1-1-1988

California Judicial Retention Elections

Gerald F. Uelmen

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol28/iss2/4

This Symposium is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
III. CALIFORNIA JUDICIAL RETENTION ELECTIONS

A. Essay - Supreme Court Retention Elections in California

Gerald F. Uelmen*

I. INTRODUCTION

Judicial accountability and judicial independence stand at opposite poles. Those professing devotion to either end of the spectrum have been engaged in a debate for at least two centuries. The debate did not begin in California, and it certainly will not end in California, although the state has historically been a harbinger of national change. Most often, the debate temporarily suspends with a compromise. Retention elections were intended to strike such a compromise. Those advocating absolute independence were persuaded that retention elections would achieve life tenure for most judges, since removal would be the rare exception rather than the rule. Those advocating absolute democracy were convinced that retention elections would provide a safety valve whose mere existence would remind judges that they were accountable to the people. Like most compromises, however, the progression of events calls for occasional reevaluation and fine tuning.

The events of 1986 provide strong impetus to reexamine the future viability of this compromise. For the first time, California’s judicial retention elections became hotly contested political races. Most people participating in the debate, leading to the establishment of retention elections in California, assumed that the elections would not be contested with the same fervor as other electoral contests. Most of those who now suggest leaving the system alone assume that the state will again revert to uncontested retention elections in the future.

© 1988 by Gerald F. Uelmen

Thus, the first task is to determine whether 1986 was an aberration. If the advent of the contested retention election is upon us, we must reevaluate our system of retention elections with an eye toward the events of 1986.

To answer the question, one must place 1986 in two contexts: the historical perspective of 137 years of California Supreme Court elections, and the national perspective of what is happening in state supreme court elections throughout the United States at the present time. Both perspectives strongly suggest that a more politicized judiciary is part of our future. We may have a unique opportunity now to minimize its impact without disturbing the delicate compromise of our retention election system.

This paper proposes three modest adjustments to the present system of appointment and retention of supreme court justices:

1. A newly appointed justice would face the voters at the next general election after his or her appointment. At present, an initial confirmation vote is delayed until the next gubernatorial election, which can be as long as four years after appointment.

2. A justice winning confirmation would be elected to a full twelve-year term. At present, a justice is elected to the remainder of the term of his or her predecessor.

3. At the conclusion of a twelve-year term, a justice would continue in office only after reappointment by the Governor and confirmation to a new twelve year term.

While these changes would not insulate justices from the maelstrom of electoral politics, they would minimize the impact of political whirlwinds upon the court as an institution. Before explaining why and how, 1986 must be put in context.

II. A Historical Perspective: California Supreme Court Elections, 1849-1986

Much clamor has erupted over the fact that 1986 was the first defeat of sitting supreme court justices since retention elections were established in California in 1934. Forgotten is the fact that prior to 1934, such defeats were relatively common. From the court's inception in 1849 through 1986, fourteen of its ninety-nine justices were defeated in bids for reelection. (See Table I). Another five were denied renomination in party conventions, thus ending their judicial careers.1

---

1. Incumbent justices denied renomination by their party include Alexander Anderson
Along the way, three significant changes were made in the way California Supreme Court justices were elected: an increase in the length of terms to twelve years in 1879; a conversion of election contests to nonpartisan status in 1911; and the introduction of “yes-no” retention elections in 1934.

Initially, the justices ran in contested party elections, the same as other candidates running for state-wide office. Election contests were frequent since terms were short, and a justice’s success was closely tied to the fortunes of the political party which nominated him. Party nominations were plums that were warmly pursued and hotly contested. This fact, more than any other, explains the present structure of “terms” on the court. The interests of the political parties in having these “plums” frequently available were best served if a seat on the supreme court became vacant on a regularly recurring basis. Thus, when the length of terms for supreme court justices increased from six to ten years in 1862, the terms of the five justices were timed to expire in two year intervals. The justice with the shortest term was denominated chief justice.

The influence of political parties over nomination and election

(D) (1852), David Terry (Democrat-Know Nothing) (1859), Samuel McKee (D)(1886), Charles Fox (R)(1890) and Ralph Harrison (R)(1892). McKee and Harrison were both among the new justices elected when the court was reorganized in 1879. McKee served a seven year term, and Harrison served eleven years.
to the supreme court during this period was candidly described during the debates of the Constitutional Convention of 1878-79. Political veteran W. J. Tinnin made the following remark:

I have attended the conventions of the Democratic party, of the Independent party, and the Republican party; and what is the argument advanced therein in regard to judicial positions? Why, A already has the office, and the party owes him no more compense; his fealty has been paid for; now give it to B, or some one else who has served the party. That argument invariably controls the convention, and you will find that those who have held the office are ousted to make room for others. Public clamor has its influence even upon Judges.

Horace Rolfe added:

This idea of a justice of a Supreme Court being reelected in consequence of having been a good and efficient Judge, is all a delusion. It never has happened in this State, and I do not believe it ever will happen. If a Justice of our Supreme Court is nominated for reelection, and happens to be on the ticket that wins, he is reelected. If he happens to be on the ticket in the minority, he is defeated. I have known some of our best Judges defeated because they were put up by a party that was slightly in the minority.

The delegates debating the future of the California Supreme Court during the constitutional convention of 1878-79 included two former justices of the court and two future justices. With the adoption of a new constitution in 1879, the court was set at its present size of seven justices, and twelve year terms were established. However, a justice would only be elected to fill out the term of his predecessor.

To ensure that at least two seats would be vacant every four years, it was provided that the six new associate justices elected in 1879 would draw lots. Two would get three-year terms, two would get seven-year terms, and two, along with the newly elected chief justice, would get eleven-year terms. Thus, a pattern was estab-

---

2. W.J. Tinnin was a member of the Constitutional Convention representing the Third Congressional District.
4. Horace C. Rolfe was a member of the Constitutional Convention, representing San Diego and San Bernardino counties.
5. Willis, supra note 3, at 959.

Although this scheme was designed to ensure that two justices would be on the ballot every four years, in practice more than two are frequently up for election. A justice must appear on the ballot at the next gubernatorial election after his or her appointment. Rarely does that appearance coincide with the beginning of a twelve year term. In recent times, this has meant that the appearance of a majority of the court on gubernatorial election year ballots is a regularly recurring phenomenon:

1966: Five Justices
1970: Four Justices
1974: Four Justices
1978: Four Justices
1982: Four Justices
1986: Six Justices

This also means that justices routinely face election contests more often than every twelve years. Only twenty of the seventy-four justices since 1879 have served a full twelve year term from beginning to end.7

The second significant change in election of supreme court justice occurred as part of the Progressive reforms of Governor Hiram Johnson in 1911. Party nominations and designations of supreme court candidates were abolished. The office became a “non-partisan” one.8 This reform coincided with the institution of the direct primary

7. In 1990, five of the current justices will appear on the ballot. Chief Justice Lucas will again face the voters for confirmation to the eight years remaining on his term as chief justice. Justices Kaufman, Arguelles and Eagleson will all be on the ballot, but only Justice Eagleson will be up for a full twelve year term. Justice Panelli, who faced the voters in 1986, will again be up, this time for a full twelve year term.

election in California. Thus, supreme court justices found themselves facing two election contests, primary and general, unless they succeeded in garnering an outright majority in the primary.

This reform did not diminish the frequency or ferocity of contested elections, but it did improve the quality of the candidates. During the period of 1849-1911, when selection of supreme court justices was controlled by party politics, successful candidates tended to be experienced politicians who had previously run for a variety of political offices.

After 1911, primaries frequently became free-for-alls for ambitious lower court judges. Often, the successful candidate was one who had made one or more previous unsuccessful attempts, thus achieving some "name identification." The wisdom or popularity of a court decision had rarely been an issue during the era of party politics. When contests became non-partisan, however, a justice who rendered an unpopular decision could count on some opposition the next time he faced the voters.

Probably the best example was the sad fate of Justice William G. Lorigan of Santa Clara. Justice Lorigan was defeated for reelection in 1918, after sixteen years of service on the court. He was a widely respected jurist, who came to the court after thirteen years as a superior court judge in Santa Clara County. Unfortunately, he was among the four justices who voted to grant political boss Abe Ruef a hearing in the supreme court after his conviction in the San Francisco graft trials. This decision was so unpopular that it motivated the adoption of provisions for recall of judges, as well as a legislative investigation of the supreme court. Seven years later, Lorigan became the only one of the four justices voting to grant Ruef a hearing who had to face the voters. He was vulnerable.

Waiting in the wings was an ambitious court of appeal justice named Thomas J. Lennon. Lennon was an effective campaigner. Af-

9. One possible exception was the decision of Justice W. C. Van Fleet in *Fox v. Oakland St. Ry.*, 118 Cal. 55, 50 P. 25 (1897). In reversing the award of $6,000 damages for the wrongful death of a child as "excessive," Justice Van Fleet wrote that damages should be less for a child of a working man, "since experience teaches that children do very frequently pursue the same general class of business as that of their parents." *Id.* at 68, 50 P. at 29. Van Fleet was defeated by Walter Van Dyke after a vitriolic campaign which capitalized on the insensitivity of this opinion. Van Fleet was also denounced as a tool of the Southern Pacific.

10. Justices Henshaw, Melvin, and Chief Justice Beatty also voted to grant Ruef a hearing. None of them faced the voters thereafter. Henshaw resigned before the expiration of his term in 1918, Melvin died before expiration of his term in 1920, and Chief Justice Beatty died in 1914.
ter defeating Lorigan, he set his sights on becoming chief justice. In 1926, when he announced his candidacy to oppose Chief Justice William H. Waste, he attempted to capitalize on the current unpopularity of the governor:

If I am elected at the hands of the people I will not be 'The Governor's Chief Justice.' I shall be the people's Chief Justice, responsible only to the people, for the administration of the office, and if I am the people's Chief Justice, I can assure you that there will be no beaten path from my office to the private office of the Chief Executive of the State.\(^{11}\)

Although party labels were absent from the ballot during this era, justices were closely identified with the Governor who appointed them. The defeat of some justices was attributable to nothing more than their identification with an unpopular Governor. In 1922, for example, both Justices Sloane and Shurtleff were narrowly defeated after replacement of Governor William D. Stephens, the Progressive Republican, who appointed them to the high court. In 1926, Frank G. Finlayson was defeated two months after Governor Friend Richardson appointed him, after Governor Richardson was defeated in the primary election.

The third significant change in election procedure was the adoption of retention elections through a 1934 initiative. The initiative was drafted and sponsored by a statewide “good government” committee which included leaders of the California Federation of Women’s Clubs, the League of Women Voters, the State Chamber of Commerce, the American Legion, the Chiefs of Police of Los Angeles and San Francisco, and the man who was then serving as District Attorney of Alameda County: Earl Warren.\(^{12}\)

What motivated them was concern about rising levels of crime. They reasoned that efforts to reduce crime depended on the honesty and competence of persons administering the law. They argued that abolition of contested elections would ensure that more qualified persons would stay on the bench. Although most of the Committee members agreed with Earl Warren that executive appointment with lifetime tenure was the ideal method of selecting judges, they were concerned that their proposal not “blanket in” all of the judges then sitting for lifetime tenure.\(^{13}\) The competence of judges then sitting in

---

13. Id. at 581-82.
California was not uniformly high. Ultimately, the Committee concluded that a compromise plan proposed by the Commonwealth Club of San Francisco stood a better chance of gaining public acceptance.

An extensive campaign in support of the initiative was mounted by the Chamber of Commerce. Its basic thrust was that the measure was needed to remove judges from the political fray, and eliminate the dangers of corruption from judges having to seek votes and solicit campaign funds.

The "good government" proposal, which appeared on the ballot as Proposition No. 3, was limited to appellate judges, however. On the same ballot was A.C.A. No. 98, a proposal sponsored by the State Bar to provide an identical retention election procedure for trial judges in Los Angeles County.

In the 1934 general election, Proposition No. 3 was adopted by a vote of 810,320 to 734,857. A.C.A. No. 98 was narrowly defeated, by a vote of 733,075 to 659,355. Two explanations have been offered: (1) Proposition No. 3 was strongly linked to three other initiatives as an "anti-crime" package, and all four measures were adopted by similar margins of success; (2) A.C.A. No. 98 was at the end of the ballot as Proposition No. 14, immediately following a very unpopular proposal for local option prohibition of alcohol sales. Thus, California was left with the anomaly of retention elections for appellate justices, while trial court judges remained subject to challenge.

It is important to put the 1934 measure in the context of the times. In 1929, a Los Angeles Superior Court judge named Carlos Hardy was actually impeached and tried by the State Senate. Accused of attempting to improperly influence the investigation of the circumstances surrounding the mysterious disappearance of Aimee Semple MacPherson, (he was an active member of her church), Judge Hardy was acquitted by a narrow vote. A subsequent effort by the State Bar to discipline Judge Hardy was dismissed for lack of State Bar jurisdiction over judges. In 1932, the Los Angeles County Bar Association spearheaded a successful recall of three superior court judges accused of accepting bribes to influence the ap-

pointment of receivers in bankruptcy cases. And in 1933, a San Francisco federal judge named Harold C. Louderback was impeached and tried by the United States Senate. The vote of 45 guilty to 34 not guilty fell short of the necessary two-thirds. Louderback had been a superior court judge before his elevation to the federal bench and was accused of carrying on a former practice of appointing his political friends as receivers. Each of these widely publicized cases presented an example of the dangers of combining judicial office with political activity.

Up until 1986, the system of retention elections freed justices from the burdens of campaigning and fundraising. However, retention elections have not insulated the justices from politically motivated criticism of their decisions. In 1940, when pro-labor and anti-labor union factions were particularly vociferous, the California Supreme Court upheld the right of a union to picket a company in an effort to recruit new members. The decision was handed down a month before the general election in which newly appointed Chief Justice Phil Gibson and Associate Justices Jesse Carter and Roger Traynor would appear on the ballot. Gibson and Carter had signed the majority opinion. Several associations called for their defeat, including the Retirement Life Payment Association and the Associated Farmers.

In 1966, shortly before newly appointed Chief Justice Roger Traynor appeared on the election ballot, he authored an opinion striking down Proposition 14, an initiative declaring that Californians have the right to discriminate on the basis of race in the sale of their property. Traynor was widely denounced by press and politicians, and many newspaper editorials urged his rejection at the polls. Traynor was retained by a vote of 65 percent in 1966, a smaller margin than any previous vote of affirmation received by a justice of the California Supreme Court. Four years earlier, Traynor had received a retention vote of 89.7%. Similar low returns were posted by the justices who joined Traynor in the Proposition 14 opinion. Justice Paul Peek, for example, was retained by a 62% vote, even though he had been confirmed only two years before by an 88% margin.

In 1978, those opposing the confirmation of Rose Bird as chief justice seized upon her concurrence in an opinion holding that rape per se could not serve as "grave bodily injury" to enhance a sentence for burglary. Television ads were produced urging a "no" vote on the grounds that "a rapist would be out on the streets sooner" because of the court's decision. Opponents also capitalized on public disaffection with the Los Angeles school busing case in urging defeat of Bird and Justices Newman and Manuel, even though none of them had participated in the decision. The trial judge in the case, Judge Alfred Gitelson, was defeated for reelection in 1970. After a campaign in which she outspent her opponents $341,452 to $301,156, Chief Justice Bird was confirmed by a narrow vote of 51.7%. The margin of victory for other justices on the 1978 ballot was also affected: Manuel, 62.1%; Newman, 65.3%; and Richardson, 72.5%.

In 1982, after voters adopted a wide ranging criminal justice initiative in June (Proposition 8), much campaign rhetoric was focused upon cases pending before the supreme court which challenged the validity of the initiative. Senatorial candidate Pete Wilson announced that he would personally oppose justices who voted against the initiative. On September 2, 1982, the court handed down a 4-3 decision upholding the constitutionality of Proposition 8. The following November, Justices Broussard, Kaus, Reynoso and Richardson were retained by margins of 56.2%, 57%, 52.4% and 76.2%, respectively. Subsequently, Justice Otto Kaus candidly reflected that he remains uncertain in his own mind whether campaign rhetoric had a subliminal impact on his decision in the case.

Since 1982, the door may have been opened wider for partisan involvement in judicial elections in California. After the Republican Party state central committee endorsed the "nonconfirmation" of three justices on the 1982 ballot, a suit was brought to restrain party "endorsements" in non-partisan judicial races. The California Supreme Court upheld the grant of a demurrer, finding no state consti-

tutional or legislative restraint upon political party endorsements in non-partisan races. A measure was placed before the voters to overturn this decision, and was adopted in June, 1986. Proposition 49 bars political parties from supporting or opposing candidates in non-partisan races. The constitutionality of Proposition 49 was thrown in doubt, however, by the decision in San Francisco Democratic Central Comm. v. Eu, in which the Ninth Circuit held that political parties have a first amendment right to make public endorsements even in primary election contests. The use of "slate mailers" by political parties may lead to even more partisan involvement in retention election campaigns.

The 1986 campaign needs no reprise here. When viewed from the perspective of the past 137 years, however, it hardly appears aberrational. Supreme court incumbents have frequently been successfully challenged, and the disdain for particular decisions or the governor who appointed them has frequently been turned against them. While retention elections have provided a cushion of protection until now, the cushion has been steadily eroding. (See Table II).

From 1942 to 1962, the twenty-one justices who faced the voters received an average affirmative vote of 90%. The unpopularity of a single decision reduced that margin by twenty-five percentage points in 1966. After 1966, the average affirmative vote never returned to the previous high levels. Without even including Chief Justice Rose Bird, the fifteen justices who faced the voters from 1970-1982 averaged an affirmative vote of 69%. That is not much of a cushion if one unpopular decision can cost as much as it cost Chief Justice Traynor and Justices Burke, Mosk and Peak in 1966. The rebound effect of the 1986 elections is likely to reduce the average affirmative vote even further. In short, no current justice of the California Supreme Court can rest easy. The prospect of increasing vulnerability at the polls is part of every justice's future.

30. 792 F.2d 802 (9th Cir. 1986), vacated, 107 S. Ct. 864 (1986), aff'd on rehearing, 826 F.2d 814 (9th Cir. 1987).
TABLE II

CALIFORNIA SUPREME COURT
RETENTION ELECTION RESULTS
1936 - 1986
(Source: California Secretary of State)

<table>
<thead>
<tr>
<th>Date</th>
<th>YES</th>
<th>NO</th>
<th>% AFFIRMATIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td>November 3, 1936</td>
<td>1,094,751</td>
<td>398,580</td>
<td>73.3</td>
</tr>
<tr>
<td>For Associate Justice</td>
<td>Douglas L. Edmonds</td>
<td></td>
<td></td>
</tr>
<tr>
<td>November 8, 1938</td>
<td>1,168,225</td>
<td>557,162</td>
<td>67.7</td>
</tr>
<tr>
<td>For Chief Justice</td>
<td>William H. Waste</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>William H. Langdon</td>
<td>1,116,891</td>
<td>539,574</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Jesse W. Curtis</td>
<td>1,068,778</td>
<td>543,134</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Frederick W. Houser</td>
<td>1,060,153</td>
<td>540,840</td>
</tr>
<tr>
<td>November 5, 1940</td>
<td>1,354,264</td>
<td>581,375</td>
<td>70.0</td>
</tr>
<tr>
<td>For Chief Justice</td>
<td>Phil S. Gibson</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Jesse W. Carter</td>
<td>1,325,949</td>
<td>544,412</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Roger J. Traynor</td>
<td>1,252,737</td>
<td>562,737</td>
</tr>
<tr>
<td>November 3, 1942</td>
<td>1,120,686</td>
<td>176,785</td>
<td>86.4</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>John W. Shenk</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Douglas L. Edmonds</td>
<td>1,100,856</td>
<td>161,379</td>
</tr>
<tr>
<td>November 7, 1944</td>
<td>1,892,517</td>
<td>208,690</td>
<td>90.1</td>
</tr>
<tr>
<td>For Associate Justice</td>
<td>B. Rey Schauer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>November 5, 1946</td>
<td>1,476,300</td>
<td>160,353</td>
<td>90.2</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Jesse W. Carter</td>
<td>1,366,010</td>
<td>176,046</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>B. Rey Schauer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Homer R. Spence</td>
<td>1,388,387</td>
<td>155,382</td>
</tr>
<tr>
<td>November 7, 1950</td>
<td>2,317,592</td>
<td>189,558</td>
<td>92.4</td>
</tr>
<tr>
<td>For Chief Justice</td>
<td>Phil S. Gibson</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Homer R. Spence</td>
<td>2,208,801</td>
<td>188,248</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td>Roger J. Traynor</td>
<td>2,179,844</td>
<td>185,381</td>
</tr>
</tbody>
</table>
### RETENTION ELECTIONS

<table>
<thead>
<tr>
<th>Date</th>
<th>YES</th>
<th>NO</th>
<th>% AFFIRMATIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td>November 2, 1954</td>
<td>2,428,431</td>
<td>199,917</td>
<td>92.4</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Douglas L. Edmonds</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>John W. Shenk</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>November 6, 1956</td>
<td>3,485,243</td>
<td>325,370</td>
<td>91.5</td>
</tr>
<tr>
<td>For Associate Justice</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marshall F. McComb</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>November 4, 1958</td>
<td>3,096,161</td>
<td>448,755</td>
<td>87.3</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jesse W. Carter</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Rey Schauer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>November 8, 1960</td>
<td>3,555,338</td>
<td>484,436</td>
<td>88.0</td>
</tr>
<tr>
<td>For Associate Justices</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maurice T. Dooling</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Raymond E. Peters</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thomas P. White</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>November 6, 1962</td>
<td>3,412,638</td>
<td>347,282</td>
<td>90.8</td>
</tr>
<tr>
<td>For Chief Justice</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Phil S. Gibson</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Associate Justices</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mathew O. Tobriner</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Roger J. Traynor</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>November 3, 1964</td>
<td>3,138,000</td>
<td>360,209</td>
<td>89.7</td>
</tr>
<tr>
<td>For Associate Justice</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paul Peek</td>
<td>4,342,506</td>
<td>581,051</td>
<td>88.2</td>
</tr>
<tr>
<td>November 8, 1966</td>
<td>3,266,628</td>
<td>1,737,345</td>
<td>65.3</td>
</tr>
<tr>
<td>For Chief Justice</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Roger J. Traynor</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Associate Justices</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Louis H. Burke</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marshall F. McComb</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stanley Mosk</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paul Peek</td>
<td>2,886,584</td>
<td>1,758,012</td>
<td>62.1</td>
</tr>
<tr>
<td>November 3, 1970</td>
<td>3,744,682</td>
<td>902,197</td>
<td>80.6</td>
</tr>
<tr>
<td>For Chief Justice</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Donald R. Wright</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Associate Justices</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Raymond E. Peters</td>
<td>2,950,897</td>
<td>1,127,460</td>
<td>72.4</td>
</tr>
<tr>
<td>Louis H. Burke</td>
<td>3,342,794</td>
<td>926,444</td>
<td>78.3</td>
</tr>
<tr>
<td>Raymond I. Sullivan</td>
<td>3,013,846</td>
<td>1,102,307</td>
<td>73.2</td>
</tr>
</tbody>
</table>
III. NATIONAL PERSPECTIVE: THE GROWING VULNERABILITY OF JUDGES

If we examine the appellate courts which sit at the pinnacle of each of our fifty state judicial systems, we see a full spectrum of alternatives for selecting and retaining justices represented, with some interesting regional patterns.

Only four states, all in New England, have opted for life tenure or its equivalent.\(^2\) Probably the closest thing to life tenure on the spectrum is a system of reappointment to successive terms by the appointing authority. Eight states, mostly on the east coast, have

---

32. Massachusetts, New Hampshire, Rhode Island and Vermont.
opted for this system, including New York and New Jersey.33 Most of these states provide for lengthy terms of appointment. In New York, fourteen year terms are provided, while in New Jersey, reappointment is for life after an initial term of seven years.

At the other extreme, contested partisan elections are the prevailing practice in ten states, nearly all in the south.34 Typically, these states provide shorter terms, of six or eight years. Close to this alternative is the contested non-partisan election, the system utilized in thirteen states.35 Most of these states are in the northwest.

The use of "yes-no" retention elections is the fastest growing method of judicial selection, currently utilized by sixteen states at the supreme court level.36 Another five states utilize retention elections only for trial or intermediate appellate judges.37 California was the first state to adopt retention elections in 1934. The movement gained most momentum during the 1960's when seven states adopted retention provisions, and the 1970's, when eight more states adopted provisions.

In all of these states, the defeat of incumbent judges has become a rare phenomenon, especially at the appellate level.38 But recent research suggests that the comfortable margins of safety that formerly protected judges in retention elections are eroding fast. Twenty years ago, 92.9% of judges on retention ballots were retained by a margin of 80% or more. In 1984, that proportion had dropped to 26.4%.39 The national mean for all trial court judges on retention ballots was 85.7% affirmative in 1964. In 1984, it was 76.7%, rebounding from a low of 73.8% in 1978.40 The low was attributed to

35. Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin. Id.
36. Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont and Wyoming. Id.
37. Georgia, Idaho, Maryland, Montana, Tennessee, Utah. Idaho. Montana and Utah require supreme court justices to face retention elections if they are unopposed; otherwise, nonpartisan contested elections are conducted.
38. In the election years of 1972, 1974, 1976 and 1978, an average of 1.6% of the judges running for retention were defeated. From 1964 through 1979, only two appellate justices were denied retention. Carbon, Judicial Retention Elections: Are they Serving Their Intended Purpose? JUDICATURE Nov. 1980, at 210, 283.
40. Id. at 343, Table 1.
the "Watergate" phenomenon of declining trust levels for all American institutions: "Although the match is not perfect, the national trends in political trust and those in the mean affirmative vote of judicial retention elections are very similar." 41

While it remains to be seen what impact the "Iran-Contra" affair will have on general levels of public trust, only a Pollyanna would anticipate any increase in those levels in the immediate future. This can only mean increased vulnerability for judges facing election challenges, even in states which utilize the retention election procedure. In Illinois, where the "Greylord" scandal has added to the burden all judges must carry, thirteen trial judges have been defeated in retention elections since 1974 - including three in 1986. 42 In Oklahoma, a well-financed campaign by death penalty advocates came very close to succeeding in the removal of a court of criminal appeals judge in the 1986 retention election. 43

In states which permit candidates to run against incumbent justices, 1986 was a banner year. Three justices of the North Carolina Supreme Court, including the chief justice, lost their seats in partisan election contests. In Ohio, which utilizes non-partisan contests, the contest assumed a highly partisan flavor. The democratic chief justice was unseated by a republican-supported opponent.

The 1986 contests just picked up where the 1984 contests left off. In 1984, the chief justice of the Indiana Supreme Court was challenged in a spirited campaign by right-to-life advocates after he authored a controversial decision striking down a state law limiting abortions. Although he retained his seat, the negative vote was substantially higher than previous retention elections. Another 1984 "close call" was the challenge to Oregon Supreme Court Justice Hans Linde, who retained his seat only after a nation-wide fundraising effort was mounted.

As battles for supreme court seats become well-financed political contests in other states, 44 the climate of vulnerability of incumbent judges will certainly transcend regional differences and impact retention states as well. In part, this increased vulnerability of all judges may simply reflect increased public awareness of the role

41. Id. at 344.
42. Id. at 343, Table 1; Schotland, 1986-A Historic Year for Judicial Elections, JUDICIALCATURE, Oct. 1987, at 246 (1987).
43. Schotland, supra note 42, at 246.
44. Seven million dollars were spent on the 1986 Ohio contest. $1.8 million were spent in battles for three contested high court seats in Texas in 1980. Schotland, supra note 42, at 246.
judges play in deciding controversial issues of public policy. The suggestion that support for incumbent judges can be increased by greater efforts to "educate" the public on the role our courts play is naive. Several studies find a negative relationship between information/knowledge levels and support of the courts. In other words, the more the public knows about what judges really do, the less inclined they are to support them.

As judicial races become more politicized throughout the nation, supreme court justices are amassing sizable campaign fund war chests. In Texas, for example, it was recently disclosed that lawyers for Texaco contributed $72,700 to five supreme court justices, including two who were not even on the ballot. However, lawyers for Pennzoil were in no position to cry foul. They contributed $315,000 to the same justices. From 1982 to 1986, the average amount of campaign contributions collected by successful Texas Supreme Court candidates increased 219%, from $272,189 to $868,604. Records were set in 1986 for many other states as well. $2.7 million was spent in the Ohio race for chief justice, compared to $99,192 spent in 1980. In Kentucky $183,000 was spent in one race for the supreme court, a 353% increase over the last race for the same seat in 1978. Montana's two candidates for chief justice spent $247,342, a 320% increase over the 1980 race. The California Supreme Court race led the nation, of course, with $11.4 million being spent, an all-time national record.

The most disturbing aspect of these figures is the tendency of campaign funds to reproduce and inflate themselves on a recurring basis. Political fundraising has become an industry that feeds on itself. Once sources of contributions are identified, fundraisers actively seek out issues and candidates which can tap those sources. Professional fundraisers will be looking for issues that can generate multi-million dollar judicial campaigns in 1990. For major political donors, judicial races may be perceived as a "good investment." As the President of the Ohio State Bar Association bluntly put it: "The people with money to spend who are affected by Court decisions have reached the conclusion that it's a lot cheaper to buy a judge than a governor or an entire legislature and he can probably do a lot more for you."

47. Id.
Contributions by lawyers and law firms are the largest single source of campaign contributions for judicial election contests, and such contributions raise substantial ethical concerns. A recent study of more than 400 candidates for contested superior court elections in California from 1978 to 1982, concluded that lawyers are the single largest source of campaign funds, providing nearly half of the dollars received by incumbent judges. In contested elections, many lawyers and law firms hedge their bets by contributing to both candidates.

Prospects for laws limiting campaign contributions to judicial contests are dim in light of Buckley v. Valeo, which gives limited first amendment protection to campaign contributions. While proposals have been made to limit lawyers contributions in trial court contests, only Michigan has imposed limits on the amount judges can solicit from attorneys. In the context of retention elections, it is virtually impossible to limit contributions by those opposing the retention of a judge. Thus, it would be grossly unfair to use Codes of Judicial Conduct to impose limitations on the fundraising activities of incumbent judges.

The reality of political fundraising poses a significant challenge to sitting supreme court justices. First, effective fundraising requires personal involvement of the candidate, which means a substantial demand on time. Meetings with professional fundraisers, fundraising events, fundraising letters, and even fundraising phone calls are fast becoming part of the daily regimen of sitting justices.

Even more serious is the problem of avoiding the appearance of impropriety. The gravest risk is presented by contributions from lawyers who frequently engage in litigation before the judge.

The American Bar Association Code of Judicial Conduct directly addresses this concern. While the solicitation of contributions from lawyers is not prohibited, the judge is required to solicit all funds and support only through "committees of responsible persons to secure and manage the expenditure of funds for his campaign." A commentary admonishes that, "unless the candidate is required by

---

50. 1986 Cal. Assembly (Reg. Session) 2565 (carried by Assemblyman Larry Stirling, R.-San Diego).
52. See Grodin, supra note 27, at 368.
53. A.B.A. CODE OF JUD. CONDUCT, Canon 7(B).
law to file a list of his campaign contributors, their names should not be revealed to the candidate."\(^{84}\)

The A.B.A. provision was originally adopted as part of the California Code of Judicial Conduct, but was suspended on September 21, 1976, after the Political Reform Act of 1974 was enacted. The Political Reform Act fully applies to judicial candidates, including those who run unopposed.\(^{85}\) Full disclosure of the identity of donors is required, so it is impossible to insulate judges from knowing the identity of contributors to their campaign. This presents a sensitive problem for judges who accept contributions from lawyers. Obviously, direct contributions should be declined from lawyers with cases pending before the judge. Should this extend to all members of a law firm with a case before the court? When the court is the state supreme court, with over 4,000 filings per year, that would eliminate a lot of lawyers. Those opposing judicial candidates take full advantage of the disclosure lists, to suggest that some contributors have something to gain in cases pending before the court. Regardless of how unfair that suggestion might be, a judge must be concerned with "how it looks." This concern was well expressed by former Justice Joseph R. Grodin in reflecting on the 1986 California campaign:

Money came from a variety of sources, but principally, I would have to say, from lawyers and groups that had some interest, not to say stake, in the judicial process. 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. All of this was not only personally distasteful but unseemly as well, and unavoidable as it was, almost certainly, in the long run, erosive of public confidence.\(^{86}\)

In Ohio, the newly elected chief justice voted to rehear thirty cases which had been decided in the final weeks of his predecessor's term. After news reports disclosed that he had received campaign contributions from lawyers in five of those cases, he disqualified himself from the hearings. The spectre of disqualification is disquieting for many Ohio lawyers. As the State Bar President put it, "The campaign was so expensive and so much money was raised that damn near every prominent lawyer in the State of Ohio gave to somebody."\(^{87}\)

\(^{54}\) Id. at Comment.
\(^{55}\) CAL. GOV'T CODE § 84207 (West 1976).
\(^{56}\) Grodin, supra note 27, at 368.
\(^{57}\) Kaplan, supra note 46, at 31.
If every justice on the Texas Supreme Court who received a contribution from a lawyer in the case disqualified himself, only one justice could sit on the Texaco-Pennzoil case. Simply shrugging our shoulders and saying "it comes with the territory" is no answer, unless we are ready to accept a public perception of judges which is indistinguishable from the perception of other politicians. The current politicization of the judiciary is a national phenomenon. Any contested election, including a retention election, will put incumbent judges in a very cruel dilemma - lie down and give up, or hit the campaign trail and start soliciting contributions. Many of the finest judges will simply opt out.

VI. MINIMIZING THE IMPACT OF POLITICIZED RETENTION ELECTIONS

When viewed from the perspectives of California history and national politics the 1986 California retention elections do not appear aberrational. Rather, they appear to be part of a widespread trend with serious implications. Throughout history, the California Supreme Court justices have frequently reaped the wrath of a volatile electorate. While retention elections have eliminated the worst aspects of partisan contests, they provide no insulation from electoral politics. Even if a contest on the scale of 1986 never recurs, the mere threat of recurrence can be a powerful force. Special interest groups will be motivated to voice their dissatisfaction with decisions by threatening to retaliate at the polls. And those threats will motivate justices facing retention election contests to form campaign committees and accept campaign contributions.

National trends suggest that fertile fields await those seeking campaign contributions on behalf of justices. Institutional litigants view judicial campaign contributions the same way they view contributions to legislative and gubernatorial contests - as simply a cost of doing business. It should be apparent to political observers throughout America that the increasing flow of money into judicial campaign coffers represents a cynical judgment. Such contributions are perceived as a good investment, with a potential for far greater return than other political races. Lawyers are another fertile source of campaign contributions. They tend to view such contributions as a form of insurance. They can't afford not to be contributors.
Faced with the prospect of ineluctable politicization of retention contests in California, we should be searching for ways to minimize the threat. I do not think the abolition of retention elections and establishment of life tenure is a realistic prospect, so I am not going to waste time discussing it. But we can reduce the frequency with which individual justices must face the prospect of a campaign, and influence the thrust of such campaigns. By simply giving every appointee a full twelve year term, and providing for confirmation of that term at the earliest statewide election, we can avoid or minimize many of the most pernicious effects of contested retention elections.

First, by giving every confirmed appointee a full twelve year term, we can maintain the longevity of service of individual justices which has characterized the past half century of the court's history. Although justices have had to regularly face election contests more frequently than every twelve years, the uncontested nature of these contests encouraged a trend toward longer tenure, averaging 13.1 years. As Table III shows, the average tenure of California Supreme Court justices was 8.5 years during the 1880-1934 era of contested elections, even though the full legal term has remained at twelve years since 1880. With the advent of contested retention elections, a reversal of this trend toward increased longevity can be anticipated. While the defeat of sitting justices may still be a rarity, the prospect of frequent campaigning and fundraising will provide a strong incentive for early retirement.

<table>
<thead>
<tr>
<th></th>
<th>0-5</th>
<th>6-11</th>
<th>12-15</th>
<th>16-20</th>
<th>21+</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>1849-1879</td>
<td>18</td>
<td>8</td>
<td>1</td>
<td>—</td>
<td>—</td>
<td>4.3</td>
</tr>
<tr>
<td>1880-1934</td>
<td>17</td>
<td>14</td>
<td>6</td>
<td>5</td>
<td>3</td>
<td>8.5</td>
</tr>
<tr>
<td>1935-1987</td>
<td>10</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>4</td>
<td>13.1</td>
</tr>
</tbody>
</table>

The current system of appointing justices to the remainder of their predecessor's term is a historical anomaly which no longer serves any valid purpose. Normal turnover by death and retirement will insure that some supreme court justices are on statewide ballots on a regular basis.

Second, having appointees stand for election to twelve year terms at the next statewide election after their appointment will minimize the risk that such elections will be turned into referendums on the popularity of particular decisions. Instead, the election would be
more likely to focus on the qualifications and competence of the candidate. The thrust of the issue presented to the voters would be prospective, rather than retrospective. The contest would occur no more than two years after the initial appointment. And the contest, at least in off years, would be uninfluenced by a concurrent gubernatorial race.

Limiting judicial retention elections to gubernatorial years is a relatively recent innovation, adopted as part of a broad revision of the judicial article of the California Constitution in 1966.58 For the first thirty years after the retention election system was instituted, newly appointed justices faced the voters "at the next succeeding general State or primary election."59 One consequence of the change, apparently unanticipated, is the presence of a majority of the justices appearing on the ballot at the same time. From 1936 to 1964, in a total of fifteen statewide elections, the average number of justices on the ballot at the same time was two. Only once did more than three justices appear on the same ballot, in 1938. Since 1966, however, a majority of the court has appeared on every gubernatorial ballot. In 1986, six justices appeared concurrently. In 1990, at least five will appear, and it's conceivable that all seven could appear. Reverting to a system in which the newly appointed justice appears on the ballot at the next statewide election would minimize the risk of massive disruption of the court's workload while a substantial proportion of the justices are distracted by campaigning, and would reduce the risk of a large-scale turnover of justices at the same time.

Third, the potential for reappointment to a successive twelve year term would permit even longer tenure for outstanding jurists. While some have suggested that one twelve year term may be enough, much of the reputation the California Supreme Court has achieved in recent years is attributable to the lengthy tenure of its most outstanding justices: Traynor (30 years), Gibson (25 years), Mosk (23 years), Schauer (22 years), Carter (20 years) and Tobriner (20 years). While reappointment could subject justices to political pressures, and the ensuing election contest could focus on the prior term rather than the upcoming one, these problems will probably be rarely encountered. A governor is not likely to reappoint a justice who would face a serious challenge. Even if reappointment is a rarity, its possibility should not be foreclosed. In declaring that every supreme court seat becomes vacant every 12 years, it may well

be that the most qualified candidate to fill the vacancy is the incumbent. A governor should not be foreclosed from considering that candidate.

None of these changes would totally remove supreme court justices from electoral politics. They leave the essential compromise of our retention election system intact. The voters would still be free to reject a Governor’s choice for appointment to the supreme court, applying any standard they see fit. The full legal term for a supreme court justice would continue to be twelve years. But by restructuring the expiration of terms and the timing of electoral contests, we can minimize the prospect that our justices will be sent out to the political hustings on a recurring basis. An appointee to the court will be assured that he or she will face the voters on one occasion, shortly after appointment, and, if successful, enjoy a secure tenure of twelve years of service without the distraction of campaigning or fundraising.
B. Transcript — California Judicial Retention Elections

1. Defense of Paper — Dean Gerald F. Uelmen

I strongly suspect that there are many among us, including the justices of the California Supreme Court, who are relieved that 1986 is behind us, and are now looking forward to a return to the good old days when no one except lawyers and law professors even knew who the California Supreme Court justices were, or cared to know. I recall Justice Panelli’s marvelous comment on the eve of the election last year, when he reflected that “the polls show that seventy percent of California citizens never heard of me, and I’d like to keep it that way.” My first task this afternoon is to convince you that those days are gone forever. And to accomplish that I would like to offer you two perspectives. First, a national perspective to put what happened here in California last year into a broader perspective and secondly, a historical perspective looking back at what’s gone on in the past in California, to put 1986 into a deeper context. I will conclude that, like it or not, we are in the midst of a large scale upheaval, in which the judicial office is rapidly being politicized to an extent unprecedented within our history.

I think the Bork controversy is simply one more example of that, and I especially enjoyed the irony of the extent to which the Bork controversy turned into a battle by public relations managers to turn public opinion one way or the other, and ultimately, I think that was determinative. The undecided Senators really ended up voting the way the polls turned out, and managing the anti-Bork campaign was Norman Lear, who had been very much in the forefront of the pro-court campaign here in California. Managing the pro-Bork public relations campaign was Bill Roberts, who had been very much in the forefront of the anti-court campaign here last year. So they just moved on to a bigger stage.

Our system of retention elections in the past offered some protection for supreme court justices, from the politicization, but that protection has eroded to the point now where I think every justice has to consider the prospect of financing a state wide campaign in order to stay in office. Faced with this reality, we should be looking for ways to minimize the impact. I am not optimistic that there is any hope of abolishing retention elections, replacing them with a lifetime appointment, but I do recommend some modest changes that I think can make a substantial improvement in the situation.
First, I recommend having justices face confirmation at the next general election after their appointment, rather than waiting as long as four years for the next gubernatorial contest. Secondly, I recommend giving justices a full twelve year term, rather than the remaining scraps of their predecessor’s term. And finally, I recommend a single twelve year term unless a justice is re-appointed by the Governor to a second twelve year term.

Now, let me start with the broader national perspective that I promised you. We in California tend to be very insular and look at what happened to us here in 1986, just from the perspective of the campaign we experienced. But all across the country, new records were set last year for the amount of money being poured into state supreme court contests. The reality is that those who spend money to influence public policy, have suddenly discovered that a lot of public policy is made by supreme court justices and it’s a lot cheaper to influence the outcome of this selection of supreme court justices than it is to influence the outcome of the selection of a governor or a legislator. What’s remarkable is that this massive infusion of money occurred regardless of the form of the election contest. Nine states still utilize contested partisan elections in which the political parties actually choose candidates to run for supreme court seats. Nearly all of these states are in the South. And in all of these states, supreme court election contests have in recent times taken on all of the trappings of gubernatorial contests. In just a four year period, for example, from 1982 to 1986, the average amount of campaign contributions collected by successful Texas Supreme Court justices increased 219%, from $272,700 to $868,000 per justice. 1986 contributors included Texaco, which donated $72,700 to five of the justices, two of whom weren’t even on the ballot, and Pennzoil, which gave $315,000 to the same five justices.

Thirteen states utilize non-partisan elections, in which candidates can run against incumbent judges, but without party labels. And even in these states, the contests have assumed a very partisan cast. That’s what happened in the race for Ohio’s chief justice last year. $2.7 million was spent on a hotly contested race between an incumbent chief justice, well known as a Democrat, and his Republican challenger. The Republican won, and promptly voted to grant re-hearings in thirty cases decided in the final weeks of his predecessor’s term. After news reports revealed that he had received campaign contributions from lawyers in five of those cases, he disqualified himself from further participation.

Fifteen states now utilize the yes - no retention election system
RETENTION ELECTIONS

which we use in California. In 1986, we set the national record with a total of $11.4 million being spent by both sides. Heated campaigns took place in other retention states as well. California was not alone. In Oklahoma, where they have a split supreme court, a Special Court of Criminal Appeals, one of the justices on that Criminal Court of Appeals was very nearly unseated by a well-financed effort by death penalty advocates, very much the same issue being raised here.

As we look about the country, we're seeing that the wide margins of safety enjoyed by justices in states using retention elections are quickly eroding. Twenty years ago, ninety-three percent of judges on retention ballots were retained by margins of eighty percent or more. By 1984, that proportion had dropped to twenty-six percent. Political scientists have some very interesting things to say about these trends. First, they tell us that there is a very close match between the general level of what they call "Political Trust," and the average affirmative vote that judges receive in retention elections. Both hit rock bottom in the wake of Watergate when the national average for all judges on retention ballots reached a low point, falling below seventy-four percent. The other thing that political scientists have to tell us that's interesting, is that educating the public about the role of our courts in our system is not the solution. In fact, they find an inverse relationship between public knowledge of the courts and public support of the courts. In other words, the more the public knows about what courts do, the less inclined they are to support them.

The financing of judicial campaigns at these levels all across the country presents obvious problems. In retention states we have an easy way to avoid those problems. We simply defeat the incumbent judges and we don't have to worry about whether they are influenced by campaign contributions. Their replacements then start out with a clean slate. That's not a nice clean solution, however. What does a retained incumbent do when he gets back to work after the campaign, and starts recognizing the names of campaign supporters or detractors on the briefs and the pleadings that cross his desk. Without doubt, contributions by lawyers and by law firms were the largest single source of campaign contributions during all of the 1986 contests. Now if we were to require justices to disqualify themselves in cases handled by a campaign contributor, as the chief justice of Ohio recently did, that source of campaign contributions would dry up overnight. There also wouldn't be a judge left in Texas to decide the Texaco-Pennzoil dispute.
I think there's an even greater danger, though, than the potential scandals that judicial campaign fund raising presents. And that's the danger that our finest judges are simply going to opt out, and say, I didn't become a judge so I could go out and hustle campaign contributions. I'd rather retire than face the prospect of a political campaign.

The second perspective I'd like to offer is a historical perspective of what has happened in California in the past. Actually, the history of judicial elections in California was somewhat of a surprise to me. I did not realize how many incumbent justices had been turned out by the voters. There were a total of fourteen. If there was a recurrent theme that I saw in each of these contests, it was that an unpopular governor is an even heavier albatross around the neck of a justice than an unpopular decision. Most of these justices were turned out of office simply because of the unpopularity of the Governor who appointed them.

Now although the 1986 defeats were the first since we instituted retention elections in 1934, I think they were completely predictable and consistent with national trends. The results of all supreme court election contests in California since we instituted retention elections are collected in Table II.

If you look at that Table, you will see a very interesting trend developing historically. The twenty-one justices of California Supreme Court who faced the voters from 1942 to 1962 received an average affirmative vote of ninety percent. Without even including Rose Bird, fifteen other justices faced the voters from 1970 through 1982. They averaged an affirmative vote of sixty-nine percent. That's a drop of twenty-one percentage points.

The average level of support for justices is now low enough that one unpopular decision can make any justice vulnerable. And I say that based on the historical precedent of what happened to Chief Justice Roger Traynor. Because of his opinion striking down Proposition 14, which permitted racial discrimination in the rental and sale of property, Traynor in 1966 was retained by a vote of sixty-five percent. Just four years earlier, as an associate justice, Traynor had been retained by a ninety percent margin. So even if you’re starting with the margins of seventy-eight to seventy-nine percent that Chief Justice Lucas and Justice Panelli racked up last year, a similar drop

1. See supra Table I, at 335.
2. See supra Table II, at 344-46.
of twenty-five percentage points, based on one unpopular decision, could turn a routine confirmation into a potential rout. And it's not hard to conjure up a very realistic scenario in which this could readily happen.

Petitions are already being prepared to put some very controversial initiatives on the ballot in 1988. Before 1990, the supreme court would in the natural course of things have to render a decision on the constitutionality of such an initiative. A decision either way could unleash the same political forces which supported or opposed the initiative to oppose the retention of individual justices. It happened in 1966 with Proposition 14, it happened in 1982 with Proposition 8, and it could easily happen again in 1990. The difference between 1966, 1982, and 1990 is that the margin of safety that protected the justices has now disappeared.

Let me turn my attention to my suggestions minimizing the impact of this change. Clearly, if we look at what's happening throughout the country, if we look at historically what is happening in California, the risk is substantial that in 1990, the justices will again face the prospect of having to mount a campaign and raise campaign funds. While replacing retention elections with lifetime appointments would be the ultimate solution to the problem, I'm enough of a pragmatist to realize that's not a very realistic agenda. But there's still a lot that can be done to minimize the problem, and I would suggest that we start by putting justices on the court for an honest twelve year term. Our current system of having new appointees simply fill out the term of their predecessors is really a historical anomaly dating back to the era when supreme court seats were political plums controlled by the nominating conventions of the political parties. And really the only reason we have that pattern of twelve year terms expiring in four year intervals and having two of those terms expire every four years was simply to make those plums available on a regular recurring basis for the political parties to make nominations. I don't believe that serves any interest today. Rather than limit the potential impact of a single election on the stability of the court, it exacerbates it. In recent years, the appearance of a majority of the court on the ballot is a regular recurring phenomena. In 1966, we had five justices on the ballot. In 1970, we had four, 1974 we had four, 1978 we had four, 1982 we had four, 1986 we had six and there will be a minimum of five justices on the ballot in 1990. And in large part that is because of our system having justices fill the term of their predecessor. Actually, of the three new appointees of the court, only one will even be up for a twelve year term in 1990.
So, we kind of built into our system this regular recurrent appearance of a majority of the court on the ballot every four years.

I believe we should also revert to the pre-1966 practice of having justices appear on the ballot at the next state-wide election after their appointment, rather than our present structure, which was instituted in 1966, waiting until the next gubernatorial election at four year intervals. I think the sooner a justice appears on the ballot after his or her initial appointment, the greater the likelihood that the contest will be perceived as a confirmation of his or her qualifications rather than a referendum on the popularity of previously rendered decisions. And this change would also avoid the log-jam of so many justices on the ballot at the same time. Also avoiding, at least every other election, having the supreme court contests coincide with gubernatorial contests, a coincidence that can only serve to add to the politicization of the contests.

My final solution, or suggestion, is one that I'm much more ambivalent about. And that’s limiting justices to a single twelve year term unless they are reappointed by the Governor. The reason for making that suggestion is so that justices serve a twelve year term with no thought of facing the voters for a referendum on his or her decisions. I think we need to be concerned about the influence of contested elections on the decision making process itself. The crocodile in the bathtub that Justice Kaus refers to.

On the other hand, my ambivalence arises from the incredible contribution to the greatness of the court, made by the justices who have served multiple terms in the past. I think that the thirty years of Traynor, the twenty-five years of Gibson, the twenty-three years of Mosk, have a lot to do with the national reputation that the California Supreme Court enjoys. I would not want to foreclose that possibility altogether by precluding reappointment. But I think we’re entering a new era where even twelve years will be an unusually long term and reappointment for a second twelve year term should be reserved for the truly exceptional justice in which a Governor actually makes that choice to reappoint for a second twelve year term.

Now there is an alternative, of course, of taking these steps and that’s simply to have the justices stop deciding such controversial issues. However, I think that option has passed us by. The reality of today’s world is that justices now face the prospect of having to organize campaigns and solicit contributions, every time they offend enough special interest groups to make the retention a contest. And with the issues that are regularly presented to the California Su-
preme Court, I think we can rest assured that 1986 will not prove to have been an aberration. It will prove to have been an overture. Thank you.

2. The Panelists’ Discussion*

a. Professor Gideon Kanner**

There are essentially two problems of an historical nature that are facing the judiciary. One is the problem of judicial activism, which I hasten to point out, is not a dirty word. It does however, implicate things which are a matter of degree. Bob Thompson once used an expression in one of his opinions in which he likened some legal principle or other to being like garlic in a stew. And I think the same is true of judicial activism. It’s a matter of degree. And it further seems to me that once we accept the concept that judges may heap handfuls of ideological garlic into their decision on an ongoing basis, or entirely apart from ideology, that they can be a very active governing force in the American government, then some things follow from it. By the way, not the least of which is the problem that was touched on earlier today, the fact that you can’t get the courts of appeal to agree on things, that they keep contradicting each other. After all, if a judge ceases to think of himself as the interweaver of the law, to use Justice Traynor’s expression, as the weaver of the seamless web, and starts thinking of himself as a doer and shaker, a maker of public policy, then why the hell should he agree with someone who’s just like himself, except that he sits in another city. It has disturbing effects on the whole judicial pyramid.

The other problem, I think, is political. And that is, that judges have become pawns in a political fight which is raging around them, in which they’re not entirely innocent. At the risk of saying some controversial, but to me, obvious things, for lack of a better term, the liberal wing of American politics has had things pretty much its own way beginning with F.D.R. and in my opinion, reaching some kind of a peak under Johnson, when most, if not all of the liberal political legislative agenda was enacted. Unfortunately, the world is a harsh place. Sometimes it does not deal kindly with political theory. The millennium did not arrive. Perhaps we’ve reached some kind of a peak. Perhaps there is a public reaction. There seems to be a shift into the political right. For whatever reasons, it seems to me that the

* We are indebted to Professor Kenneth A. Manaster for moderating this discussion.
** Professor of Law, Loyola Law School.
current crop of liberal politicians have decided that not only can they not push their agenda any further, but they would be better advised to retrench and defend whatever it is that they have achieved. How to do it in a society which seems to be shifting to the right? Well, the answer lies in the courts, because the courts are historically a non-democratic institution. And so the battle seems to be erupting around the courts, both from the left and from the right. The recent California elections and the Bork hearings provide all kinds of varying degrees of examples of this sort of thing.

Well, what are the courts to do about it? I think, perhaps they ought to reconsider whether or not they have perhaps put too much garlic into the political stew and this is what Dean Uelmen was advertising before. I'm supposed to be telling you, that perhaps a little bit of retrenching on the part of the judiciary may not be such a bad idea. We are all familiar with the expression, "Don't just stand there, do something." But there's also a less well-known expression of Dean Acheson's: "Sometimes the advice ought to be, don't just do something, stand there." And it seems to me that it may not be such a bad idea for the courts to ease off a little bit, and let society digest the many judicial changes that have been imposed by it, through valid non-democratic means, and which as we have seen can be pretty unpopular. I don't believe, therefore, that the sort of change proposed by Dean Uelmen, monkeying around with the terms of election, or for that matter, even any other significant change in the selection process of judges, is a great likelihood, and certainly not in the near term.

However, unlike Dean Uelmen, I'm not nearly as pessimistic. I believe, or at least, we'll see if I'm right, that what we have witnessed in the past year by way of judicial elections was something of an unusual event. It was a reaction to perceived abuses, which would get us into all sorts of controversial things to start replowing that ground that we all did last year. But it seems to me, that it reminds me of the days when I was a young man in college, it was the McCarthy era, and I remembered demagogues running around who were trying to convince us that if you let one Ruskie in under your bed, it was curtains. We had to root them out because a single Communist, a single subversive, could contaminate everything. In the process, there was conferred upon the McCarthyists super-human status. And I saw vague echoes of that in the campaign of last year. In the sense that you know, those wicked right-wing reactionaries out there, why, if you let them do their thing, they will bring down the whole edifice of justice in government. I don't think that they're
magicians any more than McCarthy’s Communists were magicians. I don’t think that they were able to arouse the people to the degree they did without being able to work with some not illegitimate public perception that the court had been governing too deeply, and had been stirring some things that are just too fundamental in the Americans’ notions of how they ought to be governed.

And I want to remind you of the principle on which this country was founded, that is, the idea that government derives its just powers from the consent of the governed. Now that doesn’t mean that we should have a freely and purely elected judiciary, which I consider to be disastrous, and I think we’re all agreed on that. It does mean, however, that even the judiciary has some limits which are tacitly imposed on it by society which judges tamper with at their peril. I think that is what we have seen in California but unlike Dean Uelmen, I don’t see much of a repetition. I just don’t know that the future would be political operatives of the kind he describes, who will be able to capitalize on the head of steam that existed among the population in the past. Perhaps I’m wrong, the future will tell.

As long as people see judges as something other than neutral arbiters, they are not going to buy any reforms that entrench judges in office. I think that Dean Uelmen’s proposal is, therefore, premature. I don’t know that it’s a bad idea, but I think it’s premature and at the moment it’s impractical. The solution that you’ve already had foreshadowed, which is don’t just do something, stand there, let us have a digestive period, let’s absorb some of the great changes that have been made.

This is not the Ayatollah’s Iran in the midst of a revolution. There are just not that many fundamental horrible injustices running around loose. And the courts are doing a pretty good job, even at their present pace, of assuring American citizens of a reasonable degree of protection from the law, criminal as well as civil area. I think that what we need to do, and what we need to experience, is a restoration of a greater public perception of judges as neutral, politically, socially, ideologically. Now, we lawyers and professors know that judges have always fudged, but I said public perception. The people need to be reassured that judges are indeed not like elected politicians. And therefore, they must not act too much like them. If that happens, and if that degree of perception is restored somewhat, I think much of the various concerns will be defanged.

And this would have one other fallout. And that is what we badly need is some degree of restoration of legislative authority. Re-
member that much of this problem arose from the originally brilliant and eventually pernicious notion that since the legislatures weren’t doing their jobs, the courts had to step in and take care of all kinds of social problems. I call this the legislative nonfeasance theory. Well, that’s wonderful if you’re a legislator and you’re judges are of the same ideological persuasion as the majority in your house of legislature, you’ve really got a nifty thing going, right? Because you don’t have to pass any controversial legislation and face the voters. The judges do it for you, and they’re wonderful. They’re like priests in their black robes, and they’re respected, they’re admired, and your political and ideological agenda then is furthered without you having to take political hazards. Well, maybe it’s time to put an end to it. Maybe the legislators ought to start dealing with problems that they’ve been fobbing off on the courts, and I think if we can persuade them to do that, it would also go a long way towards restoration of public respect for these institutions. So, that pretty much is my response.

b. Justice Allen E. Broussard*

I want to express my appreciation to Dean Uelmen for the very fine paper that he has put out. I want to compliment him on his response to the question as to whether or not 1986 was aberrational. I must say that I have been among those who have believed, and who have wanted to believe, that 1986 was an aberrational year and that we had never faced before with the possible exception of 1982, and would never face again a similar phenomenon in California. I believed that would not happen again despite the fact that I place more importance on the 1982 election than apparently Dean Uelmen did in his paper or in his presentation today. I think that 1982 is a clear precursor to 1986, that the only differences were that it was magnified by ten-fold largely because of the personal appearance of Rose Bird on the ballot, and the great involvement of Governor Deukmejian in the whole election process. And because of those things, the whole process was complicated and multiplied many-fold. But beyond that, I think that he has made an excellent point that the phenomenon of today is that politicized retention elections are probably a part of our future, that we are in a situation where any powerful politician or any divisive issue might subject any particular justice’s career to at least the prospect of a hotly contested election.

* Associate Justice of the California Supreme Court (1981-present).
I agree with Dean Uelmen that however desirable life tenure might be in the abstract, today is not the day to talk about it. As a matter of fact, while he persuades me that maybe 1986 was not aberrational, and we can look forward to having tremendous political input into retention elections in the future; I am not as completely persuaded that this is the time when something can be done about it. Maybe Bill Lockyer can help us to understand what the political mood of the People may be, but in any event, I'd like to move to some consideration of the modest, and those are his terms, modest suggestions that have been made in the paper and by Dean Uelmen here today, to determine whether or not, in my judgment they have any validity.

I do believe that society is served best by a judiciary that has relative independence from popular opinion and the whims of political tides. Now that does not mean that there should be no accountability for judges. In my own judgment, I have always felt that the problem was not in the retention election system, but I felt that there had been some abuse of that system by some who were powerful and who had great motivation to use the system to their own political ends and interests. If that's true, and if there can be some modest adjustment to the system to make it a little more immune to political manipulation, then perhaps those kinds of changes ought to be seriously considered. And with that in mind, I would just say that I personally have no problems with the first two of Dean Uelmen's suggestions.

I think that there is no beneficial purpose served by having an appointee of the supreme court not run until the next gubernatorial election. That means that they're in office for up to four years before they may have to run. His proposal would require the election within two years and it might have what I view as a salutary effect of causing the election to be more prospective rather than retrospective in terms of evaluating and confirming the justice. Likewise, I personally don't see any benefit served today from the retention of the fixed twelve year terms. That's the only justification for having the justice when he or she does run for election, to be confirmed only for the unexpired portion of the term rather than for a new complete twelve year term. That's what makes possible the phenomenon of Cruz Renozo and Ed Panelli. Cruz Renozo was appointed in 1981 and within approximately a year he had to run. He ran in 1982 and he received the four year unexpired portion of the term to which he had been appointed. Then he ran in 1986 and you know the results of that election. Ed Panelli is another illustration of a justice who
within a very short period of time after having been appointed, ran in a confirmation election in 1986, was confirmed and received a four year term and will have to run again in 1990. I see nothing beneficial in that, and would wholeheartedly support the concept of a justice once confirmed at an election, receiving the full twelve year term. But as to the third suggestion, that involving reappointment by the Governor, I have some serious reservations. But before I mention those, I would like to make one other comment about the paper generally, and about the presentation today. I thought that it was interesting that there was no mention of our Commission on Judicial Appointments. It is a part of our process of appointing and conceivably of retaining supreme court justices, yet apparently it has deserved no mention or consideration. I think that it is a part of the process which should be considered, which is deserving of attention now, particularly because of what appears to be less than a unanimous view as to the role that the Commission ought to play in the appointment process. I think it would be worthwhile spending a little time comparing and contrasting our Commission on Judicial Appointments procedures to those, for example, of the Senate in the confirmation of Judge Bork. It is interesting, as Dean Uelmen indicated, that two of the major players in terms of the California retention election were involved in the confirmation process at the federal level.

Let me just give you a little personal illustration. I want to mention two things which I have done only once in my life. One is that only once in my life have I stood before the Commission on Judicial Appointments seeking confirmation of my appointment as a justice of the California Supreme Court. That was in 1981 and most of you may not remember that occasion. But it was then that I became the charter member of the two-to-one club. Most of you may not know what the two-to-one club is, but you might remember that now Governor, and then Attorney General Deukmejian had just begun the process of sending written questions to the appellate appointments on nominees of then Governor Jerry Brown and then following that up with rather active questioning at the hearing. The questions he asked me was whether or not if confirmed I would be an activist judge. But at any rate, the result of that confirmation hearing was that I became the first of some seventeen or eighteen appellate justices who received a negative vote of then Attorney General George Deukmejian.

The second thing that I have done only once in my life, was to sit as Chair of the Commission on Judicial Appointments when it
was considering, of all things, the appointment by now Governor George Deukmejian of Malcolm Lucas to be Chief Justice of California. So in a very real and personal way I have to ask and answer for myself what is the appropriate role to be played, not only by the Commission, but by me as a Commissioner. In all candor, it was my considered judgment that political and philosophical considerations have gone into the votes of the then Attorney General in deciding for whom he would vote and whom he would oppose, and that if I were to be guided by those same things, I might be presented with a substantial question as to whether or not the appointment of Justice Malcolm Lucas should have been confirmed. I subscribe now as I did then to the fact that in our system, as contrasted with the federal, the appropriate role of the Commission has been that which in the past it traditionally played. I had disagreed with the role of the Governor when he voted against me, and I would disagree with that role at this time. But I do think it's a subject for discussion.

Back to proposal number three. I quite agree that it would be unfortunate if we forced, and I may find some opposition from Joe Grodin here, but if we forced justices on the supreme court to serve but one term, I think that we would have the potential and the very real potential of losing greatness for no reason other than the fixation of that term. However, if we are to allow justices to serve beyond the twelve year term, I don't believe that judicial appointment is the way to obtain a second term. Judicial appointment followed, and all he says in his paper is by confirmation, which I believe must be the confirmation election and not the appointment confirmation process. Not the commission appointment process. Judicial selection by gubernatorial appointment for a second term does nothing other than to substitute the process of a sitting justice looking in the eye, not only the electorate, but the Governor. And I would fear that for political considerations the Governor might be reluctant to reappoint a Traynor, a Gibson or a Mosk to a second twelve year term because there would be other political considerations which would strongly motivate him to appoint someone who may have the potential for greatness but for whom he had more political alliance, or more political indebtedness.

So there's no assurance that greatness we achieve through longevity would be achieved in a system involving gubernatorial appointments to a second twelve year term. And if you are to have gubernatorial appointment and then follow it with an election confirmation process, you do not avoid any of the pitfalls that we heretofore have had in confirmation elections except that the prospect that
the present Governor would not be opposing the candidate on the
nominee, but perhaps the opposing candidate for Governor who’s
opposing him might. In essence, I don’t see any beneficial reason to
allow for, or to provide for gubernatorial appointments for a second
twelve year term although I do see advantages in having that possi-

bility exist.

I think that the justice who is sitting and who would anticipate
any substantial opposition from an election would probably in just
about every case opt not to run after having served twelve years, and
therefore those great justices who would not face any substantial op-
position from the electorate would be those who would choose to run
for another term that should be rather uneventfully confirmed and
we could continue with the greatness of this court as enjoyed in pre-
vious years.

I go back to the question. It is not that I’m one who subscribes
to the philosophy that generally we should not just do something but
stand there, but I remain to be convinced that this is the time when
something can be done. If it can I think that at least the first two and
then the modified third part of Jerry’s proposals would be good
things to endeavor to accomplish. Thank you.

c. Justice Joseph Grodin*

Well, before I tackle what I take to be the mainstream of dis-
cussion here, I would like to pay due’ respect to Gideon Kanner’s
position. And that won’t take me more than a short while. Gideon’s
position as I understand it, is that we don’t really have a problem or
to the extent that we have a problem, it is a problem that is attribu-
table primarily to an excess of judicial activism which is a problem
that we can solve without tinkering around with selections. And this
is apparently a fairly recent problem because it does not apply to the
days when giants trod the earth. I’ve always found that kind of argu-
ment troubling, when we reflect upon what it is that made, for ex-
ample, Roger Traynor a great judge in the opinion of so many peo-
ple. I suppose his decision to bring strict liability in tort to California
could not appropriately be characterized as a decision of judicial re-
straint, nor could it appropriately be characterized as simply the ap-
lication of neutral rules. That opinion, and so many other opinions,
of Justice Traynor in the area of conflicts of law, in the area of
criminal law, were opinions which deliberately took into account is-

Professor of Law, University of California, Hastings College of Law; former Associ-
ate Justice of the California Supreme Court (1982-86).
sues of public policy which he regarded as inevitable for the courts to decide. And if the public is confused in this area, I think it is confused by people who tend to present a black or white view of the judicial role and to say either on one hand that judging is nothing but the application of neutral principles, or on the other that judging is nothing but politics. And those of us who were then in the business, or who have studied it, I think have to conclude that judging is somewhere in the middle of that and it has different aspects according to the issue that is before the court. And it is precisely that mixed character, that mixed quality of the judicial process that makes generalization about it so difficult.

In any event, I think that the facts are contrary to Gideon's assumption, that is, the exit polls in the last election demonstrate, I think quite conclusively, that it was not Gideon's concern over the court's role, and land owners and the state about which he has written so extensively that troubled the voters. It primarily was the death penalty issue, pure and simple. So I don't think that we solved the problem that way, and I accept Dean Uelmen's evaluation of the situation that 1986, for all its peculiar aspects, was not all that unique.

My own perception of the whole situation was colored somewhat when I first came into my chambers and saw on the bronze plaque of my door, a list of former occupants with their years of service. I saw one of them, Justice Finlayson was appointed in October of 1926 and he served until November or December of 1926, and I thought that probably the poor fellow had a heart attack upon perceiving the enormity of the duties of the office or something of that sort. It turned out to be that he was defeated in the election of November and it is he who is shown on table P4 with one-sixth of a year after his name. The shortest tenured judge, I think, in the history of the state. So I share Dean Uelmen's evaluation of the nature of the problem with respect to the remedies that he proposes.

I think it would probably be an improvement if judges stood for election, if we're going to have elections, at the first election following their appointment rather than at the gubernatorial election. But one only has to look at what happened in 1982, when Allen Broussard, Otto Kaus and Cruz Reynoso were on the ballot, that was their first election after their appointment, and Justice Reynoso received, as I recall, something like fifty-two percent of the vote. He was very nearly defeated in that election. So, I'm not sure that allowing judges

4. See supra Table I, at 335.
to run for the first election sooner, rather than later, after the gubernatorial appointment, is going to have that much of an effect on the outcome, but as I say, it couldn't hurt.

The idea of a single twelve year term, I think, is unquestionably desirable for the reasons that Dean Uelmen stated. I just can't think of any argument whatsoever for maintaining the present system which has an arbitrary impact upon judges according to the tenure that they happen to inherit.

With respect to the proposal for gubernatorial reappointment, I share Justice Broussard's concern and I don't reject the idea, but it seems to me that we ought to have a careful look at those states like New Jersey where that system is in effect, and try to arrive at some kind of understanding as to whether the prospect of reappointment by the Governor is likely to have an impact on the judges perception of his role in a way that we would not like it to have. So subject to that reservation, if this is all we can get, then I'm for it. I don't think that it's all that we ought to have, however. The last election demonstrated the limitations on my political abilities, I defer to Bill Lockyer and others who are in the political arena as to what is feasible. But in my opinion there is no question but that so long as the prospect of election looms, it is going to be an insidious influence and cannot help to be after the last election and after what is going on in the rest of the country. I think that we might look at the question this way.

There are two kinds of problems. One is, how do we get a judge appointed. And I take it everybody is in agreement, that everybody on this panel so far, and I assume generally, that there needs to be some kind of confirmation process that the governor's appointment needs to be confirmed somewhere else in the system. Presently we have the Commission on Judicial Appointments. With all respect to that body, I don't know that anybody is satisfied with the system in which the chief justice who may be sitting with the judge who is being nominated, the Attorney General of the state who is going to be arguing cases before the judge, and the senior justice of the court of appeal, who may or may not be knowledgeable in the matter. I don't know of anybody who seriously contends that's the best of all possible worlds. So we might well look, it seems to me, at other modes of confirmation that do not involve that and yet do not involve an election.

One of those is the proposal for confirmation by the Senate. That is not a proposal that I am wildly enthusiastic about with all respect to the California Senate. I think that there is a tendency in
that body to be even more political about such matters than the United States Senate, and the prospect of senatorial confirmation does not delight me. On the other hand, I think it’s preferable to an election, if I had to choose between the two. I think that a context in which the judicial appointee is called to be questioned by a Senate Committee and has an opportunity to respond to criticisms, the kind we’ve seen with Judge Bork. Whatever one thinks about that hearing, and however one regards the nature of the questioning, the degree of politicization that took place around it, nevertheless it seems to me that on balance, it’s highly preferable to a system of election.

But another alternative and I think more preferable yet, would be an expanded Commission, an expanded body, a Commission on Judicial Appointments that would be broadly representative of the bench and bar and lay persons who could bring to bear a broader kind of judgment than the present Commission on Judicial Appointments is expected to bring to bear. And in that process perhaps fulfill the role that we now expect an election to play. Once having a judge appointed, the question is then for what period does he serve and what happens at the end of that period. I have suggested elsewhere that an alternative either to an election system or to the system which Dean Uelmen proposes of gubernatorial reappointment would be one in which the judge serves for some substantial years and then at the end of that period leaves to go his way. It may be twelve years, it may be fourteen years, that is what New York has done with its court of appeals. After a system in which there were contested partisan elections for the court of appeals, the State of New York moved in the 1970’s to its present system of having gubernatorial appointments for fourteen year term. It’s true that we would thereby lose some people whose service on the court beyond fourteen years would be desirable. It is also true, I suppose, that we would deter some people from accepting that kind of service. But fourteen years is a long time, given the judges are typically not appointed to the supreme court until they’re at least fifty, and usually a little older than that. Fourteen years followed by a retirement plus an opportunity to do other things is not all that bad, and I suspect would not be that unattractive.

Finally, if we are to continue having elections, which I take it we will do for the foreseeable future, I think we need to turn our attention to whether there are things that can be done to or with the election process that will represent an improvement. One arena that should obviously be looked at in that connection is the arena of campaign contributions. Dean Uelmen’s paper and his talk today out-
line, quite well I think, the troubling problems that arise in that arena. I can't tell you how awkward it made me feel in the course of the campaign, to go around soliciting or accepting contributions from lawyers and from others who might have an interest in the process, and knowing that I would have to sign a campaign statement at the end of the campaign in which I would have to state under oath the names and amounts of contributions of all who had contributed. That is not a healthy situation. Whether or not it ever in fact has an impact upon the way judges decide cases, the perceptions that it might is something that surely ought to be avoided if possible. And whether we can devise ways of doing that, that meet the problems, the constraints of the first amendment, I don't know, but it seems to me that we need to try, whether it's in the form of limitations of contributions or expenditures or public funding of judicial campaigns.

And the other and last point with respect to the conduct of elections is that if we're going to have another, if we're going to continue to have judicial elections, and if they're going to continue to be contested in anything like the way they have been over the last few years, then it seems to me that thoughtful people should attempt, at least among themselves, to arrive at a consensus as to what the criteria ought appropriately to be and to explain that consensus as best they can to people who would like guidance in such matters. One of the most troubling aspects of this last election to me was the spectacle of people saying the constitution says nothing about the criteria to be brought to bear.

We know that judges often make decisions which involve value judgments on their part and, to that extent, they're performing functions that are similar to that of the Legislature and therefore it follows that you should bring to bear the same criteria that you bring to bear in the case of candidates for a legislative or executive office. That posture, with respect to judicial elections, it seems to me, is one that is being, that is subject to modification through public education despite what the political scientists say about negative effects of education.

I have just one further comment about that, and it has to do with the Bork hearings. We, most of us in this room, have heard, and believe we know something about a social science study that was conducted somewhere, we don't remember quite where, sometime in the past, we don't remember quite when, which demonstrated in the fashion which we can no longer recall, that if the Bill of Rights were put up to popular vote, it would lose, and that is a part of the com-
mon assumptions among people who care deeply about the Bill of Rights. That is, that we are a lonely minority and that we're sort of the remnant of civilization, keeping civilization's values alive. And if there's anything else that the Bork hearings have demonstrated, and I say this by way of being a bit skeptical about social scientific studies, it is that people of this country feel very deeply about constitutional values and indeed have a certain consensus surrounding rights of privacy, first amendment, and equal protection among other things. So all of the questioning by the Senators to pass on the assumption that if Judge Bork indeed held the views that were being attributed to him, then he would indeed be outside the mainstream of constitutional theory and public opinion. That degree of consensus seems to be quite startling. But those are my comments.

d. Senator Bill Lockyer*

I wanted to summarize briefly the discussion as it has occurred thus far in recent years in Sacramento regarding the issue of judicial confirmations. There have been a variety of proposals put forward, none of which have achieved any significant degree of success legislatively. The suggestion of improving the Commission on Judicial Qualifications is probably the idea that most would embrace, though no one has yet been able to figure out who they would trust adding to the Commission and feel like it would be a better screen, but that still is perhaps the best thought for the next decade. I find considerable wisdom in Professor Uelmen's suggestions. They have not been, at least thus far, considered in the form of any constitutional amendment.

Those two which have been recently considered would provide for confirmation by Senate majority vote. The proposal has had one vote in the Senate Judiciary Committee. Senator Petris, who of course was one of the most vocal defenders of the court, and H. L. Richardson, who was one of the most vocal opponents of the court, were the two who voted against Senate confirmation. And the remaining members of the Committee supported the basic idea suggesting, perhaps, that it's those who wish to see either a more liberal or a more conservative court, feel that there aren't adequate numbers in their particular wing of the Senate to succeed with those particular plans and they'd rather keep it in current form. Senator Hart from Santa Barbara has a suggestion which is that the appointees be

* California State Senator (1982-present); Chairman, Senate Judiciary Committee (D. So. Alameda County).
confirmed by a two-thirds vote of the Senate. Having tried to pull two-thirds votes together on numerous occasions, that particular one distresses me. That they only receive one twelve year appointment, and there be no elections whatsoever. That each new Governor should be able to select a new chief justice. Those are the extent of recent suggestions for confirmation changes.

I thought perhaps I could usefully take a moment to suggest that we should re-examine the fundamental rationale for our federal and state approaches to these matters. Of course as has been mentioned in California at least, there's virtually no check on the executive prerogative to make those appointments. The screening is an exercise that doesn't seem to really screen anyone out anyhow. And I guess we need to give some thought to what the whole notion of checks and balances are about in our system of government. At the risk of being unduly pedantic, I want to at least encourage you to think about not just the enthusiasm for Newtonian physics that was the basis for that system, but perhaps more significantly, the mistrust of human beings. A basic question that I hope people will constantly inquire about is whether Hamilton was right or wrong in saying that the basic way to understand our species is as people who are ambitious, vindictive, and rapacious. The Tom Paynes of the time were obviously not heard in the institutional framework that we operate in. It assumes that people will be greedy, and that you need to have all these elaborate checks and balances to guard against their natural propensities. I hope they were wrong and that the institutional arrangements can perhaps encourage and draw out the noble side of the human personality. But that is the institutional situation we have relied on and reaped reasonable success in this society, so it seems natural to me to try to apply the same idea of checks and balances that you would see during the Bork confirmation process to Sacramento.

It having not been tried, I don’t know that we can assume, Justice Grodin, that it would be overly political. There’s no doubt in my mind that there would be some politics to it. Guessing, I would say, probably Rose Bird would never have been confirmed as chief justice. I suspect the other Brown appointees would have been confirmed. And most of the Deukmejian appointees would have been confirmed with, perhaps one exception of a person who might be regarded as ideologically close to Justice Bork. That screening it seems to me, would be a worthwhile thing, that we would occasionally pick off one on the extreme left or extreme right, but the center would dominate the court. That obviously doesn’t guarantee the cre-
ative, scholarly, judicial exercises, but I think it might reassure the
general public as to the kind of folks they have operating the judicial
branch. I think that's what I want to conclude with now. Thank
you.