

FRED FRIENDLY SEMINARS, INC
ETHICS IN AMERICA II
CHOOSING JUSTICE: ELECTIONS AND JUDICIAL INDEPENDENCE
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MODERATOR: MILLER
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O'CONNOR: It's a bad system to go around electing state judges.

SCALIA: If you don't elect them, that's fine. But if you have decided to elect them, what is the basis on which you're gonna select among them?

FRANK: There's no way in the current situation in American society today that judicial elections will be conducted in any way different than any other set of elections.

NAPOLITANO: The judicial branch is supposed to be anti-democratic. It's supposed to be faithful to the Constitution, not to the majority.

OLSON: I think that people are going to give money to my campaign if they think that I'm going to be ruling in certain ways.

O'CONNOR: It runs counter to everything the framers of our Constitution had in mind. Am I worried? Yes.

VOICEOVER: The situations are hypothetical but the dilemmas are real.
From the boardroom to the bedroom; from the court room to the classroom.
Men and women put their values to the test as they struggle with the kinds of decisions we face everyday.

Fred Friendly Seminars presents "Ethics in America."

This hour: Choosing Justice: Elections & Judicial Independence.

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VOICEOVER: Ethics in America is a presentation of the Fred Friendly Seminars at the Columbia University Graduate School of Journalism.

MILLER: Panelists, I'd like you to meet John Fairfield. John is now a state trial judge. And he's thinking about living out his life's dream. And that's to become a member of the Supreme Court of Centralia. Now OLSON, would you be Fairfield for me?

OLSON: You mean run for office?

MILLER: Run for office, that is right. This state, Centralia, is-- is a judicially elected state. State Supreme Court runs at large for the entire state. You are free to say to whatever you wanna say. And you are free to raise money any way you'd like to raise money. One incumbent has stepped down. So there's one vacancy. At the moment, there's one other candidate. His name is Judge Smith. Now I'm gonna give you two friends. These are two very good friends. One is-- Bert. And the other is Elizabeth. Bert knows everything there is to know about Centralia judicial elections. Elizabeth has had a distinguished career in getting people elected. Burt, what do you say?

BRANDENBURG: You're running an election, so you might do the things that anybody in an election does. But the fact of the matter is of course, that the courts are supposed to be different. And therefore we have expectations for people who run to be judges, to run different campaigns, and that you have a special challenge. And what you will find as a candidate is that there are going to be growing and growing pressures from interest groups and partisans to essentially get you to make commitments in advance as to how you might rule on a case. So that by the time you're in the courtroom if you win, the parties who come in may not have as equal a shot at due process as guaranteed under the Constitution.

MILLER: Elizabeth, what do you say?

BLAKEMORE: My job is to identify people and groups and anybody I can think of, and give them an opportunity to financially support him.

MILLER: Money-- (UNINTEL).

BLAKEMORE: Yes. Makes—

MILLER: Money!

BLAKEMORE: The life bread of politics.

MILLER: How much money are we talking about?

BLAKEMORE: We're talking about a state district court judge?

MILLER: Oh we're talking about Supreme Court—

BLAKEMORE: Supreme—

(OVERTALK)

MILLER: --of the state, somewhere between Illinois and California, (LAUGHTER) somewhere between let's say 12 and 19 million people.

BLAKEMORE: How about—

MILLER: --people.

BLAKEMORE: --two million?

MILLER: Two million?

BLAKEMORE: Yes.

MILLER: Two million?

BRANDENBURG: I wish it was that small. Nearby in Illinois, near Centralia, \$9.3 million just to get a Supreme Court seat a couple years ago. You may have to raise a lot more than that.

MILLER: Now you've been a U.S. attorney and a state court judge. You didn't inherit the farm. Where are you gonna get \$2 million?

OLSON: I must say, that I find that di-- disturbing, unsettling. I believe very strongly in the judicial system and in people's perceptions of the independence of the judiciary.

And I suppose in order to get this two or nine million dollars or large amount of money, what it is-- they're going to wanna not give that money to me unless they think I'm supportive of their positions, their corporations or labor unions or-- or whatever it is. I'm worried about that process, because I see it play itself out in the legislative offices and so forth. And it bothers me that I may be forced into relationships or associations or promises or the perceptions of promises that maybe judges or justices of the state Supreme Court shouldn't be forced to do.

MILLER: Where's that money gonna come from, Burt?

BRANDENBURG: Most of that money will come from attorneys who appear before you or want to appear before you, and from corporate and labor interests who know what they want out of the courts. And they want you to know that they're your friend.

MILLER: What does that mean? "Who know what they want out of the courts"?

BRANDENBURG: They want decisions that--

MILLER: They want--

BRANDENBURG: --are fav--

MILLER: --decisions.

BRANDENBURG: --that are favorable to them.

MILLER: Yeah.

BRANDENBURG: And they want this candidate to know that they were his friend before, so
that he--

(OVERTALK)

BLAKEMORE: I --disagree--

BRANDENBURG: --will remember--

BLAKEMORE: --I disagree.

BRANDENBURG: I mean I'm not sure why you give money otherwise.

BAILEY: I think you have to also understand that a judge just like a legislator or just like an executive officer has certain core experiences, attitudes, and beliefs. And that individual doesn't lose that because they put on a robe. But certainly you're going to approach those individuals and those segments of support where you think that they are most in line with your own experiences and core beliefs.

MILLER: Now what's the quid pro quo, judge?

BAILEY: Quid pro quo is simply that-- that you know me. You know what I stand for. You know how I have responded to the public interest in the past. And you know that I'm gonna be consistent with that in terms of my honesty and my willingness to speak truth to power.

MILLER: Now Elizabeth, I sense you were disagreeing with Bert a couple minutes ago.

BLAKEMORE: I do. I have never had-- one of my clients in-- in my presence asked, "What is your position on this?" People truly want good and fair judges. And they never know if they're gonna be on the defense side or the plaintiff side. So why would you say, "Well I-- I need to support somebody who's gonna go this side or that side"? Because truly what you want is a fair shake.

MILLER: The proverbial level playing field?

BLAKEMORE: Yes.

MILLER: Slightly--

BLAKEMORE: And so--

MILLER: --tilted—

BLAKEMORE: --and so John's one promise is-- is-- just to carry out the law.

O'CONNOR: Well I wish it were that simple. (LAUGHTER) Because in-- in these contested elections for judicial positions-- aren't you pressed to take particular positions for particular constituencies? And aren't the people most apt to give money, those who are lawyers and expect to appear before that very judge? I mean I'm sitting next to a prominent trial lawyer here. And let me ask you, if I may, Mark, would you be more

inclined to give money to a candidate that you thought would be favorably disposed to your cases?

LANIER: Let me see, Justice O'Connor, if I understand this right. (LAUGHTER) I make money generally on a contingent fee.

O'CONNOR: Right.

LANIER: If I win, I get a cut.

O'CONNOR: Right.

LANIER: If I lose, I get nothing.

O'CONNOR: Right.

LANIER: These cases I win go up on appeal. I have a choice between supporting a judge who has a heart towards the victims or supporting a judge who has a heart towards corporate America. One judge may make me enough money to put my kids through college. The other one may cost me money. Would I let that enter my decision on whether or not to give money? (LAUGHTER)

O'CONNOR: Probably would.

LANIER: I think it might.

(OVERTALK)

O'CONNOR: --probably would-- but my--

LANIER: --now that you mention it--

O'CONNOR: You know this illustrates why it's a bad system to go around electing state judges.

OLSON: I just wanna say this, that I saw during those confirmation hearings just this year those same kind of questions being put to people for the United States Supreme Court where there wasn't an election.

FRANK: Well I-- I agree with that. But I think it's more controllable--

But I-- let me talk about the flipside there are similar human instincts whether you're running for the city council or a state Supreme Court justice or anything else. Gratitude in our society is generally taught as a virtue.

And then you get to be a candidate, and ingratitude becomes a virtue. We who are candidates and who accept the money that people give us are the only people I know of who are supposed to take money for very important purposes from strangers and swear that it has absolutely no effect on our behavior. (LAUGHTER)

NAPOLITANO: But people-- people vote for you because they know where you stand on issues.

And that's why they give you money and that's why they vote for you. That's not what a judge is supposed to do. I agree with Justice--

FRANK: Supposed to--

(OVERTALK)

NAPOLITANO: --O'Connor--

FRANK: I agree with you. Supposed to, shmaposed (PH) to. The fact is that-- (LAUGHTER)

NAPOLITANO: Shmaposed to? (LAUGHTER)

FRANK: Yes. You're from New Jersey. I thought you'd understand. (LAUGHTER) The-- the

(UNINTEL) is this-- that I--

NAPOLITANO: Justice Scalia?

SCALIA: I got it. (LAUGHTER)

FRANK: Thirty years ago--thirty years ago-- thank you-- I think the difference between judicial elections and other kinds of elections, there's still some difference, but it's a lot narrower than it used to be. And I don't think that's healthy.

BOPP: The reason that Mark is particularly concerned is because the courts do have a lawmaking role; that is the development of the common law, particularly in the area of personal injury. So the people have given that lawmaking authority to judges, that they quite legitimately are gonna exercise. So the people would wanna know, you know, "What's your disposition?"

FRANK: With-- with one problem that I have. And it-- it is true, there is a certain law making type of activity. But we also have decided in society that there are things we want judges to do that are so unpopular that we want only-- that-- that we can only rely on them to do them. That they-- and-- and the ability of judges to do unpopular things, I think gets eroded when you get into this sort of a situation.

GILLERS: The issue is not whether John is going to vote in a particular way because someone gave him money or not. The more fundamental issue for me is how the public will view John's votes, he having received these \$2 million from defined interest groups. Maybe he would've voted that way anyway. Fine. But will the public believe that, or will they believe that justice is for sale? The appearance as important as the fact, how do we avoid that appearance?

MILLER: Let me go back to the candidate. How do you feel about this?

OLSON: I feel very uncomfortable being-- putting myself out for bid, so to speak. You know, I think that people are going to give money to my campaign if they think that I'm going to be ruling in certain--

MILLER: But-- you know who you are.

OLSON: I do know who I am. And I-- but I want to be that person if-- if I'm elected. I'm--

MILLER: Are you doubting yourself?

OLSON: I'm not doubting myself. I want people to believe that I'm that kind of person. I am disturbed about the-- the process and what it-- the message that it does send out to the people. If I have to raise all that much money-- it seems to me if it was a smaller amount of money and-- and so forth, it might be easier to get--

BLAKEMORE: But the--

MILLER: Is there-- is there anything in your head-- not about abstract outside interests, but the fact that the lawyers who will appear in your court, are people who did or didn't contribute to your campaign? Like Mark.

OLSON: I do-- it does bother me. I don't think I'd have-- as-- as a chief justice or a justice on that Supreme Court-- any trouble ruling against Mark. But I do believe that the people want to-- to have the appearance of justice as-- as independent and impartial. And if all of my money comes from the-- the plaintiff's trial bar or these corporations that may be on the other side of the political spectrum, what are people going to think about what kind of justice I am?

(OVERTALK)

BLAKEMORE: --and that's why--

OLSON: --and-- and it's--

FRANK: --the key question is—

OLSON: Barney's point--

FRANK: The key question is this. Are you elected for the rest of your life? Or are you running for reelection? Because gratitude may ebb. But self interest lives on. And if you are (LAUGHTER) elected and you were running for reelection, that's qualitatively different than if it's a one time election.

NAPOLITANO: You know Justice O'Connor is so correct. We don't like the idea of elected judges. Why don't they--

(OVERTALK)

NAPOLITANO: --because the whole--

SCALIA: Why is the problem any different for judges than it is for FRANK? I assume Barney is-- is-- is supposed to vote on-- on the many matters that come before him as-- as a representative; the way he thinks is best for the country. And just as a judge is supposed to rule in each case the way the judge thinks—

(OVERTALK)

NAPOLITANO: But the judicial branch is supposed to be anti-democratic. It's supposed to be faithful to the Constitution, not to the majority.

(OVERTALK)

HARRIS: Just because a donor thinks that you can be bought, does not mean you are up for sale when you run for election. And I think that we have-- we cannot discount the seriousness with which each of us who has been elected takes the oath of office.

There is something we have sworn to do, which is to uphold the law, to be impartial, and to do what we believe is the right thing—

FRANK: Yeah, but--

HARRIS: --at any given moment--

FRANK: I have heard members of Congress-- I have heard members of Congress say, "Of course you're right, it's unconstitutional. But I gotta vote for it 'cause it's got a very popular base. And that's why we have judges." Now--that may not be the way it ought to be.

But-- and-- and the-- there's one other point. And there is a tension. I am not supposed to-- I'm told by angry constituents, just do what I think is right. They think I do that too much. There's a democratic element. There's a representational element that's totally absent from what you do. It's a mix in what I do.

There's a tension there. I'm supposed to pay some attention to what the public wants, where you-- I mean it's a spectrum. But you're on one end and we're at the other.

MILLER: Judge Fairfield has heard all this advice. And he's decided to go into the swamp and run for election.

One of the first things you hit is something from an organization called Centralians for an Informed Public.

OLSON: That sounds good. (LAUGHTER)

BLAKEMORE: No, that sounds--dangerous-- (LAUGHTER)

MILLER: They have submitted a questionnaire to all of the judicial candidates in the state. So

here are the questions. Where did you go to law school?

OLSON: Well I can answer that.

MILLER: You can answer that.

OLSON: I went to school in Centralia.

MILLER: Okay. Describe your professional experience.

OLSON: And I can answer that. I've been a prosecutor. I've been a trial judge. People who have been before me have seen what a good judge I am and how fair I am.

MILLER: Here's another one. On this one you have to check a box. Statement number one, "I am a strict constructionist who adheres to the plain language and original intent of the framers." That's box one.

OLSON: That's the Justice Scalia box. (LAUGHTER)

MILLER: Box--

SCALIA: I-- I can answer that. (LAUGHTER)

FRANK: Like I said you know, you don't have to. (LAUGHTER)

MILLER: Box two says, "I believe that the Constitution is an evolving document, the interpretation of which may reflect changing circumstances."

OLSON: I think I would not--

FEMALE VOICE: (UNINTEL PHRASE)

OLSON: --decline to mark one or two. And I would try to describe-- I would attach to the response-- and they may not like that, but I can not be bound by the words that someone chooses to put me into a specific box with respect--

(OVERTALK)

SCALIA: Why am I voting for you? I mean—

OLSON: I'm going to write it in a way--I'm telling--

SCALIA: -- because I like the way you tie your tie? I mean I'm voting-- assuming you want to elect judges-- now maybe you shouldn't elect them. If you don't elect them, that's fine. But if you have decided to elect them what is the basis on which you're gonna select among-- among the candidates?

GILLERS: Well, wait. There-- there might be--

(OVERTALK)

SCALIA: Who's the most honest? Who's the smartest? I mean--

OLSON: You haven't read what I'm going to write. I'm going to write something that will please both you and the people on the other side. (LAUGHTER)

MALE VOICE: But it will not get published. It will not get published in the questionnaire (UNITEL)--

FRANK: Let me tell you from experience it's easier said than done.

PHILLIPS: I think it is legitimate to-- if you're going to be elected, to visit with the voters about

how you see the role of a judge. I think you have to stop short when it comes to committing on a particular case. It's a judge's job to apply the law that the other branches of the government have made.

GILLERS: Might we not hope that even though Judge Fairfield can answer the question, that there are people who will find him more acceptable because he chooses not to play his hand on those questions? So there may be some who will say, "I'll vote only for those who checked box one or box two." But there may be others who say, "I respect the refusal to answer those questions."

BOPP: The answer to this question is the most profound question in terms of the role of the judge in my view. If you, the judge agrees with-- with box number one, he's not going to go off making up the law to suit his own personal views.

OLSON: Well you know (UNINTEL)-- we're talking about strict construction with-- with respect to terms like due process, equal protection, cruel and unusual punishment, reasonable searches and seizures. And while I like the formulation and I like the philosophy articulated to a degree, I think it's-- if I'm going to be on the state Supreme Court I have to be a little bit more--

FRANK: Let's talk about the reality about elections. Steve Gillers said, "Maybe there's some people who respect his refusal, yeah probably in the state of Centralia, (LAUGHTER) six, 700.

MALE VOICE: Six would be my-- (LAUGHTER)

(OVERTALK)

FRANK: The fact is, those voters are gonna translate that into specific issues. And-- to a certain extent, it depends on what issues are hot. 'Cause I agree with Justice O'Connor.

MILLER: --okay. Let me-- let me go to--

FRANK: There's no way in the current situation in American society today that judicial elections will be conducted in any way different than any other set of elections.

MILLER: Here's the next question. "In Roe vs. Wade (LAUGHTER) the Supreme Court held that a right of privacy in the United States Constitution protects a woman's qualified right to terminate her pregnancy." Do you agree with that holding?

SCALIA: Did you make up this thing? Or did-- did you filch it from some actual election?
(LAUGHTER)

MILLER: These are state secrets. (LAUGHTER)

(OVERTALK)

FRANK: He got it-- he got it from-- you know he got it from a memorandum from the Senate Democrats on the Judiciary Committee. (LAUGHTER)

OLSON: I-- I agree that the Supreme Court of the United States rendered that decision. As a state Supreme Court justice, it is binding on me with respect to Constitutional questions.

(OVERTALK)

OLSON: It's not going to be up to me as a state Supreme Court justice to--

GILLERS: That's not the question.

OLSON: --change that decision.

NAPOLITANO: His answer is right. The opinion of a state Supreme Court is irrelevant as long

as Roe vs. Wade is still the law.

MILLER: But wait a second. Wait a second. I sensed over here a-- a-- a belief that the people should be able to feel their judicial candidates. How can they feel Fairfield without knowing what his philosophy is on this?

LANIER: It should not be the old T.V. show of Let's Make a Deal where you've got a choice between the curtain or what's in a box. You should be able to see to some degree if it's--if you're going to have an elected judiciary

MILLER: You spoke earlier about corporate interests, people interests. When you're giving money or when you're going into the voting booth, do you want to know whether the candidate believes that Roe vs. Wade was rightly decided?

LANIER: I think that can be an-- a-- an issue, absolutely. Because while the Supreme Court candidate himself in a state is not gonna make a decision that overturns Justice Scalia, he's still gonna be faced with other laws that are written that deal on that issue, whether or not you have parental notification rights under abortion. There are a number of other abortion decisions that will come up to the state Supreme Court judge, that certainly you should be entitled to know about.

BOPP: This is a great question to reflect the judge's judicial philosophy. Because many believe and I believe that Roe v Wade's a penultimate example of judges essentially making up a Constitutionally protected right. So people can approach this without a position on abortion-- as-- as a matter of their judicial philosophy.

SCALIA: It seems to me that the more you allow questions like these to be asked, and the more that you-- that-- that you are willing to answer them, the more you reduce the influence of money. It seems to me that money is-- is a great factor to the judge who has to run in states that said judges cannot take positions on any issue that is likely to come before the court.

In that kind of a state, all that counts is name recognition. All that counts is advertising. In that kind of a state, boy, somebody that gives you a lot of money is somebody you owe. Whereas in a state where the positions of the people come out, I don't care how much money you get, if you're in a state that-- that likes a strict constructionist judge and-- and you're running as-- as the opposite you're going to lose--

(OVERTALK)

SCALIA: --no matter how much money--

MALE VOICE: --I wish that was true--

MILLER: Do you believe it should all hang out and let the democratic process-- if you're gonna be committed to judicial election--

SCALIA: If-- yes. If-- if you-- if you are committed to judicial--I don't see why it makes sense otherwise--

FRANK: The fact is that given the First Amendment, and everything else , once you get a campaign it's a campaign, no holds are barred. And here's the issue that I think is connected. Do we want the judiciary to have as one of its functions the protection of Constitutional rights that are not popular. Justice Scalia, if you had been a state Supreme Court justice and voted as you did in the flag burning case, that would not have been helpful if you were running for state for reelection if you had to. And I'd want there to be a capacity in the judiciary to take unpopular positions on behalf of minorities. You will lose the capacity to have in the judiciary if is, if people are subject to election after decisions, the capacity to--protect minority--

(OVERTALK)

SCALIA: Well I-- I agree with all that, which is why I do not favor the election of judges.

FRANK: You and I are together on that.

SCALIA: But if you're gonna elect judges--

FRANK: Oh, I agree--if you're gonna elect 'em, no holds are barred. It's-- there's-- there's no way to--

MILLER: We have a basic question here. If you're going to have elections, you would like to have an informed electorate. And we--

O'CONNOR: Yes.

MILLER: --talked about these questionnaires.

O'CONNOR: Right.

MILLER: We've talked about loss of independence, something that your--

O'CONNOR: Right.

MILLER: --colleague here is very concerned about. What should we do? Your colleague, Justice—

O'CONNOR: It is hard.

MILLER: --Scalia said--

(OVERTALK)

O'CONNOR: Now I happen to have lived in a state where I ran on a campaign where I had to

get money. It was lawyers who wanted to contribute. Nobody else did. (LAUGHTER) I got-- (LAUGHTER) I got questionnaires, not unlike what you were reading. And I thought if they were ones that just put you in an impossible choice, I wouldn't respond to the questionnaire and just took the hit. If that group chose not to-- vote for me, okay. But on questionnaires that were ones where I felt that I could go through and answer, I would.

NAPOLITANO: But isn't the price, the awful price of popularly elected judges, that we will never have an independent judiciary that is free to resist the majority and uphold the Bill of Rights.

MALE VOICE: I agree--

(OVERTALK)

O'CONNOR: But that's why I don't think we should have popularly elected judges--

MILLER: The campaign's on. You're doing quite well. You've got enough money so that you can buy T.V. ads. And your team has put together sort of a-- a nice ad. It-- it-- it tells who you are, a family man, career--

OLSON: Dogs.

MILLER: --accomplishments, dogs. Dogs and all that. Any-- any problems with that?

OLSON: No. I-- I don't see any problem with communicating with the public, who is going to have to vote, in the most effective way. If it happens to be television-- of course. That's-- that's the way most people get information these days.

MILLER: But it's plain vanilla. You know, it's boring. Are you going to more aggressive than that?

BLAKEMORE: I don't need to be more aggressive than that. You know when you've got, when you've got gold, what do you need to -- talk about the issues.

MILLER: Elizabeth, smell the coffee. Judge Smith comes from Central City. He's got name recognition. He's got money. And he's got sort of catchy ads.

BLAKEMORE: But we're catchier.

MILLER: Listen. He went into this in part because he believes Judge Smith is soft on crime. That when Smith gets a conviction in drug dealing, almost all cases go to rehab. They don't go to jail. He believes you slam the door. You incarcerate them. Is that worth an ad?

BLAKEMORE: Absolutely.

MILLER: You got any problem with that?

OLSON: Well I-- I wanna see the ad. Because-- (LAUGHTER)

(OVERTALK)

MILLER: What a spoil sport!

OLSON: Well, she's produced some bland ones that weren't any good. Now she's maybe gonna be over the tide. I wanna make sure that-- (LAUGHTER) that there was a-- there was a fair line between presenting facts fairly that the voters are entitled to know.

BLAKEMORE: And interpreted--

OLSON: On the other hand, I mean there's also-- and I know this doesn't-- gonna go in the ad.

You were gonna tell me this one-- not gonna go in the ad to be fair, but these are individual cases. And judges have to sentence people on the basis of the individual facts. But to the extent that there is a statistical difference based upon facts, the voters are entitled to know those.

MILLER: And she wants you at the end of the 30 seconds to be standing there at the jailhouse door slamming it. (LAUGHTER)

(OVERTALK)

OLSON: I-- I think--

O'CONNOR: Or maybe billboards with handcuffs on it and his name, right?

MILLER: But in principle, as long as it's a factual presentation, statistically accurate, that's a go?

OLSON: Yes-- it's sta-- statistically accurate and fairly presented--

SCALIA: And relevant to the job.

OLSON: Yes.

BRANDENBURG: But judge, we're creeping closer and closer to the point. I mean you're a judicial candidate. You're promising in advance that no matter what the case, no matter how bad the facts, my job is to look at the law, the Constitution, the facts of the case, and nothing else. Not whether I like to lock 'em up or I don't like to put 'em in rehab. That should be completely set aside. And if you as a judge run on that as a difference, what does that do to the sense of the public that you will decide cases one at a time and be unpopular and cut against your own stated philosophy if the case so demands?

OLSON: I think what I'm saying with respect to this, is that I have applied the law fairly. My

opponent has not. My opponent has taken liberties with the sentencing process in a way in which it is harmful and inconsistent with the way the laws were written and intended to be enforced.

BRANDENBURG: So-- so you're gonna accuse another sitting judge of not applying the law fairly?

OLSON: I'm going to present those facts. I think if the record justifies it, the people are entitled to know those things.

MILLER: He feels strongly about it, Bert.

LANIER: So this wasn't something that was focus grouped first and polled to see if it's gonna be a strong issue with the electorate?

(OVERTALK)

LANIER: Because if it's a strong enough issue, then all of a sudden you're gonna come out on this position. You're going out there to try and win an election on an issue that you think another judge is bad on. And you don't wanna tell us that you've gone ahead and focus grouped it? Not only focus grouped it, but polled, done community attitude survey--

OLSON: --this--

LANIER: --and decided this'll help get you the job?

OLSON: Well look, it is an election.

SCALIA: You should only focus on those issues that won't help you get the job. (LAUGHTER)

MALE VOICE: That's right. (LAUGHTER)

LANIER: I mean-- (LAUGHTER) it is-- it's like gratitude.

OLSON: It is an election. It is entirely appropriate it seems to me, if I'm running an election, I'm running it fairly, I'm presenting information that's relevant the to public to find out those issues that are relevant to a--

(OVERTALK)

OLSON: --a judicial election that the people are interested in.

GILLERS: The title-- the title of this series is Ethics in America, not Law in America.

The ethical dilemma, the hard question is, given your own values, your own standards, your own respect for law, are you willing to do that? Or are you willing to say as-- as Justice O'Connor who won her state election said, "I will not answer those questions"?

OLSON: And what's unethical about presenting factual information to the public on a-- on a relevant subject, that is to say law--

MILLER: Oh, let's-- let's push that. One of your aides says to you, "Judge, if you're really going to do the soft on crime versus your view on crime, shouldn't you tell Centralians about little Haley?"

Don't you remember, Smith had that case with a small time drug offender. He puts him into a rehabilitation program. And while he's supposedly in the rehabilitation program, he gets involved in a shootout. And it's his bullet that kills five year old little Haley.

OLSON: I understand the slippery slope. (LAUGHTER) It is a hard question. If,if that sentence was blatantly unjustified, I think that it is fair to point out the consequences of a statistically demonstrable practice in real life.

MILLER: For the first time, Elizabeth is not smiling. (LAUGHTER) Because you're going to

have to give him advice about using this in an ad.

BLAKEMORE: I think we only use it if we have to. We look (LAUGHTER) at the polls.

MILLER: What kind of a punt is that, "If we have to"? (LAUGHTER)

BLAKEMORE: You look and see where you are. The name of the game is to win. The name of the game isn't to win at all cost. This is facts. This is true. But it's a little edgy.

MILLER: By the way—

BLAKEMORE: Yes?

MILLER: By the way, Haley's parents are willing to be on the ad (LAUGHTER) with a picture of little Haley.

BLAKEMORE: That's because everybody is supporting Fairfield. I understand that.

HARRIS: Let's not discount the-- the-- the wisdom of voters. Because we've all seen elections that have reduced down to that base level. And it turns voters off. And I think that there is something to be said for the checks and balances in the electoral process, both in terms of the standards that candidates, judicial candidates or others hold themselves to, in terms of the ethics of that profession. And then there is the standards that voters do have. And at the point that it becomes pandering, they're not stupid. And they know that. And they do take a step back. And it often turns them off. I've seen that happen in many of our local elections.

MILLER: What would be your guess as to the break point in this sequence?

HARRIS: At the point that it becomes so extreme in its example that it is not statistically based, is not indicative of the life of that person's career. I mean that is the great thing about an

election.

It takes place over a period of time. If it's done like it's done in San Francisco, you go and you talk to community groups. We have debates. We have conversations. And it's on that basis that they make a decision.

LANIER: But I tell you, I live in a state where this happens on a regular basis. And here's what they do. They sit there and they run the polls and the focus groups, and they say, "Okay, this is gonna get me four points." And then they have BLAKEMORE's good idea of, "This may be a little edgy, we don't use it unless we have to," which translates into this. Three days before the election, when the other side has no chance to respond and tell the other side of the story, they decide they're within the four point spread. They better use it.

And that's when it comes on T.V. And there is no response. And there is no educating the public in a debate or any other place.

MILLER: Mark, isn't this is what legislators and executive branch candidates do all the time?

LANIER: Yes.

FRANK: Yes.

LANIER: But they're not judges.

MILLER: Ahhh! Big deal.

LANIER: Yes, it is--

MILLER: Now, we're really getting arrogant about judges.

LANIER: Absolutely. The separation of powers in this country may be being erased in different places, but it can't be; it's what makes America great.

MILLER: --different standard?

LANIER: Absolutely.

BRANDENBURG: The job of the legislator is to make a promise and keep a promise. And the job of a judge is to decide cases one at a time based on the facts and the law, and not promises either explicit or implicit--

LANIER: And that's a strict constructionist view.

SCALIA: I see nothing wrong-- about in-- in-- in the course of an election, if you decide to elect your judges, finding out what-- what particular philosophy.

FRANK: But that's-- that's fine. And I agree with-- I-- I think it--

SCALIA: Barney agrees with that.

FRANK: You asked what the break point is about this. The break point is when you leave the Bay area. I mean I wish-- (LAUGHTER)

(OVERTALK)

FRANK: If America-- if America was San Francisco, I'd be the President. I'd solve the whole thing. But the fact is -- (LAUGHTER)

MILLER: All right, we're a couple of weeks away from the actual election. And John, things are going pretty good.

The problem is, there's a new candidate in. His name is Vince Values. (LAUGHTER)
And Vince believes that he's the candidate of true Christian family values. There's this case that's been submitted to you. It involves sort of a mundane insurance problem.

You have this worker who gets killed in a car accident. And the spouse has applied for medical benefits under the insurance policy. And for whatever reason, the insurance company has said, "No, we won't cover the spouse."

It's a straight-forward simple little contract question as to who's covered by the policy. And partners are covered. No-brainer. Now here's the problem. The worker killed was Chris Walker. The surviving partner is Pat Jones. They're both women. And they were married in Massachusetts. (LAUGHTER)

It has nothing to do with reading the contract. But you have this sneaking feeling that Vince Values is gonna make a big deal about your rendering a decision in violation of Christian family values. Your court has a pretty clear rule: opinions, decisions within 60 days of submission. You look at the calendar. (LAUGHTER) It's 30 days to election. Does it occur to you, "Well, I'll wait for the 31st day."?

OLSON: I actually think that's easy. I render the decision when I'm ready to render the decision. And if I allow that election to affect the timing of that decision, I don't deserve to be elected. I don't deserve--

MILLER: You're a busy--

OLSON: --to be--

MILLER: --trial judge--

OLSON: I know human nature might—you know those things might occur to people, and probably would occur to any human being. But to the extent that I allow that to affect my decision, I think that is fundamentally basically wrong. (LAUGHTER)

LANIER: First judge I'll contribute to this year!

OLSON: I'll take it. (LAUGHTER)

BLAKEMORE: Thank you-- (LAUGHTER)

OLSON: Wait a minute--

MILLER: Judge Napolitano.

NAPOLITANO: I don't believe what I just saw. He actually handed him cash!

BLAKEMORE: Absolutely.

LANIER: I say you report this.

BLAKEMORE: You see why its an honor to work for this guy.

FRANK: I gotta tell ya, in the circumstances you said, the number of people who I think would say, "You know what, I can decide it on the 32nd day or I can decide it on the 28th day and it will make no-- it will make zero difference," I am not confident that the overwhelming majority of candidates would make the decision that way. I think--

LANIER: I agree.

MILLER: Mark, did I sense a little cynicism?

LANIER: Absolute cynicism. I'm sorry. I-- I-- I know these people. (LAUGHTER)

MILLER: These people? (LAUGHTER)

LANIER: I know these people.

(OVERTALK)

O'CONNOR: --there--

MALE VOICE: No, I--

O'CONNOR: He's helped put them there.

LANIER: Not these days in Texas, sweetie-- (LAUGHTER)

MALE VOICE: The-- the-- (LAUGHTER)

BLAKEMORE: I beg to differ.

(OVERTALK)

LANIER: But I-- I'm just telling you, they-- they don't-- you know I-- we've got-- you've got such an impeccable panel. But that's not what exists necessarily out there. More and more of our judges, they sit there and they think, "Okay, I don't have a job if I-- if I lose my election. I've gotta keep my seat and I'm gonna make the same ruling 31 days from now that I'm gonna make today. It doesn't change anything. This way I-- I still have a job." (LAUGHTER)

MILLER: --in a curious way, he's avoiding misperception about the opinion. Because he-- he-- he has an instinct Values is gonna distort it.

LANIER: Well that's another that's another great rationalization he can make. (LAUGHTER) I mean he can sit there and say, "Well you know, if I decide it today, then it's gonna affect the election because people are gonna think I'm coming out and making a values statement, when really I'm not. I'm just making a legal decision. So to keep from being perceived as making a values statement, I owe it to the electorate and the country (LAUGHTER) to wait."

(OVERTALK)

HARRIS: But you know, that gets back to a fundamental point about ethics also I think, which is the standard may be, what does that individual do when no one's watching?

MALE VOICE: That's exactly right.

HARRIS: Versus what they do when everyone is watching? Because the question really here in terms of the ethical-- integrity of this candidate is when is he gonna make the decision, not what will the decision be. And I think that is-- so we should also think about how we probe that point in the course of an election.

PHILLIPS: Eighty-nine percent of the trial judges in America face some kind of an election. Almost two-thirds of 'em are contested elections. And over three-quarters of the appellate judges face some kind of an election. These ethical problems--

MILLER: Judge?

PHILLIPS: --that we're talking about are in front of us.

MILLER: I'm glad you say that. You're-- you're Fairfield.

PHILLIPS: No, he's Fairfield.

MILLER: No, you're Fairfield. That's the won--

OLSON: Thank goodness--

MILLER: --the wondrous thing-- (LAUGHTER) about this hypothetical world. Anybody can be Fairfield. You won. You won.

You had a magnificent term. Now you're saying to yourself, I'd really like to the change

this system. What would you do?

PHILLIPS: You know in Texas we take small changes. (LAUGHTER) that'll be a-- an improvement.

I'd like longer terms. I would like to look at the public funding system, like North Carolina has, where occupation taxes for lawyers go into a pool of money. If you get enough signatures on petitions, you can share in some of that money. So you don't have to go with your hand out-- to the-- and-- and frankly it is just the people who want something from the courts who are going to give. I raised \$2 million in my first race. And about \$300 was from widows and orphans. (LAUGHTER) The rest was from somebody else.

MILLER: It sounds as if you're willing to stay with an election system, though.

PHILLIPS: Well there's going to be some kind of an election in most states. It's going to be a vote. And it's going to be at regular intervals.

And so the issue becomes how do you communicate with the voters? And what do you say to help the voters make an informed decision?

SCALIA: I-- I have said-- and-- that-- that I do not favor an-- an electoral system for judges. I don't favor it because I have a-- a-- a-- a relatively narrow view of what judges oughta be doing. And-- when you have a judiciary that-- that has that narrow view, they are not making many basic social decisions for the society. If you change that view and the judges are doing more, it will be inevitable that in a democratic society the people will want to hold them accountable--

FRANK: Can I--and that-- that is a--

SCALIA: We-- we-- we did not have elected judges in this country until the Jacksonian Era, which is the same era in which we began to-- to-- to view the common law as something that changed. Prior to that, once there was a decision, the only change could be made by

the Parliament. The two go together. If you want to have unelected judges, it seems to me you have to have judges whose scope of activity is not as broad as that.

MILLER: Now I take it, Justice O'Connor, you would prefer a non-political appointed system?

O'CONNOR: Yes. With people recommended for appointments from a non-partisan bipartisan commission.

BAILEY: Let me ask Justice O'Connor, if you go to the appointed system, do you complement that with some expectation that the judges appointed will fairly and proportionately represent the population in the area where they sit?

O'CONNOR: Yes. I think you can reasonably expect that. And in my home state where we went to that system, we got far more minorities on the bench than we ever had under the—

FRANK: Agreed.

O'CONNOR: --political election system. Far more.

NAPOLITANO: If-- if we went to a--

(OVERTALK)

O'CONNOR: And women, too. (LAUGHTER)

NAPOLITANO: If we went to a system in the states-- (APPLAUSE) if we went to a system in the states similar to the federal system, the-- the pressure on state governors, as there is on Presidents, to appointment women and minorities would probably result in more of them being appointed than would ever be elected.

MILLER: All right. All right. All right. He thought he was gonna get off the court. But a funny thing happened this morning, you got a call from the Attorney General. You're on the short list to be appointed to the United States Court of Appeals. That's a federal court. Justice Scalia--

SCALIA: You never have to run again the rest of your life. (LAUGHTER)

PHILLIPS: But then you have all these people reviewing your opinions--

MILLER: Tell the non-lawyers-- tell the non-lawyers, what's that about, these-- these federal courts.

SCALIA: There's this whole separate system of-- of-- of justice-- at the federal level-- federal district courts, federal courts of appeal, and the Supreme Court. They only deal with federal law. And the overwhelming majority of-- of legal issues in the country are state law issues, not federal.

OLSON: They don't have to run for office, but they do have to go through the Senate confirmation process.

SCALIA: Which is worse-- (LAUGHTER)

(OVERTALK)

MILLER: But they're appointed. They don't have to collect money--

SCALIA: They are appointed by the President, by and with the advice and consent of the Senate. So they have to get a majority of votes in addition to being viewed favorably by the President.

MILLER: Now court of appeals?

SCALIA: All-- all federal judges are the same.

MILLER: That's a big judge, huh?

SCALIA: All-- everyone is-- oh, it's very big deal.

(OVERTALK)

SCALIA: You know what? I was a court of appeals judge--

MILLER: As you look at your colleagues, how many of your colleagues are court of appeals judges?

SCALIA: On the current court--

OLSON: All of them.

SCALIA: All of them have been judges, not federal court of appeals--

OLSON: --all of them-- all of them--

SCALIA: --judges.

OLSON: --were appointed--

SCALIA: No.

OLSON: --to the court of appeals, every single one.

SCALIA: No. No. Oh-- oh I'm-- I'm still counting Sandra.

O'CONNOR: Yes--

SCALIA: Darn it.

O'CONNOR: See, I'm out.

SCALIA: I'm still-- (LAUGHTER)

O'CONNOR: Hello. (LAUGHTER) Earth to Scalia! (LAUGHTER)

MILLER: Does it take politics out? Do-- do we now have a system on the federal side without politics?

SCALIA: No. I mean--

O'CONNOR: No.

SCALIA: No Republican President is likely to-- to nominate a Democrat to the Court. And no-- no Democratic President is likely to nominate a Republican. I mean there-- there being a million lawyers in the country, sure you-- surely you can find some Republican who's-- who's worth the job, or some Democrat if you're a Democratic President.

(OVERTALK)

BAILEY: What-- what do you do then, Justice, when you've got a county in that state that's-- heavily minority, all of whom pr-- pretty much who are Democrats, And you've got a Republican governor and he's not likely as a practical matter to appoint a Democratic lawyer?

SCALIA: Well you-- I think he-- he-- he looks for a-- he-- he-- he-- he looks for a black

Republican lawyer--

(OVERTALK)

BAILEY: Well that's gonna be a hard search-- (LAUGHTER)

MILLER: Why did the feds opt for this system, so radically different?

SCALIA: Federal courts have never had common law powers. They have never been able to revise the law of torts, revise the law of contracts. They only apply statutes enacted by Congress and the-- the text of the Constitution.

O'CONNOR: How about the law of admiralty?

SCALIA: Yeah, all right. (LAUGHTER) All right, I'll-- I'll-

(OVERTALK)

SCALIA: Sandra, it is not-- it is not common law. It is admiralty--

O'CONNOR: --it's common law.

SCALIA: --teency (PH) eency (PH) bit. I mean--

O'CONNOR: Common law.

SCALIA: --there is not a whole lot of power there. (LAUGHTER) The fact is...

O'CONNOR: Gone, but not forgotten.

SCALIA: Therefore-- (LAUGHTER) federal courts had-- had less-- power to invent law, as

opposed to apply the text of the Constitution, which is powerful.

(OVERTALK)

MILLER: Does our other justice take that historical view?

O'CONNOR: We derived our system largely from that of Great Britain. The King appointed the judges. And they served at his pleasure. And finally in the Settlement Act in the 1700s they decided the King couldn't just remove them. They were going to serve for X amount of time, and not subject to removal by the King. And that is the system we thought we were copying in this country.

MILLER: Now we know that there are political influences both in election and appointment.

O'CONNOR: Absolutely.

MILLER: Is-- is there any difference-- is-- is--

(OVERTALK)

O'CONNOR: Well--

MILLER: Is one more genteel than the other?

O'CONNOR: Oh, they're both miserable. (LAUGHTER) But-- at-- at-- in the federal appointment process, you get the U.S. Senate involved, largely through the judiciary committee. And we've all been witness to what that entails. And it--

MILLER: But you know--

O'CONNOR: --can be pretty miserable, too.

MILLER: In a sense the individual candidate is less on the ground on an appointed system than in an elected system.

O'CONNOR: Well the individual doesn't have to run around and talk to voters. But they have to run around and talk to senators and try to get their support. (LAUGHTER)

MILLER: Which is-- which is worse?

O'CONNOR: They're both bad. I've done both. (LAUGHTER)

LANIER: I will tell you-- from-- from the-- the practicing trial law perspective, a federal judge to us seems much more an independent judge, whereas the elected system sometimes the judges just seem simply politician.

HARRIS: But I think that's because of the—

(OVERTALK)

LANIER: And that's unfortunate.

HARRIS: --tenure. That's more-- a function of the tenure than it is the process of getting there. If you know that you're in a-- you know all of us as electeds, I think, hope that we will be judged not on any one decision but on a body of work. And the reality is, that the longer time you have to demonstrate your principles, the better it is and the more likely those decisions will be made with the right purpose. So when we talk about, what is an ideal system, perhaps if there is some reform it would tend to lean itself toward longer terms so that that process can take place and the decisions can be with integrity.

MILLER: The longer term presumably breeds more independence.

HARRIS: Absolutely.

MILLER: Less accountability perhaps, but more independence.

HARRIS: But that's why then there has to be more integrity in the process of getting someone to that longer period of time.

BOPP: But the problem is historically that that just hasn't panned out. The people want impartial judges that follow the law and we have adopted an elective system-- in part because of the response-- to-- to Dred Scott. The-- states-- of-- of the Midwest and the West, their constitutions were formed by abolitionists that were concerned about judges not staying within their bounds. So elections is a mechanism by which the people can ensure that judges stay within their proper bounds. And this is a problem.

MILLER: You have gone through the confirmation process. You are on the bench. You're doing fine.

But as inevitably happens, there's another big battle. You sat on a three judge panel that reversed the conviction of a supposed terrorist. You voted to affirm And all hell has broken loose. People are getting up in Congress, calling your colleagues traitors. They're screaming, "Impeach him! Impeach him! Impeach him!" How do you feel about that?

PHILLIPS: Other than glad I voted for the dissent of-- (LAUGHTER) Well, again, I-- I go to what Kamala says. It's very unfair to judge anybody particularly a jurist on the basis of one decision. It's-- you need a career to look at.

If the judge is doing his or her job, they are not making a judgment based on their own personal desires for what they'd like the ideal society to be or even how they'd like the laws to be created. They're trying to apply a law passed by another branch of government or some rule promulgated by the highest court of procedure and then letting the chips fall where they may.

MILLER: And you know that you and your colleagues did-- did a professional, honorable--

PHILLIPS: Well, I don't--

MILLER: --integrity job, but you're being--

PHILLIPS: Well--

MILLER: --at least your two colleagues are being hammered.

PHILLIPS: --don't forget, I dis-- I dissented. Maybe I thought they were--

SCALIA: He thinks his colleagues were wrong?

PHILLIPS: --maybe so. I don't know. (LAUGHTER)

NAPOLITANO: What is the—

MILLER: Ted, do you think--

NAPOLITANO: --he care what people think? He's a life tenured judge. He's not supposed to care what they think.

MILLER: Well-- isn't that an interesting question. Should you care?

NAPOLITANO: No.

MILLER: You apparently don't care.

NAPOLITANO: No. I care about-- (LAUGHTER)

MILLER: Do you care about anything?

NAPOLITANO: --fidelity to the Constitution?

PHILLIPS: Well you care-- I mean how the system is perceived is very important.

MILLER: I mean we had a nice--

(OVERTALK)

MALE VOICE: --don't have their own--

MILLER: --by Gillers earlier on about on public perception of the process. And here is a perception of the process being hammered in the halls of Congress--

NAPOLITANO: Because--

MILLER: --media—

NAPOLITANO: --because it's not the process that's being hammered. It's the outcome that's being hammered. Presumably the process was fair. They reviewed what the trial judge did and they reversed--

(OVERTALK)

MILLER: Yes, the imagery (UNINTEL)-- the-- the imagery, Andy-- imagery is these are traitors.

SCALIA: Oh, look it--

MILLER: These are traitors.

NAPOLITANO: --oh, look it-- it-- That's why they have lifetime tenure--

MALE VOICE: Exactly.

NAPOLITANO: --so they don't have to worry about the imagery.

SCALIA: It's-- it's one thing to say that you wanna give judges lifetime tenure. It's another thing to say we can't criticize our judges. I mean--that-- that-- that-- that goes with the job. It goes with any job in public service. And if you can't handle the criticism, you--

MILLER: Isn't anyone going to speak up for them today. Ted?

(OVERTALK)

SCALIA: You want some other job.

OLSON: I agree with Justice Scalia it's entirely appropriate to criticize the merits of the decision.

And it's--and it's the First Amendment that protects people's--right to say it in an outrageous way.

But it is the responsibility of those of us in the legal community who are not judges to speak out and defend the judges that did make that decision.

They rendered a decision on the basis of their honest convictions of what the Constitution required. Some people might recall it a technicality. That's what you do s-- when you don't like the outcome-- it's a technicality.

But I do think it's very, very important for the legal community, the academic community, the bar associations, and elected public officials to come out and say, "We're not going to impeach judges because they rendered a very unpopular decision-- especially if it involves someone accused of being a terrorist."

(OVERTALK)

BRANDENBURG: That's exactly right. And if that doesn't happen, if-- if after that absolutely protected criticism there isn't a good response; what we will see will be criticism turning into impeachment threats and attempts--

O'CONNOR: Right--

BRANDENBURG: --to get legislators to just oust judges. And this is what we saw in the Terry Schiavo case where a determined minority got the Congress of the United States to run as fast as they could to jiggle with the case, threaten the impeachment of the judge. The guy had to have a deputy sheriff to walk his dog. And the American public, stood up and said, "We need to protect the right of judges to make the right decision--

FRANK: Well--

MALE VOICE: --even if we disagree with it."

OLSON: --let me say one more thing 'cause you said to-- to protect the rights of the judges to make the right decisions. We protect the rights of the judges to make wrong decisions.

BRANDENBURG: That's right.

OLSON: --too.

BRANDENBURG: That's right.

O'CONNOR: Well the one thing that I get concerned about at times is whether there's an effort on-- another branch of government to retaliate against a judge for making a decision. Now that's where I think we run into trouble. I don't think that's the system the framers had in mind when they wanted to protect an independent judiciary. Criticism is entirely justified. But is it justified to then say, "Let's impeach that judge because of a decision

with which we disagree? Let's strip the courts of jurisdiction over that kind of case? Let's cut the budget that we're gonna approve for the judiciary. These are retaliatory actions.

GILLERS: I wanna come back to the title of the forum. And it's Ethics in America. I think now we're talking about the ethics of the legislators who are attacking the unpopular decision by threatening impeachment or by threatening to cut off funding or jurisdiction or what have you.

For my nickel the federal judiciary is perhaps the most successful man-made institution of government in Western Civilization. Threats of impeachment and threats to cut off jurisdiction undermine what is a wonderful prize for the American people. And legislatures who do that because of some immediate perceived political advantage are acting unethically. That's very different from criticizing the decision. That's a head on challenge to the reasoning. It's quite different however to try to cut off the judiciary at the metaphorical knees through jurisdiction or-- or monetary or impeachment threats.

(OVERTALK)

MILLER: As you look at where we are today, 2006, are you worried?

O'CONNOR: I am. Because I-- I've lived a long time. I'm an old person here now. And in my lifetime I have never seen such a level of attacks being made on judges. Are you aware of what's going on South Dakota, where there's a proposition to go on the ballot to amend their constitution to withdraw judicial immunity and allow judges to be sent to jail for some unpopular decision? This is quite radical. And it-- it runs counter to everything the framers of our Constitution had in mind. Am I worried? Yes.

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