

**Testimony for Senate Judiciary Committee Hearing on
Judicial Independence and Accountability
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What To Do About Judicial Elections?

by

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Introduction

Thank you Chairman Schiff and committee members for calling these hearings to begin what I hope will be a continuing discussion about improving and securing the quality of California's trial and appellate bench. I have previously submitted a written report to the committee reviewing some of the Practices and Trends in judicial elections, and I have also submitted a report drafted by one of my students, Ms. Debbie Kiley, on the topic of Merit Selection of California Judges.

I think it is clear that the process and recent practice of judicial elections in California is having a negative impact upon the quality of the bench. A 1993 survey conducted by the California Judicial Council revealed that the selection/election process was among the three greatest disincentives to becoming a judge (along with salary and loss of privacy). There is not much that can be done about loss of privacy; it's a public office, after all. An increase in judicial salaries is an issue that will be before you this year in a bill sponsored by the California Judges Association. And judicial elections is our topic today.

Judicial Elections and Politicization of the Judiciary

California's practice of subjecting judges to the electoral process has become a serious and legitimate topic of discussion in the last several years because of a confluence of separate and seemingly independent legal developments and practical realities. The legal developments include the following:

Successful challenges under the First
Amendment to restrictions on judicial

campaign speech. *See, e.g., Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993) (striking down Canon 7(B)(1)(c)).

A successful challenge to California's constitutional ban on party endorsements in elections for nonpartisan offices. *California Democratic Party v. Lungren*, 919 F. Supp. 1397 (N.D. Cal. 1996).

Changes in the law regarding the content of the ballot with respect to appellate retention elections. *See Special Report: Analysis of the Impact of Stating Term Length on Ballot for Retention of Appellate Justices* (Administrative Office of the Courts, July 1995).

The new practical realities include the following:

Increasing use of campaign mailers, phone banks and other political machinery to influence voter behavior with respect to judicial elections.

An indication in the lead-up to and results of the 1994 appellate retention election that voters are interested in having more information about judges listed on the ballot.

An apparent increase (perhaps temporary, but perhaps not) in the number of contested elections for trial court offices.

Dramatic increases in the cost of running a judicial election campaign. *See California Commission on Campaign Financing, The Price of Justice* (1995).

A challenge to the retention of two Supreme Court justices in the 1998 election.

While these legal and practical developments may appear at first glance to

be essentially unconnected, one commonality stands out: **Each of the developments individually pushes judicial elections incrementally in the direction of a more political and partisan model.** Collectively (and coming, as they do, roughly contemporaneously), these developments portend the real possibility of a significant change in the culture of judicial elections in California, a culture that may pose a threat to the independence of the judiciary and undermine the public's respect for the courts as an institution capable of impartial and reasoned decision-making.

Where Do We Go From Here?

I was asked by this committee to present alternatives to the current system. I'm going to give you now a list of ways in which we can reduce the politicization of the judiciary by the judicial election process.

Judges

Everyone has a part to play in this effort, not just the Legislature. Let me start with what judges themselves can do, sometimes by themselves and sometimes with the support of the Legislature.

One of the biggest threats to the judiciary comes from the fact that judicial elections are normally very low salience races and judges are generally unknown in the community. The result is that small amounts of information -- like votes in individual cases -- can have a disproportionate impact. And if there is no relevant information upon which voters can base their judgment, the result is that appellate retention votes reflect, in part, the general level of public satisfaction or dissatisfaction with the courts.

Chief Justice George noted yesterday in his State of the Judiciary address the importance of educating the public regarding the role of the courts and giving the public a sense of confidence and trust in the judicial branch. His remarks bear upon the question you are considering today since general confidence and trust in the courts is likely to lead to greater margins in retention elections. The Chief mentioned several specifics in his speech: (a) the community outreach and strategic planning effort; (b) jury reform; (c) court facilities; (d) death penalty process reform; and (e) last, but certainly not least, stable funding for the trial courts. The Legislature has a critical role to play in supporting the courts in these efforts.

There is one thing that judges can do themselves to increase public confidence. In drafting opinions, judges need to be aware of what ticks off voters

and to avoid, where possible, provocative language. For example, judges should avoid drafting an opinion striking down a popular initiative with language that deliberately trumpets the court's power of judicial review. Remember that *Marbury v. Madison*, which first established the doctrine of judicial review, was one of the main reasons that Thomas Jefferson abandoned his prior support for giving judges life tenure in favor of electing judges, and the states ultimately agreed with Jefferson, rejecting life tenure in favor of judicial elections. Courts still need to be sensitive to the public's fear of the seemingly unrestrained, undemocratic power of judicial review. Courts can't back away from the power of judicial review. It is, after all, a critical feature of our constitutional structure. But courts need to employ the power with humility and express that humility in opinions striking down legislation or initiatives.

Next, in drafting concurring and dissenting opinions, judges should limit themselves to the facts and the law. Don't draft an opinion that includes personal attacks upon the majority, suggesting that the justices in the majority either possess evil motivations or are simply not very smart. That style of dissenting personalizes and politicizes the court, and the public picks up on it. It does not engender confidence.

Finally, we need to see if there is some better way of helping the public understand trial court rulings. When the press, particularly the print media, wants to report upon a judicial decision, they often call upon a relatively small number of academics to provide commentary. You've got quite a few of the regular media commentators here in the room today. I can tell you as one of those commentators that it is much easier to comment upon appellate opinions because we have virtually immediate access to the appellate opinion. We can read the opinion and then comment intelligently. It is harder with trial court rulings. There often is no written opinion; if there is a written opinion, it will be difficult to get hold of quickly; and, the court itself is of course unable to make any public comment. I have recently been having discussions with some practitioners in the federal courts about the possibility of developing some routine mechanism for quickly gathering information about trial court rulings. That will make it possible for me and other academic commentators to offer informed explanations of trial court rulings.

Secretary of State and Local Registrars of Voters

Let me now turn to steps that the Secretary of State could take. Given the low salience of judicial elections, information in the ballot pamphlet about judges is very important. Several years ago, the length of term of each judge was added to the ballot, and the result was a substantially lower vote in favor of retention,

and the votes were directly related to the length of term (judges standing for 12-year terms received the lowest percentage, judges standing for 8-year terms received the next lowest percentage, and judges standing for 4-year terms received the highest percentage). The length of term information did not appear in the 1998 ballot pamphlet. That change was the result of a statute passed by the Legislature.

Exercising his own discretion, the Secretary of State decided that the 1998 ballot pamphlet should include for Supreme Court justices a 200-word ballot statement drafted by the justices. That, in part, may account for the high retention vote in 1998. The Secretary of State should consider whether something similar can be done for Court of Appeal justices. This might require the cooperation of county registrars, and perhaps the Secretary of State should convene an election summit to discuss the topic.

In general, the more information available to voters about judges, the better. The California League of Women Voters' web page on judicial elections is a good model.

Political Parties

The political parties could do a lot to reduce the threat to judicial independence from judicial elections by voluntarily adopting a party plank pledging strict neutrality in judicial elections. No endorsements of judicial candidates or opponents of candidates. This plank would not prevent an individual party member from endorsing a candidate or supporting opponents of a candidate, but I think it would substantially raise the bar to getting involved in judicial elections. Voluntary restraint by state-level politicians was critical in keeping last year's Supreme Court retention election from becoming seriously politicized. That voluntary practice can be institutionalized with a political plank. The weight and influence of the political parties is too great for a fragile judiciary to bear.

Governor

Let me now turn to what the Governor can do, again without requiring legislative action. Nearly all judges reach the bench by being appointed by the Governor. There are a few trial court judges who were elected without being appointed, but the number of such judges is vanishingly small.

We already have one-half of a merit selection system in place for appellate judges with retention elections, and trial judges as a practical matter usually do not

even appear on the ballot since a trial judge appears on the ballot only if there is a challenger. The Governor could implement full merit selection by executive order. Governor Reagan and the Judicial Council proposed such a system in 1968, but it was not adopted.

It would work something like this. The Governor could create by executive order local or region-wide nominating committees that would submit 3 to 5 names to the Governor for any judicial vacancy. The Governor would then choose from among the names submitted by the nominating committee. In other states that use this system, the nominating commission usually has 7 to 9 members consisting of some lawyers, some non-lawyers and a judge or two. The Governor could appoint several members, perhaps the State Bar could appoint the lawyer members, and the Supreme Court or the Chief Justice could appoint the judicial members. Perhaps the Speaker or Senate Rules Committee could also be given appointments.

I encourage Governor Davis to give this proposal some serious consideration. I think a nominating commission system would be a great help to the Governor in attracting the best candidates for judicial office, in assuring diversity on the bench, and in opening up the process. With the unification of trial courts in 52 counties, appointments to the trial bench are even more important. In those 52 counties, the Governor can no longer use the municipal court as a training ground for superior court appointments. Every appointment is as important as every other.

Legislature

I'd like to turn now to the Legislature. The first thing you can do is to support any or all of the efforts I have previously mentioned. Some of the proposals I have mentioned may require budget support; others may benefit from legislative encouragement or approval.

The last set of proposals I will mention could be implemented only by constitutional amendment and, for that reason, require very careful thought and planning.

First, we could change the constitutional rule requiring appellate justices to stand for election immediately after appointment, an election that often is to a short term. Gerald Uelmen has previously suggested this approach, having new appointees stand for a full 12-year term. Dean Uelmen has also suggested changing the timing of judicial elections so that they are not limited to gubernatorial elections. That would decouple judicial elections from the

governor's race.

Second, we could extend the term of trial, court of appeal and/or Supreme Court justices to 14, 15 or 20 years. This would significantly reduce the impact of elections upon our judges.

Third, we could reenact the constitutional ban on party endorsements but limit the ban to judicial elections instead of trying to apply it to all non-partisan offices. Although a ban on endorsements to all non-partisan offices has been declared unconstitutional, a more narrowly focused ban on endorsements in judicial races might withstand constitutional attack.

Fourth, if the Governor does not voluntarily adopt nominating commissions, a constitutional amendment could compel their use.

Fifth, we could modify the retention election system to include judicial evaluation committees, which is done in some states. The results of the judicial evaluation are then reported to the voters to make judicial elections more meaningful. There are some dangers with judicial evaluation committees, but they seem to be working well in other states.

Sixth, we could extend the retention system to trial court elections. Counties already have the option to adopt retention elections for the trial court, but no county has exercised that option. The Legislature could propose an amendment to the Constitution to require retention elections for trial court judges.

Seventh, we could follow the lead of some states which provide for gubernatorial reappointment with legislative confirmation, entirely avoiding the need to have judicial elections while retaining some element of judicial accountability.

Eighth, we could adopt a system of automatic reappointment unless the Legislature passes a non-retention resolution by a two-thirds vote and the Governor concurs.

Ninth, we could adopt the federal system of life tenure.

Conclusion

I want to thank the committee again for giving me the opportunity to present some ideas on this topic. As you can see, there are quite a few options that will have to be considered as we move forward with this dialogue.