

NJ Governors and the State Supreme Court

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Transcript for Parts III and IV

John Wefing: Good afternoon everyone. Hopefully, you have all enjoyed the morning session, I certainly did, and learned a lot. And I hope this afternoon will be equally informative. I know my earlier moderator colleague decided not to introduce the panel, but I've decided to do so. But I'm doing it in a way probably very different from what most introductions of them have been. Because I was originally asked to be on the panel, I believe, because I'm writing a book about Governor and Chief Justice Richard J. Hughes. I've been working on the project for a couple of years already. And sometimes my wife says to me, "Do you talk about anything besides Governor Hughes?" But I have managed to tie every one of our panelists directly or somewhat a little indirectly into Governor Hughes and his role both as governor and as chief justice. So it's a daunting task, undoubtedly, to try and talk about a distinguished panel with two former governors, one former chief justice, one former associate justice, a former U.S. attorney, who is also a former attorney general, and a number of former judges and prosecutors. But they've all "former" in their terms, but delightfully, all of them are still practicing law or engaged in other activities, and are continuing to contribute to our society. So I want to start, of course, with Governor Byrne. Governor Byrne was reappointed prosecutor in Essex County by Governor Hughes.

Mayor Addonizio, who many of you may recall, the former mayor of Newark, was actually eventually prosecuted for his various acts of misconduct. And one of the things he tried to avoid was the presence of that annoying prosecutor in his county, Governor Byrne, now Governor Byrne, or former Governor Byrne. He had originally been appointed by Governor Meyner. Governor Hughes was now chief justice, and trying to decide whether to reappoint Governor Byrne as prosecutor. Many of you who have any knowledge about Chief Justice and Governor Hughes knew that his nickname was "Two Buckets." His nickname came from the fact that he tried to keep everybody happy at all times. And he, knowing that Addonizio was mayor of Newark, was trying to block the reappointment, he turned to Governor Byrne and said, "How would you like to be alcoholic beverage commissioner for the state?" Governor Byrne said, "Well, okay, but I'd really rather be prosecutor and continue my work." As some of you know, Governor Byrne later got the nickname of "the man who couldn't be bought," which had a lot to do undoubtedly, with his eventual governorship. But in the meantime, Governor Hughes acceded to his request, and did in fact reappoint him. Later on, he appointed Governor Byrne as the director of the Public Utilities Commission as well.

Chief Justice Poritz has led our court for the last 10 years. She was appointed by Governor Whitman, as you know, after serving as both counsel to the governor and attorney general. And I can tie her in very indirectly. She's been worried about how I would manage to tie her into

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Governor Hughes. But I can do it by telling you about a wonderful letter that Governor Hughes wrote-- I should say Chief Justice by then, Hughes wrote to Marie Garibaldi. Many of you may recall that Marie Garibaldi was the first woman justice on the New Jersey Supreme Court. And in the letter that he wrote to her, he clearly indicated his incredible support for women and women in high places. So I know if he had lived to see the appointment of Chief Justice Poritz, he would have been delighted and sent her a similar wonderful note.

Justice Clifford had an incredibly distinguished career as a trial lawyer, one of the best in the state, and then spent a number of-- had a number of positions in the governor's office when he was appointed to the court. He was appointed just a few months, I believe, before Chief Justice Hughes became the Chief Justice, served with Chief Justice Hughes for seven years, they were quite good friends, I believe. And then he went on to serve another 14 years on the court. Even in his later years though, Hughes could never leave politics behind. There was a wonderful, large celebration on his 80th birthday. But never one to do one thing, he was, as I say in my book, a multi-tasker before that term became common. It was also a fundraising event for the campaign of Governor Florio for Governor. And Governor Florio also had met with Governor Hughes when the only time in history that New Jersey hosted a large national political convention. Some of you, I look out and see a few young faces, don't remember that in 1964, the Democratic National Convention was held in Atlantic City. Governor Hughes was the host of that convention. That was the convention where Johnson was overwhelmingly selected, and then overwhelmingly won reelection. Actually, President Kennedy had chosen Atlantic City as the place for the convention, but unfortunately as we know, he was assassinated before that time. There was a big debate during the campaign about the seating of the Mississippi delegation, it became a major factor. And during that time, they assigned a number of young Democratic volunteers to sit in the seats of the Mississippi delegation until they could decide who was going to actually hold the seats. And Governor Florio was one of those young Democratic newbies who was sitting in those seats.

Judge Humphreys, a distinguished jurist serving as an assignment judge in first Hudson, and then Essex County, was serving as prosecutor of Passaic County during the years that Hughes was serving as chief justice. He was involved in many fascinating cases, including, some of you may recall the Ruben Hurricane Carter case. I hope many of you recall that case. I always tell my students that Denzel Washington was innocent, but Hurricane Carter was guilty. But he had been very instrumental in that case, which case of course eventually went to the Supreme Court and was decided during the years when Hughes was chief justice of that Supreme Court. Bob Del Tufo, who's held the two highest law enforcement positions in the state, both the United States attorney and the attorney general of the state, and who is particularly of interest in today's discussion, because he clerked for two years for Justice Weintraub, was also an early-on supporter of Governor Hughes in his first campaign, a fascinating campaign where Hughes was not expected to win, and yet ultimately did win.

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And just yesterday, I found out from Bob Del Tufo that he was there during the historic moment when President Kennedy, just three days before Hughes's election, arrived in the state and may have been the factor that led to the election of Hughes. Hughes did in fact start out with being hundreds of thousands of votes behind Mitchell. And by incredible campaigning, did narrow the gap. But the arrival of President Kennedy and his stirring words that Bob remembered so well and so clearly, certainly made a difference. Judge Arthur Simpson had a long-standing involvement with Governor Hughes. Judge Simpson originally agreed to spend six months working as the acting director of the courts, and ended up spending the entire seven years that Hughes was chief justice as the director of the courts. And as many of you know, and has been mentioned already today, in New Jersey, the chief justice has an enormous responsibility in running the entire court system. And I think today, we'll be talking about that in some more detail.

So when Don Linky asked me to chair this panel, he said "Keep it somewhat light, somewhat anecdotal." And I'm hoping today, in this part of it-- in the morning session of course, we were talking about the intersection between governors and justices, and particularly chief justices. Today I think we're, this afternoon in this panel, I'm trying to focus a little bit more on the chief justices themselves and what they added. And I think it became clear in our morning session that we have had a group of very strong, interesting, and powerful chief justices. They're powerful in part because of their role, because of the way the court works, and there was much discussion of that earlier today. But also, by dint of their own strong personalities. And we had undoubtedly a group of the strongest personalities you could imagine. So I want to just briefly start a discussion of some of the personalities and a little bit, their approaches to the law. And a little bit of this was touched upon earlier, but I want to also raise the issue of result orientation and things of that nature, and whether or not the court has reached results that might have been, on occasion, inconsistent with the technical issues that were before them. But reached decisions like *Winberry v. Salisbury*, which was mentioned earlier today, in which perhaps, if you really read the law carefully, you would have to agree that the decision of Chief Justice Vanderbilt in that case was not correct.

So anyway, let's begin with Vanderbilt. Unfortunately, not too many of the members of the panel had any direct contact with Vanderbilt. But I think most of the people in the room do know something about Vanderbilt. Vanderbilt managed to at one point in his life be both president of the American Bar Association, the dean of the NYU Law School, a Republican leader of Essex County, an active practicing attorney, all rolled into one. And so he had a major role, as was already mentioned by Bob Williams, behind the scenes at the convention that created the 1947 Constitution, and then of course, became the first chief justice. What wasn't mentioned is that he was seriously considered for the United States Supreme Court. I often think how the history of this country would have been different if Vanderbilt would have been selected. Because although Vanderbilt was certainly not a conservative, he certainly, I don't think would have been the type of chief justice that Justice Warren ended up being. That could be debatable. But it came very close. And of course, Warren was ultimately selected over Vanderbilt, primarily because he threw

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his votes in favor of Eisenhower during the convention where Eisenhower was selected as President of the United States.

So I'd like to ask, I know already Governor Byrne made a comment or two about Justice Vanderbilt. I wonder if Governor Byrne would add a little amplification to his comments about Chief Justice Vanderbilt. Governor?

Gov. Byrne: Well, Vanderbilt really I think will go down in history not for any of the decisions he made as chief justice, but as the way he organized and ran the court. He was very tough. I remember arguing as a young lawyer one case. We didn't quite finish the argument by four o'clock and so it was carried over until the next Monday. And I stood up the next Monday and I said, "I believe I have some time left." And Vanderbilt looked at his notes and he said, "You have two and a half minutes left." And I think that sort of symbolized how tightly he ran the court system. He was a good administrator. He did not carry any political implications when he got on the court. I mean, he was pretty tough. When he was county chairman in Essex County, he was a pretty tough politician. There was in those days, and his grandson gets upset when I mention it, there was a custom, let me say, a custom if you were a county employee of making a contribution to the party. And that was pretty rigidly recognized. And something like that, once he got on the court, he not only didn't recognize that but pretended he had nothing to do with it. I think Vanderbilt got the new Constitution off to a good start. He got it working, he got the court system working. By the time I got to be a judge, there was sort of a court system in transition.

And Weintraub was the chief. But there was a time, I think before Weintraub's time, there was a time when you accounted as a judge for every minute of your time. You were accounted for when you were on the bench and when you weren't on the bench. I mean now, judges spend a lot of time off the bench and justify in terms of good administration. But in Vanderbilt's day, you submitted a report, you submitted how much time you did on the bench and how much time you spent on the-- anyway, this was all things that may not need anymore. It's like the tough regulations I made for Atlantic City. I see them being relaxed little by little. But we needed them when I put them in. And I think we needed a Vanderbilt when we had him.

John Wefing: Justice Clifford was clerking for Justice Walkenfeld at the time Vanderbilt was on the court. Justice Clifford, do you have any comments you'd like to add?

Justice Clifford: Only to remind people that Chief Justice Vanderbilt really didn't lose a lot of sleep about developing criminal law in New Jersey. And he had-- Oh, I always forget that old thing. There you go. You probably want me to do it all over again.

John Wefing: That's okay.

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Justice Clifford: I hesitate to sound critical by saying something like "disinterested in." He was perfectly content to leave to Justice Walkenfeld, who had tried I think, Governor Byrne will bear this out for me, tried more murder cases than anybody else in the history of the state by the time he was there. He knew his way around, and he was interested in it, he loved it. And Vanderbilt, I think the world at large took the view that he's going fine, don't get in the way. And he continued in that leadership, developmental to the extent that it was a developed position while he, Walkenfeld, was on the Supreme Court. But Vanderbilt died what? In 1957, did he not? Is that the right date? Doesn't make much difference. It was pretty close.

John Wefing: Fifty-seven. Yeah. He served on the court until '57, and died while he was on the bench. Yes.

Justice Clifford: That is right, yeah.

John Wefing: Fifty-seven. One quick story about Vanderbilt. Vanderbilt was very strong, and this was mentioned early today by Chief Justice Poritz and others, about no political involvement. Interestingly, Driscoll appointed Vanderbilt in '48. He also appointed Hughes in '48. We talk of Hughes as governor and chief justice, but you should not forget that he was a judge for 10 years before he was ever governor. And he was originally appointed as the last of the Court of Common Pleas judges. That was one of the many different court systems that Bob was talking about earlier that was so convoluted and difficult. And he was appointed to the Court of Common Pleas. Two days later, he and all the other Common Pleas judges were appointed as County Court judges. So this was done under Driscoll at that time. But Hughes of course, prior to being a judge, had been democratic leader of Mercer County, had run for Congress and lost. So he kind of still kept a little bit of contact with his political colleagues. And of course, that was a total no-no. And one day it appeared in the paper that Hughes had been at a dinner that was in his honor thrown by a number of political figures. And Vanderbilt had him down on the carpet immediately about that kind of activity. Hughes read a long, detailed letter of explanation, saying it was just a very small group of personal friends, who also happened to be political figures. And the court accepted his information. But that was the start of this strong, strong attitude that judges are not to be involved in politics in any way.

Justice Clifford: Hughes was, incidentally, a marvelous trial court judge. People, most of them when he was on the bench in Elizabeth.

John Wefing: In Elizabeth? Yes.

Justice Clifford: Yeah. Frank clearly was reaching an age where it appeared desirable that he might enjoy some other pursuits. And the chief justice had made Dick Hughes the

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_____. But I mean, he knew how to try a case. You had a master in front of you when you tried a case in front of him.

John Wefing: He was a wonderful trial attorney. I know Governor Byrne, in my interview with him, also mentioned that he used to try cases before Byrne while he was a trial-- before Hughes while he was a trial court judge.

Gov. Byrne: Yeah.

John Wefing: That's enough. I remember you saying to me that he would do something that I don't think many of the judges do today. Do you remember what that was that we talked about?

Gov. Byrne: Yeah. He would taken you into chambers after the case was over. And he would give you a critique of how you tried the case. And I'll never forget his telling me, "Mr. Byrne, you don't have to, for the jury, recall all of the testimony of all of the witnesses. You can do some of them."

John Wefing: Hughes always liked everything short and to the point, there's no question. Any other comments on Vanderbilt?

Gov. Byrne: Yeah. There was a case. This involves Vanderbilt, Weintraub and Walter Winney [ph?]. Walter Winney had been the prosecutor of Bergen County. He was indicted. And Vanderbilt wanted him indicted. I mean, not that he had anything to do with it particularly, but he wanted him indicted. He didn't like Walter Winney [ph?]. The case gets before Hughes as the trial judge. Weintraub is representing Walter Winney [ph?]. Hughes reads Weintraub's brief and dismisses the case. Vanderbilt takes Hughes off the case, reassigns it, and insists that the case be appealed. Vanderbilt reverses Hughes. And Weintraub tries, with John McGeehan, Weintraub tries the case and gets a conviction. So that was the confluence that kept coming up with Vanderbilt and his enemies.

John Wefing: The fascinating thing is that Vanderbilt actually selected Hughes to try that case. I'm not sure why. It was being tried in Bergen County, Hughes was then either in Mercer or Union, I'm not sure which at that particular moment. Hughes managed to try trial cases in 11 different counties. I don't think any other judge in the history of New Jersey has ever actually handled cases in 11 different counties.

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Justice Clifford: Am I right that Weintraub never won a case against _____. When Vanderbilt was in court, any case that got to the Supreme Court failed under Vanderbilt's _____.

John Wefing: If Weintraub was trying the case?

Justice Clifford: If Weintraub was trying for the defense.

John Wefing: That I've never checked that.

Gov. Byrne: Vanderbilt wanted to do what?

Justice Clifford: I'm sorry?

Gov. Byrne: Vanderbilt never wanted what?

Justice Clifford: No, Weintraub never won a case that was tried when Vanderbilt was chief justice.

Gov. Byrne: Weintraub never won one?

Justice Clifford: No.

Gov. Byrne: Probably he didn't.

Justice Clifford: Vanderbilt was--

Gov. Byrne: Although ironically, Vanderbilt had a great respect for Weintraub and assigned him as a pro bono-- as an amicus to write a brief for-- I forget what the case was. It was some criminal aspect. But Vanderbilt respected his skills.

Justice Clifford: He could be, as you well know. I'm trying to find the right adverb. He could be just obstreperously abrupt in the court when he ruled. <slaps table> In the Supreme Court. He would make his ruling then turn the chair around and put his back to the audience. I was clerking at the time, I damned near fell off the chair. There wasn't any mistake about what the ruling was.

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John Wefing: Judge Humphreys wanted to add a comment.

Judge Burrell Ives Humphreys: Two short stories about Chief Justice Vanderbilt might be of interest to you. I too argued a case before the Vanderbilt court when I was a very young lawyer. I was clerking for a federal judge at the time, and he allowed me to do it. And it was an indigent pro bono case. My client had committed a crime, been put on probation, gotten a suspended sentence, committed another crime while on probation, now the judge gave him a much bigger sentence. And I was arguing that the original sentence should not be increased. And I'd only gotten a few sentences out of my mouth when Chief Justice Vanderbilt suddenly said, "Young man, isn't your entire argument a technicality? And are we up here to hear technicalities anymore?" Well, my wife had typed the brief. And I was not getting paid, so I was rather angry. And I said, "My client appeared before the bar of justice, he received his sentence, three years later that sentence was increased. He's still in jail, he doesn't think it's a technicality." At that point, I expected to be taken away in handcuffs. But the chief justice just smiled and said, "Continue." I lost. Eight-one, though. There was one justice, Justice Hare [ph?].

The other story may be of more interest to you. One of the most important reforms that Chief Justice Vanderbilt put in was to have a continuing committee, that is, the various rules committee that each year would look at the rules and revise them. And the Bar hated this, particularly the Civil Bar. The rules were constantly being revised and they had to read the rule book every year. Chief Justice Vanderbilt also was leader of the Republican Party and an arch enemy of Frank Hague. So there was no love lost between Hudson County, Democrats, and Chief Justice Vanderbilt, Republican. So one year, I was with a large law firm in Hudson County at the time. Chief Justice Vanderbilt was to be the speaker. And he got up and he started speaking. And at some point, the Hudson Bar, because we were at the Waldorf Astoria in New York, started booing him. In fact, I think somebody threw a roll at him. It was all about the rule book, you know. And I remember he gripped the lectern and he looked down at them and he said, "I know you don't like me. But I don't like you." And from there on, it went down.

John Wefing: For those of you in the audience who are younger you should know that Mayor Hague from Jersey City was probably one of the most powerful bosses in the history of New Jersey. Pretty much could pick governors in the early years of his mayoralty. He was a very powerful force, and also had the same rule about three percent of your salary always went to Mayor Hague. Mayor Hague lived on a salary of \$6,000, but had an \$8,500 a year rental, a house in Deal, and a place on Fifth Avenue in the city. So somehow, that three percent was well spent by him.

Justice Clifford: His nephew sat on the Court of Errors and Appeals too.

John Wefing: Justice Clifford tell us that. Do you know the whole story on that?

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Justice Clifford: No.

John Wefing: Okay. I'll steal it from you. It's been mentioned earlier today about the 16-member Court of Errors and Appeals, with six lay members of that court. Probably the worst example of political patronage perhaps in the history of New Jersey with connection to the court was when Mayor Hague's son was appointed to that court. A. Harry Moore was governor and he made the appointment. And when asked by the press, he boldly said, "I thought it would make his daddy happy." So fortunately, things changed dramatically obviously after that. Now we should turn to Chief Justice Weintraub. A quiz for the whole audience. How many people know who Weintraub's classmate was at Barringer High School in Newark? John Gibbons would know, of course. John Gibbons knows everything.

Audience member: William Brennan.

John Wefing: William Brennan, Chief Justice Brennan. Now, Dan O'Hern, who was here earlier, I don't know if he's still here, wrote an article some years ago in which he said at the beginning of their careers, there would have been no doubt in most people's mind that Weintraub would go the furthest in a law career, because he was clearly a super bright individual. Brennan was not unintelligent, obviously, but he did not quite match Weintraub. I've often said it was one of the reasons why Weintraub could scoff at some of the U.S. Supreme Court cases later on. And we'll talk more about that later. But let's turn to Weintraub. I know Governor Byrne has spoken a bit about Weintraub already. But if you'd like to add anything to what you've already said, please do.

Gov. Byrne: I'll comment on what everybody else says.

John Wefing: Okay. Mr. Del Tufo, you clerked for Weintraub for two years. And what are your thoughts on Weintraub?

Robert Del Tufo: Thank you, John. I will get to Weintraub, this is almost relevant, in just a second.

John Wefing: Sure, absolutely.

Robert Del Tufo: But when you said to be anecdotal, you never said to be anecdotal and be on the subject matter.

John Wefing: Absolutely not.

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Robert Del Tufo: I just have to say a couple of things up front. I was struck when the prior panel was here when, I think it was Justice O'Hern, or maybe it was Justice Clifford, was talking about mixing up judges, which brought to mind a story which I thought you might enjoy. Justice Souter and Frank Bellotti, former AG in Massachusetts, put on this dinner every year in September for law enforcement types, just to drink a lot and eat a lot. And he told me this story. Souter, as you know, was the attorney general of New Hampshire. And he drives back and forth from Washington to New Hampshire. And he stopped in Massachusetts on his way on one of these trips. And somebody came up to him-- Governor Byrne, I can't think of anybody being as quick as this except maybe you. So I think-- I'm trying to make it relevant, you know. Doing my best. Someone came up to him and-- well, I have to add first that Justice Souter and Justice Breyer are confused many, many times. They think one is the other and the like. So this fellow in Massachusetts came up and said, "Justice Breyer." Souter said, "Yes." And he said "What is the major thing, what's the greatest thrill, what do you get from being a justice of the United States Supreme Court?" And Souter looked back and said, "It's working with that great justice, David Souter."

And I saw Harvey Fisher here earlier, that was a memory. Harvey runs the New Jersey Lawyer now, but he was a reporter during the Byrne administration, when Governor Byrne had to go and say that this was government under glass, and a lot of these reporters believed it. And I remember Harvey Fisher spent weeks—

Lew Kaden was Governor Byrne's counsel. And he had to live in New Jersey. And of course, Kaden lived mostly in New York. But Harvey Fisher followed him around for weeks to see if he went to his home in Perth Amboy or went to New York. But just by way of recollection, you remember Governor Boley Schwartz and Moon Mullins and John McLaughlin and John McGowan and Rodney Sullivan, Joe Sullivan, these were really colorful reporters back then, but they were really good. And they had the capacity to dig under glass and to look, and they did. And it really was a very healthy thing. It's too bad we just don't have people in the media, and reporters of that quality anymore in New Jersey or anywhere else. I think that one theme I just want to express, and I'm going to get to Weintraub, John, I promise. And this is part of it, is experience is so important. If I look back at the chief justices and the justices of the Supreme Court going back-- Vanderbilt court I don't know very well. But going back to the Weintraub court, they were all people who had significant life experiences, and when they were on the bench, brought that experience to their tasks, which I think is very, very important. And I have to say one thing about my colleague on this panel, Justice Clifford, in terms of experience. Justice Clifford, many of you may or may not know, was one hell of a trial lawyer. I mean, he was one of the best trial lawyers I have ever seen. I had a couple of cases with him. They didn't turn out very well. But he would win them almost in the beginning. He would get up on the voir dire, and he would address the jurors by name. "Mrs. Smith, now have you done this? Mr. Goldstein, how are you--"

Justice Clifford: First and last name.

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Robert Del Tufo: I mean it was-- the jurors were taken back. They loved him immediately. And I've never figured out how in the hell he did that. I think maybe you might have hinted to me once at a Bar Association meeting, but it was really extraordinarily effective.

Justice Clifford: Sheer genius.

Robert Del Tufo: As John said, I had some first-hand experience as a young lawyer with a chief justice and justices of the Supreme Court. I did clerk for Justice Weintraub for two years. We were ensconced in the Mutual Benefit Building on Broad Street in Newark. And the chambers there included the chambers of Justice Francis and Justice Jacobs, and later on, Justice Scatino [ph?]. And it was really an extraordinary experience coming in contact with people of that brilliance and caliber and learning really what's important to an appellate court. I do remember frequent visits by Governor Byrne. I think you were still wearing those white bucks at that time. Coming in the office and speaking with Chief Justice Weintraub. This was while you were still secretary to Governor Meyner I think, and then afterwards, while you were prosecutor.

Gov. Byrne: Yeah.

Robert Del Tufo: But you weren't prosecutor, I think, when I was there. So it had to be while you were secretary to Governor Meyner. Chief Justice Weintraub was a very private and reserved person. But I did have the opportunity to spend some time with him when he would be more relaxed and open up and talk about things, talk about his life, talk about life force, talk about life and death, and everything that really concerns us. And it was really interesting for me, with no experience, to listen to a man who had vast experience. Now, he really had a different experience than Richard McGlynn and Whiffenpoofs. I'm sorry, he went to Princeton. I did too. He worked in Ed McGlynn's office in Newark, as a teenager. He was an office boy, swept the floors and did things. And Ed McGlynn sent him to Cornell for college and to Cornell Law School, and made him a lawyer. And when he finished, he went back and practiced in that office. So he had another layer of experience than perhaps others of us do. He worked very hard on preparing for arguments and for writing his opinions. And I would mention, John, that the Sunday closing decision is not in the list of decisions contained in the materials. But that was a pretty important case. It had religious overtones and all kinds of things. And the Supreme Court, probably to the legislature's astonishment said that when the legislature enacted a Sunday closing statute that was directed only at automobile dealers, they had repealed the old Sunday closing law by implication. And I mean, that created quite a fervor, because Sunday closing legislation was being transformed then to a day-of-rest legislation. But for years and years and years, it was the Christian holiday. And so there were lots of things, lots of extracurricular things going on at that time. He wrote his own opinions. I tried my best for two years to give him a draft of something or to get a paragraph. And finally, I'm down to a sentence, for God sakes. And I think he would just look at it and "Yes, all right." And that's really hard work. But he wrote everything. In all candor,

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I think I managed to get three, four words in over that time. It's not a very good record. And it was a great experience for me. We got along well.

When I left him, I was giving an argument and I was before the Supreme Court. I can't remember what the case was about. And Fred Hall, Justice Hall, was really beating the hell out of me. He was asking these questions, question after question. And I was really, really floundering. And Weintraub stepped in and he said, "Mr. Del Tufo, I take it your position is--" and then he rattled off this whole thing. And I had no idea what he was talking about. And I just said to myself, "Is he trying to help me, or is he trying to hurt me?" And I said, "I think he's trying to help me." And I said, "Yes." And when I was driving home, I figured out what he had told me. And he was absolutely right. I would just, in closing, generally on relationships I don't think we've ever had in New Jersey, I don't know about Governor Meyner and Chief Justice Weintraub, Governor Byrne, you'd know more about that, but I think it's true there as well. We've never had a Lyndon Johnson, Abe Fortas type of relationship, where people are talking back and forth, and maybe even talking about cases. But we do, in New Jersey, have a really small tight-knit community that is very collegial. And everybody really is attuned to what's going on politically and practically and the whole business. So you have the court being social activists, say Mt. Laurel or the school cases, or the Sports Authority case, for example, that was a tough case. And bonding kinds of cases. And also, at least in those bonding and Sports Authority cases, being deferential and-- the Turnpike case, Parsons, which goes way back. That's Vanderbilt's court, I guess. Trying to be deferential to the legislature and upholding the legislative will. It's a real balancing act, and I think it's the way courts ought to operate.

And I don't think courts can operate that way unless the justices have human experience and know what goes on in the world, and also that if we didn't have that tight-knit community where lawyers and judges and citizens really interact with each other. And I'm going to close by giving you an example of that interaction. The legislative correspondents' dinner was a very, very big annual event, where all the state house reporters would put on skits and just trash everybody in government. And the sitting governor and former governors, and sitting chief justices and former chief justices and distinguished people like that sat on the podium. So it was again, everybody sitting there experiencing things that deal with New Jersey as a whole. But I remember one dinner when Governor Byrne was running for reelection, and Paul Jordan, Mayor of Jersey City, was running against him. And this by way of-- I'm connecting this by saying justices were in the political mix, John. It really doesn't work, but I'm trying.

John Wefing: It's fine. It's interesting.

Robert Del Tufo: And it was at the old Robert Treat Hotel, big, big beautiful ballroom. But the air conditioning wasn't working, as I recall. It was so hot, the bowls of ice cream in the center of the tables were melting. But prior to that dinner, Paul Jordan was attacking Governor Byrne for

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using helicopters to travel around the state. And then a story broke where Governor Byrne's very, very wonderful, but very, very independent daughter somehow got her hands on a state car and had an accident out of state. And then the papers, the legislators, they're all beating on Governor Byrne. They were saying, "What about the other kids? They probably have cars too. Let's go do this. Let's go do that." So that was the way things were when Governor Byrne got up to speak. And I really don't do it justice. But somewhere along the line, he says "Well, Paul Jordan says I shouldn't use the helicopters. But how am I going to get around when the kids have all the cars?" And now trying to make it relevant. This tight-knit community, that was never heard from again in the press or from anybody else. It was a wonderful, wonderful thing. Thanks, John.

John Wefing: There's been some suggestion by some, I think, that Weintraub was such a dominant personality on the court that he almost enforced a unanimity of approach. Years ago, I did a study of the decisions of that court in the area of search and seizure. There were 60 decisions during that time, 58 were unanimous. And they were almost all anti-defendant, which was kind of Weintraub's position on the exclusionary rule, which he opposed. Is there any support, do you think, for the idea that he so dominated the court that they would go along with him without too much regard to their own opinions?

Robert Del Tufo: No.

John Wefing: No.

Robert Del Tufo: He was a dominating--

John Wefing: Oops, I'm sorry.

Gov. Byrne: It wasn't his personality, it was his logic. Weintraub could logic with you and make a pretty good case. And the 58 decisions out of the 60, the one decision he would not make, I tried to get it after, what was it, _____ v. Ohio?

John Wefing: Right.

Gov. Byrne: After that case, I argued that the good faith rule should be applied, and that that case did not overrule _____ v. Richmond, which said if you did it in good faith, you don't suppress the evidence. I divorced the remedy from the-- He would not buy that. Not because he didn't think it was right, but because he didn't think the Supreme Court would let him get away with it.

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Robert Del Tufo: John, can I just say I agree fully with Governor Byrne. I think it was his intellect and his organization, his logic, that would compel people to agree with him. But listen, that court had some really strong personalities on it. Justice Jacobs and Justice Francis, and they would clash occasionally right in chambers. And they had Justice Hall. It was a pretty independent minded group. They were not going to be cow towing, is what I'm saying.

John Wefing: Judge Humphreys?

Judge Burrell Ives Humphreys: A comment on the powers of his persuasion. New Jersey had the McNaughton Rule in insanity. Did you know what you were doing? Did you know it was wrong? And this had been criticized throughout the psychiatric community as the wrong rule, terrible rule, made no sense. No psychiatrist agreed with it. Along came a case in which the defendant liked to burn down Catholic churches with people inside them. It went up to the New Jersey Supreme Court, and he wrote an opinion in which he said admittedly, McNaughton has terrible flaws. State v. Louisi [ph?], I think, or Louizi [ph?]. Terrible flaws, but it's the best we have. There's no other way that you can parse the human intellect and the human emotions and come up with a just result. Single handedly, he stopped the movement in the country which was leading toward the rule in Washington, D.C., I believe, which was the crime the product of a mental disease. He stopped it. And one of the psychiatrist, Professor Whitehoeffen [ph?], I think, wrote an article in the ABA Journal saying he changed his mind after reading that opinion, McNaughton's the best we have. And today, we still have McNaughton.

John Wefing: And almost every state in the country now has McNaughton again.

Gov. Byrne: I'd like to know from the chief justices, especially, if you get a bad judge, or a judge is sort of incompetent, how do you deal with that judge? Do you send them to Cape May County?

Judge Burrell Ives Humphreys: Tell the assignment judge to take care of it.

Gov. Byrne: No seriously, what do you do?

Chief Justice Poritz: In every system, there are going to be some people who are not functioning in the system. Initially, after there's realization that someone's having a problem, after consultation with the assignment judge, at least when I was there, presiding judge, or both. We tried to make sure that the judge had an assignment that would not be too taxing, that the judge could handle, and that would enable the judge to gradually learn to function. We would assign a mentor to the judge. We would go through an evaluation process to try to help the judge. Which brings us to the tenure point. And that's very interesting, because the chief justice

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is in a very awkward position at the point of reappointment of judges. There's the chief justice's sense of his or her system and how the judges in the system feel. The judges want to believe that the court and the chief justice stand behind them on reappointment and will assist them in reappointment. I think there would be enormous morale problems in the court system if there wasn't a sense that if you do your job reasonably well, you're going to have the backing of the system. And if there are attacks based on politics or whatever that are irrelevant to the kind of job you're doing, the system will help you out. What do you do when there's a judge who's really not functioning well, even after getting a tailored assignment, even after mentoring, even after a video of a judge's performance and a critique, and all of the kinds of things that you would want to do to try to help a judge really be able to function well. And the answer is, it's difficult. There were occasions when I know from my predecessors and I, when we declined to comment on a judge who had come up for reappointment. And that was enough to say that there were concerns about the judge's performance. Sometimes that led to a break in service. If the governor doesn't nominate you, you probably know if the governor doesn't nominate. And within the seven-year time frame, there can be a break in service. The person is reappointed and another seven years runs, and there has to be another point at which the judge can achieve tenure. And sometimes that's enough for the judge to really take stock say "Look, I almost didn't make it. I've got to really learn how to do this, if that's the problem." But it's a difficult position in our system that the chief justice is in, in terms of relationships with the judges in the system and the sense that there has to be some point at which you say "We want quality judges and the performance here is not that."

Gov. Byrne: I remember one time there was a judge in Hunterdon County. And I got such bad reports, I refused to reappoint him. I got a call from a Supreme Court justice who said, "Boy, you're doing the right thing. This guy is terrible." I said, "Can I quote you on this?" "Oh, no, no." So what I did thereafter was ask the court to set up an evaluation system of their own. And I think they still have it.

Chief Justice Poritz: They do.

Gov. Byrne: Yeah.

John Wefing: Perhaps at this point, we can turn to the next chief justice. Well actually, the next chief justice would be Pierre Garvin. Unfortunately, Pierre Garvin, who was a very-- I did not know Pierre Garvin, but I understand was a very capable individual, unfortunately died very shortly after his appointment. So while he is certainly a chief justice, I don't know that there's any reason to talk about him. Then we turn to Governor Hughes, who was, as I mentioned earlier, the only one who served in both capacities. I think it was already mentioned at the earlier program that Governor Cahill, while a lame duck, he had lost in the primary and was not going to be reelected, wasn't even going to run again, did desire to make the appointment. And he

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ultimately suggested it. And as Governor Byrne said earlier, Governor Byrne acquiesced in the suggestion. But he came in with a mixture of experiences. And certainly had been a judge for 10 years, had actually been on the appellate division the last year or so of his time. Resigned from the court primarily for financial reasons. But he had also administrative experience, obviously, as governor. He had worked for three years in a law firm in between. So maybe I can turn to Judge Simpson for a moment, and ask a little bit about Governor Hughes as the administrator of the courts.

Gov. Byrne: But isn't that guy with the funny looking bow tie supposed to be up here?

John Wefing: Justice Pollock? He's on the next panel.

Gov. Byrne: Oh, the next panel? All right. I don't want to miss Pollock.

John Wefing: Judge Simpson, could you comment on Governor Hughes as an administrator of the court?

Judge Arthur Simpson: Well, I think he was a magnificent administrator. I don't know if anybody had any thoughts to the contrary. I'm sure you're all aware of the individual himself. You probably know, if you don't, you'll hear it right now from me, that when he was governor, he was a widower with four children. He lived in Princeton, New Jersey. And he met, while trick or treating with his four kids, a woman named Betty Murphy, who was a widow with three kids. They got married, and had three more kids. Now there were a total of 10 of them. When he decided to run for governor, he had promised the kids a cross-country trip, 3,000 miles to California and back, if he was elected. He was elected. So they had two station wagons. He had five of the ten kids in his station wagon, Betty Murphy Hughes had the other five kids in her station wagon. State trooper in front and a state trooper in back. They drove 3,000 miles across the U.S. and 3,000 miles back. This was the kind of person he was. Absolutely the finest I've ever met in my life. I can't think of any particular case though, that you may be referring to.

John Wefing: I'm thinking of some of the developments. I think he started a number of programs while he was administrator, while he was chief justice. I believe he put lay people on the ethics committee. He did a number of creative things in that way.

Judge Arthur Simpson: I believe you're absolutely right. He did those things when he was chief justice. And I can't think of anybody that was both governor and chief justice that had a much more remarkable record than him. Perhaps somebody else in the audience can, or even at the

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front table. But I cannot think of anyone that had that combination of a career of governor and chief justice as Richard J. Hughes.

John Wefing: Judge has mentioned the "his, hers and ours" case. There's a fascinating story about Betty Hughes. Those of you who remember Betty know that she was quite a character in her own right. She wrote an article regularly for newspapers, she was a fairly popular television personality out of one of the Pennsylvania stations for many years. But she tells the story of when they were first moving into Princeton, some of you may have lived in Princeton, so forgive me if I say this, that there are a certain number of somewhat snooty-type people in Princeton. And she was in the supermarket buying stuff for the family and nobody recognized her as the governor's wife. And the people were talking and saying, "Can you imagine that mob of kids moving into our Morvin? They'll probably have a pig in the parlor." Betty went out, bought a beautiful Belgique pig, and placed it in the parlor, where it stayed for the rest of their governorship. And I say "their governorship," because that's the way Hughes would often refer to it, as their governorship. I want to turn to other members of the panel to see their reactions to Hughes. I could tell a million stories, but that's not my job. Governor Florio, please.

Gov. Florio: I'll say something about Governor Hughes, he was a very, very nice man, as those of you who know him know. But there are a classification of judges that I know and I suspect you know as well, who are political people. I mean, they are former legislators or former people. And they maintain their political instincts. Notwithstanding, they perform well in the court, they obviously are nonpartisan. But I think it's fair to say that Governor Hughes as Chief Justice Hughes, Justice Hughes, still maintained his political instincts, as you heard. [audio begins abruptly]

After he retired from office, he had reached out to us, "I want to be helpful to you. I'm going to have a birthday party. Why don't we convert it into a fundraiser?" which we did, as you heard. There are judges I know around the state who are former legislators, former political people, that I'll run into them every once in a while. We'll have a cup of coffee. And they just salivate at the idea of having political gossip shared. that's something that I think that Governor Hughes maintained. When I was in office, during the midterm elections, as some of you may recall-- I see Senator Gormley's here. He recalls it vividly-- the opposition carried the day in both houses of the legislature by overwhelming numbers, vito proof numbers. The day after the election, I got a call from then retired Chief Justice Hughes, who called and said, "Governor, I just want to offer you some advice. I had the same problem." I think it was in his second term, in the midterm election, he lost the legislature at both sides. And he said-- this is a very nice, good piece of advice. It was very thoughtful. He said, "You know, always try to accommodate, wherever you possibly can, but never compromise on principle." I think that was something that was his way of doing things, always trying to be as accommodating as possible, but there were certain lines below which you don't go. And so he always regarded himself as obviously a justice,

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a chief justice. But he always had these political instincts that he was willing to share, and in some respects, hungry to share, because he remained to his last day, a basically political person.

John Wefing: Justice Clifford, you served for seven years with him on the court. Any thoughts?

Justice Clifford: Yeah, I don't want to tell you about those. I want to add a story I forgot about Hughes. He was a sartorial moron. He was incapable of putting together a jacket and tie that did not clash dreadfully. It became accentuated when Betty Hughes took-- she used to go down south occasionally for health purposes. That left Richard to pick out his own clothes. This was a disaster. It was. He went to conference in the chambers that Bob Del Tufo was talking about on Broad Street. That meant all of the members of the court, of course, were there, and all the staffs from the various justices who attended were likewise there. The day comes when Betty's down in North Carolina, Richard has to dress himself. No other way to put it. And during a recess, he retired to the gentlemen's lounge. He came back and all the girls-- forgive me, you don't say that any more. All the young ladies in the-- I'm serious about that-- in the outer offices, you here going, "Tee hee, tee hee, tee hee." As the chief walks back in, we say, "What's going on?" He said, "I don't know." He stands up, and he's got a shirt through which you can see which says, "Candy is dandy, but sex won't rot your teeth." "Chief, we can tell you. What are you doing with that?" "Oh, Betty went south and I just reached into one of the kids' drawers and pulled out his t-shirt. Sorry about that." That was the end of that. The other sartorial disaster came-- well, it came many times. He had a driver. As you may recall, the chief justice's vision was somewhat impaired. I think he did not drive by the time he got to the court. But he had a driver. His name was Jack Slim, wonderful man. Drove Richard Hughes all over everywhere he had to go. Slim looked like the chairman of the board of General Motors. He'd sit in the front seat, driving the car. That's nice. And the chief justice would sit in the second seat. You would swear that there had been a serious mix up, and a change of corporate control. He looked like a movie star. Jack Slim looked like a movie star's version of the chief executive. And Dick would sit in the back with these cruddy looking-- I mean, bad. He just didn't care, didn't care, and when Betty was around, that was the only way it was taken care of. Well, we enjoyed it. Now, what did you want me to do? Talk about something special--?

John Wefing: If you want to.

Justice Clifford: -- I've taken up far more of your time than I should.

John Wefing: Okay, thank you. The sartorial splendor story, that's reminded me of another story. I shouldn't take up too much time, but we often think things skip generations, and Hughes's father was a Democratic force in South Jersey for many years. Although, as a Democrat in Burlington County, he didn't have much force. But he at one point was a mayor. He ran for a number of offices, almost always lost. But he was just the opposite, very dapper, very

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well dressed, and throughout Hughes's first campaign, his father would constantly call him and tell him, "How could you go out dressed like that?" And unfortunately, Hughes's dad died two days before he was elected governor, died believing that his son was not going to win the position. We should though, because we're running out of time, turn to the next chief justice. We're not going to get to the _____ court and that. We'll just turn to the Wilentz court at this point. I'm sure most of you know a lot about Judge Wilentz, another powerful intellect, a person whose family was well known. His father had argued the Lindberg kidnapping case as attorney general of the state. A very powerful figure. Side story: the first person to call Hughes and urge him to run for governor after Grover Richmond-- it's fascinating. We all talk about how much luck is involved in all of this, and sometimes it's bad luck for somebody else, but in Hughes's first run, he was happily practicing law, making money after having retired from the court, trying to make up for the money he hadn't made while a judge and to raise his, at that time, I guess, nine kids. And all of a sudden, Grover Richmond, who had been selected by the party leaders to run for the Democratic nomination, did have a heart attack. It was not terribly serious, I don't think, but it was enough so that he was not going to run. The party leaders joined together, the old style Wilentz with John Kenney and Jerry [ph?] and Dennis Carey [ph?] and a number of others me at a restaurant, and decided, after going through many names, and finally picked Hughes to run for governor. But Wilentz's father was the first one to call Hughes from that meeting and say, "Why don't you run for governor?" So he came, Wilentz was in the legislature himself. He was a well known attorney and he was selected. Perhaps I can turn to Chief Justice Poritz to give some recollections about Wilentz.

Chief Justice Poritz: I'm going to start with a story that may seem unrelated, but really isn't, and it has to do with something that Bob Del Tufo was talking about before, when he told you about this dinner in Massachusetts, the Billotti dinner. That was something that was held with former attorneys general from the northeast, and current attorneys general. And I attended a few of those myself. I recall when I became chief justice feeling a tremendous amount of isolation and angst because, after all, I was joining a court whose members had been together for a very long time, and had worked together and knew one another, with the one exception of Justice Coleman, who was a more recent appointment by Governor Whitman. But everyone else had worked together for a long time. And although I had appeared before the court, and had interacted with Chief Justice Wilentz many times over administrative matters and in other context. And I will tell you about one appearance before Chief Justice Wilentz, because I think it was something that said something about the man. But I felt that there was so little continuity, so little way for me to learn from this great man. At the Billotti dinner, I was there with Chief Justice Jeff Amistoy [ph?] who had been an attorney general in the state of Vermont, whose court-- Jeff wrote the opinion, had issued that the civil union decision from Vermont. And Jeff and I were friends. We were standing together, talking about, "How do you do this job as chief justice? Can we give one another any advice or information?" And Justice Souter was there, and he was standing next to us. And he listened to us, and then he said, in a pause of the conversation, "Three years." And Jeff and I turned to him. He said, "I was sitting at my desk, the supreme court, and it was about three years. And I looked up and I realized, 'I can do this

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job." So Jeff and I took that to heart. Jeff had a very difficult court, a non collegial court, a court of five members, where the members did not get along at all. I came to a court, as I said, that was almost, I think Justice Long called it a well oiled machine. They knew one another. They knew how to work together, and I was the outsider. I had, and I mentioned this earlier this morning, one opportunity to meet with Chief Justice Wilentz. It was in the hospital where he was waiting the possibility of additional surgery. He had a brain tumor, and he died shortly after. And he had-- I didn't talk about this this morning. He had a yellow legal pad, which he had written down the most important things he could think of that he wanted to tell the new chief justice. And he wanted as much time as he could get. I think we ended up talking together there in that hospital room for three hours. But the nurse kept coming in, and two members of his family kept coming in and saying, "She has to go. You're getting tired." And he kept saying, "No, no, a little longer." And I was sitting there with a legal pad, writing as fast as I could write, and trying to learn from him. And I remember some of the things that he thought were priorities, which I think also tell you something about this extraordinary man. He said he had spent-- the first gender in the court study was done. He had convened a committee. He was, I think, the first chief justice and it was the first court system in the country that had looked at these issues very carefully. And he said to me, "I didn't do enough, Debbie. I'm going to leave it to you. You'll know what to do." That was very high on his list. "We need more women and minorities in important positions in the judiciary." The chief justice, as you know, has the appointment power within the system, and so that meant we need more women and minorities on the appellate division. We need more women and minorities among the assignment judges and the presiding judges. When I came, there was not a single woman assignment judge. He knew it. That was near the top of his list when he talked to me. He also talked, we said something today, about the administrative side of the job. The chief justice, as the chief administrator of the court system, and as a member of this court that had a national reputation, has one. He said, "I have never learned to balance those two sides of this job. The administrative side of the job can swallow you, take all of your time. It's one thing after another. But there is the court, and the work of the court is so important." He said, "I hope, I wish that you can find a way to balance in a way that's better than I was able to." And I will tell you that I wasn't. It's almost unmanageable. Every day, the court system calls on you as chief justice to worry or make some decision about a problem down in Cape May, a problem in Middlesex, a judge who said something indiscreet to the press, or whatever it is. Day after day, those issues come before the chief justice, and they do have the potential to just swallow up all of the time. I think that what he was trying to say to me about the court-- and he didn't talk about how the court worked. I learned that later. He didn't talk about procedures and processes, and I do want to get to that, that were in place for the functioning of the court. He talked more about the work of the court, and how important it was, and he clearly loved the court. He viewed it as something very, very special and he wanted to convey that to me.

A propos of that, and the procedures and the way the court works, when I came, I learned from the clerk of the court that the court had a defined way of conducting its meetings, its conferences, of dealing with preparation for oral argument. And I remember, I got a long memo

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from the clerk of the court describing these procedures to me. And I'm not a very formal person, and these were very formal procedures. And I remember running down the hallway, talking to justice Alan Handler who had his chambers down the hallway, who I think felt very keenly that he wanted to be able to give me advice and talk to me. He knew that I had talked only this one time to Chief Justice Wilentz, but he also felt that he didn't want to tell me what to do-- for a long time, under the modern constitution, try them, and we did, and I understood what he was talking about. Let me give you some examples. The court has a formal way of discussing cases, and that formality-- this is something ironic about this-- I think contributes to the collegiality of the court. If you know that you're going to speak at a certain point, you don't jump in to interrupt someone who's saying something you don't like, because that's not permitted. You wait your turn. And waiting for your turn means that you're going to have to think about how you reacted, and you're going to have to listen possibly to a few other justices who come ahead of you. And the discourse, I discovered, was extraordinarily civil. Whatever strong emotions might be there about a given issue or a given case, had time to diffuse through this process. And I learned something about the use of those kinds of formal structures in running a conference or even in the traditions that had come down to me through Chief Justice Wilentz. And I understand, although I've never learned specifically, but perhaps back to Vanderbilt, of not lobbying fellow justices, not calling about cases that you really cared about, waiting for conference. About what it meant to hold back, listen to oral argument, go back to your chambers, do additional research or ask the law clerks to do additional research, come prepared for conference, expecting that any member of the court may present on the case. Be ready to present on a case and give your opinion. And it was an extraordinary structure. I've spoken about it a few times before, but my understanding is that we had my predecessors some quite unusual men. They were all men who developed these procedures over time. As I said before, perhaps back to Vanderbilt. And they work.

And the collegiality of that court is really rather special. I would add that-- I think that's another thing that we might talk about, but the change over in the court, from the time I came, when there were so many people who had served together-- there was a woman then, Marie Garibaldi-- who had served together and knew one another and worked well together, to the point where, at one point, I looked up and I realized, I was there the longest of anyone on the court. And that goes back to the traditions and the understandings and what we pass on from one generation to the next. And the difficulties when you have all new people, of trying to recapture that. I appeared before Chief Justice Wilentz's court a number of times. I still remember-- will always remember, an experience in which I was defending a law that established-- it was actually a regulation of the Department of Human Services, under a specific law, part of the AFDC statute, but established limits on emergency monies for shelter for women and children. That's who was being serviced, who lost their shelter, and it was challenged. Legal services mounted the main challenge. Dee Miller was arguing the other side. And I remember Chief Justice Wilentz leaning over that very-- by that time they were in the new courtroom, out of the Annex-- leaning over and looking down and saying to me, "Are you telling me, are you telling this court, that there will be women and children in the street in 180 days?" And I read the opinions that came out. There

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were a series of opinions that dealt with these issues over a period of two or three years. And this goes to the interactions between the court and the other branches, which the court at first, in a pro curium opinion, was very deferential to the other branches, and essentially said, "The executive branch will do the right thing," because I had been able to say, after talking to the commissioner, that there were safety nets in place, and that that would not happen, that I did not expect that the commissioner would let that happen. But over a series of two or three opinions later, Justice O'Hern [ph?], I don't think he's here any more, he wrote them, the court getting more and more upset because it was happening. And the court finally invalidating the regulations, and I think with the fourth opinion, which says something about the relations between the court and the other branches, the court trying to be as deferential as possible, and finally saying, "This can't work." But it seemed to me that Chief Justice Wilentz was saying something about the law, but about how he viewed the law, and about how he viewed what the court's role was. And there's a theme that runs through all of the opinions written by Justice O'Hern, that embodies that view.

John Wefing: Thank you. Governor, did you want to add anything? We have time for just one or two questions. Does anyone-- go ahead. Thank you very much. Any questions from the audience?

Governor Byrne: Incidentally, in 1977, Robert Wilentz was the counsel for the New Jersey State Democratic Party, and he came to see me at Morven in that role to tell me that there was no way I could win another election.

John Wefing: How many people know Governor Byrne's nickname?

M1: One term, or?

John Wefing: Absolutely, OTB. Thank you members of the panel, thank you to the audience.

[End of session.]

Paul Tractenberg: Good day. I'm Paul Tractenberg, professor at Rutgers's law school. I want to point out three things that are different, to some degree at least, between this panel and the others. I'm not sure whether it was designed this way intentionally, but this is in a way a differently constituted panel. That is, the official subject is, "Governors and Courts as Policy

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Makers. Perfect together." We don't have a governor on the panel, so the panelists are going to have to speak for the governor.

We do have one former justice, retired justice of the New Jersey Supreme Court, Stewart Pollock, who probably comes as close to a governor representative as we have, since he served as counsel to a governor a long while ago, and I think only for a year or so. So I won't put that whole burden on him. We have a distinguished, long serving, widely respected legislator. I think the first direct legislative presence on the panel. We have somebody who, if it's not anatomically absurd, has managed to live a life professionally and personally, with a foot in four different worlds, and that's Judge John Gibbons, who of course, has a distinguished career as a private practitioner. Served for 20 years as a distinguished federal court judge, eventually the chief judge of the Third Circuit Court of Appeals. He has a career known to some of us very well as a constitutional law professor and author of some 20 law review articles. And in his latest incarnation, he's doing a lot of work in alternative dispute resolution.

We also have two people whose primary role, not exclusive role, is in the private practice of law, Bill Greenberg and Jack Kraft. And Jack and I had some substantial connections through Jack's involvement as a bond counsel in the early days of school funding reform in the Robinson against Cahill litigation. So it's good to have them here as a panel. The second way in which this panel will be slightly different is that I'm going to take what was a pretty complicated, comprehensive set of, if not instructions, guidance to the panel, and try to put it into a kind of structured outline form, not because I think for a moment I'm going to limit what the panelists will choose to say, but to give them and the audience a kind of overview of what is a potentially sprawling issue. And the third thing I want to do that's a little different is to tell you I have a very strong imperative to try to wind up this session as close to 3:30 as possible, even though we're getting started late, because I have a long standing play date with my three young grandchildren. So there's a lot of pressure for me to try to move things along. But let me just say, by way of trying to introduce the subject matter, because "Governors and the Courts as Policymakers, Perfect Together." I want to try a little bit to unbundled that. There's an assumption in there that the courts make policy, either on their own, or in collaboration with the governor, or other branches of government. I guess if I put my law professor hat on for a moment, there's both a descriptive way to look at that, and a so called normative way. That is, you could ask the question, well, is that really happening? Do courts really make policy? What do we mean by that? And then you could ask the normative question: if they do, is that a good thing or a bad thing? Is it inevitable that the New Jersey courts will engage in the policymaking process? Does the court's involvement in the policy process flow inexorably-- and this is probably my favorite phrase, taken from the jurisprudence of the New Jersey Supreme Court-- does that role inexorably flow from the court's role as "last resort guarantor of constitutional rights?" If you see yourself, and you advertise yourself as the last resort guarantor of constitutional rights, it's pretty hard, I think, to say, "Oh, but we can't engage in policymaking. We've got to draw a sharp, hard line and stay away from policymaking." There are, however, and this has come out throughout

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the day. It's certainly come out through my long involvement with the court, primarily on the school funding reform litigation, that there are limits on what the court can do, what the court is prepared to do.

One of those, obviously, is separation of powers, a kind of formal restraint. There's the related, but somewhat broader constraint of deference to the other branches of government, which goes somewhat beyond the formalities of separation of power. Third, there are concerns about either legitimacy, or the capacity of the courts to engage themselves in policy related matters, particularly policy related matters that may have enormous budgetary implications. And then there are pragmatic considerations, and they've been sort of the subtext of a lot of the conversation. But that's the view that courts have kind of a limited or finite reservoir of capital, political capital, if you will. And the more time the court does things which may be unpopular with large portions of the public, the more it jeopardizes its status, the more it jeopardizes the willingness of the public to give great weight to, and to adhere to their decisions. There's also the question, if the courts were more constrained, if they stopped short of engaging in the policy process, would that embolden the other branches to step forward and discharge their responsibilities to a greater degree? Are we giving the other branches an easy way out, an easy way to get out from under making tough decisions, because they can turn to the court and at least privately accept the appropriateness of the court, or inevitability of the court, making some of the hard decisions? Or if the court held back, would it result in a system where majority but not minority rights were upheld and advanced? And I don't mean that necessarily in racial terms, although certainly often it does have racial or ethnic connotations.

And I want to list, without saying anything about, a number of the areas which Don Linky and the material he submitted, raised as test cases, if you will, areas where we are really challenged to make the hard judgments about the role the court should play. And let me, I think just listing them will give you some idea of how challenging it has been for the courts. We have school finance and educational rights. We have affordable housing. We have legislative reapportionment, which I don't think we've talked much of at all about. The death penalty, issuance of state debt, gay marriage, and I would add to the list a couple of others: racial segregation in the schools, the right to die with dignity and even surrogate parenting. I mean, these are enormously complicated and controversial public questions, all of which have wound up with the courts. Finally, two last elements of my little outline. With the benefit of hindsight, might any of these issues have been dealt with in a fundamentally different and perhaps better way by less or, unthinkable as it may be, more judicial involvement in the decisional process? And finally, are there new factors at work, some of which I think had been adverted to earlier in the program, that might alter the role of courts and their relationship to New Jersey's governors, or to the other branches of government? And the kinds of things Don listed, and I agree are real issues, is what about the public and media cynicism about government generally? What about the related notion of the public attitude toward judicial activism, whatever they take that to mean? Even the emergence of the internet as a powerful means of communication, and the

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emergence of talk radio as a political force. So we're in a very complicated, dynamic situation, where in my view, the stakes are enormously high. Go down that list of issues. They really go to the heart of what a society is about. In New Jersey, the court has wound up being centrally involved in all of those issues. They have interacted in complicated ways, as you've heard throughout the day, with governors. And if we had more legislative representation, we probably would hear an equally complicated and interesting story emerging there. So with that as an introduction, I invite the panel to weigh in on any or all of that. We are talking, I just remind you, about the main theme of the day, which is governors in New Jersey and the courts. And when it comes to policymaking, how have they gotten along, from the perspective of either side or the legislative or the private side? Since Justice Pollock has not only served as a justice, but I know has thought and written about the role of state courts, and the role of state constitutional rights, I wonder if I might impose on you just to react?

Justice Pollock: Thank you very much. Listening to that myriad of questions and issues, some thoughts nonetheless distill out. First, all of the court's decisions that you mentioned, and the various issues-- and I'll just refer to two, the Mount Laurel decision, dealing with prohibitions against excluding people of low and moderate income, and the school finance decisions-- they're all rooted in language in the constitution. So although public policy may inform the court, I hang a footnote at this juncture, and say we have to be careful how we define public policy. But although public policy may inform the court in those areas, the decisions are legal decisions. The only further thought I would offer at this preliminary time is that, in those cases, as I believe was true in all the decisions that the court rendered when I was on it, we showed great deference to the other branches of government. If you were to look at the decisions that you know so well, Paul, the Robinson Cahill, and the Abbot decisions, you'll see from the first decision, down to the point, I think it was five or six opinions later, when the court finally ordered the closure of the schools, there was great deference shown to the legislature. The provision of guidance, the extension of deadlines and so forth. And then if you read the various Mount Laurel opinions, there is a constant imploring to the legislature to please step in. And ultimately, of course, the legislature did step in, with the enactment of COAH.

So although the court on which I served, and I think the New Jersey court generally, has tried to be responsive to the needs of the time, whatever those needs are, and whatever time we're talking about, its decisions have always been rooted in law, generally in the instances I've cited, constitutional principles, and also having shown appropriate deference to both the executive and legislative branches.

Paul Tractenberg: Thank you. I wonder if I could jump to Senator Gormley on that very point. I think there are two different visions. I mean, one is, here's a court anxious to run the state government, run the state's finances, run the state's education system. And on the other, the view that this is a court that has sought to be as deferential as possible to the other branches, including the legislature. I think it would be interesting to get a legislative take on that.

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Senator Gormley: First of all, it's an honor to be on this panel. I think a compliment to the governors that I've served under, since Brendan - Governor Byrne. The independence of the judiciary has been maintained across the board, despite how controversial it might be at times, and also in terms of how many times it might be politically not expedient to have supported that independence. That is a great tradition in New Jersey, that has been supported across the board by every one of the governors. In terms of-- I'm the other version of Ireland. He wrote the law review articles. Let me give you the pragmatic side. Okay, let's go to property rich districts. Now, isn't that special? And you go to a Republican caucus, and you say, "Well, you're going to spend as much money in Alpine as you do in Newark per pupil." And then you're in that Republican caucus, and they say to you, "Can we just do the Chevrolet and not the Cadillac to match the dollars?"

Now the similarity to Abbott decisions and the movies is, there are as many Abbott decisions as there are Rocky movies. Chief, I'm not making that up, am I? So if we got to Abbott two, and by the way, you have to understand, the people I'm going to talk about, even if I disagree, I hold in enormous respect. Chief Justice Wilentz, I was one of the three votes for him. By the way, I'm a Republican. You might get disoriented by the end of this talk. As a matter of fact, I remember, just on a personal note, brilliant, wonderful human being who I had the honor to talk to two days before he left this world, and he was just a very, very special person. And I admire him for the fact that his wife's happiness meant that much to him that he would put his position at risk. He was a very, very special person. However, if you look at the 1990 decision, we do tend, if you're in the caucus, you hear words such as communism bantered about. And of course, I'm there, having voted for him and defended him. And you do run into a situation, "Where's the money going to come from?" And one of the restraints or comments of the Republican caucus was, "What are we going to do about the efficiency of the money spent in these urban areas?" And it's the truth. If you want to look at inefficient spending, or to many degrees, what has been a boondoggle for patronage, it was how money was misspent in urban school districts.

So there is a balance here. You're never going to be perfectly correct, and if you're a politician, you always can pick the simple answer. You can pick, they're spending the money inefficiently, and that can be your harp. What you're trying to find here is what I call Switzerland. You're trying to find a point where there's a few moderates in the caucus, who are given enough coverage that they can bring some balance to this, because there's always going to be extremes at either end. And do I want to see money in urban areas? Of course I do. Do I want to see a better education for these young people? Of course I do. But at the same time, the court. And let's get to Governor/Justice Hughes, who had that gift that politician from California had, and I mean Earl Warren, who got that unanimous vote on that little segregation case, because he worked it to get the unanimous vote. And there's a gift there. And I do think, from time to time, just a little bit, just a little bit of the predicament that these politicians are going to be placed in by these well intended decisions, I think would be a good thing, especially in terms of financial restraint, in terms of certain of the school decisions, because they got quite expensive. And on

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occasion, there wasn't enough money to go around. And for my perspective, being the person who voted for every justice, being the person who, shall we say, was a defender of the court, in terms of the legislature, I would have wanted to see a little more restraint in terms of the spending mandates that came down. And I think that, was that pragmatic? Maybe it was, but I don't think a little bit of pragmatism hurts, in terms of making these decisions, because from my perspective, I had to deal with the demonstrators. I had to deal with the result of those opinions. But the independence of the court was and is great, and will be continued by people like Chief Justice Rabner [ph?]. But the problems you do have is, sometimes when you're writing in a pure world, I'm in that world where they're making sausage every night. It's not pure. And I just think a little twinge of pragmatism when we're writing a lofty opinion would be much appreciated for the people who are on the ground.

Paul Tractenberg: Since Judge Gibbons, as I indicated earlier, has carved out a role for himself in alternative dispute resolution, I think he's the perfect member of the panel to turn to now. We have a bit of an argument building. Is there a principled, win-win way to resolve this?

Judge Gibbons: I don't think there are any magic formulas for resolving the stresses of government, and I'll give you an example. When government is most under stress, is when it's facing challenges that may go to its very existence or legitimacy. Perhaps at the federal level, we have seen now going on eight years of that. But in the history of New Jersey, we went through a period in 1967 when we had riots and chaos in the street that seemed to be threatening the very fabric of government. The executive branch had to take stern measures. They called out the National Guard, they called out the state police, they called out the local police. There was shooting in the streets, an extremely stressful situation. Now one would think that in that situation, the instinctive reaction of someone in the executive branch would be, "The courts have nothing to do with this. We have to restore law and order." And certainly, in about the third or fourth day of these disorders, that's what the executive branch was doing. At one point, the number of detainees approached 2,000, and they were held in armories and other places of confinement, because the local jails weren't anywhere near large enough to hold them. And none of them were getting any opportunity to see a lawyer or to get to the courts.

Now Governor Hughes was the governor at the time. He happened to be a close personal friend of mine. I was president of the state bar, and I was appalled at the fact that we had almost 2,000 people detained, without access to the courts. As it happened, Lawrence Whipple was the acting assignment judge in Essex County on that occasion. And I got on the phone with him and said, "You have to get a hold of some people in authority, and make arrangements so that these detainees have access to the courts and lawyers." Now Whipple was an unusual person to make that approach to. After all, he was the former prosecutor of the police of Hudson County, a pretty strong law and order type. But he agreed to convene a meeting in his office, and I made the pitch that we had to get access to the courts. The head of the state police, representative of the National Guard, someone from the attorney general's office, someone from the mayor's office,

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strongly objected. They said, "We can't spare policemen or National Guardsmen off the streets to transport these prisoners to the Essex County jail." Not a bad point, considering that they were shooting people in the street. But Judge Whipple sort of leaned back in his chair, and he said, "Well, I can understand that, but could you spare enough state policemen to escort the judges to the place of confinement?" And of course, they had to agree. And then they turned to me and said, "Now you have to get the lawyers to represent them," which actually, Mike Griffinger [ph?] in my office organized that effort. We got the lawyers to represent them and almost all of the detainees were released. Maybe less than 200 were actually held for bail, and the crisis went away. Now I think largely that is an example of the deference of the executive branch at that time, namely Governor Hughes, felt toward the courts, because his reaction to his friend John was to appoint me as a member of the riot commission to prepare the report about the causes of the riot. I don't think that in any other state at that time, that would have happened. This was an example of the kind of deference that the executive branch in New Jersey has then held, and I think still does hold toward the judiciary as a separate branch of the government, which they recognize as necessary to control their own power.

Paul Tractenberg: I think actually Judge Gibbons has put his finger on an interesting point. We've been thinking, I've been thinking about deference in terms of the role of the court, vis-à-vis the other branches, and he's now said, "Well, but deference runs both ways." Other branches can, in appropriate situations, defer to the court. I mean, it strikes me, we're talking about where you find the proper pivot point between pragmatism on the one hand, and what you might call principle on the other. That's never easy. And Bill Greenberg and Jack Kraft, I hope you'll jump in. Although I don't want to understate your long commitments to public activities, you have primarily over the years, been in the private practice. Bill, you wanted to say something?

William Greenberg: Yeah, it's amazing how these various degrees of what is it, connectedness. I was an army private, being shot at on the streets in Newark, and I was very happy that apparent-- I didn't know this till today how it happened, but I was taken off the firing line and assigned to take the judges to the courthouses [laughter] and so I'm ever grateful to Judge Gibbons for his work. Then later-- and I think McCarter and English has a lot of contributing lawyers to that effort. If it's all right with you, Professor, I'd like to just follow along with the other panelists, tell a little bit about not so much war stories, but there are two cases. One is in your materials. You know, for all the great cases decided by the great Vanderbilt and Weintraub and Horitz and others, there are a couple of poor dumb bastards like me, the lawyers who have to bring the cases through the court system. And there are two. One is here, Passaic County bar vs. Hughes. This follows along what Judge Gibbons was saying. It is the trial court opinion before Judge Whirl Mountain [ph?] who later became Justice Mountain. You wouldn't believe it, but in the governor's office, we had myself, there were ten other assistant counsel, all ambitious young lawyers.

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My late great friend Alan Kartcher, who became speaker of the Assembly. We were the only two that said, "Here, give me the case. We'll take the case. We want to take the case and represent the governor in this." Nobody wanted to touch it, particularly not the attorney general, who himself was running for governor in the next year. So we took this case and we learned a lot of lifetime lessons, one of which is, we were always bothering the plaintiff's lawyer. "Why don't you do this, do that, this," and he says, "Look, I'm running a business here. You've got one lousy case that's going to go all the way to the Supreme Court. I've got to run a whole practice." So we focused in on this, and I invite your attention to what Judge Mountain said. It's the ultimate, it seems to me, in deference to the other two branches of government. One would argue, in the visa case-- and the court split on this-- but I think that this is emblematic, as emblematic as any case, not just because I argued it, but of deference to-- and then I had a senior moment. Richard McGlynn was here earlier, and he argued for the president of the Senate. I argued for the governor, and so forth. I said, "Didn't your dad argue that case?" He said, "No, I did." And I said, "Well, we're both getting to look a little bit like our respective fathers." In any event, if you read it closely, you will see it's a wonderful opinion, but you won't see a reported opinion of the Supreme Court of New Jersey. You'll see "serve denied" by the Supreme Court of the United States. But this is one of those situations in which-- and we argued it before Chief Justice Weintraub and his court-- there is no written opinion of this decision. He decided this is the way it was going to be, and that was the end of it.

And finally, let me invite your attention to Driscoll vs. Burlington County Bridge, one of the great cases, probably around two or four NJ, where this confluence-- it's a wonderful confluence. It's a wonderful state to practice law in and to be part of the legal community. Talk about judicial activism. This stands for the proposition, Driscoll, governor of New Jersey, who didn't like what Powell, a former speaker of the Assembly, stole the two bridges that crossed the Delaware River, the nickel bridges they were called then, and directed his attorney general, who refused I think to prosecute the case. He said, "Look, it's wrong. They crossed the Ts, dotted the Is, sold them to a private interest, but this ain't right, and I'm the governor of New Jersey. I'm going to set it straight." And Vanderbilt took the case, and set it straight, and it was all a matter of political get even, as well as it was the right thing to do. So I commend both of these cases as the inevitable crossing of the vectors of all three of the political branches and the political whirlwinds and shifts in New Jersey.

Paul Tractenberg: The segue I can think of to Jack Kraft is that the hardest issues, I think, for the court and the other branches to come together on, are those that involve money, and particularly big dollars, as many of these cases do. Jack has been involved for his career in money, bonds in particular. And as I said, he's had involvement in some of the early litigation, when issues of bonding came into place. So Jack, I'd be interested in your reaction.

John Kraft: Thank you. I was a little surprised when Don Linkey called me and asked me to participate in this panel discussion. I was very pleased that he did, and particularly because I

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had the opportunity to sit and listen to John Wefing, the governors and the justices and some of the others, like Judge Humphreys, the first thing of the afternoon. And I could tell that everybody was enraptured and quite alert. Now we're near the end of the day. So having said that, and expressed my appreciation to Governor Byrne and the others, I want to speak about debt. And this is debt in the present and in the future. And I'm going to criticize the Supreme Court decision in the Lonnegan [ph?] case, and the earlier decision in 1997 when the pension bond issue was challenged as being violative of the constitution. That is, the Spedoro case. And I want to tie this into the present. I think that the courts were too friendly, if you will, to the administrations, the various governors over this period, and also the legislature. And the result is, 35 and reaching for higher, billion-- that's not million-- billion dollars of debt that has been saddled upon the people of New Jersey, without so much as a say so, which the New Jersey constitution adopted in 1947, provided in simple terms to protect the people of New Jersey from profligate spending, which was taken away from the people of New Jersey. And it's continuing to go on now. So I know that members of the Supreme Court and others that are here, and may have been here earlier, don't agree with my analysis, but I believe that the Supreme Court, when faced with debt provisions in the past, beginning with the 1950 decision in the Parsons case, which upheld the validity of the Turnpike Authority to issue bonds, specifically because those bonds were not a burden on the general treasury of the state. And a long line of cases followed that, until the Spedoro case and the Lonnegan case. And as a result, all of us here have been burdened with tremendous debt that we can't really afford. It was like a credit card given to somebody without limit, but without the means to make the payments. And that's where we stand now. To bring this down to the current situation, the current treasurer of New Jersey, and the governor, have said that they would support a constitutional amendment that would say you have to get voter approval if you're going to issue bonds unless there is a dedication of a specific revenue to pay the bonds off. The problem with that is that in order to dedicate revenues in a meaningful way, you have to submit it to the voters. Their plan does not provide for submitting any of this thing to the voters. So this dedication is ephemeral. About a week ago in the *Star Ledger*, which I read every Sunday, they have the Kean-Byrne dialogue. They talked about dedicated revenues. There was banter between Governor Byrne and Governor Kean about dedication of revenues. How did it come up? People thought that a surcharge on our driver's licenses would pay for helicopter services for the state, which were needed and which never were paid or purchased. Helicopter improvements were never made. So now people are saying, "What did I pay that extra surcharge for if we didn't get the helicopters? Were they dedicated?" Governor Kean said, "If something is dedicated, really the governor and the legislature should carry that out, should honor that dedication."

Governor Byrne said, "Come on, Tom, we all know, as governors, that we have imperatives where we have to use the money for something else." Governor Byrne ended up by saying, "Okay, dedication makes a bad policy anyway." He's correct on that, in my view. We all have opinions. We're taking the opportunity to express opinions. The only dedication that's binding is if the voters approve the dedication. Otherwise, the legislature and the governor are free not to honor the so-called dedication. When the governor says, "We're going to protect the citizens

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because we won't issue bonds without voter approval unless the funds are dedicated and the dedication is not submitted and approved by the voters, it's a shell game. That's what's going on now. We are now \$35 billion in the hole reaching for \$40-\$45 billion, because we're not stopping. Somebody's got a blank check and the governor is writing on it. I think that's wrong, so I wanted to just urge all you opinion makers to recognize that the State of New Jersey is practically bankrupt. It can't make the balanced budget that it's supposed to. Thank goodness the courts have tried to reign in by ruling, although it hasn't been ruled by the supreme court, by ruling that you cannot use borrowed funds to be treated as revenues to balance the budget. The court held that and so that's where we're at. Maybe the courts are coming around a little bit. When you go home tonight, think about how much of a burden it is on you and on everybody else to have unbridled borrowing without the constitutional control of voter approval.

Paul Tractenberg: This colloquy probably would justify a court in deciding it's going to stay as far away from policy making as it can, because on the one hand, the court is criticized for being insufficiently deferential to the legislature and the executive. On the other hand, it's being criticized for being excessively deferential. The common theme is dollars are involved. Senator Gormley, did you want to jump in on this?

Senator Gormley: You're against debt, Jack, is that right?

John Kraft: No, I'm all for it.

Senator Gormley: Oh, okay, Jack. Did you ever sign off on contract bonds in the last ten years?

John Kraft: No.

Senator Gormley: Never?

John Kraft: No.

Senator Gormley: Do you think they were legal the whole time?

John Kraft: Yes, I do, without voter approval. They're not illegal now, because the Supreme Court of New Jersey has held that state contract debt. That's borrowing \$5, \$10, \$20, \$30 billion without voter approval is okay. Do you know why they say it's okay? Why you don't need voter approval? Because by calling it state contract debt, it is subject to annual appropriation. What

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that means is that theoretically, the state can walk away from its obligation. And the poor bondholders, the greedy bondholders, have no recourse, because the state didn't put its full faith and credit behind it. That's legally the case and the first one who really proselytized this in a big way was Brian Clymer when he was parading the pension bond before investment bankers. He was careful to say, "Now we want you to buy these bonds and we expect to pay them back. But if we choose not to, you can't get the money from the State of New Jersey, because it's subject to appropriation. The legislature makes the appropriations. But I can tell you that it's de facto debt of the state, because the state has never failed to appropriate the money to make these payments each year. So it's the same as a debt.

Panel Member: <inaudible>

John Kraft: Well, that's the point. I think I would agree with you, if you're suggesting that the state will always make the payments. It's a legal fiction that ignores the reality that you just stated that we have to pay these things.

Paul Tractenberg: I just want to suggest we try to move on, because I resisted the temptation to get involved in arguing Abbott again. And I will continue to do that, except one thing Senator Gormley said had reverberations. During much of the time I was involved in the case, I was living in Milburn Short Hills. I was called a communist more often than there are Abbot decisions.

Senator Gormley: I just was reflecting on what others were saying.

Paul Tractenberg: I understand that. It's just that there was a memory jogged by the word "communist" and the connection to school funding.

Senator Gormley: I do think the last two speakers bring up an interesting point. You're under pressure to find the money and maybe you get creative to find the money. But you're in the middle of this and you're under a deadline to achieve a certain goal. In retrospect, it can be too creative in terms of how debt is created and it can be too liberal on the other side, in terms of the opinion. But you're dealing with June 30th and the state closing. It's not a real constitutional aura around the state house. It's somewhat complex. You're dealing with what you-- not that there would ever be a trade or anything or anybody would be gazing at, somebody might want to head up the motor vehicle agency or something or whatever, and that might hold up the whole state budget. But you deal with a very complex scenario here. You have pressures from both sides. I do admit in retrospect you can say certain of the things that were done at certain points in time were wrong. But I don't know if there was the political will until we got to this stage in the state budget. By the way, it's \$110 billion, if you add the medical costs we owe. You have

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no-- the unfunded pensions are staggering. Now that I'm retired, hopefully it's okay. You've got to make sure before you leave it's safe. But it's about \$110 billion.

And I will say that this governor has had the most honest conversation about debt. He has put up with people dressed as pigs. He has a treasurer and a chief of staff now, Abelow, who has been up front about the money. Look at the paper every day. There's no money for anything. I will say the one constant this governor will have is that I think he's going to stick to the dollar amount. With all the crises that's gone on and his number is down and not doing very well. We are going to reach that critical point. Maybe it was ten years too late, but we are going to reach that critical point. The irony of it is we're not addressing the problem. We still owe all the money. This is a budget so we don't go deeper in the hole. There's still \$110 billion sitting out there, just for the record. You can trace all those pension dollars to the last 60 years of budgets and who had to get grandfathered and who had to get put in. If these three people got jobs, maybe we'll have some good luck and get the budget through by June 30th and won't close the state. So all these-- it's a very complex puzzle every year to get anything done and there's many flaws.

William Greenberg: But also, no governor has ever proposed the abolition of 567 municipalities or 612 schools districts. You can't blame everything on the courts, can you?

Senator Gormley: I'm not.

William Greenberg: Isn't that part of the enormous public debt burden in New Jersey? Every one of those has a lawyer. Make sure there's a pension at the end of part-time service.

Senator Gormley: Just for the record, I didn't do that, okay? I just got the one from the leg-- I didn't do it.

William Greenberg: I know you didn't.

Senator Gormley: No stacking here. But oh, some of them are absolute-- How about when I asked before I left office for the top 200. Then I said, "I want the list of those who exceed the chief justice's pension who are municipal court judges." There were only six or seven. That was staggering. That was just-- but it was the system. It was the loophole. You see people who were put in PERS who were on a part-time basis. I do think this year, because we made, now Senator O'Toole and I were-- we issued a report two years ago on pension changes. I think that's going to pass this year. I saw Senator Bueno, who's really taking up the cause, Senator Sweeney, from the union sides taking it up. I think the public's going to demand that finally, that

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the balance of the abuses in terms of pensions are abolished. It is a problem with more school districts than towns and everybody's a solicitor and everybody's a cousin. You add that up and it gets pretty expensive.

John Kraft: Let me just say one more thing, not about what I spoke, and to try to give a little historical perspective about Pete Garvin, who, before he became chief justice, was counsel to Governor Cahill. I worked in the counsel's office under Pete Garvin. I heard what Bill said about the ten attorneys in the counsel's office. We had five attorneys under Governor Cahill that handled the business of the office of counsel to the governor. I think that says something positive about Pete Garvin. And it says something about the hours that we work.

William Greenberg: Yes, but in all fairness, because they're all dead, they deserve a defense. Dick Hughes was the most frugal, penny-pinching governor in the history of New Jersey. He didn't pay us anything. There may have been ten of us, but we earned less than you.

John Kraft: I'm sure you did.

Senator Gormley: I like this argument.

Paul Tractenberg: I see a hand out there.

Senator Gormley: I can justify for a lot better than the ten. That's what I heard.

Paul Tractenberg: This is, obviously, a panel out of control, so let's extend it to the audience. Yes?

Q: Theoretically, what would happen if some future legislature or some future governor did what Andrew Haskell did with John Wefing, who said <inaudible>. And you said, "No. We're not going to borrow money to build new schools for the entire state." What would happen?

Paul Tractenberg: I'm the moderator, so I don't get to answer. Justice Pollock?

Justice Pollock: I'm not so sure I'm going to give you the answer you want. One of the lessons I drew from the Mount Laurel cases, in particular, was that the first question a judge should ask when deciding a case is, "Can I enforce the judgment?" That's a sobering consideration. It's just something you have to look ahead, look at the consequences of your decision. The legislature in New Jersey, I think has been responsible and respectful of the court's opinions. It has sought, **Center on the American Governor, Eagleton Institute of Politics, Rutgers University** <http://governors.rutgers.edu/>

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even though it has disagreed with them, it has sought to comply with the court's decisions. We never had to face the question of "Should we put the president of the senate and the speaker of the assembly in jail for contempt of court?" I simply mention that because the ultimate and judicial decision becomes a charade if you're not prepared to enforce it. So you have to ask the question, "If there's noncompliance with the decision, are we prepared to go to the full extent of the law to enforce it?"

Q: On that point, the first decision on the pension plan bond, they allowed to move to education and so forth <inaudible>.

Justice Pollock: The bonds had been sold. Part of the thinking was the omelet's been made. We can't unscramble the eggs.

Q: <inaudible>

John Kraft: The bonds had been sold, but not delivered.

Paul Tractenberg: But I should say in the end game of the Robinson against Cahill portion of the school funding litigation, the court held oral arguments several times on remedies, some of which are pretty Draconian. In effect, declaring a statewide property tax, redirecting appropriated dollars in a way that was compatible with the constitution. And, of course, ultimately what I think paved the way for the state income tax, the injunction which prohibited the spending of any public funds on the schools. Granted, the court did that in July, so it wasn't quite as extreme as it might otherwise have been. But I think in that phase of the litigation, the court really came hard upon a real constitutional confrontation. We did, I have to admit, at one point talk about contempt as an appropriate sanction, but the court would have none of that, showing its good judgment. I saw a question in the back. Yes?

Q: <inaudible>

Senator Gormley: I don't have the numbers right in front of me. You have no idea. That would be an incidental income stream in terms of what you need to attack this debt. Maybe they might pass something like that, but--

Q: <inaudible>

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Paul Tractenberg: I don't know if you all heard the question. It was about imposing a luxury tax on expensive items.

Senator Gormley: There's only one town that has a luxury tax. That's Atlantic City. It's used to build convention centers and tunnels and all good things that are in the public interest. The senator put that all through. All wholesome stuff.

Paul Tractenberg: Incidentally, a group of this sophistication probably knows, but just to make sure, New Jersey, actually by most measures is a low tax state at the state level and an extraordinarily high tax state at the local level. We're living with the consequence of that. Just one number to throw out. New York State has slightly more than twice the population of New Jersey. Its state budget is four times the size of New Jersey. So New York State spends about twice as much per capita at a state revenue as New Jersey. The challenge is how do you redress that imbalance? How do you somehow find a way to reduce local property taxes and, to some degree at least, supplement the state budget? The politics of it, the public policy aspects of it are mind boggling. But really, that's where we ought to be headed if we could find the root.

Senator Gormley: Can I ask somebody a question on the panel?

Paul Tractenberg: Sure.

Senator Gormley: Justice, when you were counsel to the governor, did you write that pine lands executive order for Governor Byrne? Was that you who wrote that? That onerous executive order that took 1.1 million acres from the citizens of southern New Jersey and took it off the tax rolls? Look at that. That perked them up. Not my pinelands. Don't go after my pine lands.

Justice Pollock: Again, I'm not going to give you the-- I hope I don't embarrass Governor Byrne in saying this, but I think, with all due respect, that was his finest moment as governor. It also demonstrated to me, I had the most unnecessary job in state government. The way the governor orchestrated the three branches of government to bring about the pine lands legislation, I think was simply extraordinary.

Senator Gormley: What I found amazing was the deliberate pace at which the court did not review the executive order, to the point we had to finally pass a bill, because the economy of southern New Jersey was stopped. I said, "It's got to get to the supreme court soon." It was a year. It was 18 months. There was a backlog, a backlog like I've never seen before.

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Consequently, we had to pass a bill or our whole economy was destroyed. I'm not saying it was political. But I'm not sure to this day I'm over it.

Paul Tractenberg: Perhaps that answers one of the questions in my original outline. If the court stayed its hand, then the other branches might eventually have to rise to the challenge. Other questions? Because I said this was going to be different, it was different in yet another respect we had, I think. I referred to it facetiously as an out-of-control panel. I thought it was a very animated panel engaged with the issues. I appreciate that. It's 3:30. We're finished.

<clapping>

Paul Tractenberg: Thank you.

End of Program