

# Letter to the Editor: The Politicization of the San Francisco Superior Court

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San Francisco Superior Court

At the June election, four public defenders hope to unseat four judges of the San Francisco Superior Court, Andrew Cheng, Curtis Karnow, Cynthia Ming-mei Lee, and Jeffrey Ross. According to one of the challengers, "this was really a group decision."

More is at stake in this election than initially meets the eye; and it imposes special responsibilities on the legal community.

The most notable aspect of the challenge to these judges is the reason for it, which has nothing to do with either the quality of their work or the measure of their character. Although none of the judges is a Republican (all are Democrats), they were targeted for the stated reason that all were appointed by a Republican Governor. One of the challengers says that "this is not about politicizing the bench, not about judicial independence" but only about the fact that "a Schwarzenegger appointee doesn't reflect the values of our community, it's that simple."

It is not that simple; the statement is transparently ridiculous. The effort to defeat four of the most able, compassionate, and experienced judges in northern California simply because they were appointed by a Republican Governor in an overwhelmingly Democratic county is an unmitigated act of political opportunism.

But much worse, and whatever the intentions of the challengers may be, the effect of their effort threatens to undermine the independence and integrity of one of the finest superior courts in this state. (I am the senior presiding justice of the Court of Appeal that has jurisdiction over the San Francisco Superior Court and most other superior courts in northern California. All of the judges of my court, who regularly review the rulings of the four targeted judges and know the high quality of their work, have endorsed all of them (as we are entitled to do by the Code of Judicial Ethics), something we have never previously done.)

If challenges to sitting judges without regard to their competence and character become acceptable in California, the consequences for our judiciary will be transformative. Exceptionally able but politically inexperienced lawyers will be less likely to seek judicial appointment. Lawyers who do seek appointment might feel it necessary to seek and obtain the political support of well-financed or influential groups, which may want to know where they stand on issues courts decide. Governors will favor candidates possessing the political skills and financial or other resources necessary to defend themselves. Some judges may think twice about ruling against politically influential parties, lawyers, or interest groups. Judges may feel it necessary to establish campaign funds to discourage potential challengers, and lawyers who appear before such judges may feel compelled to contribute, a situation presenting fertile ground for conflicts of interest.

All of these things are now commonplace in a growing number of states. But because California courts, the most respected state judiciary in the nation, have not been corrupted by money and politics, at least not yet, many are unaware of the danger. One of the first signs of politicization of the

judiciary are growing challenges to judges seen as politically vulnerable, no matter how distinguished they are as jurists, as is now happening in San Francisco.

One must acknowledge the constitutional right to challenge a sitting judge. But the challenge should be justified by the incumbent's unfitness or some other unusual consideration. Years ago I endorsed an openly gay public defender in his successful campaign against a newly appointed judge. I did so not just because the candidate was highly qualified but because there was in my view another factor that needed to be taken into account: the continuing refusal of successive governors to consider the judicial appointment of openly gay men and lesbians at that time. There is no such justification for the present challenges.

There are, however, signs that the four challengers are waking up to the need for a better justification than the one that motivated their candidacies. One of them recently complained that the San Francisco bench "is not representative of San Francisco" and "Racism is still very strong in the San Francisco Superior Courts." This charge is absurd. The San Francisco Superior Court may well be the most diverse court in the United States, and maybe the world. About 40 percent of its 49 members are Black, Latino, or Asian, at least 16 percent are gay men or lesbians; 37 percent are women, and 10 - one-fifth of the sitting superior court judges - are former San Francisco public defenders, and two other judges were formerly public defenders in other offices.

Some challengers justify their candidacies on the need to further diversify the court. I strongly agree with that goal. My career as a lawyer was primarily in the service of organizations representing racial and ethnic minorities, women, and the poor; and I was the member of Jerry Brown's first administration responsible for managing his judicial appointment process, which produced more judges who are lesbians, gay men, people of color and women than had been collectively appointed by all presidents and governors in the history of this nation. Diversity is necessary because the authority of the judicial branch depends much more on the deference of the people than that of the other two branches of government; and that deference turns in significant measure on the extent to which the individuals who preside over our judicial system reflect the extraordinary diversity of our state. Admittedly, we still have a way to go.

Diversity is not, however, the only quality essential to the judicial enterprise. Respect for judicial decision-making may well depend most heavily on public confidence in the integrity and impartiality of the judiciary, which in California is still proudly considered the least political branch. As we know from what is happening in many other states, the politicization of judicial elections leads inevitably to the politicization of the judicial process; and when that happens the diversity of the court is not just worthless but embarrassing. If it becomes perfectly acceptable to defeat an able judge, judges will be compelled to become political figures and fundraisers, which undermines judicial impartiality and is therefore destructive of judicial institutions. The defeat of four experienced and fair-minded judges simply because they were appointed by a governor belonging to a political party that is not popular in San Francisco would demoralize judges statewide and set a devastating precedent. Yes, we need to continue to further diversify the San Francisco Superior Court; but the four challengers could have done that in other ways, by running for open seats on the court or submitting application for judicial appointment to the Governor, who aggressively seeks out meritorious candidates from diverse backgrounds.

If Texas, Mississippi, and other states in which judicial elections have become highly politicized are any indication, the poor and oppressed are far more likely to be the victims of politicized courts than are powerful special interests. The judicial appointment process may not be free of politics, but it is far less political than elections for partisan offices. Appointees are subject to rigorous peer review by the State Bar, and a governor who appoints unqualified persons subjects himself to public criticism.

The San Francisco Superior Court has long been free of political partisanship. Richard Kramer, the

superior court judge who struck down a statute limiting marriage to a man and a woman and Chief Justice [Ronald George](#), who affirmed that ruling, were both appointed by Republican governors (and were themselves Republicans); and a Republican governor also appointed Supreme Court Justice Kay Werdegar who was also a crucial vote in favor of same-sex marriage and many other progressive policies. There are plenty of other examples. The judicial appointments of California governors of both parties, unlike those of governors in many other states, have not been highly partisan, nor should citizens be urged to vote for judicial candidates on partisan political grounds.

Judges are few in number and politically unsophisticated. They cannot say how they would rule if re-elected on issues people care about, and many are unwilling to solicit money or political endorsements because they feel it would be compromising (even though it is allowed by the Code of Judicial Ethics) and too uncomfortable in political settings to campaign as effectively as those who target them. And the support of other judges is often dismissed as just a "circling of the wagons." Given these realities, the legal community must rise to the occasion. It understands the issues and what is at stake and possesses the resources to draw public attention to these judicial races and use them as an opportunity to educate voters, not just about the quality of the challenged judges and those who would replace them, but the real threat these challengers pose to our judicial institutions and the rule of law.

The integrity of the San Francisco Superior Court has been placed at risk. No lawyer committed to the high principles of the legal profession should abstain from the effort to support the court.

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