

Judging Judges: The Investigation of Rose Bird and the California Supreme Court. By Preble Stolz. Foreword by Anthony Lewis. New York: The Free Press, 1981. Pp. xxv, 453. \$19.95.

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On November 7, 1978, Chief Justice Rose Elizabeth Bird, the first woman ever to serve on the California Supreme Court, was narrowly confirmed by the voters as chief justice.¹ Earlier in the day, the *Los Angeles Times* had published a story claiming that the supreme court had decided to overturn a popular law requiring prison terms for persons who use a gun in committing certain crimes. It reported the vote to overturn the law was four to three with Chief Justice Bird among the four votes in the majority. The most newsworthy part of the article suggested that the decision had not been publicly announced because of its possible effect on the confirmation election.² When the court's decision was eventually announced on December 22, Chief Justice Bird had concurred in the result, which did not strike down the "use a gun, go to prison law," but which preserved the trial judge's power to grant probation to convicted defendants in certain cases.³ By this time, a

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¹ The official vote total statewide was: 3,152,071 "yes" (51.7%); 2,941,627 "no" (48.3%). CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE, *General Election November 7, 1978*, at 29 (1978). In the same election, Associate Justices Wiley W. Manuel and Frank C. Newman, appointed by Governor Edmund G. Brown, Jr., and Associate Justice Frank K. Richardson, appointed by former Governor Ronald Reagan, were easily confirmed for their positions. Chief Justice Bird was confirmed for a term that extends until 1986 when she will again face voter confirmation, this time for a 12 year term. See CAL. CONST. art. 6, § 16(a).

² Endicott & Fairbanks, *Supreme Court Decision to Reverse Gun Law Reported*, L.A. Times, Nov. 7, 1978, Pt. I, at 1, col. 3 (Morning Final).

³ *People v. Tanner*, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978) (officially unpublished). The chief opinion by Justice Tobriner held that CAL. PENAL CODE § 1203.06 (West 1982), which stated in part, "[n]otwithstanding the provisions of Section 1203: (a) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for . . . [a]ny person who used a firearm during the commission or attempted commission of any of the following crimes . . .", was not intended to prevent the trial judge from using § 1385 of the Penal Code to strike a charge that a defendant had used a gun and put the defendant on probation. 587 P.2d at 1114, 151 Cal. Rptr. at 301. Harold Tanner had been convicted of robbing a grocery store of \$40 in what he claimed was a mock robbery. The jury also found that he had used a firearm. The trial

movement had begun that led to an investigation by the California Commission on Judicial Performance into alleged improprieties in the processing of cases by the supreme court. These events and the inconclusive hearings that followed are the subject of Professor Preble Stolz' book, *Judging Judges: The Investigation of Rose Bird and the California Supreme Court*.

In the three years since these events, it is clear that they constitute simply one chapter in an ongoing controversy in California over the state's judicial appointment process. At times this debate has been primarily personal as, for example, in the dispute between Justices Tobriner and Clark over events leading to the prolonged consideration of the *Tanner* "use a gun, go to prison" decision.⁴ The attacks on Chief Justice Rose Bird's handling of the court and administrative responsibilities as head of the California judicial system and her responses have been both personal and political.⁵

At other times the debate has been intensely political. A hallmark of Governor Edmund G. (Jerry) Brown, Jr.'s administration was very visible appointments of women, minorities, and judges of a generally

judge struck the gun use provision over the objection of the district attorney and the state appealed the trial court's order. Justices Mosk and Newman concurred in Justice Tobriner's opinion. Chief Justice Bird filed a concurring and dissenting opinion arguing that the legislature did indeed intend to preclude judges from granting probation when a defendant uses a gun under the provisions of § 1203.06. However, she found this direction an unconstitutional interference with the judicial sentencing function, violating the separation of powers. *Id.* at 1124-29, 151 Cal. Rptr. at 311-16. (Bird, C.J., concurring and dissenting). Justice Clark filed a dissenting opinion joined by Justice Richardson. *Id.* at 1129-35, 151 Cal. Rptr. 316-22. Justice Manuel filed a separate dissent. *Id.* at 1135-36, 15 Cal. Rptr. 322-23.

⁴ P. STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* 141-46 (1981). Much of this acrimony arose over Justice Clark's refusal to sign a memorandum prepared by Justice Tobriner that declared *Tanner* had not been delayed for any improper purpose.

⁵ See, e.g., P. STOLZ, note 4 *supra*, at 102-16. Stolz is critical of Bird throughout this section as a court administrator and his evaluations of her personality in this regard are appropriate. Elsewhere in the book his evaluations are uncomfortably personal. See, e.g., *id.* at 305 ("The affair had all the wisdom and detachment of a lover's quarrel between eighth-graders, and, like an eighth-grader, Bird discussed it with all her friends"), and 334 where Bird is compared to a "petulant opera [star]." Although Stolz hands out criticism all around, his remarks about Bird have highlighted the personal aspects of the book and obscured its valuable contribution to the literature on the operations of the court. Stolz and Bird have in effect carried on a feud since the book was published. See, e.g., their interviews in L.A. Daily J., Dec. 23, 1981, at 4, col. 3 (Bird); *id.*, Dec. 29, 1981, at 1, col. 3 (Stolz).

liberal approach on criminal justice matters.⁶ The appointment of Chief Justice Bird exemplifies this pattern. In turn, these appointees have authored a number of very controversial opinions in a rancorous political climate — opinions on the death penalty,⁷ criminal procedure,⁸ and legislative reapportionment.⁹ The results reached were often at odds with the political outlook and sentiment of the California Republican Party and its vocal and active right wing. Consequently, the courts in general, the Brown appointments in particular, and eventually the ap-

⁶ See, e.g., P. STOLZ, note 4 *supra*, at 94-95; L.A. Daily J., Dec. 28, 1982, at 1, col. 2.

⁷ In 1972, before Rose Bird became Chief Justice, the California Supreme Court found that the death penalty violated the California Constitution. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972). California voters immediately approved an initiative amending the California Constitution to overturn the *Anderson* decision. See CAL. CONST. art. I, § 27. Six years later a wide-ranging voter initiative broadened California's death penalty legislation. See CAL. PENAL CODE §§ 190.1-190.5 (West Supp. 1982) (initiative measure approved Nov. 7, 1978; mentioned in P. STOLZ, note 4 *supra*, at 81-82). The death penalty has continued to bedevil the court. Portions of the 1978 initiative measure were found unconstitutional in *People v. Superior Ct. (Engert)*, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982) (CAL. PENAL CODE § 190.2(a)(14) (West Supp. 1982), providing death penalty for murders "especially heinous, atrocious, and cruel, manifesting exceptional depravity," is unconstitutionally vague under U.S. and California Constitutions) and *People v. Ramos*, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982) (jury instruction that governor could commute or modify a sentence of life imprisonment without possibility of parole violates fifth, eighth, and fourteenth Amendments to United States Constitution). Since legislative reinstatement of the death penalty in California in 1977, only three death sentences have been upheld by the California Supreme Court. L.A. Daily J., Dec. 14, 1982, at 1, col. 6.

⁸ E.g., *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982) (barring all hypnotically aided testimony in California courts); *People v. Bustamante*, 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981) (extending right to counsel to prearraignment and preindictment identification lineups); *People v. Collie*, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981) (limiting prosecution discovery in criminal cases); *Holman v. Superior Ct.*, 29 Cal. 3d 480, 629 P.2d 14, 174 Cal. Rptr. 506 (1981) (defense discovery available before preliminary hearing); *People v. Williams*, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981) (voir dire questioning of jurors may include inquiries designed to determine whether to exercise peremptory challenges).

⁹ In *Assembly of California v. Deukmejian*, 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297 (1982), the supreme court allowed reapportioned state and federal legislative districts drawn by the Democratic-controlled legislature to be used in the 1982 primary and general elections despite the qualification of Republican-sponsored referenda challenging the plans for the primary elections. These referenda were approved in the primary election and the legislation overturned. The Democrats, however, made substantial gains in the general congressional elections under the disapproved plan.

pointment process itself came under political attack from the Republicans.¹⁰ The political aspect was further dramatized during the four years of Governor Brown's second term when the Lieutenant Governor, a Republican, attempted to make and alter judicial appointments when the Governor was out of the state and he became Acting Governor.¹¹ In addition, the Attorney General, who sits on the three-person Commission on Judicial Appointments, was also a Republican and eventually succeeded to the governorship.

Less frequently, the debate has been philosophical. Involved in all this wrangling are enduring questions concerning the legitimacy and limits of judicial power in a representative democracy, the appropriate methods and standards for review and retention of appellate judges, and the role of the executive and legislative branches of state government in the appointment process.¹²

Although some of the highest drama throughout this controversy has occurred over challenges to popularly approved voter initiatives, ultimately the California Supreme Court upheld the two most controversial such measures before it in the recent past: Proposition 13, the property tax limitation measure,¹³ and Proposition 8, the so-called

¹⁰ P. STOLZ, note 4 *supra*, at 8-14, 47-52, chronicles part of the Republican campaign against Chief Justice Bird in the 1978 political campaign.

¹¹ Ultimately this dispute also came to the California Supreme Court. In *In re Commission on the Governorship of California*, 26 Cal. 3d 110, 603 P.2d 1357, 160 Cal. Rptr. 760 (1979) (*Brown v. Curb*, companion case), the supreme court held that the Lieutenant Governor had full powers as Acting Governor when the Governor was physically absent from California. This included the power to make judicial appointments. However, the court also held that, upon his return, the Governor could withdraw appointments made by the Lieutenant Governor as acting Governor before their confirmation by the Judicial Appointments Commission. As a result, Governor Brown's choice as Presiding Justice for the Second Appellate District, Justice Bernard S. Jefferson, was ultimately confirmed to the position. (Justice Jefferson, sitting by designation of Chief Justice Bird, wrote the majority opinion in the controversial *People v. Caudillo* opinion discussed in P. STOLZ, note 4 *supra*, at 16-28, 39-42, 49).

¹² P. STOLZ, note 4 *supra*, at 401-27. This is Stolz' final chapter, "Some Observations about Accountability." It contains the most thought-provoking material in the book from a law academic's perspective.

¹³ *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978). Justice Richardson wrote the majority opinion; Chief Justice Bird dissented on equal protection grounds. See also P. STOLZ, note 4 *supra*, at 28-33. Although Stolz terms her dissent "puzzling" and "not very persuasive," *id.* at 31, it might find more adherents today. Cf. *Zobel v. Williams*, 102 S. Ct. 2309 (1982) (Alaska revenue distribution plan based on lengths of residence unconstitutional) (no majority opinion). In two more recent cases, the California Supreme Court has opened what Justice Richardson characterized as "the hole which

“Victim’s Bill of Rights,” dealing with a host of criminal justice and related matters including limitations on the defense of diminished capacity and the elimination of state restrictions on illegally seized evidence.¹⁴ Thus, in those cases in which the philosophical debate could have been most intense — between the democratic expression of the popular will and judges subject to only limited and infrequent tests of voter approval — it was defused.

On the other hand, the most intense aspect of this debate concerned charges and denials that the controversial decision limiting the popular “use a gun, go to prison” law¹⁵ (a decision later reconsidered and reversed,¹⁶ thereby generating another controversy) was delayed in order to aid the voter confirmation of Chief Justice Bird in the November 1978 general election. These charges eventually led to hearings before the Commission on Judicial Performance. The hearings themselves, the events that led to them, and their effects on the California Supreme Court are the subject of Stolz’ book.

In *Judging Judges*, Stolz attempts to do several things at once — to write a journalistic history of the California Commission on Judicial Performance’s 1979 investigation into the California Supreme Court and the events (both political and judicial) that led up to it; to discuss

they have cut in that protective fence which the people of California thought they had constructed around their collective purse by the adoption of article XIII A” *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 57, 648 P.2d 935, 941, 184 Cal. Rptr. 713, 719 (1982) (Richardson, J., dissenting) (payroll and gross receipts tax proceeds used for general fund expenditures are not “special taxes” requiring two-thirds vote under CAL. CONST. art. XIII A, § 4); *see also* *Los Angeles County Transp. Comm’n v. Richmond*, 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982) (limiting such “special taxes” to special districts that can levy taxes on real property).

¹⁴ Proposition 8 twice made it past the supreme court. In *Brosnahan v. Eu*, 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982), the court, with Chief Justice Bird joining the dissenters, allowed the proposition to remain on the ballot despite several technical attacks. In *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) following passage of Proposition 8, the court upheld the proposition against challenges that it violated the “single subject rule.” Chief Justice Bird again was among the dissenters.

¹⁵ *People v. Tanner*, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978) (officially unpublished). CAL. PENAL CODE § 1203.06 (West 1982) provides “[p]robation shall not be granted to, nor shall the execution or imposition of sentence be suspended for,” persons convicted of the enumerated crimes.

¹⁶ *People v. Tanner*, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979); *see* P. STOLZ, note 4 *supra*, at 184-85, 239-45. Anthony Lewis, in his provocative and unusual *Foreword* to Stolz’ book takes Justice Mosk to task for switching his vote on rehearing without offering any explanation. A. Lewis, *Foreword* to P. STOLZ, note 4 *supra*, at xx.

very briefly the recent history of the California Supreme Court, its rise to prominence among state courts, its recent perceived decline in prestige, and the controversy surrounding it; to review critically the performance of Rose Bird as Chief Justice of the California Supreme Court; to analyze recent changes in the staffing, procedures, and caseload of the California Supreme Court and how that has altered the fundamental character of the court from a collegial body to a grouping of semi-autonomous, self-contained offices producing opinions without significant collaboration; and to consider the implications of the investigation on the persistent issues of judicial accountability and judicial discipline.

As if the range and depth of the issues considered were not enough, Stolz also attempted to write his book on several levels to several audiences. Although he states that he wrote the book "with the nonprofessional reader in mind,"¹⁷ sections of *Judging Judges* contain very close textual considerations of legislative history and analysis of certain of the crucial cases,¹⁸ including a complete discussion of *Tanner* with the facts of *Tanner's* arrest and a dissection of the evolutions of each of the opinions in *Tanner* from conference memorandum to published opinion.¹⁹ Stolz sought to write for the nonprofessional reader, but he was also anxious to avoid the undocumented attribution of motives and reliance upon private, unsubstantiable information that he believed characterized *The Brethren*.²⁰

With these goals in mind, it is difficult to achieve a balance of coverage that satisfies both the professional and lay reader. What apparently is to be the central feature of the book — a recounting of the hearings of the Commission on Judicial Performance²¹ — is one of the least interesting. In attempting to be fair and thorough in reviewing the public testimony of the five Justices of the California Supreme Court who appeared before the Commission, Professor Stolz has apparently recreated the plodding sense of the hearings themselves. As he points out, "[t]he hearings lacked some essential elements of good theater: there was no protagonist, no single tragic flaw, and no conclusion."²²

In contrast to the detail of the section on the hearings themselves,

¹⁷ P. STOLZ, note 4 *supra*, at 5.

¹⁸ *Id.* at 20-27 (*Caudillo*); 200-45 (*Tanner*); 245-61 (*Fox*).

¹⁹ *Id.* at 200-45.

²⁰ See L.A. Daily J., May 26, 1981, at 2, col. 3 (story by Philip Carrizosa quotes Stolz as saying that his will be "a better book" than *The Brethren*).

²¹ P. STOLZ, note 4 *supra*, at 267-360.

²² *Id.* at 267.

relatively short segments of the book raise issues of considerable public importance both in California and throughout the nation. Stolz briefly takes up the major issues of the administration of the California court system;²³ judicial accountability and judicial elections;²⁴ the relationship between the judiciary and the press²⁵ (this section contains a response to comments in the Foreword by Anthony Lewis of the *New York Times*);²⁶ mechanisms for evaluating judicial performance and judicial discipline;²⁷ and problems created by the increasingly bureaucratic staff structure of the California Supreme Court²⁸ — a phenomenon that is visible throughout the American judiciary.²⁹ One might expect these “larger” issues to be interwoven with the essentially historical narrative of the events leading up to the hearings of the Commission on Judicial Performance. Unfortunately, however, there is little real integration of the book’s historical and analytic segments, and the narrative of the Commission’s history does not even serve as true empirical data of the issue of judicial discipline. Stolz makes no real attempt to compare California’s choice for evaluating judicial performances (even in this one instance) to other mechanisms tried or proposed elsewhere. In his thoughtful, but all too brief concluding chapter, “Some Observations about Accountability,” he merely notes that, “[t]he critical point is that legal mechanisms of accountability, like the Commission on Judicial Performance, work best when they need not be resorted to,”³⁰ using as an example the impeachment process as it related to Watergate. Stolz then reviews what he terms the breakdown of traditional, nonformal relationships that tend to keep the court in check and avoid the direct clash experienced in California in 1979.³¹

In the limited perspective of a year and a half since the publication of *Judging Judges*, it is apparent that this book is more a part of the debate outlined earlier than an analytic treatment of it. Stolz’ book en-

²³ Stolz chronicles the “administrations” of Chief Justices Phil S. Gibson (1940-1964), Roger Traynor (1964-1970), and Donald Wright (1970-1977) as well as commenting critically on Rose Bird’s early stewardship of the California courts. *Id.* at 95-111.

²⁴ *Id.* at 5, 58, 425-26.

²⁵ *Id.* at 116-17, 416-20.

²⁶ A. Lewis, *Foreword to P. STOLZ*, note 4 *supra*, at xi-xxii.

²⁷ P. STOLZ, note 4 *supra*, at 4-5, 98, 100-01, 425-26.

²⁸ *Id.* at 108-11, 194-200, 409-13; *see also id.* at 346-60 (supreme court staff testimony before the Commission on Judicial Performance).

²⁹ *See, e.g.*, J. OAKLEY & R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 10-35 (1980).

³⁰ P. STOLZ, note 4 *supra*, at 401.

³¹ *Id.* at 402-07.

ters the fray at all levels. It contains sharp personal criticisms of Chief Justice Bird, and to a lesser extent of Justices Tobriner and Clark.³² And, as such, it became a source of controversy that eventually produced personal attacks on its author.³³ *Judging Judges* is, however, also a law professor's work — one that deals with the larger issues of judicial review and judicial accountability and competency. It is when he deals with these issues that Stolz' book is a valuable contribution to legal scholarship.

Stolz does have an opinion on how courts should act in light of challenges to their authority and legitimacy. And he has an opinion on the way in which the particular controversy in which the California Supreme Court found itself in 1978-79 fits into the larger context of judicial power in a democracy. Both are well thought out moderate and pragmatic positions that derive from his perspective on the role of the judiciary in the American democratic-constitutional system. To Stolz, the continuing problem facing the judiciary is to reconcile its claim to supremacy through judicial review with democratic theory, which favors the legislative and executive branches (at least the elected officials in those branches).³⁴ He does not rely on any special theory of judicial review and constitutional interpretation;³⁵ instead he sees a continuing tension between the power of the courts through judicial review and devices to ensure the dominance of majoritarian views over judicial review.³⁶ Under this view, courts and judges are never wholly free to

³² This treatment, which tends to favor Clark over Tobriner and Bird, is most obvious in Stolz' summaries and commentaries of the Justices' testimony before the Commission on Judicial Performance. *Id.* at 278-92 (Tobriner); *id.* at 292-318 (Bird); *id.* at 318-46 (Clark). For a closer comparison, see *id.* at 236-40, where Stolz is generous with Mosk, who switched sides between the two *Tanner* opinions without explanation, and Clark, who allowed *Tanner* himself to avoid a prison term while insisting that such an interpretation of Cal. Penal Code § 1203.06 by the trial judge was improper. In contrast, Stolz is noticeably less kind to Tobriner and Bird who wrote their opinions for all to see.

³³ See, e.g., Chernoff & Chernoff, Book Review, *DICTIONARY* 7 (Apr. 1982); Carrizosa, *Book Review*, *L.A. Daily J.*, Dec. 8, 1981, at 14, col. 1; *Sacramento Bee*, Nov. 18, 1981, at B10, col. 3 (commentary by P. Schrag). See, Tribe, *Courts Should Not Be Criticized for Ignoring Public Opinion*, *CALIFORNIA LAWYER* 11 (Jan. 1982); Stolz' letter reply, *CALIFORNIA LAWYER* 9 (Mar. 1982).

³⁴ P. STOLZ, note 4 *supra*, at 3-5, 76-82, 413-16, 420-22, 424-27.

³⁵ Many such theories are extant. Recently published works include J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980), and J. ELY, *DEMOCRACY AND DISTRUST* (1980). The Warren Court's activism was challenged by Professor Wechsler. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

³⁶ P. STOLZ, note 4 *supra*, at 424-27.

impose their interpretations of the constitution in the face of contrary popular pressures. They must constantly face highly charged political issues. Mechanisms to force adherence to popular mandates — including the California Commission on Judicial Performance — will always be available to limit judicial freedom, and there is no generally accepted theory to support judicial supremacy over the legislature through judicial review.³⁷ Under these circumstances, Stolz argues, courts need all the friends they can get and, in particular, they must stay in touch with their “audiences.” These he identifies as lawyers (counsel in the particular cases and the bar in general), the law schools, lower court judges, the supreme court’s own staff and the bureaucracy of the judiciary, and the press.³⁸ Each of these audiences has a dual function: they act as critics of the courts and thereby keep the courts closer in contact with “popular” opinion, and they in turn explain, justify, and defend the courts and their prerogatives to the public. If the courts fail to keep in touch with these audiences, Stolz asserts, they face disaster because they do not have any special claim to power or even a well-developed means of communicating with the general public — they do not regularly make public speeches, run for office, or give press conferences. Stolz makes a strong argument that this loss of contact has gradually happened to the California Supreme Court so that when the challenges to its authority came — from H.L. Richardson in 1978 and the Commission hearings in 1979 — it had too few defenders to prevent the harm that resulted.³⁹

Events since the publication of *Judging Judges* substantiate Stolz’ theory. In another divisive confirmation election in November 1982, three recently Brown-appointed justices of the California Supreme Court were narrowly confirmed.⁴⁰ Since that election, at least two recall attempts were threatened against Chief Justice Bird; one actually resulted in a signature-collection effort.⁴¹ A California Supreme Court comprised largely of appellate judges sitting by designation upheld legislation creating eighteen new appellate judgeships and advanced the effective date of the decision. This gave out-going Governor Brown

³⁷ At least this is the position of Stolz’ colleague, Dean Choper. See *Nat’l Law J.*, Jan. 10, 1983, at 15, col. 4.

³⁸ P. STOLZ, note 4 *supra*, at 403-13, 416-20.

³⁹ *Id.* at 402, 427.

⁴⁰ Associate Justices Otto M. Kaus (took office July 21, 1981), Allen E. Broussard (took office July 22, 1981), and Cruz Reynoso (took office Feb. 11, 1982), all appointed by Governor Edmund G. Brown, Jr., were confirmed for their respective terms Nov. 2, 1982.

⁴¹ *L.A. Daily J.*, Jan. 17, 1983, at 2, col. 4.

time to make appointments to the new positions and allowed the Commission on Judicial Appointments barely enough time to hold hearings and act on the appointments before Brown left office and the appointments could be withdrawn by the incoming Governor Deukmejian.⁴² Meanwhile, the incoming Governor, sitting on the Commission in his capacity as Attorney General, voted against several of the appointments, successfully blocking those for which only two Commission members were eligible to vote.⁴³ The new Governor currently is in the process of making those appointments himself. Ironically, he now faces a three-person Commission, two members of which are the Attorney General, a Democrat, and the potentially hostile Chief Justice. Throughout the past year the court has found itself with political hot potatoes in its lap — first the Proposition 8 litigation, and then, state and congressional redistricting plans passed by a Democratic legislature, signed by a Democratic governor, and eventually repudiated in a voter referendum led by the Republicans. The incoming legislature will once again consider plans for revising the appointment and confirmation process for California judges at all levels.

One of the good things to come from a painful episode such as this one is that it makes more concrete a number of tensions that always exist between the judiciary and our other more democratic institutions of government. This is an area of great and continuing controversy not just to lawyers and the legal profession, but to all students of American government and ultimately all citizens of this country. The difficulty of the issue can be seen in that even the premise just stated is subject to dispute. Are our federal and state courts truly “less democratic” than our legislatures or executive departments (which currently include literally hundreds of administrative agencies)? A respectable argument can be made that at times the courts are the only truly responsive arm of government. Legislators, who under this model should be the most responsive to popular or majoritarian influence, may in fact be influenced by interest groups or those who have the most money to offer in a campaign.⁴⁴ The legislatures themselves may be unrepresentative of the

⁴² *Brown v. Superior Ct.*, 32 Cal. 3d 705, 655 P.2d 1260, 188 Cal. Rptr. 425 (1982) (opinion by Newman, J., Reynoso, Acting C.J., with Brown (Gerald), J., [assigned] and White, J., [assigned] concurring; dissenting opinion by Richardson, J., with Caldecott, J., [assigned] and Frauson, J., [assigned] concurring) (effective and final “forthwith”). Minutes of the Supreme Court, Nov. 18, 1982, Official Reporter Advance Sheets, No. 33, at 28-29.

⁴³ Four appointments were blocked. L.A. Times, Dec. 30, 1982, at 1, col. 5.

⁴⁴ Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 248-49 (1981); Wellington, *Common Law Rules and Constitutional Double Standards: Some*

population.⁴⁵ Judges, who have no pretensions to be representative of any particular group or groups of people may thereby be freer to attempt to reflect the policies or views of the whole.

For the federal judiciary, the problem is starker if not simpler. Federal judges and the United States Supreme Court Justices are appointed for life.⁴⁶ Their only direct encounter with electoral politics is in the appointment process. Thereafter they are free to go their own way subject to their own allegiance to the Constitution, Congressional legislation, and, for some, appellate review. The relation of the Justices of the California Supreme Court to electoral politics is more complex. Following appointment by the governor and approval by the Commission on Judicial Appointments, they must stand for confirmation at the next general election. Thereafter they must be reconfirmed by the voters every twelve years. They cannot be opposed; rather, the voters are given the choice of confirming them for the term provided or rejecting them.⁴⁷ A close look at the events leading to the hearings of the Commission on Judicial Performance suggests that the real culprit is not the justices of the California Supreme Court or the press but the institution of judicial elections in California, at least when coupled with the appointment procedure.

Judicial appointments are inexorably bound up in politics. At both the federal and California levels, an elected partisan politician — the President of the United States and the Governor of California, respectively — makes the initial appointment. Appointments of individuals not of the president's or governor's political party or, at least, political persuasion, are not the rule.⁴⁸ At the federal level there is another political check on this system — the Senate — that must act affirmatively on the appointment of the judge or justice. This necessarily acts as a moderating influence. Even when the Senate is controlled by the same party as the President, the nominee must face questioning and investigation by members of the opposition who have some stake in finding

Notes on Adjudication, 83 YALE L.J. 221, 240-41 (1973).

⁴⁵ Chief Justice Earl Warren believed the Supreme Court's decision to intervene in legislative reapportionment and creation of the "one person-one vote" principle in *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964) were the most important decisions of his tenure because they "corrected" the democratic political processes to reflect more fully popular sentiment (at least in a numerical sense). See G. WHITE, EARL WARREN, A PUBLIC LIFE 189-90 (1982). *But see* BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 106-15 (1970).

⁴⁶ U.S. CONST. art. III, § 1.

⁴⁷ CAL. CONST. art. 6, §§ 7, 16(a), 16(d).

⁴⁸ P. STOLZ, note 4 *supra*, at 420-24.

material to discredit the nominee, the President, or both. Moreover, confirmation is taken more seriously at the federal level because that is the only effective means of keeping unqualified or biased nominees off the bench.

Unlike the federal system, California does not have a mechanism to moderate political influences. After the governor's appointment, three people, only one of them an elected official, the attorney general, pass on the prospective nomination.⁴⁹ At the supreme court level, at least one member — the Chief Justice — usually will have to work immediately with the nominee if confirmed; the second member — the senior appellate justice — is part of the same system. The Commission's limited membership and close connection with the judiciary make it unlikely that the appointee will be subjected to the kind of questioning that occurs in the United States Senate. As a result, judicial appointees are an easy mark for state politicians who have played no role in the nomination or selection process.

One short-term solution to the current politicizing of the California courts is to involve the legislature in the confirmation process. Appointments are made for political reasons, and an immediate political review may moderate later political attacks on the appointees when they have assumed their positions as members of the judiciary. However, in the long term there is no "solution" to the problem of judicial accountability.⁵⁰ If we are to retain the judiciary as an independent branch of government, judges will always fit uncomfortably into the ideal of representative democracy. There will be political attacks. There will be irresponsible charges by the equally unaccountable media. But this ongoing tension serves to moderate both sides.

Professor Stolz ends his book by urging the justices to listen to their "audiences" — the bar, the press, the civil service — and to recognize that they do not have a program of their own or a mandate to govern — only a devotion to a fair process.⁵¹ He is calling for restraint. Ultimately that may be a course for the justices, but restraint can be asked from all the players here — politicians and the media as well. It is not

⁴⁹ These are the designated members of the Commission on Judicial Appointments. CAL. CONST. art. 6, § 7.

⁵⁰ *E.g.*, Professor Philip L. Dubois of the Political Science Department of the University of California, Davis, reports that even partisan political election of judges effectively carries out an accountability conferring function. P. DUBOIS, FROM BALLOT TO BENCH 144-77 (1980).

⁵¹ P. STOLZ, note 4 *supra*, at 427. Stolz has in mind particularly the danger that the justices may feel more committed to the political program of the governor who appointed them than to the more enduring ideal of fair process. *Id.* at 421.

apparent that there is less need for judicial activism in response to our current legal-political problems. Respect for the judiciary may also be preserved by courts acting courageously in opposition to the popular or political will of the moment.

