



**Judicial Elections:  
Practices and Trends**  
by  
**J. Clark Kelso**

**INSTITUTE FOR LEGISLATIVE PRACTICE  
MCGEORGE SCHOOL OF LAW  
UNIVERSITY OF THE PACIFIC**

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# **Judicial Elections: Practices and Trends**

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## **Chapter 1**

### **Executive Summary**

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The subject of this report is the law, practice and policy of judicial elections with a particular focus upon California. Leading policy-makers in California and around the country periodically re-assess the issue of judicial elections. The Framers thought long and hard before approving a system of life tenure with guaranteed compensation for federal judges. In the early 1800's, the Jacksonians fought an ultimately successful battle against duplicating the federal system in the states. The election of judges became the norm. In the early 1900's, at the urging of Dean Roscoe Pound, the American Bar Association and the American Judicature Society turned their attention to reform of state judicial election systems, and these organizations remain very active in ongoing discussions.

Over the last fifteen years, we have witnessed a resurgence of interest in judicial election systems. As one commentator has noted, “[c]omplaints about judicial elections--their cost, their ethics and their consequences--are streaming in from contests for the lowest municipal trial courts to state supreme courts across the land.” Tom Watson, *The Run for the Robes*, *Governing*, p. 49 (July 1991). See also Catherine Trevison, *Justices Asked to Take Judge Election Case*, *The Tennessean* (June 9, 1996); Lawrence Messina, *Lawyers Divided Over Judicial Elections*, *The Charleston Gazette* (June 1, 1996); Associated Press, *Alabama One of Few Remaining States with Partisan Judicial Races*, 1995 Westlaw 6742807 (Sept. 27, 1995). In the last several years, there have been a number of academic symposia on the topic of judicial independence and elections. Symposiums were conducted in Florida, Georgia, and most recently at the University of Southern California.

Two justices of the United States Supreme Court have called for an end to judicial elections. In an interview in October of 1995, Justice Anthony M. Kennedy expressed the view that state judges, like federal judges, should be appointed for life with guaranteed compensation. He told reporters that, “I just don’t see how a judge can mount an election campaign without frightening conflicts of interest.” Dan Freedman, *Kennedy Slams Judicial Elections*, *The San Francisco Examiner*, A13 (Oct. 13, 1995).

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In 1996, Justice John Paul Stevens joined the debate, declaring that electing judges is “profoundly unwise.” See Richard Carelli, *Stevens: Electing States Judges Is ‘Profoundly Unwise’*, The Daily Recorder, p. 1 (Aug. 7, 1996). Stevens worried that “making the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be.” *Id.*, p. 3.

California’s practice of subjecting judges to the electoral process has become a serious and legitimate topic of discussion in the last several years because of a confluence of seemingly unconnected legal developments and practical realities. The legal developments include the following:

- Successful challenges under the First Amendment to restrictions on judicial campaign speech. See, e.g., *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993) (striking down Canon 7(B)(1)(c)).
- A successful challenge to California’s constitutional ban on party endorsements in elections for nonpartisan offices. *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996).
- Changes in the law regarding the content of the ballot with respect to appellate retention elections. See *Special Report: Analysis of the Impact of Stating Term Length on Ballot for Retention of Appellate Justices* (Administrative Office of the Courts, July 1995).

The new practical realities include the following:

- Increasing use of campaign mailers, phone banks and other political machinery to influence voter behavior with respect to judicial elections.
- An indication in the lead-up to and results of the 1994 appellate retention election that voters are interested in having more information about judges listed on the ballot.
- An apparent increase (perhaps temporary, but perhaps not) in the number of contested elections for trial court offices.

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- Dramatic increases in the cost of running a judicial election campaign. See California Commission on Campaign Financing, *The Price of Justice* (1995).
- A challenge to the retention of two Supreme Court justices in the 1998 election.

While these legal and practical developments may appear at first glance to be essentially unconnected, one commonality stands out: **Each of the developments individually pushes judicial elections incrementally in the direction of a more political and partisan model.** Collectively (and coming, as they do, roughly contemporaneously), these developments portend the real possibility of a significant change in the culture of judicial elections in California, a culture that may pose a threat to the independence of the judiciary and undermine the public's respect for the courts as an institution capable of impartial and reasoned decision-making.

This report is not intended to make a case for changing California's existing system of electing judges. Whether there should be a change is a decision to be made by California's policy-makers and the public. There are significant trade-offs between independence and accountability that must be weighed in the balance. The narrower purpose of this paper is to explain the recent developments described briefly above which have made the issue of judicial elections topical. This information should assist policy-makers in considering whether there is any need for reform, and, if so, what direction those reforms should take.

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## **Chapter 2**

# **Judicial Independence and Accountability**

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### **A. The Need for an Independent Judiciary**

An independent judiciary is as important today as it was more than 200 years ago when the Framers gathered to create our federal constitutional system. “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” The Federalist No. 78, p. 491 (Belknap Press 1961) (A. Hamilton). Alexander Hamilton’s statement still commands general assent among judges and lawyers concerned about protecting respect for the Rule of Law. “Independence” is one of the five goals set forth in the Judicial Council’s long-range strategic plan.

But what does “independence” really mean? The judiciary cannot be a self-sustaining entity. It depends critically for its sustenance upon the support of the other branches of government and upon the trust of the people. Judicial independence cannot mean judicial isolation. So in what way and for what purposes should the judiciary be independent?

The necessary scope of the judiciary’s independence in our constitutional system can be determined by considering the core functions which the judiciary is charged with performing. Understanding the judiciary’s essential role in government and society will take us a long way towards understanding the precise ways in which the judiciary must remain independent.

The Judicial Branch of the State of California performs certain critical sovereign functions. It is charged with the exclusive responsibility of hearing and resolving criminal trials, one of the key components of the criminal justice system. It resolves civil actions brought by government against private persons. It protects civil liberties from governmental encroachment by resolving suits brought by private persons against government. It resolves large numbers of purely private, civil disputes, and it enforces the resolution by non-judicial means of many other private disputes (e.g., enforcement of arbitral awards). By virtue of its power of judicial review of legislative enactments and executive actions, the judiciary is the final word when it comes to interpreting the California Constitution.

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In performing these functions, the judiciary is brought into contact with, and the judiciary's decisions directly affect, other branches of government and individual members of the public. In order for the judiciary's decisions to command the respect of coordinate branches and of the public, those decisions must be perceived as being the reasoned work-product of an *impartial* tribunal. The impartiality of our courts and their processes remains one of our most cherished due process values. *See, e.g., Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process"); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process").

At a minimum, the appearance and reality of impartiality can not be guaranteed unless the judiciary retains a measure of *independence* from the coordinate branches of government and from the people. The public's perception that the judiciary acts impartially will be compromised if the courts are perceived as being merely the mouthpiece of the legislature or the executive or as being the captive of narrow, special-interest groups. As Chief Justice Ronald M. George commented in his 1996 State of the Judiciary address:

"An independent judiciary is one in which a judge rules on a matter based on the legal merits of the case and not on the popularity of a particular result or the ramifications of a specific outcome. What the court cannot--indeed, must not--do is attempt to anticipate the popularity of its rulings, or seek to be responsive to one constituency before any other. Our strict charge, then, is not to make or remake the law, but only to interpret and apply it fairly." Judicial Council of California, *1996 Annual Report*, p. xi.

From these observations, we can see that one aspect of judicial independence involves the separation of powers principle--to be impartial, the Judicial Branch must be separate from the legislative and executive branches of government. However, a healthy separation of powers between coordinate branches is only a necessary, but not a sufficient, requirement for an independent judiciary. The judiciary must also be appropriately independent of the people and the political process. It is only through an appropriate independence that judicial action in individual cases will earn the respect and confidence of the people. Yet, particularly in a democratic society, the legitimacy of governmental operations is also dependent upon government servants being *accountable* to the public, a concept which in California is closely tied to the requirement that officeholders periodically stand for election. It is the tension between *independence* and *accountability* that makes the issue of judicial elections relatively unstable in constitutional discussions over long periods time.

## **B. The Federal Protections of Life Tenure and Guaranteed Compensation**

The federal judiciary's independence from both coordinate branches and the public is safeguarded in part by the constitutional guarantees of life tenure (with removal only by impeachment) and an irreducible compensation. U.S. Const., Art. III, § 1. The framers had personal experience with a judicial system in which judges were not protected by tenure and irreducible compensation. Following the English example, colonial governments by and large did not observe the separation of powers principle, and the judicial power was often subject to direct legislative or executive control (and, thus, indirectly to the forces of electoral politics). Roscoe Pound, *Organization of Courts*, chs. 2 & 3 (1940). The absence of an independent judiciary was one of the complaints registered in the Declaration of Independence:

“He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

Notwithstanding the Declaration of Independence, the Articles of Confederation created a federal judiciary that was neither independent nor powerful. The Articles made Congress “the last resort on appeal in all disputes and differences . . . between . . . states concerning boundaries, jurisdiction or any cause whatever.” Articles of Confederation, art. 9 (1778). The judiciary's jurisdiction was limited to “the trial of piracies and felonies committed on the high seas” and to “recognizing and determining full appeals in all cases of captures.” *Id.* Judges under the Articles of Confederation were not protected by life tenure or guaranteed salaries, and judgments could be enforced only by special legislative action. See Edwin H. Greenbaum & W. Willard Wirtz, *Separation of Powers: The Phenomenon of Legislative Courts*, 42 *Ind. L.J.* 153, 154-55 (1967).

It was in the light of their experience under colonial rule and under the Articles of Confederation that the framers of the Constitution provided for a measure of judicial independence by giving federal judges life tenure and an irreducible salary. Hamilton explained the importance of life tenure as follows:

“That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary

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commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.” The Federalist No. 78, p. 495 (Belknap Press 1961).

A guaranteed compensation was equally important, according to Hamilton:

“Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.... In the general course of human nature, a power over a man's subsistence amounts to a power over his will.” The Federalist No. 79, p. 497 (Belknap Press 1961).

The federal guarantees of tenure and compensation are not for the benefit of the judiciary or the judges. Rather, these guarantees were perceived as being necessary to safeguard the Constitution and, most importantly, to protect the individual rights of litigants who appear before the courts. Kurland, *The Constitution and Tenure of Federal Judges: Some Notes From History*, 36 U. Chi. L. Rev. 665, 668 (1969) (life tenure of federal judges “not created for the benefit of the judges but for the benefit of the judged”); Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 690 (1979) (same). Chief Justice Marshall emphasized the point as follows:

“The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.” *O'Donoghue v. United States*, 289 U.S. 516, 532 (1933) (quoting debates on the Virginia State Convention of 1829-1830, pp. 616-19).

### **C. Independence and Accountability in California Judicial Elections**

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Unlike the federal judiciary, California judges are not protected by *de jure* life tenure and an irreducible salary (although life tenure is a *de facto* reality for most state judges). All judges in California are subject (or potentially subject) to approval by the voters. Compensation is determined by the Legislature, limited only by the rule that a judge's salary may not be reduced during a single term of office. *Olson v. Cory*, 27 Cal.3d 532 (1980).

As noted above, the federal protections of life tenure and irreducible compensation were designed to insure that the judicial branch and individual judges would be free to perform their functions without fear of retribution from the other branches of government or from the people. Even though state judges do not share the full federal protections, judicial integrity and the judiciary's obligation to preserve public trust require that judges courageously apply the law to the facts irrespective of the personal or institutional consequences that may flow from unpopular decisions. Whether judges subject to the electoral process can reasonably be expected to fulfill this obligation remains problematic (which is why the framers of the U.S. Constitution opted for protections that would remove the possibility that fear of retribution would influence judicial decision-making). As discussed further below, our recent experience in California suggests that subjecting judges to the electoral process has created strong political pressures that may have influenced the courts and have certainly influenced the manner in which other branches of government have reacted to court decisions.

As noted above, provisions for judicial election or removal express the public's desire that judges remain accountable to the public. As also noted above, there is a robust tension between the desires for judicial independence and judicial accountability. That tension is plainly evident in reviewing the history of judicial elections in California.

**1. The California Constitution Of 1849 Created An Elected Judiciary That Ultimately Was Accountable To, And Dominated By, Political Parties**

California began with a popularly elected judiciary in which there were no restraints upon party support or activity. The California Constitution of 1849 provided that justices of the supreme court and district court were elected by the people for 6-year terms (Cal. Const. 1849, Art. VI, §§ 3 & 5), and judges of county courts were elected by the people for 4-year terms (*Id.*, § 8).

The choice of an elected judiciary in California was consistent with the history of judicial election methods during the mid-1800's throughout the country. The preference in the states for

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an elected judiciary was contrary to the federal model, and the apparent reasons for the preference are illuminating.

Although the principle of judicial review is today well-accepted, *Marbury v. Madison*, 5 U.S. 137 (1803), was viewed at the time as an exceedingly controversial and political decision. As a result of his disagreement with Chief Justice Marshall's opinion in *Marbury*, Thomas Jefferson abandoned his prior support for judicial life tenure in favor of 6-year terms. Evan Haynes, *The Selection and Tenure of Judges*, pp. 93-94 (1981). He was soon joined by many others who believed that judges needed to be made accountable to the electorate, either indirectly through reappointment by the executive or legislature, or directly by standing for popular election. *Id.*, pp. 94-99. Making judges accountable to the public through election became part of the populist movement known as Jacksonian Democracy that swept the nation in the early 1800's. See Susan Carbon & Larry Berkson, *Judicial Retention Elections in the United States*, p. 1 (1980); Burton Atkins, *Judicial Elections: What the Evidence Shows*, 50 *The Florida Bar Journal* 152, 152 (1976) ("The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process . . . , spearheaded by reformers who contended that the concept of an elitist judiciary . . . did not square with the ideology of a government under popular control.").

The great turning point in this public debate came in 1846 when New York repealed its system of gubernatorial appointment with tenure during good behavior for a system in which all judges were popularly elected for 8- or 4-year terms. Haynes, *supra*, pp. 100 & 123. Within ten years of this change, fifteen other states followed suit, and every state to enter the Union since 1846 has provided initially that all or most judges stand for elections for terms of years. *Id.*, p. 100.

Professor Haynes describes this dramatic change as follows:

"It seems reasonable to say that the fundamental causes of that change [i.e., the change to an elected judiciary] had very little to do with the relative merits of this or that system of judicial selection and tenure, but were rather the ideas and impulses of a violent swing toward the democratization of government generally. The more mature and seasoned counties of Europe, who experienced the same revolution in government, preserved the idea that judges should be competently selected, and free of political pressure; but in America, the ebullient enthusiasm and intemperance of youth and inexperience carried all before it. Whatever may be the best provision for the judiciary, it seems safe to say that the solution

of that problem which was adopted in the United States a century ago was arrived at almost completely without regard for the particular considerations of policy and principle which arise out of the nature and functions of the judicial arm of the government.” *Id.*, pp. 100-01.

The consequences of subjecting judges to frequent elections in which partisanship was permitted were, in hindsight, predictable. Individual judges became beholden to party interests. See Gerald F. Uelman, *California Judicial Retention Elections*, 28 Santa Clara L. Rev. 333, 334-36 (1988). The judicial system was perceived by many members of the public to be just another cog in the party machines that dominated the political landscape in the late 1800's. One scholar gives the following explanation:

“The post-Civil War increase in industrialization and urbanization nurtured political ‘machines’ in the nation’s larger cities. The Tammany Hall organization in New York epitomized the potential abuses of partisan judicial contests. Seizing control of the political processes that led to nomination, Tammany was able to run and elect its hand-picked and politically responsive slate of judicial candidates. The stranglehold of such an organization over elections was strengthened by the metropolitan electorate’s ignorance and complacency about judicial candidates. Elections often became rubber-stamp confirmations of the machine’s slate, not the Jacksonian ideal of individual and equal expression of free will through the ballot.” Sari Escovitz, *Judicial Selection and Tenure*, p. 6 (1975).

In California, the political machine was embodied in the railroad interests and the “Big Four.” See, e.g., *California Politics and Policies*, p. 4 (eds. Eugene Dvorin & Arthur Misner 1966). As for the judiciary, as explained in a publication of The League of Women Voters of California, “[b]y the early part of the 20th century, the disadvantages of partisan judicial elections were clear. Many felt that the quality of judicial performance was low, that judges had to spend too much time campaigning, fund raising, and currying favor with party bosses.” Jean Askham, *Courts, Judges & Voters--A Guide to Judicial Elections*, p. 3 (1990).

## **2. The Antidote To Political Domination Of The Judiciary Was The Nonpartisan Election Of Judges And The Judicial Retention Election System**

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Public dissatisfaction with the domination of government and judicial offices by political machines resulted in a counter-revolution led by Progressives. The Progressives “associated the civic outrages of the Southern Pacific with partisan political activity and, consequently, sharply circumscribed political parties through legal enactments. Parties *per se* were regarded as the instruments of misrule.” Richard B. Harvey, *California Politics: Historical Profile in California Politics and Policies*, p. 15 (ed. Eugene Dvorin & Arthur Misner 1966).

In this context, Dean Roscoe Pound’s influential 1906 address to the American Bar Association, *The Causes of Popular Dissatisfaction with the Administration of Justice* (reprinted in 46 J. Amer. Judicature Soc. 55 (1962)), focused attention upon the evils associated with partisan, popular judicial elections. Pound pointed out that “[p]utting courts into politics and compelling judges to become politicians . . . has almost destroyed the traditional respect for the bench.”

Pound and others called for fundamental reforms, of which there ultimately were three major types:

- The rejection of traditional, contested elections, and the adoption in their place of unopposed, retention elections.
- The removal of partisan politics from judicial elections by making judicial offices nonpartisan.
- The creation of merit selection systems to reduce political influence in the initial selection of judges.

Each of these reforms was designed to foster the independence of the judiciary, to enhance public respect for the judiciary and for the rule of law, and to insulate judicial decision-making from the pressures of party influence. See Jean Askham, *Courts, Judges & Voters--A Guide to Judicial Elections*, p. 2 (1990).

California joined in the counter-revolution. In 1911, California changed to nonpartisan ballots for judicial elections. Concern about the integrity and independence of a judicial branch subject to the electoral process--whether partisan or not--led to enactment in 1934 of Article 6, Section 26, of the California Constitution, which provided that judges on the California Supreme Court and Courts of Appeal run unopposed on the ballot. So long as the appellate judge received the approval of a majority of the electors voting, the judge remained in office.

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That protection makes it less likely that judges will fear retaliation by the electorate. The change from election to retention is credited by Joseph Grodin as contributing to the birth of “the great age of the California Supreme Court.” Joseph R. Grodin, *In Pursuit of Justice*, p. 53. Among other things, Grodin notes that prior to 1934, “tenure on the court was quite brief, averaging only a few years.” *Id.* Grodin notes that the California court’s national reputation and influence was often tied directly to those justices who had served substantial periods of time on the court, such as Phil Gibson, Roger Traynor, Raymond Peters, Mat Tobriner, and Stanley Mosk. *Id.*, p. 54.

A separate proposal to adopt retention elections for trial courts also appeared on the 1934 ballot. This proposal was not adopted, however, in part because of the trial court proposal’s placement on the ballot. The appellate retention proposal was associated with three other initiatives at the front of the ballot which were part of an anti-crime package of reforms. The trial court retention proposal appeared near the end of the ballot immediately following an unpopular prohibition initiative. *See The Price of Justice*, p. 24.

As a result, unlike judges serving on the appellate courts, judges serving on the municipal and superior courts are exposed to the possibility of contested elections. Even here, however, the risk that politics will dominate the process is significantly reduced. First, a judicial candidate’s name appears on the ballot only if that candidate is opposed. Second, even in a contested election, there has historically been a tradition--encouraged, if not required, by the Code of Judicial Ethics--that a judicial election campaign operates under different rules than other elections (the pressures to change this tradition are discussed below in chapters 3 and 4).

When considering the merits of an elected judiciary--or at least a judiciary that is subject to retention or recall--it is well to recall that even at the federal level, a significant amount of dispute resolution takes place before non-Article III judicial officers who lack the protection of life tenure and irreducible compensation (e.g., magistrates and administrative law judges). Although none of these non-Article III federal judicial officers may be removed by the electorate, there remains the possibility of at least indirect political control and accountability.

Moreover, politics plays a large part in the appointments process at both the federal and the state level. The public can indirectly (and perhaps unwittingly) influence the makeup of the judiciary by deciding who becomes president and who becomes governor. The appointments process and the role played by the executive and the legislative branches in that process has been the subject of great controversy throughout our history. Most recently, attention has

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focused at the national level on appointments to the Supreme Court of the United States and the Senate's role in the confirmation process.

A great deal has been written recently about the appointments power and the confirmation process. See, e.g., Robert F. Nagel, *Advice, Consent, and Influence*, 84 Nw. Univ. L. Rev. 858 (1990); Judith Resnik, *Changing Criteria for Judging Judges*, 84 Nw. Univ. L. Rev. 889 (1990); David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 Nw. Univ. L. Rev. 900 (1990); Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 Nw. Univ. L. Rev. 962 (1990); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 Nw. Univ. L. Rev. 985 (1990); Monaghan, *The Confirmation Process: Law or Politics?*, 101 Harv. L. Rev. 1202 (1988); Bruce Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1106 (1988); Freund, *Appointment of Justices: Some Historical Perspectives*, 101 Harv. L. Rev. 1146 (1988); Robert Bork, *The Tempting of America: The Political Seduction of the Law* (1990). Perhaps the most that can be said without significant contradiction is that the Constitution contemplates the appointment and confirmation of justices to be a political process subject to some or all of the vagaries inherent in that process. If this were not the intent of the Constitution, then the power of appointment and confirmation would not have been vested in two political bodies, the Executive and the Senate. Rather, the power to appoint judges would have been vested in some independent body, as has been done in a number of states.

The question then is not whether politics should *ever* enter into the decisions we make about who should sit and remain on our courts. Politics enters into the appointment of federal judges, and it enters into the appointment and election of state judges. The question is *how much* politics should be permitted to play a role in the appointment and election of judges. At one extreme, the partisan election model, one could imagine that judges would campaign just like any other elected official. At the other extreme, all judges would be selected by an independent commission to serve with life tenure (which raises, of course, the question of who selects the members of the independent commission?).

The California and federal systems fall between these two extremes, with the California model creating a greater risk than the federal model that politics will affect the judicial branch. Politics usually affects the federal judicial branch only at the nomination and confirmation process (although one can wonder whether the politically-motivated discussions to split the Ninth Circuit Court of Appeals may have some impact upon that court), and nominees have generally avoided compromising their independence in the confirmation process (e.g., by refusing to answer specific questions about cases which are likely to come before the courts).

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Politics can affect the California judiciary through the pressure or fear of upcoming elections, through the consequences of free-wheeling judicial campaigns and fund-raising, and through the results of retention or contested elections. The next two chapters discuss some of the recent events in judicial elections which suggest a swing in the direction of greater politicization.

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## **Chapter 3**

### **Free Speech and Judicial Elections**

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One of the traditional characteristics of judicial elections in California has been their nonpartisan nature and the relatively uncontroversial, low-key and low-profile style of judicial campaigns. There have always been exceptions to this tradition, but the exceptions only served to emphasize that judicial elections are usually short on information and of little interest to voters.

Part of the tradition was reinforced by ethical and legal restrictions upon judicial campaign speech. However, recent decisions based on the Free Speech Clause of the First Amendment have struck down some of these restrictions, opening up judicial elections to more robust speech. The consequences of these decisions is only just beginning to be felt, and it may be another 5 or 10 years before their full reach becomes apparent. But the recent experience with judicial elections in San Francisco is not encouraging. Noted attorney Joseph Cotchett warns, “We’re going back to the ward politics of Chicago and Brooklyn. We’re going to see in the future where every judicial seat is contested.” Reynolds Holding, *Politic’s Stench Overwhelming Judicial Race*, The San Francisco Chronicle, B1 (March 4, 1996).

#### **A. Partisan Endorsements in Judicial Elections--De Facto Partisanship**

From 1926 until the present, the California Constitution has contained a provision making judicial offices nonpartisan. Cal. Const. of 1926, art. II, § 2 3/4; Cal. Const. of 1985, art. II, § 6 (“All judicial, school, county, and city offices shall be non-partisan”). Prior to 1926, statutory provisions in the Elections Code achieved the same result by, among other things, prohibiting party affiliation information from appearing on the ballot for certain offices, including judicial offices. *See, e.g.*, Cal. Stats. 1913, ch. 690, p. 1379.

In addition to the differences in the mechanics of nonpartisan elections set forth in the Elections Code, there has been an historical tradition of varying intensity not to turn campaigns for nonpartisan offices into political affairs. This uneven tradition was no doubt in part a result of the fact that some of the nonpartisan offices are of comparatively low visibility.

Even in the context of nonpartisan elections, however, voters have always been able to rely upon partisan cues regarding candidates for nonpartisan offices. Even if political parties did not formally endorse candidates, voters could look for guidance to other individuals or organizations with recognized partisan leanings. For example, particularly in the days when every city had more than one newspaper, voters could discover essentially partisan recommendations on editorial pages. In addition, state and local governmental officials with well known political affiliations sometimes endorsed candidates for nonpartisan office (including judicial offices). The 1986 retention elections for several justices on the California Supreme Court are only the most visible example of the possibilities.

Thus, although judicial elections have been *de jure* nonpartisan, there have always been legally permissible ways to make such elections *de facto* partisan. This practical reality is worth remembering when considering issues regarding judicial elections and when comparing California's system of electing judges with the systems in other states (including states which are overtly partisan). In short, the practical differences between a technically nonpartisan election and partisan election may be more imagined or perceived than real.

## **B. Political Party Endorsements in Judicial Elections--De Jure Partisanship**

### **1. Political Party Endorsements Prior to 1986**

Although judicial and certain other state and local offices were declared to be nonpartisan, until 1986, neither the Constitution nor the Codes contained any express proscription of political party endorsements of candidates for non-partisan offices. Over time, it became customary practice in some counties for political party central committees and governing bodies to endorse and otherwise support candidates in elections for nonpartisan office, including judicial offices. See Lee, *The Politics of Nonpartisanship* (1960); *Unger v. Superior Court*, 37 Cal.3d 612, 616 & n.7 (1984).

Prior to the 1982 retention election, the Republican Party, by action of its state central and executive committees, indicated that it planned to endorse the nonretention of three Supreme Court justices. On March 9, 1982, two registered voters filed a petition in superior court seeking to restrain the party from supporting the nonretention campaign, alleging that the "non-partisan office" clause of the California Constitution (Art. II, § 6) barred political parties from endorsing or otherwise supporting candidates for such offices. In *Unger v. Superior Court*, 37 Cal.3d 612 (1984), the California Supreme Court held (by a vote of 5-2) that Section 6 did

*not* bar a political party from endorsing or otherwise supporting candidates for non-partisan offices.

## **2. The 1986 Initiative to Bar Political Party Endorsements**

The injection of partisan politics into the 1982 retention election of several supreme court justices, and the court's holding in *Unger v. Superior Court*, 37 Cal.3d 612 (1984), that state law did not prohibit political party endorsements, support or opposition of judicial candidates (and other nonpartisan offices), led the voters in 1986 to enact Section 6(b)'s narrowly-targeted proscription against political party endorsements in elections for nonpartisan offices. Proposition 49's ballot argument, which is the most significant indicia of the voters' intent other than the language of the proposition itself (*see NCAA v. Hill*, 7 Cal.4th 1, 16 (1994)), explains the common-sense rationale for the proscription:

“VOTE YES ON PROPOSITION 49 AND KEEP THE PARTY BOSSES OUT  
OF ELECTIONS FOR LOCAL OFFICES AND JUDGESHIPS!

For more than 70 years, the people of California have voted for . . . judges, largely without regard for the candidates' political party memberships.

\* \* \*

. . . a recent California State Supreme Court decision overturned a long-understood ban on partisan electioneering in local and judicial elections. The Court said no law specifically prevents the party bosses from moving in on these elections.

PROPOSITION 49 WILL MAKE IT CLEAR THE PARTY BOSSES *MUST*  
STAY OUT OF ELECTIONS FOR JUDGESHIPS ....

For most of this century, our state has enjoyed a well-deserved reputation for good, clean, effective government at the local level. California has been largely free of the machine-style politics that is typical of some Eastern states.

WHEN PARTY BOSSES HAVE HAD A STRANGLEHOLD ON LOCAL  
POLITICS ELSEWHERE, HOWEVER, CORRUPTION IN CITY HALL AND IN  
THE COURTS OFTEN HAS BEEN THE RULE . . . NOT THE EXCEPTION.

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To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.

WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN--NOT BECAUSE THEY ARE IMPARTIAL--BUT BECAUSE THEY OWE ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?

WHO WANTS TO RELY ON THE DECISIONS OF JUDGES WHO ARE CHOSEN--NOT BECAUSE THEY ARE WISE OR BECAUSE THEY KNOW THE LAW--BUT BECAUSE THEY HAVE PROMISED TO TOE THE PARTY LINE?

Californians do not want their judges to become beholden to political parties.

UNLESS YOU VOTE YES ON PROPOSITION 49, JUDGES MAY WELL BE INDEBTED TO PARTY BOSSES TO WIN ELECTIONS. THEIR JOBS WILL DEPEND ON IT! . . . ." (Argument in Favor of Proposition 49, 1986 Ballot)

The common sense conclusion that the independence of and respect for the California judiciary might be imperilled by permitting political parties or central committees to endorse, support or oppose judicial candidates is supported by empirical evidence. Studies of those states which have partisan judicial elections establish that voters use party affiliation as their most important cue when casting votes for judicial offices. See Mary Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not in The Analysis of Judicial Reform*, p. 80 (ed. Philip Dubois 1982) ("Party labels, where used, are the single most significant voter cue"); Philip Dubois, *The Significance of Voting Cues in State Supreme Court Elections*, 13 *Law & Society Review* 757, 768 (1979) ("Voters in low salience elections rely upon available voting cues, and in partisan judicial elections the party label is the most meaningful guide to voting."). That this would be so is not surprising since psychological attachment and loyalty to political party is widely recognized as the most powerful and stable determinant of voting behavior. Philip Converse, *The Concept of a Normal Vote* in A. Campbell et al., *Elections and the Political Order* (1966).

Moreover, even if political party endorsements, support or opposition did not *actually* affect voting behavior to a significant extent, the public would *perceive* that judges were accountable to the major political parties. This perception would be nourished because, even if

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individual voters were unaware of which parties had endorsed which judicial candidates, the candidates themselves would inevitably be drawn into the party process as a result of endorsements, support or opposition. The perception of political connection and domination would directly undermine public confidence in and respect for the California judiciary.

In the primary election of 1986, the voters decided to protect California's judiciary from both the reality and the appearance of political domination by approving Proposition 49. When California voters cast their ballots for judicial candidates, they expect those candidates to be free from the sort of political entanglements that would result from political party endorsements, support or opposition. Absent Section 6(b), nonpartisan offices would be nonpartisan in name only, and voters would, as a consequence, be misled by the appearance of nonpartisanship in the voting booth (with the reality of partisanship vis-a-vis endorsements and support). Thus, Section 6(b)'s proscription is arguably necessary to insure the public's constitutional demand for nonpartisanship in judicial elections. See *Burson v. Freeman*, 112 S. Ct. 1846 (1992) (upholding a "campaign-free zone" around polling booth to protect voters from confusion in voting).

The argument against Proposition 49, which was prescient in light of subsequent litigation, emphasized that its provisions were "clearly unconstitutional" and that it was "a gross insult to you as a California voter" because it "implies that you cannot be trusted to make informed electoral choices if you are exposed to political endorsements." The argument against Proposition 49 continued as follows:

"Proponents will argue that [the ban] is necessary to protect judicial integrity and impartiality by ensuring that local elections remain nonpartisan.

No one wants to return to the bad old days of partisan wheeling-dealing over judgeships. But in order to protect nonpartisanship, we needn't violate our First Amendment.

The chief purpose of the First Amendment is to protect our right to discuss our government. That includes candid, public evaluations of the people running for public office. In this society, we need to share our observations and comments in order to make informed choices, for those whom we elect are entrusted with our future. Why deny the political parties of this state, which are

only the collective expression of our personal political preferences, the right to join in the dialogue?"

### **3. First Amendment Protection for Political Party Endorsements**

The constitutionality of Proposition 49 was challenged in a federal court action filed on September 11, 1987. District Judge Zirpoli granted plaintiffs' motion for summary judgment on its constitutional claim, holding that Proposition 49 violated the free speech rights of political parties. *Geary v. Renne*, 708 F. Supp. 278 (N.D. Cal. 1988). That decision was reversed by a three-judge panel of the Ninth Circuit Court of Appeals in *Geary v. Renne*, 880 F.2d 1062 (9th Cir. 1989). The Ninth Circuit granted a rehearing en banc, and an eleven-judge limited en banc panel reversed the three-judge panel decision (by a 7 to 4 vote), holding that Proposition 49 was, as found by the district court, unconstitutional. *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (en banc). This extensive federal litigation ultimately came to naught when the Supreme Court of the United States held that jurisdiction was lacking because the case was not ripe (since none of the plaintiffs had declared an intention to endorse any particular candidate). *Renne v. Geary*, 501 U.S. 312, 321 (1991).

The issue arose again, however, in a case arising out of the Democratic Party's decision to support Delaine Eastin for State Superintendent of Public Instruction, a nonpartisan office, in the 1994 election. Anticipating a challenge to its decision to support Ms. Eastin, the Democratic Party and others filed an action on May 13, 1994, seeking a declaratory judgment that Section 6(b) was unconstitutional and an injunction against the Attorney General from enforcing Section 6(b). In a lengthy and well-reasoned opinion, Judge Orrick granted the plaintiffs' motion for a summary judgment, holding that Section 6(b) violated the First Amendment. *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996). The Attorney General decided not to appeal Judge Orrick's opinion in light of the Ninth Circuit's earlier en banc decision.

Judge Orrick's opinion is worth careful review. The court correctly begins the analysis by asking whether Section 6(b) burdens rights of speech that are protected by the First and Fourteenth Amendments. *See, e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989).

Section 6(b) applies only to political parties. The Supreme Court has repeatedly held that political parties enjoy the protections of freedom of speech and association under the First and Fourteenth Amendments. *Eu v. San Francisco*, 489 U.S. at 214; *Tashjian v. Republican*

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*Party of Connecticut*, 479 U.S. 208, 214 (1986); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107( 1981).

Section 6(b) prohibits political parties from “endors[ing], support[ing], or oppos[ing]” candidates for nonpartisan offices. This proscription plainly burdens speech and associational activities since it directly targets the political parties’ ability to communicate its views regarding particular candidates for office. This type of speech--speech regarding candidates for public office--lies at the very core of the First Amendment.

Because Section 6(b) directly burdens core political speech that is protected by the First Amendment, it “can survive constitutional scrutiny only if the State shows that [the law] advances a compelling state interest, . . . and is narrowly tailored to serve that interest.” *Eu*, 489 U.S. at 222.

Judge Orrick discussed in his opinion three possible state interests: (a) protecting nonpartisan offices from the corrupting influences of partisan campaigns; (b) creating a “level playing field” for candidates for nonpartisan offices; and (c) as applied to judicial elections, protecting the judiciary from the appearance of partiality. Judge Orrick concluded that these interests did not justify the restriction on speech. Either the interest was itself constitutionally illegitimate because it directly targeted core political speech (*California Democratic Party*, 919 F. Supp. at 1401-02), or, even assuming the state’s interest was compelling, the ban on political party speech was not narrowly tailored to further the interest (*id.*, 919 F. Supp. at 1402). In essence, when the state’s interest was defined so that Section 6(b) was narrowly tailored, the interest was not constitutionally permissible (much less compelling); and, when the interest was defined in a way that might be compelling, Section 6(b) was no longer narrowly tailored.

For purposes of this report, the few paragraphs devoted exclusively to judicial elections are worth reproducing in full:

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In the alternative, defendants ask the Court to uphold section 6(b) insofar as it bans political party endorsements of candidates for state judicial office. Defendants argue, quite rightly, that it is especially crucial for judges to avoid the appearance of partiality.

They err in their argument that the state’s interest justifies section 6(b)’s ban on political parties’ speech.

For obvious reasons, the Court is sympathetic to defendants’ desire to protect judges from political pressures. Nonetheless, section 6(b) is no more constitutional as applied to judicial campaigns than it is as applied to other campaigns for nonpartisan office. California can, of course, prohibit judges from engaging in partisan political activity once they are in office. [citation omitted] But California cannot suppress speech by political parties concerning the merits of judicial candidates’ qualifications for office. [citation omitted]

Once again, section 6(b) takes aim at the wrong evil: “The political threat to judicial independence . . . is attributable far more to the decision to elect judges in the first place, and to subject them to re-election, than it is to party endorsement.” Geary II, 880 F.2d at 1085 (Canby, J., dissenting). The choice that California can make is between permitting voters to elect judges, with all the partisan political activity that such campaigns entail, and appointing the state’s judiciary in order to insulate judicial officers from political pressures.

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*California Democratic Party v. Lungren*, 919 F. Supp. at 1404-05.

#### **4. Likely consequences of permitting political party endorsements**

In effect, Judge Orrick’s opinion holds that, at least from the perspective of the First Amendment, a campaign for nonpartisan judicial office is not significantly different from a campaign for partisan office. In either case, the fact that the office is subject to a popular election makes the campaign subject to robust public debate and speech from *all* persons, including political parties (one caveat is in order here: the issue of whether the speech of judicial candidates themselves can constitutionally be limited is discussed below).

Most of the possible consequences of Judge Orrick’s opinion for judicial elections are readily apparent. Although judicial offices are declared to be nonpartisan by the California Constitution, the information given to voters during a judicial campaign can be completely partisan (except, perhaps, for statements by the candidates themselves). State and local political parties will undoubtedly step up public endorsements of, and support for, particular

judicial candidates. These endorsements will carry to voters explicit messages about the party's viewpoint, and implicit messages (whether accurate or inaccurate) about the party affiliation of judicial candidates. Since party affiliation remains one of the most salient cues given to voters for all elections (and is particularly influential in elections for offices where there is relatively little voter interest and information), we should anticipate in California the likelihood that partisan endorsements will tend to politicize judicial elections (and, indirectly, the office itself).

Because political party endorsements can be such an important cue to voters, one additional (but less apparent) consequence is that there may be a significant increase in the number of persons willing to file papers for already occupied superior and municipal court seats. Historically in California, the overwhelming advantage of incumbency has deterred persons from challenging sitting trial court judges. With the support and aid of a political party, however, the incumbency advantage may be sufficiently eroded to encourage increasing numbers of challengers.

If these possible consequences materialize, judicial elections in California will increasingly be nonpartisan in name only. In effect, although California will still formally be listed among those states which have nonpartisan judicial elections, the reality may be closer to those states in which partisan judicial elections are explicitly authorized by law.

## **C. Judicial Campaign Speech**

### **1. Restrictions Imposed by the Code of Judicial Ethics**

Canons of judicial conduct around the country have almost uniformly restricted the type of speech, political activities and campaign fundraising in which judicial candidates can engage. These restrictions are imposed in an attempt to balance the need for judicial independence and the appearance of impartiality with the very real and practical need for judges who are elected to communicate information to the voters. On the one hand, imposing no limits upon the political speech and activities of judicial candidates would risk transforming supposedly nonpartisan, impartial judicial officers into political representatives (a status largely inconsistent with our tradition of judicial independence and impartiality). On the other hand, a total ban upon judicial campaign speech and political activities (such as fundraising for a campaign) would cripple candidates for judicial office and render the election process for judges essentially meaningless.

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The American Bar Association's 1972 Model Code of Judicial Conduct, which was adopted in nearly all states (*see* Jeffrey M. Shaman, Steven Lubet & James J. Alfani, *Judicial Conduct and Ethics*, § 1.02, p. 4 (2d ed. 1995) (hereinafter cited as *Judicial Conduct and Ethics*)), restricted the speech of judicial candidates in Canon 7B as follows:

“(1) A candidate, including an incumbent judge, for a judicial office ... (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.”

Because of the breadth and vagueness of these provisions, it has been noted that “the man in the moon and the weatherman are about all of the people a judicial candidate can with impunity talk about without attitudinizing himself.” Florida Supreme Court Committee on Standards of Conduct Governing Judges, Op. 78-13 (1978).

Naturally, disputes have arisen about what sort of statements constitute a “pledge or promise,” and recognizing that judicial candidates must be permitted to talk about *something*, Canon 7B(1)(c) has been interpreted as creating space for judicial candidates to send voters unmistakably substantive messages. For example, a judicial candidate in Illinois told voters that he was “tough on crime” and “tough on taxes.” These statements were held not to violate Canon 7B(1)(c) because they were within the realm of generalized comment *Judicial Conduct and Ethics*, § 11.08, p. 368 n.61.

As discussed in detail in the next section, Canon 7B(1)(c) was criticized by some scholars on constitutional grounds for its over-breadth. Although most courts had upheld the canon against constitutional attack, the ABA took the criticisms seriously, and in the 1990 revision of the Model Code of Judicial Conduct, the ABA made a few alterations (most significantly with respect to the ban on discussing “disputed legal or political issues”). The revised canon, renumbered as Canon 5, provides that candidates

“shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent . . . .”

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Pursuant to Article VI, Section 18(m), of the California Constitution (added in 1995 by Proposition 190), “[t]he Supreme Court shall make rules for the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns.” The Supreme Court adopted a new Code of Judicial Ethics effective January 15, 1996. Canon 5 of the Code of Judicial Ethics, which is based upon the ABA’s 1990 Code of Judicial Ethics, speaks directly to the question of judicial political speech and judicial campaigns. It provides in full as follows:

“Judges are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, avoid political activity which may create the appearance of political bias or impropriety. Judicial independence and impartiality should dictate the conduct of judges and candidates for judicial office.

A. Political Organizations. Judges and candidates for judicial office shall not:

- (1) Act as leaders or hold any office in a political organization;
- (2) Make speeches for a political organization or candidate for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office;
- (3) Personally solicit funds for a political organization or nonjudicial candidate; make contributions to a political party or political organization or to a nonjudicial candidate in excess of five hundred dollars in any calendar year per political party or political organization or candidate, or in excess of an aggregate of one thousand dollars in any calendar year for all political parties or political organizations or nonjudicial candidates.

B. Conduct During Judicial Campaigns. A candidate for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing authority that commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts, or (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent.

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C. Speaking at Political Gatherings. Candidates for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office.

D. Measures to Improve the Law. Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice.”

Although it may appear on first reading that California’s version of Canon 5 is quite restrictive, it actually permits judges to engage in a substantial amount of campaigning (a fact which, as discussed in the next section, may undermine the constitutionality of the entire canon). First, although it bars judicial candidates from endorsing candidates for non-judicial office, it clearly permits judges and judicial candidates to endorse other candidates for judicial office, to speak at political gatherings in support of other candidates for judicial office, and personally to seek funds for a judicial candidate. The most likely consequence of permitting judges to endorse other judges is that incumbents seeking re-election will ask for (and in some cases receive) support from colleagues on the same court. Through this mechanism, the politics of a judicial election may spread throughout an entire court (and not be limited simply to the offices which are on the ballot). We can probably expect challengers who do not receive judicial endorsements to complain about the unfairness of having incumbents draw upon the support of fellow judges.

Second, although Canon 5D provides that “judges shall not engage in any political activity,” the exceptions render the proscription virtually meaningless. In the first place, the proscription is subject to other provisions in the Code (e.g., the rest of Canon 5) which permit a significant amount of political activity upon a judge’s own behalf and upon behalf of other judges. Second, the proscription does not apply to activities “concerning the improvement of the law, the legal system, or the administration of justice.” Needless to say, this leaves the field of political activities by judges and judicial candidates essentially unobstructed. How many activities related to law could not be construed as relating to “improvement of the law, the legal system, or the administration of justice”? See generally J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 *Loyola of Los Angeles L. Rev.* 851, 852-55 (1995).

Third, California’s version of Canon 5 drops the proscription against making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of

the office.” On the one hand, dropping this part of the ABA’s Code is probably a good thing since the “pledge or promise” proscription is more likely to violate the First Amendment than the other sections of Canon 5. *See, e.g.,* Robert M. Brode, *First Amendment Limits on Ethical Restrictions of Judicial Candidates’ Speech*, 51 Wash. & Lee L. Rev. 1085, 1122 (1994); Mark R. Riccardi, *Code of Judicial Conduct Canon 7B(1)(c): An Unconstitutional Restriction on Freedom of Speech*, 7 Geo. J. Legal Ethics 153, 179 (1993). On the other hand, dropping the proscription means that judicial candidates in California are free to make any campaign pledge or promise so long as it does not “commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts.” It should be relatively easy for judicial candidates to make all kinds of pledges without appearing to commit themselves to “cases, controversies, or issues.” For example, candidates arguably can pledge to be “tough on crime”, to be “a protector of Proposition 13”, to enforce “three strikes”, and so on, all without committing themselves to particular cases or legal issues. With this much pledging and promising now apparently permitted by the Code of Judicial Ethics, it seems likely the difference between a non-judicial, partisan campaign and a judicial campaign will begin to blur.

## **2. The constitutionality of restrictions on judicial campaign speech contained in Codes of Judicial Ethics.**

Since judicial candidates must be permitted as a practical matter to engage in *some* campaign speech, restrictions upon such speech are necessarily content-based. As already noted above, content-based restrictions on core political speech are anathema to the First Amendment and can be justified only by showing a compelling interest and that the restriction is narrowly tailored to further that interest.

The long-term trend in First Amendment jurisprudence is towards an expansion of the rights of speech and association and a rejection of the state’s ability to draw narrowly-tailored lines between acceptable and unacceptable speech. Perhaps in part as a result of the Supreme Court’s own struggle to draw a clear line between obscene and non-obscene speech, courts increasingly doubt the ability of any legislature, agency or court to make constitutionally acceptable content-based distinctions.

This trend has been apparent in cases raising the constitutionality of restrictions upon judicial campaign speech. It is a good guess that 50 years ago, it would have been nearly inconceivable to assert the unconstitutionality of a ban upon pledges or promises in a judicial

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campaign. Yet successful challenges to proscriptions on judicial campaign speech are now commonplace, and the field of constitutionally permissible regulation has been reduced almost to the point where a judicial campaign can be virtually indistinguishable from a non-judicial campaign.

Courts appear uniformly to agree that the state's interest in restricting the content of judicial campaign speech--i.e., protecting the independence and impartiality of the judiciary--is a compelling interest. The difficulty has been to craft and apply a rule of judicial ethics that is narrowly tailored to further that interest. For example, as drafted, the "pledge or promise" proscription would seemingly prevent a judge from pledging to work to improve court efficiency, yet it is difficult to see how barring such a pledge protects the independence and impartiality of the bench. To the contrary, it would seem that the independence of the judiciary would probably be strengthened if the public were convinced that judges were concerned about the efficiency of the judicial process.

Because different courts are likely to draw the lines in different places, the cases around the country are split both on what type of statements the Code's of Judicial Ethics proscribe and whether those proscriptions are constitutional. For example:

- An incumbent in Washington was censured for making a campaign statement that he was "tough on drunk driving." *In re Fadeley*, 802 P.2d 31 (Or. 1990).
- A judge in Kentucky was censured for campaign materials describing the judge as having a "solid reputation for law and order" and as "not allow[ing] plea bargaining." *In re Nolan*, unreported order (Ky. Comm'n 1984).
- A judicial candidate cannot express the view that marijuana should be legalized. Florida Supreme Court Committee on Standards of Conduct Governing Judges, Op. 78-6 (1978).
- A judicial candidate may not identify himself as "pro-life." *Deters v. Judicial Retirement and Removal Commission*, 873 S.W.2d 200 (Ky. 1994).
- A judicial candidate should not claim to have "a strict sentencing philosophy." State Bar of Michigan Committee on Professional and Judicial Ethics, Formal Op. C-219 (1980).

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On the other hand, courts have approved quite a few seemingly similar statements by judicial candidates:

- In Washington, a judge who was censured for claiming to be “tough on drunk driving” was *not* sanctioned for pointing out that his opponent “has received the majority of his financial contributions from *drunk driving defense attorneys . . .*, the only group . . . not supporting my re-election.” *In re Kaiser*, 759 P.2d 392, 395 (Wash. 1988).
- In Ohio, a candidate was permitted to propose implementation of a pretrial mediation program and to criticize the incumbent’s frequent use of trial referees. *Berge v. Supreme Court of Ohio*, No. C-2-84-1227, slip op. (S.D. Ohio 1984).
- In Florida, a candidate was permitted to say, “I will make every effort to see that there is effective discipline of children who become subject to the juvenile powers of the court.” Florida Supreme Court Committee on Standards of Conduct Governing Judges, Op. 78-7 (1978).
- Also in Florida, a candidate was permitted to criticize the incumbent for threatening defendants with a jail term if they did not plea bargain. Florida Supreme Court Committee on Standards of Conduct Governing Judges, Op. 84-18 (1984).
- In Illinois, statements that a candidate was “tough on crime” and “tough on taxes” did not violate the canons. *In re Tully*, Order No. 90-CC-2 (Ill. Cts. Comm’n, Oct. 25, 1991).

In addition to these individual cases, a number of courts have declared portions of Canon 7 of the 1972 Code to be unconstitutionally overbroad. *See Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993) (striking down Canon 7(B)(1)(c)); *ACLU v. Florida Bar*, 744 F. Supp. 1094 (N.D.Fla. 1990) (striking down ban on discussion of “disputed legal or political issues”); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991) (striking down requirement that judicial candidates “maintain the dignity appropriate to judicial office” as overbroad); *Ackerson v. Kentucky Judicial Retirement & Removal Comm’n*, 776 F. Supp.

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309 (W.D.Ky. 1991) (striking down ban on pledges and promises as applied to judicial administration functions).

It is not possible to forecast with certainty just how far the First Amendment cases will go since all courts agree that states have a compelling interest in preserving the impartiality and integrity of their judicial systems. It seems likely that courts will manage to uphold relatively narrowly-drawn restrictions upon judicial campaign speech, at least in the short run. But it is precisely because these restrictions must be narrowly-drawn that we may anticipate an increasing amount of substantive speech from judicial candidates. Moreover, in the long run, we should anticipate the real likelihood that content-based restrictions on core political speech will ultimately be struck down as contrary to the central purpose of the First Amendment. The sentiment expressed by Judge Reinhardt in his concurring opinion striking down Section 6(b) sounds a clear warning:

“The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate. It cannot forbid speech by persons or groups who wish to make their views, support, or endorsements known. Nor can it complain if the citizens wish to make their electoral judgments based in part on recommendations made by political parties. If the people are to be given the right to choose their judges directly, they are free, rightly or wrongly, to consider the political philosophy of the candidates.” *Geary III*, 911 F.2d at 294 (Reinhardt, J., concurring) (footnotes omitted).

In the meantime, candidates are already taking matters into their own hands. A television advertisement for a court of appeal election in Georgia attacked an opponent for letting off on “a technicality” a man who had confessed to molesting his own son. The candidate then says on the ad: “People who commit crimes against innocent children should be convicted and serve their entire sentences. Isn’t it time our judges protected us from criminals instead of protecting criminals from justice?” Stuart Taylor, *Talkin’ Trash Around the Bench*, *The Recorder*, p. 4 (July 24, 1996). The recent election for a seat on the Nevada Supreme Court was described by observers as “down-and-dirty” and as “marred by personal attacks.” *See, e.g., New Judge Selection Urged*, *Sacramento Bee*, B3 (Nov. 13, 1994).

Unfortunately, there may be an inevitability to these type of campaigns. As the stakes and expenses rise, candidates will become more and more likely to reach for the most effective

tools to affect voters. The most effective tools may be negative, personal campaign attacks and relatively blatant pledges of action in office.

Even if a judicial candidate desires to avoid resort to such tactics, an opposition campaign may force a response. For example, Justice Penny White of the Tennessee Supreme Court lost her 1996 retention election when she received only 45% “yes” votes from the public. The opposition campaign had labeled her soft on crime and soft on the death penalty, in part as a result of a vote she had cast in a single death penalty case. According to one of the organizers of the opposition, “This is just the beginning. The people are going to retake the criminal justice system and throw out the soft-on-crime elitists.” Kirk Loggins, *State Turns Out Justice White*, *The Tennessean*, p. 5A (1996). Ultimately, the opposition included the state Republican Party and some law enforcement officials. Faced with this type of opposition campaign, what options does a judicial candidate have to respond?

### **3. Elections Code Restrictions on the Content of Ballot Statements**

The Elections Code regulates the content of candidate’s statements for nonpartisan offices which are printed in the voter’s pamphlet that is sent to voters shortly before an election. Section 13307(a)(1) of the Elections Code provides that “[t]he statement may include the name, age and occupation of the candidate and a brief description, of no more than 200 words, of the candidate’s education and qualifications expressed by the candidate himself or herself.” Section 13308 contains additional restrictions upon the candidate’s statement for judicial office. It provides that a judicial candidate’s statement “shall be limited to a recitation of the candidate’s own personal background and qualifications, and shall not in any way make reference to other candidates for judicial office or to another candidate’s qualifications, character, or activities.”

The exact scope of Section 13308's proscription remains unsettled, in part because of the paucity of appellate decisions interpreting it. In *Clark v. Burleigh*, 4 Cal.4th 474 (1992), the only decision from the Supreme Court involving Section 13308, the court interpreted the statute as proscribing the following statement:

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STATEMENT OF CANDIDATE FOR  
JUDGE OF THE SUPERIOR COURT,

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OFFICE # 2  
6 YEAR TERM  
AGE: 55

(NAME) WILLIAM B. BURLEIGH

OCCUPATION: JUDGE OF THE MUNICIPAL COURT

EDUCATION AND QUALIFICATIONS:

After 17 years as Municipal Court Judge, I am challenging the incumbent Superior Court Judge (Jerry Brown appointee).

WHY?

Because, as a citizen, I am greatly disturbed by his decisions.

Criminal activity is being dismissed. Innocent citizens have had their lives and businesses disrupted by court interference.

Some Examples:

A police officer was told the defendant (a convicted murderer on parole) was selling drugs from his camper. When confronted, he attempted to hide the drugs and the officer seized them. Judge Silver dismissed the case. (Reversed on appeal.)

Defendant and victim were fighting. Defendant was losing, left the scene, returned with a knife, stabbed the victim, chased him into the street and killed him. Silver ruled there was no malice.

Marina Safeway, losing \$20,000 a month, announced it was closing. Silver ordered Safeway to remain open.

It's time to get tough with criminals . . . time to end court interference in community affairs.

ENDORSED BY POLICE CHIEF'S ASSOCIATION

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Qualifications:

U.S. Marine Corps.

Doctor Jurisprudence, University California, Berkeley.

Nine years private practice; City Attorney.

Vice-President, California Judge's Association.

Faculty, California Judge's College.

Associate Editor, "California Court's Commentary"

Founder, two charity fundraisers (Big Sur Marathon, River Run) raising money for local needy services.

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It is not clear from the court's opinion whether referencing Judge Silver by name was enough to violate the statute or whether the statute was violated only because of the overtly partisan nature of the statement. The court identified the purpose of Section 13308 as follows:

"From its terms and conditions we may reasonably infer that its primary purpose is to give the voters at least a minimal amount--200 words' worth--of basic information about the background and qualifications of little-known candidates. In light of that purpose it is plainly reasonable for the Legislature to provide in section 10012.1 [the predecessor to Section 13308] that the statement should not also be used by the candidates as *a partisan campaign device to attack their opponents.*" *Id.*, 4 Cal.4th at 493 (emphasis added).

This statement of purpose may indicate that Section 13308 is limited in application to those references that are partisan or which attack an opponent, and that it does not apply to nonpartisan comparisons. That this may be a proper construction of Section 13308 is suggested by the court in footnote 17 of the opinion:

“Like all statutes, section 10012.1 should be reasonably construed in light of its purpose. For example, if a candidate were to assert in a statutory statement that ‘I am the best candidate for the office,’ the implied comparison with other candidates might be deemed to indirectly ‘refer’ to them but could not reasonably be read to attack them. *Accordingly, the statute should not be construed to bar such a statement.*” *Id.*, 4 Cal.4th at 493 (emphasis added).

Arguably, this footnote indicates that a candidate’s statement can refer to an opponent and even make comparisons to an opponent so long as the statement does not “attack” the opponent. Or, perhaps, the footnote is limited to *indirect* and *inferential* references to an opponent.

Whatever the true meaning of footnote 17, the ambiguity which it creates makes it very difficult to know whether a particular campaign statement violates Section 13308. Consider the following excerpts from recent judicial campaign statements:

- “Unlike my opponents from the government sector, I know the burdens of litigation and I know there are solutions.”
- “I am running against one of Governor Wilson’s most recent appointees.”
- “In this race for judge, you have a choice between judicial experience and politics.”

Which, if any, of these examples violates Section 13308? Moreover, if Section 13308 is, as interpreted by the court, so imprecise, how can a candidate reasonably be expected to know in advance how far he or she can go in a candidate’s statement?

Next to incumbency, the candidate’s statement appears to be the most important factor affecting voter behavior in trial court races. This is not surprising since it is, for most voters, their only opportunity to learn anything about a judicial candidate. Because of the importance of the candidate’s statement, we should anticipate that candidates may attempt to push the envelope of acceptable campaign speech, putting additional pressure upon Section 13308 and upon the appearance of nonpartisanship in judicial elections.

#### **4. Constitutionality of Elections Code Restrictions on Ballot Statements**

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Section 13308's restriction on the candidate's statement in judicial elections raises serious First Amendment questions. The restriction is, on its face, content-based, which in the usual First Amendment case triggers strict scrutiny. Under this level of scrutiny, the statute would be struck down unless the state could establish a compelling state interest and that the statute is narrowly tailored to further that interest. It seems unlikely that the state could make such a showing with respect to a statute that appears to ban all comparative statements, regardless of their truth or relevance to the voters' decision.

Nevertheless, the California Supreme Court *unanimously* upheld the constitutionality of Section 13308 in *Clark v. Burleigh*, 4 Cal.4th 474 (1992). However, the decision in *Clark* does not finally resolve the constitutionality of Section 13308. First, the court in *Clark* considered the constitutionality of Section 13308 only against the federal constitution; it expressly reserved the question of whether Section 13308 violates the State Constitution's free speech clause. *Id.*, 4 Cal.4th at 481-82. Second, a federal court could come to a contrary conclusion about the constitutionality of Section 13308 and enjoin its enforcement (since the holding in *Clark* would not bind a federal court).

Even though *Clark* was decided by a unanimous court, it may be inconsistent with the First Amendment, and a federal court could come to a contrary conclusion. The most important step in the court's analysis was its decision *not* to employ strict scrutiny but, instead, to employ a reasonableness standard in evaluating Section 13308. The step was justified in *Clark* by the court's conclusion that the space allocated to a judicial candidate's statement was a non-public forum for First Amendment purposes. It is this conclusion that is subject to some doubt.

In assessing the constitutionality of government restrictions upon speech activities occurring on publicly owned property, the United States Supreme Court distinguishes between three types of "forums": (1) the traditional public forum (e.g., speeches, public parks); (2) the designated public forum; and (3) the non-public forum. See *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992). Content-based restrictions on speech in traditional public forums and designated public forums are reviewed pursuant to strict scrutiny. Content-based restrictions on speech in non-public forums are reviewed under a reasonableness standard.

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The first issue--which the court in *Clark* did not discuss--is whether "forum analysis" even applies to content-based restrictions on statements by candidates in a voter's pamphlet. The court assumed that the voter's pamphlet was "public property". While it is literally true that the voter's pamphlet is printed on paper owned by the state, it does not necessarily follow that the voter's pamphlet would be considered public property for First Amendment purposes. The Supreme Court's "forum analysis" cases have all involved governmental control over speech that predominantly occurs within governmental buildings or on governmentally-owned real property. See, e.g., *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992) (publicly owned airport); *U.S. v. Kokinda*, 497 U.S. 720 (1990) (sidewalk outside Post Office); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (high school newspaper published by journalism class); *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985) (charity drive at federal workplace); *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) (mail system within public schools); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising on city-owned buses).

The voter's pamphlet, by contrast, has no nexus to governmentally-owned real property. It is distributed to all voters and is a critically important medium for communication from candidates to voters. The Court has repeatedly emphasized that the First Amendment "'has its fullest and most urgent application'" to political speech. *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 223 (1989). It is therefore arguable that Section 13308 must be analyzed as a content-based restriction on political speech (thereby triggering strict scrutiny) rather than as a case involving regulation of a governmentally-owned forum.

Even assuming that forum analysis applies, the conclusion in *Clark* that the candidate's statement is a non-public forum may be incorrect. In deciding whether a governmentally-created forum is public or non-public, the Supreme Court looks to the purpose for which the forum was created. The court in *Clark* identified the "primary purpose" of the candidate's statement as "giv[ing] the voters at least a minimal amount--200 words' worth--of basic information about the background and qualifications of little-known candidates." *Clark*, 4 Cal.4th at 493. Given this description of legislative intent, a strong argument can be made that the predominant purpose of permitting a candidate's statement in the voter's pamphlet is to foster expressive activity by a candidate directed at the voters. If fostering expressive activity is the predominant purpose, then the candidate's statement is a designated public forum, and the state can make content-based restrictions only on a showing of a compelling interest.

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The court in *Clark* reached a different conclusion by asking a slightly different question. Instead of asking whether the candidate's statement was intended to create a forum for expressive activity by a candidate directed to the voters, the court asked "whether the Legislature, by creating the statutory 'candidate's statement,' intentionally opened a public forum that candidates for local judicial office may use *for the purpose of attacking their opponents.*" *Id.*, 4 Cal.4th at 488 (emphasis added). In light of the italicized language, the court readily concluded that the Legislature intended to *prevent* attacks on opponents, and the forum was therefore a non-public forum.

There is something a bit circular about using the state's content-based restriction on speech as the sole basis for determining whether a government forum is public or non-public. If this analytic approach were uniformly valid, there would seemingly *never* be a designated public forum. There is, however, support for the approach taken in *Clark*, particularly in the U.S. Supreme Court's decision in *Cornelius, supra*, which involved restrictions on access to the federal government's charity drive program. It is thus a close question whether *Clark* was properly decided.

Perhaps the strongest argument in support of the result in *Clark* is that government should be able to control within reasonable limits the content of a publication which government prints and sends to voters. On the other hand, the additional expense of printing a candidate's statement is actually charged to the candidate (Elec. Code § 13307(c)), so the government's interest in content-control is reduced.

Whether *Clark* was correctly or wrongly decided is, for the time being, not as important as the fact that Section 13308 is apparently not being enforced by local elections officials, as can be seen by the examples given above from a recent voter's pamphlet. Local officials are no doubt uncomfortable attempting to engage in a content analysis of candidate's statements to determine whether the statute has been violated (which is part and parcel of the constitutional issue which Section 13308 raises).

The non-enforcement of Section 13308 (either because of its potential unconstitutionality or because local officials simply don't make the effort) is likely to lead to candidate's statements that are increasingly comparative, increasingly political and partisan, and increasingly negative. In short, the candidate's statement for judicial candidates is likely to look more and more like candidate's statements for other elective offices.

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## **Chapter 4**

# **Financing Judicial Election Campaigns**

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### **A. The Rising Expense of Judicial Campaigns**

Most judges are, by temperament, training and practice, uncomfortable engaging in public campaigns for election. Nevertheless, judicial candidates in contested races have no choice but to raise funds and engage in some semblance of a campaign.

It is not news that campaign spending at all levels of government (federal, state and local) has reached impressive proportions. Running for president is a \$100,000,000 plus adventure. The race for Governor of the State of California costs tens of millions of dollars. Candidates for Los Angeles County supervisor may spend several millions.

When the prospect of an incumbent losing a campaign for judicial office is very low (e.g., the typical appellate retention election), there is no need for an expensive campaign. But as the prospect of losing rises--e.g., when an appellate retention election becomes a major public issue or when an incumbent trial court judge faces a contested election--the need for an expensive campaign likewise rises. And, in those rare instances when there is no incumbent for an open trial court seat, judicial candidates again have no choice but to run an increasingly expensive campaign.

Judicial campaigns around the country occasionally involve millions of dollars. A supreme court justice in Pennsylvania (a state with partisan ballots) spent \$1.2 million in a 1989 campaign. California Commission on Campaign Financing, *The Price of Justice*, p. 75 (1995). In 1988, spending on 6 seats on the Texas Supreme Court reached over \$10 million. *Id.* The race for the Chief Justice of Ohio (a contested but nonpartisan election) cost \$2.7 million. *Id.* Expenses for trial court elections are also on the rise around the country, although the numbers here generally range from \$30,000-\$150,000. As a judicial election consultant in Washington said, "You'd better come to a campaign with a fat wallet if you intend to be a serious challenger." Associated Press, *Want to Be a Judge? Better Have 'Fat Wallet,'* S.F. Daily Journal, p. 3 (Aug. 29, 1996).

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California has witnessed similar increases in the costs of judicial campaigns. The appellate bench in California runs in retention elections. Retention elections are, in the overwhelming percentage of cases, low risk and do not warrant the expenditure of significant campaign funds. In the over sixty year history of appellate retention elections in California, only three appellate justices have lost, Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin in the 1986 election. These justices had been targeted by the insurance industry, some prosecutors, victims groups and some highly visible Republican leaders (in part, perhaps, in response to the Supreme Court's reapportionment decisions in the early 1980's). Because of the money spent by these and other groups, the justices were themselves forced to raise millions of dollars to mount a campaign. The total cost of the campaign (both for and against) was around \$11 million, setting a national record for judicial campaigns. *Id.*, p. 47. (The public campaign focused almost exclusively on the death penalty, but it seems clear that the death penalty was not the only issue motivating contributions to the anti-retention campaign.)

Although superior and municipal court offices are filled by contested elections, unless an opponent files for a judicial election, an incumbent's name does not appear on the ballot, and the incumbent is deemed to be the winner as a matter of law. This reduces somewhat the need for sitting trial judges to raise campaign funds (although it does not entirely avoid the need since a judge may have to raise funds in anticipation that someone *may* file election papers). However, once it becomes clear that an office will be contested, campaign spending becomes a virtual necessity. The comprehensive study of judicial elections in Los Angeles trial courts published by the California Commission on Campaign Financing reports that "*spending in Los Angeles County Superior Court races has increased 22-fold*, from just over \$3,000 in 1976 to \$70,000 in 1994. Median incumbent spending jumped 95-fold, from just over \$1,000 in 1976 to nearly \$95,000 in 1994." *Id.*, p. 51 (emphasis in original). In one 1994 election for a superior court seat, an incumbent contributed \$176,000 to her own campaign. *Id.*, p. 46.

Because the need for judicial campaign spending rises as races become more frequent and more competitive, the changes in the law described in Chapter 3 are likely to lead to further increases in amounts spent on judicial campaigns. For example, the ability of political parties to endorse judicial candidates may encourage persons who otherwise would not file for a judicial office to take the plunge. Once in a race, the expansion on what is acceptable (or constitutionally protected) campaign speech may tend to make judicial elections closer in result. And, as the money increases and the stakes become higher, there will be greater pressure to employ proven, political strategies in the campaign (such as the use of slate mailers, print and electronic advertising, focus groups, and negative campaign techniques).

## **B. Sources for Campaign Funds**

As a generality, it is probably true that most persons give money to a campaign in the expectation of receiving something in return--a *quid pro quo*. The *quid pro quo* may be an intangible, such as "good government," or it may be more tangible, such as access to the excitement of a campaign, an invitation to a dinner or party, or generally favorable governmental action affecting the contributor. So long as the *quid pro quo* does not involve an "explicit promise" of favorable governmental action (*McCormick v. United States*, 500 U.S. 257, 273 (1991)) or an offer with the intent to "influence corruptly" (*United States v. Jackson*, 72 F.3d 1370, 1380 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1546 (1996)), the contribution is lawful (and, indeed, is constitutionally protected as a form of speech).

The persons most interested in judicial elections are: (1) candidates; (2) lawyers who appear regularly in court; and (3) persons or organizations which regularly have legal issues before courts (e.g., large businesses, public interest groups).

Because a single trial court judge is not likely to have a significant impact upon any one lawyer or interest group, it is not surprising that the single largest source of campaign funds for trial court elections are the candidates themselves. As reported in *The Price of Justice*, 46% of the total dollars raised for Los Angeles Superior Court races from 1976 to 1994 came from the candidates and the candidates' families (p. 65), and the figure for Municipal Court elections was 52% (p. 69). In most cases, these payments to the campaign are gifts (essentially treated as a cost of becoming a judge); in a few isolated cases, however, the campaign has borrowed funds from the candidate, and fundraising efforts continued *after* the candidate became a judge (pp. 66-67).

The next largest block of contributions to trial court judges come from attorneys and law firms. In Superior Court races over the same period reported above, attorneys contributed 21% of the total, and lawyers gave 23% of the total to Municipal Court candidates.

Because appellate elections in California are for retention only, it is relatively uncommon for appellate justices to engage in significant fundraising for an upcoming election. However, when an appellate retention election becomes controversial, or the results uncertain, the pressure to raise campaign funds is intense, and the stakes can be much higher. Compared to a single trial judge, a single appellate justice has a much greater potential for affecting the development of the law and the results in large numbers of cases. Moreover, the potential for affecting the law is

magnified several times over when there is the chance of affecting the retention of more than one appellate justice at a time.

Evidence in support of these common sense observations can be found both within California and elsewhere. As already noted above, the 1986 retention election--where three justices of the California Supreme Court were targeted--involved over \$10 million of expenditures, and the affected justices raised over \$4 million. *Price of Perfect Justice*, pp. 46-47. Other states have also seen multi-million dollar races for seats on the state's highest court. *Id.*, p. 47 (e.g., Texas and Ohio).

Justices on the California Court of Appeals ordinarily have not had to engage in any fund-raising, since the margins of victory in these retention elections has usually been substantial. That no longer may be the case. A substantial percentage of the public (perhaps as high as 30-35%) routinely votes "no" on all issues, including retaining appellate judges in office. This leaves appellate judges with a significantly narrowed margin. In the 1996 retention election, the appellate ballot had been changed so that it indicated the length of term of office for each judge on the ballot (i.e., 4 year, 8 year, or 12 year), instead of simply saying "the term prescribed by law" (which had been the former practice). This one change had a significant impact upon voter behavior. Judges being retained for longer terms received fewer votes, with some retention percentages dropping into the low 50% range. *See Analysis of the Impact of Stating Term Length on Ballot for Retention of Appellate Judges* (Administrative Office of the Courts, July 1995).

The length of term information in the appellate ballot has now been restored to its former status, and appellate justices were retained by overwhelming margins in the 1998 election. However, the lesson is clear: In a low-visibility, low-information election, even small amounts of information may have significant effects upon voters. In light of this lesson, it would not be surprising to see other appellate justices following the lead set by justices on the Second Appellate District in 1996, who conducted an informational advertising campaign prior to the retention election. Web pages for appellate candidates were employed in the 1998 elections, and the Secretary of State published a special booklet with information about appellate judges and the retention elections.

### **C. The Ethical Problems Associated with Soliciting Campaign Funds**

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The receipt by incumbent judges or judicial candidates of campaign contributions, most of which come from lawyers, creates two related problems. First, it tends to undermine the appearance and reality of judicial independence. Second, it creates questions about the bias and impartiality of individual judges hearing individual cases.

The most notorious recent example of campaign contributions creating the appearance of bias in an individual case involves the \$10 billion plus lawsuit between Pennzoil and Texaco in the Texas state courts.<sup>1</sup> Pennzoil's trial counsel, Joseph Jamail (one of the leading plaintiff's lawyers in the country), made a \$10,000 campaign donation to the first trial judge while the case was pending. The Texas court of appeals affirmed the trial court's judgment against Texaco, and Texaco filed a petition for review with the Texas Supreme Court. Pennzoil's lawyers donated over \$315,000 to the campaigns of seven members of the Texas Supreme Court (three of whom were not even up for reelection), and Texaco's lawyers donated \$72,700 to the same justices. See Stephen J. Adler, *The Texas Bench: Anything Goes*, American Lawyer, p. 11 (Apr. 1986). The Texas Supreme Court denied Texaco's writ of review.

The appearance of bias in this one case shook the Texas judiciary to its foundations, ultimately creating a risk to its independence. The aftermath in Texas included the resignation of the Chief Justice in order to lead an effort to reform the judicial election system in Texas. John L. Hill, *A Time of Challenge: Judicial Reform in Texas*, 52 Tex. B.J. 165 (1989). The Texas judicial system was the subject of a CBS 60 Minutes story titled, "Justice for Sale?" (Dec. 6, 1987). Candidates in Texas now routinely accuse opponents of being well-financed by special interest groups which are trying to "buy . . . a seat on the court." Charles Bleil, *Commentary: Can a Twenty-First Century Texas Tolerate its Nineteenth Century Judicial Selection Process?*, 26 St. Mary's L.J. 1089, 1096 (1995).

The former Model Canons of Judicial Ethics addressed the appearance of bias problem by flatly prohibiting receipt of contributions that would raise a question of impropriety. See Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 Stan. L. Rev. 449, 466 (1988). One consequence of this prohibition was that it virtually compelled judicial candidates to finance their own campaigns. *Id.*, at 467.

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<sup>1</sup> The author of this report was an associate at Kaye, Scholer, Fierman, Hays & Handler (New York) when the judgment was entered against Texaco and participated in the post-judgment appeals on Texaco's behalf.

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The 1972 Code of Judicial Conduct permitted judicial candidates to receive contributions indirectly through a campaign committee. Canon 7B(2) of the 1973 Code provided as follows:

“A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit attorneys for publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers.”

This relieved significantly the pressure on judges to self-finance their campaigns, but came at the cost of permitting at least indirect entanglements with members of the bar and litigation interest groups. Although courts routinely held that a judge was not disqualified from presiding in a case merely because one of the attorneys had contributed to that judge’s campaign (*see, e.g., MacKenzie v. Super Kids Bargain Store, Inc*, 565 So.2d 1332, 1335 (Fla. 1990)), scholars worried that the appearance of impartiality suffers serious scarring with each such holding. *See, e.g.,* Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harv. Civ. Rts.-Civ. Lib. L. Rev. 189 (1996); Susan E. Lontas, *Judicial Elections Have No Winners*, 20 Stetson L. Rev. 309 (1990); Leonard A. Bennett, *The Impossibility of Impartiality: Interest in Judicial Reelection as a Denial of Due Process for a Criminal Defendant*, 4 Geo. Mason U. Civ. Rts. L.J. 275 (1994); Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 Georgetown J. Legal Ethics 839, 841 (1994).

In California, Canon 5 of the Code of Judicial Ethics provides that judges “should avoid political activity which may give rise to a suspicion of political bias or impropriety.” It is clear from the commentary, however, that judges may directly solicit campaign contributions. The commentary provides, in relevant part, as follows:

“In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. It is not possible for judges to do the same sort of fund raising as an ordinary politician and at the same time maintain the dignity and respect necessary for an

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independent judiciary. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(4), a judge's campaign may receive attorney contributions."

Although the legal and ethical restraints upon judicial candidates soliciting contributions are dropping away, and the need to engage in fundraising is increasing, judges themselves are not comfortable with the obvious threat to the appearance of impartiality. In 1989, the California Judges Association surveyed 91 judges who had never faced a contested election, and 91% of those judges were of the view that races had--by 1989--become so expensive as to create ethical problems. See Keith Donoghue, *Judges' Campaign Hangovers*, *The Recorder*, p. 1 (March 26, 1996).

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## **Chapter 5**

### **Judicial Election Models in Other States**

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This Chapter contains a brief description of judicial election systems employed in states around the country. Most of the information in this Chapter is drawn from reports from the American Judicature Society, which closely tracks methods of judicial selection around the country. The basic elements of any judicial electoral system are as follows: (A) Method of Initial Selection; (B) Term of Office; and (C) Method of Election / Retention.

#### **A. Method of Initial Selection**

State court judges are initially selected by the Executive, by the Legislature, or by the People. Appointment by the Governor is the predominate method of initially selecting judges. Gubernatorial appointment is employed in almost 40 states for either initial or interim appointments. A handful of states do not have an appointing authority, and judges are initially selected by the People (Arkansas, Illinois, Louisiana, Michigan, Mississippi, North Carolina, Ohio, Oregon, Pennsylvania, Texas and Washington). Legislative appointment is used in only 2 states (South Carolina and Virginia).

The governor's appointing power is often limited or guided by external institutions, both before and after the nomination. In California, for example, the Governor has the advice of the State Bar's Judicial Nominees Evaluation Commission before a nomination, and nominations to the appellate bench must be approved by the Commission on Judicial Appointments. Cal. Const., Art. VI, § 16(d). Legislative confirmation is a requirement in a number of states for some or all judicial appointments (e.g., Connecticut, Delaware, Maine, New Jersey, and New York). Almost thirty-five states limit the governor's appointment power to nominees previously selected by a separate nominating commission. Most of these states have adopted some version of merit selection as proposed by the American Judicature Society.

#### **B. Term of Office**

There is quite a bit of variation in the term of office for judges, both within states and among states. In California, initial appointments to appellate courts must stand for retention election at the next gubernatorial general election. Cal. Const., Art. VI, § 16(a). Once retained, appellate

justices serve a 12-year term. Trial court judges have a 6-year term, but vacancy appointees must stand for election at the next general election. Cal. Const., Art. VI, § 16(c).

California's approach, requiring an appointed judge to stand for election at the next general election, is employed in several states (e.g., Kansas, Maryland, New Mexico, and Tennessee). A number of other states duplicate the effect of California's system by giving a new appointee a short term of 1 or 2 years and then holding a retention election for a full term of 6 to 12 years (e.g., Arizona, Colorado, Florida, Indiana, Iowa, Missouri, and Oklahoma).

A few states require their trial judges to run for office every four years (e.g., Arizona, Idaho, Kansas, Mississippi, Oklahoma, Texas, and Washington). However, the most common terms for judges range from 6 to 12 years. Judges in Massachusetts, New Hampshire, and New Jersey are not subject to election and may serve until age 70. The initial term of office in New Jersey is 7 years, after which time a judge may be reappointed by the governor to age 70 with the advice and consent of the senate. Following the federal model, judges in Rhode Island are appointed for life.

### **C. Method of Election / Retention**

Most states require their judges to stand for some form of election, either partisan or nonpartisan and either retention or contested. As noted elsewhere in this report, appellate justices in California stand for retention, and trial judges run in contested elections (but a judge's name appears on the ballot only if there is an opponent). All races are nonpartisan.

Retention elections are one way of insulating sitting judges from the ethical problems associated with running judicial campaigns. At least 18 states hold retention elections for some or all of their judges (e.g., Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Indiana, Iowa, Kansas, Maryland, Missouri, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming). Around 22 states hold contested elections for some or all judges (e.g., Alabama, Arkansas, Georgia, Idaho, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, and Texas).

In those states which hold either retention or contested elections, the overwhelming choice is for nonpartisan elections. Partisan elections are held in only 8 states (Alabama, Arkansas, Illinois, Louisiana, North Carolina, Pennsylvania, Texas, and West Virginia).

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One of the most recent novel developments in judicial elections is the creation of state judicial evaluation commissions which collect information about judges and then present that information, often with a recommendation, to the voters (either in the form of ballot summaries or in separate publications). At present, Alaska, Arizona, Colorado, Tennessee and Utah have commissions that conduct evaluations for their judicial retention elections. Kathleen Sampson of the American Judicature Society explains these commissions as follows:

“The evaluation committees, usually composed of attorneys, lay people and judges, assess such qualities and skills as integrity, legal ability, communication skills, ability to work effectively with court personnel and other judges, punctuality, and administrative skills. Some states also evaluate judges’ compliance with case processing standards and continuing education requirements. Summaries of the findings are discussed first with the judges being reviewed and then are made available to the public in a variety of ways.” *Evaluating the Performance of Judges Standing for Retention*, 79 *Judicature* 190 (Jan.-Feb. 1996).

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