most of them have done so. In 39 States, voters elect trial or appellate judges at the polls. In an effort to preserve public confidence in the integrity of their judiciaries, many of those States prohibit judges and judicial candidates from personally soliciting funds for their campaigns. We must decide whether the First Amendment permits such restrictions on speech.

We hold that it does. Judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor — and without having personally asked anyone for money.

##### 2. **Citizens United v. Federal Election Comm’n (2010) 558 U.S. 310**

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an “electioneering communication” or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. § 441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 203–209, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). *Austin* had held that political speech may be banned based on the speaker’s corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that “*Austin* was a significant departure from ancient First Amendment principles,” *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (*WRTL*) (SCALIA, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.

### 3. Caperton v. A.T. Massey Coal Co., Inc. (2009) 556 U.S. 868

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.

Under our precedents there are objective standards that require recusal when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

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After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship [chairman, CEO, and president of the defendant company] decided to support an attorney who sought to replace Justice McGraw. Justice McGraw was a candidate for reelection to that court. The attorney who sought to replace him was Brent Benjamin.

In addition to contributing the \$1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost \$2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U.S.C. § 527. The § 527 organization opposed McGraw and supported Benjamin. [Citation.] Blankenship's donations accounted for more than two-thirds of the total funds it raised. [Citation.] This was not all. Blankenship spent, in addition, just over \$500,000 on independent expenditures — for direct mailings and letters soliciting donations as well as television and newspaper advertisements — "to support . . . Brent Benjamin." [Citations.]

To provide some perspective, Blankenship's \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. [Citation.] [Plaintiff] Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined. [Citation.]

Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%). [Citation.]

#### **4. Alicia Bannon, Rethinking Judicial Selection in State Courts (Brennan Center for Justice 2016) (footnotes omitted)**

In the past 15 years, high-cost supreme court races have become commonplace. In the 2000-09 decade, 20 of the 22 states that use contested elections to select judges set spending records, and new records for contested elections have already been set in five states since 2010. More recently, retention elections, where a judge runs unopposed and faces a yes-or-no vote, have seen similar patterns. Average spending per seat in retention elections nationwide has increased tenfold from 2001-08 to 2009-14 (from an average of \$17,000 per seat to \$178,000 per seat, respectively). In Florida, a 2012 retention election for three supreme court justices saw nearly \$5 million in spending and was the second most expensive judicial election in the country that year. During

the entire previous decade, Florida Supreme Court retention elections had seen a paltry \$7,500 in spending (all in 2000).

These spending trends have occurred against the backdrop of a series of U.S. Supreme Court decisions that weaken states' capacity to regulate campaign finance. Most notably, after *Citizens United v. FEC*, which barred restrictions on independent spending by corporations and unions, spending by outside groups has surged. In 2013-14, outside spending as a portion of total spending in state supreme court elections set a new record — much of it coming from groups that do not disclose their donors. In 2009-10, outside spending was 16 percent of total spending; in 2013-14, it was 29 percent.

These trends also reflect new attention by interest groups in judicial elections, most often rooted in battles over tort reform and the perceived business-friendliness of state courts. Nearly two-thirds of contributions to supreme court candidates in 2013-14 came from business interests, lawyers, and lobbyists — all interests that regularly appear in state court. While outside spending is harder to track due to weak disclosure laws, many of the recent high spenders, such as the Republican State Leadership Committee (which spent \$3.4 million in total on judicial races in five states in 2014) and Pennsylvanians for Judicial Reform (which spent \$3.4 million on Pennsylvania's 2015 supreme court election), are funded either by business interests or the plaintiffs' bar. (Although both sides have participated in the spending arms race, in the aggregate, groups supporting conservative justices have far outspent the other side.)

## B. Candidate Speech

*Republican Party of Minnesota v. White* (2002) 536 U.S. 765

The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. [Citation.] Since 1912, those elections have



been nonpartisan. [Citation.] Since 1974, they have been subject to a legal restriction which states that a “candidate for a judicial office, including an incumbent judge,” shall not “announce his or her views on disputed legal or political issues.” [Citation.] This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the “announce clause.” Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. [Citation.] Lawyers who run for judicial office also must comply with the announce clause. [Citation.] Those who violate it are subject to, *inter alia*, disbarment, suspension, and probation. [Citation.]

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There is an obvious tension between the article of Minnesota’s popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court’s announce clause which places most subjects of interest to the voters off limits. (The candidate-speech restrictions of all the other States that have them are also the product of judicial fiat. [Footnote omitted.]) The disparity is perhaps unsurprising, since the ABA, which originated the announce clause, has long been an opponent of judicial elections. [Citations.] That opposition may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. “[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.” [Citations.]

The Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment.

#### **IV. DO JUDICIAL ELECTIONS AFFECT DECISION MAKING?**

##### **A. The Crocodile in the Bathtub**

- 1. Gerald Uelman, Crocodiles In The Bathtub: Maintaining The Independence Of State Supreme Courts In An Era Of Judicial Politicization, 72 Notre Dame L. Rev. 1133 (1997)**

The late Honorable Otto Kaus, who served on the California Supreme Court from 1980 through 1985, used a marvelous metaphor to describe the dilemma of deciding controversial cases while facing reelection. He said it was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.

- 2. "State Supreme Court Beyond Public Influence, Lucas Says"**

Los Angeles Times, May 27, 1987

Asked about the influence of the electorate on the justices, [Chief Justice] Lucas said:

"Justice Kaus once said that we should ignore the election, but it's a little like ignoring the alligator in the bathtub. . . . My thought, however, is that we've taken the alligator out of the bathtub and made alligator shoes out of it.

"I don't think our court is considering elections or polls or anything else that is happening in terms of our day-to-day activities and decisions," he said.

- ##### **B. Michael S. Kang & Joanna M. Shepherd, Judging Judicial Elections, 114 Mich. L. Rev. 929 (2016)**

We extend our earlier study here by exploring the empirical relationship between attack advertising and judicial decision-making. We demonstrate that judges apparently respond to the

threat of attack advertising in just the way that critics of judicial elections fear. Television attack ads, which often vilify judges for casting votes in favor of criminal defendants, are associated with an increase in judicial hostility to criminal defendants in state supreme court appeals. Even if attack advertising does not reduce judges' reelection rates, our findings offer a worrisome explanation for this result and depict a considerably bleaker picture of judicial elections. Our findings here, in combination with previous work, suggest that judges might feel pressure to preempt electoral vulnerabilities on the critical issue of criminal law as campaign spending and attack advertising run higher.

**C. “In states with elected high court judges, a harder line on capital punishment”**

Reuters, September 22, 2015

A review of 2,102 state supreme court rulings on death penalty appeals from the 37 states that heard such cases over the past 15 years found a strong correlation between the results in those cases and the way each state chooses its justices. In the 15 states where high court judges are directly elected, justices rejected the death sentence in 11 percent of appeals, less than half the 26 percent reversal rate in the seven states where justices are appointed.

Justices who are initially appointed but then must appear on the ballot in “retention” elections fell in the middle, reversing 15 percent of death penalty decisions in those 15 states, according to opinions retrieved from online legal research service Westlaw, a unit of Thomson Reuters.

**D. “Clashing courts: Law restricts federal judges’ ability to intervene in state criminal cases”**

Los Angeles Times, September 5, 2015

Some law-and-order groups — and conservatives on the 9th Circuit — see the restrictions [on federal courts’ power to overturn state convictions] as a valuable correction. The

California Supreme Court should have the last word because the justices serve at the will of the voters, said Kent Scheidegger, a director of the pro-death penalty Criminal Justice Legal Foundation.

“We can’t get rid of Reinhardt,” Scheidegger said. “We got rid of Rose Bird.”

E. *People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, cert. denied (2016) 136 S.Ct. 1714

Defendant claims that his constitutional rights to due process and a fair trial were violated and are being violated because the trial court judge was, and the justices of this court are, subject to judicial elections. Defendant maintains that judges who are subject to election cannot be impartial because they might be removed from office if they rule in favor of a capital defendant.

Defendant cites *Tumey v. Ohio* (1927) 273 U.S. 510, 515–517, 47 S.Ct. 437, 71 L.Ed. 749, which reversed a conviction for possessing intoxicating liquor under the Ohio Prohibition Act because the trial was conducted by the mayor of the village. A local ordinance provided that the village would receive half of the \$100 fine collected from the defendant and the mayor would “receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases.” (*Id.* at p. 519, 47 S.Ct. 437.) The high court recognized “[t]hat officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided . . .” (*Id.* at p. 522, 47 S.Ct. 437.) The high court noted that the fact that judges are also taxpayers who would indirectly benefit from the collection of fines is not enough to disqualify them because “the circumstance that there is no judge not equally disqualified to act in such a case had been held to affect the question.” (*Ibid.*) However, disqualification certainly is required if the judge “has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case.” (*Id.* at p. 523, 47 S.Ct. 437.) Here, any interest stemming from judicial elections is indirect and nonpecuniary, and affects all California judges equally.

Defendant also relies upon *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 873, 129 S.Ct. 2252, 173 L.Ed.2d 1208, which held that a justice of the West Virginia Supreme Court of Appeals should have recused himself from an appeal from a \$50 million verdict against a coal company because the board chairman of the coal company had contributed \$3 million to support the justice's election. The high court observed: "The proper constitutional inquiry is 'whether sitting on the case . . . 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"" [Citations.] 'What degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision."'" (*Id.* at p. 879, 129 S.Ct. 2252.) The high court noted that each case that had held that a judge must be recused on this basis "dealt with extreme facts that created an unconstitutional probability of bias." (*Id.* at p. 887, 129 S.Ct. 2252.) No such extreme facts demonstrating a denial of due process are present here.

## V. REMEMBERING THE 1986 ELECTION

## VI. THE LANDSCAPE SINCE 1986

### A. California

#### 1. "Chief Justice George Raises Funds, Criticizes Election Process / Abortion foes seek ouster; he says job isn't affected by it"

San Francisco Chronicle, March 6, 1998

Chief Justice Ron George, under attack from abortion foes as he faces confirmation by voters in November, yesterday denounced the influence of politics on the judiciary.

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It was shortly after his elevation [to Chief Justice] that he incurred the wrath of anti-abortion forces because he wrote a majority decision overturning a law requiring parental consent for teenagers seeking abortions.

Also targeted is Associate Justice Ming Chin, another [Governor Pete] Wilson appointee who joined George in the decision.

Two other associate justices, Stanley Mosk, first appointed in 1964 by former Governor Pat Brown, and Janice Rogers Brown, another Wilson appointee, are also on the ballot. But they differed with George and Chin on the parental consent decision, and have not attracted opposition.

## **2. “The specter of more frequent ‘100-year floods’ ”**

At The Lectern blog, August 20, 2014

[Reporting about] an email from a group upset about the [California] Supreme Court’s recent decision to strike from this November’s ballot a proposition asking the voters to give their advisory opinion whether the U.S. Constitution should be amended to overturn the U.S. Supreme Court’s Citizens United opinion. According to the email, the state Supreme Court’s action “proves we now have a problem with right wing agenda driven judges throughout our court system.” The email identified Justices [Goodwin] Liu, [Marvin] Baxter, and [Kathryn] Werdegarr as three of the five “responsible” judges who are subject to a retention election this November and said, “if [the justices] think they can act unilaterally to deny the People a chance to speak out in opposition to Citizens United, maybe we’ll all come out and vote anyway, AGAINST them.”

## **B. Other states**

### **1. “Rejection of Iowa judges over gay marriage raises fears of political influence”**

Los Angeles Times, November 5, 2010

Iowa's rejection of three state supreme court justices who ruled in favor of same-sex marriage underscored the growing electoral vulnerability of state judges as more and more are targeted by special interest groups, legal scholars and jurists said Thursday.

"It just illustrated something that has been troubling many of us for many, many years," California Chief Justice Ronald M. George said. "The election of judges is not necessarily the best way to select them."

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Although Iowa's vote will have no immediate effect on marriage rights there, it sends a signal to other judges that voters are watching.

"It will pressure judges, or some judges anyway, perhaps even subconsciously, in their decision-making by what would be popular or what might meet the political preferences of the moment," George said. "And the judge's loyalty has to be first and foremost to the rule of law, and not to the political or social or economic pressures or personal preferences."

## **2. "Tennessee Supreme Court justices win after GOP campaign against them"**

Los Angeles Times, August 8, 2014

Tennessee voters rejected an effort Thursday to oust three state Supreme Court justices who were under attack by conservatives for being too liberal for the state.

Chief Justice Gary R. Wade and Justices Cornelia A. Clark and Sharon G. Lee all retained new eight-year terms on the state's highest court.

Wade and Lee won with 57% of the vote. Clark won with 56% of the vote, according to the Tennessee secretary of state's office.

3. **“Outraged by Kansas Justices’ Rulings, Republicans Seek to Reshape Court”**

New York Times, April 1, 2016

Washington is locked in partisan warfare over control of the Supreme Court. But it is hardly the only place. Look at the states, where political attacks on judicial decisions are common and well-financed attack ads are starting to jar the once-sleepy elections for State Supreme Court seats.

Nowhere is the battle more fiery than here in Kansas. Gov. Sam Brownback and other conservative Republicans have expressed outrage over State Supreme Court decisions that overturned death penalty verdicts, blocked anti-abortion laws and hampered Mr. Brownback’s efforts to slash taxes and spending, and they are seeking to reshape a body they call unaccountable to the right-tilting public.



*The following documents are provided as reference materials only.*

IN PURSUIT  
OF JUSTICE  
REFLECTIONS OF A  
STATE SUPREME COURT  
JUSTICE

JOSEPH R. GRODIN

With a Foreword by  
Justice William J. Brennan, Jr.

University of California Press  
Berkeley • Los Angeles • London

## Elections

A friend asked me, while Judge Robert Bork's nomination to the United States Supreme Court was pending before the Senate Judiciary Committee in 1987, what I would do if I were a member of the committee, and I said I would vote to confirm and pray I would be outvoted. I like to think I was being facetious, and that if I were really in that position, I would act in a more principled fashion, but my answer was faithful to the ambivalence I felt then and continue to feel now.

Many of my liberal friends had no qualms about opposing Bork and did not understand why I should have any; after all, wasn't it Bork's conservative supporters who spearheaded the campaign against me? What's sauce for the goose . . . , my friends said. But then they did not experience the election as I did.

I was skeptical of some of Bork's legal theories and of what seemed to be his tendency to become captive to abstractions, but I felt sympathy for him because I knew what he must have been going through. It is dreadful for a judge to find himself in the midst of a political maelstrom and to see his views exaggerated and mischaracterized by opponents, as Bork's views clearly were at times. When opponents sought to demonstrate his bias by subjecting his opinions to statistical analysis instead of legal analysis, and when they put on television a simplistic and misleading advertisement in opposition to his confirmation, it reminded me of the 1986 California election.

But it was more than sympathy that made me uneasy; it was concern for the integrity of the judicial function and the long-range

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implications of the kind of campaign that was being waged. Granted that the Senate throughout its history has at times used its constitutional authority to withhold confirmation on what might be called ideological grounds; granted that President Reagan may legitimately be charged with an excess of ideological zeal in some of his appointments to the federal bench; and granted that some of the views that Bork expressed over the years might properly be viewed as extreme, I still was disturbed by the extent to which Bork was questioned (and the extent to which he answered!) as to his views regarding particular precedents and issues as if he were a politician making campaign promises. I was disturbed also by the overall politicization of the appointment. Regardless of the result, it was bad precedent.

Nevertheless, the politicization of the Bork campaign and its portent for the future integrity of the judicial branch were both small-time compared to the nature and potential impact of a full-blown judicial election such as my colleagues and I went through in 1986. The Senate Judiciary Committee and the Senate itself at least provide structured settings for rational inquiry and consideration of the criteria thought to be relevant to a judicial appointment. In fact, the Bork hearings were highly educational; they became for a while a national pastime, and I was astonished to discover how intrigued my nonlawyer friends were with the nuances of constitutional debate. A judicial election—or at least the one I experienced—lacks such a structure and thus tends to degenerate into slogans and thirty-second television spots singularly inappropriate to the evaluation of judicial candidates.

Moreover, the federal confirmation process takes place only once, *before* the candidate has served in the position to which he or she is seeking confirmation. At that juncture there is something to be said for the Senate acting in counterpoint to the president, who after all is free to take, and presumably does take, the candidate's "philosophical" views into account. A judicial election that occurs some time *after* the candidate has served in the position poses a somewhat different problem, for it tends inevitably to become something of a referendum on the content of the candidate's decisions. These characteristics of judicial elections, along with the ugly aspects of campaign fund-raising, pose risks to the integrity of the judicial process that are deserving of far more public attention and

scrutiny than they have thus far received. In this chapter I shall try to explain why.

First, a bit of history may be useful. During the American colonial period King George III retained and exercised the power to appoint and remove judges—a circumstance so deeply resented by the colonists that the Declaration of Independence lists among its grievances, "He has made judges depend on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Determined to avoid undue executive influence over the judiciary, eight of the original thirteen states provided in their constitutions for selection of judges by one or both houses of the legislature, and the remaining five states qualified executive appointment by insisting on legislative concurrence. Apparently determined further to protect judicial independence, a majority of the states provided for lifetime appointments, subject to good behavior. At that time popular elections for judges did not exist.

But in the second quarter of the nineteenth century there was something of a revolt among the citizenry. Judges, who had never been very popular as a group, became even less so. Thomas Jefferson, when he was president, had engaged in vehement attacks on Federalist judges whom he regarded as intent on blocking the program of the new Democrats. President Andrew Jackson was the standard-bearer of a new populism that preached voter control over all aspects of government, including the judiciary.

The populist ethos of judicial accountability found common ground with some leaders of the organized bar, who believed that elections would be a means of improving the quality of the bench (mainly because they thought it would give the bar more of a voice in the process) and at the same time of enhancing the authority of the judicial branch by providing it with a base of popular support. The result was a uniquely American phenomenon—the partisan judicial election. From 1849 (when California became a state) through 1913 all newly admitted states adopted the partisan election as a means of filling judicial vacancies upon expiration of a fixed term, and most of the older states amended their constitutions to the same effect.

But then the pendulum swung back. Critics began to charge that elections, and particularly elections based on party politics, were inconsistent with the standards of quality and independence ex-

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pected of the judicial branch. A search for alternatives began. Around the turn of the century about a dozen states moved to so-called nonpartisan elections, in which party designations were not used on the ballot, but that system also evoked criticism. It was charged that selections were in fact still being made by party leaders, only now the public was being kept in the dark and deprived of cues that would enable them to vote intelligently. Roscoe Pound, famous jurist and dean of Harvard Law School, in 1906 delivered a speech entitled "Causes of Popular Dissatisfaction with the Administration of Justice," in which he asserted that "putting courts into politics, and compelling judges to become politicians in many jurisdictions . . . [had] almost destroyed the traditional respect for the bench."

In 1913 the American Judicature Society, an organization devoted to improving the administration of justice, was formed, and it came to advocate two related changes in the way judges were appointed. First, it advanced what came to be known as the commission plan, or the merit plan, in which a governor in filling a judicial vacancy would be limited in his selection to a list of candidates prepared by some blue-ribbon, and hopefully nonpartisan, commission. Such plans exist presently in about half the states. In the 1960s a commission plan was proposed for California, but the commission it contemplated would have been dominated by the state bar, which was in turn dominated by the large law firms. Former Chief Justice Phil Gibson and many others (including myself) opposed the plan on the ground principally that it would limit the governor's discretion unduly and that several of the great justices of the state (including Gibson himself) would probably not have made it onto the sort of lists that such a commission was likely to produce.

The society's second recommendation was to subject judges initially appointed through the commission plan to a "retention election," in which their names would appear on the ballot without opposition and voters would vote yes or no on the question of whether they should be retained in office. The idea was that the retention election would insulate judges substantially from politics while preserving the right of the people to pass judgment on them.

California was the first state to adopt the retention election system, though without the merit plan component. It did so in 1934

through an initiative amendment to the state constitution. Under that system appellate justices are appointed by the governor to vacancies as they occur, subject to confirmation by the Commission on Judicial Appointments. Once confirmed by the Commission, the justice takes office and begins to serve, but his or her name appears on the ballot at the first gubernatorial election following the appointment, and the justice must receive a majority of the votes cast to continue in office. Appointment is for a twelve-year term, but if the appointee's predecessor left office before the completion of the term, the appointee holds office only for the balance of that term, and then must stand for election a second time. If the appointee receives a majority of the votes cast in that election, he or she does not have to face a retention election for another twelve years. This system applies only to appellate justices; trial court judges, who serve for a shorter term, are subject to being "bumped" from their benches by a challenger in a contested election.

The background of the 1934 constitutional amendment provides a historical perspective and a touch of irony. In that era it was the conservative elements in society that viewed judicial election campaigns as a threat, especially in light of the emerging political strength of labor unions. The Commonwealth Club of San Francisco, then as now a generally conservative Republican organization, had long contended for replacement of judicial elections with lifetime appointments, as in the federal system, but it came to recognize that was not a politically attainable objective. It settled on the retention election model on the theory that it would insulate appellate justices from the political pressures generated by the existing system of electoral challenge. The principal backers of the 1934 initiative—the state Chamber of Commerce and the state Republican party—supported it as a law-and-order measure, necessary to assure that criminals would receive their just deserts instead of the undue leniency unions and other critics of the social order might prefer. And the San Francisco Labor Council was the most vocal opponent of the initiative, arguing that judges should be responsive to the public will. As with the issue of judicial activism, positions seemed to depend primarily on who owns the gored ox.

From 1934 to 1986 no sitting judge had been removed by a retention election in California, but beginning in the 1960s there were

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portents of such an eventuality. Contrary to the assumption of both the proponents and opponents of the 1934 initiative, however, the challenge came not from the left but from the right.

In chapter 7 I described the sharp decline in affirmative votes for Supreme Court justices in the election of 1966 after the court's decision in *Mulkey v. Reitman* invalidated a popular initiative that had authorized private discrimination in housing. The next substantial challenge occurred in 1978 when Chief Justice Rose Bird was on the ballot for confirmation. There was strong opposition led by ultra-conservative state senator H. L. Richardson and bolstered by a coalition of public officials and agricultural interests. The opposition, contending that the chief justice was lax on crime, focused partly on a concurring opinion she had written in *People v. Caudillo*, in which the majority of the court concluded—quite correctly in my judgment—that in prescribing more serious penalties for crimes involving “great bodily injury,” the legislature had not intended to include all rapes in that category. The chief justice agreed with the majority but stuck her neck out to write separately on the issue, and her opponents made it sound as if the first female justice on the Supreme Court did not appreciate the horrors of rape. They pointed also to her reputation for causing friction within Governor Brown's administration and to her lack of prior judicial experience. The latter did not seem to be a major shortcoming in the case of several of her predecessors, including two revered chief justices, Phil Gibson and Roger Traynor (neither of whom had served a day on the bench prior to their appointment); but even some supporters of Governor Brown thought he should have appointed veteran justice Mathew Tobriner or Stanley Mosk to the chief justiceship and made Bird an associate justice, possibly to elevate her at some later time. In addition, the chief had ruffled some feathers within the judicial establishment when she assumed control of the Administrative Office of the Courts and started doing things differently. No one in the opposition ever mentioned the chief's gender, of course, but it would be naive to suppose that it did not play a role in the formation of attitudes toward her chief justiceship. Finally, there was the sensational story that appeared in the *Los Angeles Times* on the day of the election suggesting that the chief had conspired to withhold a controversial decision until after the elec-



tion (see chapter 4). In the face of all of this opposition Chief Justice Bird was confirmed, but by less than 52 percent of the vote—the lowest percentage in California history.

Some political “experts” decreed that the closeness of the 1978 election was attributable to personal characteristics of the chief justice and was no portent of the future; but the next election, four years later, proved them wrong. In 1982 the chief was not on the ballot, but four associate justices of the Supreme Court were, and three of these (Cruz Reynoso, Allen Broussard, and Otto Kaus) were opposed by conservatives, including the Republican party and future governor (then attorney general) George Deukmejian himself. The three were quite different in background, outlook, and judicial performance. What they had in common was that they were all appointed by the same governor—“Jerry’s judges,” the opposition called them. But the death penalty issue lurked in the background. Deukmejian, asked by a reporter to explain the apparent inconsistency between his fairly recent vote on the Judicial Appointments Commission in favor of Kaus and his announced opposition, said it was because of Kaus’s opinion in a death penalty case. And so the die was cast.

The campaign against the Brown-appointed justices was not strongly financed or well run, but despite that fact the three received the lowest vote percentages for justices in any previous judicial retention election except for the 1978 Rose Bird election. Justice Kaus did the best with 57 percent; Justice Broussard came next with 56.2 percent; Justice Reynoso barely made it with 52.4 percent. The unopposed justice, Frank Richardson, breezed by with 76.2 percent, within the normal range. The impact of the campaign was clear.

My own appointment to the Supreme Court was confirmed by the Commission on Judicial Appointments just seven weeks after that election. I was under no illusions. I knew that I would be on the ballot in 1986 (the next gubernatorial election year) along with Justice Reynoso; I knew that Chief Justice Bird would be on the ballot with us; and I suspected that she, at least, would face organized opposition. But worrying about a retention election was the last thing on my mind at the time; I was far more worried about how I was going to get my work done on the court.

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Moreover, from the outset people who seemed to know what they were talking about assured me that I had nothing to worry about. I had an excellent reputation, they said, and Governor Deukmejian, who had voted for me three times as a member of the Commission on Judicial Appointments, had publicly endorsed my competence and fair-mindedness when he voted to confirm my appointment to the Supreme Court.

Then in the latter part of 1984 several groups formed to announce their intended opposition not only to the chief justice but to me and Justice Reynoso, as well, on the grounds that we were too lenient toward criminal defendants in general and too hostile toward the death penalty in particular. (A couple of them threw in Justice Stanley Mosk, also an appointee of a Democratic governor, for good measure.) The groups were for the most part quite right-wing and did not seem to represent a broad spectrum of the electorate; but I met with some close friends, and we decided that I should have the advice of a political consultant just in case a serious threat developed.

It did, and quite soon thereafter. Meeting under the unofficial auspices of the state District Attorneys' Association, a group of deputy district attorneys from throughout California—though again I was assured by "knowledgeable" people that they were only after the chief justice—adopted a resolution opposing the three Brown appointees. Justice Mosk was also scheduled to be on the ballot if he decided to seek an additional term on the court; but though he appeared on the basis of his opinions to be a natural target for the deputy district attorneys, they withheld taking a position on him pending his decision on whether to run.

By the spring of 1985 it was apparent that the opposition campaign was going to be formidable. There were two main organizations. One of them, Crime Victims for Court Reform, was headed by Bill Roberts, former manager of the gubernatorial campaigns of both George Deukmejian and Ronald Reagan. Its publicity featured relatives of victims in a number of murder cases, but it received substantial funding from the Farm Bureau Federation and the Western Growers Association. Additional contributions along the way came from oil and gas interests, insurance interests, and real estate interests.

The other organization, headed by "tax crusaders" Howard Jarvis and Paul Gann (who sponsored Proposition 13 in 1978), was called Californians to Defeat Rose Bird. Despite its name, the organization had identified me, Justice Reynoso, and Justice Mosk as covillains. It relied on extensive direct mailings—a technique developed and perfected by the Jarvis-Gann group—to raise funds for the campaign and, incidentally, for the campaign's organizers. I recall a mailing the group sent out: it invited recipients to identify their own individual targets and contribute a suggested amount for each. I was insulted to discover that the suggested amount for the chief justice was four times the suggested amounts for the rest of us. In early 1986 the two groups joined forces under the banner of the California Coalition for Court Reform and dropped opposition to Justice Mosk.

The question was what sort of campaign, if any, was to be waged on our behalf. One possibility that occurred to me, and that I discussed with my friends, was to do nothing. After all, the early polls showed that I was ahead among people who had an opinion about me, and the fact that this included a relatively small percentage of voters—the remainder either not knowing who I was or having no reaction—seemed to me an advantage rather than a liability. When a friend asked me how it felt to have less name recognition than a baby who had been born the previous week to Farah Fawcett, I said it felt just fine. Moreover, doing nothing and allowing others to come to my defense if necessary—and if they were of a mind to do so—would avoid the unpleasantness and appearances of impropriety that I suspected would attend any vigorous campaign.

Political pros, however, persuaded me that a do-nothing approach was exceedingly dangerous—that low name recognition is evidence of a vacuum that can be filled one way or the other by media advertising, and that if I left it to the opponents to fill that vacuum, I would lose. Though I lost anyway, events proved their analysis was probably correct. My friends persuaded me that trying to remain "pure" by doing nothing was a form of suicide not demanded by legal ethics and certainly not contemplated by the system of elections the state constitution had established.

Justice Reynoso and I both favored encouraging the formation of a single, statewide group, independent and bipartisan, perhaps or-

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ganized by leaders of the state bar. Both of us received communications from lawyers and others around the state who were prepared to move in that direction if we gave the nod. But the chief justice was adamantly opposed to such a development. On the basis of her prior experience in the 1978 election she had become wary of others purporting to act on her behalf, and she insisted on forming and controlling her own separate committee. In the face of her opposition there seemed little prospect of an independent group being formed at that time, even one limited to the support of Justice Reynoso and myself. Though there were lawyers and others who did not like the chief and who did like the two of us, they were reluctant to go public with that position, and lawyers who were prepared to support all three of us were reluctant to incur the chief's wrath. In the end Justice Reynoso and I each formed our own campaign committees, hired political consultants, and entered the battleground.

Nothing in my prior experience had equipped me for what was to come. In the late 1960s I ran for the city council in Berkeley (and lost), but Berkeley politics is hardly a model for the state—I was the "fascist" candidate in a field that ranged from liberal Democrat to the far left. In addition, campaigning locally and statewide are two quite different beasts. I had dabbled in statewide politics, but mainly advocating issues and not working at the core of any candidate's campaign. Traveling about the state giving speeches and interviews, engaging in intensive political fund-raising, making television spots—all of this was to me a new adventure.

I have to say that there were aspects of the experience that I enjoyed, or that at least I considered valuable. A candidate is bound to derive from a campaign a certain amount of ego satisfaction, whatever the nature of the opposition. Besides, I like public speaking, and I felt a challenge in trying to explain myself and the courts to audiences in nonlegal communities, such as at Rotary Club luncheons or union meetings. Speaking to law enforcement groups (two of which ended up endorsing me) was of course a special challenge.

Moreover, I learned a great deal in the process, not only about political campaigns in general and judicial campaigns in particular, but also about my state and the people in it, and about my self as well. Appellate justices tend to live rather restricted lives, and the

process of meeting and communicating with people from various parts of the state and various walks of life is mutually instructive. That much, at least, I can say for judicial elections. As a student who came to hear me speak at a state university put it, if it were not for the election, I probably would not have been there.

I would also concede that judicial elections can serve a useful purpose in maintaining public confidence in the judiciary. There was a time in our nation's history when judges were drawn from narrow segments of society and were seen as representing the interests of particular groups or classes. That can happen again. Indeed, perhaps the public in California saw us in that light. The public expression of discontent through the ballot may have a certain regenerative effect.

There is, however, a darker side to a judicial election, which I found myself confronting with increasing intensity as the campaign wore on. I do not mean simply the wear and tear on the candidate—that is a characteristic of any political campaign; and though trying to undertake campaign tasks under the pressure of judicial duties and being attacked publicly as a judge who is callous to the victims of crime are not pleasant experiences, the price is surely one that the public has a right to exact if the process is otherwise worthwhile. It is the peculiar aspects of being a statewide candidate in a *judicial* election that are the subject of my concern.

I did not fully appreciate, when I was appointed to the court, the handicaps that canons and traditions of judicial ethics and decorum impose on a judge in such an election. Unlike most candidates for elective office, I could make no campaign promises. If I knew about opinions yet to be filed that would be pleasing to the voters (as was the case), I could not talk about them. My "platform" was limited to my past.

Moreover, the tradition is that a sitting judge is not supposed to talk publicly about opinions he or she has written or joined in such a way as to provide an interpretation of the decision. Part of the reasoning behind that tradition is that an opinion in which more than one judge joins is a collegial product, and each judge may have a different view as to its meaning. Another part is that a judge should not be in the business of announcing in advance how he or she might rule if a particular issue comes before the court, and public interpretation of a judge's remarks may have that effect.

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Whatever their force in the abstract, these considerations are particularly potent when a court has before it cases that bear close resemblance to cases previously decided. This was so, in the 1986 campaign, with respect to death penalty cases. There were about one hundred fifty death penalty judgments awaiting court consideration, and for me to talk publicly about past death penalty cases posed the risk that I would be understood as expressing an opinion about issues in pending cases as well. Death penalty jurisprudence was in a state of flux during this period at the federal level, and there was constant discussion within our court as to what United States Supreme Court precedents required. Anything that I or any other justice said in that sensitive arena was subject to misinterpretation. I decided that it would be improper for me to talk about death penalty cases in more than a very general way.

I also felt constrained about attacking my adversaries in public, and in particular about questioning their motivations. There was good reason to believe that for many of them the death penalty issue was a cover for objections to decisions in other areas or for a simple desire to make room on the court for appointments by a conservative governor whom everyone expected to win reelection in the gubernatorial race. But the fact is that I expected to win also, and I did not want to contribute to an atmosphere of hostility that would continue to hover over the court's deliberations in years to come. After all, the governor, the district attorneys, and the various business interests who were contributing to the opposition campaign were all frequent litigants before the court. So, much to the chagrin of the reporters who constantly lust after direct confrontation, I limited my comments to issues I could discuss in an impersonal way.

The constraints on campaigning were much less troublesome for me than the problem of fund-raising. The opposition started early and was raising big money for an announced media campaign. At first I thought I could get by with a low-level response; but on the advice of persons experienced in politics I decided I had to plan for the worst, and so my committee set out to raise a million dollars on my behalf.

We came close to our target, raising a bit more than nine hundred thousand dollars, but that was peanuts compared to what was raised elsewhere in the campaign. Altogether my committee,

those of Chief Justice Bird and Justice Reynoso, and the independent committee formed late in the campaign raised nearly \$4.5 million. The opposition raised more than \$7 million, and that does not include the amounts spent by political candidates who found it to their advantage to include an anti-Rose Bird message in their own advertising. Twelve million dollars to decide whether three justices of the Supreme Court should remain in office! I could not help thinking how many homeless people could have been housed and fed with all that cash.

The process of raising that money was one of the worst experiences of my life. We had fund-raising events, we sent fund-raising letters, and worst of all we made fund-raising phone calls. At first I resisted personally asking anyone for money, but our canons of judicial ethics in California expressly permit a judge who is opposed in an election to do that, and I was finally persuaded that I had to do it if we were to come anywhere near our fund-raising goal.

Money came from a variety of sources, but a large part of it came from persons and groups—lawyers and labor unions, for example—that had some interest, not to say stake, in the judicial process and in the outcome of cases. The same was true of the opposition: agricultural, insurance, oil and gas, and other business interests contributed large sums. And under California law there was no way I could insulate myself from knowing who had contributed. I had to sign periodic reports to a state agency listing each contribution and its source, and so did the opposition. All of this was not only personally distasteful but also unseemly and, unavoidable as it seemed to be, almost certainly erosive of public confidence in the long run.

The ugliness of fund-raising hit me toward the end of the campaign in a most dramatic way. I was talking to a lawyer in Los Angeles at the bar of a hotel where I was to speak. He informed me that someone had called him to ask for money for both me and Justice Reynoso and had told him that the two of us were keeping tabs on who contributed and who did not and that once we were confirmed, we would keep that in mind when it came to deciding cases. The information made me very upset, and I begged him to tell me the name of the person who had called him so that I could take steps to correct the situation; but he declined to do so. When

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I returned to San Francisco, I called my professional fund-raiser (yes, of course, I had several of those) and told him to get the word out that if I learned the identity of anyone who engaged in such tactics, I would personally report him to the state bar. He was surprised at my intensity.

I am confident that any judge worthy of his robes would not be influenced by such considerations. I made clear in my speeches that lawyers and others who supported me could expect nothing more in return than my attempt to do an honest job. But I would think that the appearance of impropriety, especially in the eyes of the general public, is unavoidable. As the Texas Supreme Court met to consider Texaco's appeal from a \$10-billion verdict in favor of Pennzoil, the judges (who are elected to their seats in contested elections) heard on both sides from lawyers who had contributed heavily to their campaigns. As it happened, Pennzoil's lawyers had contributed approximately \$315,000 to Texaco's mere \$72,000. A professor at the University of Texas was quoted in defense of the system as saying, "You use your resources to elect legislators favorable to your position; it's no different than electing judges favorable to your position." I think it is.

Even more disturbing than the fund-raising, however, was the atmosphere generated by the nature and focus of the opponents' attack. Their subtext was in accord with the premise of the Texas professor: confirming judicial appointments through election is no different than choosing among candidates for legislative or executive office; if you like their "voting record," vote for them, and if you do not, vote against them. Many politicians and editorial writers reiterated that view. Early polling showed that the message was well received. Though voters were nominally supportive of an independent judiciary, a poll by Pat Caddell in the spring of 1985 showed that they believed by a margin of 68 percent to 24 percent that they should vote against retention of judges with whose decisions they disagreed.

By *decisions* it is clear that what is meant is not the *opinion* the judge has written or signed, expressing the legal justification for the result, but the result itself, pure and simple. This was the scorecard approach, which achieved its peak in the death penalty arena. Opponents tabulated our votes in death penalty cases so as to



show the number of cases in which we had voted to affirm or to reverse, typically without the slightest mention, much less criticism, of the reasons underlying our opinions.

Governor Deukmejian invoked the scorecard approach when in late August of 1986 he finally announced his position regarding Justice Reynoso and myself. He had indicated his opposition to the chief justice back in 1984, and in the spring of 1986 he was challenging his opponent, Mayor Tom Bradley of Los Angeles, to take a position on her retention when a reporter asked him about Reynoso and me. He replied that on the basis of our records to that date he was inclined to vote against us but intended to wait and see how we decided future death penalty cases. Justice (now Chief Justice) Malcolm Lucas, an ex-partner of Deukmejian, told me that he had spoken personally with the governor and recommended that he endorse me. But in August the governor announced his opposition to both of us, relying on the fact that Justice Reynoso had voted to affirm in only one death penalty case, and I in five, to conclude that we were not "objective" in that arena.

The shallowness of that approach is reflected in Governor Deukmejian's comparison of our "voting records" in death penalty cases with that of our colleague, Justice Mosk. He observed that Justice Mosk had voted to affirm in a greater number of cases, the implication being that if another "liberal" judge had found it in his heart to do such a thing, there must be something wrong with our perceptions. The fact is that nearly all of the cases in which Justice Mosk voted to affirm while I voted to reverse fell into one of two categories. Some of them were cases in which the jury had been instructed that it should not consider sympathy for the defendant; Justice Mosk adhered to his dissenting view that such an instruction was permissible, whereas I followed the majority holding in *People v. Easley*, decided prior to my arrival on the court, that such an instruction violated federal constitutional standards. In the other category of cases Justice Mosk and I disagreed on how to apply standards for reversible error established by the United States Supreme Court and our court for situations in which the jury is not instructed that it must find *intent* to kill in order to impose the death penalty. This latter area of the law was in a state of flux, and in one of the pending death penalty cases I wrote a dissenting opinion, which Justice Mosk and Justice Lucas both signed, aimed at arriv-

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ing at a constitutionally acceptable procedure for dealing with such situations. (I have described the dimensions of that legal and practical dilemma in chapter 6.) My point, of course, is not that I was right and that Justice Mosk was wrong but that there existed between us legitimate legal disagreements that accounted for the difference in the "scores." To concentrate on the results without considering the reasons seems hardly a legitimate means of evaluating judicial performance. Besides, the governor failed to say how many more death penalty judgments I would have to vote to affirm to gain his approval.

The issue is more than that of fairness to the candidate—though I admit I still burn when I think about it. I recognize that politics is often unfair, and that people who choose to enter the political arena (if that is what we want to say judges do when they run for retention) have to take that into account. What concerns me more is the impact on our body politic—on courts and the way we view them—of such a cost-accounting approach to judicial evaluation.

During the campaign I declared that it was my goal to go to bed election night knowing, as best one can know such things, that I had not decided any case differently because of the election. I believe I achieved that goal, but I have to recognize that I may be wrong. At no time while I was on the court did I participate in or overhear any discussion as to how a particular opinion would "play" in the public ear. Any judge who articulated such a concern would have been frowned at by his colleagues. But one would have to be superhuman not to *think* about such things—Justice Kaus said it was like brushing your teeth in the bathroom and trying not to notice the crocodile in the bathtub. And having thought about them, how does a judge make sure that they do not influence his or her opinion one way or the other—by yielding unconsciously to public pressure or bending over backward to avoid it?

After he left the bench, Justice Kaus acknowledged the possibility that a key vote of his during the 1982 campaign when he was on the ballot may have been affected, perhaps subconsciously, by the pendency of that election. There is profound truth, as well as great candor, in that acknowledgment. I would have to acknowledge the same dilemma, particularly with respect to death penalty cases. In any event, whether such a campaign in fact influences how particular judges decide cases, it is likely to give rise to the perception

that it does. Indeed, in an election in which the public is told time and again that judges are politicians like anyone else on the ballot, it would be surprising if the public did not believe that.

The point was brought home to me toward the end of the campaign when the court filed an opinion, which I wrote, essentially affirming a death penalty judgment. Justice Reynoso joined in that opinion, and the spokesperson for the crime victims group held a press conference to announce that we had done so only to attract voter support. I could not help reflecting on what the defendant and his attorney must have thought when they read the report of that press conference.

There were people, including some lawyers and law professors, who voiced criticism of Chief Justice Bird on grounds other than her decisions in criminal cases, and to some extent that was true also of criticism of Justice Reynoso and myself. Business interests, particularly, were probably not nearly as concerned with decisions in death penalty cases as they were with decisions they perceived as overly protective of the interests of consumers, workers, and accident victims. A group of lawyers from a Los Angeles firm issued a "white paper" during the campaign in which they identified a number of such decisions and criticized them. I responded by pointing out that I had not participated in most of the cases they criticized and by observing some inaccuracies and distortions in their analysis. I did not consider, however, that I could legitimately ask voter support on the basis that my decisions were favorable to a particular group or class, since I considered that to be a wholly inappropriate criterion for judicial evaluation.

It seems clear, in any event, that the law-and-order issue, and within that primarily the death penalty issue, determined the outcome. My low name recognition and my substantial lead among those who had an opinion remained until the closing weeks of the campaign when the opposition, satisfied that the chief justice was going to lose, went after Justice Reynoso and myself with thirty-second television spots linking the two of us to Rose Bird and the death penalty issue. One of these featured an emotional presentation by a mother complaining that the Supreme Court had set aside the death penalty judgment against the murderer of her child and implying that the murderer was on the loose as a result. The spot did not mention that a second trial had already been conducted

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and that the murderer had again been convicted and sentenced to death. Another television spot told viewers that if they wanted to keep the death penalty in California, they should vote no on Bird, Reynoso, and Grodin. That spot pictured a hand with a ballot marker coming down on the "no" box opposite each of our prominently featured names. After those television spots began to run, my name recognition increased dramatically, and along with it my negative rating. Polls throughout the campaign showed that it was the perceived leniency of the chief justice and "her" court toward the death penalty and criminal defendants generally that most upset the voters, and exit polls confirmed that it was these issues that did us in.

I had my own television spots. One of them pictured a real superior court judge declaring that I was a "judge's judge" and had written a key opinion applying the Victim's Bill of Rights. A second pictured two police officers walking away from the scene of a nighttime arrest and announcing that both their organizations had endorsed me. A third featured me saying something banal about applying the law. Though professionals thought they were "good spots" (I guess they were), and though they were all truthful, the fact that it seemed necessary to appeal to voters this way was disturbing. The chief justice ran some high-minded ads, whereas Justice Reynoso's ads were similar to mine. An independent group that formed toward the end of the campaign with the participation of former governor Pat Brown attempted to garner public support on the basis of court decisions that "favored" consumers, workers, the environment, and accident victims—roughly the liberal equivalent of the result-oriented campaign of the right. The fact is that nothing we did, or could think of doing, came anywhere near countering the emotional impact that the opponents were able to derive from the opposition's victim-based appeal.

Throughout the campaign I debated—with myself as well as with others—the question of the criteria appropriate to such an election. Editorial writers, politicians, lawyers and legal scholars, and our supporters and opponents all expressed a variety of views. Some of them I found useful, others not. A useful view, it seemed to me, had to begin with some notion of what it means to be a judge and had to combine that with some notion of what it means to have a judicial election. If, for example, one were to view judges

as being in the business of making laws in essentially the same manner as legislators, who bring to bear in each case nothing more than their personal policy preferences or the immediate views of their constituency, then it would seem quite appropriate to adopt the criteria implicit (and sometimes explicit) in the opposition to the three of us. In the previous chapter I explained why I think that view of the judicial process is distorted and unfaithful to reality.

I could not in good conscience, however, advocate the polar view—that judges simply apply the law, and nothing more. Such a view would support the proposition that election criteria should be extremely narrow—perhaps limited to impeachable offenses and the like, or possibly extending to some judgment of incompetency based on performance—but it is not a view that comports with my understanding of the judicial process nor, I think, with anyone else's understanding. It requires no legal genius to recognize that Chief Justice Rehnquist and Justice O'Connor of the United States Supreme Court typically reach different conclusions than Justices Brennan and Marshall, nor to understand that the difference must be attributable to something other than their abilities to read the Constitution and prior precedents. Some of our supporters (and perhaps we ourselves on occasion) invoked the model of the umpire to argue for restrictive criteria; but insofar as that model conjures the image of someone simply calling balls and strikes, I cannot say it appealed to me.

In the course of the campaign I attempted to articulate the middle ground I expressed in the preceding chapter—that the judicial function ranges along a continuum from constraint to discretion depending on the area of law involved and the nature of the particular case—but I found it hard going for two reasons. First, the concepts involved in that proposition are not so easy to explain, particularly in a brief interview. Second, the criteria appropriate to the middle ground are not so clear.

There are, I think, several criteria that are in theory appropriate to the middle ground. For example, one might attempt to determine whether a particular judge is in fact faithful to his or her obligation to follow the law in those situations where its meaning seems clear. In those cases in which the judge is called on to bring value judgments to bear, one might attempt to determine whether a particular judge is acting within the historical mainstream of

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community values, which it is his or her duty to consult. One might ask whether a particular judge is so much the captive of a particular ideology or outlook that he or she cannot perform as a judge is expected to perform.

These are theoretically acceptable criteria; the problem is that they are not particularly useful. Identifying the extent to which a judge's personal outlook may have contributed to a judgment in a particular case is at best a highly esoteric task. Law professors who devote their lives to studying judges and their legal opinions have difficulty making, let alone agreeing on, such judgments. It is extremely difficult in an election campaign for a voter even to obtain information that would support that sort of analysis. Hence what is likely to happen—what in fact did happen during the 1986 election campaign—is that voters will rely on the kinds of judgments with which they are much more familiar and about which the relevant information is far more accessible—namely, whether they agree with the conclusions the judge reached in particular cases or categories of cases. Reliance on that criterion, as I have argued, poses a severe threat to the integrity of the judicial process.

It is possible that I am exaggerating the threat. Some commentators have suggested that the California judicial election of 1986 was a unique phenomenon, the product of a peculiar concatenation of an unpopular chief justice, appointed by a governor who became equally unpopular, and public furor over the death penalty. They may be right, and I hope they are, but I doubt it. Two years earlier a similar law-and-order campaign was waged against my friend Hans Linde of the Oregon Supreme Court, though he managed to prevail. As I write this paragraph I have in front of me an article from the *Wall Street Journal* that describes a similar development in Texas, where for the first time in that state's history a majority of its Supreme Court justices are about to be chosen in a single election. "Fed up with losing court cases that expand the rights of plaintiffs to sue and collect high-dollar damages," the article reports, "the business community has decided to try to eliminate the judges who vote that way—and replace them with judges who think as they do." It says that several important business cases are headed for the state Supreme Court, including one that may determine under what circumstances Texas companies can test employees for drugs; and the business community, through campaign

contributions to the justices, political ads, and anticourt editorials in trade publications, are trying to make sure they are decided "correctly." California tends to be a trendsetter, and I suspect its reputation in that respect will endure.

So what to do if I am right, and the California experience turns out to be a model for other states? It is possible, as some political scientists would argue, that even taking into account the drawbacks that exist, we are better off with elections than without them. Elections, they contend, provide a valuable means by which the public may exercise ultimate control over the judicial branch and in the process validate the functions that that branch performs, especially the function of constitutional review. An election may be traumatic to the participants and the institution, and it may result in the removal of some judges who are doing a fine job, but (so the argument goes) public confidence in the judiciary is likely to be enhanced.

I recognize there is some force to that argument, but I am not persuaded. No other country in which courts exercise the function of judicial review depends on elections to validate that function, or indeed any other judicial function. In this country the federal system of lifetime appointments has, on the whole, worked quite well. The quality of federal judges has generally been high—probably higher than in the state courts—and though we have had periods in which the United States Supreme Court was viewed as improperly impeding the public will by declaring legislative acts unconstitutional, we have as a nation resisted the numerous proposals to alter the structure of the court on that account.

Moreover, state courts pose less of an obstacle to the implementation of majoritarian policies than do federal courts. If a state court finds some governmental action invalid under the federal Constitution, its decision is reviewable by the United States Supreme Court. If it finds such an action invalid under the state constitution, its decision is subject to reversal by constitutional amendment far more readily than in the case of the federal Constitution. In fact, there is nothing that state courts do that the public cannot undo—at least for the future—by acting through their elected representatives or directly through the ballot. That concerns about "accountability" should require elections for state court judges but

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not for federal court judges, though understandable in terms of history, seems illogical.

My first preference, were I given the option, would be the federal model of lifetime appointments, at least for appellate judges. (I concede there may be a better argument for electing trial judges, who come into closer contact with the public and the practicing bar.) I would combine that model, however, with some substantial means of either limiting or passing on the governor's power of appointment so as to enhance public confidence in the selection process. This can be done through a merit system, in which applicants for the bench are screened by a blue-ribbon commission, but for reasons I expressed earlier I think that approach should be viewed with skepticism. I think an expanded procedure for considering the governor's selection would be preferable to a procedure that would limit his or her selection. Expansion could be achieved either through a broad-based commission or through confirmation by a branch of the state legislature. The latter procedure carries a potential for political shenanigans, to be sure, but it is impossible (and in my view undesirable) to exclude politics from the selection process altogether.

Lifetime appointment is not the only alternative to elections. New York has adopted the fixed-term approach for its highest court: gubernatorial appointment, pursuant to a merit plan, to a fourteen-year term of office. That would be my second choice. Whether the judge should be eligible for reappointment under such a system is debatable. If he is not, then the state may be deprived of the services of a great judge in his or her prime. If he is, then we run the risk that the judge may be perceived as currying favor with the incumbent governor through his or her decisions. I am inclined to think that fourteen years is enough.

I realize, however, that neither of these changes is likely in the near future. In the absence of a more persuasive demonstration of the defects inherent in judicial elections, the public is not about to relinquish the right to vote for judges. The immediate question is whether there are things that can be done *within* the system of elections to insulate the judicial process from the types of risk I have described.

One area certainly deserving of attention is the funding of judi-



cial campaigns. Dean Gerald Uelemen of the University of Santa Clara Law School has suggested that judges be required to disqualify themselves in cases in which a party or counsel has contributed in excess of a certain amount to the judge's election or reelection campaign. Such an approach has potential merit at the trial level, where there are other judges who can readily be transferred to hear a case. It would be more awkward at the appellate level, and particularly at the level of the Supreme Court, where there are likely to be hundreds of cases pending at any one time and only a limited number of judges to hear them. There is also the question of the scope of the disqualification principle. To avoid unseemliness, the principle would have to apply not only to cases in which a hearing had been granted but also to those in which a petition for review is pending. And in order to avoid easy evasion, it would have to apply not only to individual lawyers who make contributions but also to the law firms of which they are members. Yet if those had been the ground rules during the 1986 campaign, one or all of the three of us would have been disqualified in a majority of matters pending before the court. Perhaps that is not such a terrible thing in itself, but it certainly would have a chilling effect on contributions by any lawyers who have, or think they may have, a case before the court. That result must be viewed against the fact that the opposition would be operating under no such constraints. Such a system would have to be adjusted to avoid placing the incumbents at a serious disadvantage.

Perhaps a more fruitful approach lies in the direction of public financing, or financing through a lawyers' trust fund, tied to acceptance of limitations on contributions and spending. (Limitations not accepted by the candidate appear to pose serious problems under the United States Supreme Court's decision in *Buckley v. Valeo*, which held that restrictions on the extent of financial support violate the First Amendment.) There have been experiments with all or portions of that approach in various parts of the country, including Cleveland, Monroe County in New York, Dade County in Florida, and the states of Wisconsin and North Carolina. Professor Schotland of Georgetown University Law Center proposes a national project, backed by such organizations as the American Judicature Society, the American Bar Association, and the Ameri-

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can Law Institute, to focus attention on the problem and develop solutions.

As regards the more general threat posed by judicial elections—that the substance of the campaign will politicize the judicial process and create the appearance, if not the reality, of judges bowing to public pressure—there are obviously no easy answers. One approach is to bolster confidence in the selection process, perhaps through some form of merit system. The theory is that a public that is satisfied with the manner in which judges are selected will be less likely to be suspicious of them or hostile toward them when they appear on the ballot. My view is that such an approach deserves consideration, but only on the basis of procedures and criteria that assure that the commission assigned to do the screening be truly nonpartisan and broadly based. Avoidance of politics within such a commission is no easy task.

Beyond that, I think we need to work toward a consensus of constraint as to the criteria appropriate to a judicial election. During the 1986 election some politicians and editorial writers made the argument that there was no point in talking about what the criteria should be because the state constitution contained no limits on the sorts of considerations that could be brought to bear by the voters. That argument, of course, is a complete non sequitur. Voters know that they are free to vote on any basis they like; but an intelligent voter considers on what basis, as a good citizen, to cast his or her ballot. There is a consensus in most communities that a recall election demands different criteria than an ordinary election; a similar consensus needs to be developed with respect to judicial elections. All of us have a responsibility to see to that development.

In 1988 in Berkeley a liberal lawyer ran for office against a conservative municipal court judge who had been appointed by Governor Deukmejian. In response to an inquiry from a student at the University of California who knew of my own experience and sought my views concerning the election, I wrote the following:

It is vital to insulate incumbent judges from gross political pressures in the performance of their duties. In order to do that we need to establish a consensus of constraint. As applied to trial judges that means in my view that we should vote to oust an incumbent judge in favor of a challenger not simply because we like the challenger

better, nor because we are unhappy with some of the incumbent's decisions, nor because the governor who appointed the judge offends us, but only when it is demonstrated to our satisfaction that the incumbent is deficient as a judge in some important respect. That we may regard a judge as being too "liberal" or "conservative" is not sufficient unless we are convinced that the judge's view of the law and its relationship to society is so extreme that it lies outside the mainstream of legal thought and community values. And we must be very careful in making that judgment, so as to avoid creating an atmosphere in which politics becomes the dominant criterion. If we are unsure, I think we owe the incumbent the benefit of the doubt.

Such a self-imposed restraint, which I would adapt to retention elections for appellate judges as well, is compatible both with our right to vote in judicial elections and with our obligation as citizens to vote with understanding. Moreover, it is essential if we are to avoid damage to the important but fragile principle of an independent judiciary.

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# CALIFORNIA LEGAL HISTORY



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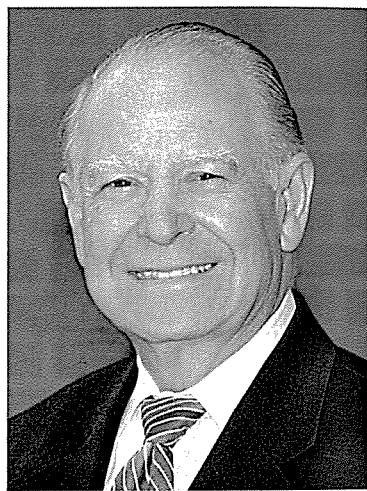
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*Oral History of*  
**JUSTICE CRUZ REYNOSO**

**EDITOR'S NOTE**

The oral history of former Associate Justice Cruz Reynoso was conducted from 2002 to 2004 by Germaine LaBerge of the Oral History Center of the Bancroft Library, University of California, Berkeley, in partnership with and under the auspices of the California State Archives, State Government Oral History Program.

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CRUZ REYNOSO

— SELMA MOIDEL SMITH

REYNOSO: No, no. This is a dance for junior high children. I was in high school at that time. They said that they were not allowed to go in because they were Mexican. I said, "You've got to be wrong. This is a school dance." I went in and talked to the gentleman in charge, whom I knew because he had been my scoutmaster. He says, "Yeah, we're not letting them in because they are Mexican and we are afraid there will be trouble if we let them in." So I found out who was sponsoring this service club, and found out who the officers were, and I went to see the officers.

LABERGE: Were the officers students, or were they adults?

REYNOSO: Oh, no, no. Those who were sponsoring it was a local service club like the Kiwanis. They were all business people. I went to look them up, one by one, to tell them about what had happened, and that I didn't think that was a good way to run a school dance. I was, of course, a high school kid, and they weren't very appreciative of my bringing that to their attention. It was the first experience, I think, I ever had of being invited to leave somebody's office. But, I must say, neither did I hear that there were such dances that didn't allow Mexican kids after that. So maybe it did some good.

LABERGE: Obviously you had an understanding and a sensitivity that it was hurting other people and that you were going to do something about it.

REYNOSO: Of course, and it may be hurting me also, but not directly. Even yesterday's morning paper reported the election returns. It may be coincidental, but there were three Supreme Court justices on the ballot and the one that got the fewest number of votes was the person with a Spanish surname, Carlos Moreno. It may be accidental, but I saw that when I was on the ballot, and we see that now. The percentages are smaller, just two or three or four percent. I don't read into that great prejudice, but you do see those differences that you are reminded that you are part of a group that sometimes is disadvantaged in society.

At age seven, we moved from Brea to rural La Habra, let's put it that way, to a little barrio called Alta Vista about a mile or mile and a half from downtown La Habra. My father had bought a small house in the barrio. I was chatting with a gentleman who knew the history of the barrio. He said the barrio was actually established, like, ten years before we moved there, and the houses had been taken from sort of a labor camp and moved to that area, which was owned by a gentleman. By the time we moved there, it was an established barrio. About fifty homes in a rural area, and my dad had bought a

So, all these things that appear to be so natural are not God-given rules. They are rules put in place, very often by folk who really say they like democracy, but not that much. They want to be in charge. And it seems to me that a democracy has to be as universal as possible. But, as you know, we started out with white-only could vote, property owners could vote, et cetera. Men-only could vote, and slowly we have been expanding the concept of democracy to where we are now, but clearly Florida reminds us that we have a ways to go to have the type of democracy that we as Americans believe that we are entitled to.

LABERGE: Well, shall we move to this other part of democracy, namely the court system?

REYNOSO: By all means, by all means. Except that their role is not democratic and that's the problem that we have. Many judges — there was a suspicion, historic suspicion against judges in the colonial days because they were appointed by the king. Then, later the U.S. government appointed federal judges. It's true that they had to be approved by the Senate, but nonetheless, there was still a great deal of suspicion of judges. And during the Jacksonian era, a movement was founded, particularly in the South and in the West, to have judges elected. That seemed to be more democratic. The problem, of course, was that judges have a non-democratic role. It's their job to enforce the Constitution of the United States and the constitution of that state. And very often the Constitution tries to protect political and other minorities — but particularly political minorities — and if a court protects that political minority, it often is making a political majority very unhappy. One of the most important roles that judges have is a non-majoritarian role, and how do you square that with a majoritarian way of selecting judges? And that's been the quandary that many jurisdictions have been struggling with for many decades now.

LABERGE: Let's go to how you were selected and appointed, and then tell me too what — how you would change the appointment process. You were, in 1976 in New Mexico. And so, what happened?

REYNOSO: I was teaching in New Mexico, minding my own business, when I received a phone call, shortly after Jerry Brown had been elected, from a gentleman whom I knew very well who was on his transition team, Mario Obledo. And he said, "Cruz, if the governor wanted to appoint you to a high political office in the state, would you consider that?" I said, "Why

sure. It depends on the timing. It depends on the job and all that.” And then nothing happened for a year and a half. I didn’t hear anything.

LABERGE: By this time are you a citizen of New Mexico?

REYNOSO: I am a citizen of New Mexico. I am voting in New Mexico. Sargent Shriver had announced his candidacy for the presidency of the United States and had asked me to be his statewide chair and I had agreed to do that. No, no, I was very much a citizen of New Mexico. Then, a year and a half later or so, I get a call from another person, by now a member of the administration, Anthony Kline, Tony Kline, who was the appointment secretary. And he said, “Cruz,” he says, “the governor wants to appoint you to a high administrative office. I can’t tell you what office it is, but the question is will you accept? And it’s a very important office and the governor is very anxious to have you be in that office.” And I said, “Tony, I am in the middle of a semester, I can’t” — oh, I said, “When will I have to report?” And he says “Yesterday.” And I said, “I am in the middle of a semester; I just can’t do it.” And he nonetheless called several times and I kept saying, “Tony, I just can’t leave in the middle of the semester.” After a while he gave up and I thought, “Well, that’s it,” because my impression had been that governors are pretty self-important, and if they ask you to do something and you say no, that’s pretty well it. Much to my surprise, a while later, a month or two later, Tony calls back. “Cruz,” he says, “the governor wants me to ask you, if you can’t accept an administrative position, would you be able to accept a judicial position?” I said, “When would I have to report?” He says, “It doesn’t matter.” I said, “Could I wait until next summer?” He says, “Oh, sure.” I said, “Well, what position did you have in mind?” And he said, “Court of appeal.” Then he said — I forget all the discussions. We had several discussions, but basically he asked, “Where would you like to go?” At that time, you will remember, Jerry Brown was in trouble with a judiciary in the electorate because he had said that judges shouldn’t worry about their pay. They should be happy with the psychic rewards of being a judge. And so I think he was trying to prove that you could run the judiciary without that many judges because he had not appointed one appellate judge at that point, a year and a half into his governorship. He had openings throughout the state. I think Tony thought that I would say San Francisco because he had been with a public interest law firm, I had been with a legal services law firm and we often cooperated on cases. But, in fact, I said, “You know, I’d like to go to the



most rural area that you have.” And the only place that they had an opening I think at that time in a smaller area was Sacramento. He said, “Well, let me explore that. That’s more difficult. One, because we have only one opening there and, two, we have some really good candidates. So I don’t know whether it will work, but let me check it out.” Later he called back and said, “Yes, that will work.” And so I accepted. I must tell you that my wife, who didn’t want to move to New Mexico, once we were there loved New Mexico, didn’t want to move back to California. So it wasn’t easy.

LABERGE: And how old were your children now?

REYNOSO: And my children, three of them were school age and one was preschool, so they didn’t want to move either. The law school interestingly just before that had named me to be the associate dean, the academic associate dean. Something funny happened. My neighbor at that time, professional neighbor, was a fellow by the name of Joseph Goldberg, Joe Goldberg. And in the morning he would always say, “Good morning, Professor Reynoso,” and I would say, “Good morning Professor Goldberg.” And then the next day he came in and said, “Good morning Dean Reynoso.” I said, “Good morning Professor Goldberg.” And then the next day he came in and said, “Good morning Justice Reynoso” — it happened so quickly. They were hoping too that I would stay with the law school. So it wasn’t an easy decision.

On the other hand, I just couldn’t say no to an opportunity to be on the appellate court. As a litigator, I used to analogize going before the appellate courts to a doctor operating. A doctor can do many things, but if you are going to operate on a person, you have got to set everything else aside. When I had a case before the appellate court, I would really set everything aside and concentrate on that because that was the one time where you were not only representing your client, but you could make law that would then affect many other people. So, I always had really an element of awe with respect to the appellate courts. I also wondered whether I really had — you know, whether I would be a good judge at the appellate level. It is true that by that time I had been a litigator, obviously, I had been a law professor, and I had sort of all the background that one would think one needs to go to that position, but I really didn’t know. It was obviously going to be an adventure for me.

Basically, that’s what happened. Until later I was given a just one or two-page opinion by the attorney general. They had been carefully — I didn’t realize,

they knew more about me than I knew about myself by the time they appointed me to the “vetting process” that the governor goes through. It is really quite an extensive one. When I got to California, Tony gave me this attorney general’s opinion that said the following: “To be appointed to the appellate bench, the Constitution requires ten years of membership in the California Bar. It does not require residency.” And that was clear. That’s been the constitutional provision all the time. Nonetheless, it is rare that a non-citizen gets appointed.

LABERGE: But you certainly fit that.

REYNOSO: Yes, and obviously I fit that, so that’s why they felt free to appoint me. And then — life is very strange. When I first started practicing law, I, among other things in Imperial County, represented farm workers, filed civil rights cases and all kinds of things that were viewed as controversial — as you might guess — in a conservative community like that, but that’s why I had become a lawyer. I had several people come to me and say, “Gee, Cruz, that’s no way for a young lawyer to get ahead.” In fact, I still remember a conversation I had with this great gentleman in the Latino community who came to see me. I still remember his name. He used to go by three initials, MCL and his last name was Ruiz. And Mr. Ruiz came to see me, and he had read in the paper that I was representing a person accused of selling or dealing with drugs or something, and he came to see me. We exchanged pleasantries, and finally he said, “Señor Reynoso,” — this was a discussion in Spanish — “we’ve so appreciated your practicing law in Imperial County, the leadership you’ve provided in the community,” et cetera, et cetera. He says, “But you know, I just read about this case, and I am just concerned that it might sully your reputation if you represent people of this sort. I wonder if you could just do civil cases instead of criminal cases.” We had this whole discussion and I don’t know if I ever succeeded in persuading him, but I tried to persuade him what the role of a lawyer was. In a criminal matter it is to say, “Look, constitutional mandates need to be afforded and provided in court. If the state says you’re guilty, now you have got to prove that this person is guilty, et cetera, et cetera.” So these sort of pressures came not just from folk that didn’t like what I was doing or didn’t like most of what I was doing, but from other folk too. Nonetheless, that is why I had become a lawyer.

Then, by circumstances of history, we end up with a governor who admired Cesar Chavez and people who worked with farm workers and who

admired legal services lawyers. Many people in his administration fitted in that category, or public interest lawyers. Mario had been a public interest lawyer; Tony Kline had been a public interest lawyer. So, I think when he looked around for people to appoint, a person like me came up high on his list. I imagine that's what happened. Aside from that, he was interested in bringing some ethnic and gender diversity to the bench, and I think that had some impact also. I told my story about how I got appointed to a federal appellate judge, and he said to me — he then recounted how he got appointed. He had been a law professor and he wanted to be an appellate judge very badly. He wrote about all these important issues, and then he figured out that law professors seldom got appointed to the bench. So he became a dean and that had more visibility. Then, after a while, he figured out that even they didn't have a chance to be appointed to the bench, so he quit being a dean and joined a big law firm. A litigator, those are the type of people that get appointed to the bench, and he got active in politics and he contributed money and all that sort of thing. And he says he really worked hard at it, and after about ten years he actually was appointed. And when I told him my story he said, "My goodness, that's the first story I have ever heard of a person being appointed on their own merits, because I really had to work hard." He said, "I thought I was meritorious" — you know, he had all the background — "I had to really work hard at it."

But for me, that's actually the way it happened. In fact, I had thought as a young lawyer that it might be nice to be appointed to the bench when you got to be fifty or sixty or something of that sort, and I quickly gave up on that idea because, at that time, when I became a lawyer, so many of the judges were ex-DA's and people who had not at all been troublesome in their communities, let's put it that way. I didn't fit that category at all, so I gave up completely on that idea. And I was happy in what I was doing, you know? I enjoyed the work that I was doing, and I figured you can't ask more from your profession. So then this came as a complete surprise to me, but I ended up on the Court of Appeal.

LABERGE: Did you ever find out what administrative positions you might have been appointed to?

REYNOSO: They wanted me to be the chair of the then new Agricultural Farm Worker Board, which would have been exactly the wrong position for me to have. They needed more neutral people and I was so closely associated

case and you do it in writing. I think all of the judges met that constitutional requirement, so I am not being particularly critical. But I could count, I thought, on the fingers of one hand, the number of judges who had the same interest that I had in the structure of the law, the history of the law, and I thought it odd that here I had been so concerned and yet — you know, I may be unfair to my fellow judges. We had at that time fifty-six appellate judges, but really from talking to them and reading their opinions, I felt that only about half a dozen had the sort of interest that I had.

LABERGE: And this is fifty-six throughout the state.

REYNOSO: Throughout the state. Yes, throughout the state. I had to work very hard. Cases, sometimes, were difficult to decide, and sometimes the presiding judge would get unhappy with me because I would take a little bit too long to decide. There was a case, for example, in which there was a Spanish-speaking defendant, and there was a tape. And we didn't have his tape where he allegedly confessed, and the record seemed unclear whether he had confessed or not, so I asked for the tape. The superior court then had to send it to me so I could listen to it, and that delayed deciding that case awhile. And, obviously, in terms of justice to the litigants, we wanted to decide them as quickly as possible. What's interesting is we dealt with criminal cases, civil cases, all kinds of cases. So, it was a great job and I very much enjoyed it, and I was there for five-and-a-half years. What other questions do you have about the Court of Appeal? The Supreme Court is quite a different story.

LABERGE: How did you get appointed to the Supreme Court and what was that story?

REYNOSO: There were speculations that if Jerry Brown had an opening to the Supreme Court, I would be the first person appointed because very often that's what governors do. And, in fact, my former partner from El Centro, was so excited he sent me an article that appeared in a magazine, saying what chance people had of getting to the Supreme Court. And I had at least a 50–50 chance. I was on the way to the Supreme Court, and by golly, then an opening came up, very early on, and that was the opening for Rose Bird. And there were predictions that I would be appointed as chief justice also. In fact, one time, I was at the Supreme Court for some type of meeting and I was in a line, I think to get into the chambers or something. I heard these two people in front of me talking about who would be the next Supreme Court justice, and they were all

convinced that I would be it. So, it is sort of interesting. Then, a second opening comes up, and people say, "Obviously Reynoso is going to be one of those two appointments." Well, he appointed two people, not Reynoso, to the chief justice and the associate justiceship. Most governors don't get to appoint many people. By coincidence, a third appointment came up, and they said, "Ah ha, now must be that Reynoso is going to be appointed." A non-Reynoso got appointed. A fourth appointment opportunity came up. They said, "Surely now!" Nothing. Finally, his fifth appointment I think, and finally he appointed me.

LABERGE: And who were you replacing?

REYNOSO: I was replacing [Mathew] Tobriner. And it was such a wonderful thing for me to replace Tobriner, the judge on the bench that I most admired. I got a letter from Ralph Abascal, I think I showed it to you.

LABERGE: You did show it to me.

REYNOSO: And I have framed it since you were here. And I am going to put it up on this wall, because it was just wonderful for me to replace him. At that time — no longer, since the Court has been redone — there was a plate on the chambers, outside the chamber door saying who had been at those chambers and Tobriner had been the judge preceding me, so it was a wonderful — that element of it was quite wonderful.

LABERGE: I must say for the tape, this is a letter that Ralph Abascal wrote to Mrs. Tobriner.

REYNOSO: Yes, and sent a copy to me. On the occasion of my going to a reception as a new justice, and he is talking about the coincidence of his coming to Sacramento to argue a case that Tobriner later wrote. His suggestion that this was like one justice passing the torch to another. So it is a beautiful letter. When I was appointed, I got a call from the appointment secretary saying, "The governor would like to see you." And I went over to the governor's office, and then somebody took me to a very small office, and there were about six people, including later Governor [then, Secretary of State Gray] Davis and others. And the governor said, "Cruz," he said, "I am going to appoint you to the Supreme Court." And he says, "We need to have a press conference tomorrow. And don't tell —

Actually, by that time, I had sat with the Supreme Court two or three times on assignment, so I understood their role and how they did their work

and all that. It was not going to be that new to me. I was prepared to accept if it were offered, so that was not a question for me. So that's the way it happened, just very quickly. And the coincidence, again, of a governor having that many appointments. Why he hadn't appointed me earlier, I don't know, though a discussion that I had with him, which I dismissed at that time, but it turned out to be prophetic, may have been a reason. He said, "Cruz," he says, "I am going to appoint you to the Court; it's up to you to keep that job." I dismissed it because at that time, those weren't issues. Later they turned out to be an issue. Maybe he already saw darkened clouds on the horizon, I don't know, but that was — mostly it was a very nice affirmative talk. But I remember that he did mention that.

The big political issue already was the death penalty. They said, "Justice Reynoso, are you opposed to the death penalty?" And I told them, no, I was not morally opposed to it. I see a lot of problems with the death penalty, procedural and others, but I have never been morally opposed to it. So that's what I said. They asked about some other issues, but that was the main thing that they were concerned about because already the death penalty was a big issue with many people having been attacking the chief justice for several years on that and some other issues.

I felt that practically all of the attacks on the chief justice were unfounded. I still remember two, then state senators, one now present congressman, [John T.] Doolittle held a press conference at the time, on the site where a murder had taken place, and the Court had just overturned, I guess the death penalty on that case. And they always spoke about the Supreme Court putting murderers out on the street. In fact, they knew that in death penalty, the only portion that normally the Court was overturning was the imposition of death because the Briggs initiative, which became the law in California, violated the U.S. Supreme Court rulings. When you reverse, the person was still convicted of the murder and still had to serve at least the sentence, which was life without possibility of parole. So they knew that they were being untruthful — to put it mildly.

But then, what I want to tell you is that either on that or another occasion, Doolittle produced a list of cases that they said showed why the chief justice was exactly the wrong person to be in that position. The list included cases decided before the chief justice had been appointed. The reporter said, "Why are you including those cases?" And he said, "Because she is a symbol of what's

wrong with the Supreme Court. So it is perfectly proper for us to point to those cases even before she got to the bench.” That was the quality of the attack on the chief justice. It was just very unfortunate. Then, though even Doolittle and others had not really been able to muster the political support for their attacks on the chief justice until the then attorney general, later Governor Deukmejian took up the call. And then, when the chief enforcement officer of the state — the governor — starts attacking the chief justice, the people, I think, naturally will listen. And when the Democratic leadership, out of the normal political aversion to anything that might cause problems to them, didn’t come to her defense, the people of the state simply heard time and time again, repeated over and over again that the chief justice was not following the law of the state. What was the public to believe when all they heard — and they didn’t hear an answer from those who were in a position to know. In some ways I have never found it in my heart to blame the people of the state of California for voting not to return her — and then I was included and Justice [Joseph] Grodin was included and they didn’t return us. But in some ways I really couldn’t blame the people. I used to tell people, “If I believed what these folk are saying that I am not obeying the law, I would vote against me.” It happened not to be true, but the people, I think, in our political process couldn’t know that.

But then I was appointed and the press conference went well. Then a committee was formed to celebrate my appointment, and apparently they gathered a lot of money and so on. They gave me a new robe and they had this great big celebration in San Francisco. I was sworn in in this huge auditorium and it was completely filled, and the judges and the chief justice and I were in the front, and there were tons of people there. Folks spoke, and when the chief justice was about to swear me in, this gentleman whom I knew from Stockton, and I forget his name, but he was very well known in the Latino community. He always wore a little hat that was the type of hat that the park rangers wear. You know, like the old World War I hat, and he had embossed it in some sort of gold substance so it was stiff and he always wore that. People used to refer to him as *el hombre del gorito*, “the man of the little hat.” And all of a sudden, he either stood up — I don’t know what he did, but everything was very quiet as the chief justice, I think, was about to swear me in, and this booming voice came out saying, “Viva Cruz Reynoso.” [laughter] And the audience responded by saying, “¡Qué Viva!” The chief justice said, “My goodness, this is the most celebratory swearing in that I

One lawyer told me this story. He had called the chief justice to see if she would perform a wedding. And, in fact, she did perform weddings; I attended some of them. But on that occasion, her assistant told them that she was too busy. And after all, she is chief justice, she has these big things to worry about. Anyway, he was completely turned off by that phone call, and I don't know whether the assistant was doing that on his or her own or whether they were under instructions, but I remember that he was turned off because he had been a long-time admirer and friend, apparently, of the chief justice. Little things like that went awry, and that all ended up with her not being able to have the type of support that she really should have had. On the other hand, I admired all of the things she was doing, and in terms of her decisions, I not infrequently disagreed with her. I would be with the majority and she would bring a concurring or dissenting opinion, but I thought they were always very well researched, very well structured, and sometimes looking toward the future. In fact, sometimes, I rather agreed with her, particularly when she wanted to change the law. Appellate judges have to worry about whether there is more merit in changing the jurisprudence because there is so much merit in stability of the law. And sometimes I thought there was more merit with stability of the law, even if I disagreed with it, than changing it. But her feelings were so strong and so individualized that she would still write a concurring opinion or dissenting opinion. Not infrequently I disagreed with her, but they were always well-written, well-reasoned opinions.

Now, some people said that she was hard to get along with. Maybe that was true; maybe it wasn't. All I can tell you is that the Wednesday conferences and the way I saw her deal with the judges was always upbeat and marvelous. I don't know what the tradition was before we got there, but she would always, during our Wednesday conferences would have trail mix or something else for us. She was always jovial. She was very fair in the discussion. Never cut anybody off. Frank Newman used to describe the Wednesday conferences as the greatest seminars he ever attended. And that's the way it was. I mean, everybody was free to talk; she was very respectful. In my view, she was a great chief justice. Now, the sad thing is that because she had been a public defender, I think, and because politically some folk didn't agree with her, folk — mostly Republican legislators — started attacking her from the day she was appointed. So the attacks had gone on for like ten years before the confirmation election came up. Also, by the time the second confirmation came up — she was confirmed the first time — by that time we had quite a few death penalty cases.



In fact, we were reversing a lot of those cases. One of the reasons we were reversing them — and I have another reason why I thought those cases were difficult, but one of the main reasons we were reversing them — is that we had had an initiative in California called the Briggs initiative, where the author, Senator Briggs, had bragged that his initiative was tougher than the U.S. Supreme Court rulings on the death penalty. Because the Supreme Court had first declared the death penalty unconstitutional, then changed its mind and said, “Well, it can be constitutional if you follow all these rules.” His initiative didn’t follow those rules, and the Legislature interestingly had passed a statute that did follow the rules — a statute, ironically, sponsored by Senator Deukmejian, who later became attorney general and governor. However, the initiative passed. An initiative takes precedence over a statute. So now the law of the land was the initiative. Sad to say, the initiative didn’t comport with the U.S. Supreme Court rulings. But it takes time for a case to be tried. Well, first for the charges to be made and then the case would come to trial and then be tried, then appealed. So it was several years, very often. By the time it came to us, if it did not comport with the U.S. Supreme Court, we had to overturn it. And we were overturning many of those cases.

Now, when we overturned a case, we generally were overturning only the — death penalty cases are tried in two different trials. One trial asks the question, did the defendant do it? The next trial asks the question, what should happen to this person? Either sentenced to life without the possibility of parole, or death. So when we reversed the second trial, which is normally what happened, we were saying, “You got it wrong in terms of how you held that trial. You have got to do it in conformity with U.S. Supreme Court rulings.” None of those defendants were set free. They were in jail for life at least. The court became the political enemy of folk who disagreed with its ruling of protecting consumers, protecting workers, setting higher standards for insurance companies, et cetera, et cetera. Most of the Democrats were afraid of the death penalty issue, so except for one senator out of Oakland, who campaigned vigorously for the Court, most of the Democrats were silent.

LABERGE: Who was that? [Nicholas] Petris?

REYNOSO: Petris, yes. He was the only one. Most of the others were silent. So the public, one, didn’t understand that it was a partisan attack and, two, never heard publicly, I think, with the vigor that they should have, the

arguments in favor of an independent court system, the reality that we were simply enforcing the law, *et cetera*, *et cetera*. So it is not surprising to me that the vote went very poorly, particularly against the chief justice, but also against the two of us who late in the game were added to the attack. That was all to me a sad episode. Very unfair to the chief justice. I think that she was very conscious of her obligation. You know, the title of the chief justice is not Chief Justice of the Supreme Court; it is Chief Justice of the State of California because the chief justice has administrative responsibilities as well as judicial responsibilities. And I thought that as to everything, she took it very, very seriously, and I think I agreed with most of her positions, certainly administratively. In general, I just thought she was a great chief justice, and it was sad for the State of California that we lost her.

LABERGE: Now, what about you? I have got several questions, but let's just go with the election. What did you do, if anything, before the election to — not to campaign, but to deflect any of what was being said about you?

REYNOSO: Well, I always accepted a lot of speaking engagements, so I spoke all over the state talking about the concepts of judicial independence and that sort of thing. But, you know, when you speak, you speak to a hundred, two hundred people; television you speak to 35,000,000 people — well, at that time, only 33,000,000 people in the state. And certainly our talks didn't get on television and all that. So, the answer is that I didn't do anything for a long time. Eventually I was convinced that I needed to set up a committee, so I set up a committee and that committee tried to raise some money. I would go around and talk to those folk who gathered in different parts of the state. Eventually, incidentally, we grossed nearly a million dollars, which I thought was rather amazing for starting so late and doing everything on a small scale. But it showed that a lot people were really quite interested. But a million dollars goes nowhere in the state of California. Then, very late in the campaign, I hired — just the last two or three months, I hired a political consultant. I don't think he did any good for us, actually, except one thing. At the end of the campaign, he ran those polls that those folk run sometimes about how well you are doing — and near the end, they run it every day or every other day — and he told me that we were going to lose. And that's really the only real true value that I got out of that campaign. So I forewarned my family, and I got all kinds of calls from people who wanted to have a

party and have a celebration and all that. And I told all of them, “No, no. Thank you very much. I really appreciate it, but I am going to just stay at home and listen to the returns.” So, in a way, nothing unexpected happened. In fact, I got more votes than what I thought I was going to get. I forgot what the percentage was, but Joe Grodin, Judge Grodin and I didn’t lose by very much. The chief justice, unfortunately, lost very badly.

So I had forewarned the family, and I had decided that I had been out in the public enough talking to reporters, that, after all that, I was going to take the day off after the election. My wife and I went up to the foothills, went to Jackson. This was during the week. The election is on a Tuesday, so it was on a Wednesday. We visited a local museum that I think is open on Wednesdays for two hours and we had a nice lunch. It was one of the nicest days that we’ve spent. I always understood the campaign to be a political campaign, not a campaign really judging me because I knew that folk didn’t know anything really — the voters knew very little about why we were voting the way we were voting, and so on. I always remember a headline in the *Woodland Democrat* when I was on the Court of Appeal. Court of Appeal judges also have to run for confirmation, and by tradition, we didn’t do anything. We didn’t do anything on the time that I came up for confirmation, and the *Woodland Democrat* ran a headline that said, “The Candidates Nobody Knows.” They had pictures of the three of us judges who were on the ballot and then it said something about us and all that, but they are right! The electorate doesn’t really know who we are. So I always thought about that. I never considered it a vote on me personally. It was a campaign and how effective the campaign had been. We had enough money to, I think, put a few ads on television, but very few. We knew that it wasn’t going to compare with what some estimate to be ten to twelve million dollars that the people attacking the Court had raised.

Those who were attacking the court had one particular television ad that ran a lot, that later got an award for being one of the most effective political television ads. And it showed a rectangular box, if I remember correctly — I will paraphrase — and it said, “The people of the state of California voted for the death penalty. Rose Bird’s vote.” Then it showed cases that came up, say forty, thirty — whatever it was at that time. “Rose Bird voted to uphold the death penalty: zero.” Then it said, “Is she following the law?” Then it said, “If you don’t like Rose Bird you can’t like Grodin. Voted against the death penalty twenty times; for the death penalty four times. And you can’t

like Reynoso. Voted against the death penalty so many times, for the death penalty so many times.” Both Judge Grodin and I had voted in several cases to uphold the death penalty sentence, but more often than not we had voted not to for the reasons I indicated. So they started with Rose Bird then went to the two of us, and it was very effective.

LABERGE: They didn’t say anything about Stanley Mosk?

REYNOSO: No, they had decided by that point that, one, all they needed was three votes to take over the court because Deukmejian had already appointed one justice, so they didn’t need Mosk. And, two, Mosk had been attorney general, and he had a lot of friends. He could have raised a lot more money than the rest of us, I think. So I think they were afraid that it might look partisan, and they could see then that practically all the Democrats were cowardly and they weren’t going to speak up. I remember calling a friend of mine whom I had known for years and years who was in the Legislature, and I said, “Gee, so and so, why aren’t you folks speaking out on this? This really is an important issue.” And I remember he said, “Oh, Cruz,” he says, “about the last thing the people want is to hear another politician talk about the death penalty.” Then, to show what a good guy he was he sent \$1,000 contribution or something to my committee. But even he, who came from a safe district and all that, somehow didn’t want to take on an issue that he viewed as gratuitous I guess. So the people got very much a one-sided view.

I remember, I had an interview one time by a person, I forget what his issue was, but he was interested in the independence of the judiciary, and he asked me whether I thought the California Supreme Court would be too tied to politics, and I told him that I didn’t think so. I mentioned to him that when all is said and done, the people on the Court are still conscientious and if anything appeared to be too partisan, it would hurt the Court. It takes a confluence — a historic confluence of matters to have happened what happened with Rose Bird, and that I didn’t think that was going to happen. I still had faith, I told him, in the electorate. He says, “Boy, that’s a funny thing for you to say in light of what happened in that election.” But, in fact, I still do. It’s just that the voters unfortunately just didn’t get a true picture of what the law was, what the death penalty rulings were, and mostly I blame the Democrats for it. The Republicans though — frankly, Deukmejian was unethical in my view. He sent me a series of questions when I was named to the Supreme Court that certainly

there is a little bit of a question as to whether they would now be considered unethical — but at that time, they were clearly considered unethical. And he was a lawyer. He knew better. And the people who were attacking Rose Bird and the Supreme Court, they knew that what they were saying was not true. So it was not a very upstanding campaign against the Court and the chief justice. Frankly — I don't know whether I am now sounding cynical — that is sort of what I expected from that wing of that party, but that those who better understood, many Democrats, didn't then stand up and help educate the public about what was happening, I think, is a very sad commentary on how politicians think and their unwillingness very often to take on an issue that they don't consider vital for their reelection. Which I think is what happened.

LABERGE: George Deukmejian sent you questions because he was going to be on — voting whether you would be confirmed?

REYNOSO: That's right. The confirmation vote. When one is named to an appellate court, those judges have to be confirmed not by the electorate, but by a special constitutional commission composed of the chief justice, the attorney general and the senior presiding justice of the Courts of Appeal. And just to give you a sense about how much the political environment had changed: When I was appointed to the Court of Appeal, I was in New Mexico, and I got a call from the chief justice who called and said, "Cruz, this is so-and-so calling from San Francisco," referring to himself by his first name. I thought, "Who do I know in San Francisco?"

LABERGE: Was that Donald Wright?

REYNOSO: Yes. He said, "This is Don calling." Which Don do I know, which Don do I know? Fortunately, I didn't say, "Don who?" And then from the conversation it was clear that it was Chief Justice Wright. And he says, "Congratulations, you have been appointed to the Court of Appeal. As you know, our commission has to confirm you, but don't worry about it," he says, "I have read your background that is sent to us by the governor. It is an exceptional background. I know you will be confirmed. It is a public hearing, so somebody might show up that has some private grievance against you that happened years ago, and we will hear them out, but you don't have to come," he says. "A person from the Bar will be there to talk about your background, and what a fine background you have for this position. And then, anybody else can come, but that's done by tradition. So, don't worry about it, I will call you after the

hearing.” Sure enough, two or three weeks later he calls and says, “Hi Cruz, this is Don calling. We just had the hearing. Everything went well. Nobody showed up to talk against you. The testimony by the Bar was really great. You have such a great background. You are confirmed unanimously.” That was it.

Now, when I got appointed to the Supreme Court, I get this several-page questionnaire from Deukmejian asking how I would have voted on cases and on issues and all this sort of thing. I refused to answer it. Then, I knew that it was going to be a tough hearing.

LABERGE: Did the chief justice call you this time or not? It would have been Rose Bird.

REYNOSO: I don’t think she called. I think one of the clerks, one of her assistants called, to tell me that I would be receiving a notice of the hearing. I don’t think she even talked to me. No. That comports with the way she would do things. And certainly didn’t say, “Don’t worry, Cruz.” No, I don’t think I got a call from her. So we went to the hearing. I told friends that my wife and I always took our children to any public hearings, many years before when I was involved in politics. I remember, our children — little three- or four-year-old kids would learn how to clap very early. [laughter] And we always took them to important meetings and so on, but on this occasion I told my friends that we had left all the children at home because we wanted to save them from bloodletting because we knew it would be a tough hearing. In fact, it was very tough and I was confirmed on a two to one vote.

LABERGE: It was Deukmejian, the chief justice, and —

REYNOSO: And the senior presiding justice of the Court of Appeal in Los Angeles who was Roth, Justice [Lester] Roth. Very respected guy.

LABERGE: So, who voted against you? Deukmejian?

REYNOSO: Yes. Right. How did you guess? [laughter]

LABERGE: Did someone come to speak against you?

REYNOSO: Oh yes. Well, the most serious and precedent-breaking activity was that two judges I had served with came to testify against me. One was actually still on the court and one had resigned from the court. One was Justice [George] Paras, who had resigned from the court. He issued a press release at that time, saying that he could no longer be an appellate judge serving under the junta led by Chief Justice Rose Bird. So you can tell what his

feelings were. When he resigned from the Court of Appeal, he had written a private letter to me saying, "Cruz, nobody knows about this letter except you and me, and I am now practicing law and I had my private secretary type it. I just want to let you know that I think you have the great potential for being a great judge, but you haven't shown it yet." Then he cited several cases I had decided, to show what a bad judge I was. Just recently I had decided a case that he approved of. And he said, "Ah, but this case that you decided shows the real potential that you have." He mentioned that he thought I was too often, too much in — I considered poor people and minorities my clients, and that was a bad thing. He had some not very nice things to say. I got a phone call one time from a person I knew very well, and he says, "Cruz, I am just calling to let you know that Paras is going to release the letter he had sent you to the press." He didn't say, but apparently that was just part of his urging the commission not to confirm me. And sure enough, I got phone calls. Oh, he had put in the letter that I got off to a very bad start because I had showed how prejudiced I was in favor of colored people because I had appointed as my secretary a woman who was African American. He forgot, actually, that I had interviewed everybody. Oh, he said, "And you had such a great opportunity to hire this great lady that came to see you from San Francisco. Her judge had just retired from the First District Court of Appeal, and you didn't hire her. Instead, you hired this young black woman." Actually, interestingly, the black woman was working for the court already and everybody spoke highly of her, so I thought, "Well, I will hire her."

Later, I learned incidentally, that [Frank] Richardson who was very concerned that there was so few minorities in the court — and he was a conservative Republican — when he was presiding justice of the Third District Court of Appeal had said, "You know, we have got to do better." And it was through his efforts, actually, the courts started hiring a little bit of diversity in the court. Interesting. I didn't know that when I hired her. I just hired her because people spoke well of her, and in fact she did very well for me. And she was hired by another judge after I left. But that was his proof — among other things — that I was prejudiced in favor of black people. I was very concerned when I heard that, and I took my secretary aside and I said, "I have never shown you this letter, but I hear that it has been made public, and so I have got to show it to you now." And I showed her what he said. It turned out that he had had the good the grace of cutting that paragraph out of the letter.

He didn't cut out other things about my prejudices from his point of view, but he did cut that out. I guess he issued it with a press release, and he said that for personal reasons, he was cutting out a paragraph, and if I wanted to I could make it public. I think that's the way he handled it. It turned out that he did make that part public. I remember feeling so badly when I felt I had to show that to my secretary. She got along very well with everybody, and to have her know that one judge thought that she was a nincompoop, that I had just hired her because she was black — I thought it was really demeaning. So, he showed up and testified against me. Thought that, you know, that I just — well, I would be part of the junta.

And then, Evans, a judge by the name of Evans. Anyway, he appeared, but he had written to the Commission which had to approve or disapprove my appointment, saying, "Reynoso is a terrible judge, and the proof of it is that he wrote this opinion." He attached the opinion. And it was an opinion, of which I was terribly proud, that went to the Supreme Court and they reversed my opinion. I never took it personally. They have got their views; I have got my view. It was a case having to do with the standard of proof before you can separate a parent from a child. Not separate; when you are breaching that relationship and you are saying, "You are no longer a parent." I thought that was a very important decision for a state to make, and I set down what I thought ought to be the proper rules, which made it tougher on the state to reach that conclusion. It went to the Supreme Court, and they didn't think that the rules ought to be that tough. I think any judge or anybody reading that letter would quickly conclude that he just disagreed with my opinion. I really didn't worry about that opinion, but to have two judges that sat with you show up and say, "This guy is not going to be a good Supreme Court justice" was very bothersome, and I think that's the only thing that bothered Judge Roth. He asked several questions that somewhat related to that, and of course I responded and apparently he was convinced that in fact I would be a good Supreme Court justice because he voted for me. But that would be troublesome to anyone. Then, of course, there were many judges there who had served with me who said, "Oh yeah, he is going to make a great judge," but that's common.

Then, incidentally, there is a judge, the presiding judge of the Court of Appeal, with whom I often disagreed, Robert Puglia. I always nonetheless considered him a very thoughtful and ethical judge. He tells of Deukmejian coming to see him, when he was the presiding judge of the court to solicit his



vote against confirming a new judge [to that court]. As the story goes, and I have heard it from several people, including Judge Puglia, Judge Puglia said, "You know, we have got a procedure, and if you really believe there are good reasons why this judge shouldn't be appointed, you really should write us a letter." Apparently, Deukmejian took umbrage of that because the new judge was a very politically liberal judge, would no doubt disagree with Puglia and Deukmejian, and apparently had had some run-ins with Deukmejian as a senator because this fellow lobbied for some folk. So, apparently, Deukmejian had some personal qualms about this person. That was his approach. The presiding judge knew the lawyer, and knew that while he disagreed with him, he was a really competent lawyer, really ethical and all that. So, when it came to a hearing, he voted in favor.

Everybody had predicted that if Deukmejian got elected governor, the presiding judge, Bob Puglia, Robert Puglia, would be the first person appointed to the Supreme Court because he was respected, because he had exactly the same philosophy as Deukmejian on the death penalty, on criminal law, et cetera, et cetera. He was a perfect candidate. Deukmejian got to be governor; never appointed Bob to the Supreme Court.

LABERGE: And you wonder whether it was because of that?

REYNOSO: I don't wonder.

LABERGE: You know.

REYNOSO: Of course. And that's sad to say because Bob is a very bright guy. I would have disagreed with him probably nine out of ten cases on the Supreme Court, but personally — I may be wrong, but I have little doubt that that's what happened. I should tell you another story. These are stories that I may talk about in my biography, but I never speak to them publicly. I was once going to be appointed dean of this law school.

LABERGE: Of this law school?

REYNOSO: This law school. I had been a reluctant candidate. I got a call from the chancellor here saying, "Cruz, we need a new dean, and the search committee is very interested in talking to you." I said, "I don't think I want to talk to them if, one, I am not a candidate. I am not sure I want to go through all of the processes — being interviewed by the students, by the faculty and all that." I said, "You know, I am not sure that I want to go through all that."

REYNOSO: No, he came after I did. He and I had actually served on the Court by assignment a time before, and I remember somebody saying, "Maybe this is reflective of the Court to come." Whoever said that obviously had a premonition because both of us ended up on the Court. I have at least one story to tell you about Joe. There was a case that came up, that I don't know if I mentioned this case to you, having to do with equity.

LABERGE: No. Unless it's the real property, the trucker?

REYNOSO: Yes. Yes. What happened was that I disagreed with the majority. They felt that if there was going to be any change, the Legislature should change it and I felt that because there was an equitable issue, that by tradition, the courts could update equitable concepts. And I think Joe must have felt sorry for me because, at the Court of Appeal level if you file a dissent it's one third of the votes; it's quite respectable. At the Supreme Court level, if you file a dissent it's sort of six-to-one and a reader might wonder who this oddball is. So Joe wrote a concurring opinion of that case, and he said, "I agree with everything that Reynoso said, but when all is said and done I think the majority is right — the Legislature should do it." The vote came out five-to-two, so it sounded better. [Laughter] I still remember that case. Maybe it shows his sensitivity. Joe and I generally agreed on cases, or we never had much opportunity to be at odds intellectually or in terms of our analysis of history. I just found working with him — and we did quite a bit of travels. We had hearings in Sacramento and Los Angeles, and I very much enjoyed getting together with him and his wife, who traveled with him on those occasions. I stayed overnight at his home from time to time and that sort of thing. So, it was just a very, very nice relationship. On the other hand, he wrote a book —

LABERGE: *In Pursuit of Justice?*

REYNOSO: Yes. And he talks about me there, but he made a mistake. He said I grew up in Imperial County, and I didn't. I grew up in Orange County. [Laughter]

LABERGE: That was the only mistake, huh?

REYNOSO: That's the only one that comes to my mind. I started practicing law in Imperial County, so many people think that I grew up there.

LABERGE: You two were in the confirmation election together. Did you discuss how you were going to deal with that at all?

REYNOSO: Yes, we had discussions. And particularly, we had discussions with the chief justice. I remember a particular day when we had a discussion, where she was telling Joe and me that if we wanted to separate ourselves from her that she would not at all take it personally, because she understood that it was she who was under attack, and the polls indicated that, in fact, those who had been attacking her — in my view, illegitimately — were having some success. She was saying that if we wanted to separate ourselves from her and so on that she would understand that and perhaps even encourage it. Joe and I, I believe had talked about those issues before. At any rate, without consulting with one another, we both rejected her suggestion out of hand. We felt that it was an institutional attack on the Court, and that we all had the same obligation to come to the protection of the Court and the notion of an independent judiciary, and that her issues were basically our issues. We talked from time to time about whether we would hire a professional to help us with the campaign. Frankly, I am not quite sure whether Joe did. I think he did. We hired a professional person the last few months of our campaign, but there really wasn't that much that one could do as an incumbent judge to defend oneself. Really, anything that one would say, it seems to me, would be self-serving. The person we hired — who was a very low-key person, which is what I wanted — did produce a couple of television spots that were rather staid. My recollection was that he put me on, sort of a talking head in a way. No, I think he had two commercials. One was with me saying something nice about the independence of the judiciary, and then he had another one with a well-known actor, whose name I forget, talking about me and talking about the importance of an independent judiciary. We had a little bit of money to put it on for a few days, and that was really about it. Other than that, I accepted a lot of speaking engagements at that time, and traveled all over the state speaking to various groups, and met with folk who would do endorsing — bar associations and so on. And all of those groups endorsed us. But, in a political campaign of that sort where people don't know the issues very well, the folk who have money win, more often than not.

It was interesting, however, there were several organizations that were gathering money to fight against the chief justice, but many of those folk pay themselves very well. And they ended up near the end of the campaign with very little money even though they had raised several millions. So I have always thought that their success was due to a large extent to the governor taking

a strong stance against the chief justice. And the impression I have is that, in the last few months, he encouraged his supporters to then contribute to the organizations. I think by that time, it was reduced to a couple of organizations that were heading the campaign against the chief justice. And I assume — I don't know the ins and outs of it — that they started cooperating with one another, because they were able to put together some television ads that were very effective against the chief justice and Justice Grodin and me. I had told Joe just a few days before the election, our consultant had run a survey just not on me but on the others. And he mentioned that the chief justice was going to lose — according to his surveys — quite badly, that Joe and I would be quite close, but we were both going to lose. So I told Joe that to aid him in his — in deciding what he wanted to do. I remember now; he did have a consultant because he told me that his consultant hadn't done that last-minute survey. However, he couldn't believe it, I don't believe, because he did have in downtown San Francisco a hotel, one of those victory get-togethers that you have on election night, but it was a very sad occasion for them. I had thought that maybe if he were convinced, as he was not, that in fact the election would not come out well, then he would not have been in that type of gathering. I had decided not to, but it was very difficult, I think, for anybody who knew the history of the Supreme Court in California to accept the notion that justices would not be returned. And most of the people who were supporting the Court and the justices, this was their first experience in fighting that sort of really quite reckless attack on the Court, and folks I don't think quite know what to do about it.

LABERGE: Well, I was going to ask you, what — in your perfect world, if you could decide how justices are chosen and how long they stay, if they should have a lifetime appointment — what do you think the best for justice is?

REYNOSO: I think that despite all the weaknesses of the federal system, that probably lifetime appointment is best. Another system that would also be quite good I think is to have long-term appointments. Appoint a judge for say fifteen years, subject to reappointment by the governor. I do believe that it's perfectly proper to have politics be involved in the naming of judges, because judges need to keep up with changing times. And that can be done by the appointing power — more often than not, the governor — appointing folk that he or she believes are judges who represent those changing times. However, once a judge is appointed, I think they have a duty to forget about who appointed them

and be true to the constitution of their jurisdiction, the statutes and all that. I think it's Pennsylvania, I am not sure — there is a state that has a system of appointing judges for a long time, long-term, and then they're subject to reappointment by the governor. It seems to me, that way a judge would have time to develop his or her own style, would be there long enough to make a difference in the court, and presumably after fifteen years, the judge would have some sort of retirement when he or she left the court. It's a long-enough term to be enticing to good lawyers and folk who would do well on the bench. So, I think that might be also a good system. The literature indicates that the people of the state thought that they were depoliticizing the Court when they went to the confirmation process. The literature seems to indicate that the confirmation process was a substitute for the federal system of having to go through a trial to remove a judge. So the idea was, only if a judge had really acted improperly would it call for a no vote. I don't think those who suggested the confirmation process had in mind that the issue would be as politicized as it got.

LABERGE: You mentioned a couple times the role of the media — for instance, in that election. You also mentioned it, I think, in relation to the farm workers. I wonder if you would comment on the strength of the media, its importance, how it handles —

REYNOSO: The evolution of the media in covering this issue was very interesting. At first, the folk who talked about any criticism of the Court were those who wrote about the Court. As the issue continued, however — say, for the last year — most of the newspapers then turned those assignments to political reporters. So most of the reports were very much the type of reports that you read about the presidential election or the gubernatorial election. The Court has now come down with this opinion; that's going to hurt them politically. Right or wrong? A judge said this or the governor criticized the Court for this decision or that. That is not looking at the merits at all, and not investigating — taking at face value that the issue was the death penalty, for example. Never investigating where the money was coming from, whether there were folk who had qualms about the Court's long-time rulings on insurance companies, for example, on employer–employee relationships, on workers' compensation — any of those issues that in fact were very important, I think, in terms of who provided money against the Court. So far as I can recall, there may have been one or two articles that dealt with some of those

issues, but mostly they dealt with the death penalty because that's what those who were attacking the Court wanted people to believe. Little effort, it seems to me, by the press to explain that in a death penalty case, an overturned opinion did not mean that the person was out free; it just meant that there had to be a retrial. Very little effort to explain that, oftentimes, decisions were overturned based on the United States Supreme Court rulings. Very little in depth; very superficial. I think a good grade for the press might be an F-.

LABERGE: Now we are hearing — all this week [week of May 16, 2004], particularly — about *Brown v. Board of Education*. How that was, in a way, long in coming, but a reaction to changes in society. Or now with gay rights. How do you approach that? I mean, how much did you take into your consciousness, “Well, times have changed,” or what the society was saying?

REYNOSO: What you do is you take a second look, I think, at the basic documents that mandate how you as a judge should look at the law. So, what *Brown* did, for example, was simply take a second look at what equal protection meant. And by the time they ruled, it was not in the abstract that they were ruling, but they were ruling on the basis of what they all knew had happened since *Plessy [v. Ferguson]*. So, they knew the real effect of “separate but equal” meant “separate but not equal.” Secondly, *Plessy* was decided sort of in the shadow of the Civil War. *Brown* was decided in the shadow of the Second World War.

I have always felt that the modern civil rights movement began with the Second World War when veterans came back and they said, “I lost my buddy, I lost a leg fighting for democracy. I am not going to stand it, to not have our own country not live up to democracy.” So you had the formation of groups like the GI Forum, where a city in South Texas declined to allow a returning veteran who died at war be buried in the municipal cemetery and folks said, “Hey, wait a minute! This is not right.” Then you had in California the *Mendez* case, where the court had said that segregation in and of itself is unconstitutional. It had to do with ethnicity, not with race. In fact, it couldn't have said that about race as *Plessy* was still the law, but they had clearly said that segregation, in and of itself — segregating people based on ethnicity — and it's not a big jump to say also based on race or whatever. And the lawyers in *Brown* had filed amicus briefs in the *Mendez* case. Thurgood Marshall's biography indicates that Carter particularly, who was on the briefs with him, argued strongly that they should go for the same approach at the Supreme Court. It

The Opinion Pages | OP-ED CONTRIBUTORS

# You Get the Judges You Pay For

By ERWIN CHERMERINSKY and JAMES J. SAMPLE   APRIL 17, 2011

LEGAL elites must come to terms with a reality driven by the grass-roots electorate: judicial elections are here to stay. Given this reality, we should focus on balancing important First Amendment rights to financially support campaigns with due process concerns about fair trials.

An ugly, expensive campaign for a seat on the Wisconsin Supreme Court is but the latest example of what is now common in judicial elections: millions of dollars in misleading television ads, subsidized by lobbies that have cases before the bench.

In 39 states, at least some judges are elected. Voters rarely know much, if anything, about the candidates, making illusory the democratic benefits of such elections. Ideally, judges should decide cases based on the law, not to please the voters. But, as Justice Otto Kaus of the California Supreme Court once remarked about the effect of politics on judges' decisions: "You cannot forget the fact that you have a crocodile in your bathtub. You keep wondering whether you're letting yourself be influenced, and you do not know."

The need to run multimillion-dollar campaigns to win election to the court in much of the country renders the crocodile ever more menacing.

For more than a quarter of a century, voters have rejected efforts to move from an elective to an appointive bench. Last year, despite a campaign led by

Sandra Day O'Connor, Nevada voters became the latest to reject such a change.

Scholars, judges and advocates who find intellectual comfort in seeking to eliminate judicial elections are indulging a luxury that America's courts can no longer afford. Instead they should focus on incremental changes to what Justice O'Connor bluntly calls the "wrong" of "cash in the courtroom."

More than 7 in 10 Americans believe campaign cash influences judicial decisions. Nearly half of state court judges agree. Never before has there been so much cash in the courts. Measured only by direct contributions to candidates for state high courts, campaign fund-raising more than doubled in a decade.

But this is only part of the financial story. Nationally, in 2008, for the first time, noncandidate groups outspent the candidates on the ballot.

Perhaps most tellingly, a study of 29 campaigns in the 10 costliest judicial election states over the last decade revealed the extraordinary comparative power of "super spenders" in court races. The top five spenders in each of the elections laid out an average of \$473,000.

In 2009, the United States Supreme Court dealt with this issue, holding that due process is violated when a judge participates in a case involving a party that spent a great deal of money on the judge's election effort. The case before the court involved a West Virginia Supreme Court decision overturning a jury verdict that awarded a \$50 million judgment against Massey Coal Company.

One of the justices in the majority of that 3 to 2 decision, Brent D. Benjamin, had been elected after Massey Coal's chief executive spent \$3 million on his campaign. The United States Supreme Court held, 5 to 4, that due process was violated because of the lack of an impartial decision-maker. The court made clear, however, that campaign spending requires the disqualification of a judge only rarely.



A year later, the high court held, in the Citizens United case, that corporations and unions have the First Amendment right to spend unlimited amounts of money in election campaigns. In light of these two decisions, corporate and union officials must engage in a perverse guessing game: they want to spend enough to get their candidate for the bench elected, but not so much as to require the judge's disqualification if the campaign is successful.

Rigorous recusal rules are an important step, but merely disqualifying a judge on occasion is insufficient. The most obvious solution is to limit spending in judicial races. States with elected judges should restrict how much can be contributed to a candidate for judicial office or even spent to get someone elected.

That solution has long been assumed to be off the table, though, because the Supreme Court ruled in 1976 that while the government can limit the amount that a person gives directly to a candidate, it cannot restrict how much a person spends on his or her own to get the candidate elected. Nevertheless, large expenditures to get a candidate elected to the bench undermine both the appearance and reality of impartial justice.

The Supreme Court's 2009 decision properly focused on the \$3 million in campaign expenditures, not the \$1,000 that was directly contributed. In the legislative and executive offices, it is accepted that special-interest lobbying and campaign spending can influence votes; but that is anathema to our most basic notions of fair judging.

Thus, the Supreme Court should hold that the compelling interest in ensuring impartial judges is sufficient to permit restrictions on campaign spending that would be unconstitutional for nonjudicial elections.

States should restrict contributions and expenditures in judicial races to preserve impartiality. Such restrictions are the only way to balance the right to spend to get candidates elected, and the due process right to fair trials.

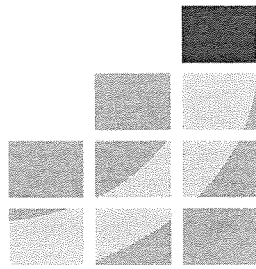
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QUALITY JUDGES  
INITIATIVE

# SELECTION & RETENTION OF STATE JUDGES

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METHODS FROM ACROSS THE COUNTRY



INSTITUTE  
*for the ADVANCEMENT of the*  
AMERICAN LEGAL SYSTEM



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## FORMAL METHODS OF SELECTING STATE JUDGES: COURTS OF LAST RESORT

COMMISSION-BASED GUBERNATORIAL APPOINTMENT (22)	GUBERNATORIAL APPOINTMENT (4)	LEGISLATIVE ELECTION (2)	PARTISAN ELECTION (8)	NONPARTISAN ELECTION (14)
Alaska Arizona Colorado Connecticut* Delaware* Florida Hawaii* Indiana Iowa Kansas Maryland* Missouri Nebraska New Hampshire* New York* Oklahoma Rhode Island* South Dakota Tennessee* Utah* Vermont* Wyoming	California* Maine** Massachusetts** New Jersey**	South Carolina Virginia	Alabama Illinois Louisiana Michigan New Mexico Ohio Pennsylvania Texas	Arkansas Georgia Idaho Kentucky Minnesota Mississippi Montana Nevada North Carolina North Dakota Oregon Washington West Virginia Wisconsin

\*Confirmation by the legislature or another entity is required.

\*A commission advises the governor, but the governor is not required by law to appoint a commission-recommended candidate.

## FORMAL METHODS OF SELECTING STATE JUDGES: INTERMEDIATE APPELLATE COURTS

COMMISSION-BASED GUBERNATORIAL APPOINTMENT (15)	GUBERNATORIAL APPOINTMENT (3)	COURT APPOINTMENT (2)	LEGISLATIVE ELECTION (2)	PARTISAN ELECTION (7)	NONPARTISAN ELECTION (12)
Alaska	California*	New Jersey	South Carolina	Alabama	Arkansas
Arizona	Kansas*	North Dakota	Virginia	Illinois	Georgia
Colorado	Massachusetts**			Louisiana	Idaho
Connecticut*				New Mexico	Kentucky
Florida				Ohio	Michigan
Hawaii*				Pennsylvania	Minnesota
Indiana				Texas	Mississippi
Iowa					Nevada
Maryland*					North Carolina
Missouri					Oregon
Nebraska					Washington
New York					Wisconsin
Oklahoma					
Tennessee					
Utah					
Rhode Island					
South Dakota					
Tennessee*					
Utah*					

\*Confirmation by the legislature or another entity is required.

\*A commission advises the governor, but the governor is not required by law to appoint a commission-recommended candidate.

## INFORMAL METHODS OF SELECTING STATE JUDGES: COURTS OF LAST RESORT

COMMISSION- BASED GUBERNATORIAL APPOINTMENT (29)	GUBERNATORIAL APPOINTMENT (17)	COURT APPOINTMENT (1)	LEGISLATIVE ELECTION (2)	PARTISAN ELECTION (1)	NONPARTISAN ELECTION (0)
Alaska	Alabama	Illinois	South Carolina	Louisiana	
Arizona	Arkansas		Virginia		
Colorado	California*				
Connecticut*	Georgia*				
Delaware*	Maine**				
Florida	Massachusetts**				
Hawaii*	Michigan				
Idaho	Minnesota				
Indiana	Mississippi				
Iowa	New Jersey**				
Kansas	North Carolina				
Kentucky	Ohio				
Maryland*	Oregon				
Missouri	Pennsylvania*				
Montana*	Texas*				
Nebraska	Washington				
Nevada	Wisconsin*				
New Hampshire*					
New Mexico					
North Dakota					
New York*					
Oklahoma					
Rhode Island*					
South Dakota			<p>*Confirmation by the legislature or another entity is required.</p> <p>**A commission advises the governor, but the governor is not required by law to appoint a commission-recommended candidate.</p>		
Tennessee*					
Utah*					
Vermont*					
West Virginia					
Wyoming					

## INFORMAL METHODS OF SELECTING STATE JUDGES: INTERMEDIATE APPELLATE COURTS

COMMISSION- BASED GUBERNATORIAL APPOINTMENT (19)	GUBERNATORIAL APPOINTMENT (16)	COURT APPOINTMENT (3)	LEGISLATIVE ELECTION (2)	PARTISAN ELECTION (4)	NONPARTISAN ELECTION (10)
Alaska	Alabama	Illinois	South Carolina	Louisiana	
Arizona	Arkansas	New Jersey	Virginia		
Colorado	California*	North Dakota			
Connecticut*	Georgia <sup>†</sup>				
Florida	Kansas*				
Hawaii*	Massachusetts**				
Idaho	Michigan				
Indiana	Minnesota				
Iowa	Mississippi				
Kentucky	North Carolina				
Maryland*	Ohio				
Missouri	Oregon				
Nebraska	Pennsylvania*				
Nevada	Texas*				
New Mexico	Washington				
New York	Wisconsin <sup>†</sup>				
Oklahoma					
Tennessee*					
Utah*					

\*Confirmation by the legislature or another entity is required.

<sup>†</sup>A commission advises the governor, but the governor is not required by law to appoint a commission-recommended candidate.

## METHODS OF RETAINING STATE JUDGES: COURTS OF LAST RESORT

RETENTION ELECTION (19)	COMMISSION- BASED GUBERNATORIAL REAPPOINTMENT (2)	GUBERNATORIAL REAPPOINTMENT (3)	LEGISLATIVE REELECTION/ REAPPOINTMENT (3)	PARTISAN/ NONPARTISAN REELECTION (19)	LIFE TENURE (3)	COMMISSION REAPPOINTMENT (1)
Alaska	Delaware*	Connecticut*	South Carolina	Alabama	Massachusetts (to 70)	Hawaii
Arizona	New York*	Maine*	Vermont	Arkansas	New Hampshire (to 70)	
California		New Jersey*	Virginia	Georgia	Rhode Island	
Colorado				Idaho		
Florida				Kentucky		
Indiana				Louisiana		
Illinois				Michigan		
Iowa				Minnesota		
Kansas				Mississippi		
Maryland				Montana		
Missouri				Nevada		
Nebraska				North Carolina		
New Mexico				North Dakota		
Oklahoma				Oregon		
Pennsylvania				Ohio		
South Dakota				Texas		
Tennessee				Washington		
Utah				Wisconsin		
Wyoming				West Virginia		

\*Confirmation by the legislature or another entity is required.



## METHODS OF RETAINING STATE JUDGES: INTERMEDIATE APPELLATE COURTS

RETENTION ELECTION (17)	COMMISSION- BASED GUBERNATORIAL REAPPOINTMENT (1)	GUBERNATORIAL REAPPOINTMENT (1)	LEGISLATIVE REELECTION/ REAPPOINTMENT (2)	PARTISAN/ NONPARTISAN REELECTION (16)	LIFE TENURE (1)	COMMISSION REAPPOINTMENT (1)
Alaska	New York	Connecticut*	South Carolina	Alabama	Massachusetts (to 70)	Hawaii
Arizona			Virginia	Arkansas		
California				Georgia		
Colorado				Idaho		
Florida				Kentucky		
Indiana				Louisiana		
Illinois				Michigan		
Iowa				Minnesota		
Kansas				Mississippi		
Maryland				Nevada		
Missouri				North Carolina		
Nebraska				Oregon		
New Mexico				Ohio		
Oklahoma				Texas		
Pennsylvania				Washington		
Tennessee				Wisconsin		
Utah						

\*Confirmation by the legislature or another entity is required.

## **ERWIN CHEMERINSKY**

Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at UC Irvine School of Law, with a joint appointment in Political Science. Prior to assuming this position in 2008, he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004 to 2008, and before that was a professor at the University of Southern California Law School from 1983 to 2004, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science.

Dean Chemerinsky is the author of eight books, including “The Case Against the Supreme Court,” published by Viking in 2014, and more than 200 law review articles. He frequently argues appellate cases, including in the United States Supreme Court.

Dean Chemerinsky is a graduate of Northwestern University and Harvard Law School. In 2014, National Jurist magazine named him as the most influential person in legal education in the United States.

## **JOSEPH R. GRODIN**

After graduation from Yale Law School and a PhD from London School of Economics, Grodin practiced labor law in San Francisco and then became a professor at University of California, Hastings College of Law. In 1979 Governor Jerry Brown appointed him to the First District Court of Appeal, and in 1982 to the California Supreme Court, where he served as Associate Justice until 1987. He was removed from office, along with Chief Justice Rose Bird and Justice Cruz Reynoso, by the judicial election of 1986. Following his removal he returned to teaching at U.C. Hastings, where he continues teaching as Distinguished Emeritus Professor. He is the author of numerous books, including “In Pursuit of Justice”, in which he writes about the role of a judge and judicial elections.

## **CRUZ REYNOSO**

Cruz Reynoso is currently the Boochever and Bird Professor of Law, Emeritus, at UC Davis School of Law, where he has been a faculty member since 2001.

After earning an associate degree at Fullerton Junior College and his bachelor's degree from Pomona College in Claremont, Justice Reynoso served in the United States Army as a Special Agent in the Counter Intelligence Corps. He then graduated from the University of California, Berkeley, School of Law (Boalt Hall), and was in private practice in El Centro, with breaks to serve as, among others, Associate General Counsel for the Equal Employment Opportunity Commission in Washington, D.C., and Assistant Chief of the Division of Fair Employment Practices at the state Department of Industrial Relations. Afterward, from 1968 to 1972, he was the Deputy Director and then the Director of California Rural Legal Assistance.

Justice Reynoso was a law professor at the University of New Mexico from 1972 until Governor Jerry Brown appointed him to the Third District Court of Appeal in Sacramento in 1976. In 1982, the governor appointed him an Associate Justice of the California Supreme Court. Justice Reynoso served on the Supreme Court until 1987.

After his service on the Supreme Court, Justice Reynoso was Of Counsel at O'Donnell & Gordon and Special Counsel at Kaye, Scholer LLP. Since 2002, he has been Special Counsel at Medina & ReidReynoso and ReidReynoso: A Professional Legal Corporation. He was a law professor at UCLA School of Law from 1991 to 2001.

Justice Reynoso has served on numerous commissions, including as a presidential appointee to the United Nations Commission on Human Rights and to the Select Commission on Immigration and Refugee Policy. For over 10 years, he was the Vice-Chair of the United States Commission on Civil Rights. He has also received many awards, including in 2000 the Presidential Medal of Freedom, the Nation's highest civilian honor.