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California Judge Warns Against Rise of Partisanship in Judicial Elections

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Midterm judicial elections in California don't usually attract much publicity, but with Santa Clara County Judge Aaron Persky staring down a recall vote and 17 incumbent judges facing challenges for their seats in June, the upcoming race has triggered concerns that politics has invaded what should be an impartial and apolitical branch of government.

Judge Stuart Rice, president of the California Judges Association, issued a letter Thursday decrying the politically charged tenor of the June election and urging his colleagues to support the incumbent judges.

"A fair and impartial judiciary is a cornerstone of our democracy. Yet, throughout our state, keeping the courts free from the influences of political partisanship and favoritism is under a serious threat. Sitting judges are being challenged in the upcoming June election for doing their jobs within the authority provided them under the law. This is not a valid reason for voters to remove them from office," Rice wrote.

"We want judges who will rule on cases based on the facts and the law, and not what is perceived as good 'policy.' We do not want 'political judges', nor do we want political judicial elections. A judge's removal by the voters should be reserved for situations involving illegal or unethical conduct, not a perceived difference of opinion or political philosophy."

It's a view shared by Erwin Chemerinsky, dean of the UC Berkeley School of Law. "I want judges deciding cases based on the law and the facts, not public opinion," he said in an interview Thursday.

Chemerinsky, who has denounced the recall effort against Persky as misguided, again came to the judge's defense and called the move to unseat him "troubling."

In 2016, Persky sentenced Stanford student Brock Turner, then 19, to six months in jail and probation, based on applicable statutes and a recommendation from the California Department of Probation, for sexually assaulting an unconscious woman.

That sentence outraged those who believed it was appallingly lenient, even if lawful.

While tens of thousands of signatures have been collected to put Persky's recall on the June ballot, judges up and down the state are lining up to support him. To them, kicking Persky out off the bench for following the law amounts to an attack on independent jurisprudence.

“The thing that is most troubling with the recall election is they’re targeting him based on one ruling he made. If we start doing that it’s going to start affecting judges’ behavior,” Chemerinsky said. “When we vote for judges, to the best of our ability, we are voting on their competence and ethics, not their rulings.”

Walter Olson, a senior fellow at the Cato Institute’s Robert Levy Center for Constitutional Studies, said situations like Persky’s can be an easy launchpad for agitators looking to whip up voters.

“It’s very common and easy for rulings that other judges of many different stripes and philosophies agree was the correct decision to get turned into something people can rail against, like saying they’re soft on crime or soft on sexual assault,” Olson said. “It’s easy to make judges look bad for doing what may be a good job.

“People will say that the CJA is itself an interest group and has a bias, but we benefit from having a judiciary that does not feel that they have to flatter the voters and let fear of unfair attacks sway the way they make their decisions,” he said. “We don’t want a judiciary that keeps an eye on popularity polls when deciding guilt or innocence.”

But Joshua Davis, associate dean at the University of San Francisco’s School of Law, said a recall election can be a good way of asserting the people’s will against a judge who doesn’t reflect their values.

Of Rice’s letter, Davis said, “I am sympathetic for the judge’s perspective because it’s hard for people to know just how much the judge is following the law. But while constrained by the law, they also have room to make a moral judgment within the law. To that extent, I think it’s perfectly appropriate for the people to say, ‘Hey we don’t think you’re representing us when you are supposed to.’”

He added, “It’s a tricky balance. We don’t want a judge to think about his or her future on the bench and not follow the law because of the repercussions.”

Chemerinsky pointed to ever-widening political divisions among voters as one reason for this year’s highly charged judicial election cycle.

“Our society is more polarized than it has been, so it’s unsurprising that it has spilled over to judicial elections,” he said.

It’s not just Persky’s recall that judges find worrisome. Rice’s letter also referred to four judges being challenged in San Francisco Superior Court: Andrew Cheng, Curtis Karnow, Cynthia Ming-mei Lee, and Jeffrey Ross.

All four incumbent judges are Democrats appointed by former Republican governor Arnold Schwarzenegger; an unusual reason to be ousted by voters, but for which they are being targeted nonetheless.

The four challengers are deputy public defenders in San Francisco. One of them, Nicole Solis, was recently quoted by the Bay Area Reporter as saying “a Schwarzenegger appointee doesn’t reflect the values of our community. It’s that simple.”

In an op-ed published on Law.com on Thursday, Presiding Justice J. Anthony Kline of the First Appellate District fired back.

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

He ended the piece saying the challenge had jeopardized the integrity of the entire San Francisco court.

Rice’s letter expressed similar horror. “There is no claim that any of the aforementioned sitting judges is incompetent, has engaged in lawless or unprincipled decision-making, or corruption of any kind,” Rice wrote. “The partisanship and single-issue politics motivating these challenges has no place in the selection of our state’s judicial officers.”

Chemerinsky, who also found the apparent partisanship concerning, said, “We should be evaluating their conduct on the bench, not on the party of the governor that appointed them. The question is, is this person performing well?”

That can be a hard question to answer, he said, since most of us go to the polls knowing very little about judicial candidates or incumbent judicial conduct, and high-profile cases like Persky’s can influence opinions and votes.

Davis voiced a similar view. “It’s really hard for the electorate to get really well-informed about a particular judge,” he said, calling challenges to judges based on the appointing governor’s political party “really troubling.”

Chemerinsky recommended voters look to credible sources, like endorsements by civic organizations and newspapers, to “gather all the information they can in terms of evaluating a judge.”

Olson said while it sometimes makes sense to unseat a judge, like in instances of unethical behavior or corruption, it shouldn’t be for purely political reasons.

“I start out with a presumption that it’s got to be a good case against the judge and the burden of proof lays on the person who wants to remove the judge,” he said. “Don’t let emotion rule. Responsible citizenship means try to read at least something from the other side and try to make sure you’re not being swept along on someone’s campaign of revenge or social media callouts.”