RONALD K.L. COLLINS*

Hans Linde and His 1984 Judicial Election: The Primary

> Linde hides behind the court's opinions, asserting they are not his own and refuses to discuss the political and social agenda he would inflict on our state. Linde's stance is pure deceit. A leader in this state ought not to hold the people in such contempt.
>
> —Norman W. Frink[1]

> I am disappointed at the departure from acceptable standards of decency in campaigning for judicial office by some of the attacks on Oregon's distinguished Supreme Court Justice Hans Linde.
>
> —Sidney I. Lezak[2]

SUCH statements, made by two prosecutors, seemed understandable in 1984, that Orwellian year when charges of left and right-wing abuses hung in the Oregon air. The propaganda campaigns, the battles for truth, and the "Newspeak" employed by some, lent credence to the prophesies of the famous English novelist. But the 1984 campaign was not fiction. It was instead a rare and instructive example of the conflict between judicial ideals and the Realpolitik of judicial elections.

The 1984 campaign to unseat Justice Hans A. Linde from the Oregon Supreme Court raised fundamental questions about the

---

* Visiting Associate Professor, George Washington University, National Law Center. Former law clerk to Justice Hans Linde (1979-80); volunteer for the Committee to Re-Elect Justice Hans Linde (1984). Warm thanks to Melissa and Michael Haglund, who gave much at a time when I had little.

[1] Frink, *Opposes Linde* (Letter to the editor), The Oregonian, Apr. 28, 1984, at C7, col. 1. At the time, Norman W. Frink worked in the Multnomah County District Attorney's office and was quite active in, and a formal member of, the Committee to Elect David Nissman. *See* Letter from Nissman for Justice Committee to "Dear Colleague" (Apr. 4, 1984) (on file with the author). Today, Frink is a deputy district attorney in Multnomah County.

[2] Lezak, *Crime Rate Unaffected* (Letter to the editor), The Oregonian, May 5, 1984, at C7, col. 3. At the time, Sidney I. Lezak was a Portland attorney in private practice, having previously served as United States Attorney for Oregon (1961-82). He was on the Committee to Re-Elect Justice Hans Linde. *See infra* appendix A. Today, Lezak continues to practice in Portland.

"tension between judicial institutions and popular passions,"[3] the clash between minority rights and majority rule, the conflict between judicial accountability and the politicalization of the judicial process, and the independent role and rule of a state constitutional system and its Bill of Rights. Important as these matters are, they are not the particular concern of this Article. Rather, my purpose here is to offer an historical account of the key events of the 1984 judicial election involving Justice Linde. I leave to others, more removed from these events, the task of analyzing and evaluating what is presented below.

Part I of this Article profiles the three central players in the 1984 judicial election, namely Justice Linde, Deputy District Attorney David Nissman, and Trial Judge Albin Norblad. Part II focuses primarily on the origin and character of the Nissman bid to unseat Linde. Part III examines the Linde response to the Nissman charges and concludes with a discussion of the results of the May 15, 1984 primary election.

I

THE PLAYERS: LINDE, NISSMAN, AND NORBLAD

A. Hans A. Linde: The "Intellectual Godfather"

Hans A. Linde was appointed to the Oregon Supreme Court by Governor Robert Straub in 1976 and took his seat as an associate justice in January of the following year.[4] He was reelected in 1978 in an uncontested race.[5]

Born in Berlin on April 15, 1924[6] and brought up in Copenhagen, Denmark, Linde at age 15, came to Portland where his father, Bruno Linde, became a member of the bar.[7] Upon graduating at the top of his class from Reed College in Portland,[8] Linde took a degree in law from the University of California, Berkeley, where he

---

[3] Linde, *Hercules in a Populist Age* (Book Review), 103 HARV. L. REV. 2067, 2069 (1990).

[4] *See* Witt, *Hans A. Linde: The Unassuming Architect of an Emerging Role for State Constitutions*, 2 GOVERNING MAG., July 1989, at 56; THE AMERICAN BENCH 1953 (R. Forster 3d ed. 1985).

[5] *See* Witt, *supra* note 4, at 60.

[6] *See* THE AMERICAN BENCH, *supra* note 4, at 1953.

[7] *See* Witt, *supra* note 4, at 58-9.

[8] *Id.* at 59. Linde's 141-page September 1947 senior thesis, for the Division of History and Social Sciences, was entitled "State, Sovereignty, & International Law: A Study of Three German Legal Theories" (on file at Reed College Library). The thesis explored the jurisprudential thinking of Georg Jellinek, Hans Kelsen, and Carl Schmitt as their views applied to international law. Linde's thesis advisor, political science Pro-

was editor-in-chief of the law review.[9] Selected by Boalt Hall's famous jurisprudence scholar and law professor Max Radin,[10] Linde went to Washington, D.C. in 1950 to serve as a law clerk to United States Supreme Court Justice William O. Douglas.[11]

After leaving the Court, Linde remained in Washington, D.C. where he served first as an attorney in the Office of the Legal Adviser of Department of State and Advisor to the United States Delegation to the United Nations General Assembly.[12] In 1953, he returned to Portland, where he joined a citizens' coalition effort to fight for a federal Hells Canyon dam. About that same time, he started to work in the political campaign of a friend, then State Senator Dick Neuberger.[13] Working as an unpaid advisor and writer, Linde helped the campaign along until Neuberger beat the incumbent U.S. Senator, with the result that the Senate swung from Republican to Democrat and Lyndon Johnson became majority leader. Soon afterwards, Linde packed up and went to Washington, D.C., where he served as a legislative assistant to newly elected United States Senator Richard L. Neuberger.[14]

Once his stint with Senator Neuberger was done, Linde returned to the Pacific Northwest. Once in Oregon, he donned a professorial cap and joined the faculty at the University of Oregon School of Law in Eugene,[15] where he remained until his appointment to the Oregon high court.[16] Before he commenced his work on the court, however, Linde was a member of the Oregon Constitutional Revi-

---

fessor Maure Goldschmidt, years later assisted in the campaign effort to reelect the justice. *See infra* note 194.

[9] *See* THE AMERICAN BENCH *supra* note 4, at 1953. For an article by Linde as a law student, see Note, *Criminal Law: First Degree Murder: Discretion of Jury to Choose Between Life Imprisonment and Death Penalty*, 36 CAL. L. REV. 628 (1948).

[10] Max Radin, Justice Douglas' good friend, was the person who, at the time, selected the Justice's clerk for each term. *See* Urofsky, *Getting the Job Done: William O. Douglas & Collegiality in the Supreme Court*, in HE SHALL NOT PASS THIS WAY AGAIN 33, 38 (S. Wasby ed. 1990). *See also* Kipling, *A Scholar Named Mr. Justice Linde*, Western L.J. Newspaper, Mar.-Apr. 1980, at 1, col. 2 (published by the L.A. Daily Journal, now discontinued).

[11] *See* Witt, *supra* note 4, at 59.

[12] *See* THE AMERICAN BENCH, *supra* note 4, at 1953.

[13] *See* Witt, *supra* note 4, at 59.

[14] *Id.*

[15] *Id.*

[16] Linde was also a visiting professor of law at Boalt Hall (1964-65), Stanford Law School (fall 1972), and UCLA Law School (spring 1973). He was a Fulbright Lecturer at Freiburg University in Germany (1967-68) and at Hamburg University (1975-76). *See* THE AMERICAN BENCH, *supra* note 4, at 1953, 1954.

sion Commission (1961-62).[17] He served on the subcommittee on the Bill of Rights and the executive branch and also as chairman of the drafting committee. It is reported that he drafted articles I (Bill of Rights), VII (judicial), and much of article V (executive) of a revised constitution for the state.[18]

Prior to his elevation to the court, Linde also did some appellate work in connection with briefs submitted to the Oregon Supreme Court. As a specialist in constitutional law, Linde authored, among other things,[19] the amicus brief for the Oregon Newspaper Publisher's Association,[20] which was presented to the state high court in 1975 in the case of *Deras v. Myers*.[21]

Hans Linde's most notable pre-court work was his influential scholarship in academic periodicals such as the *Yale Law Journal*,[22] the *Oregon Law Review*,[23] and many other such journals and books.[24] He also coauthored a casebook on the legislative and ad-

---

[17] *Id.* at 1954. *See A New Constitution for Oregon*, 67 OR. L. REV. 127 (1988).

[18] *See* Summers, *Hans A. Linde as Seen by a Junior Colleague—A Personal Tribute*, 1984 ANN. SURV. AM. L. xi, n.2.

[19] *See, e.g.*, American Can Co. v. Oregon Liquor Control Comm'n., 15 Or. App. 618, 517 P.2d 691 (1973).

[20] The brief, based largely on article I, section 8 (free speech) of the Oregon Constitution, contains early statements on Linde's views concerning the need to dispose of state law questions antecedent to any discussion of federal law. Thus, for example, Linde argued: "First, simply as a matter of logic, if Oregon law protects plaintiff's claimed right, then Oregon cannot be held to have abridged his liberty in violation of the 14th Amendment." Amicus Brief for the Oregon Newspaper Publishers Ass'n at 7, Deras v. Myers, 272 Or. 47, 535 P.2d 541 (1975). *See also id.* at 8. Likewise, the brief contains the seeds of Linde's later thoughts on the reach of article I, section 8's free speech guarantee. *See, e.g., id.* at 10-11 & n.2.

[21] 272 Or. 47, 535 P.2d 541 (1975) (striking down limits on political campaign spending under Oregon Constitution; this before the United States Supreme Court ruled similarly in Buckley v. Valeo, 424 U.S. 1 (1976)). Much of Chief Justice Kenneth O'Connell's opinion tracked what was set out in the Linde amicus brief. *See generally* Linde, *Chief Justice O'Connell's Contributions to Oregon's Public Law*, 56 OR. L. REV. 227, 229 (1977).

[22] *See* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972).

[23] *See* Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) [hereinafter Linde, *Without "Due Process"*].

[24] *See, e.g.*, Linde & Frohnmayer, *Prescription for the Citizen Legislature: Cutting the Gordian Knot*, 56 OR. L. REV. 3 (1977); Linde, *Replacing a President: Rx for a 21st Century Watergate*, 43 GEO. WASH. L. REV. 384 (1975); Linde, *Clear & Present Danger Reexamined*, 22 STAN. L. REV. 1163 (1970); Linde, *Comments on* Powell v. McCormack, 17 UCLA L. REV. 174 (1969); Linde, Book Review, 81 HARV. L. REV. 922 (1968); Linde, *Campus Law: Berkeley Viewed from Eugene*, 54 CALIF. L. REV. 40 (1966); Linde, *Justice Douglas on Freedom in the Welfare State*, 39 WASH. L. REV. 4 (1964); Linde, *Constitutional Rights in the Public Sector*, 40 WASH. L. REV. 10 (1965); Linde, *Constitutional Law — 1959 Oregon Survey*, 39 OR. L. REV. 138 (1960).

ministrative process.[25] In 1975 Linde delivered the Oliver Wendell Holmes Devise Lecture,[26] which charted a constitutional course quite different from the popular one urged by Stanford Law Professor Gerald Gunther in his seminal *Harvard Law Review* article on equal protection.[27] Gunther later remarked that the Linde article was " 'without a doubt the most lucid [and] thorough attack on my position . . . .' "[28]

Once on the Oregon Supreme Court, Linde remained the scholar, the one with the long vision of the law. In areas as diverse as contracts,[29] torts,[30] administrative law,[31] home rule,[32] legislative reapportionment,[33] government taxation powers,[34] equality of treatment,[35] freedom of expression,[36] treatment of prisoners[37] and criminal procedure,[38] the former law professor brought "his academic background to the service of the judiciary . . . ."[39] While on the court, he was a member of the council of the prestigious American Law Institute.[40] Meanwhile, the scholarly articles[41] did not abate with his elevation to the court. Linde's reputation, particu-

---

[25] *See* H. LINDE & G. BUNN, THE LEGISLATIVE AND ADMINISTRATIVE PROCESSES (1st ed. 1976).

[26] *See* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

[27] Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

[28] Kipling, *supra* note 10, at 1, col. 2.

[29] *See, e.g.*, Kabil Dev. Corp. v. Mignot, 279 Or. 151, 566 P.2d 505 (1977).

[30] *See, e.g.*, Koos v. Roth, 293 Or. 670, 652 P.2d 1255 (1982); Sandford v. Chevrolet Div. of Gen. Motors, 292 Or. 590, 642 P.2d 624 (1982); Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 652 P.2d 318 (1982); Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365 (1978).

[31] *See, e.g.*, Megdal v. Oregon State Bd. of Dental Examiners, 288 Or. 293, 605 P.2d 273 (1980); Marbet v. Portland Gen. Elec. Co., 277 Or. 447, 561 P.2d 154 (1977).

[32] *See, e.g.*, City of La Grande v. Public Employes Retirement Bd., 281 Or. 137, 576 P.2d 1204, *aff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978).

[33] *See, e.g.*, McCall v. Legislative Assembly, 291 Or. 663, 634 P.2d 223 (1981).

[34] *See, e.g.*, Kulick v. Department of Revenue, 290 Or. 507, 624 P.2d 93 (1981).

[35] *See, e.g.*, State v. Clark, 291 Or. 231, 630 P.2d 810, *cert. denied*, 454 U.S. 1084 (1981).

[36] *See, e.g.*, State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982).

[37] *See, e.g.*, Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981).

[38] *See, e.g.*, State v. Greene, 285 Or. 337, 347, 591 P.2d 1362, 1367 (1979) (Linde, J., concurring).

[39] Frank, *A Tribute to Hans A. Linde*, 1984 ANN. SURV. AM. L. xxi, xxiv.

[40] *See* THE AMERICAN BENCH, *supra* note 4, at 1954.

[41] *See, e.g.*, Linde, *Courts & Censorship*, 66 MINN. L. REV. 171 (1981); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) (1983 John A. Sibley Lecture in Law); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980) [hereinafter Linde, *First Things First*] (the first annual Judge Irving A. Levine Memorial program).

larly in the area of state constitutional law and individual rights, had blossomed to the point that in May of 1982 he was prominently featured in the *New York Times*[42] among a handful of noted state jurists.

In the span of time between 1977 and 1984, Linde had achieved a significant presence on the Oregon Supreme Court and likewise earned a national reputation. In later years, *The New Republic* magazine would label him the "intellectual godfather"[43] of the revival in state court prominence. Of course, it was precisely such kudos from liberal quarters that made Linde vulnerable to the attacks leveled against him in the winter of 1984.

B. David M. Nissman: The Young Prosecutor

David Marshall Nissman was a 30-year-old Lane County Deputy Assistant District Attorney when he set his sights on Hans Linde's seat on the Oregon Supreme Court. A native of Forest Hills, New York, he graduated magna cum laude from Emory University and moved to Oregon, where he took a juris doctorate degree in 1978 from the University of Oregon School of Law.[44] As a law student, David Nissman assisted in arguing some twenty felony cases, and later made supervised appellate arguments in three murder cases.

The dark-haired prosecutor, who in 1984 resided in Eugene with his wife, had been a felony trial lawyer in the Lane County District Attorney's Office since 1978. Additionally, Nissman had done civil litigation in the same office and had been a legal advisor to various police agencies.[45] He also lectured for the Board of Police Standards and Training and for the Oregon Law Institute.[46] Between 1981 and 1983 Nissman served on the Legislative Task Force of the Oregon District Attorneys' Association, a job that helped develop his reputation in the prosecutors' community and enhanced his familiarity with Oregon's criminal justice system.[47] By 1984, candidate Nissman claimed to have " 'tried over 200 jury trials' "[48] and "successfully prosecuted . . . the 'Vietnam Syndrome' murder case

---

[42] *See* Margolick, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at A1, col. 1 & B8, col. 1 (photograph of Linde).

[43] *See* Toobin, *Better than Burger*, THE NEW REPUBLIC, Mar. 4, 1985, at 10, 11.

[44] Nissman was in law school for a year when Linde was on the faculty but abroad as Fulbright lecturer. *See supra* note 16.

[45] *See* Nissman Voter's Pamphlet, *infra* appendix F.

[46] *Id.*

[47] *Id.*

[48] Fattig, *Supreme Court Candidate*, Daily Courier (Grants Pass), Mar. 16, 1984, at 11, col. 1.

and the Deadwood Kidnapping cases."[49]

The articulate, quick-witted government attorney also had a flair for legal writing. At the time of his bid for the Oregon Supreme Court, Nissman had coauthored two practitioner books ("guide[s] to prosecutors"[50]) entitled *Beating the Insanity Defense*[51] and *The Prosecution Function*.[52] A third such book, *Admissions and Confessions*,[53] was said to be in preparation at the time. Also, Nissman assumed a part-time professorial role between 1978 and 1984 when he served as an adjunct faculty member at the University of Oregon School of Law.[54] In the judicial race ahead, however, Nissman assumed more of the robust demeanor of a prosecutor than the reserved way of a scholar or a sitting appellate judge. Initially, this manner appeared to serve the young prosecutor quite well.

C. Albin W. Norblad: The Hopeful Third-Party Beneficiary

Albin W. Norblad III was born on March 15, 1939 in Astoria, Oregon. He grew up in Stayton, the grandson of the Governor of Oregon, Albin Norblad, Sr., and the son of a longtime United States Congressman, Walter Norblad.[55] By the time he announced his candidacy for Linde's supreme court seat, Norblad had over 11 years of varied judicial experience. In 1970 he took part-time work on the municipal court, which he continued until 1973.[56] Thereafter, he served as a district judge in Marion County until 1977.[57] From 1977 to 1984, Norblad sat as a circuit judge in the same jurisdiction.[58] As a judge, Norblad had spent considerable time presiding over juvenile correction and domestic relations cases.

---

[49] Mentioned in campaign letter, dated Feb. 4, 1984, signed by Delores French and William R. French and paid for by the Nissman For Justice Committee. David Nissman is Mr. and Mrs. French's son-in-law.

[50] D. NISSMAN, B. BARNES, & G. ALPERT, BEATING THE INSANITY DEFENSE vii (1980).

[51] *Id.* This book was coauthored with Brian Barnes and Geoffrey Alpert, both then of the Lane County District Attorney's office. Barnes was later a member of the "Nissman for Justice Committee." *See infra* appendix C.

[52] D. NISSMAN & E. HAGEN, THE PROSECUTION FUNCTION (1982).

[53] Not published as of this writing.

[54] *See* Nissman Voter's Pamphlet, *infra* appendix F.

[55] Albin Norblad, Sr. served as Oregon's Governor from December 1929 to January 1931. Walter Norblad represented northwest Oregon's 1st Congressional District from 1946 until his death in 1964. *See Norblad Says Way Cleared for Court Race*, Daily Courier (Grants Pass), May 18, 1984, at C1, col. 1.

[56] *See* Norblad Voter's Pamphlet, *infra* appendix G.

[57] *Id.*

[58] *Id.*

After graduating from the University of Oregon in 1963, Norblad went to Willamette University, where he received his law degree two years later.[59] He was then admitted to the Oregon State Bar and served as a law clerk to a federal district judge for the 1965-66 court term.[60] For the next three years he earned his livelihood as a deputy district attorney.[61] In 1969 Norblad left his government job and went into private practice, where, apart from his occasional municipal judge work, he remained until 1973.[62] Four years later he put on the judicial robes of a circuit judge for the Third Judicial District.[63]

Before seeking high judicial office at the age of 45, Norblad had participated in a variety of professional activities. For example, he served as a member of the Governor's Task Force on Juvenile Corrections.[64] Similarly, Judge Norblad served on the Judicial Conference Domestic Relations Committee, the Legislative Committee Judicial Conference, the Policy Board District Committee Corrections System, and on the District Court Traffic Offense Study Committee, among other committees.

Prior to the 1984 election, Circuit Judge Norblad won the praise of some local newspapers, which said things such as: "Norblad . . . is widely perceived in the community to have been effective in curbing crime,"[65] or "Norblad . . . can point with pride to an impressive list of statistics that seems to show that his stern expectations, reorganized department and innovative programs are working."[66] It was that reputation that the tall and relatively docile Norblad hoped to carry victoriously to the public as a consequence of the Nissman-Linde fray. Judging from the events leading up to the May 15, 1984 primary, Norblad had reason to believe that he would indeed be the beneficiary of the campaign combat between the quiet associate justice and his bold Lane County challenger.

---

[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

II

DAVID NISSMAN'S BID: "CANDIDATE SAYS LACK OF FAITH IN COURTS LEADS TO VIGILANTISM"[67]

The March 23, 1984 edition of the Eugene *Register Guard* carried the above quoted message to its 65,000 daily readers. In an early campaign appearance, one before the Lane County Rubicon Society, David Nissman didn't mince words: " '[W]e are getting dangerously close to a vigilante response because generally speaking the people have lost confidence in the criminal justice system.' "[68] He continued, " 'time and time again we felt one man was responsible for a lot of the bad decisions.' "[69] How really dire was the state of public safety in the winter of 1984 and who was the man responsible for all of these "bad decisions"?

The "Nissman for Justice Committee" pointed to the culprit: "Professor" (not Judge or Justice) Hans Linde. The Committee was composed of some 145 "lawyers for Nissman," a significant number of whom were fellow prosecutors. Included among the names on the list[70] were those of the District Attorney of Multnomah County, Michael Schrunk,[71] the District Attorney of the City of Eugene, J. Pat Horton, and the United States Attorney for the District of Oregon, Charles H. Turner.

The full story behind the "Nissman for Justice Committee" and behind the Nissman campaign itself must be seen against the back-

---

[67] *Candidate Says Lack of Faith in Courts Leads to Vigilantism*, Register-Guard (Eugene), Mar. 23, 1984, at B4, col. 1; *see also* Attig, *Challenger Hits Justice's Record*, News (Springfield), Mar. 24, 1984, at A9, col. 1. According to *News* staff writer Rick Attig:

> Nissman also described an example of what he called "a vigilante response" to liberal decisions handed down by Linde and the rest of the [Oregon] Supreme Court justices.
>
> He recounted the case of a local man who became frustrated by the inability of the police to catch a man who had repeatedly siphoned gas out of his car. The man waited outside his house with a baseball bat one night, caught the suspected thief in the act, and beat him severely with the bat.
>
> No charges were filed by a grand jury against the man with the bat, and Nissman said the incident showed that local residents have come to at least condone, if not support, vigilante action.

Id. at A9, col. 2.

[68] *Candidate Says Lack of Faith in Courts Leads to Vigilantism*, *supra* note 67, at B4, col. 1.

[69] *Id.*

[70] *See infra* appendix C.

[71] Later, Schrunk asked that his name be removed from the list.

drop of what began earlier, in 1983.[72] In June of that year, Attorney General David Frohnmayer[73] chaired the newly formed Governor's Commission on Violent Crime. The Commission's stated mission was to provide a "forum"[74] for airing public views primarily concerning various statutory and constitutional initiatives formally proposed by "crime victims" groups. Though the Frohnmayer Commission publicly declined to take a public position on these matters,[75] its very existence and operation nevertheless

---

[72] Writing a year later, Russell Sadler, then a Salem-based syndicated political columnist, looked back and noted:

> Ironically, no one is talking about the incident that makes the prosecutors' thinly veiled campaign against Linde so bitter.
>
> The District Attorneys Association trundled into the 1983 legislative session with a package of bills its members felt would make prosecuting easier and give crime victims more influence in the judicial process. Civil libertarians felt the measures eviscerated the Oregon Constitution's Bill of Rights.
>
> Instead of hashing the issue out in the legislative arena, Sen. Jan Wyers, D-Portland, chairman of the Senate Judiciary Committee, figuratively locked the bills in his desk drawer. They were never seriously considered. The prosecutors, using Nissman as their spokesman, apparently have decided to take their frustrations out on the courts, where decisions about criminal procedure are made on a case-by-case basis because the Legislature failed to act.

Sadler, *Judiciary Fills Legislative Vacuum*, The Oregonian, Apr. 30, 1984, at B6, col. 3.

[73] The attorney general's brother, John E. Frohnmayer, was on the Committee to Re-Elect Justice Hans Linde. *See infra* appendix A. Years later, John Frohnmayer was appointed by the President to serve as chairman of the National Endowment for the Arts in Washington, D.C.

[74] The June 7, 1983 hearings of the Governor's Crime Commission were recorded by the attorney general's office on cassette tapes and likewise summarized in notes of the meetings (on file with the author and on file in the Office of the Attorney General of Oregon in Salem). *See also* Manley, *Police, Victims, Lawyers Debate Criminal Law Changes*, The Oregonian, July 22, 1983, at B2, col. 1.

As early as June of 1983, I voiced public objection to various aspects of the "crime victims" measures. *See, e.g.*, Collins, *'Victims' Bill Poses Threat to Cherished Rights*, The Oregonian, June 15, 1983, at B11, col. 1; Letter from Ronald Collins to David Frohnmayer (Chairman, Governor's Special Commission Against Violent Crime) (July 19, 1983) (discussing proposed ballot titles) (on file with the author); Letter from Ronald Collins to David Frohnmayer (Sept. 14, 1983) (urging Commission to withdraw its proposal to amend article I, section 15 of the Oregon Constitution) (on file with the author).

[75] In a February 17, 1984 letter to Governor Victor Atiyeh, Commission chairman David Frohnmayer wrote:

> [T]he Commission has held hearings in Salem and Portland and devoted substantial discussion to two proposed ballot measures, known informally as Ballot Measures A and B, which would make significant changes in constitutional and statutory provisions of Oregon law. Ballot Measure A would effectively abolish any exclusionary rule, otherwise applicable under the Oregon Constitution. Ballot Measure B would effect numerous changes in the law governing sentencing, parole procedures, arrest warrant jurisdiction, victims participation rights in criminal proceedings, jury selection procedures and other prose-

gave practical and political momentum to the initiative efforts. Later in 1983, District Attorney Michael Schrunk's office and Attorney General Frohnmayer's office[76] became more involved in these matters by secretly drafting a proposed statutory ballot measure.[77]

The proposal, "The Rights of People & Victims in Criminal Cases," consisted of "many and diverse"[78] provisions, significantly expanding police and prosecutorial powers. The proposed statutory changes encompassed various matters, subsequently described by the Oregon Supreme Court as "victims' compensation and participation in the criminal justice system, charging of crimes, trial procedure, sentencing and parole, and repeal of [all] statutes regulating stops, frisks and the suppression of evidence unlawfully obtained."[79] Given the working alliance already formed through the Frohnmayer Commission between prosecutors and "crime victims" groups, this proposed initiative easily won the approval and assistance of some citizens' groups, most notably "Crime Victims United." This organization, then headed by Portland home repair contractor Robert Kouns,[80] played an important political role by backing other prosecutor-drafted initiatives, and by "monitoring"

> cution practices. . . . We are informed that you [*i.e.* the Governor] already have given your support "in principle" to these measures. Although some members of the Commission strongly support these proposals in their personal capacities, it was determined, because of the pending "measure" status of the proposals and because you already independently determined your direction, that the Commission should to take no official position other than to report its role as a public forum.

Letter from David Frohnmayer to Governor Victor Atiyeh (Feb. 17, 1984) at 1-2 (on file with the author).

[76] *See* Collins, *A.G.'s Office Should Have Avoided Potential for Conflict*, Statesman-Journal (Salem), Apr. 15, 1984, at E1, col. 1 (noting Frohnmayer office's involvement in drafting proposed initiative that would, among other things, abolish most, if not all, state statutory laws governing police searches). To the best of my knowledge, Frohnmayer never publicly denied his office's involvement in this drafting of the initiative.

[77] At that time, I interviewed several attorneys from Michael Schrunk's and David Frohnmayer's offices. All said Schrunk and Frohnmayer both knew and approved of their offices' participation in drafting what was to become Ballot Measure 8.

[78] Wells v. Paulus, 296 Or. 338, 340, 675 P.2d 482, 482 (1984) (ballot title opinion).

[79] *Id.* *See also* Frink, *Sensible Reforms of Criminal Justice System Long Overdue* (Editorial), The Oregonian, June 22, 1983, at B11, col. 1 (Norman Frink was Assistant Chief Deputy District Attorney for Multnomah County at that time).

[80] Kouns' daughter had been slain earlier in a San Francisco hotel. *See* Turner, *Law-and-Order Groups in Oregon Opposing Re-election of an Oregon Justice*, N.Y. Times, Apr. 2, 1984, at A17, col. 1. " 'I feel deep frustrations with the criminal justice system,' " said Kouns. " 'The courts have gone their own merry way.' " *Id.* *See also* Jepsen, *Initiative Aimed at Exclusionary Rule*, The Oregonian, Oct. 23, 1983, at B1, col.

the decisions of Oregon courts, including the state supreme court.[81]

Attorney General Frohnmayer's office had prepared a ballot title for the proposed "crime victims" statutory measure.[82] This was the identical measure that the same office had earlier helped to draft, thus giving rise to the specter of a conflict of interest.[83] The attorney general's office also prepared a ballot title for a proposed constitutional amendment; this amendment was discussed extensively in previous meetings of the Frohnmayer Commission. The proposed initiative provided that " 'no court and no provision of this constitution shall exclude reliable evidence in a criminal prosecution because of a violation of any provision of this constitution.' "[84] Both ballot titles were challenged in court. In a unanimous per curiam set of opinions handed down on January 24, 1984, the Oregon Supreme Court modified the statutory[85] and constitutional[86] ballot

3 (photo of Doris and Robert Kouns); Portal, *The Law-and-Order Debate*, Register-Guard (Eugene), Apr. 8, 1984, at B1, col. 1.

[81] *See* CRIME VICTIMS UNITED, IS THERE INJUSTICE IN OUR JUSTICE SYSTEM? (1984) (on file with the author) (noting not only examples, facts, and statistics of crime, but also encouragement of political support for this campaign).

[82] "The Crime Victim's Bill of Rights," as it came to be popularly known, ultimately qualified for the November 1984 ballot and was listed as Ballot Measure 8. Some lay people in the crime prevention community took sharp exception to what they perceived as the prosecutors' "exploitation" of the crime victims' plight. For example, Sherry Sylvester, then Portland director of the Neighborhood Crime Prevention Program and chair of the Education Subcommittee of the Governor's Commission on Violent Crime, said of Ballot Measure 8: "With its misleading title, the measure plays upon the emotions of people who are crime victims or fear they will be victims." Sylvester, *Measure 8 No Answer to Concern Over Crime* (Editorial), The Oregonian, Oct. 11, 1984, at C11, col. 1. Sylvester closed her editorial with: "Proposals such as Ballot Measure No. 8 do nothing to improve community safety or reduce vulnerability to crime. Instead, they feed on community fear." *Id*. *See also* Sylvester, *'Truth in Justice' Amendments Offer Little Hope of Reform, Cut in Crime Rate*, The Oregonian, Aug. 17, 1983, at B9, col. 1.

[83] Of course, the situation might be different if the Attorney General's office openly proposed an initiative and, thereafter, drafted its ballot title. In such a situation, the public would be duly aware of any possible conflict of interest, which itself would help to neutralize the process. Otherwise, the problem is secrecy, especially when a controversial proposal is at issue.

[84] Remington v. Paulus, 296 Or. 317, 319, 675 P.2d 485, 486 (1984) (ballot title case). Among other prosecutors, this proposed constitutional measure won the public endorsement of then District Attorney Jackson Frost of Albany. *See* Mortenson, *Frost Backs Changing Law on Evidence*, Democrat-Herald (Albany), Mar. 16, 1984, at A3, col. 1. At that time Mr. Frost was also a member of the "Nissman for Justice Committee." *See infra* appendix C.

[85] *See* Crabtree v. Paulus, 296 Or. 347, 675 P.2d 485 (1984) (Thomas Crabtree, Justice Linde's first law clerk, argued the case. Crabtree was not, however, on the Committee to Re-Elect Justice Linde); Herron v. Paulus, 296 Or. 344, 675 P.2d 484 (1984) (Kathleen Herron represented the Portland chapter of the National Lawyers Guild and the brief was prepared by Emily Simon of Lake Oswego); Wells v. Paulus, 296 Or. 338, 675 P.2d 482 (1984). The ballot title prepared by the attorney general's office provided:

titles. These decisions enraged the prosecutors and their allies. Illustrative of this sentiment was a late January 1984 newsletter by "Oregon Vox Populi," published by the conservative Oregon Taxpayers Union.[87] After chastising the court for one of its ballot title rulings, the newsletter proclaimed: "[O]ur time will come. We can turn the Honorable Hans Linde, whose term expires in 1985, out of Office on Nov. 6, 1984. We can't get at his cronies until 1988 — unless we recall them — which is not a bad idea."[88] It was against this backdrop that 30-year-old David Nissman decided early in 1984[89] to seize the moment and to challenge Hans Linde on a "law and order" campaign platform. The "Nissman for Justice Committee" entered into the judicial campaign with the following "Fellow Oregonian" letter, which, in part, read:

> Do you know which Supreme Court Justice has voted to:
> (1) Throw out the death penalty?
> (2) Eliminate minimum mandatory sentences for murderers?
> (3) Throw out the obscene phone call statute because it interfered with "freedom of speech"?
> (4) Restrict the rights of crime victims to restitution?
> (5) Further handicap police in their efforts to crack down on drunk drivers?
> (6) Prohibit trial judges from imposing separate sentences for separate sex crimes against one victim?
> (7) Invent new rights for criminal defendants?
>
> The man that stands for these propositions is Hans Linde, a political appointee to the Oregon Supreme Court. The keystone of his judicial career has been his tinkering with the Oregon Constitution by inventing previously unknown rights for criminal de-

---

" 'MEASURE CHANGES SEVERAL PROVISIONS OF CRIMINAL LAWS IN STATE'S FAVOR.' " *Id.* at 341, 675 P.2d at 483. The Oregon Supreme Court modified the wording to read: " 'REVISES NUMEROUS CRIMINAL LAWS CONCERNING POLICE POWERS, TRIALS, EVIDENCE, SENTENCING.' " *Id.* at 343, 675 P.2d at 484. The court also modified the initiative's explanation to read: " 'EXPLANATION: NOTICE: THIS DESCRIPTION [set out below in deleted portion of quote] DOES NOT IDENTIFY ALL CHANGES PROPOSED TO CRIMINAL STATUTES.' " *Id.*

[86] *See Crabtree*, 296 Or. 347, 675 P.2d 485; Herron v. Paulus, 296 Or. 322, 675 P.2d 489 (1984); *Remington*, 296 Or. 317, 675 P.2d 485. The ballot title prepared by the attorney general's office read: " 'FORBIDS EXCLUDING RELIABLE EVIDENCE OBTAINED IN VIOLATION OF THE CONSTITUTION.' " *Id.* at 319, 675 P.2d at 486. The modified court title provided: " 'AMENDS OREGON CONSTITUTION, ALLOWS USE OF UNCONSTITUTIONALLY OBTAINED CRIMINAL EVIDENCE.' " *Id.* at 321, 675 P.2d at 487.

[87] 2 OREGON TAXPAYERS UNION, OREGON VOX POPULI NO. 1, 2 (1984).

[88] *Id.* at 3.

[89] *See* Letter from Nissman for Justice Committee ("Dear ———" letter) (Feb. 4, 1984) (on file with the author).

> fendants. Searches that are absolutely legal under our federal bill of rights now run afoul of mysterious new rules created by Linde.[90]

A similar letter was sent to police officers in the state.[91]

There was an alternative. David Nissman, the hard fighting prosecutor who cared more for citizens than criminals, was portrayed as that ideal alternative. Still, a judicial campaign had to hinge upon more than a single issue, however important. Consequently, the "Nissman for Justice Committee" lashed out at Linde's alleged "low productivity," as well as his purported delays in issuing opinions.[92] Speaking through Nissman's in-laws, William and Delores French, the Committee sent a more personal letter to Oregon physicians. The form letter chastised Linde for his decision which "substantially restricts a doctor's right to sue attorneys who negligently file unfounded malpractice claims against physicians."[93] In a February 27, 1984 Position Paper,[94] the Committee called for "judicial restraint," attacked Linde's 1978 "home rule" opinion[95] and two of his torts opinions,[96] and objected to the court's use of the Oregon Constitution in search and seizure cases, including a 1983 opinion authored by Linde.[97] Finally, the report reiterated the charges of

---

[90] Letter from Nissman for Justice Committee to "Fellow Oregonians" (undated) (on file with the author) [hereinafter Nissman Fellow Oregonian letter].

[91] *See* Letter from Nissman for Justice Committee to "Fellow law enforcement officers" (undated) (on file with the author). The letter, signed by Darryl Larson, a Eugene lawyer who was then deputy district attorney, and Pierce Brooks, who was Eugene's chief of police from 1977-1980, was "paid for by the Nissman for Justice Committee." *Id.*

[92] Nissman Fellow Oregonian letter, *supra* note 90. The Committee's letter alleged: "Linde's low productivity has lessened his impact on law enforcement. In the year before his arrival on the Court each judge produced an average of 41 written opinions. Professor [not Justice] Linde's average over the past four years has been 11." *Id.*

Because the theme of "low productivity" came up repeatedly during the election, it is worth noting that during the 1970s, the Oregon Supreme Court changed from being the only (hence direct) appellate court for all cases to becoming a review court over the court of appeals. Additionally, however accurate Nissman's allegations (Linde challenged them), they excluded per curiam opinions, including disciplinary cases and most ballot title cases. Finally, anyone working inside the court knows how much uncredited time Linde expended assisting his colleagues with their opinions.

[93] Letter from Delores & William R. French to Oregon Doctors (Feb. 4, 1984) (on file with the author). The bottom of the second page of the letter noted that it was "paid for by the Nissman for Justice Committee."

[94] Nissman Committee Position Paper (Feb. 27, 1984) (on file with the author).

[95] *See* City of La Grande v. Public Employes Retirement Bd., 281 Or. 137, 576 P.2d 1204, *aff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978).

[96] *See* Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983); Sandford v. Chevrolet Div. of Gen. Motors, 292 Or. 590, 642 P.2d 624 (1982).

[97] *See* State v. Lowry, 295 Or. 337, 667 P.2d 996 (1983).

Linde's lack of productivity and of delays in opinion writing.[98]

Nissman publicly launched his campaign in Eugene on Monday, February 27, 1984.[99] The deputy DA reiterated the Committee's charges, continually stressing the crime issue. Linde filed for reelection but "declined to respond to criticisms voiced by Nissman. He said Nissman should concentrate on explaining why he thinks he is qualified to sit on the Oregon Supreme Court after being out of law school for less than six years."[100]

Throughout March 1984, Nissman blazed the campaign trail in sagebrush country, speaking in small, out-of-the way places such as Madras[101] and Cave Junction.[102] He also made appearances in larger cities such as Eugene,[103] Medford,[104] Albany,[105] Grants Pass,[106] and Salem.[107] Nissman hammered away at his themes: Linde was anti-victim, pro-criminal, and anti-police;[108] " '[h]is views are out of touch with reality' ";[109] and not only is Linde a " 'very big problem' ",[110] but also a " 'part-time' justice."[111] In a charitable moment, Nissman conceded that Linde " 'is a very bright guy and he means well . . . .' "[112] But soon thereafter, his charity gave way to a new charge: " 'Unions put this guy in office, and

---

98 Nissman Committee Position Paper, *supra* note 94.

99 *See Deputy DA Seeks High Court Position*, The Oregonian, Feb. 28, 1984, at B9, col. 3 ("Nissman, 30, said he will run against Linde because of 'a serious disagreement with my opponent about the proper role of the judiciary.' "); *High Court Justice Challenged*, Register-Guard (Eugene), Feb. 28, 1984, at C12, col. 4 (" 'I don't intend to rewrite the law the way I would like to see it,' Nissman told supporters at a news conference in Eugene.").

100 *Deputy DA Seeks High Court Position*, *supra* note 99, at B9, col. 3.

101 Grote, *Candidate Claims Court Needs Change*, Bulletin (Bend), Mar. 14, 1984, at B4, col. 1.

102 *See Nissman Wants Linde's Post*, Illinois Valley News (Cave Junction), Mar. 22, 1984, at A1, col. 1.

103 *See Candidate Says Lack of Faith in Courts Leads to Vigilantism*, *supra* note 67, at B4, col. 1.

104 *See Nissman Campaigns in County*, Mail Tribune (Medford), Mar. 20, 1984, at D4, col. 1.

105 *See Supreme Court Election Fight Looms*, Democrat-Herald (Albany), Mar. 31, 1984, at A6, col. 1.

106 *See Supreme Court Candidate Cites Death Penalty Stand*, Daily Courier (Grants Pass), Mar. 16, 1984, at A11, col. 1.

107 *See* Cain, *Court Race Takes Unusual Turn*, Statesman-Journal (Salem), Apr. 2, 1984, at B1, col. 1.

108 *See, e.g.*, *Nissman Wants Linde's Post*, *supra* note 102, at A1, col. 1.

109 *Attorney Seeks Balanced Trials*, Pioneer (Madras), Mar. 22, 1984, at A1, col. 1.

110 *Id.*

111 *Nissman Campaigns in County*, *supra* note 104, at D4, col. 1.

112 *Id.*

they're going to try to keep him there.' "[113] Later, "clarifying" the union charge, Nissman explained: " 'The people who tried to put (Ted) Kulongoski in (the state senator['s]) office in 1982 are the same people who are working very hard to keep Linde in office.' "[114] The charge notwithstanding, Oregon's AFL-CIO did indeed endorse Hans Linde for reelection.[115]

As things heated up, the editors of the *Herald* in Hermiston applauded Nissman's robust campaign style. "He's taken the gloves off," they said, "and is eager to mix it up with his opponent . . . ."[116] The collective view from the bench, however, was more restrained, especially given the Canon of Judicial Conduct.[117] " 'Obviously,' " Linde declared, " 'it's not appropriate for a judge to engage people in a debate over these separate opinions.' "[118] Judge Albin Norblad, who had filed for Linde's seat on March 8, 1984, likewise cited ethical reasons for declining to enter into the Nissman wrangle over decisional law.[119] Similarly, Justice Robert Jones, running unopposed to retain his seat on the high court, privately noted "the paucity of things that a candidate can talk about in a judicial election . . . ."[120]

Perhaps sensing some of these ethical constraints, Nissman told a Grants Pass audience that he could not speak about the death penalty as a candidate for the supreme court. Immediately taking his candidate's hat off, however, he then shared his views on the death penalty to the same audience, this time in his private capacity: " 'I am a supporter of the death penalty because when we had the death penalty in 1980 . . . I know we saved many lives by having the death penalty as a deterrent.' "[121] Not surprisingly, the group then attempting to place a death penalty constitutional initiative on the

---

[113] *Attorney Seeks Balanced Trials*, *supra* note 109, at A1, col. 1.

[114] *Candidate Clarifies Point*, Pioneer (Madras), Mar. 29, 1984, at A2, col. 4.

[115] *See AFL-CIO Backs Demo Incumbents for Congress*, The Oregonian, Mar. 31, 1984, at D8, col. 2.

[116] *Nissman Right in Airing Issues* (Editorial), Herald (Hermiston), Mar. 14, 1984, at A4, col. 1.

[117] OREGON SUPREME COURT, CODE OF JUDICIAL CONDUCT, Canon 7 (June 1984).

[118] Cain, *supra* note 107, at B1, col. 1.

[119] *See Supreme Court Election Fight Looms*, *supra* note 105, at A6, col. 1.

[120] Internal Oregon Supreme Court Memorandum from Justice Robert Jones to Justice Hans Linde (Mar. 21, 1984). Then Justice (now Federal Judge) Robert Jones was kind enough to share this memo with me back in 1984. (I had served as a law clerk on the court some four years earlier.)

[121] Fattig, *Supreme Court Candidate Cites Death Penalty Stand*, Courier (Grants Pass), Mar. 16, 1984, at A11, col. 1.

ballot, "Concerned Oregonians for Justice," supported Nissman.[122] Linde's view by contrast was longer and more distanced, but nevertheless realistic: "Most judges may see themselves as umpires between the state and the citizen, but many citizens regard judges as part of law enforcement, and plenty of candidates will offer themselves for that role."[123] Nissman, and to a lesser extent, Norblad offered themselves up for "that role."[124]

Meanwhile, Norblad, taking temporary leave from his court duties due to a mild heart attack,[125] kept his public and rhetorical distance. Periodically, he would make a statement, inevitably about his relative centrist views and judicial experience. " '[T]he beauty of this race . . . [is that] people have a choice. You've got the issues of liberal vs. conservative, and experience vs. non-experience.' "[126] By early April, the *Statesman-Journal* in Salem reported: " 'Norblad . . . said that while Linde is considered a political liberal and Nissman a conservative, Norblad is campaigning on the theme that he's more even-handed in his approach to the law - and more experienced in the courtroom than either Linde or Nissman.' "[127]

* * * *

During the month before the primary the crime issue continued to boil, with Linde typically remaining on the defensive. The issue, fueled by Nissman's charges, made for eye-catching headlines; so much so that the *New York Times* carried a banner story entitled "Law-and-Order Groups in Oregon Opposing Re-election of a Justice."[128] The story encapsulized the campaigns: Nissman, the tough prosecutor with a concern for crime victims; Norblad, the avowed centrist;[129] and Linde, saying: " 'To run against the court is

---

[122] *See id.*

[123] Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1988).

[124] *Id.*

[125] The story of Judge Norblad's illness is recounted in a UPI wire story. *Untitled*, UPI, Mar. 29, 1984, *available in* LEXIS, Nexis Library, UPI File (regional news, Oregon) (" 'I'll have to cool it for the next month,' Norblad, 45, said from his bed at Salem Hospital Memorial unit.").

[126] Cain, *supra* note 107, at B1, col. 1; *Supreme Court Election Fight Looms*, *supra* note 105, at A6, col. 1.

[127] Cain, *supra* note 107, at B1, col. 1. *See also* Leeson, *Supreme Court Race Offers Voters Spirited Contest*, The Oregonian, Apr. 15, 1984, at C2, col. 1.

[128] Turner, *supra* note 80, at A17, col. 1.

[129] Judge Norblad, speaking from his hospital bed to reporter Wallace Turner, said by telephone:

> The bar sees Linde as a liberal and Nissman is a prosecutor. . . . So the way

new. This tends to politicize the court by making the charge that decisions are not based on law but on something else.' "[130] The crime-and-judicial-campaign story also received wide attention in the *National Law Journal*.[131] At this point in the campaign, it seemed as if appellate judges did only criminal law work. "[C]rime and punishment, guilt and retribution," Linde observed years later, "remain the paradigm of the judicial morality play."[132]

On the home front, local prosecutors, particularly in the Multnomah and Lane County District Attorneys' offices, were playing up the crime theme with Linde cast as "public enemy number one." "Linde's stance is pure deceit,"[133] proclaimed one Multnomah County prosecutor. "Linde[] [is] total[ly] insensitiv[e] to the victims of crime . . . [and] his [rape opinions are an] insult to the women of this state," claimed another prosecutor from the same office.[134] Linde is responsible for "allowing criminals to go free,"[135] for "hampering police and helping criminals,"[136] and for creating "new rights for criminals."[137] Such strident statements by a handful of government lawyers — all of whom were on the Nissman for Justice Committee — were highly unusual. Then there was the pro-Nissman article in *The Verdict*, the publicly financed Oregon District Attorney's Association newsletter.[138] There were reports of

---

> that it looks to a lot of people is that you have somebody who wants to let them all go and somebody who wants to hang them all high. And then you have me, and I'm kind of in the middle.

Id.

[130] *Id*.

[131] Leeson, *Oregon Court Seat Fight Gets Bitter*, Nat'l L. J., May 14, 1984, at 3, col. 3.

[132] Linde, *supra* note 123, at 2000.

[133] Frink, *supra* note 1, at C7, col. 1.

[134] Johnson, *Don't Endorse Linde* (Letter to the editor), The Oregonian, May 9, 1984, at B10, col 3. *But see* Fenner, *Vicious Campaign* (Letter to the editor), The Oregonian, May 12, 1984, at C6, col. 3 ("These letters [referring to the Frink, *supra* note 1, and Johnson letters] are representative of a . . . 'strident law-and-order campaign that is not only anti-intellectual but also seriously misconstrues Linde's service on the court and occasionally verges on being vicious . . . .' "). Fenner had once served as a law clerk to Oregon Supreme Court Justice Thomas Tongue.

[135] Loebe, *Tougher Anti-Crime Decisions Supported* (Letter to the editor), News-Register (McMinnville), May 14, 1984, at A4, col. 1; *see also* Loebe, *Need Help With Crime* (Letter to the editor), The Oregonian, May 10, 1984, at B8, col. 3.

[136] Wolke, *Against Linde* (Letter to the editor), Times-Journal (Condon), May 3, 1984, at 4, col. 3.

[137] Glazer, *Mills, Nissman, are Choices for Post* (Letter to the editor), Review (Lake Oswego), May 10, 1984, at A4, col. 4.

[138] *See* Durham, *Judicial Jabs*, Willamette Week (Portland), Apr. 2-8, 1984, at 3, col. 1 (although the Association asserted that the article was not an "official" endorse-

public prosecutors working for Nissman on government time. Meanwhile, the firebrand Eugene prosecutor was fanning the flames with even more vigor: " 'The court, and this judge in particular, has no feel for what happens in the streets. The decisions he's making have greatly expanded the rights of criminals.' "[139] Perhaps because of these kinds of goings-on, Attorney General David Frohnmayer felt obligated to issue a formal warning to his own staff of assistant attorneys general. Frohnmayer's April 10th internal memo noted the "vigorously contested" supreme court race and emphasized the necessity that "the department scrupulously avoid partisanship . . . . In consequence, neither my name nor the Department of Justice have been authorized to endorse a candidate of any campaign for any judicial position."[140] Copies were sent to Linde, Nissman, and Norblad.

The crime matter remained a highly charged one, especially with flashpoint issues such as drunk-driving laws. As with other legitimate public concerns about crime, the issue was how to deal with a pressing social problem in a lawful way, that is, in a way consistent with a democratic system of statutory and constitutional laws. Given the strong public sentiment to punish the drunk driver, on the one hand, and the equally strong civil libertarian belief in the protection of individual rights on the other hand, pinning political labels became too easy, however true or misleading these labels might be.

One evening in late April, the Lane County chapter of Mothers Against Drunk Driving (MADD) hosted a forum in Eugene for the three candidates in the race for the supreme court.[141] This appear-

---

ment of Nissman, no similar information about Linde or Norblad was printed); Sadler, *Judiciary Fills Legislative Vacuum*, The Oregonian, Apr. 30, 1984, at B6, col. 3. *But cf.* Collins, *Position clarified* (Letter to the editor), The Oregonian, May 13, 1984, at B2, col. 3 ("[T]he Association has not endorsed Nissman. Many district attorneys, however, individually support him.") (Collins was district attorney for Yamhill County, Oregon). *See also* Linde, *supra* note 123, at 2003 ("Some candidates who by background, past performance, or rhetoric are identified with 'law and order' can gain substantial support from law enforcement personnel. But in my recollection, the district attorney's association has not officially endorsed or opposed judicial candidates . . . .").

[139] Cain, *Race for Supreme Court Shapes Into a Heated One*, Gazette-Times (Corvallis), Apr. 21, 1984, at B6, col. 1.

[140] Interoffice Memorandum from David Frohnmayer to assistant attorneys general (Apr. 10, 1984) (regarding participation in judicial campaigns) (on file with the author). *See also* Linde, *supra* note 123, at 2003. ("Oregon's elected Attorney General, David Frohnmayer, has stated that he regards it as improper for government lawyers identifying themselves as such to support or oppose the judges before whom the state appeals.").

[141] Mothers Against Drunk Driving Forum (Apr. 23, 1984) (transcript of audio tape

ance represented the only time in the entire campaign that all three men were together in public dialogue. Linde's staff was surprised that he had accepted the invitation. After all, having him appear before this group made as much political sense as Nissman appearing before the Eugene chapter of the ACLU. Linde's "law talk" would be lost in a partisan audience charged-up about a controversial social issue. Moreover, the single-issue nature of the meeting meant political attacks and political promises. Special interest groups want results, not reasons.[142] Linde found this aspect of judicial campaigns distasteful, whatever the political cause.[143]

The MADD meeting opened with a call for signatures for one of the "crime victims" initiatives then being proposed in the state. Thereafter, Linde started the discussion, his words dry, his demeanor seemingly awkward, and his style strained. He began with a word to and about his audience: "This audience is very different from the audience at noon today [before the Lane County Bar Association] because there we could assume the lawyers knew about the work of the court and substantially all the law we might discuss."[144] He then went on to talk about his legal career, the "institutional background" of the state judicial system, and closed by mentioning a few cases that "may be of specific interest" to his audience.[145] Overall, boring.

The deep-voiced prosecutor followed. He stressed that he had prosecuted "50 to 75 drunk-driving cases . . . ."[146] True to form, Nissman asserted: "Judge Linde's decisions and his rulings have let more drunk drivers escape punishment than any other single force in the State of Oregon."[147] He then went on to discuss several Oregon Supreme Court criminal cases, including some drunk-driving related opinions written by Linde. Albin Norblad spoke last. He too began by listing his drunk-driving related credentials. As a for-

---

recorded by author) (tape on file with the author) [hereinafter MADD Tape]. A summarized account of the MADD Forum is presented in Portal, *Verbal Attacks Highlight Debate*, The Register-Guard (Eugene), Apr. 24, 1984, at B5, col. 1.

[142] Four years after the election, Linde observed: "Obviously, when an appellate judge is subject to re-election, with or without an opposing candidate, opponents will attack the court's result without regard to its reasons." Linde, *supra* note 123, at 2000.

[143] In April, Linde spoke before the Salem chapter of the National Organization for Women. Throughout the evening he was obviously troubled with the audience's expectation that he, as a judge, could promise anything.

[144] MADD Tape, *supra* note 141.

[145] *Id.*

[146] *Id.*

[147] *Id.*

mer prosecutor, Norblad stated that he "prosecuted a great many drunk-drives."[148] He also noted that early in his judicial career he had tried "a lot of drunk-drive cases."[149] Later as a district judge, he again "tried a great many cases involving alcohol,"[150] and in 1973, "started the first policy . . . that second-time drunk drivers spent a week in jail."[151]

Though the forum progressed in the manner mentioned, there was a surprising turn late in the meeting. Responding to a Linde argument, Nissman made an important substantive point that elevated the character of the exchange—a point that reflected true jurisprudential differences between the prosecutor and the judge. Said Nissman:

> [F]rom a philosophical standpoint, here's where Judge Linde and I differ the most, and that is that through the last several centuries in this country, our idea of [the] proper role of police officers has been that they can go out and do their job and collect evidence and try to stop crime and arrest people and . . . gather evidence that would lead to convictions. But they can only do so as long as they don't break any laws themselves, so . . . long as they don't violate any constitutional rights of those people. And I agree with that standard and I think that's the proper one in this country.
>
> Judge Linde gave you an idea of his . . . philosophy about this . . . . He takes a different approach, and that is: if there is no particular law that authorizes the particular act by the police officer, then the police officer is not acting legally. So you see, it's a . . . reverse idea in philosophy.[152]

Though somewhat loosely characterized, Nissman had put his finger on the "authority of law" argument that was a hallmark of Linde's jurisprudential philosophy. This argument found ample expression in Linde's majority opinions in *State v. Haynes*[153] and

---

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980). Writing for the court, with the chief justice specially concurring, Linde stated:

> We know nothing in Oregon law, nor did counsel for the state when asked, that would authorize the police to prevent or delay communication between an arrested person and a lawyer who is, or who is asked to become, that person's attorney. Certainly nothing of the kind follows from the simple fact of an arrest.

Id. at 70-71, 602 P.2d at 277.

State v. Scharf,[154] in his concurrence in *State v. Brown*,[155] and likewise in his dissent in *State v. Tourtillott*,[156] among other opinions. Just before the campaign began, Linde had written a dissent from a petition for review in a case challenging the legality of an unauthorized police DUII (Driving Under the Influence of Intoxicants) roadblock.[157] Whether police and a host of other government officials could invade a person's rights in the absence of any law—but subject to the vague, after-the-fact contours of constitutional reasonableness—was a fundamental question about the nature of our legal system. Nissman and his fellow prosecutors favored expanding the powers of the police, either by executive or judicial fiat. Failing that, they attempted to repeal many statutory laws governing police and prosecutorial conduct. Linde, sometimes joined

---

[154] 288 Or. 451, 605 P.2d 690 (1980). The case involved a defendant who submitted to a breathalyzer test only after demanding and being denied an opportunity to telephone her attorney for advice. Writing for a divided court, Linde announced: "As we have recently stated [in *State v. Haynes*], nothing in Oregon law authorizes officers to hold an arrested person incommunicado beyond the immediate necessities of the arrest and the circumstances of custody itself." *Id.* at 455, 605 P.2d at 692.

[155] 291 Or. 642, 656, 634 P.2d 212, 220 (1981) (Linde, J., concurring). Linde began his opinion in the search and seizure case by observing:

> This case, as usual, has been briefed exclusively as an application of the federal fourth amendment as interpreted by the Supreme Court of the United States. The Court's opinion decides nothing other than its best estimate of what a majority of that court most likely would hold on the facts before us. Nowhere in the briefs or in the opinions of the Court of Appeals in this case is there any reference either to the source and scope in Oregon law of a police officer's legal authority to open closed containers taken from a person in custody on a traffic charge . . . .

Id.

[156] 289 Or. 845, 869, 618 P.2d 423, 435 (1980) (Linde, J., dissenting), *cert. denied*, 451 U.S. 972 (1981). The facts involved a state police officer who detained a motorist at a temporary "checkpoint," set up at his own discretion, in order to check for criminal violations of the state gaming laws. The officer, however, did not limit his stop to gaming inquiries and thus arrested the defendant for a non-related criminal offense, for which there was no independent probable cause to stop the defendant's vehicle. The Oregon Supreme Court upheld the practice by a one-vote margin. Writing in dissent for himself, Chief Justice Denecke, and Justice Lent, Linde declared:

> As recent decisions of this court have repeatedly held, a court's obligation in a case that involves potential statutory and constitutional challenges to governmental action is to determine, first, whether the action is authorized by law; second, whether it is limited by the same or another law; third, whether it is limited by the state constitution and, if the action passes these tests, whether it contravenes the federal Constitution.

Id. at 869, 618 P.2d at 436.

[157] *See* State v. Schroeder, 296 Or. 648, 678 P.2d 1227 (1984). *See also* Schuman, *Taking Law Seriously: Communitarian Search and Seizure*, 27 AM. CRIM. L. REV. 583, 613-17 (1990) (concerning Oregon search and seizure laws).

by a majority of the court, had a limited view of such powers, especially when it came to the executive and judicial branches acting without authority of law.[158] As for Judge Norblad, he said little more than "I disagree with Justice Linde . . . and agree with Mr. Nissman."[159]

Throughout, Albin Norblad kept relatively silent, recuperated, and offered an occasional "centrist"[160] or judicial experience comment. Thus, while he declined the Lane County Bar Association's invitation to appear in an open forum with Linde and Nissman in late May, he always sought to capitalize on their differences. For example, on a Portland television news program, he was quoted as saying: "It seems like those two, Judge Linde and David Nissman, have criticized each other enough. There's no reason for me to jump in and get [in their] way."[161] But "jump in" he did, if only to echo some of Nissman's charges. While Norblad politely protested that " '[i]t's hard to criticize Linde because we're all supposed to be gentlemen,' "[162] such gentlemanliness was short-lived. " '[H]e's exceptionally liberal in his rulings, very pro-defendant. . . . He's not a

---

158 In his writings, Linde hammered home the point that those in government, including judges, could only do what they were legally authorized to do. An amusing event, which occurred a year after the 1984 primary, bears on this point. On April 15, 1985, the editors of New York University's Annual Survey of American Law dedicated their 1984 volume to Linde. There were many lines of praise, applauding Linde for various things including his official encouragement of "responsible local lawmaking." Toward the end of the dedication, the editors unthinkingly added: "Other state judiciaries, and federal courts as well, have much to learn from Justice Linde's progressive lawmaking." *Dedication*, 1984 ANN. SURV. AM. L. vii. When Linde accepted the award, he jokingly remarked: "It's fortunate for me, given my election campaign, that the editors waited until after my election to print these remarks." (author's notes, New York University School of Law (Greenberg Lounge), Apr. 15, 1985).

159 MADD Tape, *supra* note 141. At one point, an unidentified questioner asked Judge Norblad: "[Do you] take the . . . view that the police may do anything that is not specifically forbidden? . . . [T]he people of California had . . . recently passed a law preventing police strip searches of men and women who were stopped for minor traffic infractions." Norblad responded: "Oh, it's got to be within reason, within the limits of the Constitution. Absolutely. They can't do anything." The questioner then followed by asking: "[Why then] does California have to pass a law against that [sort of thing]?" Norblad answered: "I have no idea about the California law. But certainly I wouldn't consider that a reasonable thing to do. And I certainly wouldn't support that." *Id.*

160 "What I'm trying to do is say, you've got these two extremes, but I'm experienced and am considered by both the police and defense attorneys to be fair." Albin Norblad, quoted in Cain, *supra* note 139, at B6, col. 6.

161 *The Ten O'Clock News* (KPTV (Portland) television broadcast, May 11, 1984) (transcript on file with the author).

162 Wong, *Norblad Seeking Oregon Supreme Court Justice Seat*, News-Review (Roseburg), Apr. 18, 1984, at 6, col. 4.

producer.' "[163] Speaking to a Klamath Falls audience, Norblad was harsher: " 'I disagree with his liberal policies; his opinions are not understandable and he's made it difficult for police to seize and search for property. He writes less than half the opinions the other justices do; he's not a hard worker . . . .' "[164] On a another note, Norblad stressed the purported value of his judicial vote. " 'The court right now in many cases rules 4-3 liberal. If I defeat . . . Linde, it will be 4-3 the other way.' "[165]

Sometimes Judge Norblad was not accusatory; he did offer a more independent, though not always clear, account of his views of what the race for judicial office was all about:

> I think the public should understand and have a feeling for the race and understand what everybody's position is. From that standpoint, I think it's [contested judicial elections] good. I don't want it to get too shrill so that it hurts the court or hurts the system. And I support the idea of judicial elections. It's a way that people are made accountable. We all have to be accountable and certainly judges should be accountable.[166]

Still, Linde remained the main target of Norblad's attacks, which bordered on being "shrill" at times. In the course of the campaign, Norblad also took occasional aim at the Lane County prosecutor. " 'Nissman is a very young deputy DA. That's his only experience,' "[167] he noted. Or, he would say: " 'I agree with all of David's . . . criticism — I'm just not as strident as he is . . . [I'm] a little more middle of the road.' "[168] But his criticisms of Nissman were few and usually qualified. For example, Associated Press writer Brad Cain observed:

---

[163] Peters, *Judge Draws Criticism*, Enterprise-Courier (Oregon City), Apr. 26, 1984, at 2, col. 4.

[164] O'Connor, *Court Candidate Trods Campaign Trail In KF*, Herald & News (Klamath Falls), Apr. 18, 1984, at 2, col. 2. *See supra* note 101, concerning the issue of Justice Linde's productivity; *see also* Ertelt, *Race is Anything But Dull*, Oregon Daily Emerald (Univ. of Oregon), May 14, 1984, at 3, col. 1 ("Nissman stated that Linde only writes about 11 opinions a year, but Linde says he has written 178 opinions for the court in seven years, an average of 24 opinions a year."); Wong, *Judge Finds Himself in a Rare Three-Way Race for Position*, News-Review (Roseburg), Apr. 26, 1984, at 8, col. 1 (Linde "said he has written 173 majority opinions of the court in his seven years, or about 24 per year, more than twice the average his opponents have stated").

[165] *Norblad Stresses Firmness, Innovation*, Spokesman (Redmond), Apr. 18, 1984, at 15, col. 1.

[166] *The Ten O'Clock News*, *supra* note 161.

[167] *Norblad Stresses Firmness, Innovation*, *supra* note 165, at 15, col. 3.

[168] Johnson, *Race for State Supreme Court Justice Loses Stately Veneer*, Observer (LaGrande), Apr. 24, 1984, at 3, col. 1.

> Norblad . . . said that [while he] feels ethically bound not to enter into the fray between Linde and Nissman, he doesn't fault Nissman for raising the law-and-order issues in his campaign.
>
> As a judge, Norblad said, "I can only discuss the betterment of the judiciary."
>
> "Nissman, on the other hand, is not a judge, so he is not bound by those ethics and he can properly criticize . . . ." he said.[169]

Since he was not so bound (according to Norblad), Nissman did not stay his rhetorical hand, even against his tame competitor Albin Norblad. His Marion County opponent is " 'not intellectually strong enough for the job,' "[170] claimed Nissman. In his bold and brash manner, the young prosecutor added: " 'There are a number of mediocre minds on the court now [these were the same people with whom Nissman hoped to work!]; it wouldn't be helpful to the state to have another.' "[171] There was more: " '[Judge Norblad] has had more experience, but the quality of his experience doesn't rate with mine. Why take someone who's been kicking around for 15 or 20 years and hasn't distinguished himself in any of these endeavors?' "[172] Then, as if to finish things off, Nissman pointed to Norblad's rating in a 1981 Oregon State Bar judicial performance survey—Norblad had the lowest rating of any judge in his county and ranked sixty-first out of seventy-one judges statewide.[173]

The barbs against Judge Norblad, however, were relatively few. After all, Norblad did not pose the greatest threat to the prosecutor's political ambitions. If anything, Norblad's occasional criti-

---

[169] Cain, *supra* note 139, at B6, col. 6. On another occasion Norblad said: "David . . . is not bound by those rules. There are different ethics governing attorneys and judges. Nissman can advise you on how he might rule in a given case if he were a judge, but I can't—the rules are different." Johnson, *supra* note 168, at 6, col. 1.

Judicial restraint notwithstanding, Judge Norblad did endorse the "Crime Victims" statutory initiative. *See* O'Connor, *supra* note 164, at 2, col. 2; *see also* Wong, *supra* note 162, at 2, col. 4. Norblad was a bit more circumspect in his endorsement of the proposed death penalty initiative to amend the state constitution: "If it were done right (if it were properly drawn), I would support it." O'Connor, *supra* note 164, at 2, col. 2. *But cf.* Wong, *supra* note 162, at 2, col. 5 ("[Norblad] declined comment on a proposed ballot initiative to restore the death penalty, saying he might be asked to rule on the constitutionality of the penalty if elected to the court."); *see also* McLaughlin, *Not Candid* (Letter to the editor), News-Review (Roseburg), Apr. 23, 1984, at 4, col. 5 (complaining of Norblad's "patently transparent attempt to appease voters on both sides of the [death penalty] issue").

[170] O'Connor, *Hopeful Calls for Court Changes*, Herald & News (Klamath Falls), Apr. 22, 1984, at 6, col. 1.

[171] *Id.*

[172] Portal, *Charges Fly in Hot Race for Justice*, Register-Guard (Eugene), Apr. 28, 1984, at C1, col. 5.

[173] O'Connor, *supra* note 170, at 6, col. 6.

cisms of Linde were a political plus. That is, Norblad could help to divide the vote and thus pave the way for a Nissman-Norblad runoff in the general election.[174] In that event, the Marion County judge could be dealt with later. Thus, all Nissman had to do was focus on his primary opponent, Hans Linde, firing any remaining shrapnel Norblad's way.

* * * *

Targetting Linde was not difficult, especially in light of the fact that as a sitting judge he continued to issue opinions from the bench during the campaign itself. At least two opinions stood out as the primary progressed. In late March, Linde released a dissent in *State v. Schroeder*,[175] a DUII police checkpoint case. Seemingly oblivious to its impact on his reelection bid, Linde aired a familiar complaint:

> A claim of official authority to interfere with people's freedom of movement and privacy by such means as a roadblock or obligatory checkpoint stop first needs a source for that authority in some law or policy enacted by a politically accountable lawmaker. Perhaps state and local lawmakers would choose to authorize roadblocks and checkpoint stops administered in prescribed ways, perhaps not. Second, the asserted authority must be administered within the authorization and not transgress some other law. Only then should constitutional limits become an issue.[176]

However valid the complaint, it was a dangerous one to tender in the midst of a "law-and-order" counter-campaign. The only thing worse would be for the incumbent to appear in the public company of criminal defense lawyers, which Linde did when in late March he joined Justice Robert Jones at the annual meeting of the Oregon Criminal Defense Lawyers Association Conference. Was Linde indifferent, foolhardy, or just plain arrogant to act as he did?

About the same time, Hans Linde wrote for a unanimous court in *DeFazio v. Washington Public Power Supply System*.[177] The seventy-two page opinion, which put Linde's photograph on the

---

[174] Addressing that hoped-for possibility, Nissman told a reporter: " 'I don't know if I want to come out on top. . . . I'd like to finish second to keep that underdog outlook.' " Harden, *Unglamorous Hopefuls Eye Posts*, Review (Lake Oswego), May 3, 1984, at A4, col. 3.

[175] 296 Or. 648, 678 P.2d 1222 (1984) (Linde, J., dissenting).

[176] *Schroeder*, 296 Or. at 651, 678 P.2d at 1228 (Linde, J., dissenting).

[177] 296 Or. 550, 679 P.2d 1316 (1984).

front page of *The Oregonian*,[178] sustained the legality of eleven contracts that Oregon cities and public utility districts had entered into with the controversial nuclear power provider, Washington Public Power Supply System. When the decision came down, plaintiff and then-Lane County Commissioner Peter DeFazio was angered: " 'The court has now said municipal utilities can incur limitless debt without a vote of the people if they just characterize that debt as a power sales agreement.' "[179] Putting aside the merits, Nissman saw Linde's judicial handiwork as another "impossible" opinion to read, an opinion which could have been written " 'in 10 or 15 pages,' " he added.[180] Bad results, combined with bad reading. It seemed as though the incumbent were digging his own grave.

* * * *

On the surface of things, David Nissman appeared to be a formidable opponent. By mid-April of 1984, for example, what newspaper coverage there had been of the campaign was more favorable to Nissman than to his opponents.[181] And later that same month the head of "Crime Victims United," Robert Kouns, made a television announcement that his organization had suspended its own rules and had voted to endorse a judicial candidate—David Nissman.[182] The Nissman campaign also won the support of the Oregon Council of Police Chiefs and Associations, the Multnomah and Lane County Sheriffs' Departments, the Eugene Police Department, the Oregon Farm Bureau, Lifesavers, the Oregon Taxpayers Union, and many Oregon district attorneys.[183] Moreover, political precedent seemed to favor him. Nissman's anti-crime campaign for the

---

[178] Leeson, *Court Rules Contracts With Supply System Legal*, The Oregonian, Mar. 21, 1984, at A1, col. 1.

[179] *WPPSS Ruling Reactions Mixed*, The Oregonian, March 21, 1984, at B4, col. 3.

[180] Leeson, *Supreme Court Race Offers Voters Spirited Contest*, The Oregonian, Apr. 15, 1984, at C2, col. 1.

[181] Memorandum prepared by Ronald Collins (Apr. 12, 1984) (on file with the author). My study revealed, among other things, the following: Pro Nissman Coverage (19 items total): Eugene (4 items), Springfield (2 stories), Salem (1 letter), Medford (1 story), Madras (1 story), Cave Junction (1 story), McMinnville (1 letter), Roseburg (1 story), Astoria (1 story), Bend (1 story), Grants Pass (2 stories), Albany (1 story), Hermiston (1 editorial), Hillsboro (1 letter). Note the absence of any significant coverage in areas such as Salem and Portland.

[182] Memorandum, KMTR-TV (Eugene-Springfield) (undated) (on file with the author) ("In Focus" quoting Kouns in response to question posed by news director Paul Riess).

[183] *See Nissman Best High Court Candidate* (Editorial), Argus (Hillsboro), Apr. 26, 1984, at 14A, col. 1; *Politics '84*, Statesman-Journal (Salem), Apr. 29, 1984, at 9A, col. 4 (Lifesavers was a group formed to combat drunk driving).

court in some ways resembled the heated 1970 judicial contest between law-and-order candidate Judge Dean Bryson and the then incumbent Oregon Supreme Court Justice Gordon Sloan. Bryson won. Thus, as the primary drew nearer, some seasoned political observers, such as Bend's Robert Chandler,[184] believed that the Bryson precedent might be repeated. "I think Hans Linde has a real chance of losing his seat," wrote Chandler.[185]

III

"WHEN YOU STRIKE AT A KING, YOU MUST KILL HIM"[186]

David Nissman once described Hans Linde as "a great political operative."[187] There was much truth in this claim, though perhaps in ways different than Nissman charged. Always busy, always thinking, the jurist who had orchestrated a successful 1978 election campaign[188] moved slowly, silently, and systematically. For him, overseeing this election was like calculating moves in a chess game.[189] Figuratively speaking, Hans Linde realized the neces-

[184] Robert Chandler served with Hans Linde on the Commission for Constitutional Revision in 1962. *See A New Constitution for Oregon*, *supra* note 17. At the time of the 1984 election he was, among other things, an influential newspaper publisher.

[185] Chandler, *Court/Tough Fight for Linde*, Bulletin (Bend), Apr. 8, 1984, at B2, col. 3. Chandler's newspaper, The Bulletin, later endorsed Linde in an editorial presumably authored by Robert Chandler. *See Keep Linde on the Court* (Editorial), Bulletin (Bend), May 2, 1984, at A10, col. 1.

[186] THE MIND & FAITH OF JUSTICE HOLMES 197 (M. Lerner ed. 1943) (quoting Ralph Waldo Emerson's advice to the young Oliver Wendell Holmes, Jr.).

[187] Leeson, *supra* note 131, at 3, col. 3.

[188] First in 1978 and then in 1984, Linde benefitted greatly from the organizational support of talented lawyers (typically from the Stoel Rives law firm in Portland) such as George Fraser, Henry Breithaupt, and Hardy Myers. Ernest Bonyhadi (of Portland) also played a key role in fundraising, both in 1978 and later in 1984. So formidable was Linde's 1978 bid, supported by numerous editorials and influential lawyers, that he ran unopposed. After the election, the Linde Committee returned about one-third of the funds collected to the contributors.

Generally, unless a well-known public figure runs for a state-wide judgeship, as Ed Fadley and Vern Cook did later in 1988, the vast majority of voters pay relatively little attention to such races until the final weeks of the campaign. Then, what matters greatly is the money with which to inform them of endorsements, bar polls, newspaper editorials, and the like. In all of this, Linde was experienced, while Nissman was a novice.

[189] Something of the same can be detected in the following observations of federal circuit Judge Abner Mikva, who once served with Linde as a fellow law clerk in the U.S. Supreme Court:

> [P]erceptivity . . . is perhaps Hans Linde's greatest strength. As a scholar and theoretician, he loves the symmetry of the law in its ancient forms. As a reformer, he still thinks of government as a place where problems can be solved

sity—and even the advantage—of sacrificing a pawn or a knight in order to later capture a queen or king. Politically, he was most effective when he appeared most vulnerable, and David Nissman and Albin Norblad made Linde appear politically vulnerable many times before the May 15, 1984 primary.

The "Committee to Re-Elect Justice Hans Linde" consisted of ninety-three members.[190] Most were powerful and prominent in their communities. For example, there was Charles D. Burt (a Salem trial lawyer), Mildred Jean Carmack (a big-firm Portland attorney), Robert Durham (a Portland labor lawyer), John "Jack" R. Faust (another big-firm lawyer and TV talk show host), John Frohnmayer (brother of the state attorney general and partner in a Portland firm), William F. Frye (a Eugene lawyer and former district attorney), Neil Goldschmidt (former Portland Mayor, then vice-president for Nike shoes who later became governor), Sidney Lezak (a Portland attorney and former United States Attorney), Malcom F. Marsh (a Salem attorney), Hardy Myers, Jr. (then Speaker of the Oregon House), Leslie Roberts (another partner in a Portland firm), and Richard S. Springer (a state representative). George Fraser (a partner in the Portland firm of Stoel, Rives) chaired the Committee and Henry Breithaupt (a skilled tax lawyer and a partner in Stoel, Rives) served as treasurer. The official stationary carried the union "bug," a symbol included on the Nissman stationary but missing from the Norblad campaign literature.

Melissa Haglund,[191] who had served on the staff of Tom McCall's 1978 campaign for governor, was Linde's campaign coordinator. She worked out of her Portland home, scheduling meetings, answering the campaign phone, arranging mailings, and overseeing the day-to-day operation of the campaign. There was a finance committee and a steering committee, both of which met regularly. Sev-

---

rather than caused. And yet, for all that, there is a toughness to his views and analytical capacities that makes him very worldly-wise. During the 1950's, there was a poker game among the Supreme Court law clerks. The game was table-stakes, with small antes but a potential for large final bets. Some of the participants went on to become Supreme Court Justices, senior partners at the nation's largest firms, and first-rank legal scholars. Hans Linde was an enthusiastic player, and almost always a winner. Of greatest significance for his later career, it was very hard to bluff him out of a pot.

Mikva, *Hans Linde: Hard to Bluff*, 1984 ANN. SURV. AM. L. ix.

[190] *See infra* appendix A.

[191] Melissa and her husband, Michael Haglund (a Portland attorney then with the firm of Lindsay, Hart, Neil & Weigler), gratuitously provided me with room and board in their home during my campaign stay in Oregon.

eral mass mailings were scheduled, including a 6,818-piece February mailing to the Oregon State Bar. "Area chairpersons" were identified and organized to coordinate campaign activities in virtually every county.[192] The steering committee worked to secure important editorial endorsements and endorsements from large organizations such as the Oregon Educational Association (OEA) and the AFL-CIO.[193] Linde's schedule was carefully planned around meetings with influential lawyers, newspaper people, and business people, arranged by the "area chairpersons." Unlike the Nissman and Norblad campaigns, major population areas received significant attention. "Dear Friend" letters, always signed by well-known people in the group targeted, were mailed to the academic[194] and legal[195] communities. There were also the Linde postcards. In the postcard campaign, supporters wrote postcards, printed by the election committee, to their clients, friends, family, and associates. One finance committee memo stated:

> If you will simply keep track of [the volunteers'] names and how many postcards they are willing to write, we [the committee] will arrange to get the cards to you for distribution . . . . We are asking individuals to sign, address, and stamp the cards (for an inkind contribution) and return them to the campaign p.o. box to enable us to mail them *all at once* in a blitz-type effort in May. We hope to distribute 40,000 cards between now and the first of

---

[192] *See* Memorandum from Linde Steering Committee (Mar. 28, 1984) (listing area chairpersons) (on file with the author).

[193] *See* Memorandum from Linde Steering Committee Meeting (Apr. 11, 1984) (listing endorsements) (on file with the author).

[194] *See, e.g.*, Letter from Ernest Bonyhadi, Maure Goldschmidt, and Theodore Falk to "Dear trustees, faculty, alumni & friends of Reed College" (Mar. 28, 1984) (on file with the author); Letter from Virgil Boekelheide, Robert Campbell, Chapin Clark, Sharon Gordon, James Klonosk and Richard Littman to "Dear Faculty Member" (Apr. 2, 1984) (on file with the author).

[195] *See, e.g.*, Letter from Sidney Lezak to Warren Christopher (Apr. 27, 1984) (on file with the author). Christopher (who preceded Linde as a law clerk for Justice Douglas) was the managing partner of the prestigious Los Angeles law firm O'Melveny & Myers. In his letter, Lezak wrote:

> I am writing at the request of the Linde committee to ask if you would personally contact some people in the Los Angeles area . . . who we have reason to believe would be interested in supporting someone like Hans Linde. . . . [The letter then listed the names of eight prominent people in the Los Angeles legal community].
>
> . . . .
>
> The campaign for the primary still needs to raise $10,000 by May 10. I hope you can help in this effort . . . .

Id.

May.[196]

Other regular activities included meetings with big firm lawyers, businesspeople, and religious leaders; advertising in trade journals; letters to the editor campaigns; and contacts with local and college newspaper editors and reporters. Additionally, a national "law professors network" letter was prepared,[197] with Theodore Falk[198] and University of Oregon Law Professor James O'Fallon supervising the effort.[199] After all, Linde was "one of the nation's legal treasures" according to the March 12, 1984 fundraising letter signed by Laurence Tribe (Harvard Law), Gerald Gunther (Stanford Law), Shirley Hufstedler (former federal judge and secretary of education), and Professor O'Fallon.[200] Radio and television ads would follow when campaign finances were secured. Finally, Linde insisted on two other things: no billboards and no deficit spending.

Through all of this, Linde was remarkably calm. Nissman's campaign, though irritating, was never viewed as a serious threat, if only because it lacked political and economic power and was not very visible in the major population centers. Much of the same was true for Norblad despite his well-known family name. Still, in 1983 the Oregon legislature had abolished the longtime practice of ballot

---

[196] Memorandum from Linde Finance Committee (Mar. 21, 1984) (on file with the author).

[197] I suggested the idea and later prepared the draft of the letter, which was subsequently edited and approved by the co-signers. *See* Memorandum from Ron Collins to Gerald Gunther (Mar. 2, 1984) (on file with the author).

[198] Falk had earlier served as a law clerk to Justice Linde, and was a lawyer in a large Portland law firm at the time.

[199] *See* Memorandum from Linde Finance Committee, *supra* note 196.

[200] Letter from Gerald Gunther, Laurence Tribe, Shirley Hufstedler, and James O'Fallon to "Members of the Legal Community" (Mar. 12, 1984) (on file with the author). The letter, which was used for national fundraising purposes, also stated:

> We write to you to elicit your support of the reelection of one of the finest jurists in the nation, Justice Hans A. Linde of the Oregon Supreme Court.
>
> . . . .
>
> We believe that Justice Linde's record as a state judge is nearly unmatched in recent times. He came to the Court as a distinguished, nationally respected scholar in federal constitutional law. And he is surely the nation's foremost, and most principled, authority on state constitutional law. Moreover, he is a highly regarded authority on legislative and administrative processes, and he has gained considerable renown for his torts and contracts opinions. In these and other areas, his contributions certainly parallel those of the leading state judges of this century—judges of the caliber of Benjamin Cardozo and Roger Traynor.

Id. *See also Fund-Raising Ills; For Judges, the Stakes Are Rising*, L. A. Times, Mar. 4, 1988, § I, at 2, col. 6 (noting Linde's "nationwide fund-raising drive").

slogans whereby an incumbent was identified as such.[201] This fact and others meant that the combined threat posed by Nissman and Norblad could force Linde into a runoff, most likely against Judge Norblad.[202]

* * * *

If there was any single turning point in the campaign, most likely it came on the afternoon of April 23rd when the Lane County Bar Association hosted an exchange of sorts between Hans Linde and David Nissman. Norblad was unavailable. Up to this point, the former University of Oregon law professor-turned-judge was under attack but was largely non-responsive. He remained above the fray but seemingly at the risk of being politically ruined by it.

" 'Theories developed in the Utopias of the classroom' "[203] was how Nissman branded the Linde mindset. It was that aloof mindset that the young prosecutor had hoped to encounter in his Lane County exchange with the Justice on the run. Linde talking theory. Linde talking about the judicial system. Linde not talking about the attacks leveled against him. And Linde not talking about Nissman. This was the Hans Linde that David Nissman was prepared to meet, and devour, on that Monday in late April in Eugene.

The luncheon event allotted ten minutes to each of the two men followed by a question-and-answer period. Nissman, wearing a huge "Nissman" campaign button near his left lapel, opened with a statement of populist appeal: "One of the nice things about this campaign, and one of the things that I think is a by-product of this race, is that we are able now to get a lot more people involved in a judicial election . . . ."[204] As if mindful of the limited scope of his legal experience, the prosecutor stressed his experience in litigating civil cases. Then he moved to what he thought were the six major issues in the campaign: (1) "Legislating through the judicial branch";[205] (2) "[H]e [Linde] decides cases on issues not raised,

---

201 1983 Or. Laws ch. 7, § (1)(e).

202 It is difficult to get fifty-one percent of the vote among three or more candidates. Even a relatively uncontroversial jurist such as Justice Edwin Peterson had to go into a run-off in 1980 when opposed by two adversaries, one of them a well-known former state representative, Shirley Field.

203 *Court Candidate to Speak*, Democrat-Herald (Baker), Apr. 17, 1984, at 3, col. 1.

204 Address by David Nissman, Lane County Bar Association Luncheon (Apr. 23, 1984) (audio-tape on file with the author).

205 *Id.* Nissman added:

> [O]n a number of occasions Justice Linde has placed his own personal views into the law even where the court is not being asked to decide a policy ques-

briefed, or argued by the parties";[206] (3) "He's extremely slow at producing opinions";[207] (4) "Judge Linde produces very few opinions";[208] (5) "[His] decisions . . . are not very well written and difficult for judges and lawyers to understand and apply";[209] and finally (6) "[B]ecause of some of the unusual ideas that go into this judge's philosophy and lack of trial and practical experience, he has greatly expanded the rights of criminal defendants."[210] Nissman then rounded out his remarks by elaborating on his judicial philosophy and how it differed from that of Hans Linde. He spoke favorably of a "balancing" approach to law and of deciding appellate cases on the "narrowest legal principle," the "authority of law" argument notwithstanding.[211] In short, he argued that Linde's rule of law had

---

> tion. . . . Now, in one of the articles that he wrote . . . he indicates that he believes that judges should consider the state constitution first "even [where] counsel does not raise it, which is most of the time."

Id. (quoting Linde, *First Things First*, *supra*, note 41, at 383).

206 Address by David Nissman, *supra* note 204. He added: "There are a number of cases that you can take a look at to get that sense: Sandford v. Chevrolet Division of General Motors [292 Or. 590, 642 P.2d 624 (1982)], State v. Lowry [295 Or. 337, 667 P.2d 996 (1983)], State v. Clark [291 Or. 231, 630 P.2d 810 (1981)], [and] a whole host of others." Address by David Nissman, *supra* note 204.

207 Address by David Nissman, *supra* note 204.

> Now, the ABA standards in this particular area call for written opinions to be handed down following oral argument within sixty to ninety days. The average in 1980 had slowed down—this is not a criticism of Judge Linde alone— . . . our Oregon Supreme Court was getting to them at an average of about 141 days.

Id.

208 *Id.* "In 1983, he signed his name to only 7 [opinions]. Of course, that was also the time when he had taken a leave of absence to teach at Arizona State University." *Id.*

209 *Id.* "[A]fter the decision comes down, if it's not clear, if it is ambiguous, then we spend years and years arguing what these words mean." *Id.*

210 *Id.* "Now, I've spoken about this before and I'm not going to go into it a whole lot now, unless anybody has any particular questions about that area." *Id.*

211 *Id.*

> Judge Linde's students will remember that he was not in favor of balancing tests. He's a student of Kenneth Culp Davis—and I say that in a generic sense— . . . . Davis' ideal legal society is a civil law system of Western Europe. . . . [T]hose who believe in that particular system believe in a highly regulated society, and if you read Judge Linde's opinions you will find three assumptions in those opinions . . . . The first one is, if an act is not authorized, then it is illegal. . . . [referring to *State v. Tourtillott*, 289 Or. 845, 869, 618 P.2d 423, 435 (1980) (Linde, J., dissenting)] . . . . And the second assumption is that if the legislature won't write all of these technical rules then they've abdicated power to the court, and the court must [act]. And the third assumption is that if any governmental worker violates one of these rules . . . then as a civil case it will be reversed even if the error is harmless, and in a

left the Oregon legal system "dangerously out of balance."[212]

When Linde took the podium, he began as expected by talking about his professional credentials. Speaking from his prepared text,[213] Linde remarked: "One of my opponents says that I do not express myself plainly. I shall speak plainly."[214] Then, speaking in a firm and deliberate manner, Linde cleared his throat, bit his lip, and proceeded to surprise his audience with an unusual display of contained indignation:

> There is reason for concern about the kind of campaign that is being waged against judges this year. It seeks to import single-issue politics into Oregon judicial elections by shrill and false attacks on court decisions. It is a disservice to the public, and it could in time endanger judicial independence as we know it. Oregon's system of electing judges has worked because candidates traditionally have offered the public their qualifications, their knowledge, their experience, and their integrity. My opponent, Mr. Nissman, either does not yet understand the Oregon tradition or he rejects it. He is running for the Supreme Court by running against the Supreme Court. And he is not above misleading the public with some pretty wild statements.[215]

Linde then took aim at five Nissman allegations, ranging from the death penalty to the right to counsel in criminal cases, and responded point blank to each one. A three-page Linde response to still other Nissman charges was also circulated to the press at the time.[216] The incumbent justice thereafter pounded away at a point that would get wide play in the days before the primary, namely, that Nissman's attacks were really as much against the court as they were against Hans Linde:

> This candidate boasts of his six years of experience since graduating from law school. The unanimous decisions that he attacks

---

> criminal case the evidence will be suppressed if there's no constitutional law violation.

Id.

212 *Id.*

213 *See* Address by Justice Hans A. Linde, Lane County Bar Association Luncheon (Apr. 23, 1984). The full text of Justice Linde's statement appears as appendix D, *infra*. Unless otherwise indicated, all references to Justice Linde's April 23rd remarks are to his prepared text as set out in appendix D, *infra*. (At that time, I also made an audio-recording of the entire event.) In the interest of full disclosure, I note that I assisted (though in a small editorial way) in the preparation of Justice Linde's remarks and in preparing the two press releases accompanying them.

214 *Id.*

215 *Id.*

216 *See* News Release from the Committee to Re-Elect Justice Linde (undated) (on file with the author).

> reflect a total of some 200 years of professional experience and 80 years of judicial service, among the seven present justices of the Supreme Court, four of them former trial judges. Yet he has the gall to say that unless he is elected, we shall have vigilante justice in the streets.[217]

With the young Nissman sitting stoically still, the elder Linde asked: "Should we ignore such distortions as a bit of immature exuberance, or as harmless political exaggeration?"[218] Warning against "half truths" and "clever distortions"[219] in Nissman's voter's pamphlet, and against "demagoguery"[220] in a judicial campaign, Hans Linde—the "lazy, impractical master politician who [had] mesmerized a court"[221]—asked his audience to look to the future:

> [We] usually reach unanimity on most opinions, even if it takes time and several drafts. One essential reason is that the Oregon courts have not become a political football as has happened in some states. That tradition will be important long after my colleagues and I are gone. I hope we can keep it.[222]

The future came the next day, when the polls closed for members of the Oregon State Bar who had been asked to select a high court judge for position #1. Fifty-six percent of those invited to vote-by-mail responded.[223] The numbers were clear.[224] What was less clear is how the numbers should be interpreted.[225] A Nissman for Justice

---

217 Address by Justice Hans A. Linde, *supra* note 213.

218 *Id.* Just before this statement, Linde made the following comment, some of which deviated in part from his prepared text:

> Mr. Nissman also prides himself on his part-time teaching. I hate to think that he teaches his students to brief cases the way he does. If [former University of Oregon School of Law] Dean Hollis weren't sitting right here in front of me, he'd be spinning in his grave. [Laughter.]

Id. (audio-tape of remarks, which differ from prepared text appearing in appendix D, *infra* on file with the author).

219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 Memorandum from Oregon State Bar Association (May 2, 1984) (on file with the author).

224 For figures, see *infra* note 225. The results were reported in *Judge Linde Rates High in Poll, Seeks Re-Election to High Court*, News-Register (McMinnville), May 11, 1984, at A13, col. 1; *Oregon Lawyers Favor Incumbent Judge Linde*, Chronicle (The Dalles), May 1, 1984, at 2, col. 4; *Poll of Lawyers Favors Incumbents*, Register-Guard (Eugene), May 2, 1984, at 1C, col. 3.

225 The numbers were as follows:

CANDIDATE	TOTAL POINTS/1ST CHOICE VOTES
Hans A. Linde	8,354/2,491
Albin W. Norblad	4,878/814
David M. Nissman	3,480/534

Committee press release[226] portrayed the results as a serious blow to the incumbent:

> A majority of votes cast by Oregon lawyers in a recent poll conducted by the State Bar Association went against Hans Linde, a Supreme Court Justice trying to win re-election on May 15. The vote was [an] unprecedented rejection of an incumbent Justice and his policies. The last time a Justice was challenged by two opponents, the Bar voted over 90% in his favor.
>
> Challengers David M. Nissman and Albin Norblad collected 8,358 total votes to Linde's 8,354 votes.[227]

For Nissman, the Bar poll results suggested that public sentiment was actually turning against Justice Linde: "Everywhere I go around the state, people are waking up to what Mr. Linde has been doing and they don't like it. Not only has he helped to emasculate Oregon's criminal statutes, but he has muddled every other area of the law he touches."[228]

Of course, the Linde folks saw something entirely different in the Bar poll numbers. They stressed that the incumbent had won sixty-five percent of the first-place votes; that voters preferred Linde over Norblad as their first choice by a 3-to-1 margin, and over Nissman by a 4-to-1 margin.[229]

* * * *

With the primary only weeks away, Linde was making his big moves. He had secured early and important endorsements. The Oregon AFL-CIO, OEA, and Council of Communications Workers of America, among others, threw their support his way. The state chapters of the National Organization for Women and the Women's Political Caucus did likewise.[230] The deans of the three Oregon law schools publicly endorsed the former law professor.[231] State Sena-

---

Candidates were awarded three points for a first-choice vote, two points for a second-choice vote, and one point for a third-choice vote. *See* Memorandum from Oregon State Bar Association, *supra* note 223.

[226] *See* News Release from Nissman for Justice Committee (undated) (contact person: Karen Lobb) (on file with the author). The release was reprinted almost verbatim in a North Bend newspaper story. *See also State Bar Votes No for Jurist*, News (North Bend), May 10, 1984, at 8, col. 4.

[227] News Release from Nissman for Justice Committee, *supra* note 226.

[228] *Id.*

[229] Memorandum from Committee to Re-Elect Justice Hans Linde (Apr. 30, 1984) (discussing results of Oregon State Bar poll) (on file with the author).

[230] *See* Memorandum from Linde Steering Committee (May 2, 1984) (on file with the author).

[231] *See* LaFrance, *High-Caliber Opinions* (Letter to the editor), The Oregonian, May 4, 1984, at D12, col. 5 (signed by Arthur LaFrance, Lewis & Clark College); Merrill,

tor Jane Cease mass-mailed a Linde support letter to those on her own campaign reelection list.[232] Television, radio, and print ads,[233] featuring former Chief Justice Arno Denecke,[234] former Portland Mayor Neil Goldschmidt,[235] and Oregon Labor Commissioner Mary Wendy Roberts,[236] appeared in major population areas.[237] Unlike the winter months, newspaper coverage increasingly favored Linde, especially in the larger cities.[238] Meanwhile, the "vote for Linde" postcards were going out in droves and Linde lawn signs were popping up in several counties.

On the Nissman campaign front, the most visible signs of the candidate's effort were lawn signs, but most of the campaigning was done throughout by word of mouth. The same was largely true for the Norblad Committee, though in a few places, like southeast Hawthorne Boulevard in Portland, one could find billboards with the judge's picture accompanied by the words, "One of Oregon's Most Respected Jurists." Similar full-page ads were run in newspapers with the caption, "A No-Nonsense, Hard-Working Judge."[239]

By mid-April, newspaper editorial endorsements began to pour

For Hans Linde (Letter to the editor), Register-Guard (Eugene), May 9, 1984, at A14, col. 5 (the letter was signed by Professor Fred Merrill and fifteen co-signers of the University of Oregon law faculty); Tornquist, *Justice Hans Linde* (Letter to the editor), Statesman-Journal (Salem), May 12, 1984, at A15, col. 2 (signed by Leroy Tornquist, Willamette University).

232 *See* Letter from Jane Cease to "Dear Friends" (May 1984) (on file with the author).

233 These ads were prepared by the Portland advertising agency of Petzold & Associates. *See* Memoranda from Petzold & Associates (May 1, 1984) (Broadcast copies of 60-second radio advertisements) (on file with the author).

234 Arno Denecke: " 'I served on the Supreme Court with Hans Linde for five years. He's doing an *excellent* job.' " *Id.*

235 Neil Goldschmidt: " 'I've known Justice Linde since I was a student in law school. He's an expert on constitutional law, and a great Oregonian.' " *Id.* Later, Goldschmidt became governor of Oregon and in 1990 appointed Linde's successor.

236 Mary Wendy Roberts: " 'Justice Linde is widely respected for his knowledge and fairness.' " *Id.* Among other things, the radio ad also ran an endorsement by former District Attorney Des Connall: " 'Neither of Justice Linde's opponents can match his experience or training.' " *Id.* Linde came on near the end of the ad (as is required of all candidates). He said, " 'This is Justice Linde. Look for my name on the judicial ballot.' " *Id.*

237 *See* Memorandum from Linde Steering Committee, *supra* note 230.

238 *See* Memorandum from Ron Collins (May 4, 1984) (analysis of newspaper campaign coverage) (covering period of April 11 - May 5, 1984) (on file with the author).

239 *E.g.*, Norblad Advertisement, The Oregonian, May 14, 1984 at A6, col. 1; Norblad Advertisement, The Oregonian, May 13, 1984, at C10, col. 4; Norblad Advertisement, Register-Guard (Eugene), May 13, 1984, at A9, col. 4; Norblad Advertisement, Herald & News (Klamath Falls), May 11, 1984, at 9, col. 3.

in. The *Oregonian* [240] (Portland), *Statesman-Journal* [241] (Salem), *Register-Guard* [242] (Eugene), *East Oregonian* [243] (Pendleton), and

---

[240] *See Keep Linde on Court* (Editorial), The Oregonian, Apr. 26, 1984, at D6, col. 1. In relevant part, the editorial stated:

> Oregonians should be proud to have a person of Hans A. Linde's intellectual stature on the state Supreme Court. Instead, Linde, a Supreme Court justice for seven years and University of Oregon law professor for 18, faces a re-election challenge that portrays him as a malevolent force leading his colleagues down the primrose path.
>
> . . . .
>
> The potential for a discussion of a legitimate issue existed in this race [reference to the use of the state constitution to offer protections beyond the federal minimums].
>
> Unfortunately, Nissman, backed by other prosecutors, has distorted the issue into a law and order campaign that unfairly casts Linde in the mold of a judicial villain siding with criminals over police and prosecutors. . . .
>
> Norblad has hinted he agrees with Nissman but has not joined in the intense attack, hoping to benefit from the fallout.

Id.

[241] *See Keep Linde on High Court* (Editorial), Statesman-Journal (Salem), Apr. 21, 1984, at A14, col. 1. In part, the editorial in Judge Norblad's town paper stated:

> The Oregon Supreme Court is a respected court that enjoys a national reputation. One of the reasons is Justice Hans Linde. . . .
>
> . . . .
>
> [Descriptive reference to the independent use of the state constitution to protect various rights, including the right to bear arms]
>
> [David] Nissman may have a judicial career ahead of him, but at age 31 there is plenty of time for his legal views to mature beyond a hazy and prosecutorial myopia and a misunderstanding of what a Supreme Court is supposed to be.
>
> . . . [Judge Norblad] seems to have positioned himself in the race to profit from any dissatisfaction with both Linde and Nissman.
>
> Frankly, we would like to see Norblad stay precisely where [he] is: handling domestic relations and most, or all, of the court work with juvenile offenders. . . .
>
> . . . .
>
> . . .[Linde] is a distinguished judge of huge national repute, and Oregonians are fortunate to have a man of his stature and intellectual capacity on the high court.

Id.

[242] *See Retain Justice Linde* (Editorial), Register-Guard (Eugene), Apr. 29, 1984, at A16, col. 1. The editorial in David Nissman's local paper, in part, said:

> [Albin] Norblad has not waged a very visible campaign, at least in our area. . . .
>
> [David] Nissman has waged an aggressive campaign with a heavy "law-and-order" component. He obviously hopes to capitalize on widespread public dissatisfaction with the whole judicial system for allegedly being "soft" on criminals. His professional backing consists pre-eminently of prosecutors and police.
>
> . . . .
>
> In fairness, there are members of the bar other than prosecutors who share some of Nissman's feelings. . . . But in our judgment, the sum of substantive

the *Daily Astorian* [244] (Astoria), among many others,[245] cast their support Linde's way.[246] David Nissman won the editorial nod from the *Democrat-Herald* [247] (Albany), the *Daily Courier* [248] (Grants Pass), and the *Argus* [249] (Hillsboro), while Albin Norblad picked up the backing of the *Observer* [250] (La Grande), the *Democrat Herald* [251] (Baker), and the *New Review* [252] (Milwaukie).

There was more here than numbers. There was a reoccurring charge in many of the editorials across the state. "Misleading" was the word that surfaced time and again in connection with David Nissman's campaign. "[S]elected statistics which he must have known would be misleading,"[253] is how the *Bend Bulletin* put it; "irresponsibly misleading"[254] is what some called it in Eugene;

---

merit in these complaints, weighed generously, falls short of justifying any consideration of replacing Hans Linde—even if an adequate replacement were available.

Id. *See also* Linde, *Hans A. Linde* (Letter to the editor), Register-Guard (Eugene), May 7, 1984, at A11, col. 2 (letter of Hans Linde noting paper's endorsement and closing: "When you reach your judicial ballot, remember: Justice Linde is doing the job now. The other candidates want the job.").

[243] *See Hans Linde Best Qualified for the Supreme Court* (Editorial), East Oregonian (Pendleton), Apr. 20, 1984, at A10, col. 1.

[244] *See No Evidence* (Editorial), Daily Astorian (Astoria), April 11, 1984, at G, col. 1.

[245] *See, e.g.*, *Give Linde Another Court Term* (Editorial), Gazette-Times (Corvallis), Apr. 26, 1984, at A4, col. 1; *Judicial Races* (Editorial), Stayton Mail (Stayton), May 10, 1984, at A2, col. 4; *Keep Linde on Court* (Editorial), World (Coos Bay), May 7, 1984, at 4, col. 1; *Keep Linde on the Court* (Editorial), Bulletin (Bend), May 2, 1984, at A10, col. 1; *Linde Best Choice for Supreme Court* (Editorial), Herald & News (Klamath Falls), May 7, 1984, at 4, col. 1; *Re-Elect Hans Linde to Supreme Court* (Editorial), Sun Enterprise (Monmouth), Apr. 25, 1984, at 4, col. 1; *Retain Hans Linde on Supreme Court* (Editorial), News (Springfield), Apr. 28, 1984, at A10, col. 1; *Retain Linde* (Editorial), Spokesman (Redmond), Apr. 25, 1984, at 4, col. 1; *Supreme Court Election Heated* (Editorial), Mail Tribune (Medford), May 4, 1984, at A4, col. 1.

[246] One paper later withdrew its endorsement and took no position on the supreme court race. *See Court Endorsement Turns to Neutrality* (Editorial), Sun Enterprise (Monmouth), May 9, 1984, at 4, col. 1.

[247] *Young Challenger for Supreme Court* (Editorial), Democrat-Herald (Albany), Apr. 28, 1984, at 4, col. 1.

[248] *Nissman Pick for High Court* (Editorial), Daily Courier (Grants Pass), May 5, 1984, at A4, col. 1.

[249] *Nissman Best High Court Candidate* (Editorial), Argus (Hillsboro), Apr. 26, 1984, at A14, col. 1.

[250] *Change Needed* (Editorial), Observer (La Grande), April 27, 1984, at 4, col. 1.

[251] *Norblad is the Best* (Editorial), Democrat-Herald (Baker), May 7, 1984, at 4, col. 1.

[252] *The Review Goes to the Polls* (Editorial), New Review (Milwaukie), May 10, 1984, at 14, col. 1.

[253] *Keep Linde on the Court* (Editorial), Bulletin (Bend), May 2, 1984, at A10, col. 1.

[254] Ertelt, *supra* note 164, at 2, col. 3.

"misleading and incomplete"[255] is what they labeled it in The Dalles, echoing the same charge leveled by 16 members of the University of Oregon law faculty;[256] "faulty research"[257] is how they tagged it in Monmouth; "blatant falsehoods"[258] is what they said of it in Hermiston; "careless with the truth"[259] was the message from Medford. The editors of *Willamette Week* were anything but charitable: "[H]is attacks have been shrill, mean-spirited and intellectually dishonest. Even when viewed dispassionately, they amount to little more than an unfounded broadside against the entire court on which Linde sits."[260] David Marshall Nissman now felt that the press was being unfair. He called it "pretty strong talk" as he set out to defend the several claims he had made in the voter's pamphlet.[261] Nevertheless, Nissman pushed on. He stated: "Oregonians used to be proud of their Supreme Court, not alarmed by it. Let's make it a focus of pride again."[262]

* * * *

May was the media month. The larger television stations ran news stories and features with more regularity. One such program was a KOIN (Portland) television news report.[263] The report opened with the statement: "[L]abels can be misleading when

---

255 *Linde for Supreme Court* (Editorial), Weekly Reminder (The Dalles), May 10, 1984 (page number unavailable).

256 Merrill, *supra* note 231, at A14, col. 5 (letter to the editor with 15 co-signers).

257 *Re-elect Hans Linde to Supreme Court*, *supra* note 245, at 4, col. 1. *But cf. Court Endorsement Turns to Neutrality*, *supra* note 246, at 4, col. 1.

258 Erichsen-Webster, *Candidate Distorts Court Cases* (Editorial), Herald (Hermiston), May 2, 1984, at 4, col. 3. For David Nissman's reply to this story, see *Judicial Hopeful Backs Up Position* (Editorial), Herald (Hermiston), May 9, 1984, at 4, col. 4 (extended letter with 4-point response to charges leveled against him).

259 *Supreme Court Election Heated* (Editorial), Mail Tribune (Medford), May 4, 1984, at A4, col. 1.

260 *Primary Time* (Editorial), Willamette Week (Portland), May 7-13, 1984, at 1, col. 1. *See also Give Linde Another Court Term*, *supra* note 245, at A4, col. 1 (while noting a "few deserved criticisms," characterizing Nissman charges against Linde as amounting to "many unearned accusations"); *Retain Hans Linde on Supreme Court*, *supra* note 245, at A10, col. 1 ("and to some extent we believe [Nissman's crime statistics] mislead voters as to the role of the Supreme Court in the justice system"); *Retain Linde*, *supra* note 245, at 4, col. 1 ("Nissman consistently has misrepresented Linde's and the court's opinions"); *Voters' Signal Strong* (Editorial), The Oregonian, May 17, 1984, at D12, col. 1 (characterizing the Nissman campaign as a "misleading law-and-order campaign").

261 *See Judicial Hopeful Backs Up Position*, *supra* note 258, at 4, col. 4 (extended letter with 4-point response to charges leveled against him).

262 *Id.*

263 *Newsroom Six* (KOIN (Portland) television broadcast, May 2, 1984) (5:00 p.m. news report filed by Richard Draper) (transcript on file with the author).

describing the work of the Oregon Supreme Court. And misleading too is the perception some people have of the court's work."[264] These introductory remarks signaled reporter Richard Draper's unwillingness to run with sensationalism. The television camera scanned the front side of the courthouse of the Oregon Supreme Court, with the reporter commenting: "Compared with a trial court [the Nissman-Norblad domain], Oregon's supreme court is generally a quiet place. There are no trials here, no juries, just seven elected justices who decide questions of law appealed from lower courts. Inside, the mood is more collegial than combative."[265] The camera then moved to the inside of the courthouse, scanning the justices sitting during oral arguments in a case. Next, David Nissman's image appeared, and he voiced his "serious disagreement" with Linde over the "proper role of the judiciary."[266] The lens then focused on Judge Norblad's chambers: "I would be working for a consensus and be working in an attempt to mold opinions to a more conservative bent."[267] Linde, likewise sitting in his chambers, replied:

> You can't call those things liberal or conservative for a very simple reason: some laws are liberal, some laws are conservative. There are some criminal laws which are designed to be very punitive, and so on. There are other kinds of laws which are completely neutral; you wouldn't describe them as liberal or conservative. Is it liberal or is it conservative to enforce the people's right to bear arms? That's a constitutional right; we enforce it.[268]

The report closed with Draper commenting: "As much as anything, this election could become a referendum on whether Oregon voters want their supreme court justices accountable [for] political philosophy or intellectual ability."[269]

Four days before the primary, KPTV in Portland profiled the candidates on its evening news program.[270] The report went immediately to the crime issue and its effect on the conduct of the campaign.[271] Speaking from an earlier taped interview in his chambers, the mild-accented Linde said: "Mr. Nissman has tried to turn [the

---

[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *See The Ten O'Clock News*, *supra* note 161.
[271] *Id.*

crime issue] into a political attack on me, [on] decisions of the court. I think it is a shame if the effect is to cause people to lose confidence in the laws of Oregon or in this court."[272] Next, the youthful appearing David Nissman fired back: "[We] publiciz[ed] what that court has done . . . . [I]f they feel that that damages their reputation, then it is because of [their] decisions . . . [and] not because someone has dared to tell the public about what the court is doing."[273] The report, while quoting Albin Norblad, noted that the Marion County judge was "making every attempt to stay out of the fracas."[274] The rest was a visual replay of several charges and counter-charges that had been voiced by the candidates throughout the campaign. The story ended with the reporter stating: "Asked to prejudge the outcome of this race, Justice Linde replied, 'We have to just wait and see.' "[275]

IV

LANE PROSECUTOR LOSES CHALLENGE,[276] LINDE IN RUNOFF[277]

When the voting booths closed on May 15, 1984, the people of Oregon had expressed their common will on the direction of judicial justice. They had elected Justice Robert Jones to his first full term of office and reelected incumbent court of appeals Judges John Buttler, George Joseph, and W. Michael Gillette.[278] The race for supreme court position #1, however, required more public deliberation. At a glance, the results were:

Hans A. Linde	(45%)
David M. Nissman	(25%)
Albin W. Norblad	(29%)[279]

" 'I did not find the outcome, in the three-way race, surprising,' "

---

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *See* Portal, *Justice, District Judge Retain Seats*, Register-Guard (Eugene), May 16, 1984, at C3, col. 3.

[277] *See Linde in High Court Runoff*, Statesman-Journal (Salem), May 16, 1984, at A1, col. 3.

[278] *See* Portal, *supra* note 276, at C3, col. 3. Gillette would later assume a seat on the state high court.

[279] *See* Evenson, *Norblad Feels Fit for Linde Battle*, Statesman-Journal (Salem), May 17, 1984, at A1, col. 4.

said the incumbent.[280] Linde prevailed in twenty-two counties, Norblad won five, and Nissman took nine. Judge Norblad made his strongest showing in his own Marion County, where he carried fifty-six percent of the votes compared to Linde's twenty-nine percent. David Nissman did best in the conservative southern and eastern counties, with his top showings in Douglas and Josephine Counties. Hans Linde dominated elsewhere, especially in his home county of Lane and in the important Portland metropolitan counties.[281]

The official campaign finance reports help to explain these results. The final reports also tell much of the story:

Linde raised:	$59,295	spent: $55,038
Norblad raised:	$16,406	spent: $14,924
Nissman raised:	$23,819	spent: $23,841[282]

Thus, while Nissman had out-spent Norblad, he was unable to translate that into a victory at the polls. As for his other opponent, Nissman told a reporter: " 'Justice Linde outspent me 5 to 1 yet he wasn't even able to take me 2 to 1 in the voting.' "[283]

There was also the matter of the people and organizations who stood behind the campaign dollars. For Hans Linde, there was an official April list of some 17 pages of contributors, which included in-kind contributions.[284] Notable contributors who gave more than $100 included:

---

[280] Leeson, *Runoff Election Slated for Ore. High Court Seat*, Nat'l L. J., June 4, 1984, at 19, col. 1.

[281] *See* Evenson, *supra* note 279, at A1, col. 4.

[282] *See Top Campaign Fund-Raiser Loses Despite Big Spending*, The Oregonian, June 18, 1984, at B3, col. 1.

[283] Evenson, *supra* note 279, at A1, col. 4.

[284] Statement of Contributions & Expenditures, submitted by Committee to Re-Elect Justice Linde (Apr. 1984) (signed by Henry Breithaupt, treasurer) (on file with the author).

Edwin J. Peterson[285]	$150.
Law firm of Necomb, Sabin et al	$250.
Floyd Abrams[286](New York)	$250.
Gersham Goldstein	$250.
Law firm of Miller, Nash et al.	$250.
Ernest Bonyhadi	$300.
Law firm of Spears, Lubersky et al	$500.
Law firm of Lindsay, Hart et al	$500.
Oregon Education Association	$5,000.[287]

Judge Norblad's April statement listed a single contribution over $100, one by William Schwartz for $250.[288] The Nissman for Justice Committee statement included the following list of contributors who gave more than $100:

Seymour Rosenthal (New York)	$200.
Sanford Weiss	$200.
Harry Ritchie	$200.
Joe Hollman	$200.
Multnomah County Sheriff's Office PAC	$250.
John Kosydar	$250.
R.B. Pamplin	$250.
David M. Nissman	$300.[289]

Beyond the campaign dollars issue, the defeated prosecutor also took ex-post-facto aim at Linde and Norblad: "Both of those gentlemen tried to make issues out of my age and experience . . . . Yet I still got over 130,000 votes, because I was talking about issues, and I think a lot of people were interested in those issues."[290] The once-hopeful Eugene candidate for judicial office exited the race with words of advice for Albin Norblad: "If Norblad makes it an issues campaign, I think he can win."[291]

---

[285] In 1984, Edwin Peterson was the chief justice of the Oregon Supreme Court, a fact noted on the official Linde Statement of Contributions & Expenditures. Though their views on criminal justice could be quite divergent—*see, e.g.*, State v. Tourtillott, 289 Or. 845, 618 P.2d 423 (1980), *cert. denied*, 451 U.S. 972 (1981)—they shared a mutual respect for each other.

[286] Floyd Abrams is a New York media lawyer with a national reputation for arguing first amendment press cases.

[287] *See supra* note 284.

[288] Statement of Contributions & Expenditures, submitted by Judge Albin Norblad for Supreme Court Committee (Apr. 19, 1984) (signed by J. Wallace Gutzler, treasurer) (on file with the author).

[289] Statement of Contributions & Expenditures, submitted by Nissman for Justice Committee (undated) (signed by Richard Muller, treasurer) (on file with the author). *See also Nissman Misses Deadline; Linde Leads in Court Spending*, Observer (La Grande), May 9, 1984, at A7, col. 1 ("Lane County Assistant District Attorney David Nissman failed to file a report by Tuesday's 5 p.m. deadline.").

[290] Evenson, *supra* note 279, at A1, col. 4.

[291] *Id.*

Much as opportunity brought David Nissman to Oregon, so also it later took him to the Virgin Islands. By 1987 he had settled in St. Croix, where he served as an Assistant United States Attorney.[292] Four months later, the talented and ambitious prosecutor became Chief Assistant United States Attorney for the area.[293]

Judge Norblad continued to take things slowly after the primary, at first giving little or no thought to the general election. Still, his health had improved and he vowed, in time, "to aggressively go after the election."[294]

Then there was Hans Linde. News of the primary results was just surfacing in the Wednesday morning papers when Linde boarded a plane for Washington, D.C. to participate in a conference of the Council of the American Law Institute. Unlike his Salem opponent, the seven-year veteran was all too prepared for what was to come.

* * * *

May 1984 was drawing to a close and a summer of campaigning lay ahead. The first part was over, the second part about to begin. The reader may now pause and say, with Jonathan Peachum in Bertolt Brecht's *Three Penny Opera*, "to this point we have come."[295]

[To be continued . . .]

---

[292] *See Six Arrested for Thefts in Hurricane-Ravaged St. Croix*, UPI, Oct. 5, 1989, *available in* LEXIS, Nexis Library, UPI File (regional news, Florida).

[293] Telephone conversation with David Nissman (Aug. 1, 1991). *See generally*, Navarro, *Years Later, St. Croix is Coming Back and Trying to Bring Tourists with It*, N.Y. Times, Sept. 23, 1990, § 1, at 26, col. 1.

[294] *Norblad Says Way Cleared for Court Race*, Daily Courier (Grants Pass), May 18, 1984, at C1, col. 1.

[295] B. Brecht, *The Threepenny Opera* (English book by D. Vesey, English lyrics by E. Bentley, Grove Press: N.Y., 1964).

APPENDIX A

COMMITTEE TO RE-ELECT JUSTICE HANS LINDE

George H. Fraser
CHAIRMAN

Henry Breithaupt
TREASURER

Karen C. Allan, Medford
Bruce H. Anderson, Eugene
Rex E. H. Armstrong, Portland
Peter L. Barnhisel, Corvallis
Cliff S. Bentz, Ontario
Marc Blackman, Portland
Robert D. Boivin, Klamath Falls
Ralph Bolliger, Portland
Brian G. Booth, Portland
Bobby B. Bouneff, Portland
James M. Brown, Salem
Charles D. Burt, Salem
Richard A. Cantlin, Jr., Portland
Clifford N. Carlsen, Portland
Mildred Jean Carmack, Portland
Wilford K. Carey, Hood River
Willard K. Carey, La Grande
Phil Cass, Jr., Eugene
Lavinia G. Churchill, Portland
James H. Clarke, Portland
Raymond J. Conboy, Portland
Des Connall, Portland
George H. Corey, Pendleton
William D. Cramer, Burns
Willard L. Cushing, McMinnville
William V. Deatherage, Medford
Paul J. De Muniz, Salem
Donald A. Dole, Roseburg
Robert D. Durham, Portland
John R. Faust, Jr., Portland
Valerie Fisher, Portland
John E. Frohnmayer, Portland
William F. Frye, Eugene
G. Ness Matthew Gabay, The Dalles
Jack A. Gardner, Eugene
J. Anthony Giacomini, Klamath Falls
Vernon D. Gleaves, Eugene
Neil E. Goldschmidt, Portland
John W. Gould, Portland
Susan P. Graber, Portland
Michael E. Haglund, Portland
Douglass M. Hamilton, Portland
David W. Hantke, Tillamook
Edward C. Harms, Jr., Springfield
James P. Harrang, Eugene
Wayne Hilliard, Portland
Orlando J. Hollis, Eugene
Stephen T. Janik, Portland
Bernard Jolles, Portland
Dennis C. Karnopp, Bend
Roy Kilpatrick, Mt. Vernon
Sidney I. Lezak, Portland
Dennis J. Lindsay, Portland
Stanton F. Long, Salem
W. F. Lubersky, Portland
James C. Lynch, Lakeview
Robert C. Macdonald, Astoria
Don H. Marmaduke, Portland
Malcolm F. Marsh, Salem
Robert T. Mautz, Pendleton
Paul R. Meyer, Portland
Hardy Myers, Jr., Portland
J. F. Ouderkirk, Newport
Charles P. A. Paulson, Portland
Agnes M. Petersen, St. Helens
James E. Petersen, Bend
Frank H. Pozzi, Portland
George H. Proctor, Klamath Falls
Timothy V. Ramis, Portland
Joe B. Richards, Eugene
Robert G. Ringo, Corvallis
Leslie M. Roberts, Portland
Martha J. Rodman, Eugene
Steven R. Schell, Portland
Louis F. Schultz, Grants Pass
John L. Schwabe, Portland
Willard C. Schwenn, Hillsboro
Kenneth E. Shetterly, Dallas
Bruce E. Smith, Eugene
Raul Soto-Seelig, Portland
Ruth M. Spetter, Portland
Richard S. Springer, Portland
Martin E. Stone, Coquille
Leslie M. Swanson, Jr., Eugene
Nancy Tauman, Oregon City
Stephen N. Tiktin, Bend
Wayne A. Williamson, Portland
Donald R. Wilson, Portland
Lyndon A. S. "Tuck" Wilson, Tualatin
Morton A. Winkel, Portland
Fred A. Yeck, Newport

APPENDIX B

JUDGE ALBIN W. NORBLAD
FOR
SUPREME COURT POSITION #1

CAMPAIGN COMMITTEE

J. Wallace Gutzler
CHAIRMAN

M.L. Mullennex
TREASURER

John Bradley
Joseph E. Burns
Lucian Carson
William C. Crothers
Carl Davis
Don A. Dickey
Paul A. Ferder
Norman W. Frink, M.D.
Paul Hurd
William Kennedy
David Logan
Ben (Kip) Lombard, Jr.
Michael S. Loy
Con Lynch
Melvin Mark, Jr.
George W. McLean, Jr.
Rebecca Mullen
Mrs. Paul Patterson
Anne Pavelek
Gerry Pavelek
Paul Pohlen
Daryl M. Pulley
John C. Ray
Kathy Schuld
Lorraine Schuld
Fernando Smith
Mrs. Fernando Smith
Harry Steinbock
Dr. William Schantz
Roberta Thompson
Charles H. Turner
John G. Vandenberg, M.D. (Ret.)
Marilyn Moylan Wall
Wendell Wyatt
Jean Young

APPENDIX C

NISSMAN FOR JUSTICE COMMITTEE

Richard Mullen
TREASURER

LAWYERS FOR NISSMAN

H. Thomas Anderson, Eugene
David L. Atkinson, Eugene
Charles Ball, Portland
Dan Barkovic, Salem
Brian R. Barnes, Eugene
John A. Bennett, Portland
Charles L. Best, Portland
Jeff Blixt, Medford
Frank Bocci, Eugene
Jane Bolin, Eugene
John C. Bradley, Portland
Ron Brown, Bend
Paul Burgett, Coquille
Richard Busby, Portland
David L. Bussman, Portland
Edwin Caleb, Klamath Falls
Patrick K. Callahan, Portland
Jason Carlile, Albany
Errol Carlsen, Portland
John D. Colby, Portland
John Collins, McMinnville
Craig Coyner, Bend
Lewis W. Dahlin, Medford
Carl Davis, Portland
Jacques A. Dekalb, Vale
Robert Dewey, Medford
Don Dickerson, Eugene
John Duerst, Coquille
Charles Duncan, Eugene
Roy Dwyer, Eugene
Kirk Engdall, Albany
Doug Engle, Medford
Ray English, Moro
Gene Farmer, Grants Pass
Kenneth N. Feldman, Eugene
Dennis Fennell, Bend
Steve Fogelson, Pendleton
Robert Foltyn, Klamath Falls
Charles French, Portland
Norman W. Frink, Portland
Jackson L. Frost, Albany
John Fussner, Springfield
John D. Gardner, Portland
Hugh V. Garrabrant, Hood River
Foster Glass, Canyon City
Peter Glazer, Lake Oswego
Robert C. Gorham, Eugene
Thomas P. Greerty, Eugene
Edward I. Hagen, Jr., Eugene
Duane Halbleis, Dallas
Terrence Hammons, Eugene
Don H. Haller, III, Astoria
Douglass F. Harcleroad, Eugene
Fred Hartstrom, Eugene
Thomas A. Hermans, Eugene
John K. Hoover, Portland
J. Pat Horton, Eugene
Larry K. Houchin, Albany
Tom Howes, Bend
Mark Huddleston, Medford
Frederick A. Hugi, Eugene
Greg Hunt, Eugene
Paul Hurd, Portland
John Ingman, Eugene
Roger J. Isaacson, Klamath Falls
Jennifer Jacobs, Portland
Jennifer James, Portland
Clay Johnson, Grants Pass
Karon V. Johnson, Portland
Douglas Johnson, Baker
Jeffrey S. Jones, Portland
William S. Juba, Medford
Janet Klapstein, Portland
Daniel Koenig, Eugene
Charles M. Kokes, Portland
Joe Kosydar, Eugene
Lou Kurtz, Eugene
Darryl Larson, Eugene
Fred Lenszer, Portland
Kip Leonard, Eugene
Richard Levin, Eugene
Henry Loebe, Dallas
Kathryn Logan, Albany
Gregg A. Lowe, Portland
Joshua K. Marquis, Eugene
George McLean, Portland
Keith E. Meisenheimer, Portland
James Miller, Bend
John Miller, Salem
David Mills, Eugene
Mickey Morey, Portland
Richard S. Mullen, Eugene
Robert Naslund, Eugene
Judy Neuman, Newport
Robert F. Nichols, Lakeview
Kenneth Osher, Corvallis
James Palmer, Eugene
Jennifer Palmquist, Portland
Frank R. Papagni, Jr., Eugene
Kathleen Payne-Pruitt, Portland
Wayne C. Pearson, Portland
Stephen Peifer, Salem
David Peters, Hillsboro
Paul Pohlen, Portland
Daryl Pulley, Portland
John R. Ratto, Portland
John Ray, Portland
Daniel R. Remily, Albany
Peter J. Richard, Klamath Falls
Stephen Rickles, Portland
Peter Sandrock, Corvallis
Michael Schrunk, Portland
John T. Sewell, Newport
Barry Sheldahl, Portland
Paul Silver, Portland
James F. Simpson, Portland
Eileen Simpson, Eugene
Steven M. Skelton, Eugene
Robert Smejkal, Eugene
Bernard L. Smith, The Dalles
Irvin D. Smith, Burns
Justin M. Smith, Medford
Les Smith, Portland
Norm Smith, Portland
Robert Smith, Eugene
Alan M. Spinrad, Portland
Ulys J. Stapleton, Newport
William Stater, Eugene
Michael Sullivan, Madras
Sally Tebbett, Hood River
Gary Thompson, Prineville
Robert Thompson, Grants Pass
Tim Thompson, Grants Pass
Mary A. Tomlinson, Portland
Betsy Trainor, Portland
Charles H. Turner, Portland
Dennis Ulsted, Eugene
Scott Upham, Hillsboro
Eric Wasmann, Newport
Stan Wax, Portland
Fred N. Weinhouse, Portland
David White, Hillsboro
Alexander Wold, Eugene
Pat Wolke, Condon
Bette G. Yada, Portland

APPENDIX D

REMARKS OF JUSTICE HANS A. LINDE
TO
LANE COUNTY BAR ASSOCIATION
EUGENE, APRIL 23, 1984

It is always a pleasure to be back with you in Eugene.

You know that I spent 18 years of my professional life here before I joined the Supreme Court seven years ago. So I will not take this time to tell you who I am, what I have done, and what I do now, beyond saying that it is a privilege to serve the people of this state on the Court, that I do so to the best of my ability, and that I hope for your support to continue doing it.

One of my opponents says that I do not express myself plainly. I shall speak plainly.

There is a reason for concern about one kind of campaign that is being waged against judges this year. It seeks to import single-issue politics into Oregon judicial elections by shrill and false attacks on court decisions. It is a disservice to the public, and it could in time endanger judicial independence as we know it. Oregon's system of electing judges has worked because candidates traditionally have offered the public their qualifications, their knowledge, their experience, and their integrity. My opponent, Mr. Nissman, either does not yet understand the Oregon tradition or he rejects it. He is running against the Supreme Court. And he is not above misleading the public with some pretty wild statements.

Let me cite chapter and verse.

1. Mr. Nissman attacks me around the state because, in his words, I "voted to throw out the death penalty." Of course, that is not what happened, you as lawyers know.

The Supreme Court unanimously found that the initiative measure was so badly drafted that it deprived a person of the right to have a jury decide an essential fact in his case. Justice Tanzer's opinion said: "The novel and constitutionally impermissible provision of ORS 163.116 is that it places responsibility for fact finding as to the greater mental state with the judge, not the jury. . . ." The measure would have been equally invalid if the penalty were a year in the county jail instead of death.

Mr. Nissman knows this. But he cannot resist capitalizing on the death penalty issue even at the cost of misleading people about the law and about their Supreme Court.

2. Mr. Nissman says that we "threw out" a law against obscene phone calls because "it violated the defendant's freedom of speech." That is false. The statute did not refer to obscene messages. Rather, it made illegal any communication "likely to cause annoyance or alarm," and the Court held without dissent that those broad words covered too much ground. The decision did not rest on anything concerning the defendant in that case.

3. Mr. Nissman accuses me of "restricting crime victims' restitution rights." I think he refers to an unanimous decision written by Justice Tanzer interpreting a 1977 statute. We are judges, not legislators. If Mr. Nissman thinks the statute should be amended, he can suggest improvements to your excellent Lane County legislators rather than attacking the Supreme Court.

4. In another unanimous opinion for the Court, Justice Jones wrote that a certain statute "does not authorize a sentencing judge to speculate what the exact life span of any given person will be" in order to imprison that person for one-half of his remaining life. This common sense decision is turned into an attack on me for "voting to eliminate minimum mandatory sentences for murderers."

5. In another unanimous decision, the Court held that the law does not permit police officers intentionally to prevent an attorney from reaching a suspect. That seems pretty basic. But Mr. Nissman, once again, distorts the decision as a case in which a confession was excluded because "unbeknownst to the murderer, his accomplice had hired an attorney for him." That description is simply false. The circuit judge had found that police officers intentionally took the defendant away from the Springfield jail to prevent the attorney from reaching him. You will agree that is a very different story.

I shall spare you more of the same.

This candidate boasts of his six years of experience since graduating from law school. The unanimous decisions that he attacks reflect a total of some 200 years of professional experience and 80 years of judicial service, among the seven present justices on the Supreme Court, four of them former trial judges. Yet he has the gall to say that unless he is elected, we shall have vigilante justice in the streets.

Speaking of my own opinions, Mr. Nissman has diametrically misrepresented the views I have expressed, which anyone can read.

I hate to think that he teaches his students to brief cases the way he does.

Should we ignore such distortions as a bit of immature exuberance, or as harmless political exaggeration? I suppose some observers are hardened to this kind of thing in ordinary political races, and some tend to dismiss crucial legal distinctions as technicalities. But these are not casual bits of hyperbole in stump speeches. They are carefully phrased and repeated in Mr. Nissman's statements throughout the state. They will be sent to every registered voter in his Voters Pamphlet statement. That is irresponsible.

Oregon voters are not used to having a judicial candidate tell them half truths and clever distortions about their courts in the Voters Pamphlet. Oregonians pretty much escape demagoguery in any race, let alone a judicial campaign. The voters have no means to judge the falsity of these attacks for themselves.

It is not all bad news. Mr. Nissman allows that Professor Linde "is a bright guy and he means well," he just is "out of touch with reality" and can't write. For instance, Mr. Nissman could have written the decision on the WPPSS contracts in 10-15 pages. Luckily, according to him, I do not work hard, because I am a "great political operative" who is to blame for all those opinions by other justices.

There's his profile of the Justice whom Lane County sent to the Supreme Court: A lazy, impractical master politician who has mesmerized a Court that includes former prosecutors, legislators, trial lawyers and circuit judges into doing his bidding. I hope you recognize me.

Could it be that what we do is to follow the law?

Mr. Nissman is not running in just another political race, though he wants to turn it into that. He claims that he should serve on the Supreme Court. You may consider whether you want to submit your briefs to someone with Mr. Nissman's view of legal reasoning. You may also consider that the Supreme Court is where the professional ethics of attorneys must be judged in 20 or 30 cases a year.

Let me close on a positive note.

The Oregon Supreme Court had an excellent nationwide reputation long before I came to Salem. Some of the credit belongs to K. J. O'Connell, who earlier came from the University faculty, and whom I was proud to follow. I think the Court, and the state, can take pride that its opinions are found in national law school casebooks, instead of apologizing for them. Despite the rapid turn-

over that now has made me one of the two longest-serving justices, the members of the Court continue to work well together and usually reach unanimity on most opinions, even if it takes time and several drafts.

One essential reason is that the Oregon courts have not become a political football as has happened in some states. That tradition will be important long after my colleagues and I are gone. I hope we can keep it.

NOTE:

The cases referred to are (1) State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981); (2) State v. Macy, 295 Or. 738, 671 P.2d 92 (1983); (3) State v. Blair, 287 Or. 519, 601 P.2d 766 (1979); (4) State v. Dillon, 292 Or. 172, 637 P.2d 602 (1981); (5) State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980).

APPENDIX E

VOTER'S PAMPHLET, 1984 PRIMARY
HANS A. LINDE

OCCUPATION: Judge, Supreme Court of Oregon.

OCCUPATIONAL BACKGROUND: Attorney admitted to Oregon Bar, 1951. Professor of Law, University of Oregon, and visiting professor at other law schools, 1959-76. Arbitrator in numerous labor disputes, 1962-75. Oregon Supreme Court Justice since 1977.

EDUCATIONAL BACKGROUND: University of California School of Law; Reed College; Lincoln High School, Portland.

PRIOR GOVERNMENTAL EXPERIENCE: Law Clerk to U.S. Supreme Court Justice, 1950-51. Attorney, U.S. State Department, and Adviser to U.S. Delegation to United Nations, 1951-53. Legislative Assistant to U.S. Senator Richard Neuberger of Oregon, 1955-58. Member, Oregon Constitutional Revision Commission, 1961-62. Member, Administrative Conference of the United States, 1978-82. Seven years' experience on Supreme Court of Oregon.

JUSTICE LINDE IS A LONG-TIME OREGONIAN

Justice Hans Linde has been an Oregonian for 45 years. His father was an attorney in Portland. Justice Linde went to school and college there, earning his way by factory and shipyard jobs. He served in the U.S. Army in Europe during World War II.

Justice Linde and his wife Helen have been married 38 years and live in Salem. They have two grown children, Lisa and David.

JUSTICE LINDE IS PROFESSIONALLY DISTINGUISHED

Justice Linde has achieved national distinction both before and after becoming a judge. In his 18 years as a law professor, he specialized in constitutional law and administrative law. He also taught criminal law and labor law. Over 1,000 Oregon lawyers took his courses.

As a judge, Justice Linde's opinions have been cited in casebooks and by courts across the country. His accomplishments were recognized by election to the national Council of the American Law Institute.

JUSTICE LINDE ENFORCES OREGON'S LAWS

Justice Linde is a recognized leader in enforcing Oregon's constitution and laws. His firm, impartial devotion to the rule of law is

widely respected. He is supported by former prosecutors like Jim Brown, Des Connall, Dick Forcum, Bill Frye, John Leahy, Sid Lezak, Francis Linklater, Louis Selken, and R.P. (Joe) Smith.

JUSTICE LINDE IS AN EXPERIENCED AND EFFECTIVE JUDGE

Justice Linde was appointed by Governor Straub in December 1976 and was elected by the people in May 1978. He is now one of the two judges with the longest experience on the Supreme Court of Oregon.

Justice Linde is a hard working and productive judge. His work combines legal scholarship with mature judgment, practical experience and common sense. Arno Denecke, retired Chief Justice who presided over the Supreme Court during five years of Justice Linde's service, says: "Justice Linde is a very hard working member of the Court, both on opinions assigned to him and on all court business."

The Supreme Court is the highest court in Oregon. Its decisions are made collectively, not by individual judges. Since the legislature transferred most appeals to the Court of Appeals in 1978, the Supreme Court decides far fewer but more difficult cases. Important issues on which the Court's opinion was assigned to Justice Linde include:

— Standards for police and firefighter benefits consistent with city home rule.
— Tenants' damage claims for substandard housing.
— Unconstitutionality of the 1981 reapportionment that left westside Portland without a state senator.
— Civil damages for battered spouse when protective order is not enforced.
— Unconstitutionality of requiring local governments to ratify proposed sales tax amendment.

JUSTICE LINDE HAS BROAD SUPPORT

This year, as in 1978, Justice Linde is supported by lawyers throughout the state and by many other community leaders and citizens. He has bipartisan support from Oregon's political leaders, including U.S. Sen. Mark Hatfield, U.S. Reps. Jim Weaver and Ron Wyden, State Labor Commissioner Mary Wendy Roberts, former U.S. Reps. Edith Green and Bob Duncan, former U.S. Sen. Maurine Neuberger, former Portland Mayor Neil Goldschmidt, former House Speaker Hardy Myers and many other state legislators.

Though they differ on many issues, they unite in urging that Justice Linde be re-elected to the Supreme Court of Oregon.

RE-ELECT AN OUTSTANDING JUDGE

Justice Hans Linde has a proven record: 30 years of able, dedicated service to the people of Oregon, including seven years' work on the Supreme Court. His maturity and impartiality qualify him to serve six more years on our highest court. He has earned your continued trust and support.

APPENDIX F

VOTER'S PAMPHLET, 1984 PRIMARY
DAVID M. NISSMAN

OCCUPATION: Attorney.

OCCUPATIONAL BACKGROUND: 1975: Managing Editor, OBF Magazine. 1976-84: Lane County District Attorney's Office: Major felony trials, career criminal division, civil litigation, police agencies' advisor. 1978-84: Adjunct Professor, University of Oregon Law School. Authored "Beating the Insanity Defense" (1980) and "The Prosecution Function" (1981). Commercial fishing business, central Oregon coast.

EDUCATIONAL BACKGROUND: Doctor of Jurisprudence, University of Oregon School of Law. Bachelor of Arts, magna cum laude, Emory University.

PRIOR GOVERNMENTAL EXPERIENCE: 1978-84: Prosecutor, Lane County, Oregon; 1981-83: Member, Legislative Task Force, Oregon District Attorneys' Association.

DAVID NISSMAN has been endorsed by the OREGON COUNCIL OF POLICE ORGANIZATIONS, THE LEGISLATIVE COMMITTEES OF THE OREGON POLICE CHIEFS AND THE OREGON PEACE OFFICERS ASSOCIATION, THE MULTNOMAH COUNTY SHERIFF'S ASSOCIATION, CRIME VICTIMS UNITED, hundreds of Oregon lawyers and District Attorneys, and the OREGON FARM BUREAU.

A CRITICALLY IMPORTANT JUDICIAL RACE FOR OREGONIANS: The Supreme Court is responsible for seeing courts run efficiently, that people are treated fairly and victims of criminal and civil wrongs receive justice. Oregonians have a right to expect hard work and common sense from their Supreme Court Judges.

DAVID NISSMAN WORKS HARD TO PROTECT YOUR RIGHTS: A vote for David Nissman is a vote for hard work and expert legal knowledge. He stands behind his record of prosecuting major crimes and protecting the rights of crime victims. Nissman is a trial lawyer with past experience in the business community. As a prosecutor, David Nissman has never represented special interest groups and owes no political debts.

An adjunct professor at the University of Oregon, David Nissman has personally trained many of this state's trial lawyers. He has written two critically acclaimed legal books and is a nationally respected expert who has advocated reform of our over-used in-

sanity defense laws. Nissman has accomplished in a short period of time, more than most lawyers and judges have in a lifetime. He will bring vigor, hard work, and dedication to the state's most important court.

THE INCUMBENT IS OUT OF TOUCH WITH OREGONIANS: The incumbent has been a major disappointment to Oregonians. All too often his major concern has been for the criminal, not the crime victim. He has voted for decisions striking mandatory minimum sentences for murderers, restricting crime victims' restitution rights, limiting sentences for rapists and creating new rights for drunk drivers. He wrote a decision throwing out an Oregon law that made obscene phone calls a crime, arguing it violated the defendant's freedom of speech.

In another case, police had fully informed a dismemberment murderer of his rights to remain silent, and to a lawyer at public expense. The murderer told police that he did not want a lawyer, and freely confessed to the crime. The incumbent wrote a decision throwing out the confession because, unbeknownst to the murderer, his accomplice had hired an attorney for him.

The incumbent has taken a consistent stand against justifying searches by legitimate concerns for officer safety. The results have been that important evidence gets excluded because of technical rules. He has voted to strike down the death penalty, adopted overwhelmingly by Oregon voters, and has interfered with our constitutional right to initiate legislation by popular vote.

Nissman's opponent has used his judicial office to write personal political beliefs into law and has refused to discuss this issue with the Oregon voters.

OREGONIANS DESERVE A FULL-TIME JUDGE: Justice delayed is justice denied. American Bar Association Standards call for opinions to be published no later than 90 days after oral arguments. Litigants often wait eight to eleven months for the incumbent's opinions. He rarely missed an opportunity to reverse administrative board decisions. The result: litigants wait a year for Linde's decision and are told to start all over again, driving the court costs sky high.

The incumbent chose a period when the Court was short-handed to take a winter leave to teach in a sun belt school, saying he needed time to "think systematically." The SALEM *Statesman-Journal* observed "In our judgment, Linde owes it to the state to defer his

teaching leave." (November 18, 1982) He was gone for four months.

On other occasions, brother judges have written separate opinions taking the incumbent to task for delayed decisions. In one case, a judge was moved to exclaim "this is no way to run a railroad." More and more Oregonians agree.

In addition to his writing and teaching, Nissman has tried hundreds of cases. His expertise in the area of criminal law will improve the composition of our Supreme Court. Nissman is the only candidate, judges, lawyers and police agencies call upon to bring them up to date on criminal procedure issues. He has lectured for the Oregon Law Institute, the District Court Judges Association, and the Board on Police Standards and Training. Dave lives in Eugene with his wife, Susan.

VOTE FOR HARD WORK AND COMMON SENSE.

ELECT DAVID MARSHALL NISSMAN
SUPREME COURT JUDGE, POSITION 1

APPENDIX G

VOTER'S PAMPHLET, 1984 PRIMARY
ALBIN W. NORBLAD

OCCUPATION: Circuit Court Judge.

OCCUPATIONAL BACKGROUND: Circuit Judge, 1977 to present; District Judge, 1973-77; Attorney, private practice, 1969-73; Municipal Judge, Sublimity and Jefferson, 1970-73; Deputy District Attorney, 1966-69; Clerk, Federal District Judge, 1965-66.

EDUCATIONAL BACKGROUND: B.S., University of Oregon, 1963; J.D., Willamette University, 1965; Graduate, National College of State Judiciary; Admitted to Oregon State Bar, 1965. Also licensed to practice U.S. District Court—Oregon, U.S. Ninth Circuit Court of Appeals, U.S. Supreme Court.

PRIOR GOVERNMENTAL EXPERIENCE: Member, Governor's Task Force on Juvenile Corrections.

JUDGE ALBIN NORBLAD — AN 11-YEAR RECORD OF DISTINGUISHED SERVICE

Judge Albin Norblad is one of Oregon's most respected jurists.

He has served Oregon as a full-time working judge for 11 years and has been widely praised for the conduct of his Court.

As one observer put it: "While Judge Norblad retains the highest regard for judicial tradition, he has been unusually innovative and makes the system work to the benefit of the people."

The record proves the truth of the commendation. As Judge he has the best record in Oregon for collecting restitution for victims of crime. Guilty offenders know that Judge Norblad will demand they pay for their offenses, repay damage to their victims, and not slip away with the proverbial "slap on the wrist."

JUDGE NORBLAD — "IMAGINATIVE, ENLIGHTENED"

According to figures from the State of Oregon Analysis of Criminal Offenses & Arrests in 1976 in his jurisdiction a total of 43 percent of all arrests were juvenile. By 1982 only 25 percent were juveniles.

Observers of the system say such figures clearly point to the effectiveness of Judge Norblad's no-nonsense approach and that his even-handed firmness became, in the final analysis, a deterrent to crime.

He is credited with developing some of the most enlightened programs of rehabilitation in the state. He has been commended for his

imagination and resourcefulness in bringing private and public organizations together to work effectively.

Even during recent bad economic times Judge Norblad has doubled support collections for spouses and their children.

His handling of domestic relations cases is equally impressive. Judge Norblad's Court is responsible for a substantial increase in the reporting of physical and sexual abuse, neglect, and child abuse.

Judge Norblad is often asked to share his views at symposiums and legal gatherings. He has been a guest lecturer at Lewis and Clark College, Portland State University, Oregon Association of School Administrators, Western Oregon State College, and Willamette University.

JUDGE NORBLAD — "EXPERIENCED AND LOGICAL"

Few people have broader or better Courtroom experience than Judge Albin Norblad. After service as Clerk for a Federal District Judge, he became a Deputy District Attorney, then Municipal Judge, and following a period in private practice was elected District Judge and later Circuit Court Judge.

Through this wide experience Judge Norblad developed the legal skills which made him a logical choice for the Oregon Supreme Court. A vigorous person, he will carry his share of heavy workloads and help keep Court dockets current.

HERE'S WHAT OTHERS SAY ABOUT JUDGE NORBLAD

"Speed and clarity have given the Court (Judge Norblad's) a forceful reputation, without sacrificing the perception of fairness."

"In terms of due process . . . the performance of the Court . . . is excellent."

U.S. Dept. of Justice—LEEA Program Evaluation, July 15, 1981.

"That's because Norblad, elected by the voters to his present post, is widely perceived in the community to have been effective in curbing crime . . . "

Statesman-Journal (Salem), August 14, 1983

"Judge Norblad makes juveniles responsible to the victims of their crimes. Restitution payments by juveniles have increased 200 percent since 1976."

Daily Astorian (Astoria), August 17, 1978

" . . . behind this tremendous drop in juvenile crime statistics is (Judge) Norblad's tough, no-nonsense policies as well as his commitment to certain, speedy justice for offenders."

Mail (Stayton), January 24, 1980

"But Norblad . . . can point with pride to an impressive list of statistics that seems to show that his stern expectations, reorganized department and innovative programs are working."

Oregon Journal (Portland), February 11, 1982

"We think Judge Al Norblad and his solid staff are doing an outstanding job . . ."

Appeal Tribune (Silverton), April 19, 1979

" . . . (Judge Norblad's Court) is also praised by Salem Police Chief Roy Hollady and other law enforcement officials for its strong backbone."

The Oregonian (Portland), February 2, 1981

" . . . judicial candidate Albin Norblad promised to get tough with juvenile offenders and realize community benefit in dealing with them. Norblad was elected and he kept his promise."

Independent (Woodburn), June 9, 1982