1987

Judicial Elections: The California Experience

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Source: Judicature

Citation: 70 Judicature 365 (1987).

Title: *Judicial Elections: The California Experience*

Judicial elections: the California experience

One of the justices defeated in California in 1986 reflects on the process by which judges are retained in that state, and in particular on the methods used and implications of last year's election.

By Joseph R. Grodin

For four years I had the privilege of serving on a court which for decades enjoyed a national reputation for its commitment to excellence and concern for justice. In November, 1986 I lost that privilege, but I gained a duty—the duty to tell the story of what happened in that election and its implications for judges and the public, in California and throughout the land. First, some background.

In California, judges of the intermediate appellate courts, which we call the court of appeal, and judges of the highest court, which is our supreme court, are appointed to vacancies by the governor, subject to confirmation by a Commission on Judicial Appointments. The commission consists of the chief justice of the supreme court, the attorney general, and the senior justice of the court of appeal.

The term of the appointment is eight years in the case of court of appeal justices, and 12 years in the case of supreme court justices, but, in both cases, subject to a hitch. The hitch is that the justice must face the voters at the first gubernatorial election following his or her appointment, then again at the conclusion of the term to which he or she was appointed, and then again every eight or 12 years, as the case may be.

These are retention elections; there is no opponent on the ballot, and voters simply vote yea or nay on the question of whether Justice X shall be retained. If the justice receives a majority of the votes, he or she stays; if not, he or she goes, and a successor is appointed by the governor elected in that same election.

The history of this arrangement is enlightening. Most of the early state constitutions provided for lifetime appointment of judges, subject to good behavior, as in the federal system. In the second quarter of the 19th century, however, there was something of a popular revolution, spurred by Thomas Jefferson's pronounced distrust of the federal judiciary, and by Andrew Jackson's populism, and many states amended their constitutions to provide for selection of judges, or at least their removal, through contested elections. When California became a state in 1849 it adopted that populist model, in a constitution which provided for gubernatorial appointment to fill vacancies, but subject to contestable elections for all judges, trial court and appellate.

Developing dissatisfaction

By the beginning of the 20th century there was developing some dissatisfaction with the contested election model, particularly in states, such as California, where the elections were contested along partisan lines. There were those who advocated the federal model of lifetime appointments, but that was a hard sell, in light of the widespread belief that judges should be subject to some form of accountability in the form of elections, and so a third model was put forth and adopted in some states—the model of the retention election. The theory behind the retention election model was that it would preserve a mechanism of accountability through the ballot, while at the same time insulating judges in substantial degree from politics.

In California, a proposal to substitute retention elections for contested elections for appellate justices appeared as an initiative measure on the 1934 ballot. The principal proponent of the initiative was the Commonwealth Club of San Francisco—a generally conservative, generally Republican group that supported the initiative with the claim that it would insulate judges from the political pressures of groups that might dissuade judges from enforcing the criminal laws of the state in a manner firm but fair. In other words, it was essentially a law and order campaign: if you want to make sure that the bomb throwers get what is coming to them, we need a system which permits judges the independence to throw them in prison where they belong, proponents implied.

The pressure groups that the Commonwealth Club of San Francisco had in mind and deplored were, of course, the labor unions with their emerging

political strength and, indeed, the principal opposition to the 1934 retention election initiative came from the San Francisco Central Labor Council, which argued that retention elections would insulate judges too much—and that contested elections were necessary in order to keep judges responsible to the people. Whether there is any lesson to be learned from this historical irony I leave for the reader to judge.

On the ballot

I was appointed to the California Supreme Court in December, 1982. I knew, of course, that my name would be on the ballot in 1986, because that was the first gubernatorial election following my appointment. I knew also that Chief Justice Rose Bird would be on the ballot with me, because that was the end of the term to which she was appointed, as was the case with several of my colleagues. I anticipated that there would be some opposition to Chief Justice Bird, as there had been when she appeared on the ballot for the first time in 1978 and barely obtained a majority. And I anticipated that there might well be some opposition to me as well.

In November of 1982, when my colleagues Justices Allen E. Broussard, Otto Kaus, and Cruz Reynoso were on the ballot, they were opposed by conservative forces, including the Republican party in California and then-Attorney General George Deukmejian, himself a candidate in that election, and the three were identified by the opposition as "Jerry's Judges", the "Jerry" referring to the then not-so-popular Governor Edmund G. (Jerry) Brown, Jr. Because I had also been appointed by that governor—a status I shared with both Chief Justice Bird and Justice Reynoso, who would be on the ballot again in 1986 as well—you might say that I was on notice that the sailing might not be altogether smooth.

Nevertheless, I was not particularly worried. My appointment to the Supreme Court had been greeted with general enthusiasm within the bar and the press. The president of the San Francisco Bar Association, the dean of a distinguished law school, and a former president of the state bar, who had been on the other side of the courtroom from me in the practice of labor law, all appeared at my confirmation hearing and spoke glowingly of my qualifications. Even governor-elect Deukmejian, who had voted to confirm my earlier appointments as associate justice and presiding justice in the court of appeal, voted for me as a member of the Commission on Judicial Appointments yet a third time, explaining that he had read my opinions on the court of appeal, and that although we disagreed somewhat philosophically, he believed that my opinions reflected both objectivity and competence. So I came to the office with a unanimous vote of the commission, and considerable optimism about the future.

Imagine the power of the 30-second television spot: a stomach-turning crime committed by a person whose humanity was cloaked in blood.

Optimism Lost

I will not provide a detailed description of Optimism Lost. Suffice it to say that by the end of 1984, a full two years before the election, several opposition groups had formed, ranging from one led by state Senator H.L. Richardson on the far right, to one more or less in the center of the conservative road, led by a public relations firm, Dolphin Group, that had represented Governor Deukmejian in the 1982 election. Somewhere in that spectrum was also Paul Gann, the public-spirited soul who gave us Proposition 13 some years earlier, and who seems to have learned the lesson that with a well-organized mail campaign and an appealing subject, one can raise a whole lot of money.

In fact, that is one thing that the opposition groups had in common—they raised a lot of money on mailings and other fundraising activities. The other thing they had in common was that they all agreed that the one issue that would be most useful in attacking the court was the issue of the death penalty.

I have no desire to rehash the arguments of the campaign or to defend myself or any other member of the court. I did what I thought was right, and if I had it to do over again I would do it the same way. But one must imagine the power of the death penalty issue in the hands of our opponents. In 1978 California had adopted a death penalty initiative by an overwhelming vote of the electorate. The polls showed that the people of the state continued to favor the death penalty by a margin of more than 4 to 1. Here was a popular governor whose very rise to political power rested in large measure upon his battle for the death penalty; and here was the California Supreme Court overturning every death penalty judgment that came along, generally for reasons which the citizens, not surprisingly, found very difficult to understand—particularly as large segments of the public believed that it was the Supreme Court's job in each case to decide whether the defendant was guilty and, if so, whether the death penalty was appropriate. Because in most of the cases it was pretty obvious that the defendant was guilty of something, and in many of them the crimes and the defendant's character were both so horrible as to make the death penalty appropriate if it ever is, it must have been extremely frustrating for the man in the street to see so many reversals. As I said during the campaign, if I thought that was what the court was supposed to be doing, I would vote against myself.

Television power

And imagine the power of the 30-second television spot: here was a stomach-turning crime, committed by a person whose humanity was cloaked in blood; here is the mother, or the grandmother, or the daughter of the victim lamenting her loss, and suggesting, or implying, that the California Supreme Court, in its unalterable opposition to the death penalty, and in defiance of the public will, had in reliance upon some unidentified technicality set the defendant loose on the streets. Of course, it was no technicality, it was a matter of constitutional or statutory right, and of course the defendant was not turned loose, but returned for retrial—in fact by the time the oppo-

sition ran the principal ad I have described, the defendant in the case had already been retried, reconvicted, and resentenced to death. But try explaining all of that effectively in 30 seconds on television, or in any manner sufficient to offset the emotional impact of the opponents' appeal.

Toward the middle of the campaign, the principal opposition groups had coalesced in a group calling itself Crime Victims for Court Reform, and they had agreed upon the identification of the enemy: it was Chief Justice Bird, Justice Reynoso, and myself. The District Attorneys' Association of California joined the battle on the side of the crime victims group, issuing a "white paper," the inaccuracies of which failed to reach public attention with the same force as the accusations. And Governor Deukmejian, who at first announced opposition only to the chief justice, declared that he would be inclined also to vote against Justice Reynoso and myself if our records in death penalty cases did not improve. Still later, in the early fall preceding the election, he announced that he did, indeed, intend to vote against the two of us as well, citing as justification that Justice Reynoso had voted only once to affirm a death penalty judgment and on only five occasions had I done so. There was no analysis of the cases, no argument that the grounds on which we had voted to reverse death penalty judgments were legally insubstantial, and no indication of how many death penalty judgments we would have to affirm in order to meet with Governor Deukmejian's approval.

A smokescreen?

Of course, many skeptics believed that the death penalty issue was just a smokescreen designed to conceal other motives, and while I refrained during the campaign from discussing motivation, I must say that their skepticism is not without reason. In 1982 Governor Deukmejian had opposed the retention of Justice Kaus, though he had been regarded as a moderate throughout his long judicial career and though Governor Deukmejian had voted to confirm him, as he did me—and on that occasion Governor Deukmejian was candid enough to admit that he wished to have someone more to his liking on the court.

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During this campaign, Deukmejian at one point attempted to broaden the scope of the attack by suggesting that the court was antibusiness, but when he was asked for examples, and presented a list of cases that was ludicrous, including one in which he, as attorney general, represented the prevailing party, he backed off. A group of lawyers in Los Angeles, however, picked up that theme and published a white paper advocating that the three of us should be removed from office for our positions in a number of civil cases.

Quite apart from the fact that I had not participated in two-thirds of the cases discussed, and apart also from the fact that the white paper grossly mischaracterized the court's holdings in a number of respects, the selection of the cases is revealing. For the most part these were cases in which the court had interpreted statutes, or common law doctrines, to protect the interests of consumers, workers, injured persons, or minority groups. The California Supreme Court had long been in the forefront in developing law protective of such interests—not only under Chief Justice Bird, but under several previous chief justices. It was probably no coincidence that much of the funding for the opposition came from insurance companies, agricultural growers, and similar interests. The prospect of replacing three members of the court with judges appointed by the current governor—virtually assured of reelection—must have been an appealing one.

The rest of the story is familiar. Chief Justice Bird was behind in the polls from the very beginning, and stayed behind to the bitter end. Justice Reynoso and I were ahead among those who claimed to have an opinion, but the truth is that very few voters knew either of us from Colonel Sanders. Once the opposition was satisfied that they had beaten the chief justice, they turned their attention—and their resources—upon the two of us. We were identified in all their literature and media advertising as members of an evil triumvirate—though our voting records were, in fact, quite disparate—and in a brilliant endgame their television spots encouraged the voters to vote "three times for the death penalty; vote no on Bird, Reynoso, Grodin."

That is, of course, what the voters did, in varying but nevertheless substantial numbers. There is no doubt whatsoever what the voters thought the issue was; exit polls showed that of the voters who voted against the chief justice, only 11 per cent gave as a reason that she was not qualified, and only 18 per cent that she was too liberal; 66 per cent said that it was because she opposed the death penalty, and clearly that was their view regarding Justice Reynoso and myself as well. The opponents had succeeded in framing the terms of debate.

This much is all public information. I intend, before I close, to tell you something more personal, about what it was like to be involved, as a supreme court justice, in the sort of campaign I have described.

A novel experience

To begin with, it was a novel experience, and one for which nothing in my background had particularly prepared me. I had been a candidate for a local city council years ago—and my practice representing labor unions was hardly reclusive. I had been politically active to a degree—in the McCarthy for President campaign, for example. But I had had no experience with a statewide campaign, and for ten years I had been judging and teaching in relative political isolation. To put together a campaign organization, to hire a political consultant, to raise nearly a million dollars statewide, to spend time away from the court visiting newspaper editorial boards, and giving interviews to television reporters for 60 seconds on the evening news—that is not exactly what I thought I had bargained for. Being attacked publicly as a judge callous to the victims of crime, and receiving letters

calling upon me to resign as an enemy of the people, was likewise not an altogether pleasant experience.

These experiences, uncomfortable as they may be, come with the territory in any political campaign, and I have no right to complain of them. It is on the unique aspects to being a statewide candidate in a *judicial* election that I wish to focus.

I did not fully appreciate, when I was appointed to the court, the handicaps that canons and traditions of legal ethics and decorum impose upon a judge in such an election. Unlike most political candidates, I could make no campaign promises, nor could I state my position on any legal issue pending or likely to be pending before the court, unless I had already done so in an opinion. If I knew of cases in the court's pipeline that would be decided in a way pleasing to a majority of the voters, I could not talk about them. I could say very little about the cases that had already been decided, by way of defending them, for fear of saying things that would be viewed as providing an interpretation of the opinions themselves. I was myself reluctant to appeal for votes on the basis of decisions which the voters might like, for I firmly believed that to be an inappropriate criterion. And I felt constrained not to attack the motives or tactics of the officials and politicians who opposed me, out of a concern that in doing so I would further politicize the court and cause damage to it as an institution. In short, I felt I was in the ring with at least one hand tied behind my back.

Fundraising

One of the worst aspects of the campaign, from both the personal and institutional points of view, was the fundraising. The opposition started early and was raising big money. We had no choice but to do likewise, unless we were to lie down and play dead. I favored formation of an independent campaign committee that would raise and spend money on behalf of all three of us, and for the principle of judicial independence, but for a variety of reasons that did not come to pass until very late. I was advised to, and did, hire professional fundraisers. We had fundraising events, fundraising letters, and worst of all, fundraising phone calls. At first I resisted personally asking anyone for money, but our canons of ethics in California expressly permit a judge who is opposed in an election to do that, and I was finally persuaded that I had to do it if I were to raise the amounts needed for an effective campaign.

Money came from a variety of sources, but principally, I would have to say, from lawyers and groups that had some interest, not to say stake, in the judicial process. And, under California law, there was no way I could insulate myself from knowing who had contributed; I had to sign periodic reports to a state agency listing each contribution and its source. All of this was not only personally distasteful but unseemly as well, and, unavoidable as it was, almost certainly, in the long run, erosive of public confidence.

My campaign was successful in its fundraising efforts—we raised more than $900,000. Altogether my committee, the chief justice, Justice Reynoso, and an independent committee formed late in the campaign raised nearly $4½ million. The opposition raised approximately $7 million, and that does not include the amounts spent by political candidates who found it to their advantage to include an anti-Rose Bird message in their advertising. I can't help thinking how many homeless people could have been housed and fed with all that cash.

Impact on decisionmaking

Even worse than the fundraising, however, was the atmosphere generated by the nature and focus of the opponents' attack. During the campaign I declared that it was my goal to go to bed election night knowing, as best one can know such things, that I did not decide any case differently because of the election. To the best of my knowledge I achieved that goal. But I have to recognize that I may be wrong. Justice Otto Kaus, after he left the bench, acknowledged the possibility that a key vote of his, during the 1982 campaign when he was on the ballot, may have been affected by the pendency of that election—at a subconscious level—he could not say. There is profound truth, as well as great candor, in that acknowledgement. And whether that campaign in fact influenced his vote, or mine, certainly the public perception must be that such is the case. Indeed, in an election in which the public was told, time and again, that judges are politicians like anyone else on the ballot, it would be surprising if the public did not believe that. The point was brought home to me toward the end of the campaign when the court filed an opinion, which I wrote, essentially affirming a death penalty judgment. Justice Reynoso joined in the opinion, and the spokesperson for the crime victims group held a press conference to announce that we had done so only in order to attact voter support.

The voters were told from the beginning of the campaign that they should feel free to vote against us if they did not like our opinions, which is to say the bottom lines of the opinions—"reversed" or "affirmed"—on the basis of the same criteria they would bring to bear in voting for or against candidates for legislative or executive office. They were told this not just by the opposition, but by many politicians and by editorial writers as well. And early polling showed that was their disposition; while voters were nominally supportive of an independent judiciary, a poll by Pat Caddell in the spring of 1985 showed that voters believed by a margin of 68 per cent to 24 per cent that they should vote against retention of judges with whose decisions they disagreed.

During the campaign I referred to this point of view as the "chocolate ice cream theory" of jurisprudence: some judges like chocolate, others vanilla, and that is all there is to the adjudicatory process: *de qustibus non disputandum est.* It is a convenient perspective, because it avoids the necessity for reading opinions as a basis for evaluating the court's conclusions. It is also a perspective capable of infinite flexibility; in skillful hands it can be used to explain why a judge might reach a result which is thought to be contrary to his personal taste without having to concede the possibility that he acted on a principled basis: he did it for political reasons, of course.

There are few people today, lawyers or nonlawyers, who are prepared to accept the dogma that judges do nothing but apply fixed legal rules to particular cases through the use of logic and reason. It is no longer a secret—if, indeed, it ever was—that the adjudicatory process is a dynamic one that often calls upon judges to make difficult choices among competing rules or principles, and that these choices typically entail value judgments

of some sort. We know, too, that judges are human beings who inevitably bring to the judging process something of their backgrounds and outlooks. The legal realists taught us all of that. But there is considerable distance between that quite sensible proposition and the reductionist view represented by the chocolate ice cream theory. Where the balance lies between the subjective and the objective is bound to vary from case to case, and no doubt from judge to judge, but that an element of principled constraint is, and should be, part of the adjudicatory process can hardly be doubted. Any judge who has ever given effect to a statute he would not have voted for as a legislator can testify to that.

Courts have no power, only authority. That authority is seriously undermined when the public is invited to believe that what judges do is based solely upon their personal predelictions. Worse yet, when the public is invited to *act* on that belief, and to vote for or against judges according to whether the results in particular cases or categories of cases are agreeable, the rule of law is in trouble.

The problem is particularly acute, of course, in the arena of constitutional rights. The very core of the judicial function—the protection of the rights of individuals, minorities, and groups lacking in political power—is critically threatened in an election in which the unpopularity of case results is made the cornerstone of the campaign.

The election was traumatic for me personally, but I survive. I am doing what I enjoy doing—teaching, writing, and speaking—with far less pressure and with much greater opportunity to be with my wife and family, and I am wholly optimistic about my own future. What I am not so optimistic about is the future of the judiciary in California, and in other states in which courts and the public may be exposed to similar experiences.

The consensus supporting the principle of judicial review in this country is, and from the time of *Marbury v. Madison* has been, a fragile one. So, for that matter, has been the consensus that supports the interpretation of statutes and common law according to principle rather than the roar of the crowd.

Polluted atmosphere

The manner in which the opponents of the court waged their campaign in California has polluted the intellectual and political atmosphere in which that fragile consensus exists. What the fallout from that pollution will be—how intense, how prolonged, how broad in scope—whether it will be confined to California or extend throughout the country—like the radioactive explosion at Chernobyl—only time will tell. The phenomenon is a continuing one.

But that the poison is in the atmosphere, and that it must, inevitably, erode to some extent the authority and independence of the courts, even if it does not affect the way judges decide cases—of that, I think, there can be no serious doubt. Whether our basic constitutional guarantees, and our fundamental legal rights, can continue to flourish in such an atmosphere is, I take it, part of the question of the day.

We have all learned, as a general proposition, that questions are easier than answers, and this question is no different. I certainly claim no superior wisdom on that score. But it is clear to me that for those of us who are concerned with the health of the system in the long haul, the answers at least include educating, or reeducating, ourselves, and the public generally, regarding the role of courts—including particularly state courts as well as federal courts—in our society. During the campaign I spoke to many people and many groups—and I was struck with the lack of understanding on these subjects.

We need to set in proper balance the extreme and equally distorting conceptions of the judicial process, on the one hand that a judge does nothing but apply fixed legal rules to determined facts, and on the other that in deciding cases, a judge does nothing but express his personal predelictions. We need to demonstrate, to reconfirm, the value to society as a whole in having a branch of government not subject to lobbying or political pressure—the value to society of insisting upon judicial integrity, upon the right and duty of judges to decide cases on principled grounds, even when the decision meets with boos rather than cheers.

I believe we need to rethink the whole issue of "accountability" of judges at the state court level. Public debate over the relationship between the judicial branch and democratic principles has focused almost exclusively upon the United States Supreme Court and its function of federal constitutional review. That focus tends to distort the issue of accountability, and particularly at the state level. Constitutional adjudication forms a relatively smaller part of a state appellate court's caseload. A state court's decisions under the *federal* constitution or statutes is, of course, subject to review by the Court in Washington. Its decisions under the *state* constitution are subject to modification through constitutional amendment more readily—typically by initiative or referendum—than is the case with the federal constitution. Everything else that a state court does, whether through statutory interpretation or the common law, is subject to revision by the people acting through their elected representatives or, in states like California, through the initiative process.

If we are to re-evaluate the desirability of elections for appellate judges, and I think we should, we need to take these—and perhaps other—forms of accountability into consideration. We should also consider, as my remarks have implied, the social and institutional costs that a judicial election may impose, and decide whether, on balance, such elections are desirable. Finally, if we were to conclude that they are, or that as a practical political matter they are with us for the foreseeable future, then at least we need to evaluate, in light of these considerations, whether change is needed in the ground rules and whether there is room for consensus as to the criteria to be applied in such elections.

I would emphasize that this is not, and should not be, a partisan agenda; rather, it is and should be based on an appeal to those deeper principles of political philosophy and fairness which inform our national heritage. Nor is it an agenda limited to the legal profession. I suggest that if wars are too important to be left to generals, the cause of judicial independence is certainly too significant to be left to judges and lawyers. □

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This article is adapted from a paper delivered at a conference on "New Challenges in the Judicial Selection Process" sponsored by the Judicial Selection Project in Washington, D.C. on February 12, 1987.