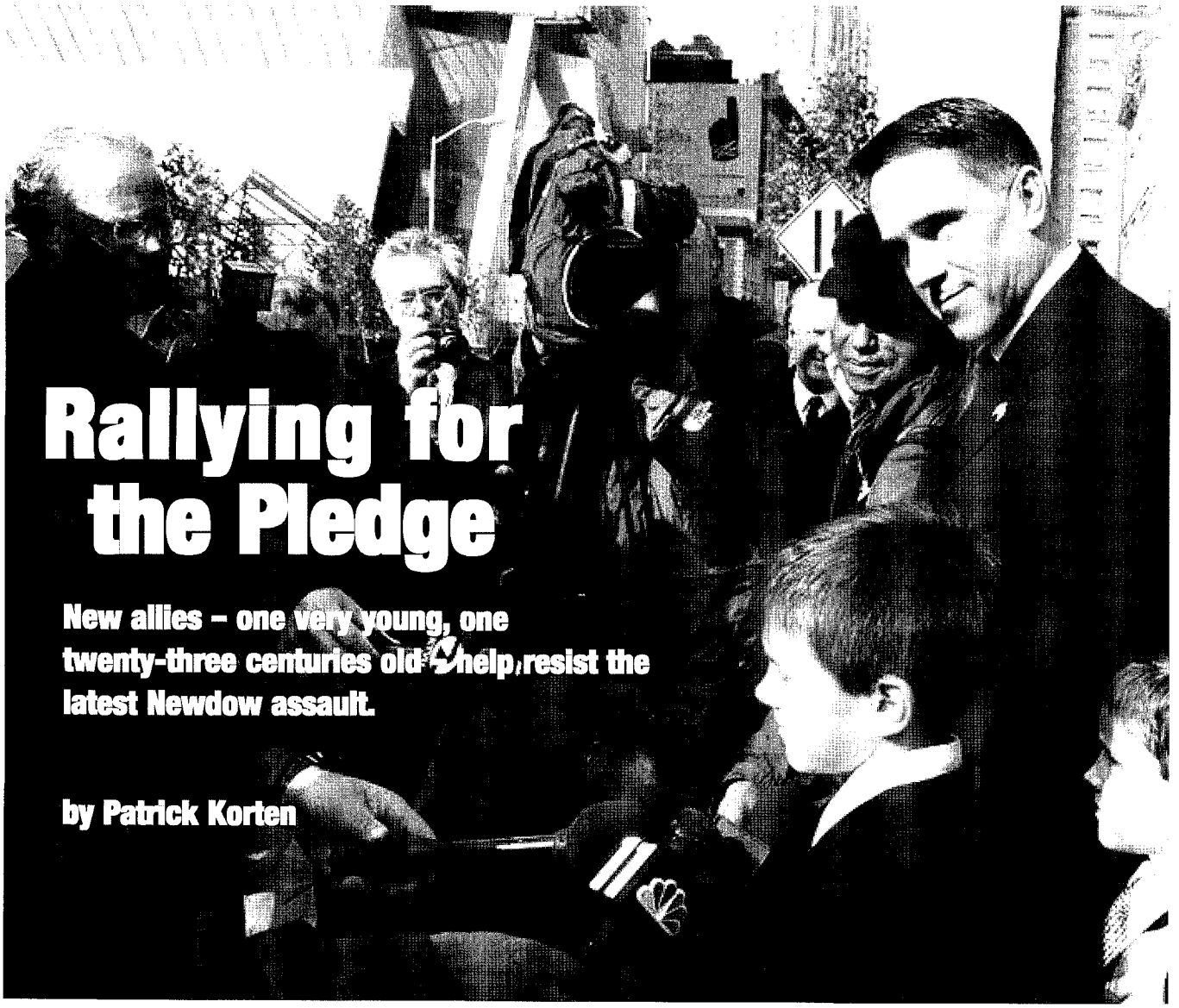


Rallying for the Pledge

New allies – one very young, one twenty-three centuries old – help resist the latest Newdow assault.

by Patrick Korten

BRENDEN CAREY MEETS THE PRESS.

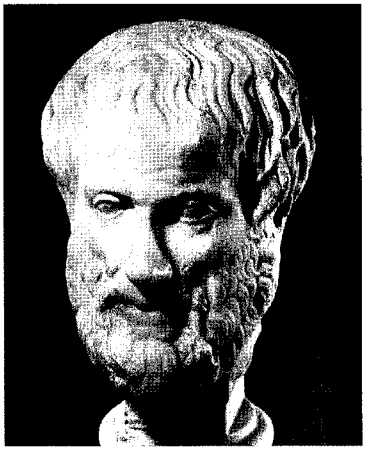
In a remarkable coincidence, Aristotle, the ancient Greek philosopher — twenty-three hundred years after his death — may wind up at the center of two separate events, both very important, occurring at about the same time: an historic meeting between Pope Benedict and a group of Muslim scholars in Rome and a decision handed down by the U.S. Ninth Circuit Court of Appeals in San Francisco.

The Rome meeting will search for common ground between Christianity and Islam, and on the surface there is precious little com-

Patrick Korten, former director of public affairs for the U.S. Department of Justice under President Ronald Reagan, is vice president for Communications, Knights of Columbus.

mon ground to be had. But during what is often referred to as Islam's "Golden Age" of intellectual and scientific accomplishment, Muslim philosophers studied Aristotle and wrote learned commentaries about his thought. Two of the most famous philosophers in Islam's history, known in the West as Averroes (Abul Walid Muhammad Ibn Ahmad Ibn Rushd) and Avicenna (Abu Ali al-Husayn ibn Abd Allah ibn Sina), drew heavily from Aristotle in their work, and in turn influenced the work of Christian theologians and philosophers, especially Thomas Aquinas. The Pope hopes that his dialogue with the Muslim scholars can draw on that common heritage.

And, perhaps even more remarkably, Aristotle may well turn out to transform the way American courts view the words "under God" in the Pledge of Allegiance and other similar references in America's foundational documents and philosophy of government. Oral argument before a Ninth Circuit panel December 4 — in *Newdow vs. Carey* (doctor/lawyer/atheist/non-custodial parent Michael Newdow's latest assault on references to "God" on the nation's currency and in the Pledge of Allegiance) — raised and considered in some detail a genuinely new issue in these types of First Amendment cases: the question of Aristotle's "god of the philosophers" — the Supreme Cause or Unmoved Mover that Aristotle postulated. Not that the justices engaged in philosophical speculation about Aristotle's ideas; rather, they considered the point that here is a God not dependent upon or growing out of any specific religion — certainly not Christianity, Judaism, or Islam (although Aristotle has influenced all three) — but from philosophy: the "philosophers' God," and that *this* God is referred to in the American Declaration of Independence, Pledge, and dozens of other references. That discussion before the Ninth Circuit panel holds enormous potential for advancing the national debate on the First Amendment.



ARISTOTLE

RIGHT AT HOME

The December hearing, however, as it began, showed little promise of providing anything new. Actually, although Groundhog Day was still two months away, Bill Murray would have felt right at home. Judge Stephen Reinhardt was in his customary spot, presiding over yet another examination of the First Amendment's religion clauses' meaning. And Newdow was in *his* customary spot, at the plaintiff's table, preparing once again to serve as his own lawyer in a pair of cases seeking to remove references to "God" from the nation's currency and from the Pledge of Allegiance.

The courtroom was filled with Newdow groupies, and while we waited for the hearing to begin, several of them engaged in a spirited discussion of the Scopes *monkey trial.*

Newdow may or may not have a fool for a client, but he gives no impression of being concerned about the matter. He is a dour, intense, and relentless man, robbed of a clear decision on the Pledge when the Supreme Court ruled in 2004 that he lacked standing to bring his original case, now back with a co-plaintiff whose custody of "Roe child two" is unquestioned, and determined to get a decision on the merits this time around.

The courtroom was filled with Newdow groupies, and while we waited for the hearing to begin, several of them engaged in a spirited discussion of the *Scopes* monkey trial. For them, the latest cases are nothing more than a replay of the Clarence Darrow-William Jennings Bryan courtroom debate over the teaching of evolution back in 1925, and pledging allegiance to "one nation under God" is no more rational than a law prohibiting

the teaching of evolution (the issue in *Scopes).* It would shortly become apparent that Judge Reinhardt was inclined to see things in much the same way.

The opening hour was given over to a discussion of Newdow's challenge to putting the words "In God We Trust" on the nation's currency. His argument that it was simply intolerable to be forced, as an atheist, to use money proclaiming trust in God every time he paid for something was unenthusiastically received by the court. (One waited in vain for a suggestion that in the modern age, he could simply use a debit card emblazoned with "Bank of America" rather than "In God We Trust.")

Then it was on to the main event, *Newdow vs. Carey.* It is, by the way, the case caption, or title, that first indicates something different about this latest Pledge challenge. John Carey is a Knight of Columbus whose children attend school in Elk Grove, just outside Sacramento (The caption of the earlier case was *Elk Grove Unified School District v. Newdow).* John and Adrienne Carey and their son Brenden (a handsome family, watching intently this morning from the front seats) are among seven families of Knights who entered the case as "defendant interveners" shortly after Newdow filed his renewed challenge to the Pledge in January 2005. They and the Supreme Council of the Knights of Columbus are represented by The Becket Fund for Religious Liberty, a public interest law firm based in Washington, D.C., known for its skillful handling of complex First Amendment religion clause cases (full disclosure: I served formerly as the Fund's vice president for communications).

The Becket Fund asked the district court to allow the Knights to intervene because the Order had led the campaign in the early 1950s to add the words "under God" to the Pledge.* Judge Lawrence Karlton granted the Becket Fund motion to intervene, and captioning conventions being what they are ("Carey" comes before "Elk" alphabetically); the case became *Newdow v. Carey.* And it is the Knights' intervention that set the stage for what may turn out to be the most consequential new twist in the case, potentially changing the way the courts interpret the meaning of the word "God" in this setting.

AVICENNA

Five and a half years ago, when it ruled on the first Newdow case, the Ninth Circuit held that in the context of the Pledge, "under God" was "a profession of a religious ... belief in monotheism" that was "identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' [or] a nation 'under Zeus'." (Judge Reinhardt was on that panel, too, but did not write the decision.) Put another way, the 2002 court said that to recite the words "under God" is to make a *theological* statement. And the latest panel was headed in the same direction, until Becket Fund President Kevin Hasson (whose degrees at Notre Dame include philosophy as well as law) took his turn at the podium and begged to differ.

AN 'UNKNOWABLE ESSENCE'

"At the time of the republic, before and after the revolution, one of the consuming questions was how we would secure our individual rights," Hasson began. "And the solution people came to was to embrace a natural rights theory ... based on a god that was the source of those rights. But it wasn't the Christian god. And it wasn't the Jewish god, and it wasn't the Muslim god. It was the *philosopher's* god ... precisely because an argument from religion alone would never do. The colonists

* Of the 17 congressional sponsors of resolutions to modify the Pledge in 1954, nine were Catholics and eight of the nine were Knights. The ninth, Louis Rabaut of New York, joined the organization the following year. They included liberal Democrats like Peter Rodino of New Jersey and Republicans like New York's William Miller, who would later be Barry Goldwater's running mate in 1964.

had seen that fail many times over: Rhode Island and Pennsylvania both failed to establish religious liberty based on a religious proposition. Because that had failed, they needed to base this philosophical argument on the philosopher's god, who could be known by reason alone."

SAINT THOMAS AQUINAS

Judge Dorothy Nelson quickly agreed. "Right, he was described as an 'unknowable essence' by some," she interjected.

Judge Reinhardt, suddenly intrigued, decided to joust a little bit.

"And is that a religious god, or a non-religious god?"

"The philosopher's god is not a religious figure for the purposes of the Establishment Clause," Hasson returned. To say that all men are endowed by their Creator with certain unalienable rights "was not just a throwaway line in the Declaration of Independence," he continued. "In May of 1776, Madison was writing the equivalent of the Bill of Rights for Virginia using natural rights theory based on the philosopher's god. Along came Jefferson, with his Declaration of Independence, doing exactly the same thing. It's not the Christian god, because this god is known philosophically. It's self-evident that we are endowed by our Creator. The argument that it's self-evident is not an appeal to scripture, or an appeal to religious authority. It's an appeal to reason."

Hasson and the Knights had made a version of the argument years earlier, in an *amicus* brief filed with the Supreme Court during the battle over the first Newdow challenge. They'd made it in the briefs filed in this case as well. But there's no substitute for being able to make the argument in person, in front of the circuit panel, looking them straight in the eye. It is nearly impossible for the judges to read all of the thousands of pages of briefs sent their way. But they must grapple with the arguments presented to them in person. Judge Reinhardt was now grappling, and the *Scopes* line of inquiry now made an appearance.

"If the world just evolved naturally and we came from fish or whatever to human beings, and it just happened through the forces of science, is that a god?"

Hasson was ready. "There are philosophers who would say that there is a causal principle behind that, and the philosopher's god would be alive and well and living in evolution."

Judge Nelson chimed in again: "You give that the name god, or Mr. X, or the creative force, or whatever ..."

Judge Reinhardt was now really intrigued. "That includes straight natural sciences, planets that were up, exploded, gasses came, the earth evolved from all those gasses, and then we went through generations of various animal species, ended up with man, those forces — natural forces — of gas, explosions, all that — that is god?"

"Your honor," Hasson replied, "however any individual believer in the philosopher's god wants to conceive of that argument, the fact remains that the philosopher's god was the god they were referring to. That's why you never see things referring to Jesus, or to Krishna, or whatever."

Reinhardt, who'd allowed the discussion to continue beyond the allotted time, finally brought it to an end. "Well, we could go on all day. This is very interesting."

THE 'BINDING PRECEDENT' ISSUE

It would be foolhardy to read too much into the exchange — so much of the work that appeals courts do is mind-numbingly dull and/or technical — and it's common for judges to delight in the rare moments when the job is just plain fun. This was certainly one of those moments.

In the Pledge case, it's also true that a pivotal threshold question is whether the 2002 Ninth Circuit decision carries any weight as a precedent since it was reversed by the U.S. Supreme Court on the narrow grounds of standing. Judge Karlton, the district judge in the current Newdow case, *did* consider it binding precedent and found the words "under God" unconstitutional on that

basis alone. Much of the oral argument offered by the lawyers for the United States and the school district focused exclusively on that issue. If the Ninth Circuit panel decides that its previous decision *is* binding precedent, it will uphold Judge Karlton on that basis and won't reach the First Amendment argument at all. Of course, that would not preclude another appeal to the U.S. Supreme Court — again, on the precedent issue.

But it's also possible that the panel will ignore the earlier decision and accept the argument that "under God" in the Pledge is a philosophical, not theological, reference and that its adoption at the height of the Cold War in 1954 was simply an affirmation that in America, we believe that, because they come from our "Creator," fundamental rights are not the government's to give or take away. Here, it's government's job to "secure" — to protect — those rights. The Soviets, of course, saw it the other way around.

Rhode Island and Pennsylvania failed to establish religious liberty based on a religious proposition. The colonists needed to base this philosophical argument on the philosopher's god, who could be known by reason alone.

Newdow was not merely ineffective in dealing with Hasson's argument, he was reckless. He tried to kiss it off in a few seconds, telling the court that "concepts concerning god or a supreme being of some sort are manifestly religious," and "do not shed that religiosity merely because they are presented as a philosophy or as a science." It might have worked, if he hadn't added, "that's from *Edwards v. Aguilard,* Justice Powell concurring."

Unfortunately for Newdow, such a statement is nowhere to be found in Powell's concurrence in the 1987 decision. In fact, quite the reverse: "I would see no constitutional problem," Powell wrote, "if schoolchildren were taught the nature of the Founding Father's religious beliefs and how those beliefs affected the attitudes of the times and the structure of our government."

A few minutes later, his luck ran out. "Mr. Newdow," Judge Reinhardt said, "give the names of cases again where it said that the argument by your opponent about the philosophical god is not correct."

"Sorry? Say that one more time?" (That's what you say when you don't have a ready answer and need a moment to think.)

"That god means religion and not a philosophical concept."

"I think that everyone interprets 'god' as meaning god ..."

"No, but you said that there were cases in which they said it's not a scientific or philosophical ..."

"In the Supreme Court?"

"Yes."

"If he said that, I missed it and I'm sorry ... and I don't know of any." (If *he* said that? No, no, Michael. *You* said that.)

DOWNWARD SPIRAL

Pretending to misunderstand Reinhardt's questions after getting caught in a lie was the beginning of a long downward spiral. Some people, it seems, can be both smart and stupid at the same time. Newdow is unquestionably smart — no one earns degrees in both medicine and law without being smart — but it has made him arrogant, and that sometimes impairs his judgment. Moreover, Newdow had no excuse for being unprepared to deal with Hasson's argument. The two have debated it publicly in several forums.

Perhaps shaken by getting caught, Newdow's arrogance flared again when he dissed Sandra Day O'Connor during a discussion of whether the Pledge meets the Supreme Court's endorsement test. Judge Carlos Bea pointed out that O'Connor, in a concurrence in the first Newdow case, "said that the Pledge is ceremonial deism and is not an endorsement of religion."

"She was alone in that position," Newdow replied, "and I'll mention that she's no longer on the court, and I'll mention that it contradicts everything that she said before that." All true, and all stated in such a way as to make any ex-

JOHN AND ADIRENNE CAREY FLANK BECKET FUND PRESIDENT KEVIN HASSON AND BRENDEN AND SPENCER CAREY OUTSIDE THE SAN FRANCISCO FEDERAL COURTHOUSE.

perienced appellate attorney cringe. After several more minutes of harsh attacks on O'Connor, Newdow turned venomous in a discussion with Judge Bea of "ceremonial deism," treating Bea as if he were a second-rate student who just didn't understand. Finally, Judge Nelson asked, "You mentioned that Justice O'Connor was no longer on the court — nor is Justice Brennan or Black. Does that mean that we can ignore what they say?"

No, Newdow replied, but "if this case got back to the Supreme Court, you might not be upheld, since there was no one else in concurrence with her."

"If I were you, I wouldn't try to count up the votes," Judge Reinhardt cautioned. A smart attorney would have bitten his tongue at that point, but not Newdow. "I'm not convinced, your honor. You know, they've never been briefed." But of course they have been briefed, by Newdow himself, in 2004. If the case does go on to the Supreme Court, the presence of Justice Scalia on the bench will be important. Scalia did not sit on the case in 2004 because in a January 2003 speech at a Religious Freedom Day event sponsored by — ironically — the Knights of Columbus, Scalia publicly said that the Ninth Circuit decision declaring the Pledge unconstitutional was based on a flawed reading of the First Amendment. Once the Court granted *certiorari,* Newdow filed a "suggestion for recusal," and without comment, Scalia declined to participate in the case.

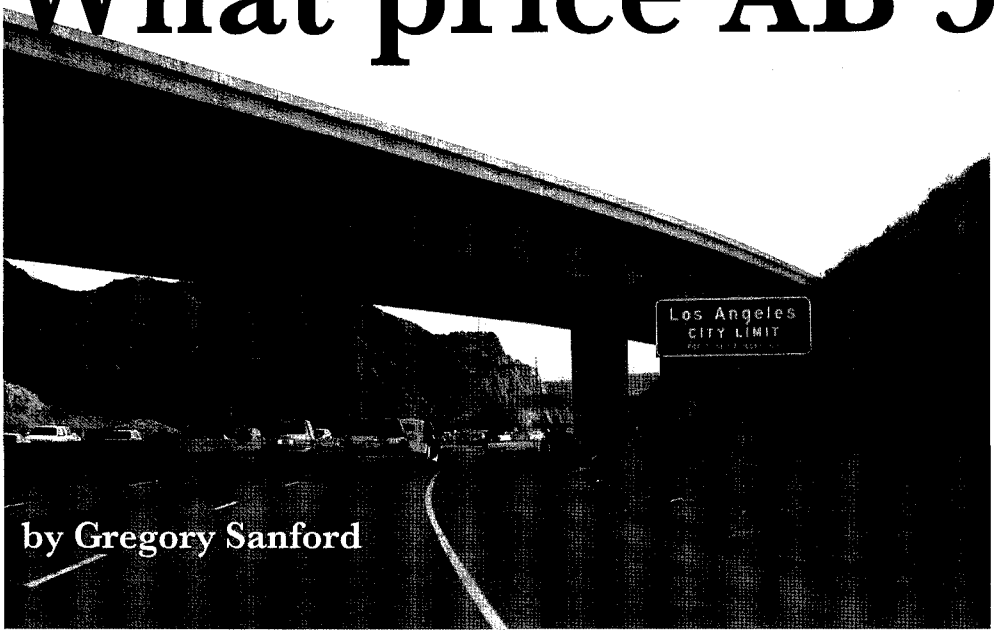
'NO BASIS IN LAW OR REASON'

Without Scalia, the 2004 court simply punted the constitutionality question in favor of the simpler decision regarding Newdow's eligibility to sue in the first place. There were several ironies in the earlier case. Justices Thomas and O'Connor and Chief Justice Rehnquist argued that Newdow *did* have standing. This time, Newdow found himself citing Thomas, who wrote separately in 2004 to declare that, "as a matter of our precedent, the Pledge policy is unconstitutional." Of course, Thomas also declared that the precedent had "no basis in law or reason," and added that he "would take this opportunity to begin the process of rethinking the Establishment Clause."

There is no doubt that such a rethinking is in order. The Newdows of the world will be back again and again if the court fails to provide a clear enunciation of American religious liberty. Even many who favor a strict separationist reading of the religion clauses acknowledge that the Court has made a terrible hash of First Amendment jurisprudence in the area since 1947's *Everson v. Board of Education.* But it's highly doubtful that there are five votes on the court for starting over.

The court could bundle the Pledge with things relegated to the category of "ceremonial deism," denatured and stripped of religious significance. But if we are to retain any sense of the way in which the Founders skillfully blended their undoubted faith and their blueprint for a society based on rights bestowed by "Nature's God," the "philosopher's god" probably affords the best opportunity. It would provide the courts with a solid rationale for rejecting the wholesale banishment of the mention of "God" that Michael Newdow so desperately seeks. CPR

What price AB 32?



by Gregory Sanford

Do Californians know the Global Warming Solutions Act's *full* potential price tag? That it *won't* reduce greenhouse gases? Or that ignorance of this new law could cost us hundreds of *billions* of dollars.

Beginning shortly after his 2006 election as California attorney general, Jerry Brown showed he'd lost none of the old Moonbeam spirit. He revived his predecessor, Bill Lockyer's, "silly" — to borrow the adjective even the *Los Angeles Times* thought appropriate for describing it — anti-automaker lawsuit (for a full update on this Lockyer/Brown litigation, see: "The public nuisance is in the A.G.'s office," by M. David Stirling and Timothy Sandefur, *CPR,* this issue, page 7). He also launched litigation against local government entities that he judged insufficiently zealous in pursuit of a Carbon dioxide-free California. Republican state senators, however, during last summer's budget battle, succeeded in eliminating funding for Brown's anti-local government litigation. At the time, it was widely predicted that the attorney general, who evidently enjoys various alternatives for funding such activities, would merely find another way to move the litigation forward. The GOP senators' "victory" was dismissed as merely symbolic with little real significance. But a funny thing has happened — it now appears the attorney general has put that particular anti-Global Warming salient on hold or, possibly, has abandoned it altogether.

That's how politics works. It is often less a game of who is absolutely strongest, with both sides pouring in everything they have, than one of feint, counter-feint, and calculated risk. Losing is often simply a matter of failing to show up for the contest, while winning sometimes requires no more than a convincing show to the other side that you will not give up without at least a token level of resistance.

This lesson is particularly important in the battle over enviro-regulatory policy in Cal-

Gregory Sanford, a frequent contributor to CPR, *writes on California politics and policy.*