

MERIT SELECTION OF CALIFORNIA JUDGES

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Introduction

In 1993, the Judicial Council of California commissioned a survey of California lawyers and judges to determine how to attract and keep highly qualified judges.¹ Overall, the survey found that the selection/election process was among the three greatest disincentives to becoming a judge, along with salary and loss of privacy.² The survey found a negative mystique surrounding the selection process, a perception that “who you know” rather than ability is the basis for judicial selection, a concern that the current process does not actively seek the most qualified lawyers but instead “accepts whoever comes through the political process,” and, finally, that the cost of running for a seat is prohibitive to many prospective candidates.³

This paper looks at California’s judicial selection history and examines alternatives to the current system.

History of Judicial Selection

In the original American colonies, the king had absolute control over the appointment and removal of judges.⁴ After the American Revolution, the original thirteen states and the federal government retained various versions of

¹Report on Significance of Various Incentives and Disincentives of Judicial Service, prepared by Hildebrandt, Inc. for the Select Committee on Judicial Retirement, Judicial Council of California (March 5, 1993), at 1-2 (hereinafter Incentives and Disincentives).

²Id. at 18; Supplemental Survey of Attorneys, prepared by Hildebrandt, Inc. for the Select Committee on Judicial Retirement, Judicial Council of California (April 21, 1993), at 10.

³Incentives and Disincentives, supra note 1, at 19.

⁴Jona Goldschmidt, Merit Selection: Current Status, Procedures, and Issues, 49 U. Miami L. Rev. 1, 4 (1994).

appointment as the method for selecting judges.⁵ With the emergence of populism during the era of Andrew Jackson, president from 1829 to 1837, many new states established partisan elections to select some or all of their judges.⁶ When California entered the Union in 1850, it followed the trend and established partisan elections as its method for selecting judges.⁷

However, early in the 20th Century, widespread dissatisfaction in the United States with the political judiciary led to proposals for alternative methods of selecting judges.⁸ During that period, the notion of merit selection was born.⁹

Merit Selection of Judges

In the merit selection process, a nonpartisan nominating commission evaluates applicants for judicial office, then sends a short list of candidates to the appointing authority (for example, the governor), who is required to select from the list.¹⁰ The process is called “merit selection” because the nominating commission chooses applicants on the basis of their qualifications and not on the basis of political and social connections.¹¹

Presently, thirty-four states use merit selection to choose at least some of

⁵Brief of Amicus Curiae American Judicature Society, *DeLaney v. Thompson*, 1998 WL 397363 (Tenn.App. July 16, 1998) (No. 01A01-9806-CH-00304), rev'd 1998 WL 887031 (Tenn. Dec. 21, 1998), reh'g denied (Jan. 19, 1999); Goldschmidt supra note 4, at 5.

⁶Id.; Goldschmidt, supra note 4, at 5.

⁷Malcolm Smith, The California Method of Selecting Judges, 3 *Stan.L.Rev.* 571 (1951).

⁸Norman Krivosha, In Celebration of the 50th Anniversary of Merit Selection, 74 *Judicature* 128, 128-29,(1990).

⁹Id. at 129-30.

¹⁰Goldschmidt, supra note 4, at 2.

¹¹Merit Selection: The Best Way to Choose the Best Judges, American Judicature Society (visited Feb. 3, 1999) <www.ajs.org>.

their judges.¹² The American Judicature Society (AJS) reported in July 1998 that fifteen states plus the District of Columbia use merit selection for all terms of all courts.¹³ In addition, AJS noted that nine states use merit selection for some of their courts,¹⁴ and that ten other states use merit selection only to fill mid-term vacancies in some or all courts.¹⁵

Merit selection plans have been established by executive order, constitutional amendment or statute, depending upon each state's jurisprudence.¹⁶ Plan structures vary widely among the states.¹⁷ In addition to the nominating commission, one common component of merit selection plans is a retention election where judges, after serving for some time period, appear on an uncontested ballot for the voters to determine whether the judge will be retained in office on the basis of his/her record.¹⁸ Of the nineteen states that hold judicial retention elections, only three do not employ merit selection to choose judges at all.¹⁹ California is one of those three.²⁰

It is notable that California already has the retention election component of

¹²Brief of Amicus Curiae, supra note 5.

¹³Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Mexico, Rhode Island, South Carolina, Utah, Vermont and Wyoming. Brief of Amicus Curiae, supra note 5.

¹⁴Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, Tennessee. Id. n.20.

¹⁵Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota, West Virginia, and Wisconsin. Id. n.21.

¹⁶Brief of Amicus Curiae, supra note 5; Goldschmidt, supra note 4, at 19-20.

¹⁷Id.

¹⁸Brief of Amicus Curiae, supra note 5.

¹⁹Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah and Wyoming. Judicial Selection in the States, American Judicature Society (rev. Mar. 17, 1998).

²⁰The other two states are Illinois and Pennsylvania. Id.

a merit selection plan in place for justices of the Supreme Court and Courts of Appeal²¹ because, in the early 1930s, California almost became the first state to adopt merit selection of judges.²²

California's Merit Selection Efforts

Until 1934, all judges in California were selected by popular election.²³ In 1933, the legislature adopted Assembly Constitutional Amendment No. 98.²⁴ The Amendment provided for the Governor to appoint or nominate Superior Court judges from two or three candidates nominated by a board composed of the Chief Justice, a presiding justice of the Court of Appeal and a member of the State Senate from the county where the judge would sit.²⁵ The Amendment established retention elections for Superior Court judges, who would serve six-year terms and be subject to constitutional removal and recall provisions.²⁶ As a result of an amendment in the Assembly, the procedure would apply only to Los Angeles County.²⁷ The Amendment was placed on the November 1934 general election ballot as Proposition No. 14.²⁸

However, a competing amendment was placed on the same ballot by initiative.²⁹ Part of a four-amendment "curb crime" program,³⁰ Proposition No. 3 called for appointment or nomination of Supreme Court and Court of Appeal

²¹Cal. Const. art. VI, §16.

²²Krivosha, supra note 8, at 130.

²³Smith, supra note 7, at 572.

²⁴Id. at 578.

²⁵California Ballot Pamphlet, prepared for Nov. 6, 1934 General Election, at 28-30.

²⁶Id.

²⁷Smith, supra note 7, at 578; Id. at 28.

²⁸Cal. Ballot Pamphlet, supra note 25, at 28.

²⁹Smith, supra note 7, at 584, 586.

³⁰Id. at 586.

justices by the Governor; confirmation by a Commission on Qualifications composed of the Chief Justice, a presiding justice of the Court of Appeal and the Attorney General; and unopposed retention elections.³¹ Constitutional removal and recall provisions were made applicable.³² The amendment did not mandate this procedure for Superior Court judges, but instead permitted counties to decide for themselves between an elective or appointive system for selecting Superior Court judges.³³ The notable difference was that Prop. 14 called for a nominating board, while Prop. 3 established a confirmation board.

Prop. 14 lost, Prop. 3 won.³⁴ None of the counties ever adopted the measure for their Superior Court judges, but the procedure has been employed for selection, confirmation and retention of Supreme Court and Court of Appeal judges ever since.³⁵

In 1968, Governor Ronald Reagan, supported by the Judicial Council and the State Bar, proposed the California Merit Plan for Judicial Selection.³⁶ Introduced in the legislature as Senate Constitutional Amendment No. 2 (SCA 2), the plan called for six appointment commissions to nominate judges to the trial and appellate courts.³⁷ The appropriate commission would submit three names to the governor for each judicial vacancy (or five names for Superior Court vacancies in large counties).³⁸ The governor would be required to make the appointment or nomination from among the names submitted.³⁹ The plan made no

³¹Cal. Ballot Pamphlet, *supra* note 25, at 6-7.

³²Id.

³³Id.

³⁴Smith, *supra* note 7, at 586.

³⁵Id. at 587; Cal. Const. art. VI, §7, 16.

³⁶California Merit Plan for Judicial Selection, 43 Cal.St.B.J. 154, 158 (1968) (hereinafter 1968 Cal. Merit Plan).

³⁷Id. at 187-88.

³⁸Id. at 189-190.

³⁹Id. at 190.

change in judicial election procedures.⁴⁰ SCA 2 was adopted in the Senate after amendment, but died in the Assembly Rules Committee.⁴¹

California's Current Judicial Selection System

Authority for California's current judicial selection process is found in the Constitution, the Government Code and the Elections Code.⁴² When a vacancy occurs in the Supreme Court or the Courts of Appeal, the governor nominates a candidate for the next election or appoints a candidate to fill an interim vacancy.⁴³ The only selection criteria imposed by law for judges is that they must have been members of the state bar for ten years before selection to the Superior, Appellate or Supreme Courts, or for five years before selection to Municipal Courts.⁴⁴ Governors informally have established judicial selection advisory boards in counties to screen judicial candidates⁴⁵ or have obtained recommendations of candidates screened by county bar associations.⁴⁶

Before the Governor appoints or nominates a judge, the name is submitted to the State Bar for evaluation of the individual's qualifications.⁴⁷ The "Judicial Nominees Evaluation Commission," comprised of attorneys and public members,

⁴⁰Id. at 155.

⁴¹Senate Final Histories, California Legislature, 1968 Regular Session and 1968 First Extraordinary Session, at 329 (1968).

⁴²See, e.g., Cal. Const. art. VI; Cal. Elec. Code §9083; Cal. Gov't. Code §12011.5, 71145, 71180.

⁴³Cal. Const. Art. VI, §16, cl. (d).

⁴⁴Cal. Const. Art. VI, §15.

⁴⁵John McDonald, Judges Face Few Opponents at the Polls, Orange County (Cal.) Register, May 10, 1998, at A14.

⁴⁶Daniel M. Weintraub & Jenifer Warren, The Road to the Bench, Los Angeles Times, July 10, 1988, at Metro 2; Mark de la Vina, Taking a Seat on the Bench, Orange County (Cal.) Register, Oct. 6, 1988, at 3.

⁴⁷Cal. Gov't. Code §12011.5.

reports its evaluation to the Governor in confidence.⁴⁸ After reviewing the report, the Governor officially appoints or nominates the candidate.⁴⁹ Qualifications of candidates for Supreme Court or Court of Appeal are subject to public comment before confirmation or rejection by the Commission on Judicial Appointments.⁵⁰ The Commission on Judicial Appointments consists of the Chief Justice, the Attorney General and a presiding justice of the Court of Appeal.⁵¹

After confirmation, the judge is sworn into office to serve until the next gubernatorial election, when the judge runs unopposed in a nonpartisan retention election where voters decide whether to retain him or her for the balance of the judicial term.⁵² Supreme Court and Court of Appeal justices serve twelve-year terms.⁵³

Although voters in each county may make the selection system for Supreme Court and Appellate justices applicable to Superior Court judges,⁵⁴ no California county has done so.⁵⁵ Instead, Superior Court judges (and Municipal Court judges where Municipal Courts still exist) are elected in nonpartisan⁵⁶ general elections⁵⁷ for six-year terms.⁵⁸ The Governor fills vacancies to unexpired Superior and Municipal Court terms by temporary appointment;⁵⁹ however, the appointment is

⁴⁸Id.; Cal. Elec. Code §9083.

⁴⁹Cal. Gov't Code §12011.5(k).

⁵⁰Cal. Elec. Code §9083.

⁵¹Cal. Const. Art. VI, §7; Cal. Elec. Code §9083.

⁵²Cal. Const. Art. VI, §16, cl. (a); Cal. Elec. Code §9083.

⁵³Id.

⁵⁴Cal. Const. Art. VI, §16, cl. (d).

⁵⁵Smith, supra note 7, at 587.

⁵⁶Cal. Const. art. II, §6, cl. (a).

⁵⁷Cal. Const. Art. VI, §16, cl. (b)(1)&(2); Cal. Gov't. Code §71180.

⁵⁸Id. at §16, cl. (c); Cal. Gov't. Code §71145.

⁵⁹Cal. Const. art. VI, §16, cl. (c); Cal. Gov't. Code §71180(a).

not subject to confirmation by the Commission on Judicial Appointments.⁶⁰ Virtually all Municipal and Superior Court judicial seats in California are filled initially by interim gubernatorial appointments.⁶¹ If the incumbents are unopposed in the election, their names do not appear on the ballot.⁶²

Alternatives to California's Current System

The most viable option to ensure that high quality judicial candidates initially are chosen on the basis of their experience and ability is a merit selection procedure.⁶³ The procedure may have various components, including one or more judicial nominating commissions and methods to review judges for retention.⁶⁴

Retention mechanisms recommended by AJS include retention elections or retention by decision of the judicial nominating commission.⁶⁵ Sixteen merit selection states have retention elections.⁶⁶ Other retention methods used by merit selection states include reappointment by the governor with legislative confirmation (Connecticut, Delaware, New York), reappointment/retention by the legislature (South Carolina, Vermont), reappointment by judicial selection

⁶⁰Cal. Const. art. VI, §16, cl. (d).

⁶¹John McDonald, supra note 45.

⁶²Cal. Elec. Code §8203.

⁶³One alternative suggestion is that judges be specially trained in school to become judges and never practice law. However, that idea has been criticized on the theory that judges would form a bureaucracy that would lose touch with the citizens. 1968 Cal. Merit Plan, supra note 36, at 175.

Other judicial selection methods include partisan elections, which California discarded years ago, gubernatorial appointment with Senate confirmation, and direct legislative appointment. California's current method is unique. Goldschmidt, supra note 4, at 13.

⁶⁴Model Judicial Selection Provisions, American Judicature Society, at vii-viii (rev. 1994), [hereinafter Model Provisions].

⁶⁵Id. at 6.

⁶⁶Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah and Wyoming. Judicial Selection in the States, supra note 19.

commission (Hawaii), life tenure (Rhode Island) and tenure to age 70 (Massachusetts).⁶⁷

Judicial Nominating Commissions

Judicial nominating commission(s) recommend a short list of candidates to the appointing authority, who must select from the list.⁶⁸ In California, the Governor is constitutionally designated the appointing authority for judges.⁶⁹ The commission would be required to recommend a specific number, between two and five, of candidates to the Governor.⁷⁰ The total number of finalists for each position might depend upon the level of court (for example, more candidates for higher court vacancies) or upon the population of the jurisdiction served by the court (for example, more candidates might be recommended for Superior Courts in counties with populations above one million than for vacancies in smaller counties). It is recommended that the number of names submitted to the governor is sufficiently low so that the commission nominates only the most highly qualified candidates.⁷¹

To be effective, several judicial nominating commissions would be established within the state. The original 1968 California proposal called for one statewide commission to nominate appellate judges and for one commission in each of the then-five appellate districts to nominate Superior and Municipal Court judges.⁷² A similar procedure could be followed now for the six appellate districts or the 18 appellate divisions within the districts; or, commissions to nominate Municipal and Superior Court judges could be established with jurisdiction over specific geographical areas (for example, part or all of one county, or several counties, based on number of judges within each area). The number of

⁶⁷Judicial Selection in the States, *supra* note 19.

⁶⁸Model Provisions, *supra* note 64, at 1.

⁶⁹Cal. Const. Art. VI, §16, cl. (d).

⁷⁰Model Provisions, *supra* note 64, at 1.

⁷¹Id.

⁷²1968 Cal. Merit Plan, *supra* note 36, at 158.

commissions in other states ranges from one⁷³ to 114 (including one for each of 99 counties in Iowa).⁷⁴

Judicial nominating commissions generally consist of both lawyer and non-lawyer members and may be chaired by a judge.⁷⁵ AJS recommends a seven-member panel which may be chaired by a judge, with attorney members appointed by a bar association and lay members appointed by the governor.⁷⁶

The original 1968 California plan called for the appellate appointment commission to consist of six members, including the Chief Justice as chair, one judge, two non-lawyers named by the governor and two lawyers named by the state bar.⁷⁷ The trial court appointment commissions were to consist of six members, including one court of appeal judge as chair, one judge and two non-lawyers appointed by the governor and two lawyers named by the state bar.⁷⁸ In addition, each commission would have had a local judge named by the governor and a local lawyer named by the commission as non-voting advisers.⁷⁹

As noted above, California governors informally have established judicial selection advisory boards in counties to screen judicial candidates⁸⁰ or have obtained recommendations of candidates screened by county bar associations.⁸¹ Governor Gray Davis asks applicants for trial and appellate judge to sign a release allowing the Governor's office to give their applications to "the judicial

⁷³Alaska, Connecticut, Hawaii, Massachusetts, Oklahoma, Tennessee, Vermont and Wyoming. Judicial Merit Selection: Current Status September 1995, American Judicature Society (1995), table 1.

⁷⁴Id.

⁷⁵Goldschmidt, supra note 4, at 21.

⁷⁶Model Provisions, supra note 64, at 2-3.

⁷⁷1968 Cal. Merit Plan, supra note 36, at 170.

⁷⁸Id.

⁷⁹Id.

⁸⁰John McDonald, supra note 45.

⁸¹Weintraub & Warren, supra note 46; de la Vina, supra note 46.

evaluation committee of the local bar association (if that association is providing such assistance to the Governor's Office) and other committees and/or individuals who have been asked by the Governor to assist him in the evaluation of applicants for judicial appointment," in addition to the State Bar's Judicial Nominees Evaluation Commission.⁸² Therefore, an Executive Order or a Constitutional Amendment that establishes judicial selection nominating commissions merely would institutionalize procedures that already exist on an informal basis.

Nationwide, the size of commissions varies from five to twenty-four.⁸³ Their compositions vary, as do the methods of appointing members and the length of commissioners' terms.⁸⁴

AJS suggests four- or six-year terms for commissioners.⁸⁵ The original 1968 California plan called for four-year overlapping terms, "so that no one governor during any one term could name even half the members to a commission."⁸⁶ Commissioners' terms in other states range from one to six years.⁸⁷

Retention Options

California already has nonpartisan retention elections for justices of the Supreme Court and Courts of Appeal, who serve twelve-year terms.⁸⁸ If Superior Court and Municipal Court judges are to be appointed under a merit selection system, they also could run unopposed in nonpartisan retention elections. Sufficient concerns may be raised by the prospect of one-third of Los Angeles County's 238 Superior Court judges (plus 89 Los Angeles Municipal Court

⁸²Authorization and Release, Applications for Appellate Court and Trial Court Appointments, Office of Governor Gray Davis (visited Feb. 25, 1999) <www.ca.gov/s/governor>.

⁸³Judicial Merit Selection: Current Status, *supra* note 73.

⁸⁴Goldschmidt, *supra* note 4, at 21.

⁸⁵Model Provisions, *supra* note 64, at 2-3.

⁸⁶1968 Cal. Merit Plan, *supra* note 36, at 170-71.

⁸⁷Goldschmidt, *supra* note 4, at 21.

⁸⁸Cal. Const. Art. VI, §16, cl. (a); Cal. Elec. Code §9083.

judges) appearing on a ballot every two years, for example, that it may be reasonable to increase the terms of Superior and Municipal Court judges to twelve-year staggered terms so that a smaller crowd appears on the ballot each election. Alternatively, each judge could run in a retention election once after the initial merit appointment, then remain in office unless impeached,⁸⁹ removed by the Supreme Court for cause,⁹⁰ or recalled.⁹¹

The original 1968 California proposal did not seek to change the existing judicial election process; rather, it focused solely on the method of appointment.⁹² The defeated 1934 proposal sought to establish retention elections for meritoriously selected Superior Court judges in Los Angeles County.⁹³

An alternative method for retaining judges is to empower the judicial nominating commission to determine whether meritoriously appointed judges should be retained.⁹⁴ Given that California already has retention elections for Supreme Court and Court of Appeal justices, the retention-by-commission alternative proposed by AJS may be a less attractive option to anyone wishing to work as closely within the existing framework as possible. However, a commission may be a viable option for retention of trial court judges, particularly where a large number of judges would appear on the ballot.

Evaluation for Retention

AJS proposes that the judicial nominating commission or other evaluating committee rate judges who are eligible for retention and publicize the evaluation well in advance of the election.⁹⁵ In case of retention-by-commission, the

⁸⁹Cal. Const. Art. IV, §18.

⁹⁰Cal. Const. Art. VI, §18.

⁹¹Cal. Const. Art. II, §14.

⁹²1968 Cal. Merit Plan, *supra* note 36, at 178.

⁹³Cal. Ballot Pamphlet, *supra* note 25, at 28-30.

⁹⁴Model Provisions, *supra* note 64, at 6.

⁹⁵Id.

evaluating committee would provide evaluations to the commission.⁹⁶ Five states utilize judicial performance evaluations in conjunction with retention elections,⁹⁷ while some other states use performance evaluations prior to reappointment or other non-elective means of retention.⁹⁸ While evaluation mechanisms differ in the five states with retention elections, AJS reports that their common elements are (1) public involvement in the evaluation process and (2) dissemination of the result to the voting public.⁹⁹

Methods of Implementation

California could implement a merit selection plan by Constitutional Amendment or by Executive Order of the Governor. It is unlikely that a statute seeking to establish merit selection on its own could survive a constitutional challenge.

Merit Selection by Constitutional Amendment

California's Constitution currently provides for the governor to nominate or appoint judges to the Supreme Court and Courts of Appeal, subject to confirmation by the Commission on Judicial Appointments.¹⁰⁰ It also provides for the Governor to make interim appointments of judges to the Superior Courts when vacancies occur.¹⁰¹ With the exception of requiring membership in the State Bar for a specified number of years,¹⁰² the Constitution enumerates no qualifications for judges of the Supreme, Appellate and Superior courts. The Constitution gives the Legislature authority to prescribe qualifications for Municipal Court judges.¹⁰³

⁹⁶Id. at 7.

⁹⁷Alaska, Arizona, Colorado, Tennessee and Utah. Brief of Amicus Curiae, supra note 5.

⁹⁸For example, Connecticut, Delaware, Hawaii and New York. Id. n.35.

⁹⁹Brief of Amicus Curiae, supra note 5.

¹⁰⁰Cal. Const. Art. VI, §16, cl. (d).

¹⁰¹Cal. Const. Art. VI, §16, cl. (c).

¹⁰²Cal. Const. Art. VI, §15.

¹⁰³Cal. Const. Art. VI, §5, cl. (c).

A statute requiring the Governor to choose judges from a merit selection list might be construed to provide a qualification for the office of judge, similar to a statutorily-mandated residency requirement, that the Legislature may not have Constitutional authority to prescribe. In July 1995, the California Attorney General issued an opinion that Government Code Section 69502, which requires that Superior Court judges reside in the county of the court they serve, was “unenforceable as constituting an invalid attempt on the part of the Legislature to add qualifications for the office of superior court judge not found in the Constitution.”¹⁰⁴ After reviewing pertinent case law,¹⁰⁵ the Attorney General reasoned that the constitutional qualifications found in Article VI, Section 15, pertaining to eligibility based on length of state bar membership or incumbency, were exclusive, and that additions or alterations to those qualifications were beyond the power of the Legislature.¹⁰⁶ Similar to the residency requirement, a statutorily-imposed qualification that makes judicial candidates eligible for appointment or nomination only if their names appear on the short list presented to the Governor by a judicial nominating commission might be unconstitutional.

In addition, the Constitution now gives the governor virtually unrestricted power to select whomever he chooses to serve on the bench.¹⁰⁷ If the Legislature were to restrict that power by establishing a merit selection plan by statute, the Legislature might be impermissibly exercising powers reserved to the Executive.¹⁰⁸ Such mandatory selection from a list is distinguishable from the statutory requirement that the Governor submit names of nominees to the State Bar for evaluation, because the Governor is not required to defer to the State Bar’s rating of a candidate.¹⁰⁹

In the original 1968 California proposal, the judicial nominating

¹⁰⁴78 Ops.Cal.Atty.Gen. 204 (1995).

¹⁰⁵Wallace v. Superior Court, 141 Cal.App.2d 771 (3d Dist. 1956); People v. Chessman, 52 Cal.2d 467 (1959).

¹⁰⁶78 Ops.Cal.Atty.Gen. 204 (1995).

¹⁰⁷Cal. Const. Art. VI, §16.

¹⁰⁸Cal. Const. Art. III, §3.

¹⁰⁹Cal. Gov’t. Code §12011.5(g)&(l).

commission would have been established by Constitutional amendment,¹¹⁰ with implementing legislation in the Government Code.¹¹¹ In 1934, the defeated Prop. 14 also would have established the nominating commission by Constitutional Amendment.¹¹² Constitutional Amendment probably would be the most efficient mechanism to establish a merit selection plan, particularly if such additional components as retention elections for trial court judges or retention evaluations were to be implemented at the same time.

Merit Selection by Executive Order

As an alternative to Constitutional Amendment, the Governor by Executive Order could establish a judicial nominating commission for merit selection of all judges of the Supreme Court and the Courts of Appeal and of interim appointees to the Superior and Municipal Courts. Although the Constitution gives the Legislature authority to establish qualifications for Municipal Court judges,¹¹³ the Legislature has vested authority in the Governor to fill interim vacancies in the Municipal Courts.¹¹⁴ The Governor can establish selection procedures for making these judicial appointments by Executive Order, since Governors traditionally have established their own selection procedures in a less formal fashion.¹¹⁵

The California Attorney General has found that the Governor is authorized to issue directives, in the form of executive orders, to subordinate executive officers concerning enforcement of the law:¹¹⁶

An executive order . . . is a formal written directive of the Governor

¹¹⁰1968 Cal. Merit Plan, supra note 36, at 186-91.

¹¹¹Id. at 191-92.

¹¹²Smith, supra note 7, at 577-78.

¹¹³Cal. Const. Art. VI, §5, cl. (b).

¹¹⁴Cal. Gov't. Code §71180.

¹¹⁵McDonald, supra note 45; Weintraub & Warren, supra note 46; de la Vina, supra note 46.

¹¹⁶63 Ops.Cal.Atty.Gen. 583 (1980).

which by interpretation, or the specification of detail, directs and guides subordinate officers in the enforcement of a particular law. (Citation omitted.) Such an order, however, need not be predicated upon some express statutory provision, but may properly be employed to effectuate a right, duty or obligation which emanates or may be implied from the Constitution¹¹⁷

The Attorney General reaffirmed that analysis of the scope of Executive Orders in 1992.¹¹⁸ Therefore, to the extent that the nomination or appointment power is granted to the Governor by the Constitution or statute, it appears that he would have the authority to issue an Executive Order directing how that duty is to be carried out.

Under the current Constitutional scheme, the Governor's Executive Order could not extend to candidates who run in an open election for Municipal and Superior Court judge;¹¹⁹ however, virtually all vacancies in the trial courts are filled by interim appointment.¹²⁰ Although the Governor could establish a merit selection plan through Executive Order, he would not be able to establish retention elections for trial judges or a retention evaluation process in that manner.

Retention Elections for Trial Court Judges

The California Constitution already provides for retention elections for Supreme Court and Court of Appeal judges.¹²¹ However, it also provides for direct election of Superior and Municipal Court judges unless the voters in each county elect to apply the appellate selection and retention system to Superior Court judges.¹²² Because no county has chosen to apply the appellate system to its Superior Court judges, either elections to decide the issue would have to be held

¹¹⁷Id.

¹¹⁸75 Ops.Cal.Atty.Gen. 263 (1992).

¹¹⁹Cal. Const. Art. VI, §16.

¹²⁰McDonald, supra note 45.

¹²¹Cal. Const. Art. VI, §16.

¹²²Id.

in each county¹²³ or the Constitution would have to be amended, with voter approval,¹²⁴ to mandate appointment and retention elections for Superior Court judges.

Even if a successful election were held in each county to extend the appellate selection and retention system to Superior Court judges, a proposal to establish the same procedure for Municipal Court judges would have to be considered separately because “the Constitution is silent [on this issue] regarding municipal court judges.”¹²⁵ The Constitution merely requires that Municipal Court judges be elected at general elections;¹²⁶ therefore, an amendment would be necessary to change that procedure. Since it is necessary to amend the Constitution to switch to retention elections for Municipal Court judges, a Constitutional Amendment likely would be the most efficient method to establish retention elections for both Superior and Municipal Court judges.

Other Retention Options

Were a retention commission to be established, the Constitutional provisions pertaining to judicial elections would have to be amended. Should an evaluating committee be desirable, it most efficiently would be established as a component of the retention mechanism.

Conclusion

To attract and keep the most highly qualified judges, California’s unique judicial selection system can be improved by an approach grounded in California history -- by adding a merit selection system for all judges, accompanied by an appropriate retention mechanism.

¹²³Id.

¹²⁴Cal. Const. Art. XVIII, §4.

¹²⁵Cathey v. Weissburd, 202 Cal.App.3d 982, 986 (2d Dist. 1988).

¹²⁶Cal. Const. art. VI, §16, cl. (b)(2).