
COMMENTARY

COMMENT ON PROFESSORS KARLAN'S AND ABRAMS' STRUCTURAL THREATS TO JUDICIAL INDEPENDENCE

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I. THE JUDICIAL ROLE AND JUDICIAL CRAFT

Consideration of structural threats to judicial independence necessarily must proceed from an examination of the foundation of that independence. This consideration is brightly illuminated by the current debate between Ninth Circuit Court of Appeals Judges Stephen Reinhardt and Andrew J. Kleinfeld. Judge Kleinfeld argues that the independence afforded Article III judges imposes an obligation of judicial restraint through application of judicial craft—the painstaking analysis and use of statutes and precedent.¹ Judge Reinhardt is quoted as declaring that the circuit's judges should not change their view of the law “in order to please the Supreme Court,”² thus extrapolating from the life tenure of Article III a freedom of federal judges to subordinate craft in order to reach results that judges view as right and good.

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1. See Andrew J. Kleinfeld, *Politicalization: From the Law Schools to the Courts*, 7 ACAD. QUESTIONS, Winter 1993-94, at 9.

2. Bob Egelko, *Maverick Court?*, DAILY BREEZE (Torrance), Aug. 17, 1997, at B1.

There is little I can add to this chicken and egg debate as it pertains to Article III judges. My focus is on appellate judges in state constitutional regimes, particularly that of California, which mandate judicial accountability by retention elections.³ It was California where, in a widely publicized 1986 retention election, three supreme court justices were removed. Like the medfly, the 1986 results seem to have spread to other states.

In these regimes, the threshold question is whether judges should be free of accountability to the voters for the results they reach when other elected officials are accountable at the polls for their actions. It is true that other elected state officials are influenced in their decisions by pressure groups and campaign contributors. But these same campaign-contributing pressure groups seek to influence judicial decisions by supporting the election of governors who may appoint judges committed to, or at least leaning toward, their viewpoints.

In this context, Judge Kleinfeld's view is the better position in the debate. Leaving aside mechanical and frequently avoided state court distinctions of the judicial role, such as concepts of standing and justiciability, lack of agenda control, mandate to adjudicate, and justification by opinion,⁴ judges differ from other elected officials primarily because of the limitation of judicial craft upon the actions they may take while in office (or on the bench). As Judge Kleinfeld puts it:

Politicalization slips through doors opened by poor craftsmanship, which leads to such failings as not recognizing significant procedural or factual distinctions between cases, or that some factual distinctions should make no difference to the outcome, or missing the parallels between usage of a word in one subsection of a statute and another.⁵

Judge Kleinfeld's statement echoes the legendary Roger Traynor, Chief Justice of California when I first became a judge, whose lessons taught me the job. Traynor stated that "whatever the far-reaching consequences a decision may have, the judge must still arrive at it within the narrowest constraints. He must work within the boundaries of the case before him and with the traditional circumspection imposed upon him by

3. Being restrained by the limits on commentary at this symposium, I do not discuss the different considerations involved in the independence of state trial court judges.

4. For discussion of the weak manner by which these concepts can distinguish the judicial role, see Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2043-52 (1988) [hereinafter Thompson, *Judicial Retention Elections*].

5. Kleinfeld, *supra* note 1, at 11.

precedent.”⁶ Roger Traynor’s is not a rigid, unseasoned restraint. As he put it:

Most people . . . agree that law does evolve with the times, and must. Nevertheless the judge has a responsibility to make clear and orderly transitions from the past to the present. An appellate judge who has the last word in the law must account painstakingly for his decision in an opinion that becomes a public record for all to read and criticize.⁷

Mary Ann Glendon, Learned Hand Professor of Law at Harvard, also supports this view. She writes:

[T]he quality most required of an appellate judge is often a craftsman’s art and painstaking care. . . . The unique political role of the nation’s highest court may require its members at times to show the sorts of excellence that are traditionally associated with executives or legislators—energy, leadership, boldness. But, day in and day out, those qualities are no substitute for the ordinary heroism of sticking to one’s last, of demonstrating impartiality, interpretive skill, and responsibility toward authoritative sources in the regular administration of justice.⁸

True, participants in a human endeavor are inevitably influenced by their backgrounds, and judges are human. In addition, precedent may be vague or confusing. But judicial craft demands that judges do their best in inductive reasoning from statutes and precedent. The vast bulk of state court litigation involves resolution of private disputes. In the words of Judge Kleinfeld, “[a] fundamental requirement of justice in legal decisions is that like cases be treated alike.”⁹ This is no minor consideration. Flesh-and-blood people plan their affairs, avoid disputes, avoid litigation when disputes arise, and settle before trial relying on statutes and precedent. Inconsistency of decisions breeds the waste inherent in litigation and encourages appeals of trial court judgments.¹⁰ This in turn overloads appellate courts, thus inhibiting application of judicial craft. Carelessness, vagueness, overly broad language, or inconsistent language in different appellate court opinions, makes the already tough job of trial judges even harder. Thus, employment of the craft is no easy matter. In Traynor’s words:

6. Roger J. Traynor, *Who Can Best Judge the Judges?*, in *SELECTED READINGS, JUDICIAL SELECTION AND TENURE* 64, 72 (Glenn R. Winters ed., rev. ed. 1973).

7. *Id.*

8. Mary Ann Glendon, *Partial Justice*, *COMMENTARY*, Aug. 1, 1994, at 22, 25-26.

9. Kleinfeld, *supra* note 1, at 11.

10. See Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 *U. PITT. L. REV.* 673, 690 (1990) (“Lawsuits are fought if both sides think they have a shot at winning. The more stable and certain the law, the less the chance that both sides will think they can win. Uncertainty thus feeds on itself. The more cases the more uncertainty; the more uncertainty, the more cases.”).

In sixteen years I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge . . . often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day.¹¹

II. STRUCTURAL THREATS TO JUDICIAL INDEPENDENCE

With exercise of judicial craft as the touchstone of freedom of accountability for judicial results,¹² there are two lurking, though not immediate, structural impediments to judicial independence. The first consists of law schools; the second is the influence of the nonjudge staff in appellate courts.¹³

A. THE LAW SCHOOLS

Development of judicial craft requires first a devotion to its significance, and then practice and more practice. In the antediluvian period immediately preceding World War II, when I attended law school, the importance of lawyer and judicial craft was virtually the single focus of law schools—with Yale being the notable exception. For three years, law students engaged in what has come to be known as “pattern recognition”—a process in law often simple, sometimes difficult, and occasionally as demanding as the most rigorous of intellectual exercises.¹⁴ They crunched cases to segregate the wheat from the chaff of trial-court-determined facts. They compared cases to determine their similarities and differences, determined coherence and dissonance, and considered whether evolution was required by objective criteria over and above disagreement with the result of precedent.

But at some point, beginning in the 1950s, “professional school” became a pejorative. Leading law schools and wannabes saw themselves as graduate components of research universities. The LL.B. became the J.D.

11. Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

12. See John Q. Barrett, *Introduction: The Voices and Groups That Will Preserve (What We Can Preserve of) Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 1, 4 (1996) (“Among the many threats to judicial independence, the most serious may be the judges who fail to judge, or explain their judging, well.”).

13. Judge Kleinfeld notes these same influences as detracting from federal court decisions. See Kleinfeld, *supra* note 1, at 12-16.

14. For a discussion of pattern recognition as it applies to appellate decisions, see Robert S. Thompson & John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1, 32-33.

Emphasis was placed upon other disciplines as related to law. The focus was not on what "law" was, but what "law" ought to be. Devotion to judicial craft and constant practice in its lawyerly equivalent were the casualties.

Emphasis on realism and interdisciplinary scholarship increasingly dominated law school research and teaching. Law students became accustomed to seeking what was right and just, while competing schools of jurisprudence defined these terms differently. The importance of legislation as the primary source of policy enunciation was neglected. Use of precedent was subordinated from its former primacy. Law students were left to develop craft after they entered the real world. Students could not escape the vital influence of their law school experience, and later experiences with law firms advocating the interests of clients by manipulating statutes and precedent tended to marginalize the craft.

While some academics share Professor Glendon's view of the role of the judge, it is my impression that most are not interested in the judicial role, while those who are interested tend to ascribe to what Glendon calls "Romantic judging."¹⁵ It is Judge Reinhardt who is invited to give the prestigious James Madison Lecture at New York University Law School and who receives journalists' coverage for his excoriation of the Supreme Court during its course.¹⁶ Along the way, state courts have become the equivalent of judicial chicken fat in the academy, despite the fact that this is where the vast bulk of litigation is decided.

The romantic, philosopher queen/king school of judging is attractive to law students whose life experience has focused on personal views of right and wrong. It does not help that case crunching can be both excruciatingly hard and tedious. These are the students, however, that have become today's state court judges. Thus, judicial craft, if it is to be developed at all, must be developed on the bench. But development of the craft on the bench is still a tough, painstaking, long, and tedious process. It is much easier, frequently more interesting, and certainly more ego satisfying, to succumb to the role of philosopher queen or king by deciding cases through individual notions of what is right and good.

Hence a paradox: Law schools which, as at this symposium, extol the value of judicial independence, are undermining its fundamental rationale.

15. Glendon, *supra* note 8, at 25.

16. See Henry Weinstein, *Judge Says High Court Unfairly Limits Appeals*, L.A. TIMES, Oct. 21, 1998, at A3.

B. THE IMPACT OF APPELLATE COURT STAFF

In an earlier day, appellate judges' dedication to craft and their competency to apply it was demonstrated in their opinions.¹⁷ There was a time when, as Justice Louis Brandeis put it, the decisions of judges were respected because they did their own work.¹⁸ But coping with explosive caseloads over the past years has rendered accountability to opinions personally crafted by judges a chimera in California, and elsewhere as well.

Now judges are supported by staffs that only lawyers used to have—three short term “elbow” law clerks in the Ninth Circuit, five career research attorneys in the California Supreme Court, and two career attorneys in the California Courts of Appeal. In addition, there are a substantial number of staff lawyers serving these courts in general, as well as law students working for the courts as part of their curriculum. This emergence of expanded staffs has profoundly changed the relationship of staff to judge.

At one time, judicial law clerks were seen as sources of ideas, intellectual critics, researchers, and editors of judge-crafted opinions. They were not independent decisionmakers or filters of information flowing to the judge.¹⁹ Volume takes its toll; as it requires efficiency as well as quality, it tends to subordinate the latter to the former. By 1984, the principal activity of law clerks to forty-nine percent of judges of state courts of last resort was initial drafting of opinions.²⁰ In state intermediate appellate courts, the percentage was fifty-six.²¹ If anything, the use of law clerks to produce the first draft of opinions has increased in the years since.²²

This change in the law clerk's role is a significant impediment to the exercise of judicial craft. Information flowing to the judge is filtered through the law clerk's perception.²³ In California, and states which have followed its lead, by substituting career research attorneys for traditional

17. One commentator expressed this earlier commitment to judicial craft as follows:

Why an Opinion at all? Above all else to expose the court's decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent.

See George Rose Smith, *A Primer of Opinion Writing for Four New Judges*, 21 *ARK. L. REV.* 197, 200-01 (1967).

18. See Charles E. Wyzanski, Jr., *The Law of Change*, 1968 *N.M. Q.* 5, 18-19.

19. See JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 12-13, 15 (1980).

20. See Thompson & Oakley, *supra* note 14, at 21.

21. See *id.*

22. See Kleinfeld, *supra* note 1, at 12-13.

23. See Thompson & Oakley, *supra* note 14, at 34-35, 39 (discussing perceptual filters).

short-term law clerks, the impact of filtering is greater because of judicial confidence in the staff attorney enhanced over time. Thus, it is the clerk and not the judge who engages in Traynor's wrestle with the devil.²⁴ Where, as for example in the California Supreme Court, the judge is served by five staff attorneys, time spent supervising subordinates and editing their work is not available for the wrestling match.

It is here that the restraint inherent in judicial craft is the loser to romantic, philosopher queen/king judging. The late Bernard E. Witkin, a nationally acclaimed authority on appellate process and unquestionably the most influential person on the process in California advocated with great success the following prescription of the judge-staff attorney relationship:

[The] courts need not seek excuses for delegating part of the opinion-writing function to talented experts, with superior legal training and experience in writing. It is the task of stating the reasons for the decision, not the authority to decide, that is delegated. No matter how elaborate or polished the draft opinion may be, the justice must make the final version his own opinion, because he is responsible for what it says.²⁵

[The task of analyzing the record and briefs and constructing an opinion] calls for expert skill and experience in dealing with legal materials; not every judge is expert in the operation, and not every expert is a judge.²⁶

Witkin thus separates the ultimate outcome, which is the obligation of the judge, from the process of reasoning, which is the responsibility of the staff attorney. The door is therefore open for the appellate judge to determine a result based on personal notions of fairness and right, and then to leave to the staff attorney the task of constructing reasons to support that result.

The literature of human group problem-solving and my own personal observation support the frequency of this occurrence. The literature teaches that people tend to perceive what they expect and want to see in what is called "the task environment."²⁷ The task environment of intermediate appellate courts is a mix of routine easy cases—mostly criminal ap-

24. See Kleinfeld, *supra* note 1, at 13 ("Those who write know the importance of a first draft. One can spot errors of analysis much more easily as one writes than one can reading someone else's polished work When judges become editors, their craftsmanship becomes less important . . . because their role in writing it is smaller.")

25. B. E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* § 10, at 16 (1977).

26. Edward M. Wright, *Witkin on Appellate Court Attorneys*, 54 CAL. ST. B.J. 106, 108 (1979) (adapted from a speech delivered by Witkin at the annual meeting of the Judicial Attorneys of Calif. on Sept. 11, 1978).

27. For further discussion of the literature as it relates to the appellate court task environment, see Thompson & Oakley, *supra* note 14, at 33-36.

peals where the appealing defendant has nothing to lose (because the costs of appeal are borne by the state) and everything to gain (because lightning may strike), plus civil appeals hoping for an idiosyncratic result where the marginal cost of appeal is slight in relation to the expense of trial—together with a smaller number of problematic cases.

In state supreme courts of discretionary jurisdiction, the mix is more complex if the state employs an intermediate appellate court. Civil cases can involve novel issues of wide public importance plus cases in which different panels of the intermediate court have disagreed. Routine criminal appeals are rare, save for easily disposed, chancy petitions for review. Death penalty appeals and habeas petitions, generally involving mammoth trial court records, represent a major call upon the resources of these courts, and tend to be particularly complex and time-consuming.

Bloated caseloads of intermediate appellate courts dictate that routine cases be disposed of quickly with a minimum call upon judicial resources. The devil lies in distinguishing the routine from the problematic, and it is here where decisions made by personal judicial perceptions of what is right and fair can, and does, have its greatest impact.

In state supreme courts, the burdens of death penalty cases require substantial reliance on staff, particularly in California where review of death penalty judgments is of right rather than discretionary. These burdens in turn impact the remaining load of the court, encouraging staff reliance and inhibiting judicial application of craft.

Most judges reach the appellate bench from the ranks of trial court judges. As such, they are experienced in fact-finding and other discretionary rulings based on what is right and fair, and then only with the speed dictated by the rigors of a trial. The temptation is great when these judges reach the appellate court to reach a conclusion of what the result should be after reading the appellate briefs. There is a strong indication to staff to subordinate judicial craft and construct an opinion supporting the judge's impression whether right or wrong. Staff following Witkin's prescription may then construct a facially decent, but erroneous opinion.²⁸

I do not suggest that this is true of all state appellate judges or that those who engage in the practice do so in all cases (though the way is open for them to do so). Nor do I quarrel with the many appellate judges for whom the construction of opinions is a joint enterprise with their staff in

28. For a discussion of bureaucratic pressures to conform and avoid dissent, see Thompson & Oakley, *supra* note 14, at 35-36.

which they intimately participate in the reasoning process, leaving to the staff attorney the physical task of reducing the reasoning to writing. What I do argue is that some judges follow Witkin's prescription in all or most cases,²⁹ that some judges in effect abdicate their function to staff attorneys,³⁰ and that other judges engage in this practice on more than an insignificant number of occasions.

This structural impediment to a judicial independence founded in the judicial craft raises another question. Should judges be free of accountability at the polls for their proficiency in selecting and managing staff? If Witkin is correct, it is the result, and not the restraint of craft that is important. If the craft is supplied by staff, it makes no difference who the judge is, beyond assuring that the work is completed on time and is decently performed. Either way, the case for freedom from accountability by retention election is weakened.

III. SOLUTIONS, IF ANY

I see no possibility that any leading law school will modify its practices short of the extremely remote chance that some angel will offer a multimillion dollar grant to finance scholarship and teaching in lawyer and judge professionalism. On the other hand, if state appellate judges are truly dedicated to craft, there is some chance that the problems incident to use of staff may be solved by concentrating on what John Frank of *Miranda* fame calls decision points.³¹

29. At an unprecedented open hearing by the California Commission on Judicial Performance on the inner workings of the state's supreme court under Chief Justice Rose Elizabeth Bird, one of her staff attorneys testified that the Chief Justice occasionally told a member of her staff what she thought the result of a case should be and instructed him to find material which could be used in a properly drafted opinion. See *Hearing in the Matter of Commission Proceedings Concerning the Seven Justices of the Supreme Court of California Before the Comm'n on Judicial Performance*, 1704-05 (1979) (testimony of John Schultz, former supervising research attorney for Chief Justice Rose Bird). Another staff member testified that the Chief Justice once asked him to prepare an opinion supporting a result, and then used it, although the staff attorney told her, "[h]e did not think it worked." *Id.* at 1755.

30. I confess that this statement is anecdotal in the sense that it is based on personal observations. A few California appellate judges have taken residence in areas of the state remote from their courts, and at least one lives in another state. They generally appear at the court only on calendar days. On far too many occasions, while on a panel in which another judge was assigned to write the opinion, I have, when attempting to discuss portions or all of the judge's pre-filing efforts, been made acutely aware that the judge had not a clue as to the reasoning of the opinion. One item does support my personal observations. In proceedings which led to the enforced disability retirement of California Supreme Court Justice Marshall McComb, it was revealed that opinions of the court had appeared under his name as author during the period when he was totally disabled by senile dementia. See *McComb v. Commission on Judicial Performance*, 564 P.2d 1 (Cal. 1977).

31. See JOHN P. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 65 (1969).

Over eighteen years ago, John B. Oakley of the University of California-Davis Law School and I proposed that staff be utilized together, with the revelation of its product to counsel for comment prior to judicial preparation of opinions. This would reduce judicial decision points to a level at which otherwise overloaded judges could exercise their craft.³² An official task force, including Oakley, that was charged with recommendations to improve the internal operation of the California Court of Appeal, recently proposed a small pilot program to test a portion of this proposal. Thus, one tiny and belated initial step has been taken to reduce the threat to California judicial independence inherent in the present use of appellate staff.

The retention election of 1986, in which California Chief Justice Rose Elizabeth Bird and two of her colleagues were removed, now seems an anomaly in California, because an aura of partisanship on the part of the California high court generated a vigorous, well-financed campaign against the justices. Chief Justice Bird was particularly vulnerable. The California Chief Justice has considerable administrative responsibilities, and, in contrast to her predecessors, Chief Justice Bird had exercised them with a starkly partisan bent favoring Democrats.³³ The court, consisting of six Democrats and one Republican, had issued two opinions supporting a Democrat gerrymander of the state's assembly and senate districts against a referendum and initiative, despite precedent and reason to the contrary.³⁴

32. See Thompson & Oakley, *supra* note 14, at 68-78.

33. See Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 809, *passim* (1986) [hereinafter Thompson, *Judicial Independence*]. See also Thompson, *Judicial Retention Elections*, *supra* note 4, at 2024 (noting how Chief Justice Bird appointed a disproportionate number of judges, who had been elevated by Democratic governors, to select positions).

34. See Thompson, *Judicial Independence*, *supra* note 33, at 842-44; Thompson, *Judicial Retention Elections*, *supra* note 4, at 2028-32. *Assembly v. Deukmejian*, 639 P.2d 939 (Cal. 1982), held that, despite qualification of a referendum which suspended operation of the gerrymander until the vote on it, the legislative districts created by the gerrymander would remain in place pending the election. This opinion was made despite an earlier California Supreme Court decision in *Legislature v. Reinecke*, 492 P.2d 385 (Cal. 1964), which held that pre-gerrymander districts should remain in place pending supreme court redistricting after a veto by the governor of a legislative reapportionment. Otto M. Kaus, one of the Democrats on the court when the *Deukmejian* opinion came down and a devotee to craft, was not charitable toward the court's treatment of precedent. In dissent in *Deukmejian*, he wrote, "I pity the 1992 Supreme Court which will have to break the tie between *Reinecke I* and *Assembly v. Deukmejian*." *Deukmejian*, 639 P.2d at 973 n.1. The four judge majority in *Deukmejian* consisted of the Chief Justice and Justice Reynoso, both removed in the 1986 election, plus one other Democrat and a retired judge of the court of appeal designated by Chief Justice Bird to fill a vacancy.

In a *per curiam* opinion in *Legislature v. Deukmejian*, 669 P.2d 17 (Cal. 1982), the court upheld the reenactment of the gerrymander with minor changes by a statute including an "urgency" clause which precluded another referendum. It gave short shrift to an argument that urgency clauses are defined by the CAL. CONST. art IV, § 8(D) as, "those necessary for immediate preservation of the public peace, health, or safety." *Deukmejian*, 669 P.2d at 22 n.9.

Willie Brown, speaker of the California Assembly and a premier Democrat political force in the state, added to the fire by declaring, “[w]e owe it all to Rosie and the Supremes.”³⁵

Republicans were energized to conduct a vigorous campaign against Chief Justice Bird and Justices Joseph Grodin and Cruz Reynoso, her Democrat colleagues who were also the subjects of an upcoming retention election. Chief Justice Bird supplied them with ammunition. The press reported that her speeches during a trip to Australia were perceived as “totally question[ing] the premise on which American society is built.”³⁶ The court’s reluctance to affirm death penalty judgments, and Chief Justice Bird’s vote to reverse all sixty-one of the death penalty judgments that had come before the court, supplied an additional hot button issue.

At a meeting of local bar leaders, convened by the Los Angeles and San Francisco Bar Associations to discuss the role of the organized bar in the campaign, supporters of the Chief Justice called a suggestion that the three challenged justices should be evaluated individually, which was a disguised attack upon the Chief Justice.³⁷ Belated, weak efforts by Justices Grodin and Reynoso to mount separate campaigns without criticizing Chief Justice Bird were therefore doomed to failure. In the end, Justices Grodin and Reynoso were swept aside with the tide against Chief Justice Bird.

This is not a scenario likely to be duplicated. The problem lies in the notion, repeatedly emphasized nationwide in the press, that the 1986 California retention turned on the death penalty, while later supporters of judges have refrained from criticizing Chief Justice Bird and the partisan slant of the California court which energized the previous campaign against the judges.³⁸ One hopes that future supporters of judges will not make that mistake.

The results of the 1998 California retention election are significant. Despite a hot button issue of the California Supreme Court’s finding that a state statute requiring parental consent to abortion violated the state’s constitution, only a token campaign against the judges developed. The supreme court justices on the ballot were retained by overwhelming margins,

35. Thompson, *Judicial Retention Elections*, *supra* note 4, at 2032.

36. Frank Clifford, *Lone Justice*, L.A. TIMES MAG., Oct. 5, 1986, at 12 (quoting an unnamed Australian journalist).

37. See Audio tape of Meeting of Local Bar Leaders (April 27, 1985) (on file with author).

38. See Philip Carrizosa, *State Justices Retained as Opposition Campaign Fails*, L.A. DAILY J., Nov. 5, 1998, at 9.

and the forty court of appeal justices on the ballot were retained by margins of over seventy percent.³⁹

The conduct of California Supreme Court and Court of Appeals judges prior to the election is instructive. They engaged in unprecedented vigorous discussion with influential members of the public, and on cable television, concerning the appropriate role of appellate courts.⁴⁰ In the end, not only were they retained, but also prior voter “drop-off” in judicial retention elections was greatly reduced, thus counteracting an automatic “no” vote that was characteristic of prior retention elections.⁴¹ Slate mailers financed by some of the judges resulted in gains of only three percent over judges who did not use them.⁴²

Challenged judges in other states can learn lessons here. However, the threat of removal at retention election for lack of craft and undue staff reliance lurks to be raised at some point when, for some reason, a vigorous attack on supreme court or appellate court judges is mounted.

39. See Jean Guccione & Anna Marie Stolley, *All 40 Appellate Jurists Easily Win Retention*, L.A. DAILY J., Nov. 5, 1998, at 9.

40. See *id.*

41. See *id.*

42. See *id.*