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Third Annual Golden Gate University School of Law Chief Justice Ronald M. George Distinguished Lecture: Chief Justices of Color

Drucilla S. Ramey

Golden Gate University School of Law, dramey@ggu.edu

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LECTURE

THIRD ANNUAL GOLDEN GATE UNIVERSITY SCHOOL OF LAW CHIEF JUSTICE RONALD M. GEORGE DISTINGUISHED LECTURE CHIEF JUSTICES OF COLOR

WELCOME

DRUCILLA STENDER RAMEY
DEAN, GOLDEN GATE UNIVERSITY SCHOOL OF LAW

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CHIEF JUSTICE TANI CANTIL-SAKAUYE
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MODERATOR

JUSTICE JOAN DEMPSEY KLEIN
SENIOR PRESIDING JUSTICE, CALIFORNIA COURT OF APPEAL

PANELISTS

CHIEF JUSTICE TANI CANTIL-SAKAUYE
CALIFORNIA SUPREME COURT

CHIEF JUSTICE MICHAEL DOUGLAS
NEVADA SUPREME COURT

JUSTICE FERNANDE R.V. DUFFLY
MASSACHUSETTS SUPREME COURT

CHIEF JUDGE JAMES WARE
UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF
CALIFORNIA

CHIEF JUDGE ERIC WASHINGTON
DISTRICT OF COLUMBIA COURT OF APPEALS

WELCOME

DEAN RAMEY: Good evening, ladies and gentlemen. On behalf of Golden Gate University School of Law, it is my immense and very great privilege and pleasure to welcome all of you to the Third Annual Chief Justice Ronald M. George Distinguished Lecture. We are transcendently fortunate to have as our distinguished speaker this evening California's own extraordinary Chief Justice Tani Cantil-Sakauye, about whom you will hear much more just shortly. Following her remarks the Chief Justice will join a remarkable group of jurists of color, who have come from all over the nation to engage in a unique discussion of the special opportunities and challenges facing them as they sit at the helm of their respective courts.¹

LECTURE INTRODUCTION

DEAN RAMEY: And now it is my great honor to introduce to you our 2011 Golden Gate Law Chief Justice Ronald M. George Distinguished Lecturer, Chief Justice Tani Cantil-Sakauye. After over 20 years on California's appellate and trial courts, with appointments from three governors, Chief Justice Cantil-Sakauye was sworn into office as Chief Justice of California on January 3, 2011. The first Asian-Filipina-American and first person of color, as well as the second woman

¹ The Welcome remarks of President Dan Angel and Chairman Dana Waldman are omitted.

ever to serve as the State's Chief Justice, she chairs the Judicial Council of California and the Council on Judicial Appointments, and stands at the helm of a court, a majority of whose members are, for the first time in our history, people of color and a majority of whom are also women. At Chief Justice Cantil-Sakauye's swearing-in ceremony, the man for whom this distinguished lectureship was named, former Justice Ronald M. George noted, and I quote, "In addition to a very compelling personal story, she has excelled as a jurist and has a unique blend of those skills that are required to carry out the functions of Chief Justice of the State of California with responsibility for the statewide administration of what is not only the largest judicial system anywhere in the United States and in most of the world, but in my view the finest."

Born in 1959 in Sacramento, Chief Justice Cantil-Sakauye was the child of first-generation Asian-American parents, former farm workers who met at a Sacramento soda fountain—so they say in the articles I've read—and who inculcated in their children a culture of hard work and the value of an education. The Chief has publicly reminisced about her mother's throwing her the now-legendary elbow jab, as mothers will, when she was a young girl, as they listened to a storied Filipina attorney, Gloria Ochoa, say some words in a speech. And her mother said to her, "You could do that too." And so she did. A graduate of U.C. Davis undergraduate and in 1984 its law school, Chief Justice Cantil-Sakauye at first couldn't find a job. You law students out there, take heed; today's struggling law graduate may be tomorrow's Chief Justice. Ultimately, following a brief career as a Reno blackjack dealer and being rejected—I think in retrospect they would say very unwisely, as too young looking by the public defender's office, our Chief Justice was hired as a Deputy District Attorney in Sacramento where she initially made less than she had been making working her way through school waiting tables, I think an experience more than one judge in this room has had. At the urging of an elementary school friend—again law students take note, networking starts in the cradle—she was interviewed for and then hired as then-Governor George Deukmejian's Deputy Legal Affairs Secretary. She later served as Deputy Legislative Secretary to the Governor who, in 1990, appointed her to the Sacramento Muni Court, making her the youngest judge in California. The rest, of course, is history—her 1977 elevation by Governor Pete Wilson to the Superior Court of Sacramento County, and her subsequent appointment by Governor Arnold Schwarzenegger in 2005 to the California Court of Appeal, Third Appellate District.

I was actually reading your bio, not the official one, but some other bios and I noticed that you also during that period were a Brownie leader. And I was thinking that it's only the women in the audience that

would know the Brownie song, which has a lot to do with smiles. It's a little like a secret handshake. Appointed by Chief Justice George to the Judicial Council of California in 2008, Chief Justice Cantil-Sakaue served in numerous high level Council positions. And throughout this seemingly impossible schedule, and even now when we can, I believe, drop the "seemingly" part, she has always strived to balance community involvement with family and career. But you younger women and the men here this evening take note again. Our Chief Justice is here to tell you that you do not back away from career challenges because of fears of future work-life balance issues. Indeed, she has, to quote Facebook's COO, most emphatically "leaned into, and not away from," right now, about the biggest career challenge that one could possibly imagine.

Our Chief Justice's greatest inspiration, she has said, is her ancestry. "When my life seems difficult or challenging, I think about what my family endured in boats, in the fields, on the battlefields, or on the job site." I related to the quote in which she says, "We are all descendents of warriors or immigrants. I am a descendent," she said, "of both. I know that I stand where I do today because in the immortal words of a 442nd infantry regiment soldier of World War II, I stand on the shoulders of my ancestors." And now her own descendents and all of us, the men and the women in this room and all who are coming up behind her in our noble profession, will surely be standing on her shoulders. Ladies and gentlemen, it is my very great honor to introduce to you the Chief Justice of the State of California, Tani Cantil-Sakaue.

CHIEF JUSTICE CANTIL-SAKAUYE: If any of you talked to me this month, you know that the first thing out of my mouth is, "Did you know that this is the 100th anniversary of women's right to vote and to run for and hold an elective office?" I say that because I consider the success of the suffragists' movement 100 years ago, October 10, as being a seminal act that placed us on the path to diversity. So 100 years from that important moment when men and women wouldn't take no for an answer, when men and women were putting forth a novel idea that women could vote and run for office, when it seemed impossible, when they failed in the legislature, when they failed at the ballot box, and we look at where we are 100 years later, what do we find? We are a female majority on the California Supreme Court. We are the entirety of the Commission on Judicial Appointments; that is, the constitutional body entrusted with the honor of confirming or not the Governor's appointments to the Court of Appeal and the Supreme Court. And Justice Joan Dempsey Klein, of course, has served on that Commission and seen its history and now serves on the Commission with Attorney

General Kamala Harris, and me. Our all female Commission had our first historic hearing involving now-Justice Goodwin Liu.

Also—and I know that my Conference of Chief Justices colleagues will acknowledge this—we now have 21 of 50 female Chief Justices in the United States.² And we also know that in law schools in California and across the country women are majority members of the entering class and the graduating class. So when I think about what has changed in 100 years, it is incredible that we have come this far. But there is work to be done. Could the suffragists have known that in 2011 California would be a minority-majority state, that we would have 10 million immigrants? I know from personal experience that immigrants bring to the table optimism, enthusiasm, patriotism, faith, and hope. And that we bring a diversity of thought through the accumulation of our experiences here in California. And who would have guessed 100 years later that, according to the last census, women in California are the majority in this state?

We tell ourselves, now more than ever, that government needs to be diverse. And that applies to the judicial branch especially, because we rely on the public trust and confidence as we resolve very complex, difficult issues in courtrooms. Until we reflect the diversity of our population, we will continue to wonder whether we truly have the public's trust and confidence. When the diversity of the population is reflected in the bench and bar we will be better able to solve problems and create that trust because people know that we walk in their shoes, we have those varied experiences, and we have a shared lens through which we make decisions.

When I talk to you tonight about diversity, I mean the different facets of diversity, including and beyond gender. As you know, diversity generally means ethnicity, it means race, but to me it also means experience and world view and professional experience. It means religion and it means culture. It means a great variety of backgrounds and experiences. Our communities are diverse. Like the communities we serve, the bench and bar contain tremendous diversity in the broadest sense. When you look at California and you look at the 58 trial courts alone, we have courts that are as different as 1,200 people in Alpine County with two judges. If you travel down I-5, you'll come to a place called Los Angeles, with ten million people and 600 judges. And everywhere in between, you will find pockets of six judges for 50,000 people and eleven judges and a million people. And that reflects the diversity of California's population and geography, and in every one of

² Conference of Chief Justices, *Member Roster*, CONFERENCE OF CHIEF JUSTICES (Feb. 1, 2011), <http://ccj.ncsc.dni.us/Roster/012011Roster.pdf>.

these courts, in every one of these 58 counties, there are different cultural needs, different practices, different rules. Nevertheless, as Chief Justice and as Chair of the Judicial Council—the policymaking body of the judicial branch—I feel it is my duty to ensure every Californian’s right to have equal access to the courts throughout California, regardless of whether they’re in a well-funded county and regardless of whether or not they are well represented in the legislature or at the executive level. It is our duty to reflect diversity in the courts while providing equal access, and we’re doing a good job of it, but there is work to do. And that will be my drum beat from this speech on for the rest of my career: we still have work to do.

Though the California Supreme Court is majority female and now also majority Asian-American, the judicial branch hasn’t changed that much from five years ago in reflecting the ethnic and racial diversity of the state of California. For example, in 2006, women judges were about 26% of the population of the judges of approximately 1,700 jurists. We are now 31%, a growth of 5%. But when you look at Latino judges, we are 8% now and—we’ve only grown by 2% or so. When you look at African-American judges, we’ve only grown by 1.2%. African-American judges are 5.6% of the judicial branch. When you look at Asian-American judges, we’ve grown by 1.2%, and we are 5.4% of the judicial branch. So there is work to do, and there is a concerted effort underway to have the bench reflect the population.

But of course, the bench looks to the Bar to stock our population. There is work to do there as well, as we all know. I rely on surveys which may not necessarily be reliable, and the information may not be as current as I would like. But we know that in 2001, when the State Bar did a survey, the minority population of the State Bar was 17%.³ Five years later, the survey, which again only gives us a rough snapshot, showed a little over 15% minority members.⁴ If we were trend people, we would say, “It appears that in five years, the minority population of the State Bar has declined.” Yet, even at its best numbers, the minority population in the State Bar has not reflected the minority population in California.

Still, I am hopeful and optimistic, because the Bar has tremendous leadership, most recently by Bill Hebert and now by Jon Streeter—people who are conscientious, who are and smart, and who are moving the Bar forward. Just a couple of weeks ago the Bar held an anniversary

³ RICHARD HERTZ CONSULTING, CALIFORNIA BAR JOURNAL SURVEY 2 (2001), *available at* www.calbarjournal.com/Portals/1/documents/2001-CBJ-Survey-Summary.pdf.

⁴ HERTZ RESEARCH, MEMBER SERVICES SURVEY 12 (2006), *available at* www.calbar.ca.gov/LinkClick.aspx?fileticket=AG4sVakYctc%3d&tabid=212.

of the Summit on Judicial Diversity. I know there's thought about completing another survey so we can get a pulse of the State Bar as it stands today in 2011.

When I think about the hope for the future of the bench and bar, I also rely on anecdotal evidence. This spring I had the opportunity to be the keynote speaker at several law schools including my alma mater, U.C. Davis. What I learned by watching these enthusiastic, inspirational, hopeful and diverse students file by, is that we are in good hands.

When I was in school in 1984, women were the slight majority in the entering class. But the minority population was much, much smaller, and I knew every one. But in 2011, I understand that at U.C. Davis four out of ten graduates are African-American, Latino, or Asian-American. When you see those graduates file across the stage, I find hope that in the future the bench and bar may reflect the diversity of the state.

Also, numbers, again from the State Bar, show that approximately 8,900 aspiring attorneys took the Bar exam. 4,600 or so passed, and we know approximately 49% of this group are women. So we are filling the pipeline, we are moving forward, but there is work to be done. And we have a population base with which to do it.

But I will also tell you that from my twenty years on the bench I know that achieving diversity depends on opportunity. Diversity in the bench and Bar require that. Where is opportunity? Opportunity exists through leaders like Joan Dempsey Klein and Dean Ramey and the deans of other law schools like Kevin Johnson at U.C. Davis and Dean Chemerinsky at U.C. Irvine and Dean Wu at Hastings. All of these leaders recruit diverse students who are the future of the bench and bar.

I want to tell you about my own experience and intersection with the structural reforms in the branch in the last fifteen years. These reforms both made the branch a strong institution and created an infrastructure that provided me the opportunity to stand in front of you as Chief Justice of California. Two years ago, when then-Chief Justice Ronald George, a great man, lectured here as the inaugural lecturer for the series named after him, he talked about the three major reforms in California that always bear repeating, because contrary to what Lady Gaga sings, we were not born this way.

The first reform was the 1997 statewide funding of the trial courts. Courts used to be funded by the county and as a result of county funding and 58 counties and 58 different relationships with their courts, there was disparate funding among the counties resulting in unequal access to the courts. In 1997, under Chief Justice George, state funding became the foundation for the trial courts, bringing stability of funding which enabled us to plan strategically.

The next major reform in the branch a year later involved the unification of the municipal and superior courts. We went from a loose confederation of over 220 courts in California to 58 superior courts. We took two different offices in every county—the municipal office and the superior court office—and collapsed them into one for greater efficiencies, better use of money, and more direct and reasonable common sense service to the public. With that came strength in concentrated numbers by unifying from 220 into 58.

What I consider the third largest reform in the last 15 years was when we became, as a judicial branch, responsible for the repair, modification, and construction of our courthouses.

You may be asking yourself how those three structural reforms—that strengthened the institution, that made us a more truly co-equal branch of government, that gave us the ability to withstand these savage budget cuts in the last three years—serve diversity. When the structure came together, there was a dawning recognition that amongst the 58 trial courts, the six courts of appeal, the Supreme Court, and the Judicial Council we are in fact an incredibly diverse state. And we can bring together cultures and people and practices that need some sorting out to develop the best statewide rules. This infrastructure created a forum to hear diverse voices, a forum in which people who represented different interests and experiences came together to distribute their best practices, to form policy for the state. I, luckily, was one of those people who volunteered to serve on the state advisory committees.

There are more than 22 advisory committees. Many of you serve on them. Many of you are subject matter experts who contribute. You volunteer your time to make better rules and policy for California, the judicial branch, and ultimately for the public. The advisory committees created a table, a place where I could sit next to my brethren from Inyo County and put a face on a challenge in Inyo County, where they could see the face of Sacramento County and know what we bring to the table and better understand the makeup of our branch. It also permitted a forum where voices like mine could be heard: voices talking about our communities and courts coming from people who looked like me. We created bonds with one another. We learned from one another. We solved problems with each other. We moved forward. We ended up creating a community of volunteers as diverse as the population we serve, and solutions to help them all.

These reforms had been in the works for ten years prior with different chiefs, governors, legislators, and Judicial Council members, but by realizing them Chief Justice George created an incredible road to diversity. He created a road on which many of us could travel, be part of the problem solving and, in helping others, unbelievably help ourselves.

If I had not had the opportunity to serve on the advisory committees, I submit to you that I likely would not have had the opportunity to be Chief Justice of this great state.

Our structural reforms are under attack now by two different entities. One is the budget, which we all face. To give you a snapshot of the California judicial branch budget, since 2009 we've been cut 30%. We've been cut \$650 million while our case load grows, while we haven't been funded for growth. In times when people are losing jobs, homes, services, and privileges, courts need to be open. But we're expected to do more with less. What that means, as you all know, is judges are working overtime and harder. Staff is working harder and harder to do the work of folks who have been furloughed or laid off to operationalize cuts. We are doing our part because we recognize that as a judicial branch of government we must be fiscally accountable.

At the same time, however, we also need to come up with a \$1.1 billion solution to court funding that was moved to the state's general fund. In the judicial branch this year we've been accused of a number of things, but what people do not say is that the legislature took from us \$350 million in construction funds to repair our courts. That came from you attorneys and your filings fees in our courts. Then they took a \$350 million involuntary, no interest loan. Also, a \$90 million loan after that. Then ultimately, in the last phase of the budget, they swept another \$310 million. In addition, they simply cut \$350 million from our general fund allocation.

When I meet with the governor he says to me, "You have no leverage." It's true. Judges don't bring votes. Judges don't bring campaign contributions. What we bring is an adherence to the rule of law. What we bring is a promise of equal access under law. And these days, it's hard to sell that when people are losing health benefits and rights because we can no longer fund those.

I recognize many of you in the audience because of the help you provide through the State and local bars. We're moving forward with a coalition of attorneys to bring to the Legislature the message that you cannot continue to cut the judicial branch budget without jeopardizing civil rights and that closing courts jeopardizes the public's ability to enforce their basic rights.

Another area of attack has been launched against judicial branch governance, judicial branch structure. There are those out there and in the Legislature who view the judicial branch as needing radical change; people who would pass legislation overnight to change decades of hard work and decision-making by four Governors, four Chiefs, multiple legislatures, multiple judges and lawyers volunteering to create not only

the structural reform but the structural reform that promotes diversity in the branch.

What I fear from these attacks on judicial branch governance and structure is that they will destabilize and stifle diversity. I fear that they will take away the rungs of the ladder that were created so that individuals like me could climb into state-level problem-solving and into state advisory committees, to find state solutions, responsive to all, and one day even to have the opportunity to lead this great state of California.

I tell those who think about trifling with judicial branch structure and governance to be careful where you tread. Twenty-five years ago, Chief Justice Malcolm Lucas followed through on a promise by Chief Justice Rose Bird and created a special committee to study gender bias in the courts. Five years after that, Chief Justice Lucas created an advisory committee to study racial and ethnic bias in the courts. Five years after that the Judicial Council adopted as its number one goal access, fairness, and diversity in the state.

If you think that those kinds of reforms were inevitable, I beg to differ, because progress not only in diversity, not only in human rights, not only in women's rights and poverty rights, is the result of deliberate, sustained effort by many trailblazers who started them, and some of whom are here tonight.

These reforms to our branch and to our opportunities were fundamental. Before we trifle with them, we need to tread carefully and remember our history and see we've come a long way—but—there is still work to do. Going backwards is not an option. It is against this background that I join this impressive panel to talk about a subject matter dear to my heart and to spend this wonderful evening with all of you. Thank you, Dean Ramey.

PANEL INTRODUCTION

DEAN RAMEY: As Joan Dempsey Klein just said, "Not a note. Not a note!" Thank you so much. That was an absolutely magnificent speech and said things that really were very important to be said. It is now my great privilege to introduce to you our panel moderator for this evening. My great and good friend, the Senior Presiding Justice of the California Court of Appeal, Joan Dempsey Klein.

Justice Klein is the walking personification of the principle that, with the notable exception of our distinguished lecturer tonight, as long as Joan is around no woman lawyer ever need worry about being the first woman anything. I thought she was fifth generation but she says it was way back before that. A multiple generation Californian with a BA from San Diego.

JUSTICE KLEIN: You know what, I'm going to join in this diversity panel because my people were the Bernalts that came here from Spain and they were here in the 1700s. So I get to be a part of the diversity panel. There we go.

DEAN RAMEY: You see what I mean? Ok. But Joan wasn't around at that time. Instead, with a B.A. from San Diego State and an L.L.B. from U.C.L.A. Law School, Justice Klein served as a state deputy attorney general for seven years before then-governor Pat Brown—that would be Jerry's dad—appointed her in 1963 to the Los Angeles Municipal Court. Justice Klein subsequently served on the L.A. County Superior Court and in 1978 was appointed by Brown, the son, to serve as Presiding Justice of the Second Appellate District, Division Three. As the now-Senior Presiding Judge of California's Court of Appeal, as was mentioned by Chief Justice Cantil-Sakauye, Joan serves on the three-member Judicial Appointments Commission, whose other two members are the Chief Justice and the Attorney General and which, therefore, for the first time in our history, is indeed an all women body. It was my privilege to be there at Joan's invitation to watch them deal very recently with Justice Liu's nomination.

Justice Klein has co-founded and led organizations too numerous to mention, but they are inclusive of her service as co-founder, with Joanne Garvey among many others, and founding President of the California Women Lawyers. I might add that that first Board, on which I sat as—get this—the First Provisional Second Vice President, drafted the CWL by-laws at a slumber party at Justice Klein's home. You know, women just do things differently. Also co-founder, first president, and to this day the unchallenged spiritual leader of the National Association of Women Judges, of which, of course, a former President is on our panel, Fernande Duffly. She testified in support of Justice Sandra Day O'Connor's nomination to the United States Supreme Court. Shortly after, NAWJ was launched and was instrumental and has been instrumental in the appointment of women to the Bench and every other high office you can imagine ever since. A Professor of Judicial Administration, distinguished lecturer, and world traveler in numerous people-to-people delegations, Justice Klein has received more awards than can be stated here, but they do include the ABA's coveted Margaret Brent Women Lawyers of Achievement Award, CWL's Inaugural Joan Dempsey Klein Award for excellence as a jurist and long-standing vigorous service and inspiration to women lawyers, and most recently, the State Bar of California's exalted Bernard E. Witkin medal. But more than anything, Justice Klein is revered as a sensational mentor to

generations of women and a few good men, inspiring all of us to take those risks and to reach for the stars, while also abjuring us that on our way up, in the words of my mother, a medical school professor and national feminist speaker, that we must stop on that mountain climb to bring along those coming up behind us. Perhaps less agile, maybe even less well endowed, it will make the view even more beautiful when we all get to the top. Joan.

JUSTICE KLEIN: The essence of all of that is that I've been around a very long time. I'm very, very pleased to participate tonight. I think the Dean, Dru Ramey, has enhanced her law school with these lectures in the name of our former Chief Justice Ron George as our present Chief Justice has indicated. The man is an extraordinary person. Tonight the fact that we have the opportunity to have with us justices, high court people of color is extraordinary. I am so proud to be a part of it.

I want to tell you what the ground rules are here for everybody to know what's going on. I will be introducing the panel members. After I have introduced them all, I will be asking them questions, which they have submitted. So they're willing to answer these questions, supposedly. And then if somebody else wants to chime in an answer, they may do so. I would tell everybody that there's somebody sitting down there in the front row. They'll give you a clue as to one minute, two minutes. I hope everybody can see it. Okay? So that's the way we're going to go.

I will start tonight with the introduction of Justice Fernande R.V. Duffly who is now, I'm happy to say, on the Supreme Court of Massachusetts, recently appointed. She was a graduate of the University of Connecticut, and she attended Harvard Law School. As a Judge she continues to work toward promoting equal access to the courts and full diversity on the bench. She is a member and past president of an organization near and dear to my heart, and that's the National Association of Women Judges. And she currently serves as our delegate to the House of Delegates of the American Bar Association, and she is a commissioner on the ABA Commission on Women in the Profession. In 2001, she was part of a delegation of judges hosted by China's Supreme People's Court, where she promoted the rule of law in China. You know, there's supposed to be a rule of law no matter what the nature of the government is, and she was right on with that one. She has presented educational programs to visiting judges here, from countries, including China and Iraq, the United Kingdom, Egypt, and others. She has received many awards, and I would just indicate one of them is the Trailblazer Award from the National Asian Pacific American Bar Association. So her ancestry is Japanese. Welcome.

The next person I am going to introduce is Eric Washington, and he is the Chief Judge of the District of Columbia Court of Appeals, and he is President of the Conference of Chief Justices. The District of Columbia Judicial Nomination Commission designated the Honorable Judge Washington to serve a four-year term as Chief Justice, and then they renewed it for a second term. He serves as Chair of the Joint Committee on Judicial Administration in the District of Columbia, and he has served several roles. He is a member of the Board of Directors for the Boys and Girls Club foundation, and the Advanced Science and Technology Adjudication Resource Project, and other civic and charitable organizations. Judge Washington is a graduate of Tufts University, and earned his law degree at Columbia University School of Law. Welcome, Judge Washington.

And the next Justice is Michael Douglas who is the first African-American Justice in Nevada's history and thereafter he was twice elected, I'm happy to say, by the people of Nevada. By the way, you're going to miss the debate tonight in Nevada. That's the way it goes. I'm sure that's a big problem for you. He's a native of Los Angeles, but he came to Las Vegas in '82 from Philadelphia, where he had been working as a private attorney. His Nevada career began as an attorney with the Nevada Legal Services. Then he was hired by the Clark County District Attorney's Office, and he served in the Civil Division there. He was appointed to the Eighth Judicial District Court bench and served until his appointment to the Supreme Court. He is a graduate of the University of California Hastings College of Law, and he is also active with the Nevada American Inns of Court, and the State Bar of Nevada, the National Bar Association—from which the Women's Judges Association took its format to go forward, and we are in debt to the National Bar Association—and he is a member of groups fighting domestic violence. Welcome, Sir.

I introduce Chief Judge James Ware, who is a judge of the U.S. District Court for the Northern District of California. He's a native of Birmingham, Alabama, but you see where he is now. He's no longer in Alabama. He received his Bachelor of Arts from the California Lutheran University and his law degree from Stanford University. He was appointed to the Santa Clara County Superior Court, and then was appointed U.S. District Judge for the Northern District of California, San Jose Division by President Bush, where he now presides. He has traveled extensively on behalf of the United States to confer with judges in other countries in successful case management and mediation practices. His travels have taken him to Nigeria, Rwanda, Jordan, Israel, Italy, Egypt, and Barbados. He has authored and co-authored law journal articles, and lectures at Bay Area law schools. Judge Ware.

Now as I say, if I have missed anything that you folks want to communicate to the assembled, don't hesitate to speak up. I don't anticipate that there are many hesitations here. Yes?

JUSTICE DUFFLY: You told me to do this, Joan, so I am going to correct you. My ancestry, which I think is going to be important in our discussion, is I'm an immigrant, my mother is Chinese, my father is Dutch. I was born in Indonesia and I actually have some California roots. Because I'm in California, you'll know what I mean when I say I come from Oxnard. Most people think that's the part of an ox, but it's not. You know where it is.

PANEL DISCUSSION

JUSTICE KLEIN: All right, thank you for the correction, and I'm sorry. And now we're going to ask some questions and see what kind of responses we get from everybody. Here's one to Justice Duffly. Do you think that the highly publicized attacks on Justice Sotomayor with respect to her "wise Latina" remark, and the similarly vocal criticism of other judicial nominees who have voiced support for a diverse judiciary have had a chilling effect on advocacy or action by judges and judicial aspirants in support of diversity in the judiciary? That's a big question.

JUSTICE DUFFLY: It has a short answer, because I speak from personal experience, I would say no. My personal experience, and I think it's fairly extensive, is that I've worked very hard for most of my legal career to work towards diversity of women and minorities in the legal profession, and I continued that through the 20 years that I've been on the bench. I think if you read all of the comments, there's nothing wrong with what Justice Sotomayor said. As the Chief Justice just said, we have so much that we bring to bear. I mentioned my own background; all of that is brought to bear when I make a decision—not just being a woman but being an Asian-American woman, being an immigrant, not speaking English when I came here—all of those things were important and are things that I bring to the bench.

What it might have done—and partly because of my age and not growing up in an age where we speak in sound bites as so many people do now—is it gave me pause and made me think, maybe I should remember that when I say the things I say, I have to remember I have to say it in sound bites, short enough that they're not going to cut off the tail end. But that's probably the only way it had an impact on me and the people that I know who continue to work for diversity and believe, as our Chief Justice has so eloquently just said, it's essential. It's essential to

our democracy and access to justice and everything we hold dear that we have a diverse judiciary. So no is my answer to that.

JUSTICE KLEIN: Eloquent is the word. Do any of you want to add your own reaction to that?

JUSTICE DUFFLY: I guess I should say in fairness I don't have anything to lose, because I don't think there's a further point I can go. So maybe that's why I don't feel uncomfortable continuing to speak my mind; but it hasn't stopped me before, so maybe that isn't a reason either.

JUSTICE KLEIN: How about the rest of you? Any comment on those remarks or the question?

CHIEF JUSTICE CANTIL-SAKAUYE: I concur.

JUSTICE KLEIN: There you go. Ok. No? All right.

JUSTICE DUFFLY: Any dissent?

JUSTICE KLEIN: Ok. Then I'm going to ask the second question, which is going to be directed to Chief Judge Washington. What challenges does a Chief Justice face in trying to secure adequate state court funding, and does being a Chief Justice of color present any special challenges in that regard whether being a Chief Justice of color makes a difference in promoting access to and/or ensuring the public's trust and confidence in the courts?

CHIEF JUDGE WASHINGTON: Thank you very much. First, let me say that I associate myself with many of the remarks by the Chief Justice made tonight here at this forum. I think that the answer to that is multifaceted. First, it depends on the culture of the place that you're coming from and that you're representing. Perhaps I should step back and tell you a little bit about the District of Columbia Courts—we're a directly federally funded court system. When I seek funding for the DC Courts I have to actually go see a Congressional representative who may be from New York, California, or even Florida, whoever happens to be chairing the appropriations subcommittee that addresses the funding of my court. So I'm not able to develop the kind of personal or professional relationship with a locally elected official who really knows the Court, because the Congressional Subcommittee Chairs change every couple of years. However, that is not necessarily a good or bad thing, looking at how state legislative and executive branch leaders are treating state courts around the country. But I do think that when Chief Justices of

color go to our funders and we talk to them about things like access to justice, about diversity on the bench, and we talk from a position of strength as the chief of a court system, there is some resonance there. When you're talking about funding the kind of systemic changes that you need to have happen in order to ensure that you can provide effective, efficient, and fair administration of justice in your jurisdiction, and you bring your personal experiences as a member of a minority community who has tried to access the courts, with friends who have tried to access the courts, people who had to access the courts without resort to lawyers and you tell those officials that there is a need, and it's important that they provide more funding to address those kinds of issues, there's at least a nod of understanding, because they know that you're coming from a very personal place, something that you feel. I think from that perspective, being a Chief Justice of color, can be helpful. It doesn't always result in more funding, unfortunately. But it does, I think, open the door for us to have a serious debate about it.

Now one of the things I'll say that I think is a challenge for Chief Justices of color, is motivating and invigorating the business community to come forward in support of funding for the courts, primarily because many of us, as Chief Justices of color, have not been involved in the business community. We may not have been involved in the same business organizations, because of our backgrounds. And that story may not be different regardless of whether you are a Chief Justice of color, or a Chief Justice who is a member of the majority. But that is one segment of our community that we have to get involved in supporting adequate court funding for our state courts if we are going to be successful. In New Hampshire, they've suspended civil jury trials for six months because they cannot hold enough jury trials; they don't have the funding and the resources necessary to do it. When that happens, and we are out promoting new access to justice initiatives for those who lack resources to navigate the court system because they cannot hire a lawyer, people are going to start to look at our courts as only providing justice for poor people. Somehow we've got to bring the diverse interests together to support the court's efforts to secure adequate funding. Therefore, as a Chief Justice of color, there are some powerful tools in your back pocket that you can use to bring the discussion and debate to a high level.

As a Chief Justice of color, I think we can make a dramatic impact on how people view the state court justice system.

JUSTICE KLEIN: Buena suerte. How about comments on that from your colleagues there.

JUSTICE DOUGLAS: I would echo what Chief Washington said. I was the Chief in the State of Nevada during this last legislative session. We happen to meet every other year. Dealing with the legislature, to be brutally frank, they could care less what color you are, especially during the economic downturn. It's about relationships. In our state, all members of the judiciary are elected officials. It's not retention election; it's a contested election. Open elections. So we know our legislators, but unfortunately like most states, we took a 16% cut and this was an under-funded judiciary to begin with. We made cases; they were sympathetic. The bottom line was no money. I had the privilege of addressing the joint session of our legislature and talking about the rule of law. A couple of times in some of these sub-committees I appeared before, there was slippage by the legislators of, "Well, can we help you with your specialty courts, *i.e.* drugs courts, mental health?" Then they caught themselves. We have no money. There is a challenge somewhat with the large law firms. I didn't come out of a large law firm. I came out of the county. There is a challenge with the business community, but by the same token I was instrumental in putting together a business court program in the state, so I have some linkage with the business community. Having said that, the challenge was not of color this time; the challenge was the economy. So this time it didn't make a difference. As the first Chief Justice of color, which my term has ended, I was accepted by the legislature. Afraid to say, I wasn't accepted well enough.

JUSTICE KLEIN: Any further comment on that? Yes? No?

CHIEF JUDGE WARE: Well, I'm hesitating, and I shouldn't because I'm an Article Three judge. So I don't face the kinds of challenges that some of my colleagues here might face, which makes them be careful about what is said, even if they're not considering higher office. But, the reason I hesitate is because I grew up in a black family. And in sitting around the table, we're brutally honest with one another. I want to be similarly honest with you: I believe that the courts are not being treated as an equal branch of government. The reason we're in trouble is because no one truly speaks for the courts. The amount of money that we use to run the judicial branch is small in comparison to what other branches of government or other aspects of our government use. And yet, I sit here as an Article Three judge, and during the whole course of my 20-year tenure, I think I've maybe had one 3% raise in salary. Now you laugh at that, but that is pathetic. It has an effect on the quality of justice. It has an effect on the attractiveness of the courts. And when I started as a Superior Court judge, I was earning much less than district court judges. And now, by contrast, the superior court

judges earn more than I do as a district judge. So, at some point we need to open this discussion up and ask the question. It doesn't matter what color we are. I don't think that's the issue. The color is green, the color is money, and the issue is an attack on the courts.

JUSTICE KLEIN: Well said.

CHIEF JUSTICE CANTIL-SAKAUYE: Can I just add something, Joan? And that is, there are battles in the legislature and in this year they are budget. But there are also non-monetary battles in the legislature that have to do with control of your budget. So it's true that the legislature will say, "You're going to take a \$350 million cut." We understand that. People are getting cut across the board. But I found myself this year having to go to the legislature on a Friday night at 7:30 at night and really ask for the pleasure of cutting myself. By that I mean, I had to go to the legislature and seek language that permitted my judicial council—my branch—to determine for ourselves where the cuts would come from, because it got to a point where the legislature was not only going to cut us, they were going to tell us where. And I had meetings with legislative leadership and received mixed messages: "Of course, you would be cutting yourself. Of course. But that's how we'd treat the executive branch. We cut them, they schedule their cuts where they need to." But it was a battle in another part of the house of the legislature to permit us to schedule our own cuts. I mean, it's a strange thing to come home on a nine o'clock on a Friday night and feel that you've scored a victory because you've gotten a promise from the governor that you get to cut yourself \$150 million. And it's true in the sense that it doesn't matter what color you are, but I will tell you what helps in the process is previously the membership voice and the legislature lawyers, but I'm seeing for, as a result of being a judge of color at this level, I'm seeing greater now more involvement with women lawyers. Those associations are coming forward, writing letters, objecting to behavior and conduct in the legislature. It doesn't have anything to do directly with money; but it has something to do with control. I'm also seeing the Bar Associations come forward, the Asian Bar, the La Raza, the Hispanic Bars come forward for that. That's very helpful.

JUSTICE DUFFLY: I just want to follow-up on the two comments that I heard—in Massachusetts, we needed a supplemental budget because we were cut so severely. And we decided after a year-long study, a really Blue Ribbon study of where we could close courtrooms, which courtrooms we would close. Nobody wants to close courtrooms; so when we got some of the money in a supplemental budget it came

with a tag that in essence prevented any courtroom closings for two years. So the control is a really important issue I think as much as the cuts. I don't think it was an issue of color. The other thing that I wanted to follow up on that may be telling was a form sent to the court that we were required to complete that was meant for all agencies. People keep forgetting that we're actually a branch, not an agency.

JUSTICE KLEIN: Well, what has bothered me over the years, in line with what you have heard here, is that we are the independent mendicants. That means that we run around with a tin cup looking for some money. Somehow, somewhere, the Founding Fathers and those in charge of the government since that time, have not provided funding for the court system. We cannot operate our own budgets and have our own funds to run our own shop. As somebody indicated, they haven't had a raise on the federal courts in, what, 20 years or something? That's ridiculous. But that's what we are. And I call us the independent mendicants. We take our little tin cup, we go around asking the legislators, "We need a buck or two to run the court system. Please? Por favor?" You know? Anyway, that's a sad situation and I do not see any answer to that in the future. But on with the program.

This next question is directed to Chief Justice Michael Douglas of the Supreme Court of Nevada. And it's a biggie. Is race or sex an issue for justices on state supreme courts?

JUSTICE DOUGLAS: The short answer is, yes. For women, if they are aggressive they're referred to, and excuse me, as a bitch. They're not decisive, as men are perceived. If you are of color, you are being arrogant if you show your legal scholarship. So it is a very delicate line that you walk. It is even more so if you are in a state where your judges are elected by popular vote in contested elections, not retention elections mind you, but pure elections where you must go out and campaign in the communities, communities in most states that you may not look like. At one point, I was standing on a street corner with then my fellow district court judge and we were saying, "Gee, we're 100% of the minority bar on the bench." Two. I say that, but let me segue because I created this question a few weeks ago, but I was struck recently because two days ago, they had the dedication in Washington of the Martin Luther King monument. I was struck by that because it took me back to the other pioneer who's overlooked of the same period—former Supreme Court Justice Thurgood Marshall. Thurgood Marshall has said a lot of things, but what captivated me was where we are at today. There was an article in the paper that talked about, is there still racism today? You have a black president. Is there still racism today because you have black judges? You have a black millionaire running as a Republican. Is there

racism? The real answer is, yes there is. Thurgood Marshall remarked almost 30 years ago that the Ku Klux Klan was still alive. They just happened to take the sheets off because sheets cost money.

Having said that, there is a difficulty for minorities as they go up, I'll say the ladder, or economically down the ladder, depending, as you go forward with this, because of the connections. Are you part of a large law firm? Are you part of a certain golf club? All those things are still alive and well. Can you overcome them? Yes, you can. But it's a road sometimes that you have to not think about as you go down it. As a person who was raised in California, I kind of took certain things for granted. But I was slapped in the face as I walked into Nevada because it brought me back to a reality. The first time I appeared in a courtroom, I'm in a three-piece suit, I have my briefcase, I'm at counsel table, no client that day. Another counsel was there, the judge looks down. He says, "I'm going to default this action because the defendant is appearing without counsel," and so on. The other lawyer looked at the judge and said, "Uh, your Honor, he's the other attorney."

I say all this because the critical thing for where we are at today is complacency. We have come a long way, but there is still a long way to go. Women in the judiciary should be looked at as competent, scholars, aggressive in nature. Those of color—brown, yellow, red—they should be looked at for what they bring to the table, not because of their color. In my bio it says, "first black Supreme Court Justice, first Chief Justice." That's a great honor at one point; but by the same token, I remarked when I got sworn in, "I still have to do the job." And if I don't do the job, there may not be another one who looks like me on the court.

JUSTICE KLEIN: Do any of you from other states want to weigh in on that issue as to whether sex or race is an issue for justices at state supreme courts? I mean, to ask the question is to answer it. Anybody else have any thoughts on what they want to weigh in with?

JUSTICE DUFFLY: I think, just to follow-up, it matters if there are more than just one. It makes a huge difference on my state supreme court. I'm the first and only Asian American. But in terms of gender, there are three women out of seven. For a brief moment, there were even four a few years ago. And three is an important number. That critical mass makes a huge difference, I think. We really all need to work towards critical mass, because once there's critical mass, change—you have to be careful, it can go backwards—but change continues once you have critical mass.

CHIEF JUDGE WARE: I would change the question to “should it”? I sat around in my chambers knowing I was coming here, and I asked the question of my law clerks and a group of law students who were serving as externs. Should the law be colorblind? And I was quite surprised by some of the answers. At first, there was a general hesitancy on the part of everyone sitting around the table to answer. And then, as they started to answer, I started to get a lot of equivocation, because there was some feeling that, “Well, that’s a nice ideal, but we aren’t quite ready for it yet. Instead, we as a society need to be cognizant of color, because we’re still struggling with it.” And I thought that was a wonderful answer. I turned to the two minority members of the group, and they said, “Absolutely not. Color needs to be a consideration. Indeed, I bring something to the table because of my ethnicity, because of my background, that I want to have recognized.” And so we aren’t quite sure. I think that Eric Holder, our Attorney General, says we’re too chicken to really talk about race and gender as a nation. And we still are. It is something that, as a court, we deal with all the time as we sit there as judges, and we take on a special responsibility. Our court—as I’m sure others—has a committee to deal with professional responsibility, and that committee is tasked to evaluate complaints whenever people feel that they’ve been discriminated against in any way during the course of court proceedings on the basis of race or ethnicity or gender. I’m not sure it’s well used, because many people let it pass. We’re often too polite to say, “That’s discriminatory,” in our society. So as a court, we often don’t have an opportunity to deal with it.

JUSTICE KLEIN: Yes, Sir?

CHIEF JUDGE WASHINGTON: I was just going to add to that that with respect to the judiciary in particular, those people of color who are interested in public service are discouraged, frankly, by the fact that they can’t get paid a fair wage to do a job. There are a number of lawyers of color who are supporting homes and families and they don’t have savings. They don’t come from generations of wealth so that taking a job that does not even keep pace with inflation in terms of salaries is not possible. They’re trying to figure out how they can make a better life for their families and their children and their children’s children. I think that concern is a big factor in their decision about whether to apply for judgeships. In the District of Columbia, which now is not majority African-American, but was for a long period of time, I’m the only African-American male on our highest court. I have two African-American women colleagues. Our only Latina judge recently retired. We have no Asian judges on our court. However, if you look at our

community, it is extremely diverse. We have an African-American who heads our Judicial Nominations Commission and several members of that commission are members of minority groups. They are trying hard to get individuals of color to apply. It's not that they're considering African-American, Hispanic, and Asian applicants and rejecting them. They're having difficulty, in a city like Washington, D.C., getting them in the pipeline. And that's a sad statement. We have so many law school graduates, so many extremely competent people. And yet, they're not applying for various reasons like the attacks on the judiciary, and the stagnation of salaries. Those factors work against efforts to encourage our best and brightest to come forward and seek judicial positions. And it is critical as Chief Justice Cantil-Sakauye said, that we have diversity on the bench because the public's trust and confidence in the courts depends on being able to see people that look a lot like you making key decisions.

JUSTICE KLEIN: Any other comments? I think our Chief Justice spoke eloquently that she's a spectacular, spectacular example of diversity on the bench. We in California are truly to be grateful for her. All right, I have a final question to Chief Judge James Ware of the U.S. District Court for the Northern District of California. You spent 15 years as a lawyer, 20 years as a District Judge, and then, you now assume the role of Chief Judge. Do you find yourself looking more fondly back towards your past roles or forward to your new roles as Chief Judge? Which of these roles did you enjoy more and why?

CHIEF JUDGE WARE: This was taking myself to therapy, in asking that question of myself. I quite frankly didn't remember how I had worded it, but the question does provoke a little different kind of discussion than we're having here. That has to do with the nature of being Chief Judge. I have the title because I was the most senior judge under the age of 65 at the point when the vacancy was created, not because my colleagues looked around and decided I was the best person for the job. But that's okay. I took the job. And, you know, the court is a unique institution. If I were the chief executive officer of a company, there would be a hierarchy where I would perhaps have more power and there would be subordinates, there would be a structure. When you're Chief Judge of a court, you are not first among equals, you are equal among equals. So I have the pleasure of bringing together my colleagues for purposes of making important decisions. But as Chief Judge, my vote is equal to every other vote on the court. I also have a lament about that, because, indeed, as Chief Judge I'm being a little more careful about what decisions I make. Because when I was District Judge and I

made a decision, it was just Judge Ware decided. Now it's Chief Judge Ware has decided. And somehow, I have in the back of my mind a feeling that I need to be a little more careful with that label placed upon my decisions than I would otherwise. Not that I'm not careful—always. But it takes on the notion that perhaps my decision is that of the court. Quite frankly, as we all know, it is not, but the public perhaps might perceive it otherwise.

But to answer the question, quite frankly, I find it a little uncomfortable to be a Chief Judge. It has its benefits. One of the things that as Chief Judge I had the opportunity to do was to host a seminar for new law clerks. In years past, it's been a seminar where we bring them together and we lecture them on motions for summary judgment, how best to get rid of cases in the courts, which is an important motion. But I chose, during my tenure as Chief Judge, to initiate this by having a special guest. The special guest I invited to meet the new law clerks was Melba Beals. Those of you who are familiar with the civil rights struggle will recognize her name as one of the Little Rock Nine. They were the students who were selected to go to Central High School and who were rejected. Governor Orval Faubus called out the National Guard to prevent the integration of the school, and ultimately closed all the schools in Arkansas to prevent integration. So she was for me a warrior who had actually gone through what in my view was a constitutional crisis in our country. And I wanted these new law clerks, many of whom were born way after all of these events, to understand the important role that the courts played during that period in saving the nation. This was an important constitutional crisis. And were it not for the matter of getting into the courts, all the way to the United States Supreme Court in the *Cooper v. Aaron*⁵ case, perhaps we would still be living under Jim Crow. And I wanted them to appreciate the jobs that they were taking on as law clerks, and to appreciate their very important role: namely, that it doesn't matter what size the case may be, because your case, the one that you're advising your judge about, could be a case as important as that. And so being in the position of Chief Judge and having the opportunity to open the court with the kind of agenda that I would wish has been a real pleasure. But on the other hand, the job becomes quite burdensome. I always comment that as Chief Judge I go home at night and I sleep like a baby: I sleep for an hour and I wake up and I cry for an hour.

⁵ *Cooper v. Aaron*, 358 U.S. 1 (1958).

JUSTICE KLEIN: Do any of the rest of you look back to an earlier time when you were in some other ranking in the judiciary, or as a lawyer, and think, “Those were the good old days?”

JUSTICE DOUGLAS: They were the good old days. I don’t cry like a baby, but I understand what he is saying. Having finished my tenure as the Chief Justice, but I was also the Chief Judge down in Las Vegas in the trial court down there. I understand the importance of what I do right now in setting policy and working with other justices. But I do miss the days of taking attorneys in the hallway or talking to young attorneys after trial about what they did and didn’t do. Being able to talk to plaintiffs, defendants, victims. Sentencing criminal defendants sometimes, giving them that one shot, even though I know that presentence investigation report says, “Don’t do it judge.” That personal, in-your-face difference. I miss that. But again, I do understand when you are sitting in conference at this level and making decisions about state reapportionment or death penalty or other things, that it’s important. It’s important, and I’ll say it the only way I can, there is a need for minorities and for women to see something I never thought I would be, role models. And that is part of the curse that you get.

JUSTICE KLEIN: Anybody else have a comment at all on that line? I would say, for my own personal self here, I wouldn’t trade my Senior Presiding Justice spot for anything that I’ve been before because I had a chance to vote for this great lady sitting right here.

I think we have a little bit of time. I have a burning question. And I’m just going to throw it out there and see what your reaction is to it. How do we, as judges and justices, justify dissenting opinions when everybody is thinking of “the rule of law,” what’s the rule of law contemplated by the forefathers and various professors, etc., when we can sit around and dissent with each other? Have you got any comment on that? How do we justify dissents?

JUSTICE DUFFLY: Joan and I were just at the same National Association of Women Judges Conference, so she knows that I know what she’s thinking about, which is a wonderful talk that Justice Ruth Bader Ginsburg gave, she gave the keynote about the role of dissenting decisions. And as I was listening to her speak—and I’ve been an appellate judge for a while and I don’t write that many dissenting decisions—I realized that she was speaking to the things that I had formulated in my own mind. It really is a role. And I use it very carefully. I’m very conscious about trying to come to agreement. I now have an opportunity to advance the law in one direction or another, and I

realize how conscious I am of that obligation to all of you to get this right, and at the same time to advance an important principle. So if I can write a decision, a dissenting decision, say, that gets incorporated into the majority for the most part—not everything, maybe not the really good part—but for the most part, then I can say, “Okay, that decision is actually now going to do almost what I want.” The dissent would have achieved nothing, or at least not now—maybe in ten years. So I don’t write, I let that one go, put that one in the file for people later to read.

Sometimes, you just have to write the dissent, because you think that “This is important. I can’t agree, it’s a matter of principle, it is something I can’t go along with.” And you write a dissenting opinion, just because you have to. It’s a freeing exercise, too. You can really write a little more loosely. I don’t mean in language, but you can be a little less cautious and speak your heart as well as, of course, the law. It’s a wonderful opportunity sometimes when you find yourself in that position of having to do it. So there is actually a role if you use it very carefully; you use it to speak to your colleagues and sometimes, as Justice Ginsburg said, you speak to someone else, like the legislature, and you get them to change the law, which she’s done a couple of times.

JUSTICE KLEIN: Anybody else have a comment on that?

CHIEF JUSTICE CANTIL-SAKAUYE: I’m going to just join in that and say, when I was on the CA, the Court of Appeal, I wrote few dissents. And there were times, I think, when I thought about simply concurring with the result and not getting into the mixed message of a dissent that then is, oftentimes we see, is used to challenge the opinion for reconsideration, or up to the Supreme Court. And it really came down to a feel of your comfort level when you just knew you couldn’t live with yourself unless you put forth your thoughts of your objections to the majority. And it need not often be long, because really I find, in developing cases and having only really—because I’ve only been on the Supreme Court less than a year, we reach, we agree for three-quarters of the analysis. And then there comes a fork in the road. And that’s where it’s a bit of interpretation. We do primarily legislative intent. That’s what we do. We have a different—that’s where we fork off into what could be a dissent, a CND, a concurring, and a dissent. Or maybe it turns into, as you all know, a footnote somewhere in the majority opinion that plays mischief later on. And so to me, it is when you just feel you’ve reached this point and you cannot agree on this component part. And it’s something that haunts you, for me, it is something that I just realize I am here on this court. I have these principles. This is part of my—what I

bring to the table, it is where I diverge in this fork, and so this is where I'm going to write my piece.

JUSTICE DUFFLY: Just following up a little bit on what Tani said, the role is very different on a court of appeal. It is an intermediate court of appeal, where I was for ten years, because then you have this other audience which primarily we don't really have now. That was us, the Supreme Judicial Court, because you're really speaking to them. And, at least in Massachusetts, the Supreme Judicial Court will look for those dissents. They'll take those cases for further appellate review and that's really nice. There's that opportunity then, because you're really speaking to that audience. Now, on the Supreme Judicial Court, not so much.

CHIEF JUDGE WARE: Justice Klein, I'd like to use this as an opportunity to comment on the law schools. Part of what a dissent does is to criticize the logic or the reasoning of the majority opinion. The legal academy, likewise, has a vital role to play in watching courts and analyzing decisions. Although I'm not sure that I have a fair basis for saying this, it does seem to me that nowadays we seldom see citations to law review articles in court decisions, and this may be because those articles have gone away from providing us with the kind of analysis and information that we, as judges, could use to hear back from the academy on how we're doing. It's very important feedback that we could be getting from the law schools.

JUSTICE DOUGLAS: The premise of no dissent would mean the law is perfect. It is not perfect. It is a creature of, I will not be gender-specific, of men. And now women. If they got it right always, they probably wouldn't need us sitting in those chairs in the robes. But it is done wrong quite often because another branch of government makes those laws. And sometimes it reflects social policy. I sit here as someone who comes from ancestry that was once written in a law book to be property. Then I was deemed separate but equal. And then I was deemed equal. Sometimes the dissent, as was talked about, is to make people feel uncomfortable enough to re-examine what they do. I will just segue a personal experience. You touched upon the law school. That law school that I went to in the city a few blocks from yours in the early '70s when I was a student had no minority faculty. And we were told that there were no capable minority members in this great city of San Francisco who could be faculty members. As a first-year student, I joined my other fellow minority students and we had a one-day strike.

Lo and behold, the next year they had a minority faculty member. That was a different type of dissent.

JUSTICE KLEIN: Well, it was interesting hearing the answers, but I still have a problem with the concept. I would like to thank each and every one of you for participating in another one of these first class programs that Dean Ramey has put together here. And I know that everybody in this audience has appreciated our panelists and the frank and interesting answers that they have provided us, and food for thought, legal or otherwise. So thank you all for coming. And thank you, panelists for participating. And thank you Dean Ramey for giving us the opportunity to be here tonight.

DEAN RAMEY: Well, since I have the power of the microphone, I did want to say one thing about the dissent question. And that is, Golden Gate recently, the law school, produced a book about an alum of ours who was a justice on the California Supreme Court, Jesse Carter. He was known as the great dissenter. His dissents were almost entirely in the area of civil rights and civil liberties. He was a man before his time, as many dissenting judges have been and will continue to be. And very often, as I believe Justice Douglas was referring to, what are the perceived morays by a majority of the population and perhaps reflected by a majority in a court, very often become very different and the law changes very often ultimately bearing quite a startling resemblance to those dissenting opinions of yesteryear. So that's my response to you. I think dissents do a real service to people of color, and women, and cases based on sexual orientation, and so on. And that would be my response. But, nobody asked me. I digress.

I want to thank our Chief Justice, our distinguished Chief Justice, and this absolutely remarkable distinguished panel, and Justice Klein for this remarkable evening. And I think I speak on behalf of us all in thanking you for really extraordinary insights into issues which are, as was mentioned earlier, extremely difficult and rarely discussed in a public forum as much as they should be. So thank you again so very much.