

NJ Governors and the State Supreme Court

A forum held at the New Jersey Law Center on May 8, 2008

Co-sponsored by the Center on the American Governor,
the New Jersey State Bar Association and
the Institute for Continuing Legal Education

Transcript for Parts I and II

Lynn Newsome: It is my privilege to welcome all of you to the New Jersey Law Center and, Governor, you're becoming a regular here and it's our honor to have you. One of the most important roles the State Bar Association has played and continues to play is in the review process for nominees for judicial appointment. Our involvement dates back to the first Judicial Appointments Committee, which was created in 1930. Three distinguished members, Robert H. McCarter, Edward Katzenbach, and William Kraft served on this committee. At the New Jersey State Bar Association's annual meeting in 1934, it was proposed that the committee assume the role of a veto council on judicial character to assure the nomination and appointment of candidates fit for judicial office. The report urged that "If the bar will place itself clearly on record as being in favor of selecting only the competent for the bench, we believe the effect upon party leaders will be to secure their cooperation." An informal judicial appointments process continued off and on into the administration of then New Jersey State Bar Association Trustee Robert Meynor, who was elected governor of New Jersey in 1953 and served until 1962.

In 1967, Governor Hughes, whose statue graces the front lawn of our building, began submitting names to the New Jersey State Bar Association Judicial Appointments Committee for recommendations regarding each candidate's qualifications. Governor Hughes sought to formalize the process with a written compact between the Governor's Office and the State Bar Association. In September, 1969, he approved the state bar's proposed procedures for the selection and appointment of judges to all of the state's courts. We are very proud that we have been relied upon since 1969 by the nine governors who have served our state to evaluate candidates who have been nominated for a judgeship and we take that role very seriously. We believe our input has helped to create one of the strongest state judiciaries in the country.

I am particularly pleased to have worked closely during my year as president with Governor Corzine and his staff and commend his efforts in increasing diversity among the New Jersey judiciary. Thank you, Governor Corzine. I see Ed McBride is here as well too and it's been a pleasure Ed.

I would like to now turn to Ruth Mandel, Director of the Eagleton Institute of Politics at Rutgers, the State University of New Jersey. Ms. Mandel also holds a faculty appointment as Board of Governors Professor of Politics. From 1971 through 1994, Ms. Mandel served as Director of Eagleton Center for the American Woman in Politics where she remains affiliated as a senior scholar. It is my pleasure to introduce Ruth and, Ruth, it's been a pleasure co-sponsoring this program with you. Thank you very much.

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<applause>

Ruth Mandel: Thank you, Lynn, and good morning everyone. It's great to be here to welcome you. It's great to have a partner in this effort. We're delighted. I do want to point out that sitting in the audience is the leader of our state university, our great state university, President Richard McCormick who has come to cheer us on and wanted everyone to say hello to President McCormick.

The Eagleton Institute of Politics has been very pleased to work with the bar association and the Institute for Continuing Legal Education to present this program today. It's part of a larger project that's called the Rutgers Program on the Governor, initiated when Governor Brendan Byrne donated papers and other memorabilia to the Rutgers University Libraries. As part of that gift, he and his wife, Ruthi Zinn Byrne are with us this morning, and raised money to support the cataloging of those papers. Reaching beyond the initial plans, they secured partial support for Eagleton's first steps to establish a permanent center at Rutgers to study the Office of Governor in the 50 states with special emphasis on our own state of New Jersey.

It was surprising to us as we reviewed what was available around the country, as we made these plans, that no other such academic center exists anywhere in the country. Our goal is to complement Eagleton's national reputation as the preeminent source of research on the workings of state legislatures by making Rutgers the leading national center for the study of governors. In conjunction with Governor Byrne's gift of his papers, we've started to build an archive on the career of Governor Byrne. We hope in the future to create similar collections about other New Jersey governors. Already and I hope some of you avail yourselves of this if you haven't already, you can view online selections from some of the 30 video interviews that we've conducted with former Byrne cabinet officials, staff, legislators, friends, journalists, and other associates. The interviews cover many different aspects of the Byrne administration. Some of them were running in the breakfast room earlier, just to give you a sense of the images of the people and I think Don Linky has told me that at lunchtime they will be running as well. Some of these interviews touch on today's theme, the governor and the State Supreme Court.

Together the interviews provide a living history of an important era in New Jersey government. We have two essential objectives today. One is to build the video and written archive that we're posting on the Rutgers website by considering how the relationship of the branches of government in New Jersey has developed under the 1947 Constitution with special emphasis on the ties between the governor and the State Supreme Court. Our other objective is to encourage you to relate recollections of personalities, anecdotes, and light moments from people you've known in the executive, judiciary, and legislature so that they're preserved for the future. We like to have gossip as part of our virtual archive as well, so anything you've got to share today. We hope this discussion is candid. We encourage everyone to participate, certainly including members of the audience. If you do

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speak from the audience throughout the proceedings today, we'd appreciate it very much if you would identify yourselves because we'll be preparing a written transcript of the session and also because online viewers will want to know who it is that they're seeing and listening to.

We've distributed along with your program the biographies of our distinguished participants today. We hope you'll rely on those so that we can devote our time to the topic at hand rather than to long introductions, so there's reading material there covering the careers of so many distinguished— not covering, highlighting of so many distinguished members of today's audience. With this in mind, I'm pleased today to present our first honored guest. We're very happy as always to welcome him to Rutgers but I'm not going to list his history and notable accomplishments except to observe in the context of this day that he appointed Stuart Rabner as the eighth chief justice to serve since the adoption of the 1947 New Jersey Constitution. It's now my great honor to present the 54th Governor of the State of New Jersey Jon Corzine.

<applause>

Governor Jon Corzine: Thank you all very much. Please, please, thank you. Brendan, when you gave this gift of papers and other memorabilia what was that you were cleaning out the closet and the attic or what – the basement, maybe that will be one of the perks that I have yet to realize as governor. I was going to start my formal remarks by saying the advice that I generally take from Brendan and the governor before that is that governors are never supposed to comment on any legal proceeding going on so I'm going to leave now.

laughter>

Governor Jon Corzine: The reality is, is that it's great to be with all of you. This is a very, very impressive group, Ruth, that you at Eagleton and Rutgers have pulled together to talk about an incredibly important nexus of governance that our state has. The relationship between a governor and the Supreme Court is essential to understand in the direction of policy and how the lives of our people are impacted. We got this other group called the legislature which is also fairly important to that process. I noticed sometimes I guess Governor Byrne had to work on that as well.

I'm very pleased to make a few observations. I'll keep them at 30,000 feet because there are ongoing elements of our relationship that are real and some of the most important topics are before the court today. It's an issue that or a set of issues that I think rightfully have to be addressed in how those laws are both applied at the fundamental level to the individual, how we have created policy translated into legislation or executive order or regulation, whether that is legal, or whether we are failing to do the things that we need to be doing where we are not observing the fundamental law, our constitution.

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The great justices that are here I think have done an extraordinary job throughout their history, not only these justices but their colleagues and predecessors in making New Jersey's Supreme Court probably the most respected Supreme Court in the country. I never hear anyone speak of the administration of the law of jurisprudence here in our state in anything other than in the highest terms, unless I read Paul Mulshine. [*Star-Ledger* columnist]

On occasion there are critics but I believe that there has been an enormous sense that our court has brought the right balance to how we have taken our 1947 Constitution and applied it to a great state, which by the way has the highest per capita income. Its children are educated at probably the best levels. We have one of the great economic engines of the world. And so, while we hear a lot of the things that aren't good, I hear a lot of things and see a lot of objective evidence that we are actually doing much better than what people might interpret at a given point in time and I think it is because of the progressive and activist view that the court has held us accountable to in terms of the constitution.

I'm proud of that and I think our state is better for it. Now that doesn't mean that everything that the court does is always in synchronization with what public policy makers are about or how they feel about things but that's why we have a constitution and why we have this separation of powers that get us to resolutions of those conflicts. I will say and this will be the only thing that you can interpret as even slightly critical is sometimes that I think there is a disconnect between how we make constitutional decisions with respect to what its implications are on something simple called the budget. It is always hard to rationalize how you pay for the things that are the values that we all express. We certainly see that as a public servant and, yes, a politician in the overall process, but it is a challenge and whether it's Robinson vs Cahill or Abbott or what I hope will be the evolution of those rules or whether it is Mt. Laurel or the administration of a whole host of our laws that have evolved from I think fundamentally sound and proper decisions, we also have to combine those with good judgments about how we go about funding our world. It takes a lot of effort to try to rationalize as opposed to collaboration between the two branches, rationalize how we put the practical reality of those progressive views which are absolutely spot on in my view together with the realities of how we finance it.

One of the great challenges of at least this administration and the last time I checked briefly about Governor Byrne, something about this income tax ended up being an issue that you had to deal with. It gets into even simple things about whether you're going to have a tax credit or a rebate and how we interpret the homestead rules and other issues which are really quite challenging so the interaction or the interplay is really quite substantial between both the law and its interpretation and application by the court. And governors have a little bit to say about the court. It's not on a day-to-day basis but this is one area where you're a Republican, a Democrat, or an Independent, I think our governors have done an

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exceptional job and I think that's by deduction if you believe that our court is of high repute and it's progressive and powerful and has done its job then by implication our governors over time have come to good conclusions about the people who should serve on that court. And, in fact, I think that's very much the case and I feel that we can be proud of the kinds of processes, whether they've been informal or more formal, in how we've gotten to the selection process.

As you know, the issue of selecting judges is the most important piece that the governor has to say about this whole process. This is a little bit like sending your kids out on Saturday night. Once they're gone you don't really know what they're doing but you hope you knew what you were doing when they got started. As far as I'm concerned, I've been very proud of those decisions that have come from this process. We've tried to take that more deeply that whole process more deeply into the selection of judges more broadly, which has led to some stickiness let's say in the movement of judges to fill positions below the Supreme Court. I'd be remiss if I didn't talk about it. We think it is absolutely important because that's probably the greatest ground on where you're going to find future Supreme Court justices. We've added a step to reflect the confidence that I have in the Supreme Court. We have asked many of our former members to be on a screening committee. I see Judge Ford [Marlene Lynch Ford] is here and Judge Pollack [Stewart Pollack] and others are actually making a view after we've done step one, which is outreach and try to find folks who we would think appropriately fill positions and then have a judicial review before we even get started so that there's a screen before the political process that is inevitable get started to find out whether we have qualified candidates.

Our outreach has been certainly one to reflect cultural, ethnic, gender diversity in that process, but we want to maintain very high standards in all of those individuals. It's not a quota system and it's about trying to make sure that we have high quality individuals serve on the court. And then you move to the Bar Association which we heard Lynn speak about and I'm proud that we're back in that compact. Then we have the work with the legislature and it is a very complicated process.

It's probably a five step process, the outreach, the judicial panel review, the Bar Association, the Senate Judiciary, and then the full Senate. That process, while long term, more lengthy than some would like also is absolutely essential in my view if we're going to maintain the high quality nature of our judges. And then I think that in turn will be reflected in the ultimate selection that goes on the Supreme Court. So we have impact. As you well know, we also get what is unusual a review after seven years which is another integration of how the governor fits into both the judiciary and the Supreme Court and so that it is another responsibility that does have some impact.

I would be very interested to listen to a panel of former justices talk and speak to how they feel their observations of how that review process works because it has the potential to be

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from a cynic's point of view influential and how someone might operate in that context. I think it makes it all the more important that you have discipline processes that have outreach to people who are other than just from the political process to make sure that we get to good, solid results. And as I want to emphasize again, I think that's the reality of what we have. Equal justice before the law is an incredible thing and it translates from whether we educate our kids appropriately, all of our children, or right up to whether there is equal justice under the law for marriage equality or civil rights in those contexts. Our court has been a great, great motivator and counterbalance to a political process that often hinders the full application of equal justice under the law. So my observations beyond that I think I will keep to myself. And if anybody in the judicial system has any way how we can equally raise the resources to be able to fund all the things that we are now trying to do that apply the law, my number is 609-777-2494.

We love you all. Thank you very much.

<applause>

Ruth Mandel: We didn't have to ask him. The governor has volunteered to take questions so he has a little bit of time before he has to move onto his next appointment, but if a couple of you have questions, we'd be happy to entertain them now.

Governor Jon Corzine: This will be more fun than the town hall meeting in Toms River I suspect. Oh, Ruthi, come on.

W1: One problem I hear all the time about the different judges is that it's not fair that they make less than their current legal positions that we're having <off mic>.

Governor Jon Corzine: Well Justice Zazzali - Chief Zazzali - and I both worked not on a collaborative basis but from our different roles in life to try to promote the idea that we needed to address compensation and I think with the cooperation of the legislature we were able to make some movement in becoming more competitive. I think that it is wrong that people who are going to make I guess no longer life and death decisions but fundamental decisions in the impact of people's lives that we don't think that is of high enough value that people should be rewarded so that they stay long enough. I'm a big believer that all of our public servants are grossly underpaid and our judges very much fit into that pattern. And I think that the idea that we pay a commissioner of education \$141,000 when we have two and a half million children that really fall under that doesn't strike me as a responsible decision. There are a number of those issues and contradictions that exist within our government structure that are very difficult and fortunately we've had some great

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leadership from the judiciary standpoint to speak up on the need to address the problem that you've talked about. I think fortunately we have a lot of civic minded and public servant minded individuals that are willing to sacrifice. I think it's a bigger issue in the lower courts than it is at the Supreme Court level.

<off mic question>

Governor Jon Corzine: Did I cut that program too?

W2: No, not yet, never.

<off mic question>

Governor Jon Corzine: My answer is not going to be dramatically different than what I said. I've tried to use the commissioner of education just to take it into another sphere, but you can go up and down most of the roles in government and people are paying a fairly significant penalty relative to the private sector to be involved in public life. And given the cynicism that exists about government, fortunately I don't think the court suffers from that as much as may be justified for governors and the state legislature but the reality is, is that everyone in government is both underpaid and totally underappreciated and I only encourage you to listen to 101.5 and you will hear rants about what it is that people do or don't do in contributing to the goodwill, to the common good that I think is not appropriately rewarded. It is a long run issue. It's true in federal government as well, by the way. We have a very serious undermining of our governance structures because of our inability to get the brightest and the best. It doesn't mean that there aren't a lot of bright and very, very good people that go into government, but they're doing it at a very severe sacrifice and the Attorney General's Office is filled with individuals of that nature. I thank you all. Have a great day. Make sure you grill this guy. I want to hear some of that gossip myself about Brendan.

And I'm sure, I saw Governor Florio just come in, I'm sure he has some good gossip too so make sure you get that on record.

<applause>

Ruth Mandel: Thank you very much, Governor Corzine. We really appreciate starting us off this way. It's a great way to start the day. I am just going to take one moment before I

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bring up the speaker and then moderator for the first session after the governor. I want to take one moment to acknowledge and point out and give credit where credit is due to the person who really put this program together, is in charge of the program on the governor at Eagleton, a colleague who does this actually as— he gets paid but we do just about as well as what the governor has just been responding to but does this as a labor of love and that is Don Linkey [ph?] who is sitting there next to Governor Byrne and Ruthi Byrne.

<applause>

Ruth Mandel: And I know you all know that because I think he's been on the phone with everybody here plus a few in putting this together today and in constructing the archive, the virtual archive on Governor Byrne. We're very fortunate to have him doing this. The person I want to bring up now with, as I mentioned before, no lengthy introductions, just a one sentence acknowledgment is a colleague from another division of Rutgers University, Camden, the law school, who has been a friend of very long standing of the Eagleton Institute of Politics. He's one of those colleagues everyone wants to have because he's not only an expert and wise but when you pick up the phone and call him, whether it's our graduate fellowship program, recruiting students, support, recommending students or working with us on a program like this, he is always more than ready in a terrific, positive way to collaborate. And so it's a pleasure to bring up Professor Bob Williams from Camden, Rutgers Camden.

<applause>

Bob Williams: Hello there. Thank you, Ruth. I appreciate that. I'm honored to be here and humbled, as Lynn Newsome said to be in this group. I appreciate being invited and I want to talk to you for a little bit about our governor and our Supreme Court in this state and how we got to where we are today, together with what I see as a constructive, reciprocal relationship that we have now between the governor and the Supreme Court in this state. I think you're all aware that we have what's clearly considered the most powerful governor in the United States, maybe in the world, and if not the best, one of the most highly respected State Supreme Courts in the United States.

I'm sure there are some days when Governor Corzine wonders about whether he's really the most powerful governor in the country. But what I want to talk to you about really is how we got to where we are today and what are the consequences of that? And, as I said, I think the two branches that I'm talking about here, the executive, the governor, and the

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Supreme Court have taken note of this historical progression and I do think have really quite a constructive, reciprocal relationship of support here. So this is really a story about how these two branches came from obscurity and weakness to strength and prominence. And in our state this has actually been an intentional process that's been supported by the public in the changes to our constitution resulting in a more equal balance in the branches. So this is a broad brush picture. Some of you know a little bit of this. In 1776, we had our first state constitution here, very interestingly adopted on July 2nd, 1776. This constitution reflected a reaction to the abuses imposed on us by colonial governors and created really what I would call a pipsqueak of a governor, not hardly a governor at all. This was a person who was elected by the joint meeting of the legislature, served a one-year term, had no veto power, had no appointment power, and interestingly also served as chancellor of the state.

So for the first 70 years of our statehood, every governor had to be a lawyer. Now as a member of the law faculty at Rutgers University, I would say, "What's wrong with that?" I mean that sounds like a pretty good idea to me. So formally the governor was weak and had virtually no power and was dependent on the legislature. As a practical matter, however, governors could exert some real influence over the state through force of personality and the use of the political process. So, for example, the first governor, Governor Livingston, really was quite adept at setting the agenda for the legislature and for the state but it wasn't based on formal powers. It was based on his own strength and personality and political acumen. At the same time, the judiciary in those days was viewed as essentially part of the executive branch. The judges were also appointed, in those days appointed by the legislature. The final appeal, as you heard, was to the upper house of the legislature, very interesting.

Once again legislators in the audience might say, "What's wrong with that" but there was no real Supreme Court as we know it now, a chaotic organization of the courts with no coordination or administrative control. Interestingly, however, this system generated what may have been the first example of judicial review in our country's history, the 1780 case of Holmes against Walton where the lower court, not the upper house of the legislature, ruled that it was unconstitutional to have a six person jury in charges of trading with the enemy, quite a courageous decision that was not overturned by the upper house of the legislature, rather the statute was amended to comply with the constitutional ruling, quite fascinating, an entire generation before Marbury v. Madison that we're all taught invented the concept of judicial review. We can claim that here in New Jersey. There are a few pesky cases in Virginia and some other states where they claim the first, but let's say we were first on this. Even out of this weak judiciary, very interesting process, who was the winner in this arrangement; the legislature, okay. So if you look at that picture of the three branches, you'll find in the middle sort of a seven foot, 250 pound legislature flanked by 5'2", 120

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pound judiciary and governor and that was just quite fine with the legislature in those days. After all the legislative branch was the darling of the revolutionary era.

This was power to the people back before people talked in those terms. The legislature was omnipotent. The New Jersey structure actually was so bad that it caught the attention of James Madison and Alexander Hamilton when they were writing the Federalist Papers. And you may know that Madison singled out New Jersey in Federalist No. 47. He said, "The Constitution of New Jersey has blended the different powers of government more than any of the preceding," the other states that he described. Hamilton said, "In New Jersey, also, the final judiciary authority is in the branch of the legislature."

So these giants of our constitutional history were criticizing New Jersey in the process of supporting the new federal constitution at the time. As you know, they wrote the Federalist Papers to the people of New York. Inside New Jersey, criticism focused on this lack of checks and balances. There was the rhetoric of separation of powers but rhetoric is no good. You need the actual mechanisms of checks and balances to put teeth in separation of powers rhetoric. And we care about separation of powers primarily to protect the people of our state from the tyranny of one branch or the other. We're not so concerned about protecting government officials from each other, but that's part of it too. The branches of government need the tools to defend themselves from encroachment by the other branches. In this early mechanism that did not happen. We had the dominant 800 pound gorilla legislature. Governors began to speak out about this. Governor Paterson [William Paterson, 1790-1793] claimed to be the weakest governor in the United States. Governor Pennington [William Pennington, 1837-1843] in 1840 began to describe the conflicts between being governor and chancellor at the same time.

I believe Governor Florio looking back on this has said, "I wouldn't have wanted the job." I think that's an accurate statement, Governor, accurate quote from the famous video. So finally we got to the 1844 constitutional convention and the equilibrium was slightly adjusted there where the governor became elected statewide, no more elected by the legislature, became a representative of all the people in New Jersey but only for a three year term with no succession.

So the governor was a lame duck the day he in those days, always he, took office. Governors could come back later and run again. It was interesting and some of them did. A new veto power was put in for the governor but a weak veto could be overturned by a majority of the legislature could be overridden by a majority of the legislature. This was a huge debate in 1844 and the majority override provision passed by only one vote in the constitutional convention so it was very close at the time. The governor could grant

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pardons and reprieves now. The governor could appoint most judges and officials with advice and consent of the Senate.

It turned out that the legislative appointment of all of these officials had become too intertwined with the enactment of substantive legislation. You saw packages that were made up of the enactment of two bills and the filling of one office and that was what would move through the legislature. From the legislative point of view, "What's wrong with that" they would say? There was no clear power though back then for the governor to remove officials. The governor was no longer chancellor and could focus on the one job and the governor was protected from a reduction of salary during his term.

The legislature was also a focal point in 1844, no more legislative appointment of trial judges. We got an actual court as the highest court. It was a weird court, the Court of Errors and Appeals, the 15 member court made up of the chancellor, all the Supreme Court justices and six lay judges referred to by some as slightly larger than a jury, slightly smaller than a mob, not a great court frankly. And very importantly the law equity distinction was retained in 1844, so some fairly major changes to gubernatorial power, more minor changes to the judiciary. Right away after 1844 began 100 year process to try to get what we now have as the modern court system. Very quickly, 1873, we had a major package of revisions to the state constitution. It's not as well known as the 1776, 1844, and 1947 changes, but there were some very substantial changes coming out of an appointed commission.

In 1873, Governor Joel Parker addressed the legislature and said, "We've got to have a constitutional convention," but of course he said, "The reason we need a constitutional convention was to reign in the legislature" so that didn't fly. But on the last day of the session the legislature provided for an appointed commission, blue ribbon commission to study the constitution and make recommendations back to it, the legislature, so the legislature could maintain control over this. But it's interesting through that process came some very major changes in our constitution. Some of you may have heard of the thorough and efficient education clause. It's not particularly relevant to what we're talking about here but another major debate about the veto power, an attempt to put in a two-thirds override like we have today failed. The legislature wasn't going to do that to itself. But on behalf of the governor we got item veto for appropriations bills, very important I think, the power to convene the legislature— the governor got the power to convene the legislature or the Senate alone and many limits were put in on the legislatures, enactment of special laws and other things which interestingly operated to draw the judiciary into the affairs of government much more than the judiciary had been involved before because we simply had more constitution there for the court to interpret. We had more limits on the legislature that would stimulate litigation that would go to the judiciary.

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So we saw a somewhat of maybe the two branches next to the seven foot legislature grew four or five inches and the legislature shrank down five or six inches. I'm not sure one could probably do a wonderful visual of this but I'm not techie enough to do that. So by 1913, Governor Woodrow Wilson came out and commented on the still weak governor. He said, "Governors passed and were soon enough forgot if you just sat tight and waited." By the 1940s, Governor Charles Edison invoked these words of Wilson. He addressed the legislature saying that we needed a stronger governor that we had the worst court system in the United States. This process leading to 1947 is fairly well documented. I'm not going to go over it in detail here. But finally the stars aligned in some respects post World War II and a political compromise was made to have a limited constitutional convention.

You may remember that under the old system every county had a senator so the small counties always stood in the way of any constitutional convention because they would have lost that advantage that they had. So by 1947, Governor Driscoll and Arthur Vanderbilt and others said, "Well why don't we just take that off the table? Let's have a limited constitution. Let's put that aside," brilliant. Why nobody thought of that earlier we'll never know and, of course, within a generation the Supreme Court of the United States had solved that problem with the one person, one vote, cases. But Governor Driscoll and Arthur Vanderbilt and others came together in the post war optimistic time when a lot of people in this country believed in strong executive leadership, the model of FDR, and we got what we think of as still now in the United States a model state constitution with a governor, with a four-year term, could succeed himself, the single statewide elected official, two-thirds vote required to overturn his vetoes, a new kind of veto, the amendatory or conditional veto, an interesting mechanism.

The item veto was expanded to include reduction in items of appropriation; a streamlined executive branch to only 20 departments under the governor's control, power to investigate and discipline executive branch officials, maybe even the power to remove, clearly the power to remove officials, maybe even up to the attorney general and the secretary of state. I say maybe. Look for one of the issues of our law journal to come out soon that will have an excellent student article about this power of the governor under the 1947 constitution. At this point, I think Governor Florio said, "I want the job" but I think I'm also accurate in quoting you as saying, "But there's no place to hide." That's what this kind of a structure provides, pinpoint responsibility in a single person, the most powerful governor in the United States.

Governor Kean used to talk about going to the National Governors Conference and I think he always said it was John Sununu who would call him the Ayatollah Kean. The New Jersey governor was the envy of all other governors because of this power. What happened to the judiciary in 1947, I think you know a good bit of this, the Court of Errors and Appeals was

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out. A strong central Supreme Court, centralized Supreme Court modeled on the United States Supreme Court, maybe with a better appointment system with the seven year review, who knows, but a little bit different. The chief justice as the administrative head interestingly appointing the appellate judges, quite unique around the country, so that governors didn't get to decide who went on the appellate bench. It is the chief justice who decides that, very interesting power. A statewide appellate court, no political involvement by the judges, abolition of the law equity distinction which was quite a mess for people to get stuck in the wrong system. The statute of limitations runs out on their case before they find out they're in the wrong system and other kinds of problems like that. Powerful new authority to promulgate rules of practice and procedure for the courts and for the administration of the courts and the power to regulate the bar which has been very important.

So right after 1947, the American Judicature Society said that we had gone from the worst court system to the head of the class literally overnight. Who was the loser here in 1947; the legislature. It seems to me that if I was techie enough to put this up you'd start to see an equilibrium really of three co-equal branches there. Since 1947, very briefly, maybe we've had a couple of little, from the governor's point of view, steps backwards. In 1981, the governor had an unwritten arrangement with the legislature that when the legislature passed a bill it wouldn't present it to the governor until the governor called for the bill. I was amazed when I saw this when I came here in 1980. And so the governor could never call for a bill that had passed the legislature. This provided a form of pocket veto actually at the end of a legislative session and during the legislative session gave the governor an incredible power to negotiate with the legislature. "Well, I might call for that bill but, gee, I hope you pass this other bill first or approve this appointment first," and informal power. It went to the Supreme Court and the Supreme Court stayed out of it, a political question. And then we amended the constitution to require that now the legislature had to send a bill up to the governor I think on the next legislative day. Some people would think and I think it's accurate that acted as a little bit of a brake at least in the governor's informal power vis-à-vis the legislature not the court.

We got an amendment in 1992 permitting legislative veto after Governor Byrne had won his case striking down the legislature's power to veto administrative regulations by the passage not of a law but by a resolution that, of course, then didn't go the governor for veto. This was pretty open and shut in the Supreme Court. That's unconstitutional and interferes with the governor's authority but it was overturned by constitutional amendment so now our constitution permits that thing, that sort of mechanism. I think it came out of the infamous runny egg regulation that came out of the Department of Health or something saying restaurants couldn't serve runny eggs and there was a revolution in the state and we changed our constitution to deal with it.

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I don't think it's ever been used this power but it's maybe a possible slight dent in the governor's formal powers. One might wonder what about the recall amendment, the more recent recall amendment? I forgot to check the date on it. It hasn't been used. Is that going to be a change in gubernatorial power? I don't know, maybe.

What about the new lieutenant governor that we'll begin to experience before too long? I think it remains to be seen. Who knows what will happen? What's happened with the court since 1947? Under the leadership of a group of extraordinary chief justices our Supreme Court has really become a co-equal branch of government. All of you know about the initiatives that the court has taken pursuant to cases brought to it. People have to understand, I think everybody in this audience understands the court just doesn't just disgorge these opinions. It's litigation, adjudication that's brought to the court; Robinson and Cahill, Abbott, Mt. Laurel, the death penalty cases insisting on procedural fairness over the years. The court upheld the death penalty but insisted on a procedural fairness. The death with dignity cases, Karen Ann Quinlan litigation really began that movement in the whole world I believe. Same sex marriage, more recently. Less visible initiatives through the rulemaking power, some very important initiatives and also regulating the bar.

We have graduated contingent fees in tort cases in the state because of the court's ability to regulate the bar. So let me just report to you a recent sophisticated statistical study. It's published in the University of California at Davis Law Review only a couple of months ago that looked at the influence of state supreme courts around the United States in terms of the number of decisions of each state court that were followed by other state supreme courts around the country. And naturally since it was Californians doing the study, they concluded that the California Supreme Court was number one. I looked at the study. I'm not very good with statistics. They're probably right but New Jersey came in regularly three or four of the most influential state supreme courts in the United States in terms of their decisions being influential enough to be followed by other state courts. I was very quick to point out to the people the study covered the years 1940 to 2005. I was actually out in California when they were presenting the study at the bar meeting and I was out there to defend New Jersey and I reminded them we didn't even have a proper Supreme Court until 1948. Don't we get an asterisk or something on this thing? Don't we get a little step forward? They didn't do that but we put it in an editorial in the Law Journal to remind everybody.

So we've got a court that Exhibit A I think is what Governor Corzine said, highly respected. Not everybody agrees with every decision. That's not my point at all but it's something I think that everybody in our state is proud of and it makes it a great state to teach law in it seems to me. Let me say just a couple of more words about what I think is the reciprocal supportive relationship that exists between the governor and the Supreme Court since

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1947. And on the governor's side it's a political support. On the court side, it's legal support. I'll explain in a minute what I mean by that. Interestingly, the court has stayed out of a couple of the biggest hot button issues.

Senatorial courtesy which operates as a substantial limitation on gubernatorial authority was said to be a political question in *DeVesa* against Dorsey, 1993. The court stayed out of it, split decision I think. Executive orders, Governor Byrne's executive order on Pinelands development was challenged dramatically. The Supreme Court heard argument in that case. The case was believed on whether the governor had exceeded his executive authority by issuing that executive order but in the meantime the legislature acted in an act of the Pinelands Statute and the court backed away from the case, said it was moot. So who knows how it would have come out. None of us know I don't think. There might be somebody who knows. The court might have said, "Well it's not really moot. We have to decide this" and decided one way or the other. The court stayed out of it.

The pocket veto presentation issue I mentioned before, *Gilbert v. Gladden*, the Supreme Court stayed out of. That was changed by constitutional amendment. But the court has operated as a referee in turf challenges between the governor and the legislature. And I might add sometimes the court has to operate as a referee concerning its own powers. There have been a couple very important, a number of very important examples of this, but that's not what I'm talking about here. So as early as 1956, *Russo against Meyner*, the Supreme Court interpreted the governor's power to investigate and discipline executive officials pretty broadly and quite supportive of governor's authority based on the 1947 Constitution's desire to create a strong governor. As I said in *General Assembly against Byrne*, the court struck down an encroachment on the governor's power through this legislative veto mechanism, overturned by constitutional amendment, so be it.

The court upheld an expansive use of the item veto in *Carter v. Kean*, 1984. Maybe I think the clearest example of this though is the case of *CWA against Florio* in 1992. You may remember there the legislature reduced budget items and attempted to tell the governor how to handle the layoffs that had to come in that budget reduction. The governor resisted it, went to court, and the Supreme Court with Justice Garibaldi writing the opinion said, "The members of the constitutional convention of 1947 considered the governor's significant responsibility over the state's fiscal affairs to be an important aspect of the centralization of state finances essential to modern government. The prime objective of the 1947 constitutional convention was to create a strong executive. The New Jersey Constitution is unusual because it's the only state constitutional with the only statewide elected official." Holy cow! She was quoting from my book about the New Jersey Constitution. I was so thrilled when I saw that. The point I want to make about this though is that this reflects a sophisticated state specific separation of powers doctrine. This is not mimicking federal

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separation of powers doctrine where there's a different arrangement of the branches and it's not mimicking the separation of powers doctrine from any other state.

For example, the state I come from, Florida, has a weak governor. There used to be seven other statewide elected officials. Now there are three other statewide elected officials who exert executive authority together with the governor. I don't think they return the governor's phone calls. I mean basically they're getting ready to run for governor is what they're doing. We don't have that in New Jersey and this kind of a judicial decision recognizes that. So I believe the court has in a legal sense been supportive of gubernatorial authority, properly in a legal sense, given our constitutional history in this state and given what the 1947 framers set out to do. Well what's the governor done for the Supreme Court or the judiciary? I believe also there's evidence of a supportive relationship there. It's political. It's not legally mandated. So just a couple of examples and I'll conclude, I don't think we've ever since 1947 had an example in this state of a governor running against the Supreme Court the way we saw at the national level when Richard Nixon ran against the United States Supreme Court. Frankly, there have been some times where that might have been very tempting for a gubernatorial candidate to do. It hasn't been done here.

We've seen, as Governor Corzine said, a string of high quality judicial appointments to the court. Yes it's political as Governor Corzine said. Yes, a number of these appointments have been from the executive branch but that's the governor's prerogative here. We've seen essentially a re-nomination process after the seven year probation period that is not based on the judicial opinions of the judge who's under consideration for re-nomination. That would be very tempting for a governor to say, "You know I don't like these decisions. I'm not reappointing this judge. I'm not re-nominating this judge." The classic example of this is Governor Kean's willingness to re-nominate Chief Justice Wilentz after I think he called the Supreme Court a bunch of communists. He said publicly, didn't agree with the chief justice's decisions, but he said "I'm going to re-nominate him because not to do it would— I think his quote was "interfere with the mix, interfere with this equilibrium, the independence of the judiciary." The legislature didn't view it that way. As you remember, the chief justice was reconfirmed by only a single vote but the chief justice wouldn't have even been considered if the governor had not re-nominated him.

The governors have abided by all these years by the informal agreement to keep a partisan balance on our court. It's unwritten but it's become a part of our culture in this state and to me I think it gives the court added credibility in controversial politically charged cases. I know people don't all agree with all these decisions but it struck me when we had the Torricelli case. I forget what it was called but the Democratic Party against somebody. That was a 7-0 that case and it was decided by a politically balanced court, why, because governors have made it that way. I believe too we haven't seen any gubernatorial,

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substantial gubernatorial support for proposed constitutional amendments overturning the decisions of the court, at least any that I can remember. And, of course, even most recently Governor Corzine supported the judicial pay raise initiative which, of course, he wouldn't have had to do. I suppose the person who most would understand the relationship between the court and the governor would have been shall I call him chief justice or Governor Hughes. He's not with us now sadly. So let me conclude with that saying that we've come a long way from our initial beginnings as being held up as essentially the worst arrangement in the United States to where we are now where I think we have what's considered generally to be the best arrangement in the United States. We worked very hard to get there. It's been 60 years now and counting and I would like to say I hope we can keep it that way. Thank you very much. Do we take a question or two?

<applause>

Bob Williams: We have an extraordinarily distinguished panel here. You have their bios. You know who they are. They have nameplates there. Our idea is to just go down the line because I wouldn't dare try to set a priority on this kind of a panel and have each of the panelists say a few minutes about their general impressions about this question of the relationship between the governor and the Supreme Court. And then we'll follow it up with some discussion on the panel and then we'll open it up to a discussion and question and answers from you. We're going to go until about what time, noon, okay. Okay so if we could start with Governor Byrne on this end, a few comments about the relationship of the governor to the court.

Governor Brendan Byrne: Okay.

Bob Williams: Or vice versa.

Governor Brendan Byrne: I go back a long way. I don't know what Driscoll's relationship was. On a personal basis, I know that he and Vanderbilt put it together. I know that Driscoll inherited Walter Van Riper as attorney general [1944-1948], didn't get along with him, and established the Office of Counsel to the Governor. It's not in the constitution. It's become more and more powerful because governors like an attorney in close. That's all I know about Driscoll.

Meyner had a strained relationship with Vanderbilt because Meyner had been on the wrong side of Windberg v. Saltzberg and so he and— Vanderbilt would come into the— I was assistant counsel to Meyner for a while then secretary to Meyner. He did not have a warm relationship with Vanderbilt but a correct relationship. Vanderbilt would come in from time

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to time and discuss things and prod him on salaries and openings in the court but it was not a warm relationship.

Meyner's relationship with Weintraub was extremely close and Meyner appointed Weintraub Chief Justice in 1956 or '57 after Vanderbilt died. Meyner was under great pressure to appoint either Herr or Wakefelt to that job for a couple of years and then after he was reelected appointed Weintraub. Meyner didn't want to take the chance. Meyner also at that point had a lot of courage because he was running for reelection. It wasn't a chip shot. There was a lot of pressure for a Catholic chief justice. Meyner refused to do it, political cost, but he went with Weintraub.

Weintraub was a tremendous influence on Meyner and frankly on me but Weintraub was the chief justice and very influential. As a matter of fact, I remember I was secretary to Meyner. He called me in one day. He says, "What do you think of Scatino [ph?] for the New Jersey Supreme Court?" I said, "It's another Weintraub." He says, "Good" and he appointed Scatino understanding that may be how it was going. Hughes I think and Weintraub got along pretty well. Hughes was the governor and Weintraub was the chief justice. Weintraub stays on the court during the Cahill time and Weintraub submits his resignation to Cahill early in 1973 and 1973 is an election year.

I think Weintraub was going to resign in the spring of '73, maybe April. I'm now the candidate, the presumed Democratic candidate. Cahill calls me and I'm just a candidate but Cahill calls me and says he wants to appoint the successor to, who was the chief justice, who died, Garven [Pierre Garvin]. I said to Cahill— I'm not sure why Cahill thought he needed me, by the way, but he was convinced he couldn't get a justice confirmed without me. I'm just a candidate. I said to Cahill that I would okay his appointing a justice but not a chief justice. He comes back to me and he says, "I got a chief justice that you can't refuse." He gave me Hughes' name. Actually I ran the Hughes name by Weintraub and Weintraub came back on that and said, "I think it's going to be all right." But the fact is, is that Weintraub in my experience was the kind of chief justice who you could deal with. I mean he was the best lawyer I've ever met, ever experienced, and I apologize to John Gibbons for saying that but I was very close to Weintraub.

When I was the prosecutor of Essex County, I would actually call Weintraub on occasion. I remember one time I had a case that was being tried in Essex County and the jury is out and the United States Supreme Court decides the case in which they held that a prosecutor cannot comment on the defendant not taking the stand. So now the court decides that while the jury is out. So I go up to the trial judge and I say, "You got to recharge the jury" and the trial judge says, "No, you can't. I can't recharge that jury." So I call Weintraub. I don't think that he would do that to me but I call Weintraub and I said, "I got nothing

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unless he recharges the jury." Well Weintraub calls the trial judge and tells him to recharge the jury. I think there's a lot to be said for that.

Professor Williams mentioned that the Supreme Court was holding the decision in the Pinelands case. Hughes would call me every couple of weeks and say, "Why can't you get the legislation passed?" I would say, "Well I'm trying my best." And he would say, "Well, we're going to have to decide this case sooner or later so do your best." We got the case. I think he was having a lot of trouble getting four votes for me but we got the dissent. I think that having an informal nice relationship between the governor and the court is good for the state of New Jersey and by and large we had it, not with all the governors, not with all the chief justices. I remember I drove Arthur Vanderbilt home from a grand jury dinner in Passaic County one day. I'm a little kid and I'm working for the governor. Vanderbilt says to me, "Please tell the governor that it shouldn't be too long before he puts Ralph Fusco [ph?] on the bench." Why does the chief justice got to tell some 30-year-old kid what he should be telling the governor directly? I don't think there's any harm in telling the governor. Anyway, I had a lot of experience with chief justices. I was as close to Weintraub as anybody. I had clerked for Weintraub. And just give me a minute and I'll tell that story because I like it. I finished my second year of law school. Somebody tells me Weintraub is the kind of guy you should clerk for, so I go see him and I say, "I would like to serve my clerkship with you." And he said, "What law school did you graduate from?" I said, "I haven't graduated from law school" and he says, "I don't want you." I said, "You don't understand. I'm willing to work for nothing." He said, "No, you don't understand. I don't want you." So he called me back three or four days later and said, "If you really want to work for nothing, come on in." And I came in and that forged a lifelong friendship. Jim.

Governor James Florio: Well thank you very much and I'm pleased to be here. This is a very impressive audience. I guess my experience is somewhat different from Governor Byrne, obviously a shorter period of time and over and above that didn't have the interaction with the chief justice, Chief Justice Wilentz largely because I shared his view that it would probably be inappropriate to be talking substance. Obviously at social gatherings we'd say hello and things of that sort but there really wasn't a whole lot of small talk or a conversation going back and forth about things that were involved, even types of advice that you might think. I'm comfortable. I was comfortable with that. But on the other hand, in terms of not so much the governor's relationship to the Supreme Court, but the governor's office's relationship to the Supreme Court was very vigorous.

I actually interacted through our Attorney General Bob DeLufo who I think is in the audience somewhere and the public advocate. The public advocate Freddie Carrabayo particularly was a very, very forceful spokesperson for administration values as well as he had some degree of independence but in this case we both independently agreed that the

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insurance companies were ripping off the state and other things as well. So we were able to work with the court, with the Supreme Court in very aggressive ways. I just philosophically have always been a supporter of an activist approach out of the judicial branch of government largely in the years prior to my coming into office and even in the time when I was in office feeling that when the legislature and the executive branch were not able to fulfill their requirements of carrying out school policy, housing policy, and things of that sort then it was imperative that the courts step in and fill the void. Now clearly that's a contentious issue.

There are lots of folks who maintain that the court has just a traditional approach of interpreting laws not doing anything that is going to be perceived of as advancing perceptions of laws. I think what it is that we were trying to do in those clear instances and going back to *Robinson v. Cahill* as well as the Abbott case feeling that the legislature and the executive, and the executive I throw in because even though theoretically from civics 101 the legislature makes the policies. The executive just implements and executes. The fact of the matter is in New Jersey particularly and I suspect other places as well the lawmaking process is a collaborative process between the executive branch and the legislative branch and if they don't correct clear deficiencies then it seems to me that the court has no choice but to intervene so that when under *Robinson v. Cahill* it was clear that nobody in the other two branches of government were doing what had to be done to correct the deficiency of having the quality of children's education determined by the accent and what town they came from. The court had no choice but to step in.

Likewise, the Mt. Laurel cases when it was perceived of and this is prior to my coming into office that exclusionary zoning was overtly taking place and nobody was doing anything in the other two branches of government the court had no choice. I would probably make the argument now that there are lines when the court gets involved when perhaps they should not get involved. I would make the argument and this is a pending matter so nobody should comment on it, but I think Governor Corzine has done a very good job with the school funding formula that replaces the argument that people had that, well, the reason these cases evolved was because nobody was doing anything about the problem.

Now you may not like what he's done but it's clear that the legislature and the executive have done what they're supposed to be doing, which is setting policy and therefore perhaps there's some question as to whether the court should stay involved in this process or not. Even the Mt. Laurel case, discriminatory zoning is clearly an area that the court should come into. You start getting into more exotic areas of planning, land use, maybe you can make the argument the court should not be as intimately involved.

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But philosophically what my administration, what I tried to do was to strike that balance to be encouraging for the courts to pick up the slack that the other two branches of government did not do what they were supposed to be doing. And then, of course, the court provides you with the framework and still it goes back into the legislative process and the executive process to try to refine the framework principles that are established in the court decision so as to remedy the problem.

Deborah Poritz: I'd like to begin with a couple of anecdotes that relate to my experiences both when I was attorney general and then as chief justice with governors and chief justices. And then to speak just a little bit about something that hasn't been mentioned here which is not part of the New Jersey system, but I think has ramifications in the New Jersey system and that's the election of judges in other states. And what that means in New Jersey in a sense that we do not have election of judges and have alongside of that some of the most stringent ethical rules that exist in the country on the political activities of judges which may tie into the relationship with governors and the executive branch and how that may have changed over the years.

Let me begin with when I was chief counsel to Governor Kean in the last year of his administration and my memory of his relationship, and I wish he was here to speak for himself with Chief Justice Wilentz, I often as chief counsel, I think that's true of many chief counsels to governors, participated in meetings that the governor had that related in some way to the law, to legal issues, interpretation of legal issues, meetings with judges and particular points of law with the legislature and so forth. When Chief Justice Wilentz came to visit Governor Kean and he did twice that last year of the Kean administration, the governor met him and greeted him and I watched the two men, the cordial relationship between them, the sense of respect and I think affection between them and I was never invited into those meetings. Those were one-on-one meetings between the governor and the chief and they came out of a long personal relationship that I believe had started in the legislature when they were both there but perhaps earlier and it was I thought a very special relationship to observe. I cannot speak to what they said to one another, only to the relationship itself.

I had a short relationship with Chief Justice Wilentz and this goes to I think what Governor Florio was saying about members of the administration and relationships with the chief. When I was attorney general in Governor Whitman's administration, I had a number of meetings with Chief Justice Wilentz about administrative matters. There were issues about the intersection between the executive branch and the courts on administering the probation system and child support. There are often in our system of government, as much as we like to think of the separate compartments of state government, there are these intersection points that may occur in administration and in other arenas and the court has

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been careful over the years to in the interest of comedy step back when there maybe was an incursion into perhaps one another's domain and the court has done that where appropriate. But I had meetings as attorney general with Chief Justice Wilentz about those issues and I would talk to Governor Whitman afterwards and discuss policy and what the executive branch views were of those intersections and how we should work together.

So certainly in the arena of administration, of various parts of the system where there was really substantial intersection, there was the necessity for that kind of interaction I believe. I did meet with Chief Justice Wilentz before he died once and that's more about I had been nominated to office so that's about the passing on from one chief justice to another about issues. We spoke very briefly about interactions with the executive branch and this will tie in I think to what I will say about the elections of judges and the restrictions on political activities of judges. I met regularly with Governor Whitman after I became chief justice. We used to have lunch together every couple of months. We never talked about cases. We talked about administrative matters, about those intersections I talked about. We talked sometimes about the appointment of judges, about candidates that she was considering that I might know. She, as you know, was not a lawyer and was always very interested in what I might have to say about the lawyers I knew and whether those appointments made sense. That was a relationship that I felt very strongly about. We were always careful about substantive issues in matters before the court that involved the executive branch.

When I went to conferences of chief justices when I was chief justice, the constant topic of conversation was the election of judges. Most states elect judges and in most states there were issues. Over and over again there was concern about the independence of the judiciary in a state where campaigns were being mounted to get rid of judges who had written opinions that various groups didn't agree with. Justice Sandra Day O'Connor has made the independence of the state judiciary in states where judges are elected one of the priorities of her post retirement efforts to speak about issues about the judiciary. She goes around the country talking about these issues and the problems in those states where judges are elected and where judges can be thrown out of office when these campaigns are mounted about the payment to judges in support of their election by companies and others that are before their courts and enough of these scandals have hit the newspapers, so that we all know about them. We don't have that in New Jersey.

Whatever we say and whatever we will say about the appointments process what Governor Corzine spoke of earlier, it is in my view so far superior to the election of state court judges and the impact on the independence of the judiciary in those states that we at least begin from a point of departure that I think is very important. Someone spoke of the court's control over the bar and over I didn't hear mentioned judges. I chair a committee the court created to review the judicial ethics code after the ABA came out with proposed revisions.

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And one of the things that we did was when we looked at the ABA code was to take all of those sections dealing with political contributions and so forth to the elections judge and say, "You know what we don't have to do that." But we do have I think the most stringent political activity restrictions on judges bar none and that's a decision that's part of the tradition I think that's developed in New Jersey to enhance the independence of the judiciary to be sure that even though we have, and I think we heard about the tradition of the governor's appointing a split on the Supreme Court between Republicans and Democrats, there's one Independent there now, and also in the appointment of judges but the idea is whatever you were before, however active you were politically before, once you're on the court that ceases. If you look at that closely, you realize that that restriction has an impact on the relationship between the court, the judges of the court and the governor and the executive branch and the legislature because it literally creates a wall that is largely unbreachable. And even Chief Justice Wilentz found himself bumping up against that wall. I think that tradition and that approach embodied in the code has a lot to do with the relationship between the other branches of government and the courts and we may deal with that more later.

James Zazzali: No introduction?

Deborah Poritz: You need no introduction.

James Zazzali: That was by far the most recent introduction I've ever had. I'm reminded of Brendan Byrne's earlier remarks opening up telling us how he went to work for Chief Justice Weintraub for nothing or wanted to work for nothing and what that reminds me of is the fact that fast forward 15 years after that where people in this audience such as Barry Evenchick] and Richie McGlynn and I worked for Brendan Byrne in the Essex County Prosecutor's Office. We did not work for nothing. It only seemed that way. Chief Justice Poritz and Bob have covered a good bit of what I wanted to talk about so I'll just cut and paste. Bob was talking about the history of the court, et cetera, and the one quote that I came across about a year ago, which resonated with me is by a historian named E.W. Brogan, an English historian maybe that will be familiar to some of you. He's really one of the best of the 20th Century in England. And he was talking about the common law in England and he said, "If anyone wants to see the common law in its most arcane manifestations, one only has to go to New Jersey, not England." And he went on to say that Charles Dickens would be more at home in Trenton than London. That shows you how fast forward it is, how bad it was. Fast forward five years to 1948 and to the article that Bob referred to in his magazine, which is the publication of the American Bar Society and the article was called The Head of the Class. And I remember how it started. It said in the referendum last November, 1947, the New Jersey voters took its judiciary from the back of the class and to the head of the class.

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Now let me fast forward once again, if I can use the phrase, to this past October. It was a thrill for me to be at the FDR Institute in Hyde Park where there was a seminar analogous to this one called the United States Supreme Court and the Presidency and the relationship over the generations, a pretty impressive group of three former White House Counsel Nina Totenberg, Senator Sarbanes. Suffice it to say that this is a more impressive group. But Chief Judge Kaye got up there and said in her keynote address, and I'm paraphrasing it, but the two best judiciaries in the nation, particularly from the point of view of absence and political interference were first New Jersey and then Massachusetts. That was a great thrill for me. I mention it why? Why have we gotten as good as we are?

I'm not presumptuous enough to say that New Jersey is the best other commentators have but certainly we're right up there and we're fourth. Where's Bob? We're fourth in the United States, in the University of California Law Review out of Davis. Nothing gives a lawyer more pleasure than to correct a law professor. We are fourth. It's California, Washington, Hawaii I think and then New Jersey. Why? I think and the chief touched on this it's the fact that we appoint our judges, an over simplification and we do have problems and warts with senatorial courtesy and the like, but clearly appointed judges makes the difference. That structural constitutional requirement speaks volumes. Last October, I was down at my alma mater Georgetown and I gave a talk on the subject of appointed versus elected judges, not knowing who was going to be there. And who in the front row was sitting there but O'Connor, Breyer, and Souter and that was intimidating. I look in the front row here and I see Bill Greenberg.

By the way, three months fast forward, I keep using that phrase that was October, in January I'm coming up on the train from D.C. on the Acela. Who is sitting next to me or across the aisle but Sandra Day O'Connor. She obviously did not remember me and just like you three months later she remembered nothing of what I said and that'll be true three months from now but I think the chief justice spoke eloquently to the issue.

The second reason I strongly believe that we make a difference here is because these governors for the last 60 years have taken the responsibility of judicial and prosecutorial and attorney general appointments, but particularly appointments to the bench and specifically the New Jersey Supreme Court so darn seriously and it's a credit to them, Democrats and Republicans alike that they have— whatever the problems they may have had over the years look upon this responsibility, I think in some cases as their first responsibility. I think in the process which is the converse of what I've just said they've depoliticized the court.

Let me shift to the executive branch. As attorney general under Governor Byrne, as chairman of the SEI under Governor Florio without embarrassing them never once in those

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tenures did either of those governors ever discuss anything with me concerning my responsibilities much less ask me about what was happening. And I dare say that it's absolutely the same thing applies to service on the court. I don't think the governor ever dares to recommend an appellate division judge, for example. I haven't seen it. Of course I was only there for about three seconds but I just don't think that kind of interference is going to frankly be damaging to the candidate. And the chief justice also touched more than I have to or more than I will on the subject of the ethical restrictions. They are really, really demanding and that's one of the reasons why I think our judiciary remains so independent.

An example that comes to my mind is that when I was named an associate justice in the year 2000 I had to resign from the Rumson Library Board which was ridiculous I thought. What really bothered me is not to have to give up all that prestige; no, that was not as troublesome as the fact that as an associate justice I then had to pay fines on all my overdue books. A final anecdote, Governor Byrne spent so much time talking about his relationship with that fellow Weintraub. I say that because it recalls something that still wounds me deeply. It was 1967. My dad practiced law in the Academy Building. So did Joe Weintraub before he was on the court. They were together in that building, not together, knew each other for about 15, 20 years. It was Christmas of '67. I was living at home. I was working for Governor Byrne as an assistant prosecutor and my dad came home to dinner that night with my mom at the table and said, "Gee, I walked into— it was December 23. I walked into the Academy Building this evening about 5:30 to pick up my papers and who came walking into the elevator with me but Chief Justice Weintraub. "Oh really," not that I was fishing for compliments or anything because I was appearing before the appellate division and the Supreme Court probably— the appellate division every week, Supreme Court probably about once a month with Barry Evonchik, my boss, but I was there ten, 12 appearances before that court. So I said to dad, "What did you talk about in the elevator?" Again I wasn't fishing for compliments. I said, "What did you talk about?" He goes, "Nothing. We just exchanged humanities and pleasantries." I said, "Did anything come up?" And he says, "Yeah." He says, "Andy," my father was Andy, my brother was Andy, he says, "I can't tell you how much I enjoy your son." He said, "I can't tell you how much I enjoy each June playing in the Essex County Golf Tournament with your son Andy" and that hurt. So with that let me turn to our senior in so many respects, how many years on this?

Robert Clifford: Don't rub it in.

James Zazzali: How many years on the court?

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Robert Clifford: A record 21 years, three months, and 16 days. Well, the problem of increased maturity known as old age permits me to go off on a life of my own. Yeah, you can have it. You're not going to pick up much with this you know. I asked Professor Weffing [ph?] to get this information for me, not that anybody has referred to it at all but when the 1948 Constitution was implemented how did they choose who was going to be chief justice? And I don't think there's many people in the room who know. I hope not because I don't know but I'm going to tell you what I have heard. They appointed Arthur Vanderbilt who had mastered this whole plan in getting the constitution and everybody in place to be chief justice insisting that he sit as an Essex County Court judge for I thought it was one day. John thinks it's maybe one week, got a pair of robes for him, never sat a day on the bench, didn't even have a courtroom I don't think. Once that time had expired then he was eligible to be chief justice, the only one of the original seven who had not enjoyed any previous judicial experience, I hope I get this right, the case Ackerson, Kerr, Lockenfeld, Oliphant and Berley, all sitting judges. An idle piece of information will get your conversation going at the next _____ it will be all over the place to find out about that.

Professor Williams referred to the fact that people sometimes don't know what to call Richard Hughes or didn't know what to call Richard Hughes. Was he to be called chief justice or was he to be governor? The answer is just pure Hughes. He didn't give it a moment's thought. "Oh, I think I would prefer to be called governor because you're elected by the people of the state. The other title is bestowed by one man." That's pretty neat especially since he didn't have much chance to think about it. I suppose he had been primed for it before.

The Hughes stories are endless, his own person. For instance, we all know of the proscription against discussion of legislative matters with members of the court. Now there's no more gregarious guy in the western world than Richard J. Hughes and on a Sunday afternoon he gathered members of the court to his home in Princeton, the street right now I forget, to discuss a legislative bill and we did it. The court sat and gave serious deliberation to this. The next thing you know the chairman of the committee comes walking through the living room door, "Oh, yes I forgot." He invited the whole damn committee there with no display of we don't want people to know about this or anything, none. "Come on in. Join the crowd." The next thing is Betty Hughes comes drifting downstairs in this lavish Sunday afternoon gown. That was the end of business I'll tell you. I'm sure it never crossed his mind. It crossed everybody else's mind. It never crossed his mind that this might have a funny tinge to it, again apropos of absolutely nothing. I guess you suffer this through the requirement of retirement from the bench at age 70.

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In the history of the chief justices since 1948, Governor Hughes had two terms, no appointments to the Supreme Court in eight years; Governor Florio, four years, no appointment to the Supreme Court. I'm having a tough time. It's really not worth hearing. I can maybe play it for myself or something. Governor Cahill, I think I am now his last appointment to the Supreme Court, sat for one term, had five appointments to the Supreme Court, had six appointments to the Supreme Court, five of them in one year, and two of the five were chief justice. It's just a remarkable effect of at 70 get out of here. Somebody asked me today, "What do you think about that?" I think it's fine, well I do. I'm serious about it, the introduction of different views, different points of view, different approaches to life.

When I went to the court in 1973, I was not only the only member under 50, I was the only member under 60. Some guy in oral argument came up with an expression that Peter you should know this, remind me, anyway it's a World War II expression and I got six guys on the left of me who had no idea what this means. They're looking puzzled out front. I said, "Don't worry, I'll take care of it out there." But I see precious little weakness to having new blood appear. Again I'm filled with points of no significance whatsoever. The court on which I last sat served undisturbed, that's not a good word, served without change for ten and a half years. The predecessor so-called Weintraub court had served for eleven years and we had and I've not heard today nor much elsewhere, we had a hell of a good time with this duty, burdensome as it was. We were known to meet. I don't know any other court that at least we know about meet on occasion during the year for a party. We had the chief justice playing the piano in my house with a sombrero on and it went downhill from there. But these were people who worked hard, worked well together, and enjoyed a remarkable affection, admiration, and respect for each other. It was some experience. Now find something irrelevant to talk about Dan.

Daniel O'Hern: I'll introduce myself since no one else has. I served on the Supreme Court from 1981 to 2000 and on our court we had what we called a five minute rule of uninterrupted oral argument. I always tell lawyers waive the five minutes. So I'm going to waive my five minutes of uninterrupted opening remarks. I just have one comment and two little anecdotes on the relationships between governors and the court. First and I think perhaps the most important thing to observe is that the first five governors of the state were lawyers, little provincial or parochial to make that observation. I think they started and nurtured this tradition, at least we think, of very sound judicial appointments and I think that's a great asset, has been a great asset to the state of New Jersey and then just two little anecdotes about the relationships between governors and the court. I actually served during four administrations, Byrne, Kean, Florio, Whitman, and believe me we always knew what the governors wanted often or sometimes in big cases. Cabinet officers would join us at oral argument so it wasn't a guessing game but there was very little if none overt politicking in support of position.

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The two small anecdotes about relations; Governor Byrne may have forgotten this but when Frank Graves proposed the Graves bill I called up Chief Justice Wilentz. I've forgotten whether I saw him personally or talked on the phone but after I explained our position for quite a while he said, "I don't think we can— I don't think I can do that Dan." He wasn't about to get involved. And the other thing Richard McGlynn I see in the audience reminds me of a very fine tradition. I don't know if it preceded Governor Byrne or the extent to which it has lasted but it was his custom to invite the present and past members of the court. And on one occasion, Richard McGlynn and I guess the fat lady sang.

<off mic comment>

Daniel O'Hern: Okay but it was a beautiful occasion. I remember it very clearly. I was counsel to the governor at the time. But the mutual respect that Chief Justice Poritz spoke about was obvious in that room. If Governor Corzine over here and Ed McBride is here, I would encourage you to reinstitute that institution. This is Justice Stein. One of our favorite things on the court was when lawyers would mix up the justices.

Bob Williams: For purposes of identification we call him Tropicana Stein.

Gary Stein: Well the younger members of the panel are down at this end and we obviously don't have a reservoir of stories to match the stories that preceded us, but I do have to echo Justice Clifford's comment about the camaraderie on the Wilentz court. I was blessed as a recipient of much of it. When I decided to ride 60 miles from my 60th birthday and 65 miles from my 65th birthday on a bicycle, Justice Clifford who is a few years my senior rode with me every step of the way. And when I cramped in the last two miles and everybody, including my son went right by me, it was Justice Clifford who stopped and picked me up. The other wonderful memory among hundreds on the Wilentz court was Justice O'Hern trying to teach Chief Justice Wilentz the intricacies of professional football especially since the New Jersey Jets were owned by Chief Justice Wilentz' brother-in-law. And, Dan, on Mondays after a Jets loss on Sunday would say to the chief justice, "Chief, tell your brother-in-law that team can't win with a Jewish general manager."

I just have a few observations to make. I think all of us really are the beneficiaries of the wisdom of those who wrote the '47 Constitution. We've got a wonderful structure, wonderful constitutional structure for our state government. When I was a kid in law school in the '50s, I already was admiring the decisions of the New Jersey Supreme Court. We have one of the strongest, if not the strongest chief executives in the country and we have a strong judiciary with enormous powers in the chief justice and in the court to administer the court system. And so looking at the '47 Constitution with the advantage of hindsight, I

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think we can persuasively conclude that they did a heck of a job. If there are problems that are being identified currently, I think there are few but perhaps significant. My own sense is that obviously the nomination of judges by the executive with the confirmation by the Senate is far to be preferred. I share the experience of others who talk to judges in states that have elected systems and they're obviously the wrong way to go. But our problem is at least from my perspective I think the quality of our trial bench has diminished in the last 30 years and I think that diminution is a direct result of the increased influence of senatorial courtesy. There's simply a different balance I perceive between the way judges were selected when Governor Byrne was in office. The way they're selected today I think the Senate is exerting far more influence than the constitution contemplated.

Our court addressed the constitutionality of senatorial courtesy in the DeVesa case. We split three to three and the division was over the question of whether the issue was ripe and harkening back to the Supreme Court's decision in Baker v. Carr the standard was whether or not there were identifiable standards to determine whether or not senatorial courtesy violated the constitution. Three justices thought there were, thought that the constitution contemplated collective action. Three justices thought there were no such identifiable standards. And so the lower court was affirmed and senatorial courtesy lives. I think it's done great damage to the state. I don't know what the solution is.

Perhaps somebody would like to try again and test the constitutionality, but for sure the quality of our trial bench depends on the discretion of the executive to pick good judges and not on camaraderie and allegiances exerted by senators who put forward judges based on standards that don't contribute to quality. I think the other phenomenon that we've witnessed is that the composition of a legislature is significantly different from what it was 30 years ago. There used to be some of the great talents in the state standing for election in the state legislature. Chief Justice Wilentz was in the legislature. We had guys like Dick DeCorte and Ray Bateman and Al Burstein and all kinds of talented individuals who would put their private lives to one side and stand for election and the quality of legislation that came out of the legislature in the '60s and '70s was demonstrable. I think that society has changed. Salaries for lawyers obviously are a lot higher now and perhaps discourages young lawyers from pursuing political careers. My starting salary on Wall Street in 1956 was \$4,000 a year.

Panel Member: You tell that story to us every week.

Gary Stein: Yes. And not many lawyers today are willing to put aside a fat salary to run for office. I don't know what the answer to that is. The pay to play legislation that's been enacted recently perhaps has helped to change the political landscape. But if we're going to have the kind of a tripartite government that the framers envisioned in 1947, we need a

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stronger legislature. It's an issue that I think warrants our attention and concern. It's a delight to be here today and I'll turn it over to Justice Verniero.

Peter Verniero: Thank you very much. Thank you to Eagleton Institute and the Bar Association and ICLE as sponsors of today's gathering. I think it is an extraordinary gathering in terms of the panel and the audience. Being the benefit of speaking last, I have the option of deciding whether to agree and express my agreement with everything that was just said or disagreement. In looking down this panel, I don't dare disagree with anything that was said. So let me just try to sum up what I've heard and certainly what I feel is the essence of the relationship between the Governor's Office and the State Supreme Court in New Jersey. The relationship is really formed and seen at three different levels. There is a personal level.

My perspective there is as chief counsel to Governor Whitman and later as attorney general in the Whitman administration, where I had the opportunity to view firsthand the relationship between the governor and then Chief Justice Wilentz and Chief Justice Poritz. I would say without qualification the personal relationship was always cordial. That cordial relationship expressed itself in different ways. The governor would host the court for dinner. The chief justice and associate justices, the court would reciprocate. There was never a discussion of any weighty matters that may come before the court. But it clearly was a personal relationship that was cordial and friendly.

The second level, the second type of relationship is what I would call administrative. Chief Justice Poritz spoke to that. There is a lot of work that needs to get done at an administrative level between all three branches of government, but particularly between the governor's office and the judicial branch. We have three branches, but one government in New Jersey. The three branches do have to act as a single government on many occasions, most prominently with respect to the state budget. The judicial branch's budget proposal is part of the governor's proposed budget, so there is a great deal of work that needs to be done administratively in discerning the judiciary needs for its budget, and the governor has to make hard choices as he or she must make with respect to all line items. So there certainly was, during my tenure in the executive branch and I'm sure since, a lot of interaction on the administrative level. I would characterize that relationship as cooperative. I would say that also was as a matter of course. I certainly didn't see any periods where there was a real lack of cooperation on any major administrative issue. The third relationship is probably the one that the public sees most of and what historians perhaps will write more about. That is what I would call the institutional relationship in respect to deciding cases on the court's end and the governor proposing and ultimately adopting legislation and the public policy of the state. On that level I would say always the relationship was respectful, but on that level there was sometimes tension. The tension

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was not personal. The tension was not spiteful. The tension did not manifest itself in any negative way on any personal level. But as Professor Williams said and as others have commented, we have in New Jersey, and I think this is a good thing, we have probably the strongest chief executive model in the country and probably the strongest state judicial model, given the broad power that the New Jersey Supreme Court has and that the chief justice has in selecting appellate division judges and the like. When you have that much authority and power reposed in the hands of either seven members on the judiciary side or one individual on the executive branch side, there is bound to be some periods, some issues, on which the roles of the two branches bump up against each other. You can call that tension. You can call that friction, however you want to call it. It's part of the system.

I think we've been blessed in this state always, without exception, whether it's the two governors here or the other governors who are not here, whether it's the two chief justices here or the others that preceded them, that institutional relationship and the inevitable tension that sometimes exists has always been managed well and in the best interest of the public. I think all who have served as chief justices and governors ought to be applauded for that. I argued two cases as attorney general that were, I guess you would say marquee cases that really speak to this relationship. I argued two of the *Avid v. Burke* cases. In the second case, I really put an emphasis on this institutional relationship. I basically asked the court to give the governor and the legislature some leeway is the way I phrased it, some breathing room. It did that.

In the second case that I had argued, it did not order additional funding and in terms of the timing of certain things, it accepted the executive branch timing. At least for a time being, the court said that it was not going to retain jurisdiction in those line of cases. So that, for all its known "activism" reputation, and we can have a whole another discussion about judicial labels. I don't really like labels for a number of reasons. But the court obviously is known in some quarters as activist. For all of that reputation, if you look very carefully at some of the major decisions that the court has made, you do see deference between the court and the governor and the court and the legislative branch. You see that in a lot of smaller cases, cases that are not as prominent, equally as important, where Chief Justice Wilentz, Chief Justice Poritz, Chief Justice Zazzali would often write in their judicial opinions themselves, "We are deferring to the elective branches." So the system has grown up well, I think. I think whatever roles have to be asserted have been asserted in the public interest. For all the talk of constitutional confrontation and so forth that you sometimes hear, we've never really had a constitutional crisis in this state. I predict that we never will, provided that governors continue to do their job in appointing honorable persons to the court, which I think that they have, and members of the court do their job in discharging their duties with integrity and with respect to their role in the system.

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Robert Williams: I want to thank the panelists for the substance and the candor of their comments. We have time for some question and answer from the audience. Let's see if we can get some discussion going here. Yes, Phil?

Q: Now that the beatification or some beatification of the judicial and executive branch has taken place, I would like to ask Governor Byrne. Isn't it true that a group of the defeated state senators from Warren County, that is Governor Meyner, when he took on the Supreme Court in <inaudible> Chief Justice Vanderbilt <inaudible>. Isn't it true that that's the reason why it was six to one with Vanderbilt dissenting in *Green v. Meyner*? Everyone here remembers that in the gubernatorial election of 1953, Meyner won two counties--Hudson and Warren. Green won all 19 others. So let's bring it down to a real New Jersey level. There were strong personalities and constant--

Brandan Byrne: Was it *Green v. Meyner* or *Meyner v. Green*?

Q: *Green v. Meyner*.

<inaudible>

Brandan Byrne: I thought it was *Meyner v. Green*.

Robert Williams: So it's cross examination and not discussion.

Brandan Byrne: You're saying was that all political?

Q: Wasn't this a grudge that <inaudible>?

Brandan Byrne: Sure.

Q: An example of it?

Brandan Byrne: Sure.

Q: <inaudible>

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Brandan Byrne: Sure. So what?

<laughter>

Q: Isn't it important that we keep that tradition up in New Jersey?

Brandan Byrne: Arthur Vanderbilt III is a partner of mine now. We argue the relative merits of Arthur Vanderbilt and Frank Hague all the time. He can't point to anything that Vanderbilt did other than the constitution and maybe a third party. I could point to a lot of things that Frank Haig did. Yes, there are political aspects sometimes <inaudible>. I think Vanderbilt was probably right in the decision on Windberg when the incident in Meyner's counsel in that case was Joe Weintraub. When Joe Weintraub got to be chief justice, he saw it the other way, too.

You know that reminds me of a story about the little kid who runs into his mother and says, "Is a lion in our backyard?" The mother runs out and comes back and says, "It's not a lion; that's a dog. I want you to go to your room and I want you to pray to God for forgiveness." The kid goes to his room and comes back down. The mother says, "Did you pray to God for forgiveness?" The kid says, "Yes. But God thought it was a lion, too." I think that if your point of view says this is the right thing to do, then no matter what, it's the right thing to do. I can understand. Vanderbilt was tough. He was authoritarian. I think that if he hadn't done some of the things he did we might not have been as far along.

Robert Williams: I'm honored to call on my former student, Ed McBride.

Ed McBride: Thank you, Professor Williams. This is a question to the former members of the court, who I've noticed in the biographies, all but Chief Justice Zazzali came directly from the executive branch to the court. Chief Justice Zazzali, however, was <inaudible>. I'm just curious the extent to which you think and how that affected your colleagues on the court who did not come from the executive branch particularly dealing with cases that involve policy and the executive branch <inaudible> power from the governor.

Robert Clifford: I was the first to come _____. That's true. Everybody up to that point had prior judicial experience at some level.

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Robert Williams: Will you pull up the microphone? The question was what sort of is the effective pattern of executive branch appointments to the court from the executive branch? That's a crude paraphrase.

Robert Clifford: I don't want to answer that question. I want to answer the one I asked. I cannot recall it affecting me or my approach to the work of the court other than anybody would expect it to affect a 48-year-old country lawyer going in with these biggies. I was the initial driver that got Justice Jakins [ph?], Justice Hall, and Justice Matthews [ph?] and drove down to Trenton. Let me tell you, I had a habit of studying, working odd hours. I'd get up at 3:00 in the morning. This amazed people. I've done it all my life. It has nothing to do with anything except these other three giants would get in the car. I'm primed up to hear. I've got to learn everything about these cases. I'm going to rip them up. Justice Hall gets in. "Well, not much here today." Not much here today? I busted my tail for hours to try to put these things together. Jacobs, "No, no. This ought to go pretty fast." Matthews sitting and nodding. I was duly impressed on that basis. This is a job. You learn this stuff and you try and find a way to give a respectable answer, because these people didn't have to go through all that. I laid the groundwork for them.

Daniel J. O'Hern: My own response to the question is I thought the experience in the executive branch was, for me, an invaluable experience. You can almost sense the physical dynamics and the personality dynamics of these questions of separation of power. Someone referred to the opinion that Justice Garabaldi wrote for the court, this beautiful opinion explaining that relationship between them. I don't think I would have had it without having had executive branch service.

Deborah Poritz: I was going to say something along those lines. There's been some concern about how many of the justices have come from the governor's office, the governors in a circle, if you will. I've never actually done a count. I think back in the ten years I was there, so many of the cases that come are about relationships between the different branches of government, legislation being challenged or decisions of the executive branch being challenged or just one after another after another. People who have served in another branch of government come to the position with some on-the-ground understanding in a very practical way of the way those relationships work. I think that's been an important asset to the court, a really important asset. I am struck by, now in private practice I speak to some of the lawyers who have never been involved with government who've represented private clients throughout their entire careers and their, just because of distance from it, lack of knowledge about the way government really works and what happens between the branches and so forth. So you do start with that knowledge when you come from that position. In the end, though, it's good to have a mix. I think

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some of the justices who've come from private practice have added a great deal to the court. I think, again, this has worked pretty well. We've been lucky.

James Zazzali: The chief's comments on mix I think is very appropriate. I would call balance the same thing. Look in recent years in terms of three different sources from the executive branch, Chief Justice Poritz, Jaynee LeVecchia both having had distinguished careers in the executive. Appellate division judges, John Wallace, Virginia Long, Helen Hoens and people from the Street--Bob Clifford, Justice Stein, who was in practice for so many years, and Justice Albin succeeding Justice Stein. I think it works by some force of happenstance.

Peter Verniero: Let me just echo that. I don't think it's certainly a prerequisite to have executive branch experience, but nor is it a hindrance. I think it is actually a positive factor. So much of the court's docket is dealing with executive branch legislative type of issues. But there is a real institutional mindset that takes place when one goes from whatever experiences onto the Supreme Court. There is an appreciation collectively that the court has its own role to play in the system. I remember the first opinion I wrote as a member of the court went against the executive branch interest. But that was a unanimous opinion. So yes, having executive experience can help you perhaps better understand the relationships and some of the nuances, but at least in my experiences, it did not affect any decision making from an objective perspective.

Robert Clifford: You must understand that Justice Verniero came from the immensely valuable experience of clerking for a Supreme Court justice.

Robert Williams: Well put.

James Zazzali: You were saying before, let's try to help him. Is it all right?

Robert Williams: Yes. Go ahead, I'm sorry.

James Zazzali: To try to help you. You were saying how your colleagues used a World War II phrase a few minutes ago. Do you remember what it was? You have to understand that Justice Clifford was probably in the history of the court, without embarrassing him, the court's finest wordsmith, a magnificent writer. But he was especially good at dissents. He wrote a lot of dissents. The word that your colleagues used to describe you in your dissents from World War II I think is kamikaze.

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<laughter>

Robert Clifford: You're a nasty puncher.

Daniel J. O'Hern: Professor, if I might respond to Justice Stein's observation about the appointment of judges and the changing dynamics. I think and I wish the governor, of course, and Mr. McBride will tell him this. A governor has such extraordinary power that the governor's office can insist on getting good judges. And you will get good judges. For some reason it slipped into having the senators recommend the names to the governor, which I think is just wrong.

Robert Williams: Yes?

Q: <inaudible>

Robert Williams: Can you hear in the back?

Q: What happens is in New Jersey we have the governors that appoint the candidates and they <inaudible> on the senate. The only power that the senate has at this point really <inaudible> a connection to the campaign system, the funding system. That's the reason why <inaudible>. This is suggestive of campaign funding working its way to try to <inaudible> the appointment of judges. I think I would personally agree that <inaudible>. That has to be changed. That should be changed. Any comments?

Robert Williams: The point is, doesn't senatorial courtesy in some way link the appointment of judges to an electoral political process that does have to raise money? Is that a rough paraphrase?

Gary Stein: I can't comment on what's going on today in the rest of the state, but my observation through the window in Bergen County suggests to me that it's got little to do with money and a lot to do with power. And that senators simply won't sign off. We all understand the practice and governors have had to deal with it for years. When my name went in from Governor Kean to be on the Supreme Court, I think Greg Stevens told me that a senator wanted to trade me for a toll collector. <laughter>

But the problem today, as Justice O'Hern points out, is that the leverage is different. The leverage is different. Governors don't have the kind of control of the process that they did

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30 years ago, because senators, because they won't sign off, I think the practice has developed that the names aren't submitted until they're cleared by the senator in advance. So the horse trading that's going on has put the senators in a much more dominant position than the constitution contemplated. Now when we got the case I think DeVesa [ph?] involved the appointment or reappointment of Judge Murphy. It was pretty clear from the record that one senator was holding up that appointment. The argument on our court was whether or not you could lead the constitution to understand that that the process of advice and consent contemplated collective action by the senate, as opposed to the action of one senator. Three of us thought that was a discernable way to read the constitution. Three of us thought it was not. But I think that the situation has gotten worse. When the executive branch is forced to compromise and compromise, of course, is the essence of our process. But when the compromise affects the quality of trial judges and those of us who have retired from the bench and are now in practice can see it day to day. It diminishes the constitutional vision that the drafters had in 1947. So I think that it's something that we have to address institutionally in this state. We need the very best of the bar to devote some time to the judiciary. We're not going to be able to do that if senators are going to be making the choices.

Deborah Poritz: I think there are three components to this problem. There's one that I think relates to what you were talking about. That is a desire by a legislator to put someone on the bench as part of patronage. Perhaps that person has been involved in a campaign. There's the level of power. I don't know if Justice Stein was referring specifically to this, but I think he was. The power that individual senators can use to get what they want from the governor, from the governor's office, the trading power within the legislature. I think there is also, and this in its own way is a strong threat to the independence of the judiciary, a decision by various legislators that that decision made to prevent the appointment of someone whose views they believe will be antithetical to their views on some political question or issue that they think is important and might come before the court or even the lower courts. I see it as breaking down into three separate components. I think all of them work to the disadvantage of the system and to the appointment of quality judges.

Brandan Byrne: We have six Supreme Court justices here. How many of them think that senatorial courtesy is unconstitutional?

<laughter>

Robert Williams: Two to two to two.

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James Zazzali: That's the national debate. I addressed it in Georgetown this past weekend and in Delaware at the meeting of the American College of Trial Lawyers. It was addressed down there. Next door in Pennsylvania, which is, for lack of a better word, corrupt. I'll say that in terms of the judicial practices. Bob Brawn [*Star-Ledger* reporter], please be careful with that, okay? The evidence is demonstrable. The guy was on the panel and he said, "Well, I think it's working pretty well in Pennsylvania." Sandra Day O'Connor, who is from the southwest, in a recent publication, talked about Texas and said the information that I'm getting from Texas, anecdotally, but it's true, is that lawyers, when they're before a judge, will very often meet beforehand to agree that they will both contribute to that judge in his forthcoming campaign so they'll be guaranteed an unusual playing field. She said, "That's horrible." Now that's a better description of the word corrupt. Strike Pennsylvania, Bob, okay? And in an anonymous poll taken of Texan judges, 45 percent indicated that those lawyers or litigant to parties that contribute to their campaigns, when that happens, they acknowledged confidentially and anonymously that it affects their decisions and their opinions. As Phil Carchman said, 45 percent, he said, "One percent is tragic." Be proud of what you have. I don't think it's going to change in the rest of the country. I really don't. Not in my lifetime.

Robert Williams: One of the problems is people think they want to be voting for judges. When I worked for the state legislature in Florida, we thought about this. We said most of the races are uncontested. You're not voting. You never have any choice. They said, "We want to do it anyway," because it feels like, particularly now with the way people feel about government as not much trust in government and all that. Now we're not even going to be able to vote for our judges. The other thing is interest groups. My wife practices in Pennsylvania and represents some very powerful big unions. They want to elect judges and lots of other interest groups also feel that way. Yes. Please speak up, if you can.

Miss Siler: My name is Miss Siler [ph?] and I'm a civilian. I'm not an attorney.

Robert Williams: My congratulations.

Panel Member: Attorneys are civilians, too, you know.

<laughter>

Robert Williams: They're even human.

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Miss Siler: This is absolutely fascinating and I really wish that this whole session could be shown to every law students as a motivation of history and politics. I never have any _____. I'm a teacher and I will mention here. But if I could _____ to this, I think I would have taken more courses in college in history and politics. I have a question to ask Judge Clifford about how he felt about the mandatory retirement age.

Brandan Byrne: Of governors or justices?

<laughter>

Miss Siler: <inaudible> new blood. I'm in agreement that bringing in new blood is important. But where I disagree is that I don't believe it should be based on age. I just think that something like a maximum number of years and I don't know what the maximum number of years is, but you'd probably, as an engineer I'd say you could go study what the term spans have been and come up with an algorithm as to what is the right. So I'd like to know what the justices who have retired or had to retire because of age feel about it.

Robert Clifford: They're not as adult by age as I am. Therefore, they can, with impunity, take a view that they don't really have to live with years <inaudible>.

Daniel J. O'Hern: If I had not been forced to retire, you would not have had Justice Zazzali become chief justice.

James Zazzali: I agree with both of them. No, I agree with both of them, because I think "new blood," I think we should give younger men and women an opportunity. I really do. I think Governor Byrne can speak for himself and may be of like mind.

Deborah Poritz: Let me amend that slightly and tell this little story. I was walking in the supermarket behind my basket in Princeton. Alongside of me, coming up to ask, was former Attorney General Katzenbach pushing his basket in the supermarket. I was within I think a week of retiring at age 70. He said to me, "75 would be better." It's good to get new people. I think that's important. I do think when the framers of our New Jersey constitution thought about this, it was a different dynamic. People didn't live as long. They weren't as healthy. I do think people still have something to contribute, but in order to achieve that balance so that you do get new people in, younger people, I like Attorney General Katzenbach's suggestions.

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Brandan Byrne: His opinions do not affect the United States senators.

Miss Siler: You can still get a lot of people coming in at different ages.

Peter Verniero: Bob, I have to do my part to show that those under 50 can tell war stories. I have one war story I will tell. We were deciding the court had heard a particularly important and prominent case dealing with grandparent visitation rights and how those rights interplay with parental rights. This is a lesson for any lawyer who's out in the audience about be careful what you say in elevators and restrooms in courthouses. One of the court's law clerks was in an elevator. I think it was in an elevator. The two lawyers who had just argued the case were conferring about how the argument went, did not realize a member of the court's staff was in the elevator. The one lawyer said to the other, "How do you think it went?" The other lawyer looked back and said, "I don't know. When I looked up at the bench, I saw a lot of grandparents up there."

Robert Williams: That's great. There's a great story of Justice Brennan, as you know is from New Jersey, served on this great court and helped to write the 1947 judicial article that included the set mandatory retirement age of 70. After he went on the United States Supreme Court and was about 80 years old, he came back and gave a talk. He used to come back to New Jersey all the time. He gave a talk where he said he'd rethought his position on the 70. We, on the *New Jersey Law Journal* editorialized in favor of moving it to 75. But your idea is what they do in Europe. They do long terms--12, 15 years--with no succession. So that's something that's been floating around as well. People come on at different periods and then go do different things and stuff. I think we probably shouldn't stand between you and lunch any longer. Let's please join me in thanking our panel.

<clapping>

End of first two of four parts

NJ Governors and the State Supreme Court

A forum held at the New Jersey Law Center on May 8, 2008

Co-sponsored by the Center on the American Governor,
the New Jersey State Bar Association and
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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