

# SYMPOSIUM

## JUDICIAL SELECTION AND EVALUATION DECEMBER 10, 2002

WILLIAM S. BOYD SCHOOL OF LAW –  
UNLV

CENTER FOR DEMOCRATIC CULTURE –  
UNLV\*

### I. INTRODUCTION

DMITRI SHALIN:<sup>1</sup> Welcome to the Justice and Democracy Forum Series of the UNLV Center for Democratic Culture. This is the inaugural forum in a series of conferences devoted to the contentious issue of judging the judges, which is co-sponsored by the William Boyd School of Law. Carol Harter, President of the University of Nevada, Las Vegas could not join us today. She asked me to read her written remarks:

I am pleased to welcome you to the University of Nevada, Las Vegas, and the William Boyd School of Law for the “Judging the Judges” Conference. We are delighted to host the inaugural conference here. I applaud the efforts of the UNLV Center for Democratic Culture, and the Conference specifically, to address the important nonpartisan issues of accountability, evaluation, and election of our judicial officials. UNLV and the Center for Democratic Culture are dedicated to promoting civic education and discussion through not only research and scholarly exchange, but through community-based programs like this conference. On behalf of the entire UNLV community, we hope you enjoy the “Judging the Judges” Conference, and your time on our campus.

I would like to recognize James Frey, Dean of the College of Liberal Arts. He will say a few words of welcome.

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\* Editor’s Note: On Friday, December 10, 2002, the UNLV Center for Democratic Culture (CDC) sponsored its first public forum in cooperation with the William S. Boyd School of Law at the University of Nevada, Las Vegas. The CDC is an interdisciplinary organization composed of interested members of the community and UNLV faculty members from various departments of the University. The presentations and commentary are based on an edited transcript of remarks made at the conference. In addition, two of the Symposium participants elected to submit more formalized remarks to the Nevada Law Journal in the form of short articles. Professor Jeffrey W. Stempel’s article is presented as an introduction to this forum transcript, while Professor Michael W. Bowers’ article follows the transcript.

<sup>1</sup> Director, Center for Democratic Culture. Professor of Sociology, University of Nevada, Las Vegas.

JAMES FREY:<sup>2</sup> Thank you, Dmitri, and welcome to all of you as participants in this inaugural event. You're actually also participating in one of the first events that's being sponsored by the newest – one of the newest – centers on campus, the Center For Democratic Culture. Approved by the regents here in August, and under the leadership of Dmitri, [the Center] is off and running with this conference and has several coming programs planned for you. It's only fitting that, apart from the college of Liberal Arts and programs like the Center for Democratic Culture, [many] people are interested in communication, intellectual discussions, debate, and maybe even some controversy. Certainly we're all interested in civic education and civic responsibility; and all these, of course, are consistent with the goals of the College of Liberal Arts, which is where the Center is housed, as well as the goals of the University. So let me welcome you again. I hope this is the first of many programs that you will be attending and participating in. I know you'll enjoy it. We have an outstanding group of participants and panelists, and it will be a wonderful opportunity for an exchange and discussion. So welcome to UNLV, to the Boyd School of Law, and to the Conference. Thank you.

DMITRI SHALIN: The mission of the Center, and of this Forum, is based on the notion that the process of democracy is at least as important as its outcome. James Madison and John Dewey used to say that if the process is unfair and unseemly, it does not matter who wins, because the outcome is likely to be unfair as well, producing social wounds. But if the process is fair, it matters little who loses because, in the long enough run, something good will come out of the [judicial] process, including social healing. The Center, and this Symposium, seeks to be that kind of exercise in healing and intellectual exchange. The Forum offers a nonpartisan setting for exchanging partisan views.

What we try to do is to expand the figurative room for the honest difference of opinion in order to encourage dialogue. What this means is that if you disagree with me, it does not mean that something is really wrong with you, and if I reject your argument, this is not necessarily because I'm a moral or intellectual midget. The CDC treasures this free exchange of ideas and wants every party to have a say, to press his program or her point of view. CDC programs of this type will involve speech, debate, and education. This is an inaugural forum, to be followed by another one on tort reform, which we know is a very contentious issue that we will bring here, hopefully in the same auditorium. [The tort reform forum will invite discussion from] builders, doctors, insurance company representatives, legal scholars, and other speakers as to what we can do with the current arguable crisis concerning liability and insurance. I hope it will be of interest to you. It's set for April 25, 2003, and that conference will be followed by another one, entitled *The Demeanor of Democracy: Civility in Public Discourse*, which will take up, among other issues, the problem of negative political campaigning and civility in public discourse and the limits of civility.

Professor Jeffrey Stempel will moderate this morning's panel presentations and discussion.

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<sup>2</sup> Dean, College of Liberal Arts. Professor of Political Science, University of Nevada, Las Vegas.

JEFFREY STEMPEL:<sup>3</sup> Thanks, Dmitri. Let me briefly introduce our panelists before beginning with our first formal speaker. First, we have the Honorable Philip Pro, Judge of the United States District Court for the District of Nevada. Judge Pro is a graduate of Golden Gate University Law School. He became a U.S. Magistrate Judge at a very young age and cut his teeth on one of the more complex cases of the modern era in Las Vegas: the MGM Fire case. His work there was so impressive that he came to the attention of the important decision-makers that select federal judges, and has now been a District Judge since 1987, more than 15 years. He's been a wonderful friend of the law school and to the CDC. Judge Philip Pro, speaking on judicial accountability and independence from his perspective.

## II. JUDICIAL ACCOUNTABILITY AND INDEPENDENCE: A FEDERAL JUDGE'S PERSPECTIVE

PHILIP S. PRO:<sup>4</sup> One of the advantages of going first is you don't have to respond to what everybody else has to say. One of the disadvantages is you don't have an opportunity to hear what others have to say and to provide any kind of commentary or questions. But I think, given my role here today, it's really appropriate. And of all the people involved in today's presentations, I'm the one that would [be considered] least qualified to be here because I'm probably the person least qualified to address many of the issues that are going to be considered by the panelists and you all today.

The subject of my presentation is *Judicial Accountability and Independence: A Federal Judge's Perspective*. And this topic affords me the opportunity as well as, to a degree, I think, the responsibility to provide a frame of reference, or a backdrop if you will, for the larger theme of today's forum. Now at the outset, I should confess that as I approach today's topic, I come from a perspective which is no doubt somewhat different than the other panelists that you will be hearing from. I am certainly no expert on judicial elections or selection processes in the state court system in Nevada or anywhere else. I've served as a federal judge for over 22 years. Jeff mentioned my role as a magistrate judge from 1980 forward, and in 1987, I received a [nomination from] president Reagan – an appointment – and [it was] confirmed by the Senate by a lifetime appointment on good behavior under Article III of the Constitution.

So, unlike some of today's panelists that you'll hear from, I've never stood for popular election for a judicial office, and I don't have the personal insights that many of our panelists may have regarding the merits and the demerits of that particular process from a perspective of one who has been there. I've never had important responsibility for developing or conducting a fair, or valid, survey of judges. I've never carried the responsibility for fairly reporting on candidates for a judicial office, and I certainly have never attempted a scholarly analysis on the subject, although I did publish one article on judicial indepen-

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<sup>3</sup> Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

<sup>4</sup> United States District Judge, District of Nevada.

dence in the February 1999 edition of the *Nevada Lawyer*. That's about as close as I've gotten to that particular scholarly approach.

However, like many of you, I have read surveys and reports that judicial elections, in the 39 states that permit them, are very costly and often acrimonious. I've read of the New York University's Brennan Center for Justice Study of the state Supreme Court elections, which occurred in 33 states in 2000, which found that judicial candidates raised campaign contributions of 45.6 million dollars. I've read reports of the recent American Bar Association, which indicates that the majority of Americans favor election of judges, but that 80 percent also favor public financing in judicial elections.

I've also read countless studies, including the October 2002 Harris Interactive Poll, reported in this month's *Federal Lawyer Magazine*, which indicates the American public does not want its judges to be too political, but at the same time wants their candidates for judicial office to announce their political views. And of course, like many of you, I've also read the Supreme Court's recent opinion in *Republican Party of Minnesota v. White*,<sup>5</sup> which held that placing limits on the ability of judicial candidates to announce their views on disputed legal and political issues violates the First Amendment. Thus, although I've read a lot of material on the subject of judicial elections, and, like every other citizen in this State, have observed campaigns for judicial office, I no doubt have less firsthand experience than most of our other panelists here today to merit the expression of a view on the pluses or minuses, the benefits or disabilities, of the various alternative methods of selecting or electing state judges.

I would, therefore, like to frame the discussion that will follow this morning with some thoughts relating to a subject I do have percipient firsthand knowledge of: the independence and accountability of those who hold federal judicial offices. I will leave it to the panelists who follow and, of course, to you, to consider whether and how these concepts, as they apply within the federal judiciary, inform the broader theme of today's forum concerning the selection or election and evaluation of state judges in Nevada.

Now the concept of judicial, or decisional, as I prefer to call it – and many writers on the subject do – decisional independence is hardly new. One of the fundamental purposes of our Constitution was to circumscribe the scope of legislative and executive authority. But an independent judiciary was seen as one important vehicle to enforce those Constitutional limits.

Article III, Section One, of the Constitution provides that “judges shall hold their office during good behavior.” The entire point of the good behavior tenure was to eliminate removal from the bench on the basis of decisions which were objectionable to the political majority or to the legislative and executive branches. We have only to look at the *Federalist Papers* to see that lifetime tenure for federal judges was the subject of considerable focus during the ratification of the Constitution. *The Federalist*, Numbers 51 and 78, stress that permanent judicial tenure was essential to destroy all sense of dependence on the legislative and executive branches in making judicial decisions, and to ensure

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<sup>5</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002) (striking down state law requiring judicial candidates to refrain from expressing specific views on concrete legal issues).

that federal judges would protect the Constitution against inappropriate political encroachments.<sup>6</sup>

Judicial independence must, therefore, be viewed not as an end in itself, but as a means to promote impartial decision making, and to preserve the Constitution against encroachments from the executive and legislative branches, and from the popular political will of the majority at any given moment in time. Once judicial independence is understood as a means to these ends, it becomes apparent that independence also requires counter-balance of accountability, otherwise an unaccountable judge would be free to disregard the goals that judicial independence is supposed to serve.

In recognition that judicial independence and judicial accountability are complimentary concepts, or allied concepts, the Constitution itself includes a number of provisions that make the judiciary accountable to the legislative and executive branches and, hence, to the electorate. Congress, of course, has the power – through the impeachment process – to remove judges it finds to have violated the good behavior standards articulated in Article III. Ironically, and as I expect many of you in this room know, I came to the office I hold now in 1987 after my predecessor was impeached and removed by Congress from office. Yet we have, since the impeachment trial of Samuel Chase in 1805, known that impeachment for judicial decision would not be tolerated under our Constitutional scheme.

Working jointly, Congress and the Executive have the authority to regulate the size, the location, and the jurisdiction of our federal courts. Congress and the Executive together wield the “power of the purse” and control the budgets available to the judiciary to perform their responsibilities. Finally, and notwithstanding recent events which cause some to question their political capacity to do so expeditiously, the President and the Senate work together to appoint and confirm federal judges under Article III of the Constitution. Beyond this, there are a myriad of rules relating to judicial ethical standards and misconduct, which operate within the federal judiciary itself, to address and sanction inappropriate extra-judicial conduct of federal judges.

However, what the legislative and executive branches of government, and, thus, the political majority, do not have the power to do within the federal judiciary, at least not directly, is to dictate or to influence the decisions by a judge by means of real or imagined threats of removal from office, or some other adverse sanction such as diminution of compensation. Now, I don’t suggest for a moment that the judicial opinions – rulings – of any judge or panel of judges in the federal system should be immune from criticism or debate by the public, the press, the Legislature, or members of the legal profession. Reasoned debate regarding the judicial decisions is often helpful and, no doubt, essential in a free society, and judges are not insulated or not so insulated as to be unaware of the widespread dissatisfaction with judicial decisions they may have made. Indeed, in a great many cases, the decisions of a judge may lead to legislative actions which address or cure the effects of an unpopular decision of a court or group of courts.

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<sup>6</sup> See generally THE FEDERALIST No. 51 (Alexander Hamilton & James Madison); THE FEDERALIST No. 78 (Alexander Hamilton).

Do judges make bad decisions? Of course we do. But not all the time. Hopefully those in this room would agree with that. At least not all of us all the time. Maybe some of us all the time. We are, as human beings, sometimes given to error in our judicial decisions, naturally, and hopefully these are errors which are correctable on appeal. And we, as judges, are also cognizant of public dissatisfaction to some rulings we make, through either letters we receive, or [through] press accounts, or word of mouth. We're not literally an ivory tower immune to what is said about things that we may issue in the form of opinions.

But imagine for a moment a situation in which a judge, a sitting judge, actually faces the risk of losing his or her judicial office because of an unpopular decision, even though in the view of that judge, the contentious view of that judge, that decision is mandated by the law and the facts of the particular case. Should the prospect that a judge in such a situation might compromise their judgment in order to remain in office not cause all of us some concern? Would such a scenario not raise a legitimate concern about the ability of the judiciary, operating under such conditions, to fulfill the important and independent role originally intended under our Constitutional scheme of government?

I suggest that once a judge has compromised their oath of office by refusing to enforce the law, as they understand it to be, in order to remain in office, both the judge and the public confidence in the courts have been irreparably diminished. In short, while criticism is not an encroachment on the independence of the federal judiciary, the threat of removal from office or some other sanction for an unpopular decision clearly would be.

Now, I must acknowledge that it's easier to focus on judicial independence and accountability issues as they relate to the federal judiciary than to address the same kinds of issues with regard to the far more complex and varied state systems throughout the country. I don't think you can simply lay the federal judicial system over each state, as a template by which to evaluate the conditions of the judicial systems within each state, for the very simple reason that the state systems are different. It remains for the citizens of each state to define what it is that they want from their courts and then to determine how best to achieve those goals.

In preparation for today's forum, I came across a recent collection of essays edited by Steven Burbank and Barry Freedman, entitled *Judicial Independence at the Crossroads*.<sup>7</sup> At this particular gathering of interdisciplinary studies on judicial independence, [the authors] note the wealth of different approaches to judicial selection and retention employed in the various states and discourages the temptation to bless one as correct [while] thereby condemning all others. The various authors note that within the American judicial system, a variety of factors affect decisional independence and judicial accountability. They note that, although the judicial selection and retention process employed in the various states is an important part of the equation, we should take a broader look at what it is that we expect of our various state court systems and what motivates and constrains the judges that serve.

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<sup>7</sup> See JUDICIAL INDEPENDENCE AT THE CROSSROADS (Stephen Burbank & Barry Freedman eds., 2002).

In conclusion, when we talk about judicial independence and judicial accountability of judges in Nevada, I suggest we must begin by asking ourselves precisely what it is that we want our judges to be independent of, and what we want them to be accountable for. Once we answer those questions and define our goals, we can best determine how to advance the goals through the methods of selection, appointment, election, or retention of those state judges. In that context we can more meaningfully assess whether judicial election reform is warranted. We can better assess whether a shift to public financing of judicial elections is desirable, and whether judicial terms of office should be extended as in the case of some states to – say 10 or 12 years – rather than 4 or 6 years. We can also address whether public judicial surveys offer the best method of informing the voting public of the qualifications of a particular candidate for judicial office, or whether we should shift away from contested elections to an alternate method of selection and retention of state judges.

These and other questions to be addressed by today's panelists are worthy of serious study because in the final analysis, our state courts, like every other part of our government, is really what we make of it.

AUDIENCE MEMBER: Judge, I realize that this is taking you off of the remarks that you just made, but since later on in the day we're examining the difference between election and appointment as a process for selection of judges, could you go back to 1987 and relate your experience when you were nominated – from that moment through the process – and can you offer anything from that experience that might be implementable into the state system?

JUDGE PRO: Well, certainly, the appointment process that federal judges go through has evolved over the years, but it's always, perhaps, been fraught with a potentiality for some contention. It's a process in which, when you are nominated by the President and awaiting the Senate confirmation process, you go through a series of background checks with the Federal Bureau of Investigation, Internal Revenue Service [and] the American Bar Association; and then you have your confirmation hearing before the Senate, where you are probed on matters in your background, which, in the view of the Senate Judiciary Committee, would test upon your demeanor, your balance, and your decision-making ability to a degree, and this would vary from time to time and environment to environment, and, I think, [involve] different philosophies.

In the case of a sitting judge such as myself, I'd been a magistrate judge for six and a half years. So I had a track record, if you will, of decisions that I had authored that could be scrutinized pretty clearly, and people could get an idea as to whether I had two heads or one, and how I might perform as a U.S. District Judge. So it certainly was a rigorous process, following Judge Claiborne, as I did, that allowed for particular focus because of the circumstances of his departure from office. And it became the subject of discussion during my confirmation hearing because it was the first time in 50 years somebody had kind of sat in that position.

But I also went through [this] before, in the confirmation hearings on Robert Bork for the Supreme Court of the United States, which, in the view of many, kind of altered the way those confirmation hearings were conducted as well. So I don't know that it really informs the situation as to election. It's

quite a bit different than standing for election, there's no question about it, but those were my experiences.

AUDIENCE MEMBER: Judge Pro, I'm not sure how this will impact the discussion today, but it's certainly topical. You mentioned that Congress' control of the purse strings has an impact on the [power] of the judiciary.

JUDGE PRO: Yes – they have no budget right now. And I'm a new chief judge, and I got handed the gavel by Howard McKibben last month and he said "congratulations, we have no budget," so . . .

AUDIENCE MEMBER: But also, the topic of salaries that our federal judges are being paid now and how they have actually eroded over the years – what impact does that have, if any, on the independence of the judiciary?

JUDGE PRO: Well, I don't think I'd characterize what impact it's had on the independence, because it does not affect the decisional independence of the judiciary. What we've not received, and what we sometimes don't receive, are what they call COLA's, or cost of living adjustments, that many people get; and there was an Ethics Reform Act of 1989 that theoretically was going to build that into the law, but it requires an affirmative vote by Congress to waive a thing called Section 140, and Congress is kind of reluctant, sometimes, to do that. Though, oddly enough, this year they gave themselves a COLA, and did not give it to senior level executive branch employees or federal judges. I think that may be addressed early in the next Congress. I think what happens in terms of salaries [is that] nobody's going to cry for a federal judge that makes roughly what a Senator or Congressman makes – 150,000 [dollars] a year – and is appointed for life.

At the same time, many people who come to the federal bench take substantial cuts in pay to take that job. Others leave the bench because they have several children or grandchildren to put through college and cannot afford to stay, and make far more in the private sector. And still others are dissuaded from considering or seeking federal judicial appointments because of the salary situation. At the end of the day that affects a certain segment.

In truth I think most of us – speaking for myself – most of my career has been focused on public service. I do that because that's what I've wanted to do. I was never motivated to seek the most pay. If I was, I wouldn't be doing what I'm doing. And I think that that's true of, frankly, a great many judges – not only federally, but state judges [as well]. I don't know anybody in public service that opts for that. They make those choices. But it does have an adverse impact attracting people and retaining people, and can be a little frustrating.

AUDIENCE MEMBER: Besides your salary, what other perks do you get – like benefit package, health care, retirement? Is yours considered the same retirement as the people on Capitol Hill?

JUDGE PRO: No. We don't get perks in terms of special insurance. We pay for our health insurance, our life insurance, just like any other employee of the federal government does. But, under Article III, the lifetime appointment means that, in essence, you know, like the Pope, I sit in that chair until I die. I hold my job until I die. If I'm drooling and no longer able to perform, I [may] literally step out of my court. I may not be a judge. I may take what's called senior status and reduce my caseload significantly. We have two senior judges



here in Nevada right now, and soon we'll have a third, that have a reduced caseload: Judge George and Judge Leen, and soon Judge Mahan.

Or you can fully retire if you want to. And your salary continues for the rest of your life. So that is the carrot on the stick, if you will, that says, well, this is pretty good – and it is a good retirement package. So you don't have to then concern yourself as much with how your 401K is doing or something else. So, in that sense, that's the perk. As to other perks, there aren't many because I mentioned the Code of Judicial Conduct that we have. I don't go to hotels and take free meals. I can't do that. I don't receive tickets to fights or concerts or something. I can't do that because the Code of Conduct for Judges really – I won't say it literally prohibits it, but it's certainly very strongly frowned upon. And so, there are what people might imagine as perks, but [they] really don't exist for members of judiciary.

AUDIENCE MEMBER: Is there an age requirement, minimum age requirement to take retirement?

JUDGE PRO: Yes. You have to meet what's called a Rule of 80. You have to be at least 65 years of age. I'm 55 right now. I have to go 10 more years. But your number of years in service plus your age must total 80. I'm technically eligible at 59. I will have served enough years as an Article III judge, but I still can't take senior status until I reach 65. So, you have to go until you're 65. If I retire at age 64 and 364 days, my retirement is zero. I don't get anything. So every judge has to at least [serve the minimum] unless they become disabled and become eligible for disability retirement.

AUDIENCE MEMBER: Is there some position in your mind that the same system in place for District appointed judges should be the same for Nevada state judges? The reason we ask that is [because of] judicial accountability and independence. There's such a completely different handling of a judge in your position as there is for the rest of the judges on the panel. A lot of us that are working towards the issue of judicial accountability, our greatest concern is that judges judge judges. It's the old saying, the fox guarding the hen house. A lot of us have real, serious, grave concerns.

How do you tie into your experiences, as a federal appointee, with the state judges who are actually supposed to be the judicial counsel and supposed to be responsive to actual complaints? We see a big disparity here, very little in the way of accountability.

JUDGE PRO: Well, I think you can well imagine, coming from where I sit, with the perspective that I come from, there's a natural reluctance – I don't want to sit here and attempt to offer opinions or pontificate about, "Gee this is what we do in the federal system. Everyone should do this." I think my comments indicate that I'm not saying that at all. I don't think you can necessarily take the way our Constitutional federal system has operated for a long time, since 1789, and you can just lay it over the state and say, "ah, if you only do this, your difficulties would be solved." I'm not suggesting that in the least. I think you, and I think the people in this room, and I think the other people on this panel, really have the responsibility, as citizens of the state, for defining what it is you want your state judges to be accountable for, or independent of, and as you define that – as the state of Nevada defines that through its Consti-

tution and the legislature, and if the people make those determinations, [I think] that you are in a position to decide what can best achieve those particular goals.

It may be that an appointment process is desirable. It may be that what's called a modified "Missouri Plan" will be the kind of approach [needed], where there are retention elections. Some states that try and assuage some of the concerns about financing, I know, have looked at public financing of campaigns. Now, there are probably legal issues about limits that could be put on that. Other states have extended the time that judges serve in office – instead of four to six years, they get ten or twelve years – to insulate the judges from those concerns. If the point of view is – as it may be – just the opposite, [where Nevadans decide]: "I want every one of those judges to be politically responsive to the electorate," then I think you take an entirely different approach and you probably would want elections every two years or more frequently.

Somebody wins and somebody loses in every suit, and people can – particularly when they've lost a case – be very cynical about it, and I understand that, and I make decisions every day that somebody wins and somebody loses. I try to get it right and hope that I'm right. I have no illusions I'm always correct. I know that can't be true and that there is an appellate process to try and correct those mistakes, or a legislative fix that can occur to correct those mistakes. But I don't know that there's an easy answer to the concern that you have.

AUDIENCE MEMBER: Can you think of a couple of cases – you've had cases that have been political hot potatoes. You've had some that have angered some people or groups of people. Can you share with us a couple of specific cases where, had you been a state judge, there might have been organized opposition to you afterwards.

JEFFREY STEMPEL: Can I just chime in for a second too. Judge Pro is perhaps a little modest. He recently issued a ruling striking down the Nevada Supreme Court's ruling prohibiting tradenames for lawyers. And that's an issue where he has, if you will, ruled against the legal establishment.<sup>8</sup>

Our next speaker is Judge-Elect Jackie Glass, who will give a report on judicial elections "from the trenches." And quite a trench it was for her this past fall, as she was the victor in what most observers regard as the most fiercely contested judicial election of last fall. She defeated a sitting Judge (the Honorable Jeffrey Sobel) in a campaign that involved substantial advertising, with a more hard-hitting, adversarial tone than that found in most judicial campaigns.

Jackie Glass is a former news reporter [with] a criminal defense [background] as a partner in the law firm of Wolfson and Glass. She will take her seat on the Clark County Eighth Judicial District bench in January 2003.

### III. RUNNING FOR JUDICIAL OFFICE: A REPORT FROM THE FIELD

JACKIE GLASS:<sup>9</sup> Thank you. I'm very happy to be here. I think. It's a little different doing this now than it was before. I'm – I was pleased obvi-

<sup>8</sup> See *Michel v. Bare*, 230 F. Supp. 2d 1147 (D. Nev. 2002).

<sup>9</sup> Eighth Judicial District Judge, State of Nevada.

ously, with the way the election came out, and I can tell you a little bit about how that happened. When I first got the inkling, I guess not last year, but the year before, that I wanted to run, I told my husband, who's my law partner, Steve Wolfson, and he said okay. So let's talk about it. So we talked about it and at that point, I just decided that I was going to run. And we started asking around about who handles political campaigns for judges.

I received recommendations made to me, and I think, I don't know, some of you in the media know who I had handle my campaign. It was Gary Gray of Gray and Associates. Gary Gray and Mark Benoit handled my campaign. And if you're going to run for office, and you're going to run for, as far as I'm concerned, a seat as a judge, one of the smartest things you can do is obtain a good political consultant to help guide you. I've been a lawyer for 18 years. Before that, I was in the media. And even though I was in the media, it really did help to have someone who had the expertise in knowing how to handle a campaign, to advise you.

So that was the first thing that we did – or I did – was obtain a good consultant. And as it progressed, I had somebody along the way tell me: “whatever Gary tells you, you listen to.” And, actually, in looking back at it, they were right. What that person did for me – what they did for me – was develop a theme for the campaign, prepare me for dealing with speeches and interviews and the press. Advis[e] me of who to contact and you – this is a very large county. Clark County is huge. And to try and take on a countywide race and never have been in it before, is kind of a daunting task. You can't be everywhere. You just can't physically be everywhere. I tried. But you can't be everywhere.

So, based on their advice, I started making contacts with other places. I was very fortunate in my situation. I was able to campaign quite a bit during the last year. I actually had what I considered to be the anniversary of my first public event, which was November 2001. I went to a mayor's prayer breakfast. And I remember that as maybe being the first event that I went out and started meeting people – and that was in November. We aren't allowed to raise money until 240 days prior to the primary, so that was, I believe, January 7, 2001, so I started going places.

I'll give you some examples of some of the places that I went. I went to the Chamber of Commerces – the Latin Chamber, the Urban Chamber, the Asian Chamber – and I went month after month after month until those people got to know who I was. I went through the standards and policies the first Wednesday of every month, 7:00 in the morning. I spent a lot of time with – there's a lot of different groups – political groups that are grass roots political groups. I went to their functions, and I met people. And I shook the same hands over and over and over again until these people got to know me.

I went to “Meet the Candidate” functions. I went to parades. I went everywhere that I could find a group. Now, sometimes there were more of us candidates than there were people to talk to, but I kept telling myself that for every one person I might reach out to, they'll go back and tell somebody, and maybe that person will tell somebody; and I really, truly believe that a lot of all the grass roots that I did paid off.

There was a time during the race when it came to be primary time. I didn't have a primary because there were only two of us in the race. I got phone calls from people asking me why wasn't I on the ballot, and I'd go and get my hair done and my hairdresser would say; "half of my clients called asking why weren't you on that ballot. Where are you? People are worried. Why aren't you there?" And I was surprised at that point that people were actually looking for me and wondering where I was. And I thought this is a good thing for them to look for me on the November ballot.

When I went out and met people, people were so happy to actually meet the candidate, particularly the judge candidates. The feedback I got was: "there's so many people running for judge, we don't know the people who are running for judge, so we appreciate you coming so that we can see who you are and try to get to know something about you." I heard that over and over and over again on the campaign. Going out to meet grass [roots] – I loved it.

As a lawyer, and married to a lawyer, I was insulated, to a degree, from much of the world. You don't realize how insulated you are until you go out and you do something like this, and you start meeting all the people out in the community who are actually doing very positive things, and trying to make this community a better place. And that was really a wonderful benefit of the experience.

One of the things that the judges had to do in this election, and I suspect it may change based on recent court decisions, [such as] the *White* case,<sup>10</sup> which is going to change, I think, some of the way the judges can talk on issues because, up to this point, the judicial canons prevented us from talking about issues. So basically, when you're dealing with judge candidates, you're kind of getting who we are, and we deal with issues such as work ethic and, perhaps, past feeling on cases, and in some elections there were ethical discussions. So it's hard [because] there's not a lot to put out there as far as issues.

So the endorsements that the judge candidates receive turn out to be very important because, as a candidate, they kind of speak for you as to what the various people in the community believe. So I was also very fortunate, during this election cycle, that I got a substantial number of endorsements. I filled out many forms, I went to many interviews, and I was well received. And I prepared for those meetings, and I worked hard at filling out my forms, and making sure that they got all the information that they needed. And that resulted in a lot of support out there, which I also think helped in my success.

Let's talk about the money. We have to. The only way to get elected – well the only way I believe I could have gotten elected – is by getting my message out. And that was grassroots, and that was my media campaign, and I know there are a lot of people who do not believe in judges having to raise money. [Generally], the people who give money to judge races are attorneys, your families, and your friends. That's it. Now, raising money is not fun. I didn't enjoy that, but it was a necessary part of the campaign because, without the money, I couldn't fund my media campaign.

One frequent concern about elected judges is whether I can still be fair because lawyer X gave me money and lawyer Y didn't give me money. I

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<sup>10</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002).

consider myself to be an honorable person, an honest person, and have integrity. And I believe in my heart that I can sit in a courtroom and make decisions, and I'm not going to have a list there [telling me] lawyer A gave me money, and lawyer B gave me money. You base your decisions on fact and the evidence and the law. And that's exactly what I plan to do.

Impact. Impact on my family and me. It was exhausting. There were some days when I did something in the morning, something at lunch, and two or three events after 5:00. I would come home and sit on my couch, and my kids would try and talk to me and I couldn't talk to them. It was just exhausting. Physically and mentally. And I've got to tell you, I don't think my feet will ever be the same again. I think I ruined my feet for good. Because you go to these campaign functions, or cocktail parties, and dinners, and you stand on your feet and you walk around and you don't realize what you're doing to yourself until you get done and you say: "Oh my gosh. I'll never walk again."

My husband. I could not have done what I did without him, the support of my husband. He was there for me, and he went places with me. He shook people's hands. When I needed him to be there with the kids – I have an 11-year-old and a 15-year-old daughter – when I needed him to pick them up and take them places, he was there. And I could not have gotten through this the way I did without his help and support. The other thing that he was there for is as a law partner. I was able to refer any cases that came in to me to him and my associate. And that took a lot of the burden off of me. I was probably one of the few people [who] still came in the office every single day. I stayed there from early in the morning until late at night. I still had cases and still had things that I did follow up on. But I did not take any new cases towards the last half of the campaign. So I was very fortunate to be able to do that, and that gave me a lot of time to be able to go out and campaign.

My children. They were troopers too. They did say to me that if they don't have to do another parade for a while, they'd be extremely grateful. They went to "Meet the Candidate" functions. My 15-year-old drove out to the Moapa Valley with me. She'd never been out there before. She said, "where do they shop, mom?" And she was asking one of the girls who lived there about living in a rural community, and what it was like. She met a lot of people. She stood right by me and smiled, shook hands, and campaigned. This was a great experience for her. My kids went to a lot of the "Meet the Candidate" functions.

Voters saw that I was someone who had family, and I think that reflected positively on me. So it really does help when you go through this experience to have the support of family. I really think it does make a difference, and the word that will probably live forever in my family is "function." "Do you have another function to go to, mom? What function are you going to tonight?" We did a lot of functions together.

The media campaign was a necessary evil since I was running against an incumbent. And believe me, all the way through, I heard people say: "You're running against an incumbent. You're running against an incumbent. How do you think you can do that? You know, it's such a hard thing to run against an incumbent." Well, when I analyzed where I was going to run, I could have gone in an open seat. There were two new seats. The seat in Department 7

Judge [Thomas] Gibbons vacated, and in Department 10, Judge [Jack] Lehman was retiring. We had weeks and weeks and weeks of discussion trying to decide where I was going to run and what would be best for me. I eventually determined to run for the Department 5 position.

Despite what some people may have reported, there was no personal issue that caused me to run in the department that I ran in. I looked at the situation and decided to run where I could have the most impact, and I would know what I was up against, as opposed to running in an open seat where, as it turned out, in one department they had five people running and in another department there were four people running. So I wouldn't know my opposition and I wouldn't know what I was dealing with until after they filed, and it would be a different situation. So, when I decided to run in Department 5, I knew what was there, I knew what issues could be used and could be raised, and there was a great deal of contrast in our campaign, and I also think that serves people.

The media. When I'm talking about media, I'm talking about my television campaign, and direct mail. I think that in this particular race, because of the issues raised, and because of the difference in folks that were running, there was a lot of press out there about my race, when I don't think there normally is. And so, I think that also was very helpful. You can't be everywhere in Clark County. You just can't. I didn't make it to Searchlight or to Laughlin. But I went a lot of other places. You've got to do what you have to do. I did television, as probably many of you know. And I did direct mail. And it really was difficult for me to accept the fact that direct mail works because, I don't know about any of you, but when you get [campaign information] in the mail, and you get so much of it, [as I noticed in] this election when I'm reading everybody's direct mail, you usually get it and a lot of it goes in the trash.

But my consultant told me that's the only way to get your name into the hands of the voting public because, even though television reaches a lot more people, how many of those people are actually going to vote? The target mail is directed at the voters. You get those lists from the election front, and it really helps. I didn't use any radio at all. So my campaign was basically a combination of grass roots – intense grass roots – TV, and direct mail. And that ends up resulting in a 51 to 39 percent victory on election day.

The issue regarding campaign funding – I know that's going to be addressed later – I know there's some talk about trying to have publicly funded elections, but I don't know, in this day and age in our state, if that's going to work, based on the budget deficits that we have, and whether the public would be amenable to having elections funded for judges. I don't think so. I suspect it's going to stay the way it is, at least for a little while. I hope Judge Pro was wrong and we don't see a move to shorter terms, with things like elections every two years. I need six years to recover.

AUDIENCE MEMBER: Due to the fact that you worked so hard during this campaign and, by the way, you're visiting all of these groups, I'd assume your opponent did the same thing. I'm sure he campaigned. In view of the experience you had during the election, do you think that judges should be elected or appointed?

JACKIE GLASS: I believe they should be elected. I don't think that I would have this opportunity to be a judge if the position were not open for

election. I think that it's important that we have people who want to run for elected office, who want to be a judge, to give them the opportunity to be able to run, as opposed to trying to be appointed and then retained.

AUDIENCE MEMBER: You give all the credit to the medium of your message. What about the content?

JACKIE GLASS: The content – well, the content went along with it. The content was – [as] I first went out and said everywhere – that I would be a full-time, hard-working judge. That was my message. And I did not say a word about my opponent until the end, and then that message was: “he’s not there. He’s not coming to work. And these are some other issues regarding his rulings and his sentencings that you need to be aware of.” So the message was there. I mean, the message was important as well, but for most of the campaign I went out talking about me, and what I planned to do, and never once, in a speech or talk, even acknowledged that there was somebody else that needed to be looked at. But, in the end, you certainly brought the message home with the content of what was in the mailers and on TV.

AUDIENCE MEMBER: I had a question about the endorsements. A lot of people, when they go for endorsements, they go for the DA’s office, the Defenders Office, the Police Department. Well, as a lawyer, you say you disqualified yourself. As someone coming before you on the bench – take a lawyer for a defendant from your firm.

JACKIE GLASS: Oh, I cannot have the person – anybody who I’ve represented – appear in front of me.

AUDIENCE MEMBER: But right now we have the former DA who is now in Department 17 taking over civil cases. He, in essence, is the lawyer for the LVMPD. So since he is technically – he represents the Las Vegas Metropolitan Police Department – do you believe that there is technically bias that could come, because of election, through that? Saying that, he would almost have to disqualify himself in every case.

JACKIE GLASS: There is a real move, and there has been, for judges to be discouraged from recusing themselves because of conflict. They really – the court administration, and the Supreme Court, and the court, and the judges – don’t want to see people conflicting out of cases very easily. I don’t think that just because David – you’re talking about David Wall, right?

AUDIENCE MEMBER: No. Stewart Bell.

JACKIE GLASS: Oh, Stew Bell, the DA, I’m sorry. Stew Bell, as the DA, now sitting as a civil judge – I don’t know that he’d have to conflict himself out. I think that’s a question that’s better served to ask Stew. Because I was in private practice, my former clients cannot appear in front of me. My husband, and former law partner, will not appear in front of me. My associate won’t appear in front of me, and anybody who is a tenant in my law building is not coming in front of me, because there’s a relationship there – they’re on my list and they’re not coming in front of me. That’s fine. As far as whether Stew will have to recuse himself, [it depends on] when he sits and looks at people in front of him, whether he feels that he can’t be unbiased and can’t be fair. I think he’ll have to make those judgments on a case-by-case basis.

AUDIENCE MEMBER: Okay, and you don’t believe that any endorsements by the Police Department. Things like that –

JACKIE GLASS: No, I mean, I was endorsed by all the major police departments, and if I had to recuse everybody – all the police officers – I wouldn't have much of a criminal calendar.

AUDIENCE MEMBER: Right. But if they were appointed instead of endorsed by you, these individuals might look better.

JACKIE GLASS: And in the appointment process, if people were vying for appointments, I still suspect that there is a sort of endorsement procedure. And to get their voices heard and to have influence on whatever body is going to be making the appointment, I think that there would be the same problem whether it was election or appointment, in the [end].

AUDIENCE MEMBER: I agree with you, as far as I think it's better, for the most part, that judges are elected. But one of my biggest concerns is no judge ever runs on the platform [stating]: "I'll protect the defendant's Constitutional rights." I think many times, and in many ways, judges are very reluctant to find the opportunity [to side] with defendants [or find them] not guilty, for fear of being deemed "soft on crime." I think that poses an extremely troubling situation for society at large because, particularly in Municipal Court, when all the trials are bench trials, my tendency is to believe that most judges are, for the most part, [going to] rubber stamp the case. How would you respond to that?

JACKIE GLASS: I've been a criminal defense attorney for the last 12 years, and I've actually had motions ruled in my favor. Down in Muni Court, I've actually won a number of trials. From your perspective, and I'm – in Muni Court they handle misdemeanors, not that they haven't been important to the people who come and who are charged with these misdemeanors – but it's not a court that's so high profile that there's somebody sitting there watching what the Municipal Court judges do all the time. I know what the issues are, as far as what comes before us, in protecting people's rights. I have to be able to do what's right, fair, and just. That's what judges do. So I know that we have to be mindful of what is politically correct and can't be so worried about the criticism you're going to come under because of your decision – I've got to be able to live with my decisions. And I wouldn't be able to sleep at night if I made a decision for political correctness as opposed to what's right for the person who's appearing in front of me.

AUDIENCE MEMBER: I'd like to follow up. You said that you wouldn't believe you'd have the same opportunities if this was an appointment process. Why?

JACKIE GLASS: Well, I wasn't politically active then. And I wasn't in the political process of knowing the people who make those decisions. And I've been here 24 years. I don't have any connections to anything. I'm just me. And so, I think that the only way that I was going to ever become a judge was to run and be elected by the people, as opposed to being appointed.

AUDIENCE MEMBER: There's been a lot in the news about campaign contributions, but how would you, as an elected judge, feel about an across-the-board cap on campaign spending? The reason I'm asking is [that] we think there's a lot of voter apathy and specific situations in the state of Nevada to get the people out to the polls. The people who do show up – some just pick the name they see the most, whether or not that person is qualified. How would you feel about having an actual cap per candidate on campaign spending? For



example, \$50,000 per candidate [that] can [be] spent on advertising. How would you feel about a cap on those funds?

JACKIE GLASS: If it was equal to everybody, I don't know that I would mind a cap. I still think that what made the difference in my race was the grass roots. In this election cycle, there were 21 District Court judges that were up at the same time, and then there were six Family Court judges that were up. So that's 27 judges that are all out there with their hands out saying, "I need a contribution, please help me."

#### IV. THE CLARK COUNTY BAR/LAS VEGAS REVIEW-JOURNAL SURVEY OF CLARK COUNTY JUDGES

JEFFREY STEMPEL: There is a bi-annual survey of the Bar of the judiciary that's conducted by the *Las Vegas Review-Journal* and the Clark County Bar Association. Our next speakers have been instrumental in that survey.

DONALD CARNS:<sup>11</sup> I'm here principally to introduce Nancy Downey. It's really her work. But I would like to tell you just a little bit about the history of this and how it came about. Actually, I was a Journalism major for about a year-and-a-half back in undergraduate days, and I think I got a little ink in my blood. So when I came out here, I just sort of fell into a – I had a background in survey research – I kind of fell into a role at the *Review-Journal*. Initially through [Managing Editors], A. D. Hopkins and then Tom Mitchell, I met you, and I think even [Publisher] Sherm Frederick came down and blessed it at one point or another. But, what I was asked to do was to design up a system whereby we could evaluate the judges in town by using lawyers' input.

I initially designed the evaluation form. We had various conversations about it. We got it down to a point where the *R-J* felt that it was appropriate – and I did too – and the first couple of those bi-annual estimations or data collection routines took place. I, of course, faded out of it at that point and Nancy came in. Nancy's a professional survey research person, and actually one of my students at UNLV – one of the best in fact. But, I in no way take credit for her work. She has been providing data for us, on a biannual basis, of how lawyers look at judges from the point of view of a number of issues. And this has, of course, been published in the *Review-Journal*, as well as [been made] available in a report form from Nancy's shop.

NANCY DOWNEY:<sup>12</sup> As Dr. Carns mentioned, we started doing formal reports in 1994, and I wanted to tell you about some of the challenges that we face from a methodological standpoint. First of all, the survey instrument must be a blend of cost-effectiveness regarding printing, mailing costs, data entry, efficiency, and ease of completing the form, to encourage high response rates. We sought a format that people would complete, that would not take very long, and that would also be clear and understandable.

We also had the challenge of increasing the level of trust in the process itself, particularly in the process of anonymity. And – if you are not familiar with the questionnaire, I have copies up here that you may review – but we ask

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<sup>11</sup> Professor of Sociology, University of Nevada, Las Vegas.

<sup>12</sup> President, Downey Research Associates, Las Vegas, Nevada.

the attorneys who receive these to sign an Affirmation Card, showing that they are the ones that filled it out, because obviously we have to safeguard against fraud to protect those who are being evaluated, while at the same time asking the respondent to trust us to live up to our end of the bargain – so that when we receive the Affirmation Card, that proves that that individual is qualified to complete the ballot question that we sent out. We separate the names from the ballot, and then at no other time are we able to identify who made the comments and completed the responses, so that all of the data that we select then just becomes numerically merged into the entire report.

The rules are stated in the instructions. After mailing, there is an honor system requiring the parties to be responsible and act with integrity and neutrality. Despite the instructions, there are unusable ballots. For example, in 2002, 2,986 were mailed. We received 713 back, but only 676 of those were eligible for inclusion.

And, [of] the ballots that came in, four percent were returned without the required affirmation. We did not tabulate those. About one percent were received after the designated closing date. And obviously when we have a deadline – we have to report this so the newspapers can have time to review it and come up with their stories – we have to have a cutoff point, and we also have to look at the overall percent of return and decide if this is representative of the population that we're sampling.

The percent of return in the state is pretty consistent, between 21 percent and 27 percent. It fluctuates just a little bit from year to year. And those are just approximate. I say that it's approximate because the actual number that we send out, compared to the number that we receive, which is how we calculate that percent of return, does not give the true picture on the number who might be eligible to complete the questionnaire to begin with. The response rates are actual rates of return, and do not reflect the true rates of response. It's difficult to determine the size of the eligible population of attorneys because of self-selection as to eligibility. Attorneys decide, once they read the rules, whether they are eligible. They also need to decide how much they appear before certain judges, how knowledgeable they feel about those judges, and if they feel qualified to respond. So we have not been able to track or compare what the actual population size is that we're surveying. So there's a challenge that we could try to work on in the future to get more specific.

The way they return those questionnaires is interesting as well. Twenty-five percent return them in the first three days. So we know that there is some interest, and there is a conscientious attempt to not procrastinate – to get these things in. But, of course, the rest of them, 75 percent of them, are not returned within the first two weeks, but they trickle in over a period of four to five weeks. So we do like to allow enough time for them to have the time to return.

Another challenge is developing rating scales and ways of comparing each judge's score to the others. So an adequacy score was added, I believe, in the year 2000 study. That was a way to track the judge's overall performance on all questions, rather than having to compare each judge on each and every question that was asked. So the adequacy score is really the cumulative average rating. It's the sum of the "adequate" and "more than adequate" categories of

responses divided by the total number of questions. So we get kind of an average score for the whole questionnaire altogether.

We also calculate a retention score – the number of people that believe the judge should be retained versus the people that believe they should not be retained – and we put those in a hopefully user-friendly kind of chart, along with the retention scores, to compare judges year-to-year as well as between judges. So it's a good way to track someone's evaluation scores if they have been in office for a period of years. You can see if there's been an improvement or you can see if there's been a decline.

AUDIENCE MEMBER: Who pays for the surveys?

NANCY DOWNEY: I was contracted by the *Las Vegas Review-Journal* and the Clark County Bar Association, in combination, so I'm not sure exactly what percent each of those pay into that. I consider both to be my clients.

AUDIENCE MEMBER: Have you ever considered asking the people that appear in the arenas themselves, besides the lawyers, because it's like it's a little bit of a fox watching the hen-house going on when you ask the lawyers to, you know, judge one of their own or rate one of their own. Have you ever considered the participants, people that have appeared before them?

NANCY DOWNEY: We haven't so far, but I would be happy to extend the scope of my research because it's something that we could do. It would be another challenge to include that and compare the data. It certainly is feasible, but whether or not the clients want to include that as part of the research process is up to them.

JOHN CURTAS: I have to disagree with the last questioner. I'm one of those chickens that's watching the foxes. After biting my tongue for two years, I look forward to getting this thing, and I think, both positively and negatively, this is one of the most critical and important things that's done in this county, with regards to the legal system, and I applaud you for the work that you're doing. I am appalled when I talk to lawyers that throw them away or don't send them back. And I rail at them. So I'm doing my part to get that 25 percent up as much as I can.

I do have one suggestion. We have at least three offices now that are making decisions that are very impactful, and they are appointed. They are not elected in the same way. They are appointed by the judges. They are the Probate Commissioner, the Discovery Commissioner, and the Arbitration Commissioner. I would very much like to see those offices included in your next and future surveys.

AUDIENCE MEMBER: I would just like to know, is it open to the public? Do you have the reports that people can go and request?

NANCY DOWNEY: My reports were sent directly to the Clark County Bar Association. I retain all of the database files and the reports on disk, and I have been asked to count this for access at the County Center for Survey Research here at UNLV. That is in the process of being setup. In other words, researchers can actually get to see the database as well, and perform further studies on this. In fact, what I don't do in here, and which people have asked me to do later, is sometimes compare responses by gender – let's say – or compare responses by the number of years that the attorney has been in Las

Vegas. Those kind of things, we can always do cross tabulations to get some more information.

CAM FERENBACH: I just want to say – and I'll introduce myself – I'm the President of the Clark County Bar Association this year. It's a volunteer job. I don't get paid to do it. In any event, we end up with a box full of those after it's over. We send each judge one, you know, but they're available for five dollars at our office (530 South Ninth Street, corner of Bonneville and Ninth in Downtown Las Vegas; 702-387-6011) and as long as they last.

DONALD CARNS: Just chat on that. If an attorney were to submit a false affidavit, he's in risk of losing his law license. I can't think of [a] rational attorney who would do that just so that they could take a jab at somebody on the survey. I appreciate the point that it's fair to evaluate the trust and verify, but I think the risk would be so high that, even if a lawyer were to attempt to editorialize and submit an inaccurate affidavit, I can't think of anybody who would do that.

NANCY DOWNEY: The main reason we validate those by Bar number is so that we don't get, let's say, 10, 20, 30 surveys with the same Bar number. Because, obviously, we don't check signatures or anything like that. But if we happen to get too many – kind of ballot box stuffing – we would notice that.

AUDIENCE MEMBER: Has there been any sort of systematic follow up with, you know, segments or things like that, or stratified samplings to try to get a picture of whether the respondents are different from the nonrespondents? For example, would it be possible that plaintiffs' lawyers respond in inordinate numbers, or that defense lawyers respond in inordinate numbers? I'd be curious as to whether there's any relationship or whether anything can be done to make sure that it is a representational process.

NANCY DOWNEY: I did not compare those to see if they were representational, but we do have a table where we talk about the type of practice of the respondents. Some people elect not to answer that question. Sometimes, we don't even know the gender. In fact, there were 4.6 percent that did not tell us if they were male or female, and we have no way of knowing that.

AUDIENCE MEMBER: What if we reverse the process and have judges evaluate the attorneys?

CAM FERENBACH: I think Dick made the first comment that you do that everyday. When you go in and argue a case in front of a judge, you get some type of feedback pretty quickly. But the other thing is, we do have the Martindale-Hubbell rating system, which judges are participating in, which is an on-going process. Of course that's a commercial enterprise, and is not fool-proof, but is helpful.

JEFFREY STEMPEL: Cam Ferenbach of the law firm of Lionel Sawyer & Collins, the President of the Clark County Bar Association, is already known to the audience. Joining Cam is Constance Akridge from Wadhams & Akridge. Connie is the president-elect of the Clark County Bar as well as an active litigator.

CAM FERENBACH: Let me just take a minute here and explain about the Clark County Bar Association because we have quite a cross-section of people here. There is the State Bar Association, [which is] the State Bar of Nevada. That is the organization that administers the Bar Exam. If you're

going to be an attorney in this state, you have to pass the Bar Exam and be licensed by the State Bar. [If] you violate rules of ethics, you're subject to disciplinary procedures from the State Bar of Nevada. That's a completely separate entity from the Clark County Bar. In fact, it's pretty much an arm of government. It answers to the Nevada Supreme Court.

The Clark County Bar Association is strictly a voluntary organization of lawyers that, frankly, I think and if you go way back in our history, it was an excuse to go have lunch – like a three martini lunch once a month – it was kind of like a lodge, really. A bunch of old boys that, in fact, used to meet at an all-male club downtown.

So our history may be a bit tarnished, but we have come a long way. We really have. And now we are very proud to say that we have more [than] 2,200 members in the Clark County Bar Association. They pay dues as volunteers [and] they support our programs. We have various volunteer programs in town.

You may have noticed that the Downey Research Center sent flyers out to 2,900 lawyers, not 2,200 lawyers. The reason for that is that Downey Research sends the flyers out to every licensed Nevada lawyer in the County, who has an address in the county that happens to be their residence address in the county, because that's the way the State Bar organizes itself – by residences, not office addresses. And the reason they do that is, of course, that some law firms have offices in various places, and attorneys go back and forth, and because the State Bar elects their representatives by where you live – they're organized by residence. Last year there were 2,900 licensed Nevada lawyers of record with residence in Clark County. Each received a survey.

As to the issue of impact, I have practiced law for more than 20 years, so I was a lawyer in state court for 10 years when there was no survey. I've been one for about 10 years now when there was, and I can tell you from a lawyer's point of view, there's a world of difference from my earlier life as a lawyer in court. During the first ten years, of course, I was new or judges didn't know me and all that. They didn't really care much what I thought about how they were doing their jobs. They were the judge, I was the lawyer – like it or lump it. If I needed to sit there for a half an hour before they come on the bench, well, that's too bad. You know, I'll just wait and bill my client for that and, you know, they're not going to read the briefs and just decide it based on how they feel in the morning. I was not going to stand up and argue with the judge, and say: "Hey, you're not doing your job right." I mean, I'm going to resemble Rumpole of the Bailey, with a certain amount of groveling.

Who of us knows, really, how many voters read the *R-J* poll and how they're influenced by it? But you know what? The judges are concerned about that. And it made a big difference in the way they treated lawyers in court. Now, whether that's good or bad for society, I don't know. But I can tell you I'm a big supporter of this program, and it's made my life better, and I do believe it has enhanced the operation of the judicial system and maybe even access to justice issues.

The Survey is bi-annual. It presents a significant burden on the County Bar to run this program, but again I think it's a very good one. During the Fall 2002 election, I would conservatively estimate that among my friends and acquaintances in town, I probably got 40 calls asking me: "who should I vote

for, for judge?" You know, it makes sense. Laypersons just do not know who the judges are. The judges appreciate the impact of the Survey and have become accountable.

Independence and accountability present twin issues in tension: what things are important to accountability? What things are important for independence? We've designed the survey to try to make judges more accountable, but to be fair as well. Occasionally one hears rumors of concerted efforts to respond to the Survey in a way that will hurt or help certain judges. But attorneys have a professional responsibility to be honest, particularly if the lawyer signs that affidavit. The Clark County Bar Association that I know, and the lawyers that practice here, make it hard for me to imagine that that would go on, but feelings run high and some people aren't happy with what's said, and rumors get started.

The system works on the integrity of the lawyers, who are officers of the court, doing this the way they're supposed to do it. My belief is that, on the whole, everyone has done it. I mean, I don't know all the judges, but I've read the reports. More often than not, I pretty much agreed with the numbers that came out.

There can be concerns over the overall score and the Survey format, when it is published, in which both a positive comment and a negative comment are given about each of the judges in the Survey. The comments are anonymous. They come from articulate people – lawyers that talk for a living – and they can [say] some real zingers, and it's hard for the newspaper to resist printing those negative comments. Unfortunately, you may have a judge with a 98 percent rating for being fair on gender, but this is tarnished by an isolated comment that this judge "never rules for a woman lawyer." How often will the average reader look at the the numbers and see: "hey, this is a 98 percent fair rating?" Instead, they may remember the isolated comment that this judge "never rules for women."

CONSTANCE AKRIDGE: Methodologically speaking, we could turn those comments into a number code system and rate them, you know, on a certain scale as to positive or negative, and give you some statistics on that. Currently, however, we don't analyze those comments. We just turn those over to the client.

CAM FERENBACH: Or at least some way to make sure that, if the comment is reported, it be vetted to make sure it's consistent [and] overall fair.

AUDIENCE MEMBER: Why don't you do this kind of survey for federal judges, or do you really believe they are so completely immune from being responsive?

CAM FERENBACH: When we had our last meeting with ABA, doing up the survey, it caused me to think that the survey really has another function, and I think making this handout available to all judges partly serves that function. It's a feedback mechanism to the judges. I mean, there's very detailed information in there, and if they want to take it for what it's worth, they can get feedback. So for the federal judges, it would be a way to give feedback to them even though there's no election going [on]. I do happen to know, without going into any detail, there's not a lot of interest in the federal bar, to have it be included in the survey, and [there is] the concern that it might create new

problems. Federal judges are rated by other organizations. Surveys are done, information is available, whether it's done through the government or commercially. There is evaluation on the national level already. The *Review-Journal* would [probably not] be that interested in it. Maybe they would, but I don't think the County Bar would.

AUDIENCE MEMBER: Do you feel that judges should be elected or appointed?

CAM FERENBACH: Overall, I would prefer something like the Missouri Plan or Modified Missouri Plan. The main reason is that there have been some elections over the years, and maybe they can talk about them some more, that really degenerated into – when you have one person running against an incumbent, you know, all kinds of accusations get made, it becomes personal and all this sort of thing. I think that if you have this appointment process with the proper safeguards, and have it be open to any qualified attorney, such as Jackie Glass – I think she's downplaying her ability to be able to get appointed if she really wanted to under an appointment system. But, be that as it may, I think an appointment system, with then some type of retention [election] where you either retain or not, [is preferable] so that if the judge, for whatever reason, is perceived by the electorate as not doing his or her job, they could be removed and then, you know, someone else could take the place.

When you have direct elections, then you have the fundraising thing – and maybe this was supposed to be an attorney's perspective. I don't think I have to say much what the attorney's perspective is when there's 27 judges running and every one of them is calling up your law firm wanting money. You know, it's just unseemly; it creates all the wrong impressions to lay persons thinking everybody's got to pay off the judges in order to get a fair shake. It's not true. I believe that Judge Glass was accurate, and really, every judge that I've appeared in front of is trying to do the best job he or she can do and fulfill the oath. But it certainly creates a terrible appearance when, during these election cycles, every lawyer in town that goes to court feels pressured to give money to judges and show up at these functions and make sure that, you know, it's not because you think you're going to get favoritism by giving them money, but somehow a concern that if you don't give them money and then everybody else does, you know, it just creates a very bad view.

AUDIENCE MEMBER: How about term limits or a single, long term for judges? Or, you can have judges serve your tour of duty. After you've been a lawyer for five to seven years in the state, your name's put in a lottery, you're picked to serve the term, four to six years. Your name is removed from that lottery after you served your term. That way there's no problem with fund raising or running for reelection.

CAM FERENBACH: It would almost be like jury duty for judges, only a little bit longer. That's an interesting proposal. You would have to consider the issue of compensation. There are a number of federal judges making a lot less money now than they were when they were in private practice. But of course they have the long-term protection.

AUDIENCE MEMBER: Yeah, as a member of the voting public, one of the problems I see is evaluating the candidates. There's no way for the average voter to determine the competency of the judges seeking reelection, and we

know that there are incompetent judges. And we know the attorneys know the incompetent judges, and we know the judges know who the incompetent judges are. But this has never crossed course so that I can make a decision.

JOHN CURTAS: I think, by and large, there is a lot of information out there. I mean, I saw all sides as a candidate – and as a candidate you subscribe to everything and you watch numbers everyday, whether you want to or not. A voter who pays attention to both our newspapers, and the TV reporting, and watches the commercials, can get a pretty informed education about the qualifications of the judicial candidates. And [they can] read the survey. I mean, you have to make the effort. It's not as easy as lining up the partisan of [Democratic congressional candidate] Dario Herrera, you know, versus [Republican Congressman] John Porter to see what they stand for. You have to dig a little deeper, you have to pay closer attention. But, by and large, I would say I was impressed by the media's attention to the judicial race, including the judicial poll. And any voter who wanted to read everything, and wanted to go on the Web and see things and pay attention to these surveys, could find out an awful lot about the candidates and make – maybe not as informed a decision as Cam Ferenbach can make, or Connie Akridge – but certainly an informed decision based upon what the media is putting out there about the judicial candidates.

AUDIENCE MEMBER: I worked in polling places, and [have] seen the voters come in, and some of the questions they ask. The average voter – it's the number of people who do the research to determine whether this person is competent or that person is incompetent. It turns out the overall voting public walks in – I had a lady walk in; she says, "Where's the button I push for the Democrats or Republicans?" This is the mentality.

CAM FERENBACH: I think in some states – there are about a dozen or half a dozen jurisdictions that have partisan elections. What I argue is: if voters really are relatively clueless, particularly when we have a cavalry charge of 27 offices or something, maybe party cues are better than nothing. You know, [to] say: "I'm a Republican, I'm a Democrat" means something.

CONSTANCE AKRIDGE: I actually don't have anything to add to what Cam presented about our, CCBA's, involvement in the judicial polling process, but I do have some documents that I'd like to distribute that I think would be helpful to everyone, not only for the afternoon session, that are more about judicial appointment versus election. And one is the poll that Judge Pro mentioned this morning that the ABA did regarding judicial impartiality, which indicates that, by and large, a majority of people prefer to elect judges. 75 percent said that elected judges are more fair and impartial than those that are appointed. And there are a number of other findings that I think you will find interesting. There's also a sheet in here regarding where we are in terms of – where Nevada is in terms of – whether we appointed or elected. And we're among seven other states, I think – or 17 other states, that have the elections – actually 14 other states. We're within 14 other states. [The sheet also notes that] seven states have partisan elections and so forth. This is kind of off my topic, but I thought it was important to bring this information. The other thing I wanted to hand out was an article by [*Las Vegas Sun* reporter] John Ralston showing the contributions to judges in this year's campaign.



John Ralston notes in his article that Mark Gibbons raised \$244,000. These are all issues, I think, that go to the perception of impartiality, and I think it goes to why the Clark County Bar Association has decided to participate in the poll and do the judicial evaluation. So I'm going to hand these out.

#### V. METASTACIZED DEMOCRACY: THE ILLOGICAL OF JUDICIAL ELECTIONS

DMITRI SHALIN: By way of transition to this afternoon panel, I want to share with you a recent experience. I was at a bar mitzvah three weeks ago, and looking through the Torah, and came upon a passage where God instructs judges as to how they should do their job. And please forgive my Hebrew. It literally means, "You now as a judge should not recognize the face" of the person appearing before you.

The commentary suggests that you will not show favoritism, even on fear of punishment of financial liability [or], obviously, death. But it is implied you are to render judgment that is impartial because the judgment is not yours as a judge. The judgment is God's. I'm not trying to breach the walls between church and state here, but I think the issues involved are very relevant for all of us today. [The issue] is: How can you pick up the phone as a judge and call a firm or a lawyer and say, "I need an extra 50,000 dollars; please send it in." And then when that person or proxy comes before the judge, [how do you] not recognize the face. Is it possible and realistic?

Our panel will address these issues to their extent. Ted Jelen, Professor and Chair of the Political Science Department here will introduce the panel.

TED JELEN:<sup>13</sup> Thank you, Dmitri. Our first speaker, of course, is John Curtas, a member of the Board of Governors of the State Bar of Nevada and a candidate for judicial office during the Fall 2002 elections.

#### VI. ANOTHER REPORT FROM THE TRENCHES OF JUDICIAL POLITICS – AND A CALL FOR REFORM

JOHN CURTAS:<sup>14</sup> I was looking at the report, the monetary report that goes around there. I notice I was put in the middle to high category of fund raising among those candidates who lost.<sup>15</sup> I begin by discussing fund raising because it is so important in the election process – too important for the good of judicial elections. There are three different reports candidates must make for disclosure concerning their fundraising. The last one was filed October 30th, and then one has to be done in January.

Those reports are fairly accurate for some judges and some of the participants in the judicial races, and they are very inaccurate for others because there's an awful lot of money [that] comes in after those reports are filed, especially at the very end of the races. Lous Lapim, editor of *Harvard Magazine*, has a great quote about politics. He says: "there are two important things in

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<sup>15</sup> During the Fall 2002 Nevada Judicial elections, Curtas ran unsuccessfully against incumbent Eighth Judicial District Judge Donald M. Mosley.

politics: money and . . . I forgot what the other one was.” A similar aphorism, that is more frequently quoted, is from Jesse Unrow, former Speaker of the House in California, who said: “money is the ‘mother’s milk’ of politics.” Nowhere is that more true, and nowhere did I get a better pie in the face about that, than when I decided to run for judicial office.

I got in late, unlike some people. I’m kind of proud of the money I raised because I only had a few months to do it and I raised more than people who started a year before me. Unlike a lot of people, including Judge Glass, I didn’t put an incredible amount of my own money into the race. What those figures misrepresent, not intentionally, but don’t figure into, is the loan that candidates frequently make to their campaigns when it finally hits home that the entire race in getting elected is entirely about money, and whether you are elected or not comes down to whether you are willing to raise, and ultimately spend, more money than your opponent. Some people decide to write very large checks, as Judge-Elect Glass did, to the tune of \$155,000 to her campaign. That put her in [for] over \$300,000 that she spent on the campaign, which was more than incumbent judge Jeff Sobel spent – and he raised and spent a lot of money.

Most of us don’t practice in that rarified air. When you decide to run for judge, the process goes something like this: you announce, after talking to a few people, and everybody’s very happy. You get a lot of nice phone calls, you talk to a few people, you make your obligatory and very pleasant pilgrimages to the press, talk to the reporters and the editors and [ask] them if they’ll take your phone call [about] why you’re running, and hope you get some favorable publicity along the way, knowing that you’re going to get some from both sides, and that’s just the way the game’s played.

Once that post announcement glow subsides, then the reality hits home because everybody then comes to you – political pros, family friends, other lawyers, other judges – and they all have one, and only one, question for you: “How much money are you going to raise?” Nobody wants to know how good you are. Nobody wants to know that I’ve tried more cases than Justice Becker or that I’m anti-death penalty and she’s pro-death penalty or anything like that. Nobody asks you those questions. The people in the know want to know one thing: how much money can you raise and how much money are you going to spend to get yourself elected judge.

That simple equation, as you find out, which is true in 95 percent of the races, means that money inevitably has perverted and corrupted the system we operate on. And any time you hand a dollar to somebody, you alter your relationship with that person – whether you’re paying them to cut your grass, or you’re buying some shampoo from them, or you’re giving them a dollar to help with their campaign. Everything changes when money changes hands. And it’s folly to think otherwise.

To have that be the underpinning of every judicial election, and that corruptive influence being the underpinning of every election, and not recognizing it is just pretty much, you know, ignoring that giant pink elephant in the middle of the room. And the people who defend the status quo, I think do so generally because as incumbents, or people that have won, they find that worked in their favor.

I disagree totally with Jackie Glass. Running for election is not about glad-handing or endorsements or grass roots campaigning. It's about spending money for television advertising – and that is all it's about. Jackie outspent her opponent. She won. Oddly, Jeff Sobel, who is a friend of mine – so is Jackie for that matter – Jeff Sobel spent a huge amount of money, but he ended up getting fewer votes in the Sobel-Glass race than I did in the Curtas-Mosley contest, which is a bit scary. But then again, despite whatever bad press I received, nobody ran a television advertisement showing me in my underwear (which was in one of the anti-Sobel TV spots run by the Glass campaign), which would have got me even fewer votes.

Everybody comes to you when you run and they say: “How much money are you going to raise, how much money are you going to spend.” From there, it jumps right into: “You’ve got to start dialing for dollars.” I think *Las Vegas Review-Journal* columnist, Steve Sebelius, writes about this and I got that quote from him. You just sit at home, you get lists of lawyers, clients, friends, family, acquaintances, and you just work the phones day in and day out, begging.

You learn three things when you run for office: You learn how to beg; you learn how to lose weight; and you learn who your friends really are. Those are probably both the good and the bad parts. But it's all about getting that money in the door, and the money isn't for anything but television advertising.

So, if we're going to look at why we elect judges, we want to look at the big picture here. You've got to cross your philosophical threshold. And that threshold is that we like the fact that we elect judges based solely upon [the idea that] he or she who has the most television advertising wins. Because, invariably, that's what it comes down to. It comes to – and if we're happy with that, which I don't perceive the public really is – then the status quo should remain. If we're not – and there are many reasons not to be happy with it because, when it comes down to just who has the fanciest commercials, or who can show their opponent in their underwear, or who can beat somebody else on the head with an issue, rather than what [the] elected office should be about, which is qualifications and experience, [we have reason to be unhappy]. We're not talking partisan elections here. Judges aren't supposed to be taking partisan positions. It should all be about those things; instead it's just about spending the cash for political commercials.

If we make the threshold determination that we want it to be about more than that, that we're setting our sights higher, both as an electorate and as a judiciary, then you have to take money out of the equation. The shocking thing, which a lot of my friends don't agree with, [is that] everybody expects me to get up – and I've given this speech a couple times now – and be against the election of judges. I'm not against the election of judges. My philosophy is that you want experience and qualification as a judge. I'm against inexperience and unqualified people being judges. That's what I'm against. I'm not against the election process.

It seems, in this state, we have two ways of improving judicial competence. We've got the money leading to fancy television commercials and you get elected, in which case you get a [judgeship]. And I know the people here. I think we have a supremely unqualified judiciary in this state. Well, maybe not

throughout the state – I don't know the whole state. I know Clark County, and I know a lot of judges, and I know all of the candidates, and I think there is a huge number of sitting judges at every level who have no business being there. And that's because the people that are there may want the job worse than the person they beat, or they may be better at raising money than the person they beat, but that doesn't mean that they're better than the person they beat. So if we all start with the understanding that we want a qualified judiciary, and an experienced judiciary, you have to figure out a way to get money out of the equation.

One way is to have judicial appointments. But unfortunately, the way that works in this state, I think, is as corrupt as the corrupting influence of money. It's as corrupt, because we have supremely unqualified judges being appointed by our governors based upon who wants to do a favor. Just because a Governor wants to do somebody a favor isn't any reason to appoint a person to such an important position as a district court, or even municipal, judge.

As I was driving here, [I spoke to] one of my clients, a businessman in town, who reminded me that he uses the judicial system on a regular basis. He's a contractor. The fellow's name is Duke Phelps, Randall Duke Phelps. He's the president of Morningside Homes. He builds houses all over the County. He is, both by choice and sometimes just by happenstance, in the judicial system on the basis of mechanics liens, construction defect and collection actions. He's a legitimate business person who has a lot of hands-on acquaintance with the courts, and his point was: you can't have something as important as a judicial position where people are making life-changing decisions for the people in front of them. You cannot have people sitting there in those seats who did not have the gumption – you know, the education or the experience or the personalities – to make these life-changing experiences, and experiences that effect people on the deepest emotional and financial levels. Because of corruption of our judicial system by money, we have a system that encourages that. But the appointment process can be just as bad. Our politicians have been more atrocious than the people that are getting elected.

Another consequence about running for election is that you develop skin as thick as [an] alligator's hide. So you can just stand up here and take the heat a little more than other people might.

You have to consider reforming the system in a way that eliminates corruption, and accentuates experience and qualifications. And running a campaign on the basis of cash isn't doing it. And having governors backing backroom deals isn't doing it. So something has to happen that, I think, takes maybe the best of both of those systems – giving it to the electorate to throw people out or put people in, maybe in a way that money doesn't play such an important role, or shining the bright light of the press and the public on what happens in the judicial appointments.

On the whole, I would run again. I believe in the elective process of judges and electing judges. But I think you have to figure out a way to do it whereby the qualifications and the experience of the candidates, and what separates them from their opponents, is placed before the electorate in an even manner so educated decisions can be made.

If that can happen, then I think elections are fair. I think somebody said a little earlier that the elective system opens the doors for people who might not otherwise be able get into the system. Well, I don't know if that's really always good a thing. Just because you want to be a judge doesn't mean you deserve to be a judge. Just because you have money, or have friends who have money, doesn't mean that you necessarily have the capacity to make the decisions that affect people's lives like a judge does.

I'm not calling for an end to judicial elections. [I am] just calling for a system that is better than the one we have now. I have practiced under the Missouri plan. I'm also licensed in New York and Connecticut and Kentucky. Kentucky elects judges just like we do. It's just wide open and crazy. Connecticut and New York have much [more] dignified systems. And I will say, having practiced as an experienced lawyer in both those states, the judiciary in those states is held to a much higher standing, in respect to the judges, by the lawyers and the public, than it is in this state. So what we have here is a system that I think is corrupt from within. We've the capacity to change it, but we have to figure out a way to end these corrupting influences. And unfortunately, it's going to take some radical thinking by greater minds than mine to do that.

TED JELEN: Thank you. Our next speaker is Tom Mitchell from the *Las Vegas Review-Journal*.

## VII. ELECTIONS AS A CHECK ON UNANTICIPATED FOLLY

THOMAS MITCHELL: I do a monologue everyday, so I prefer a dialogue where I can get out and get some people asking questions like they did this morning. But I would like to ask a few questions. Some of the topics that I heard this morning [were] things like [concerns about] objectives, civility, and public discourse.

Since when [is civility a concern]? Thomas Jefferson and the Founding Fathers never [experienced] any civility. If you read what the press said about them at the time, they were vilified. The [press] said things about them and their parentage and everything else. And also, it seems to me, [that it's] human nature. When you sit around and you see a problem, you want to fix it. Everybody wants everything to be foolproof. I've got news for you: the fools keep finding better ways to circumvent the system every day.

What you need to do is get a system that, overall, is self-correcting. Things are going to go wrong. What my role is, in the press and in a democratic society, is to go out, look, and shine a white light. And over the years, I've shone a white light on things that I felt were serious problems, and the readers and the politicians look at it and go: "who cares."

One of the things that I keep hearing, which is an underlying factor in all the discussions, is whether we should elect judges or should appoint judges, whether or not there's too much money as a corrupting influence, or [whether] TV is an influencing factor. It comes down to, at the bottom line, that the voters are just too gosh darn stupid to figure out who the best people are. Well, maybe the answer is to educate the voters better.

Now, to get back to the fundamental civics in high school and college, I should do a better job. I mean, these are some of the things we need to think about before we decide to throw out the baby with the bath water.

Regarding appointments, anybody who's worked in Louisiana, like I have, know that appointments – the term patronage – is not a dirty word. I think Huey Long's story was that he sat down with a reporter in a small rural restaurant, and put three glasses of water on the table. He said: "Here's how politics works in this state. I take three dollars from glass A, give a dollar to glass B, a dollar to C, and keep a dollar. I make one enemy, two voters and a buck."

The way to get around this is to have an educated public that knows how to go to the polls. We threw the amount of money that was being thrown out there. We know what to use it for, and [we need to] pay attention to what's going on.

TED JELEN: Next we'll have Michael Bowers, who is from the University of Las Vegas, on whether elections should be publicly funded.

### VIII. PUBLIC FUNDING OF JUDICIAL ELECTIONS<sup>16</sup>

TED JELEN: Our next speaker is the honorable Nancy Becker from the Nevada State Supreme Court.

### IX. JUDICIAL INDEPENDENCE IN AN ELECTIVE SYSTEM

NANCY BECKER: Thank you. Well, I've been listening to all of the debates today and none of them are new to me. There's one fundamental question that has to be asked and that's: what's the role of the judiciary under our form of government? And we've heard words like "accountability," as though an election is a means of accountability to the general public. We've heard the concepts of the merit selection and qualifications for upholding the office.

But when you look at when this country was founded, and what makes our country unique in the world – our system of government – it's the whole concept of an independent third branch, called the Judicial Branch of government, that is supposed to be independent of the Executive Branch, which are the people who enforce the laws, and the Legislative Branch, which are the people who create the laws.

You cannot be independent if you're beholden. Period. I don't know if you're beholden to a special interest group. I don't care if you're beholden to people who contributed to your political campaign. I don't care if you're trying to cater to the press. I don't care if you're trying to cater to the attorneys. That just doesn't jive with the concept of an independent judiciary, and the reason that our founders thought that an independent judiciary was so important was because they saw the role of the judiciary as being four things.

One role of an independent judiciary is [the] duty to prevent, or to be a check against, abuses of power by the other two branches of government.

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<sup>16</sup> Michael W. Bowers is a Professor of Political Science and Public Law at the University of Nevada, Las Vegas. Professor Bowers' comments are presented in article form following this Judicial Selection Forum. See Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107.

Abuse of power really is those two branches of government exceeding their constitutional limitations. Are they getting into things that the Constitution says they're not allowed to do, such as impeding upon the individual rights of a person?

For example, in an eminent domain case, it's our job to ensure that before the government can take your property, they must have a public purpose, and they must pay just compensation for that property. The Constitution itself gives the Executive Branch of government the right to engage in eminent domain, the taking of individual property for a public purpose. That right is in the Constitution – both the state Constitution and the federal Constitution. It isn't up to the judiciary to suddenly say: "hey, we don't like this concept. We're going to throw it out," because that would be violating our authorization. So that's one of the primary purposes.

Secondly, we're supposed to protect the rights of citizens from abuse of power by a majority. Everyone has certain rights in this country that can not be taken away from them just because a bunch of people got together, voted, and said we don't like you. That's something that the courts are designed to protect against. We're supposed to provide a fair and impartial forum for persons to settle civil disputes. We're not supposed to have judges who are pro-plaintiff or pro-defense. And, by the way, insurance companies do not contribute a lot of money to Nevada's elections; it's more proportionately trial lawyers.

Who does contribute? Construction companies and labor, either in money or in kind contributions. They're the persons that are going out and pounding those signs up, or distributing leaflets door-to-door. The gaming industry is a big contributor; doctors, probably more now than they ever have in the past – but they haven't in the past; plaintiff's lawyers – these are the people who are the big contributors to campaigns.

Judges are supposed to provide a fair and impartial forum for determining the guilt of a person accused of committing a crime. The concept of guilt beyond a reasonable doubt means it shouldn't be easy to convict people. It shouldn't be a situation of "well, hell, let's give him a fair trial and then go out and hang him" – that's an actual statement, by the way, from a judge from the Old West. That's not what judges are supposed to do.

But if that's what the people want judges to be, they can go right on, as they have for the last 50 years, in making the judges' races, the issue election process, a political process. [The process is political], whether it's the parties trying to stack the federal courts through the appointment process, whether it's special interest groups coming in to try and elect or defeat judges who support their particular point of view – no matter what the facts or the situation – including the popularity contest, [where a candidate says]: "Hi, I look good on TV."

We have gotten away from the concept that you want judges [simultaneously] to have the ability to do the job, the integrity to do the job, and the independence to do the job. Accountability doesn't mean "gee, a majority of the voters don't like you because you decided that separate and equal was no longer a valid doctrine." But that's exactly what would have happened to an elective judge, or a judge who had to come up for reappointment, in any state of this United States. If they had to say, "You know what? Separate but equal

doesn't work, because it's never equal, and it never has been, and it's time we stop fooling ourselves and we start looking at a doctrine that's different."

These issues are not academic or far removed in time and geography from our own history in Las Vegas. As anyone who was born and raised in this town knows, Jews were historically excluded from the establishment or put on its periphery. It was also a very racist town.

I was born here. People talk about, you know, the big changes in the traffic and things like that, but that misses the bigger picture. I'm much more proud of the community now than I was when I was growing up because of the changes in racial and ethnic attitudes in Las Vegas and the decline of prejudice. I'm proud of similar changes in the State as a whole.

But those changes could not have been made without the federal judges who were [not] subject to the people's will in making a decision. So there's that balance. When you talk about accountability, you're not talking about accountability because we don't like your decision. We're talking about accountability because you don't come to work on time; because you can't be fair and impartial; you are always pro-plaintiff; you are always pro-defense; or you're always pro-gaming.

That's the kind of accountability I'm talking about. That looks like you're a person [who], instead, makes opinions on the basis of facts and objectivity and recognizing that life is not black and white – and no issue ever is.

That's what I think people want in judging. And you know, you can hear all sorts of sound bites: "pro-death penalty," "anti-death penalty," whatever someone thinks is the "in-thing," "domestic violence," "DUI," "tough on crime." Those are sound bites. They don't tell you anything about the candidates. They don't tell you anything about the issues.

In my opinion, the number one goal is to preserve an independent judiciary, and then you design a selection process – whether it's appointed, appointive retention, or elections – to promote that concept.

So let's look at what it means to be fair and impartial. I've already talked about the concept that you don't want judges who just think in black and white. Life isn't like that. There aren't absolutes. And the law doesn't deal in absolutes. So you're going to have to look, as a judge, at a decision. And it might be a decision, for example – and I'll take a controversial issue [like] gun control. I get asked that all the time. "What's your position on gun control?" Well, if I answer that yes or no, people are going to infer I'm in favor or I'm not in favor. They'll infer that it's a commitment, that if I'm elected and continue to be on the bench, I'm going to vote one way or another if that issue comes up in front of me.

I never answer questions like that. Because, to me, that's making a commitment, a promise, and if I make that kind of promise, I can't be sitting on the case. I've already prejudged it. You don't want me on a case that's been prejudged. If you're the litigant, you certainly don't want that.

I understand that people want to know about me and how I look at that issue because it's important to them. It's an important issue. So how I answer it is within the canons of judicial ethics. We've already talked about the recent Supreme Court decision. That decision talked about announcing your position on issues, and I think that it's clear that the term "announce" is a pretty broad



term. The Nevada Canons of Judicial Ethics talks about comment on an issue that may possibly come before the court. Well, it's not much narrower; and I don't know if that provision could survive enforceability under the current Supreme Court law. It's not clear because the Supreme Court still left open the issue that judges shouldn't be making promises or commitments about how they're going to rule in cases.

To me, what that means, is when I'm asked about gun control, I can tell people, "Look, the Second Amendment does not say I have a right to own a gun. That's not the exact language of the Second Amendment. The Second Amendment [says] that the right to have a militia, which is a citizen army, should not be impaired. Now that clearly implicates issues of gun control. There's no doubt that that's an issue that has to be considered."

What I have to do is look at what the United States Supreme Court [says], because they're the ultimate judge of what that means in the federal Constitution. I have to look at what other federal courts have said, and I have to look at an individual statute. How far does the statute go? Does it ban the ownership of all guns? Does it simply say you have to register a firearm? Does it say that certain types of guns can be banned? How does that relate to the amendment? I can't answer that question. I can't tell you this is how I'd rule, because I don't know. Until those legal issues are presented to me and fully briefed, how can I tell you? How can I know if I don't know what the statute says? What I can tell you is that I don't have a problem with people owning guns.

To me that's not the issue. The issue is whether or not the Legislature [had the power] – because it's not my personal belief that matters. I'm not a legislator. If I want to go out and make those decisions, I should run for governor or legislator. The issue is: can the Legislature do that or is it overstepping their bounds under the Constitution?

What I'm trying to do is give you an example of how you ethically answer a question and discuss an issue, and you can discuss it in-depth without making a commitment or a promise. You can let people see you as a person, because the more you talk, the more they'll know about you. That's better than a sound bite like "I favor gun control" or "I don't favor gun control."

Sound bite judicial campaigning is bad because when you do it, either you've already made a promise, or you're lying to get a vote. It's one or the other. And that's not something that judges should do, and I don't think that is permitted under the canons of judicial ethics and elections.

We have at least touched upon partisan elections today. Well, you know, the whole view of partisan is that all of a sudden you're not independent and impartial anymore. If you're running on a party ticket, you're running on a party ticket. It's simply inconsistent with the concept of objectivity. Not to mention that you may be a Democrat or a Republican in terms of how you registered to vote, but you may not agree with all of your party's positions on every issue; so it really doesn't tell you much about a person. It tells you about a party slate.

Who's supposed to elect the judges: the party or the people? I don't think that partisan elections are a good idea if what you want is an independent judiciary. Because a party, whether it's Democrat or Republican or Independent,

takes a position; and they want their judges to rule in favor of those positions. It seems to me inconsistent with the concept of trying to be independent.

You don't want judges making decisions on the basis of public whim or popularity. "If I rule this way, I'll get re-elected." And as long as the voters encourage that concept, you will have judges that think that way, and they will in fact rule that way. And we do, in fact, have judges who rule that way throughout the country. So it seems to me that if you're going to elect judges that the issue is: how do we narrow these influences?

Public funding of judicial campaigns will only work if you can effectively deal with the constitutional issues. Wisconsin's plan has never been subjected to a Constitutional challenge and whether or not their limitations on spending will work – you get the money if you agree to limit your spending – is an issue because the United States Supreme Court says you can not constitutionally limit the amount of money by regulation, or by state law, that a candidate spends on a judicial campaign. You can limit the amount they accept from any individual group, or an individual, or a business entity. You may be able to regulate soft money – that is special interest groups buying in on behalf of the candidate. But there are limits to what you can do in terms of campaign financing reform under the Constitution.

Whether I agree or disagree with all of the rules of the United States Supreme Court on those issues, they're the rulings. They are the law of this land. So that may be a method, if we can fund it. But realistically, if you can't fund it, it's useless. And it doesn't prohibit the regulation of outside influences coming in and trying to put judges [under the label of] "conservative" or "liberal" or "pro-life" or "pro-choice," whatever division you want to take. One of the things that's going on in appellate races, Supreme Court races, throughout the nation is that people who don't live in the state are bringing huge chunks of money in to get their people elected. You really can't prohibit that effectively at the moment.

It does cost money to get your message out. I don't even mean a sound bite message, I just mean to have a website, to have informational sheets printed up about yourself that tells people who you are, to be able to do the kind of television or radio advertising, a mass media type of thing, that costs money. And if I want people to vote for me, I better dang well get out there and tell them about myself. I shouldn't just sit back and say, "Hey, you know, I just think you're going to vote for me because I'm the incumbent." I don't want to make that mistake. It may happen a lot of times, but it's a very foolish thing to do.

One of the things that the Nevada legislature looked at last session, and may look at this session as well as an additional method, is to limit the period of time in which judicial elections can raise money and, from that standpoint, thereby limit the filings. Right now, you have from January to May – there's like a five month period – and filing doesn't end until May. If you're running for judge, you know to start raising money in January. You're not going to wait until May to find out if you've got an opponent. It's just an unwise thing to do. Now some judges do, and I applaud them for it, but it's not the smartest thing to do in terms of "do you want to be reelected?"

One suggested reform is to narrow the amount of time for declaring [candidacy for] office to a three-week time period in January. Make sure everybody knows that's what it is. So if you're going to run for judge make your decision and let's move on. People who aren't opposed, then, cannot raise money. They've got to wait three weeks. You don't raise money after that fact, and you don't have these big debts. That's one way of trying to take it out. And in a contested race, you have to do as much as you can through the campaign financing reform.

One of the things that a candidate should – and that you should – look at is: how do they spread out the money? Hopefully you're trying to get as much money from as many different sources as possible so that you're not relying too heavily on one source of money. That's not always possible because people don't generally contribute to judicial races. The average citizen doesn't. They just don't think about it. But that is one way that you want to spread it out.

Try not to take all your money from a particular source, or [even] half your money. Try and spread it out as much as possible. Look at the amounts that you're taking from any given entity. If you're taking a certain amount of money from a very large business, but it's a small amount of money in comparison to the size of that business, it's a little bit different than taking that same large amount of money from a single individual and then sitting on that individual's case.

The appearance of impropriety is going to continue any time you accept money. I understand that. That's just one of the issues. As I said, be wary of people with sound bites. Try and get a candidate to really talk about the issues. Not to commit to an issue, but discuss it. What are the legal factors that play into it? What are some of the things that the United States and Nevada Supreme Court have said about these issues? If this is an important issue and they can't discuss that, then you need to say to yourself: "You know what? If this person hasn't been able to take the time as a candidate to really look into this issue, and know it and can discuss it, then maybe I don't want them as a judge. If it's not important enough, then maybe I need to think about it." And do it on more than one issue. So in terms of the fundraising and those kinds of issues, those are some of the things that have been talked about.

You try and raise this much money through general solicitation. That means you send out a general letter; you don't make personal phone calls. You try and get other people to do fund raising for you. Nevada is unusual in this respect. Most of the canons of judicial ethics say that you must raise money through a committee. Nevada does not. The reason that Nevada does not is because Nevada is a little more honest about it. Because raising money through a committee and pretending that somehow or other you don't know what money is coming in and who it's coming from when you've got to find the campaign reporting forms and when they're public knowledge – it's just silly. So we encourage you to do it as much through committee [as possible], as opposed to personal solicitation. But we don't just create a standard that we know everybody's sort of ignoring out there. Because why do it? There's no point in creating standards if it becomes a matter that's ignored.

I've always had a rule of avoiding large donations from people you've never heard of. And when you check the court records you suddenly discover

they have a case in your courtroom, or have suddenly filed an appeal to the Nevada Supreme Court. You just send it back because, clearly, it just arrived unsolicited. It wasn't part of a general fund raising party that you've had, you've never heard of this person, and suddenly you get a check for ten thousand dollars. Now, I think, any reasonable person kind of knows that "hey, you're trying to buy my vote." Candidates should exercise at least this level of scrutiny in receiving contributions.

If you don't disqualify yourself in a case, under circumstances where your campaign contributions are such that you really can say that this person probably has an appearance of impropriety and should disqualify yourself, than that can be a violation of a canon. But that's very difficult to prove because there are no standards.

The National Center for the State Courts just got done conducting a survey dealing with this whole concept of judicial selection – whether it's appointed, retention and so forth. It focuses primarily on judicial elections rather than on the appointive process, and these are some of the things that they're recommending. They do recommend that elections be conducted in a nonpartisan manner. They tell you that if you have a state that has a short term of office – they don't define what that is, whether that's four years or six years – you look at the term of office for judges and you say to yourself: "well, maybe the term should be a bit longer if you're going to have elections so that you don't have elections as frequently and, therefore, they don't have to go to the fund raising issue as frequently." But there's no suggestion as to what's short. I just received this yesterday – [it goes into] more depth later. But that's one concept.

It has been suggested that people are being appointed to fill vacant positions and allowed to serve a certain period of time in office in order to see what kind of a judge they are going to be before they come up for election.

The National Center for State Courts also stresses that you've got to have educational programs for the average voter. There's got to be a better mechanism, and it's not just individually going to voter meetings or conducting a forum like this. It really means that the bar associations, the government associations, and the media have to start promoting a concept [of] what you want to be looking for, [and what] are the questions that you want to ask. And this is how you want to start getting judges to discuss the issues. If you want to have a public debate, don't phrase it for sound bites. Phrase it to find out what this person really knows about this issue and how would they analyze it. Not because you want to get a feel for whether this person is going to rule in favor or against, but because you want to know if this person has any idea about the complex issues of the law.

You want to be wary of judicial candidates who just come back with sound bites like: "every person that commits murder is going to get the death penalty" or "the death penalty is absolutely immoral." Well, if you've got people who truly believe that, neither one of those people should be a judge. Neither one. Because they are absolute situations. They're not in accord with the Constitution, one way or another. You're substituting your personal opinion. Again, that's for the legislature to do, it's not for the judges. So you [do not] want debate. You want to be able to discuss the issues.

Another suggestion for reform is that non-governmental, diverse groups should monitor the election process, and help out with the local bar associations and community organizations, to start promoting a concept of judicial elections. What do you want to look for in a judge? How do you find those things out? [This can be accomplished by] publishing surveys and questionnaires that are not designed by a special interest group, but are designed to look at the judge's knowledge, background, and familiarity with the issues. What has that judge done in the community? [This is a] kind of educational process.

Another suggestion is that campaign contributions and expenditures be disclosed in timely fashion and be readily accessible. In the final analysis, it's a matter of educating the public: if you want a judiciary that's just going to vote in your favor, what happens when you're not the majority? You either want an independent judiciary or you want somebody who's going to be like a legislator or a governor who's going to represent you.

If you don't take steps to protect judicial independence and voter information in an electoral system, you may not have a true third branch of government. You don't want a false sense of judicial independence. You don't want judges who are not impartial or who are under the control of the power mongers or interest groups.

TED JELEN: These are the candidates for the judiciary recently, and we will start with Dianne Steel.

#### X. DIFFERENT JUDICIAL PERSPECTIVES ON CANDIDACY AND EVALUATION

DIANNE STEEL:<sup>17</sup> I have some strong feelings about the Clark County Bar/Review-Journal Survey evaluating judges and how that impacts the community. So, I hope that observations I'm making are understood and taken in the light in which they are given.

I heard a previous [presenter] before I started to speak, and, with regard to elected versus appointed, I would never have been appointed. I went to law school, I came to Las Vegas, I didn't know anybody here. Nobody would have ever appointed me. I don't shine out, you know. So I just ran for office and, fortunately, through some wonderful circumstances, I won the election.

During the first election, I went around to all the attorneys and I said: "What do you want in a judge? Tell me how I can serve you as a judge." I went around to the people [and asked]: "What do you need in a judge? What do you think is a good judge?" And I got back all kinds of answers, you know, we need this, we need that. But the thing that people really [were concerned about] was civility. "I want the attorneys to be civil to each other, and if they're not being civil, I want somebody controlling that circumstance and somebody sanctioning those attorneys in court for not being civil to each other." So I wrote that down.

Equality. The attorneys would come to me and say, "I only want to have an equal opportunity. If I have an order shortening time or something, I just want to be able to make sure you'll read it and make a righteous consideration." I wrote that down.

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<sup>17</sup> Eighth Judicial District Judge, Family Court Division, State of Nevada.

Sanctions for when attorneys are late getting their orders in. "You know, Judge, I got divorced last year, but my attorney won't write my order and so the judge hasn't signed it yet, and I've been married now for another six months. And all these things are happening – we can't sell the house, we can't do all these things. So I want my order done in time. If it's not done in time, I want you to sanction my attorney." So I wrote that down.

The Clark County Bar/*Review-Journal* Survey produces things like: "That judge is horrible." Now, I don't know of any of the things that played into it, so I took it to heart. I sanctioned the attorneys for doing the wrong things, for not turning in their orders, but the thing is I treated everybody equally. They said "I want an equal chance" so I gave them equal consideration. I did everything that they told me to do. So they didn't know me very well – I really don't have any hard feelings about some of the comments that they made as far as my abilities, or whatever, because I'd never practiced before. I just became a judge, almost as a first job after becoming an attorney. So I took their comments to heart, and I tried to work harder the next time to obtain a better evaluation in the Survey.

The very first time that you're running for office and your most recent Survey evaluation has come out, you run to the newspaper in the morning and you read every word in that paper and you just don't know what to do. I don't get good reviews. I don't [know] why. I'm not going to lay it on any kind of a theory. I'm not going to say there's a cult against me. I don't make good reviews in the newspaper. Period.

I write these letters to the editor. I write pages and volumes. I spend days. I just write them – just to make myself feel better about why it happened this way. You have people coming up to you saying: "Don't worry, you're going to win. And you don't need any money from me because I'm going to give money to those people who have real challenges. You're going to win." I did the silly thing that Justice Becker was talking about earlier. I waited until I got an opponent, which was on the very last day of filing. And, of course, by that time all the money's gone, including the soft kind. So I won't do that again.

I'm not going to take long because I've written [my points] down, and they're pretty concise. Mostly what I have are questions. I don't have any answers. I agree people need to know about us, and they need to know who they're voting on – what kind of personality I have, if I'm an honest person or if I'm a biased person. They need to know these things about me, and I don't know how to get it out there.

I really don't have the answer as to whether or not the "judging the judges" poll is a good thing or a bad thing for the public, but I have a couple of questions. If a judge were to take a secret ballot during a case and rely on that information to come to the conclusion that a person was guilty of murder or negligence, or should or should not have their children, the whole town would be outraged. They'd be throwing that judge off the bench tomorrow.

Isn't that kind of what's happening to us? We're being judged by our colleagues. They write a secret ballot on everybody. Somebody totals it up and says: "Trust the secret ballot because it's secret. And give this judge your nod or not." Where's my right to a fair hearing and my right to appeal if I don't think that the survey came out right – if I think maybe somebody was

dishonest in their response? Where's my right to find that out for sure? Where's the public's right to find out for sure?

There are two things that they grade you on in these polls. The first thing is your adequacy, whether or not you know the law one way or the other. And you're going to be surprised to know that 53 out of 58 judges rated 75 percent or better. That's not bad. We [had a couple] D's or F's, but mostly we got C's. But in spite of that, 58 judges go into that ranking.

The Survey currently is more of a popularity rate than it is a competence or performance rating. What service is the public getting in this instance when you're only given a popularity rating that's been broadcast out there? How can the same attorney be so close on some judges and so far apart on other judges? I mean, you've got the same attorneys, doing the same survey.

What, if anything, do we actually know about the attorney who tendered his opinion about a judge – the people that are out there judging the judges? Did the attorney rating each judge have one case or more in front of that judge? Did the attorney lose his case on an issue of law on which the attorney may have been wrong, but now he thinks the judge was wrong? How do we know? Who determines the legal knowledge of the attorney who rendered his secret opinion of that judge? Is that attorney a stellar attorney, the brain trust of the attorneys, or is he just somebody that's just marginally hanging in there? Has a judge ever sanctioned an attorney personally for inappropriate conduct in court, and [is he] now judging that judge? Is that attorney planning to run for office – like maybe mine? Did that attorney lose a previous race against that judge?

These are questions that lack an answer, but for which we deserve an answer. But the judges don't know. The public doesn't know. The newspaper doesn't know, even though it is happy to publish the pithy negative quote.

So why is the Clark County Bar Association sanctioning this? Why do we have a bar association, that is supposed to not demean the judges, sanctioning something which in many cases demeans the bench. Would the Clark County Bar Association sanction a survey of this nature, giving it legitimacy and a presumption of accuracy, if the judges were to be judging the attorneys – [whether or not] they are prepared for court, [whether or not] they have an understanding of the law? I think it would really impact the outcome if the judges were to name names and give ratings along the same framework.

It's just basically that the survey is kind of flawed, or is able to be flawed, and I really think the first couple times the survey came out, it was more legitimate than it is now because people know how to maneuver it. And that's a shame because I think it could have been a really good tool, and it probably still is in some respects, but I'm just really concerned about the way that it's presented. Just to give you an example, the opponent in my last race – this is the “from the trenches” part of it – used the *Review-Journal* Survey as his only reason to run against me. That was his only reason. This young man had been an attorney for a year and a half, been in Las Vegas for two years at the time and said, “That poll convinced me I needed to run against you.” He had never been in my courtroom. He never worked with any of the litigants I've ever been involved with, didn't know one thing about me, never even said hello to me before he ran against me – because he based it one hundred percent on what he read in that poll.

There was no disclaimer in any of this candidate's material noting that the Survey is not statistically [accurate]. The attorneys that I talk to say, "Oh, I don't even do that thing. I don't have any problems with judges." So I don't have that input from the attorneys. Neither does the public. I don't know the answers. I just know the problem, and it was very uncomfortable for me when the attorney wrote the things that he wrote about me. He never even knew me but relied one hundred percent on the polling documents. It made me very uncomfortable from the trenches. And even though I was the favorite, even though I won 70 percent to 30 percent, it doesn't change the fact that some people out there think that Survey results represent who I am, and that makes me feel sad. I don't know any other way to say it.

TED JELEN: Another view from the trenches, Nancy Saitta.

NANCY SAITTA:<sup>18</sup> I want to make a disclaimer right up front. I am not related to the Saittas of the car dealership in town. This has actually come up during the course of campaigning. People assumed immediately that I was somehow related to the car dealer, and they assumed a couple of other things that were involved in that erroneous assumption.<sup>19</sup> Number one, I was going to be well-funded because of this assumed relation. As a result, fund-raising was always difficult.

My first campaign, as well as Dianne's, was largely grass roots. It was at the time that I decided to run as a government employee – I was married to another government employee – and I was also, at the time, raising four children, three of whom were in college. And so it was rather difficult, as you might imagine, for me to have any funds whatsoever. Which leads me to combine my two topics. Should we be elected?

I spoke with one of our county's finest attorneys yesterday on this exact topic, and I said that whether or not I felt we should be elected was probably an issue that should be left to those who decide the process by which they want their judges to become judges. Not me. [I said that] I compared the process to, I hope, a well known fable: the Emperor's New Clothes. We walk around and we look at the parade. But, as the fable goes, the Emperor had no clothes on as he paraded through town – I think that's my recollection of it. But nobody would tell him that he had no clothes on because – guess what? He's the Emperor. Let me tell you that as a judge we operate in the very same place day after day. That is troubling to me.

Let me go back historically and tell you that while I'm proud now to be in a second term, I was also elected through a contested election. I was appointed to the lower city court by the mayor. And I have now run unopposed. So I kind of have a little bit of different place to talk to you from, I hope. I was appointed after I lost to Dianne Steel, literally, within weeks of my appointment.

I cannot tell you definitively how that appointment came about. I have a pretty good idea. But again, that would be speculation. And I'm going to tell you something: I was never brave enough to go to the people who nominated

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<sup>18</sup> Eighth Judicial District Judge, State of Nevada.

<sup>19</sup> I should also disclaim up-front that my first opponent was Judge Steel. She beat me in the primary. We have long-since discussed this irony and how fortunate we are to both be on the bench today.



me because I wasn't sure that I wanted to know why I had become the lucky recipient of that appointment. Was it a particularly influential position? No. And that's why when the first offer – that appointment came to me, I responded that I did not want to be on the city court. My background has always been in the area of abused and neglected children and I ran for the family court because of that interest. So when I was appointed to the city court, I couldn't begin to value what I could bring to that position, and I thought it was better left to someone that was more qualified than I. I learned, after having tentatively refused that appointment, that it was real stupid to refuse, and I promptly called back and said: "Thank you very much for this appointment. I would be glad to accept the appointment. I hope that I can make you proud of the appointment that you have made and I can promise that I will do my very best to learn about what it takes to be a judge and hopefully apply that knowledge in a way that will make you proud. As well as, by the way, the rest of the state for whom I was then going to be in the service of."

The reason I didn't ask why that person made that appointment was because I didn't want to be beholden. If there was something attached to that appointment, I didn't want to know. That's the truth. To this day, I don't believe that I've ever had that card called. At least I'm not aware of it. If there was a card there that was called, I missed it. At any rate, I then ran for an election, again, a contested election, to the bench in the District Court and I have never in my entire life, except when raising four children, worked harder. The hardest job I ever had. It continues to be hard now, five years into it.

We have an obligation as judges to continue to learn and educate. That requires us to be in court and continue our education. It requires us not to be beholden to anyone. And, furthermore, it requires us to somehow try to separate ourselves from the ugly, ugly system we must submit ourselves to. I take very seriously what I do. I can't think of too many greater honors than to be able to be a part of the judiciary. I have to maintain that position by the process that is here in Nevada. That means you have to be elected. You have to raise money. You can't get your message out unless there's some way to do it. It costs money. But one of the things that I think we all need to do, and every one of you as voters or as members of the media should hold us to, especially as attorneys, is that we should prove ourselves every single day in court.

Many times, of course – including today – I do not have a court calendar. Does that mean I didn't do judicial work? Hardly. I did judicial work today before coming to this program. I did it last night after I got home from a dinner that I attended. I will do it again tonight. Much of a judge's work, researching, writing, organizing, and deciding takes place outside the public eye. Unfortunately many voters do not fully realize this and do not appreciate the long working hours actually logged by judges at all levels.

I also just recently set up a brand new court in the Eighth Judicial District, or section of the court, that deals with construction defects. That's another part of the judicial role that is often overlooked. Judges serve the community in many ways in addition to presiding over live trials. Today, construction defect cases do not pose the harmful logjam they did for the Eighth District just a year or two ago. In addition, I used some of my excess campaign funds to attend a

seminar in Atlanta on the issue of mold damage – a key point of controversy in many construction defect cases.

Should we be elected? I believe we should not, because of all the frailties that an election creates. Is there a better system in Nevada right now? No. I think we need to keep thinking about it and we need to keep putting it on our agenda. Should we be reviewed and subjected to the survey that we have in the *R-J* sponsored by our bar association? Should we be reviewed? Absolutely. Should your bar association be behind that review? Absolutely. Should it be something that we can somehow contain and balance better? Absolutely.

Once, as a new judge in municipal court, I suggested that we put a box inside my department, the courtroom, that asked for comments on judicial conduct. And, at the judges meeting where I made that suggestion, after the loud gasp of air, people were [asking] me: “why in the world would you want to do that?” I said, “Well, how else are we going to know what kind of a job we’re doing?” And again, if you were the educated group of judges sitting around that table that said: “you know what? You really don’t want to know.” Well, you know what? Yeah, I do. Now, again, I’ll go back to that emperor’s new clothes. Sometimes it’s a dicey thing for attorneys to do, but I want to know how I’m doing. And I want to know it every year, or every minute that I sit on the bench.

Finally, let me close by telling you what I do with my judicial contributions during a campaign year. Justice Becker is absolutely correct. Should we suggest to you that we don’t know who contributes? We better know, because it’s on our contribution form. But I have a rule that was suggested to me by a former candidate many, many years ago when I first started this process, and she told me one thing you never do is take your contribution directly. You never open[ly take] a contribution from someone. Okay. That means you must always have someone with you who can take that. What am I going to do? I mean after we leave the event, can I go over and say hey, how much did so and so give me? Of course I could. Do I? I’m answering no. I also have an accountant who does all of my calculations and he appears at the bottom of any of my information. All contributions are sent to him. When people try to bring contributions to chambers, they, of course, never get past my secretary, under any circumstances. She takes the envelope and immediately puts it into a brown envelope, and forwards it to my accountant, who puts it into the mix.

Do I look at those who contribute to my campaign when I sign my form? Of course. Do I look at numbers? Of course. Do you honestly think that I won’t? Does it influence me in the courtroom? If I could remember all the people who gave me a contribution every time I heard one of their cases, I wouldn’t have to work as hard at being a judge, because I’d have a way better mind than I do. Now on the other hand, do I know that certain firms typically contribute? Yeah. Does it influence me? I hope not. Because our job, as I think has been adequately pointed out, is to take the facts of each unique case as it appears before us, and then apply the law, that is created either by case law or by our legislators, to that case.

If I’m doing my job well, whether or not there was a contribution, the amount of that contribution should not figure into that equation. It’s just that simple. Sadly, I also made a disclosure once about a person who was a

chairperson of my first committee, and I wanted to recuse from his case. [I said]: "I'm not going to be able to hear your cases when I'm on the bench." And he looked at me as if I had just come from Mars and said, "What, are you crazy? Of course you're going to continue to hear my case if you're elected." I came from Detroit where things were a little different. So the good news is that it was my first election and so I didn't know what the process was.

We also do [not] bring personal biases to the bench. We need to be able to set them aside and we need to be able to reach higher. We have a law here in the state of Nevada – and every other state does, of course – a federal law overriding our state law. But you know what, no matter what my beliefs are about gun control, the death penalty, abortion, I better be able to set them aside and apply, once again, the law of the state in which I'm on the bench. Now if you ask me what my opinion is – I'll use the same example, if you ask me about gun control – I'm going to tell you what the law in the state of Nevada is as it relates to gun ownership, as it relates to whether or not you can carry a gun on your hip. I'm going to tell you that. You ask me whether or not I believe that somebody should be able to carry that on their hip, it's not a question that I'm going to answer. Because, first of all, what I believe doesn't mean anything. It means there's a law and I better be able to enforce it. And I better be able to enforce it as uniquely applied to the facts and circumstances of the individual case that comes before me. It's just that simple to me.

Is our system free of problems? Not by a long shot. You look at some of the stuff that gets in the public record, and you'll note that there are a number of unopposed judges who have accepted very large campaign contributions, after they knew they were going to be unopposed, from some pretty obvious special interest groups. Almost everything in the public domain you [should] be looking at and you should continue to question it. And you should continue to hold each and every one of us accountable, and you do that by finding out how we do our job in the courtroom. You find out whether or not we do work in the community that you think is appropriate for a judge to be doing. And you better be sure that the attorneys who appear in front of us are able to tell you whether or not we are learning the law, whether or not we are making the efforts to become educated, because that's how you deal with the system here in Nevada. We are elected. It's a good way to put a judge on a bench, in my personal opinion. But that's the system that we have. So we deal with it. Is it the perfect way to do it? No. Until we have a perfect system, that's the way we will continue to do it. Thank you.

#### XI. PROTECTING DEMOCRATIC VALUES THROUGH APPOINTED AND INDEPENDENT JUDGES

TED JELEN:<sup>20</sup> I want to address the concern that has been expressed today about the relationship between public opinion and the judiciary. Underlying everything we have discussed today is the relationship between public opinion and the administration of justice. A number of our speakers, in one

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way or another, have addressed the question of whether the quality continues to be good enough, or manipulated by, the survey in the newspaper, or whether it's tainted. Others have wondered whether the public has the expertise to make these evaluations and to prudently choose among candidates for judicial office. Right across the board. Is the public equipped to make the judgments that we ask them to make when we elect members of the judiciary?

I want to take a slightly different tack on that and suggest that the independence of the judiciary – and I'm going to throw in with those who think that judges ought to be appointed – actually has an effect on the quality of public opinion. So in other words, for those of you who have a social scientific bent, I'm looking at the quality of public opinion as a dependent, rather than an independent, variable.

In a democracy, that public opinion [must] be informed – the reason we nominate the judges and so on, right? We also require that public opinion be uncoerced. For example, a couple of months ago there was an interesting item in the newspaper: Saddam Hussein was re-elected by something like 99 percent of the "electorate" in Iraq. This is, of course, a shock to those of us who study comparative politics. Many of us would quite legitimately question the authenticity of that election.

What's the problem with the "Saddam landslide?" Was the problem that he didn't have an opponent? Well this gets a little tricky. But if that's the problem, then I've got a couple of other people who have the same problem, and I would certainly hesitate to equate members of our panel with Saddam Hussein. It's a very high compliment obviously. And also how hard would it have been for Saddam to dig up an opponent? But we, of course, recognize there was something fishy about that whole process. We don't really regard the 99.6 percent that Mr. Hussein received as an authentic expression of the will of the Iraqi people. And I think for very good reason, right?

But when we look at that question of authenticity, it's tricky because it's very easy to point out to, you know, to elections in Iraq, and Iran and the old Soviet Union that there is something really wrong and fundamentally undemocratic about them. But, as we know from observations as early as Alexis De Tocqueville and as recently as Elizabeth Noelle-Newmann, coercion and authenticity can be subverted in ways that are subtle as well as direct. There's kind of a reverse Gresham's of public opinion, and that's just that popular opinions drive unpopular opinions out of circulation. In certain ways, it's very difficult, even in a country like the United States, for people to assert opinions or perspectives that are somehow out of the mainstream.

One of the most important things we can do to preserve the integrity of democracy, understood as the translation of authentic preferences into public policy, is to try to ensure that the formation of public preferences be as authentic and as free as possible. Think about the stuff in the First Amendment – I had a student ask me last week: why is that stuff jammed into one amendment when all the others seem so specific?

You've got freedom of press, freedom of religion, freedom of speech, freedom of assembly, all presumably part of the same thing. Well, my answer would have been, if I had been thinking a little bit more quickly – I'm a charter member of the I wish I'd said that club – but my answer would have been

something like: [what] all those four previous freedoms have in common is that they provide a right of self-determination. In other words, they provide a right for people to participate in the formation of their own characters.

Imagine this experience. Suppose you found out after sitting here all day that there was a subliminal recording just too soft to be audible and it said: "Vote for [United States Senator] Harry Reid" [(D-Nev.)]. Vote Harry Reid. Vote for Harry Reid." This would be uncoerced and nobody put a gun to your head or anything, but there's something wrong with that, right? If something like that happened, that's like an unfair manipulation of the opinions of people in the room.

What the First Amendment of the Constitution most fundamentally guarantees, in my view, is the right to, or the capacity to, participate in the formation of one's character. Now, in democracies, that gets a little tricky because popular majorities have a way of enforcing their preferences into public policy when we think about what kinds of things make up a person's character, including marriage, whether or not to become a parent, and what religion to practice. All have really profound implications to the way we live our lives.

For example, I was raised as a Roman Catholic, and if I were to make a decision, I must confess a very nominal affiliation with Roman policy. If I prefer a more intense version of southern baptism, for example, this could have amazing implications – very far reaching implications – for my performance in my role as a teacher, as a husband, as a step-dad, and perhaps even as a citizen.

Similarly, this decision of whether and who to marry is of fundamental importance. Those of you who are married will attest that being married constitutes a really drastic perceptual shift; the world looks different once you're a married person. Similarly, although I don't have my own children, I think that I can say with a good deal of confidence that the decision to become a parent causes you to think about yourself in entirely different ways.

So what does any of this have to do with the independence of the judiciary? Well, the fact of the matter is, when we look to public opinion for judicial selection – especially in light of the *Republican Party v. White* decision, which provides for more explicit exposition of candidate views on policy questions – one finds ways, whether it's in judicial elections or other elections, to restrict that right of self-determination for other people.

It is very threatening to the formation of authentic preferences on which democracy depends for us to put those sort of self-determining situations to a popular vote. I would like to think, although I don't know for sure, that an independent judiciary, if we in fact had one, would prevent this. I would like to think that an independent judiciary, perhaps the United States Supreme Court, will say: no you can't do that. There are certain decisions that are simply outside the reach of a popular majority. Because, when we make those distinctions, we effectively deny full citizenship to certain facets of people based on the self-defining experiences which we need to experience.

For that reason, it is very important to familiarity of those fundamental rights, those rights which define ourselves versus anyone else, to be placed out of the reach, as far as possible, from a popular majority. The Constitution said it much better than I ever could, and I quote: "We hold these truths to be self-evident, that all men are created equal and are endowed by the creator with

certain inalienable rights.” “Inalienable,” by the way, means you can’t give them up. To paraphrase Alexis de Tocqueville, “I am not more predisposed to walk beneath the yoke of tyranny because it is held to me by the arms of a million men.”