What Does California's Experience with Recall of Judges Teach Us?

Recently there has been much public discussion about whether Santa Clara Superior Court Judge Aaron Persky should be recalled. We thought it would be useful to provide an overview of the facts about judicial recalls in California, their history, and the issues involved.

This article takes no position on the merits question of whether Judge Persky should be recalled.

The Issues Involved

In general, the design of California's judiciary is influenced by some competing policy alternatives, known as "value sets." In a value set, favoring one alternative over another reflects a decision to advance a particular policy goal, and one choice is not necessarily better or worse than the other. Instead, it is a matter of choosing between two competing, mutually-exclusive alternatives.

The structural debate here concerns judicial selection and retention. The relevant value set can be distilled, in basic terms, as follows. Appointed judges who are difficult to remove are likely to be more independent, but less accountable to the public; the reverse is true for easy-to-remove elected judges, who are more politically accountable but tend to be less independent.[1] Given that, the question is whether the judicial system should favor independence or accountability, as both cannot be maximized simultaneously. The federal government strongly favors independence in its judicial system, with the provisions in Article III section 1 of the U.S. Constitution for holding office "during good behavior" and for undiminished compensation while in office. Of course, one can try to balance the two alternatives and seek a compromise solution. As discussed below, the design of California's judiciary is exactly that: an attempt to compromise between the opposing values of independence and accountability.

Judicial Selection Generally

There are three basic types of judicial selection system.[2] An appointment system permits a governor or state legislature to select judges, sometimes in concert and sometimes with the advice of a commission. A merit system permits a nonpartisan or bipartisan body to select judges, with a retention election at the end of the judge's first term.[3] An electoral system requires direct contested elections for judges, which may be partisan or nonpartisan.

The question of how to design a judicial selection system is driven by the competing values discussed above: independence and accountability.[4] Again, appointed judges (particularly those with long or lifetime tenures) have the advantage of greater independence, because they are more insulated from political pressure; the disadvantage is that those judges have less popular accountability. The reverse is true for elected judges, who have the advantage of greater accountability to the voters through the retention or reelection process, and the disadvantage of decreased independence due to their vulnerability to the political process. The problem here is making judges independent enough to make good decisions while retaining enough political control to prevent abuses of power.[5]

These considerations are not mere philosophy. Differences in selection method have practical effects. Generally, appointed judges have the longest tenure, merit system judges the next longest, and elected judges have the shortest tenure.[6] Life tenure encourages judges to exercise their best judgment free from the possibly corrupting influence of politics.[7] Elected judges tend to write more opinions, while the opinions of appointed judges tend to be cited as authority more often.[8]

Whether the appointment system determines the judicial boldness of a court is debatable. Some studies suggest that states with appointment systems have activist high courts that are more likely to expand individual liberties, while other research indicates that states with electoral systems are more likely to have judges willing to risk striking down challenged legislation.[9] The length of a judge's term also has an effect on decision making, with long-term judges showing greater willingness to expand state constitutional rights.[10]

Without giving up political control entirely (a recipe for disaster), it is impossible to completely insulate the judiciary from the political process. And doing so would

contravene the democratic principles of American government. But does making judges accountable to the public by subjecting them to recalls and retention elections exact too high a price in terms of judicial independence? The next sections review California's evolutions in its judicial system, and its experience with recall elections.

Judicial Selection and Retention in California

Article 6 of the state constitution currently provides for three courts: a Supreme Court, a Court of Appeal, and a Superior Court. Last year, there were nearly 7.5 million total Superior Court filings.[11] Presently there are approximately 2,000 judges in California.[12] Appellate justices (Supreme Court and Court of Appeal) are initially appointed by the governor after confirmation by the Commission on Judicial Appointments, and stand for uncontested retention election to twelve-year terms at the first gubernatorial election after appointment.[13] Judges of the Superior Court are initially appointed by the governor, and stand in contested elections for six-year terms at the first gubernatorial election after appointment; there is no confirmation process.[14]

California's judicial selection process changed over time, as the state experimented with different variations on appointed versus elected bench officers.[15] For example, the 1849 California constitution provided that justices of the Supreme Court and district courts would be popularly elected to six-year terms, and county court judges would be elected to four-year terms.[16] California changed to nonpartisan ballots for judicial elections in 1911, and since 1934, state appellate justices have been selected through a unique process: new justices are first nominated by the governor to fill the unexpired remainder of a departing justice's term, the nominee is vetted by a State Bar commission,[17] a constitutional commission then confirms the nominee, and the new justice stands for *retention* on the ballot in the next gubernatorial election.[18] Relative to the debate over whether judges should be appointed or elected, at least initially this retention election process was thought to continue the existing character of appellate justices as elective rather than appointive officers, who would hold and continue to occupy their positions only at the will of the voters.[19] This concept of maintaining the elective nature of the office is even more clearly applicable to trial court judges, who (like

appellate justices) are initially appointed by the governor, but (unlike appellate justices) trial judges must appear in a *contested* election "at the next general election after the second January 1"[20] following the vacancy created by the departure of the previous judge.[21]

Thus, California uses a hybrid selection system that generally occupies a middle ground in the value sets. Rather than favoring judicial independence and stability in the law with life terms, or accountability with contested elections and short terms, the state judiciary is neither a wholly politically accountable branch like the state legislature, nor is it a greatly independent branch like the federal judiciary with its life tenure. As with all value set compromises, this necessarily means that the California system strikes a balance between the competing values, rather than strongly favoring one over the other. And, given the differences between appellate and trial courts, California further differentiates between policy choices for the *levels* of its bench officers. Uncontested, longer terms for appellate justices values independence and devalues accountability—while contested, shorter terms for trial judges values accountability and devalues independence.

Retention elections can be criticized for being a political process, for being the wrong venue for debating deep policy questions, and for having all the disadvantages of a campaign. Yet since retention elections were instituted in 1934, there has been only one election where any state appellate justice was not retained by the electorate: the 1986 election when three justices of the California Supreme Court were voted off the court.[22] Examples of trial court judges being challenged (successfully or not) when they stand for contested re-election are comparatively much more numerous.[23]

The Law and History of Recall of Judges

The recall has been a power of the state electorate since 1911. This power is defined by California constitution Article 2, section 13: "Recall is the power of the electors to remove an elective officer." Since its inception, the recall has been mainly used on the local level. Governor Gray Davis is the most prominent example, though eight state legislators as well as numerous mayors have also been forced to face a recall vote. Most recall attempts fail to get enough signatures to get on the ballot. For

example, there were thirty-two attempts against sitting California governors between 1911 and 2003, but the recall of Governor Gray Davis was the first successful attempt in California, and only the second time that the governor of *any* state had ever been recalled.[24]

It is important not to confuse the recall with a retention election. As noted above, in 1986 the California electorate voted out Supreme Court Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso. While not irrelevant here, this oft-cited inflection point for the California judiciary was not a recall—it was a "no" vote in a general election on the question of retaining those three justices. In fact, there were five different attempts to recall Chief Justice Bird. All failed to get enough signatures to make the ballot.

California's Experience with Recalls of Judges

The recall of judges has been the most controversial portion of recall laws. One of the precipitating factors in the Taft-Roosevelt split in the 1912 presidential election was Roosevelt's support for the recall of judges and judicial decisions. In fact, Taft vetoed the Arizona constitution over a provision in its law allowing for the recall of judges.

California is no different. The legislative debate surrounding the adoption of the recall statewide focused almost completely on the recall of judges. Contemporary observers questioned whether the recall law would have succeeded if not for a late-breaking scandal involving the California Supreme Court. Since its adoption in 1911, recall elections of judges are exceedingly rare. There have been 27 attempts to recall individual state Supreme Court justices—and one attempt, in 1966, to remove all seven justices.[25] None of these efforts received enough signatures to qualify for the ballot.[26] It has been over three-quarters of a century (1932) since a California judge of any level has been recalled.[27]

California is not alone in using the recall of judge law sparingly. It appears that the last judge to face a recall in the United States was in Wisconsin in 1982, and the last one to actually be removed by a recall vote was in 1977.[28] A number of states specifically carve out recall exceptions for judges. The Nevada Supreme Court has a pending case in which it is supposed to decide whether a Nevada judge is covered by

the recall law, but the case has been on appeal for over a year and the judge in question's term is running out.[29] While they are controversial, to date recalls of judges have been a very rare event.

Conclusion

There is no question that the California electorate has the power to recall or vote out bench officers at any level of the state courts. The electorate at times has used that power. But in California, recalls against judges are rare. From a design perspective, if recalls are frequently necessary, then the selection process should be improved. That does not mean that the recall should never be used. It exists for a reason: to correct outliers. And on that score, the high procedural bar to recall California judges balances accountability with judicial independence by ensuring that the recall is only used in unusual circumstances.

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[1] *See, e.g.*, Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, (2010); Daniel R. Pinello, The Impact of Judicial-Selection Method on State-Supreme-Court Policy (1995).

[2] Stephen J. Choi, Mitu Gulati, Eric A. Posner, Which States Have the Best (and Worst) High Courts? (2008) at 13.

[3] We do not discuss the merit system here because (other than the retention election) strictly speaking it does not apply to California.

[4] Robert S. Thompson, Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate (1986) at 814.

[5] J. Clark Kelso, A Report on the Independence of the Judiciary (1993) at 2214.

[6] Choi et al., "Which States Have the Best (and Worst) High Courts?" at 14.

[7] Kelso, A Report on the Independence of the Judiciary at 2210.

[8] Choi et al., "Which States Have the Best (and Worst) High Courts?" at 25.

[9] Staci L. Beavers and Craig F. Emmert, *Explaining State High-Courts' Selective Use of State Constitutions* (2000) at 5.

[10] *Id.* at 6.

[11] Judicial Council of California, 2015 Court Statistics Report at xvii.

[12] Judicial Council of California, *2015 Court Statistics Report* preface.

[13] Cal. Const., Article 6, section 16(a).

[14] Cal. Const., Article 6, section 16(b), (c).

[15] For the evolution of California court structure generally, see William Wirt Blume, *California Courts in Historical Perspective* (1970).

[16] Cal. Const. 1849, Article 6, sections 3, 5, and 8.

[17] The Judicial Nominees Evaluation Commission is an organization of the State Bar of California, with members from the public and the bar, which exists to vet candidates for judicial appointment and provide recommendations to the governor. Trial court nominees need only pass through the JNE Commission before they may be appointed by the governor, while appellate court nominees must also be confirmed by the Commission on Judicial Appointments. Only once has a candidate failed to be confirmed by the CJA: in 1940 Governor Culbert Olson nominated Professor Max Radin, who was opposed by Attorney General Earl Warren because he felt that Radin was too liberal, and Radin was not confirmed.

[18] Cal. Const., Article 6, section 16; John H. Culver, *The Transformation of the California Supreme Court: 1977–1997* (1998), 1464 and n.18; Administrative Office

of the Courts, Report on ACA 1 (Nation): Superior Court Elections (June 7, 2001) at 7.

[19] William Wirt Blume, *California Courts in Historical Perspective* (1970) 22 Hastings L. J. 121, 179-180.

[20] Cal. Const., Article 6, section 16(c).

[21] Interestingly, the state constitution also permits each county to decide for itself whether to use that general trial judge system, or to adopt the appellate appointment/uncontested retention election system for the county's trial judges.

[22] John H. Culver, *The Transformation of the California Supreme Court: 1977–1997* (1998), 1466 and n.31, 1486; J. Clark Kelso, *A Report on the Independence of the Judiciary* (1993), 2214.

[23] A few recent examples, all from Los Angeles Superior Court: this year a candidate announced a challenge to Judge Ray Santana; in 2006 Judge Dzintra Janavs was successfully challenged, as was Judge James Pierce in 2014. And occasionally there are open judicial seats; for example, San Francisco Superior Court currently has a three-way race for an open seat between Victor Hwang, Paul Henderson, and Sigrid Irias.

[24] The first-ever successful recall of a state governor was North Dakota Governor Lynn Frazier in 1921. Arizona Governor Evan Meacham was set to face a recall vote before he was impeached by the legislature in 1988.

[25] Cal. Sec'y of State, Recall History in California (1913 to Present); Cal. Sec'y of State, Complete List of Recall Attempts.

[26] *Id.*

[27] Joshua Spivak, *California's Recall: Adoption of the "Grand Bounce" for Elected Officials*, (2004). See also Wilbank J. Roche, *Judicial Discipline in California: A Critical Re-Evaluation*, (1976) (discussing 1932 recall of Los Angeles Superior Court judges John L. Fleming, Dailey S. Stafford, and Walter Guerin); Joshua Spivak, *California: Santa Clara County Superior Court Judge facing recall threats*, June 7,

2016.

[28] There was a recent recall of a Wheeler County Judge in August, 2016. However, this judge served as Chair of the County Commission, as well as presiding over juvenile and probate hearings, so that position could be considered almost an executive one.

[29] Joshua Spivak, *Recalling California judge is next to impossible*, June 17, 2016, (noting that if a Las Vegas judge faces a recall vote, "it will be probably be the first recall against a judge since two in Wisconsin back in 1977 and 1982").