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## POLITICAL APPOINTMENTS AND JUDICIAL INDEPENDENCE — AN UNREASONABLE EXPECTATION†

*By The Honorable Arthur S. Alarcon\**

Prior to ascending into the obscurity and sanctuary provided by a position on the United States Court of Appeals, I was for twelve years a California trial judge and for seventeen months an associate justice of the California Court of Appeal. Looking out of the window of my federal ivory tower, I view with great alarm the political turmoil which now has sadly engulfed some of my former state colleagues.

Unfortunately, this is not a new problem. Those of you who are acquainted with the legal career of Thomas More know that when appointed to the position of Lord High Chancellor of England in 1529, he had been a prominent lawyer, trial judge, and chancellor of the Duchy of Lancaster. He was probably the most exceptionally well qualified person to serve as a judge in the history of our profession. Yet, in 1532, he felt compelled to resign as Lord High Chancellor because, as he put it, he was “not equal to the work.” In fact, he resigned because he could not tolerate the fact that Henry the VIII was manipulating the laws of England to resolve his personal problems.

In 1535, Thomas More was convicted of high treason because of his refusal to give his opinion as to whether Henry the VIII was the Supreme Head of the Church. Thomas More lost his life because of the value he placed on freedom of thought and independence. Fortunately, for those of us who sit as judges in the United States, the price of integrity is not quite that high.

Interference with judicial independence by English kings did not end with Henry the VIII. Two and one-half centuries after Thomas More died, George the III's political control and domination of judges became the subject of one of the grievances set forth in the Declaration of Independence. That remarkable document states: “He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.” The judges in the colonies

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† Text of a speech delivered on March 2, 1982, in acceptance of the Medallion award of the St. Thomas More Law Honor Society. Judge Alarcon was introduced by Warren Ettinger, Attorney, Hufstedler, Miller, Carlson & Beardsley, Los Angeles.

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served at George the III's pleasure, instead of during good behavior as had been guaranteed in England since 1701.

Ironically, nothing has really changed since George the III. Each year, for the last several years, Congress has rejected the unanimous recommendation of the commission — created by statute — which fixes the salaries of federal judges based on the cost of living. In California, former Governor Brown had successfully modified the laws which provided for automatic cost-of-living increases. The Governor also attempted, unsuccessfully, to deny cost-of-living increases for certain years.

All California appellate judges are appointed by the governor. Newly created trial court positions are filled by gubernatorial appointment. Vacancies which occur by death, resignation, or retirement prior to the expiration of a term are also filled by the governor. During the last seven years, the former governor had appointed 700 judges to the trial court, approximately thirty-six to the California Court of Appeal, and five of the seven judges on the California Supreme Court.

The choices the Governor had made for each of these positions were his alone. Under the present law, the governor need not consult anyone in *selecting* the person he wishes to appoint to the bench. Recent legislation has compelled him to submit these choices to the Commission on Judicial Nominees Evaluation. The governor is not under any duty to follow the Commission's recommendation. The Commission had found in excess of twenty percent of former Governor Brown's nominees not qualified to serve as judges.

After the judge is appointed by the governor, he or she must stand for election at the next general election. Trial judges are subject to a non-partisan, contested election. Appellate judges are on the ballot for voter approval of his or her retention. In theory, the appellate judge is running on his record. I stress the theoretical nature of the ability of a voter to assess an appellate judge's record based on my own experience as an associate justice of the California Court of Appeal. I took my oath of office as a California appellate judge on June 8, 1978, after having been elected two days earlier, without opposition, to my third term on the Superior Court. In November of the same year, some five months later, my name appeared on the ballot as an associate justice running unopposed on my record. By that time I had authored several opinions whose merit had gained the approval of at least one of my colleagues. As of election day, however, none of my work had been published. When the polls closed, sixty-nine percent of the voters had voted to retain me, I must assume, on the basis of my spotless and non-

existent record. Thirty-one percent of the voters, on the other hand, decided that I should not be retained in office based on the same phantom record. I wonder what might have happened had the voters read one of my opinions.

I have recounted this personal incident to illustrate the principal flaw in our present system of selecting and retaining judges. Where does the voter go to investigate the record of a judge whose name appears on his sample ballot? Can we really expect each voter to go to the County Law Library and read the opinions of those appellate judges whose term is ending? Even if the average voter somehow managed to read the candidate's opinions, by what standard should a layperson evaluate the quality of the judge's written expression? Is it reasonable for us to expect that a layperson will do anything more than decide if he agrees with the bottom line — reversal or affirmance? If the appellate court had determined that a criminal conviction must be set aside, despite the evidence establishing guilt, solely because of a policeman's blunder in making an arrest or search, or in advising an accused of his constitutional rights prior to a voluntary confession, are any of us being realistic in expressing our dismay that the voter may vote against the author judge because the disposition of a particular case is unpopular?

Should judges be accountable to the electorate? If so, must judges be responsive to current social attitudes of a majority of the populace on matters which come before the court? Can we legitimately apply democratic principles to the fair administration of justice in our courts?

Our state government is divided into three branches. Suppose a majority of the public wishes to extend the death penalty, increase the punishment for cocaine use, abolish involuntary busing of school children, control hand guns, control rents, provide attorneys for victims in criminal cases, permit prayer in our schools, abolish the exclusionary rule, abolish inheritance taxes, or deny pretrial bail to all persons accused of rape. A responsible member of the legislative branch has a choice on these sensitive issues. He or she can act according to his or her own social, political, ethical, or economic views — realizing that if a majority of his or her constituents disagree strongly enough his or her career in Sacramento will be soon terminated. Or, he or she can find out where a majority of his or her constituents stand, vote against his or her own personal views, and build a popular record to present to constituents. If engaged in a political campaign, he or she can seek the support of special interest groups by promising to support or oppose legislation which they support or oppose.

A governor also has the same freedom of choice either to carry out

official duties according to a personal set of values, sometimes at great political risk, or to prudently follow the will of the majority. The death penalty often presents this moment of truth to California governors. A governor may have openly expressed his view that the death penalty constitutes cruel and unusual punishment and yet refuse to exercise his clemency powers to save a condemned person — without damage to reputation for integrity or re-election chances. When a governor runs for re-election he or she may vigorously defend official decisions on controversial social issues and enthusiastically attack his opponent's contrary positions.

Contrast the above with the dilemma of a California judge facing an election. An appellate justice must run on his or her record. A trial judge cannot comment on pending matters or speak out on current social issues which may end up in litigation. A lawyer who believes strongly that school busing is wrong, that all convicted felons should go to prison, or that children should be allowed to pray in school may oppose an incumbent trial judge so as to have an opportunity to change the law of decided cases consistent with his or her views. The challenged judge may not comment on any of these issues because they are likely to come before the court for review. The judge's opponent has no such ethical constraints. In a recent contested municipal court election in Pasadena, an attorney told the voters that his opponent had never sentenced anyone to state prison. This accusation was remarkable because, had the incumbent done so, he would have usurped his jurisdiction. The appalling fact is that this unquestionably fraudulent campaign gained the challenger forty-eight percent of the vote. This type of deceitful and unethical tactic obviously places the incumbent judge in an extremely vulnerable position on election day.

More disturbing, however, is the fact that a partisan campaign against certain appellate judges in California was formally proposed by one of our two major political parties. The plan was rejected, not because it was wrong, but due to a scarcity of funds. Partisan politics has moved from the selection process to the retention election. Such a result was predictable and inevitable given the fact that under our present California system, the appointment of judges is in the hands of a politician.

The appointment of judges by an elected politician can lend itself only to the logical inference that regardless of the academic merits or professional credentials of the candidate, the person chosen reflects the social, political, and economic views of the governor. If we elect a "law-and-order" candidate for governor who supports capital punish-

ment, should we really be surprised if he attempts to choose supreme court judges who share his views on crime and punishment?

If, at the next election, a majority of the electorate also favors capital punishment, can we reasonably be dismayed that a supreme court justice facing a retention election may be judged by some voters according to how he or she voted on the constitutionality of capital punishment? Under our present system, the only record the nonlawyer understands is the one presented by the media or the justices' decisions on matters of great public interest.

A political reality is that the voter may incorrectly assess the judge's personal views. Under the Canons of Judicial Ethics, the judge is probably not allowed to disclose his private thoughts on any issue which may come before the court.

The fact is that our present system of selecting judges authorizes a governor to try to find a judge who mirrors his or her own political and socio-economic views. He or she may even feel that he or she has a mandate from the voters to do so based on his or her campaign promises and the size of the vote in his or her favor. If, by the next election, a majority of the voters becomes disenchanted with the incumbent governor, is it totally illogical for some of the electorate to suspect that the governor's judicial appointees may also be ill-suited for their jobs?

I favor merit selection, evaluation, and retention of judges, and I am very much opposed to our present system of political appointment. A judge's responsibility is to interpret and apply the Constitution, legislative enactments, and the decisions of higher courts to cases or controversies presented to the court. This function must be performed by relying on legal training and knowledge of the law, and cannot, in any conscious way, be dependent upon personal or public opinion. A judge may not consciously follow subjective social, political, or economic views if the law requires a contrary result. Specifically, he or she cannot perform his or her responsibilities in disregard of the law, in an attempt to please a majority of the electorate.

If my definition of the role of the judge is correct, political appointment and contested elections are the worst possible way to select persons committed to equal justice under the law. Political concerns and survival tactics may dictate a governor's choice rather than excellence in legal scholarship, legal experience, reputation as an outstanding member of the legal community, traits of fairness, courtesy, integrity, and patience. Under our present California system, the quality of our judges is dependent on the whims and political needs of our

governor. If we are fortunate to have a governor with a sense of history (for excellence of the judiciary, that is), we will be blessed with fine judges. If the governor is concerned solely with survival at the next election, we will see unusual appointments which have little relationship to merit or excellence.

The final step in the merit selection of judges is the retention election. Most states have opted for retention election to permit the electorate to participate in the process of the selection of persons to administer a co-equal branch of government. Without such a control, it is probable that many voters would not go along with the adoption of a merit selection system.

Some states, including Alaska, have recently added a new concept to merit selection. Under Alaska law, judges are appointed by the governor from a list of at least two names submitted by the nominating commission. After three years, a judge faces a retention election. If retained, supreme court justices then serve a ten-year term prior to running again. Trial judges must run again at six-year intervals. In addition to evaluating and nominating candidates for judicial appointments, the commission has a statutory duty to evaluate justices and judges seeking retention. The surveys conducted by the commission are designed and controlled by the Institute for Social Research at the University of Michigan. The judges are rated qualified or not qualified for retention. A summary of the evaluation results are published in the official election pamphlet that is mailed to each registered voter. A judge rated unqualified is entitled to present a personal statement, including the judge's response to the negative evaluation. New Jersey's system of merit selection and retention also includes ongoing evaluation of the sitting judges.

The District of Columbia has a unique variation of the Alaska system. In D.C., the judges are nominated by an independent commission and appointed to fifteen-year terms by the President with the advice and consent of the Senate. A judge desiring reappointment must file a declaration of candidacy with the District of Columbia Commission on Judicial Disabilities and Tenure. The commission then prepares a written evaluation of the judge's performance and a statement of fitness for reappointment. A judge seeking reappointment who is rated exceptionally well qualified or well qualified is automatically reappointed. If a judge is rated qualified, the President *may* reappoint him or her. If the judge is rated unqualified, he or she is not eligible for reappointment.

My hope in preparing these remarks is that some of you will share

my view that the time is now to reform our system of judicial selection to take politics out of our California court system. Further, we need to provide our voters with an objective evaluation of a judge's performance so that there will be a record to review in determining if a judge deserves retention. The exact system and procedure that we adopt is not important. What is imperative is that we abandon our present system. We can draw upon the experience and statutes adopted in thirty states to create our version of merit selection, evaluation, and retention.



