

**Task Force on Judicial Selection and Retention
Commission for Impartial Courts**

Judicial Council of California
Administrative Office of the Courts
Northern/Central Regional Office
278800 Gateway Oaks Drive, Suite 300, Delta Room A
Sacramento, California

Monday, November 5, 2007
10:00 a.m. – 4:00 p.m.

Minutes

Members present: Hon. Ronald B. Robie, Chair, Mr. Ralph Alldredge, Hon. H. Walter Croskey, Hon. Bonnie M. Dumanis, Hon. Kim Garlin Dunning, Hon. Terry B. Friedman, Ms. Victoria B. Henley, Mr. Jack Londen, Mr. John Mendes, Hon. William J. Murray, Jr., Hon. Chuck Poochigian, Hon. Edward Sarkisian, Jr., Ms. Sharol Strickland, Hon. Sharon J. Waters and Mr. Michael R. Yamaki.

Members present by phone: Hon. David S. Wesley

Members absent: Mr. Chris Arriola, Hon. Marguerite D. Downing, Mr. William I. Edlund, Mr. J. Clark Kelso, and Mr. Roman M. Silberfeld.

Task Force Consultant: Mr. Seth S. Andersen

Staff present: Mr. Michael Fischer, Staff Counsel, and Ms. Benita Downs, Administrative Coordinator.

I. Opening remarks, announcements, and introductions

The chair called the meeting to order at 10:05 a.m.

II. Open session for public comment

None

III. Schedule future meetings.

The future meeting dates for the task force are as follows:

- Monday, February 4, 2008 Southern Regional Office, Burbank
- Monday, April 28, 2008 Northern Regional Office, Sacramento
- Monday, June 30, 2008 Southern Regional Office, Burbank
- Monday, September 8, 2008 Northern Regional Office, Sacramento
- Monday, November 10, 2008 Southern Regional Office, Burbank
- Monday, January 26, 2009 Northern Regional Office, Sacramento

IV. Consideration of issues involving selection of judges

A. Commission-based appointment system (“Merit selection”)

Background: The task force reviewed the pros and cons of commission-based appointment systems, also known as “merit selection,” including the variations of this plan:

1. **Pre-selection:** In 33 states and the District of Columbia, a commission-based appointment system is used to select some or all judges at different points in the initial selection process. It is used to select all judges at all times in 14 states and the District of Columbia, some judges in nine states, and for interim, or midterm, vacancies only in nine states.
2. **Post-selection (“confirmation”):** The AJS “model” merit selection plan calls for a judicial nominating commission to recommend nominees to the appointing authority, executive appointment, and retention elections after brief initial terms of office. Some states have a fourth component—confirmation of executive appointments. In eight states and the District of Columbia, legislative confirmation is required; in Massachusetts, the Governor’s Council must confirm appointees; in New Hampshire, the Executive Council approves appointees.
3. **Variations:** As is the case with elective and “pure appointive” systems, no two states use precisely the same commission-based appointment system. Some states utilize commission-based appointment for all judges at all times, while others use it only for appellate judges and in some instances for trial court judges in some jurisdictions. Nine states use such systems only to fill midterm vacancies on some or all levels of court. There are significant variations among states in nominating commission rules and procedures, the number of nominees sent to the appointing authority, and the binding nature of the commission’s nominations on the appointing authority, among other features.

Discussion: The committee compared other systems with California’s present system. It was agreed that California’s present system should be kept as the current merit review of nominees by the State Bar Judicial Nominee’s Evaluation (JNE) Commission provides a system that works. The next meeting will consider issues involving modifications to the current JNE system including:

- Disclosure of JNE recommendations either in all cases of appointment or in all cases of appointment of a “non-qualified” nominee.
- Improved recruiting for greater diversity
- Formalize the process
- Review criteria JNE uses in rating and review the rating system itself.
- Other possible changes to the procedure

B. “Open” elections

Background: In nearly all states that provide for contestable election of judges, “open seats” are filled through contestable elections. (Open seats occur when a judge leaves office at the end of a full term and his/her seat is not filled by gubernatorial appointment.) The one exception is New Mexico, which provides for initial commission-based gubernatorial appointment, followed by contestable partisan elections for a full term in office, followed by uncontested retention elections for subsequent terms.

Discussion: The task force will consider action in this area after determining how many such open elections occur each election cycle.

C. “Member of bar” or “practicing law;” active or inactive membership

Background: There is extensive variation across the states regarding whether judges are required to be state bar members/licensed to practice law in the state, or whether they must have practiced law for a minimum number of years.

Excluding inactive members of the bar or licensed lawyers may serve the goal of limiting judicial office to active practitioners, but it also may inadvertently exclude lawyers working in other fields, or taking time off for family reasons, who are otherwise qualified for judicial office.

Discussion: The task force believes that any form of criteria involving type of practice of law and active versus inactive membership is rightly a factor to be considered by the JNE Commission but should not, in and of itself, be used to disqualify a potential judicial candidate.

D. Citizenship requirement

Background: Only 20 states have an explicit constitutional or statutory requirement that judges be U.S. citizens. However, it is an implicit requirement in states where judges must be licensed attorneys and/or state bar members and licensure/bar membership is limited to U.S. citizens. In California there is no explicit requirement that a judge be a citizen or that a member of the bar be a citizen.

Discussion: The task force is divided as to whether a judge must be a U.S. citizen.

E. Residency requirement- post appointment and how defined.

Discussion: The task force decided not to consider whether to impose a residency requirement on judges, noting that there is no current requirement and there does not appear to be any issue concerning this.

V. Evaluation/Screening

A. JNE Commission

Background: The JNE Commission serves many of the functions that nominating commissions perform in “merit selection” states, including a thorough review of potential appointees’ professional qualifications and fitness for the bench. It differs from traditional nominating commissions in that it does not independently accept or solicit nominations from qualified members of the bar. The question of whether to provide for the release of all or part of the JNE Commission’s evaluation upon appointment of a new judge may call for further examination of experiences in other states with the release of pre-appointment evaluation results generated by nominating commissions or other entities.

Discussion: The task force discussed ways of making the process open to the public. This would allow the public to see there is some sort of check and balance between the governor’s appointment authority and the commission.

B. Official vs. unofficial evaluation

Background: Nineteen states and D.C. have an official judicial performance evaluation program, established by constitution or statute. These programs are used to promote judicial self-improvement and enhance the quality of the judiciary as a whole. In some states, they are also used to provide relevant information to those responsible for continuing judges in office.

In many other states, state and/or local bar associations conduct judicial evaluation programs, and in other states, including Nevada, the major

newspapers evaluate judges. There is a rich literature on judicial evaluation; AJS can provide additional information upon request.

C. Evaluation at time of initial appointment

Background: In merit-selection states, this function is performed by the nominating commission. In other appointive states, state and/or local bar associations may interview, evaluate, and/or rate prospective appointees. Some governors have voluntarily established advisory committees for this purpose.

D. Evaluation at time of consideration of continuation in office

Background: Seven states (Alaska, Arizona, Colorado, Kansas, New Mexico, Tennessee, and Utah) have an official program for evaluating judicial performance and making evaluation results for judges standing for retention available to voters. In these states, an independent commission surveys those who have interacted with the judge being evaluated (e.g., attorneys, litigants, jurors, court staff, other judges) regarding the judge's legal ability, integrity, communication skills, temperament, and administrative capacity. These commissions may also refer to public records, such as case management statistics, disciplinary sanctions, and continuing education participation. A summary of the evaluation results is provided to the public. Some commissions also indicate whether the judge meets or does not meet performance standards, or recommend that the judge be retained or not be retained.

In Hawaii and the District of Columbia, a commission evaluates judges and may reappoint them. In Hawaii, the judicial selection commission questions those who have interacted with judges seeking reappointment and solicits public comment prior to making the retention decision. In D.C., the judicial tenure and disabilities commission evaluates judges, and those who are rated "well qualified" are automatically reappointed; judges who are found "qualified" may be reappointed by the president; judges who are found "unqualified" are not eligible for reappointment.

E. Evaluation of non-judge declaring candidacy for judicial office

Background: The only state in which a state-sponsored entity evaluates potential judicial candidates is New York, which established independent judicial election qualifications commissions in early 2007. These statewide screening panels, which consist of both lawyers and non-lawyers, are charged with reviewing the qualifications of candidates within their districts and making public a list of candidates found qualified to seek judicial office. Participation in these evaluations is voluntary for candidates. It is too soon to assess the effectiveness of these commissions.

F. Evaluation for retention election, contested election, or both

Background: Currently, no state has established an official evaluation program to inform voters in contested elections, and it may not be feasible or constitutional to do so. It may be problematic for a government entity to use public funds to evaluate and inform voters regarding one candidate—the incumbent judge—but not the other—the challenger.

Discussion: The task force discussed how performance reviews in a retention election can inoculate voters against negative messages that they might receive from interest groups that may want to remove a judge because of one or more controversial decisions.

Making the performance reviews public would give the voters some other source of information outlining feedback from various parties (attorneys, jurors, etc.).

The next meeting will consider materials concerning a variety of evaluation processes (continuing and election based) and will include discussion with Administrative Director of the Courts Bill Vickrey about the experience with judicial evaluation in the State of Utah.

VI. Continuation in office

A. Length of term of office

Background: In Rhode Island, judges are appointed for life; in Massachusetts and New Hampshire, judges are appointed to age 70. In all other states, judicial terms are limited—from as short as 4 years to as long as 15 years. Judges of courts of last resort have 6- or 7-year terms in 17 states, 8-year terms in 12 states, 10-year terms in 12 states, 12-year terms in 5 states, and 15-year terms in one state and D.C. Judges of general jurisdiction trial courts have 4-year terms in 8 states; 6- or 7-year terms in 27 states; 8-year terms in 7 states; 10-year terms in 3 states; 12-year terms in 1 state; and 14- or 15-year terms in two states and D.C.

In general, longer terms of office tend to enhance judicial independence, while shorter terms promote greater accountability to those charged with continuing judges in office (voters, governors, legislatures, commissions). Recent efforts in several states to lengthen terms have met with resounding defeat at the ballot box, although there is some evidence that inclusion of longer terms in a larger package of constitutional reforms may increase likelihood of passage (versus stand-alone term-lengthening measures).

Discussion: The task force discussed how most states have mandatory judicial retirement laws and they have withstood challenges. The task force also noted that as a practical requirement, a judge needs to serve at least 20 years to receive a meaningful retirement.

B. Contested election

Background: Thirty-six states have contestable elections for continuation in office for some or all of their judges, including judges of trial courts of limited jurisdiction. (Many elections are not, in fact, contested – hence the term “contestable” is best used in the context of judicial elections.) Whether partisan or nonpartisan, recent judicial elections have been characterized by unprecedented campaign fundraising and spending, increased special interest group involvement, and relaxed ethical standards for candidate speech. Extensive literature, reports, advocacy pieces, and other sources of information on contestable judicial elections exist.

Discussion: The task force members requested staff to gather statistical information regarding contested elections.

C. Uncontested contestable election (not on ballot)

Background: This refers to the current system for Superior Court selection in California, in which judges who are not challenged for re-election are automatically continued in office for another term – without appearing on the ballot. Because the vast majority of Superior Court judges are not challenged for re-election, this is the most common method of achieving additional terms. To the best of our knowledge, California is the only state with contestable judicial elections to employ this particular method for re-selection of judges. In all other elective states, judges seeking additional terms must appear on the primary or general election ballot whether they draw a challenger or not. (Note: in Montana, incumbent judges who do not draw a challenger appear on a yes/no retention ballot.)

Discussion: Staff will summarize information received from California Judges Association and report back to the task force.

D. Retention election

1. Expand to trial courts

Discussion: While retention elections for superior court judges would be viable for some of the state, they would be virtually unworkable in Los Angeles County if all 140 judges who seek to be retained every two years

appear on the ballot. The experience of other large urban jurisdictions, such as Cook County, Illinois, cautions against adoption of retention elections for all trial court judges in Los Angeles County.

2. Not on ballot unless triggered by some means

Background: The evaluation and retention processes for Hawaii and D.C. are potential continuation-in-office models for California. If judges are not found to be sufficiently qualified for automatic continuation by an evaluation commission, the continuation question may be put to the voters.

Proposals have been put forth in other states, including Illinois, to vest in a retention commission the power to continue a judge in office. These proposals generally have included a provision that a judge found unqualified would have the option of taking his/her case to the voters by standing in an uncontested retention election. None of these proposals have been implemented to date.

Another proposal that has been made by a member of the Task Force is to require superior court judges to stand for retention only when opponents gather a minimum number of signatures. Under this proposal, these opponents would be required to organize and file campaign finance reports. While this process is similar to the recall process already in place, it would seem to make judges particularly vulnerable to political backlash based on unpopular or controversial decisions.

E. Time between appointment and first continuation election

Background: States in which judges are subjected to a contestable election shortly after appointment have seen many appointees defeated by challengers, as new appointees are often seen as more vulnerable to electoral challenges. Several states, including North Dakota in the late 1990s, provided for a longer window of time before appointees must face a contestable election.

F. Appellate court elections every two years rather than every four years

Background: Holding appellate court retention elections every two years would require amending the constitution, which specifies that appellate judges stand for retention in gubernatorial election years. One advantage to holding judicial elections every four years is that judges appointed to fill midterm vacancies may have up to four years in office before going before the voters. However, a constitutional change could include a provision allowing midterm appointees to serve a minimum number of years in office before standing for retention.

Placing appellate judges on the ballot every two years would have several advantages, including limiting the number of judges that voters are asked to consider in a given election, promoting more consistent public awareness of the appellate judiciary, reducing the election-year workload of a judicial retention evaluation program, and decreasing the risk that retention elections will be politicized.

Discussion: The task force members expressed concern regarding the appellate court two year election cycle. Many feel that the public backlash to an unpopular decision with a two year window might not go away. With a four year window some of the backlash might go away and the backlash wouldn't be so problematic.

Staff was asked to consult with a political campaign consultant who could provide some insight on this subject.

VII. Diversity

Background: Most studies of judicial selection methods and diversity have found little correlation between the two. The diversity of the eligible pool of potential judges, the political dynamics, history and culture of a given state or jurisdiction, and other factors unrelated to the formal selection method appear to have a greater influence on the overall diversity of the bench. However, in a merit selection system, it is possible to structure the process so that opportunities for selecting a more diverse group of judges are enhanced. One AJS study has demonstrated that demographically diverse nominating commissions attract more diverse applicants and select more diverse nominees.

Discussion: The committee would like staff to present information on available models for recruitment and encouragement for a diverse bench. There was also a suggestion made that there be a statutory expansion of the criteria JNE examines to encourage diversity..

Adjourned: Meeting was adjourned at 2:45 p.m.