Memorandum 93-62

Trial Court Unification: Election of Judges

Article 6, Section 16 of the California Constitution provides for election of judges. SCA 3 would make necessary revisions in this provision:

> Sec. 16. (a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8, and 12 years.
>
> (b) Judges of other courts shall be elected in their ~~counties or~~ districts or branches at general elections. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.
>
> (c) Terms of judges of ~~superior~~ district courts are 6 years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.
>
> (d) Within 30 days before August 16 preceding the expiration of the judge's term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.
>
> The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies. A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments.

> Electors of a county, by majority of those voting and in a manner the Legislature shall provide, may make this system of selection applicable to judges of ~~superior~~ district courts.

As a transitional matter under SCA 3, in each former superior, municipal, and justice court district the previously selected judges would become the judges of the district court. Their terms of office would not be affected by their succession to office as district court judges. Art. 6, § 16.5. There is a potential problem with the transitional provision, since by its terms it is repealed five years after it becomes operative, thereby leaving hanging a judge in the sixth and final year of a holdover term. The staff would cure this defect by putting the repealer off for one additional year.

TERM OF OFFICE

SCA 3 would provide a 6-year term of office for district court judges. This is consistent with the 6-year term applicable to superior court judges under the Constitution and applicable to municipal and justice court judges under Government Code Section 71145. It would make the term of office a constitutional matter for all judges. This appears appropriate, and the staff has heard no concerns expressed about it.

When a judge is appointed to fill a vacant office, the judge must stand for election to a full term at the next general election following the vacancy. With trial court unification and countywide elections, this could result in a person who accepts a judicial appointment having almost immediately to conduct a major countywide election campaign. This could be a significant factor in a judicial nominee's willingness to accept an appointment to the unified court bench. A number of trial court unification proposals have suggested a minimum time before an appointee is required to run for election, ranging from three months to three years. The 1993 Judicial Council Report recommends a delay for half a term (three years), pointing out that an election only a few months after appointment "usually is too short a time in which to become known to the bar and the public. The fact that an appointed judge would have to stand for election so quickly has been an impediment to attracting the best qualified candidates to serve as trial court judges."

While this proposal makes good sense to the staff, it does not really appear to be necessitated by trial court unification. Good candidates are found right now for the superior court under the existing scheme. Moreover, this change would

make it even more difficult for a candidate for judicial office to challenge an incumbent than it already is, possibly triggering Voting Rights Act concerns. The staff recommends that the Commission not get into this matter.

We do not know whether there are any problems of staggered terms in trial court elections. Staggered terms are probably less necessary for trial court judges than appellate court judges since the work of trial court judges tends to be more solo in character. However, the number of vacancies in any given year could affect the dynamics of the electoral process. The staff has no specific thoughts on this matter, other than to note that SCA 3 would not affect any problems that may already exist in this respect.

ELECTORAL DISTRICTS

The most significant issue relating to election of judges is the definition of the electoral district. Under SCA 3 the district court is a countywide court, with the possibility of branches. The problem is nicely summed up in the Senate Judiciary Committee consultant's analysis of SCA 3:

> More complicated is the matter of election districts for judges. A countywide district court implies a countywide election for each judge. The county is currently the electoral universe for superior court judges, so unification poses no problem in this regard. Municipal court judges are elected by district, however. In 20 counties the municipal court has already been consolidated into one district, where countywide elections already occur. But in counties currently divided into separate municipal districts, the control of the local voting public over the judges would be diminished.
>
> This not only raises the cost of financing and conducting a campaign for some judges, it also portends challenges based on the Voting Rights Act. To re-create a municipal court judge currently running in a minority district as a district court judge running countywide may dilute minority influence in a manner violative of the federal law. Court lines are currently under attack on such grounds in Monterey County.

Besides financing, campaigning, and Voting Rights Act problems, there are other concerns about countywide elections. Will the heavily populated areas of a county control judicial elections at the expense of more rural areas? Should East Los Angeles voters be voting for judges who will be sitting in local Santa Monica cases? Will the campaign financing problems for countywide races lessen judicial

independence and make the offices even more highly politicized than they already are? Local judicial elections are problematic for most voters who know little about the candidates; to make the district elections countywide could worsen the problem.

But the option of smaller electoral districts within the county has serious drawbacks of its own. What districts would superior court judges be assigned to who currently run countywide? Would residency requirements cause them to have to move if they are assigned to an electoral district outside the area where they currently live? The jurisdiction of the trial court judges will be countywide—does it make any sense to elect them in one electoral district when they may not be assigned cases arising in that district or they may be assigned to a different branch? To require assignment to the electoral district from which they are elected would destroy a key element of a unified trial court system.

The 1993 Judicial Council Report expresses most serious concern about the prospect that election of judges in the unified trial court would be anything other than countywide. They note that ever since 1879 judges elected to California's trial court of general jurisdiction have run in county-wide elections, and that long-standing historical practice ought to be continued.

> Proposals to create electoral sub-districts within the district court's overall territorial jurisdiction (which ... is countywide) present severe problems. First, electoral sub-districts may foster a public expectation that judges "represent" the sub-district and that such judges would be expected to side with sub-district interests in litigation. That expectation is inconsistent with the Rule of Law and the Code of Judicial Conduct, which require judicial independence and impartiality. Second, one of the primary advantages of unification is increased flexibility in judicial assignments. The creation of sub-districts would likely create an expectation that a judge elected from a sub-district would serve primarily within that district, impairing flexibility in judicial assignments.

The Judicial Council concludes that the most appropriate action is to enact an electoral scheme that makes the most sense in terms of constitutional structure and the relationship of an independent judiciary to electors. "The most natural boundaries for district courts—based upon history and the public's common understanding—are the existing boundaries between counties."

We cannot make a decision on these matters, however, without taking into account the impact of the Voting Rights Act.

VOTING RIGHTS ACT

The Voting Rights Act dilemma is summarized in the 1993 Judicial Council Report:

> Trial court unification presents complex issues under the Voting Rights Act of 1965. (42 U.S.C. § 1973, *et seq.*) The Act contains two major provisions regarding discrimination in voting practices. Section 2 of the Act prohibits any election procedures that "resul[t] in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color...." (42 U.S.C. § 1973(a)) Section 5 of the Act requires covered jurisdictions to submit any changes in voting procedures to preclearance (either judicial or administrative). (42 U.S.C. § 1973c) Both of these sections apply to judicial elections. (*Chisom v. Roemer* (1991) 111 S. Ct. 2354 (Section 2 case); *Clark v. Roemer* (1991) 111 S. Ct. 2096 (Section 5 case))
>
> Presently, superior court electoral and jurisdictional lines follow county lines. Municipal and justice court electoral and jurisdictional lines are drawn more narrowly to reflect the geographic areas and populations they serve. After unification, district court jurisdictional and electoral lines will follow county lines. Judicial independence and integrity are best served by a district-wide electoral scheme under which judges are elected by all qualified electors in the district. Depending on past voting patterns and other circumstances, and future interpretations of the applicability of the Voting Rights Act to judicial elections, however, district-wide elections may present issues under the Voting Rights Act in some communities. For example, if municipal court judges who presently sit in a predominantly minority district are required to run in county-wide elections after unification, a claim of vote dilution may be presented. *See, e.g., Rogers v. Lodge* (1982) 458 U.S. 613 (at-large system). Moreover, four counties in California, Monterey, King, Merced and Yuba, are subject to Section 5's pre-clearance requirements. On the other hand, a race-conscious effort to draw electoral lines may itself run afoul of the Equal Protection Clause of the Fourteenth Amendment. See *Shaw v. Reno* (1993) 113 S. Ct. 2816.

The Voting Rights Act problem is not merely academic. Monterey County *this year* had its proposal to consolidate municipal court elections countywide challenged by minority voters and held invalid for failure to comply with the Voting Rights Act preclearance requirements. Commentators on SCA 3 fairly consistently conclude that challenges to electoral changes under a unified court are certain, particularly in Los Angeles County. The Los Angeles County Bar Association's State Courts Committee, for example, states that "The consensus of

the members was that in all probability there would be a challenge to any unification under the Voting Rights Act."

Whether challenges against a reasonable judicial election system would be successful is unclear. There are federal appellate cases going opposite directions on the issue of a change of electoral districts from municipal to countywide. Experts believe the matter ultimately will be settled by the United States Supreme Court, but it is not certain how soon that will occur. For a discussion of recent Voting Rights Act litigation, see Judicial Election and Selection Procedures Challenged Under Voting Rights Act (Smith & Garmel 1992), attached as Exhibit pp. 1-3.

In light of the uncertainty caused by the Voting Rights Act, what is to be done about judicial elections in a unified trial court? There are a number of possible approaches, outlined below.

Countywide Electoral Districts

The Judicial Council makes a strong case for countywide electoral districts in a unified trial court. See Electoral Districting Under the Judicial Council's SCA 3 Proposals (Warren 1993), Exhibit pp. 4-6. They acknowledge the likelihood of Voting Rights Act problems, but note the arguments favoring countywide election under the Act and that its application in each case will be highly factual and intensely local. "In light of the uncertainty concerning the standards, and the need for local assessment, the Council has concluded that it is not possible to predict with any certainty the impact of any statewide proposal on the rights of minority voters in each individual county." Their position is that countywide elections are essential to a unified court, and any Voting Rights Act violations found in a particular county should be dealt with individually in a way unique to that county.

Assuming their analysis is correct, this approach makes eminent good sense to the staff. We do note, however, that at least one communication we have received raises the concern that enactment of countywide judicial electoral districts could trigger a mass Voting Rights Act violation. "[T]he specter of trial court consolidation being held unconstitutional with the possibility of every single sitting judge losing his or her seat is sobering. Further, judges elected after court unification would face the uncertainty of the possibility of immediate removal from office in the midst of their terms, if, by chance, the elections were to be declared illegal and new elections were ordered." Letter of Judge Howard J.

Schwab, Exhibit pp. 7-10. And this is just the beginning of the parade of horrors. Judge Schwab's solution is to go to retention elections.

Retention Elections

Judge Schwab makes the argument that retention elections would not be subject to challenge under the Voting Rights Act. This assertion is based on the fact that the existing cases applying the Act to judicial elections involve contested elections. However, the limited research we have done gives us little confidence in this conclusion. Gubernatorial appointment processes, and even merit selection systems, are under challenge.

The staff does see a number of advantages for retention elections, apart from their treatment under the Voting Rights Act. However, contested trial court elections are a populist institution that we are reluctant to tamper with. The existing constitutional provision allows the electors of a county, by majority of those voting and in a manner the Legislature provides, to adopt retention elections. The Legislature has not provided procedures, and we understand no county has adopted retention elections. Consistent with our general position on this project, the staff recommends against investigating retention elections as being extraneous to the needs of trial court unification.

Cumulative Voting

One way to preserve the advantages of countywide elections and the protection of minority voting rights would be by a semi-proportional vote system, such as cumulative voting. All candidates would run at large, but each voter would be able to cumulate votes for a single candidate or a few candidates. This system is familiar in corporate director elections. It has also been used in political elections in some jurisdictions including Illinois. We understand that cumulative voting has been employed in some elections in Southern counties as a remedy under the Voting Rights Act.

An alternate system with the same result is the limited vote system, where each voter has fewer votes than the number of open seats. This system is currently in use in Japan, and would appear to be a more manageable form of semi-proportional voting than cumulative voting.

Drawbacks include: (1) Semi-proportional voting allows any small but organized block, not necessarily a protected racial minority but more likely a splinter faction with a political agenda, to win a seat. (2) It tends to favor elite

and organized groups over the general voting public, and intensifies political activity. (3) It is most useful in a context of electing one member to a deliberative board where the elected official can influence the collective decision, not for trial judgeships where the elected official generally acts alone. (4) It is likely there would be practical problems in the case of cumulative voting—would the ballots be susceptible to mechanized tallying, would ballots casting more than the allotted number of votes be disqualified, etc.?

Preclearance of Unification Plan

Any changes in voting rights must be precleared in the four counties where preclearance is required, or be subject to challenge as was the case in Monterey County. That being the case, why not submit the entire plan for preclearance before putting it on the ballot?

There are a number of problems with this approach, not the least of which is that preclearance does not settle any issues in a subsequent Voting Rights Act challenge. There are also logistical problems—how is the preclearance process to be coordinated with legislative action on the constitutional amendment, particularly if the plan fails preclearance?

Even if we do not submit the plan for preclearance, we still must obtain it for the four required counties in order to avoid the Monterey fiasco.

Such considerations as these lead the staff to the thought that we should try to avoid making any changes at all in voting patterns for judicial elections.

Keep Existing Electoral Districts

The most straightforward way we can think of to make absolutely no change in judicial election voting rights is to keep the existing judicial electoral districts without change. Thus, elections for the seats of current superior court judges would continue to be countywide after unification, and elections for the seats of current municipal and justice court judges would continue to be by electoral district after unification. In any given election, then, a person wishing to run for a unified court judgeship would choose to run either for a countywide seat or for a district seat, either of which would have countywide jurisdiction.

Although the concept of two types of seats may appear odd, the staff believes it is workable. It would be the equivalent of running for a short term seat or a long term seat as occurs in many elections where there is a vacancy to be filled.

Any changes in numbers of judgeships—either increases or decreases—would be at the countywide level rather than the district level.

Of course this still leaves us with election by district for some judges, which raises all the difficult problems identified by the Judicial Council—statewide authority but only local accountability, semblance of bias and favoritism, politicization of trial bench. See discussion below.

Electoral Districts Within County

If we are going to keep some electoral districts within the county, then why not go to an all electoral district system? The Senate and Assembly Judiciary Committee consultant analyses suggest three possible configurations of smaller than countywide electoral districts that could satisfy the Voting Rights Act.

(1) Multiple district courts within counties. The concept here is that instead of having one district court serving the entire county, a large county such as Los Angeles would be divided into several independent judicial districts, e.g. two or five, each having its own court system. Judicial elections within each district would be district-wide, just as judicial elections within single-district counties would be county-wide. The district lines would be drawn in such a way as to avoid dilution of minority voter influence.

This could be a viable option if it is concluded that it makes sense to divide some counties into more than one unified judicial district. There are a number of considerations here, such as funding, facilities, etc. This matter is addressed in Memorandum 93-57 (district court).

(2) Election by branch. It is contemplated that there will be branch courts established where the circumstances of the particular county warrants it. See discussion in Memorandum 93-57 (district court). Judicial elections could be by branch rather than countywide.

This assumes that there will be branch boundary lines drawn for venue purposes. However, branches might be established for convenience only and not have specified boundaries. Branch boundaries could be established with voting rights considerations in mind, rather than judicial business considerations, but this would tend to defeat the purpose of establishing branches.

(3) Election by electoral district for countywide service. Under this proposal the court would be a countywide court, but each judge would stand for election in a specified voting district in the county before a limited constituency.

All of these options raise the practical question of how the boundaries will be drawn and who will draw them. The consultant's analysis for the Senate Judiciary Committee suggests that, "If such electoral districts are to be created, they would again be matters best left to local government." In any event, it is clear that drawing appropriate electoral boundaries would be a very difficult and painstaking task, and would be the subject of a Voting Rights Act challenge in any case, just as surely as a countywide election system would be.

Additionally, the second and third options (but not the first), would create the serious problems noted by the Judicial Council where a judge is elected locally to serve on a countywide court:

> Electoral sub-districting would result in some district judges being exclusively accountable to certain residents of the district and other judges of the same court being exclusively accountable to an entirely different constituency. Electoral sub-districting thus creates the semblance of bias and favoritism towards the interest of a narrow constituency rather than the fact and appearance of judicial fairness based upon electoral accountability to the broadest range of people within the court's jurisdiction. Electoral sub-districting threatens to politicize the trial bench and undermine judicial impartiality. Judges should be accountable to all those within the court's jurisdiction, not just some.
>
> Electoral sub-districts would likely result in a public expectation not only that the trial judge would primarily serve the interests of those within the sub-district but also that the judge would be assigned to any court facility located within the sub-district and to cases arising within the sub-district. Tying judicial assignment to electoral sub-district would impair the very flexibility in judicial assignment which is a primary benefit of trial court unification.
> Electoral Districting Under the Judicial Council's SCA 3 Proposals (Warren 1993)

There is also the question of whether district election for countywide service really makes sense under the Voting Rights Act. After all, electors in one district will be selecting a judge to sit and make decisions in another district where the electors have no voice in the selection. This amounts to disenfranchisement on a massive scale, both in the district where the judge is elected and in the district where the judge sits. District voting can be justified in representative elections since the district representative will be part of a deliberative body in a collective decision-making effort to which representatives from all voting districts contribute; no single elected representative has power of decision. But judicial

decision-making is not of a collective character, and to permit a judge elected from one district to make judicial decisions in another district would appear to be a voting rights denial of the worst sort.

DISCUSSION

The staff agrees with the 1993 Judicial Council Report that judges who serve countywide ought to be subject to a countywide constituency. However, the influence of the Voting Rights Act is so pervasive that we are forced to consider other options.

Ideally, we would wait until the Supreme Court gives definitive direction as to whether countywide judicial elections that correspond with countywide jurisdiction of the court are permissible. Unfortunately, we do no know when that will be and cannot wait until then to move forward on SCA 3.

The objective of the Voting Rights Act—to ensure full participation in the political life of the community by historically precluded minorities—is one we should strive to implement. But the Act itself is of little value in this respect for judicial elections, since the vast majority of judgeships are filled initially by appointment rather than election. Once appointed, it is extraordinarily rare for the incumbent to be unseated in a judicial election.

The real remedy for historically excluded minorities is through greater access to the appointment process. But that is far beyond the scope of the Commission's directive to study trial court unification, and in any case that too may ultimately be held subject to the Voting Rights Act.

We could dodge the Voting Rights Act dilemma completely, in the staff's opinion, by the simple device of making no change in the current judicial election system. Superior court judgeships would become district court judgeships with a countywide electoral base, and municipal and justice court judges would become district court judgeships with their existing judicial district bases. This approach is inelegant, but it works. We could do worse.

Of the solutions proposed to date, however, the staff prefers the Judicial Council approach—countywide elections generally, subject to individual county challenges and federal court solutions on a county by county basis. This plan makes the most logical sense for a unified court, and a good argument can be made that it eventually will be upheld under the Voting Rights Act. The plan will need to be submitted for preclearance in those counties subject to preclearance, but any preclearance failures would be worked out with the federal authorities

on a county by county basis, as would any ultimate Voting Rights Act failure in individual counties.

The staff would amend Article 6, Section 16 of the California Constitution:

> Sec. 16. (a) Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years beginning the Monday after January 1 following their election, except that a judge elected to an unexpired term serves the remainder of the term. In creating a new court of appeal district or division the Legislature shall provide that the first elective terms are 4, 8, and 12 years.
>
> (b) Judges of ~~other~~ district courts shall be elected in their counties ~~or districts~~ at general elections. The Legislature may provide that an unopposed incumbent's name not appear on the ballot and may provide for election by district or other arrangement to the extent required by federal law .
>
> (c) Terms of judges of ~~superior~~ district courts are 6 years beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.
>
> (d) Within 30 days before August 16 preceding the expiration of the judge's term, a judge of the Supreme Court or a court of appeal may file a declaration of candidacy to succeed to the office presently held by the judge. If the declaration is not filed, the Governor before September 16 shall nominate a candidate. At the next general election, only the candidate so declared or nominated may appear on the ballot, which shall present the question whether the candidate shall be elected. The candidate shall be elected upon receiving a majority of the votes on the question. A candidate not elected may not be appointed to that court but later may be nominated and elected.
>
> The Governor shall fill vacancies in those courts by appointment. An appointee holds office until the Monday after January 1 following the first general election at which the appointee had the right to become a candidate or until an elected judge qualifies. A nomination or appointment by the Governor is effective when confirmed by the Commission on Judicial Appointments.
>
> Electors of a county, by majority of those voting and in a manner the Legislature shall provide, may make this system of selection applicable to judges of ~~superior~~ district courts.
>
> **Comment.** Section 16 is amended to reflect unification of the superior courts, municipal courts, and justice courts in a single trial

level court. See Section 4 (district court) and former Section 5 (municipal court and justice court). Unification does not affect the terms of sitting judges. Section 23.

Subdivision (b) is revised to authorize the Legislature to provide for alternate voting arrangements, including voting by electoral district rather than countywide, if mandated by federal law. See, e.g., Voting Rights Act, 42 U.S.C. § 1973 et seq. The Legislature may provide for this directly or by delegation, for example to the board of supervisors of an affected county.

Note. If judicial districts smaller than counties are created, then the references in this provision to counties should be replaced by references to districts. See Memorandum 93-57 (district court).

A transitional provision along the lines proposed in SCA 3 is also appropriate.

Sec. 23. (a) On the operative date of this section:

(1) In each former superior, municipal and justice court district, the previously selected judges become the judges of the district court.

(2) The terms of office of the judges of the former superior, municipal, and justice courts are not affected by their succession to office as judges of the district court.

(b) This section is operative only until July 1, 2001, and as of that date is repealed.

Comment. Section 23 is added to implement the unification of the superior courts, municipal courts, and justice courts in a single trial level court. See Section 4 (district court) and former Section 5 (municipal court and justice court).

Section 23 ensures the continuation in office of existing trial court judges in the unified trial court for the duration of their terms.

The operative date of this section is July 1, 1995. This section is transitional only and is repealed by its own terms on July 1, 2001.

Implementing legislation is needed to delegate to the counties the ability to work out Voting Rights Act solutions with federal authorities.

Gov't Code § 68122 (added). District court electoral districts

68122. (a) Judges of district courts shall be elected in their counties at general elections.

(b) Notwithstanding subdivision (a), the board of supervisors of a county may by ordinance provide for election of judges of district courts by district or other arrangement to the extent required by federal law.

(c) This section becomes operative only if Senate Constitutional Amendment No. 3 is adopted by the voters at the June 1994

primary election and becomes operative on July 1, 1995, in which case this section becomes operative on July 1, 1995.

Comment. Subdivision (a) of Section 68122 codifies the first sentence of Article 6, Section 16(b) of the Constitution.

Subdivision (b) implements a portion of the second sentence of Article 6, Section 16(b) of the Constitution, which permits the Legislature to provide for voting for district court judges other than by countywide election where federal law mandates it. In that case, subdivision (b) delegates the authority to the county board of supervisors to adopt an appropriate arrangement for district court judicial elections.

Under subdivision (c) the board of supervisors may adopt an appropriate ordinance in advance of the operative date of trial court unification if necessary to comply with the federal law, to become operative on the operative date of trtial court unification. For preclearance activities under the federal Voting Rights Act, see Section 68123 (preclearance of trial court unification).

Note. A proper urgency clause must be added. This provision should be enacted in advance of the operative date of SCA 3.

Gov't Code § 68123 (added). Preclearance of trial court unification

68123. (a) The Attorney General shall, pursuant to the preclearance provisions of the federal Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, seek to obtain preclearance of Senate Constitutional Amendment No. 3 before it becomes operative, with respect to any county subject to preclearance requirements.

(b) This section is operative immediately and remains operative only until July 1, 2001, and as of that date is repealed.

Comment. Section 68123 requires the Attorney General to seek preclearance of trial court unification under the federal Voting Rights Act before it goes into effect in those counties in which preclearance is required. For authority of the county board of supervisors to provide for a district court judicial election scheme that satisfies the Voting Rights Act, see Section 68122 (district court electoral districts).

Note. A proper urgency clause must be added. This provision should be enacted in advance of the operative date of SCA 3.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Focus

Judicial election and selection procedures challenged under the Voting Rights Act

by Nancy J. Smith and Julie Garmel

In June 1991, after hearing the combined cases *Chisom v. Roemer* from Louisiana, and the cases of *Houston Lawyers Association v. Attorney General of Texas* and *League of United Latin American Citizens v. Attorney General of Texas* (LULAC), the U.S. Supreme Court determined that judicial elections are covered by the Voting Rights Act. The Court held that the word "representative" as used in the act describes the winners of any popular election. Although judges are not truly representative of their electorate in the sense that other elected officeholders are, the Court ruled that judges who win a partisan or nonpartisan election in the district in which they run are representatives of that district.

Historically, minority voters have been unable to elect candidates of their choice in school board, legislative, and judicial elections because these voters do not have a majority of votes necessary to prevail in a particular district. Plaintiffs in Voting Rights Act cases have alleged that state officials intended to dilute minority votes by gerrymandering voting districts. In these federal lawsuits, violations of the act were cited, along with violations of the Fourteenth (equal protection) and Fifteenth (right to vote) Amendments.

Congress adopted the Voting Rights Act in 1965 to ensure that every citizen's right to vote was "equal in influence" in an election. In 1982, Congress amended Section 2 of the act to require plaintiffs alleging violations under the act to prove only discriminatory results, as opposed to intent, of an election procedure. As part of this amendment, Congress replaced the word "legislator" with "representative." This word change caused the legal controversy concerning judicial elections.

When confronted with lawsuits after 1982 challenging judicial elections, defendants argued that the word change meant Congress believed no judicial elections should be subject to the Voting Rights Act. Defendants continually answered plaintiffs' allegations of discrimination by maintaining that judicial elections were not covered by the Voting Rights Act, and therefore plaintiffs had no cause of action. Numerous lower courts reached contradictory conclusions on the question of coverage of judicial elections by the act.

Although the Supreme Court remanded *Chisom* to the Fifth Circuit for further proceedings, Louisiana willingly entered into a stipulation to settle the case, even though the federal court had never entered a judgement against the state. African-American plaintiffs in *Chisom* challenged the process of electing Louisiana Supreme Court judges. The consent decree in *Chisom* created an additional judgeship and set an election to fill the vacancy. The elected judge will then be assigned to the supreme court on a rotation basis with the other justices until a vacancy occurs on the court. The Texas cases were also returned to the Fifth Circuit, and until the Fifth Circuit panel's consideration of liability and remedy issues is undertaken, Texas continues to elect its trial judges using the at-large system the plaintiffs attacked in the *LULAC* suit.

Challenges to judicial elections

Now that the Supreme Court has determined that judicial elections are covered by the Voting Rights Act, new lawsuits have been filed claiming discrimination. Many of the cases filed before 1991 have been decided or settled.

In February of this year, a consent decree was entered by the U.S. District Court for the Middle District of Louisiana in the case of *Clark v. Edwards*, in which the plaintiffs challenged Louisiana's methods of electing various local judges. These judges are elected in at-large, multidistrict elections, which the plaintiffs complained diluted the influence of African-American voters. After nearly four years of court appeals, both sides have agreed to a settlement that includes holding special elections in majority African-American subdistricts.

In March, the U.S. District Court for the Middle District of Alabama held in *Southern Christian Leadership Conference of Alabama v. Evans* that the state's system for electing trial judges in certain divisions does not violate the Voting Rights Act or the Fifteenth Amendment. Alabama has 40 judicial circuits, each with at least one circuit court judge and one district court judge. These two categories of judges are elected at-large from their respective circuits or districts.

African-American voters within Alabama's various judicial circuits and districts alleged that the at-large system for electing trial judges dilutes their voting strength in 14 judicial circuits and districts. They also maintained that both the size of the circuits and the requirement that candidates receive a majority of the vote discriminate against the election of African-American candidates.

The court, however, held that the plaintiffs failed to demonstrate the existence of the three prerequisites established by the Supreme Court in a 1986 case, *Thornburgh v. Gingles*, as necessary to prove a violation of Section 2 of the Voting Rights Act in at-large elections. The plaintiffs were able to demonstrate only one of these prerequisites, that their group possessed political cohesion. The court said they failed to demonstrate the other two prerequisites: (1) as a minority group, the plaintiffs are sufficiently large and geographically compact to constitute a

majority in a single-member district, and (2) the plaintiffs' preferred candidates are usually defeated by the bloc vote of the majority group.

The court held that Alabama's judicial election system is not racially inspired and stated that "blacks in Alabama at the present time very definitely have a powerful political voice in the election of all judges in the challenged circuits."

In June, the U.S. District Court for the Middle District of Florida found no evidence in *Nipper, et. al. v. Chiles, et. al.* that the state's at-large system for electing judges was established or maintained for a discriminatory purpose. Minority plaintiffs alleged their votes were dilluted because of the at-large system, and they requested relief through subdistricting. Although the court held that the plaintiffs were in fact able to draw a majority African-American subdistrict, it found the plaintiffs were unable to show racially polarized voting, and therefore it refused to adopt the plaintiffs' argument that an African-American candidate would automatically be preferred over a white one.

The court also held that Florida's at-large system did not limit African-Americans from participating in the political process because (1) the voting districts were not unusually large; (2) the African-American voting population was registered at a higher rate than the white voting population; (3) the costs of running for judicial office were not a significant barrier to prospective African-American candidates; and (4) the percentage of African-American judges is substantially greater than the percentage of African-American lawyers who are eligible to run for judge. *Nipper* is now on appeal in the Eleventh Circuit.

Challenges to merit selection

New litigation has also addressed the applicability of Voting Rights Act provisions to various states' merit systems for the appointment of judges. In May, African-American voters in Missouri filed *African-American Voting Rights Legal Defense Fund, Inc., et. al. v. State of Missouri, et. al.* in the U.S. District Court for the Eastern District of Missouri, charging that the state's use of a merit selection and retention system for nominating and appointing appellate, circuit, and associate circuit judges violates the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

The plaintiffs assert that the imposition of merit selection in certain judicial circuits impairs the ability of African-American voters in these circuits to elect representatives of their choice. All appellate judges and circuit judges in the St. Louis and Kansas City metropolitan areas are chosen under merit plans. Judges are appointed by the governor from lists submitted by judicial nominating commissions. The plaintiffs contend that only two African-American lay persons have been appointed to two of the commissions, and only one African-American has served on the commission at any given time. According to the lawsuit, no African-American lay person has ever been appointed to any other commission in the state. Moreover, the plaintiffs maintain that the inability of African-Americans to vote for lawyer commission members, who are elected by local members of the state bar, impairs their ability to elect representatives of their choice.

The Missouri lawsuit also includes as plaintiffs the registered voters of the 40 circuits that have not adopted the merit selection plan and elect their local judges in partisan elections. These plaintiffs allege that the boundaries for judicial circuits and appellate circuits dilutes the African-American population's voting strength. They maintain that they have less opportunity than other voters to participate in the political process and are unable to elect representatives of their choice.

Last year, in *Tsosie v. King*, Native Americans filed a lawsuit in the U.S. District Court for the District of New Mexico, claiming that the system for electing district court judges and magistrates in the 11th Judicial District violates the Voting Rights Act. District court judges in New Mexico, however, are appointed by merit selection, stand for one partisan election after their first term, and for retention elections thereafter. As in Missouri, judges are appointed, not elected. Yet, the plaintiffs in both New Mexico and Missouri have chosen to use the word "elected" in their complaints about the merit selection system, even though no "voting" by registered voters takes place in the initial appointment.

New Mexico's 11th Judicial District is comprised of San Juan County and McKinley County, which have approximate Native American voting age populations of 33 percent and 68 percent respectively. The plaintiffs contend that as a result of combining counties, all at-large elections in the district dilute Native American voting strength. The plaintiffs further contend that the system for nominating and appointing individuals to fill judicial vacancies in the district violates the Voting Rights Act, because the list of nominees eligible for appointment by the governor is submitted by a judicial nominating commission that lacks Native American representation. The plaintiffs also charge that the at-large system of voting for magistrates in San Juan County violates the act because its Native American voting age population constitutes a minority.

The plaintiffs suggest that if this district were divided into smaller subdistricts for election purposes, the Native American population is sufficiently large and geographically compact to constitute a majority of the voting age population in one or more of these smaller subdistricts. They contend that the current district court nomination and appointment system, coupled with at-large retention elections, has the effect of "further entrenching a discriminatory election system, further diluting Native American voting strength, and denying Native American voters an equal opportunity to elect candidates of their choice."

In Lake County, Indiana, a merit selection system is used to appoint superior court judges, with retention elections for incumbents. If a judge loses the retention election, the judicial seat becomes vacant, and a new judge is appointed through the merit selection system. In *Bradley v. State Election Board* (U.S. District Court for the Southern District of Indiana), the plaintiffs allege that these retention elections prevent African-Americans from challenging a white incumbent judge in a primary or general election, and therefore denies them the right to

elect candidates of their choice. Trial in this case is set for May 1993.

In Georgia, the parties in *Brooks v. State Board of Elections* (U.S. District Court for the Southern District of Georgia) have agreed to merit selection as a remedy to allegations of Voting Rights Act violations. Trial court judges in Georgia historically had been elected under a majority vote rule. The African-American plaintiffs in *Brooks* allege that new judgeships and judicial districting created by the state have not been approved by the U.S. Department of Justice as required by Section 5 of the Voting Rights Act to assure compliance with the act. The U.S. Supreme Court affirmed a U.S. district court decision that judgeships in Georgia require approval of the Justice Department. A settlement in this case has been proposed and submitted to the Justice Department and the federal district court for approval. Its provisions include: (1) by December 31, 1994, no fewer than 25 African-American superior court judges will serve; (2) five other African-Americans will be appointed to either state or superior court seats in addition to the number previously serving; (3) the state's judicial nominating committee will be increased by two persons, including one being an attorney for the plaintiffs; (4) this new system will not preclude Voting Rights Act challenges being brought against it; and (5) after 1995, the judicial nominating committee will become the sole nominator for judges. The goal of this system is a diverse judicial system reflective of the state as a whole.

Other Voting Rights Act lawsuits

In February, African-Americans and Hispanics filed suit in U.S. District Court for the Southern District of New York, alleging that the system of at-large elections for trial court judges in New York City's four judicial districts violates the Voting Rights Act. Using the existing boundaries for these districts, African-American and Hispanic voters are in the minority. If these districts were broken into smaller election districts, as the plaintiffs request in *France v. Cuomo*, the new districts would contain a majority of African-American and Hispanic voters.

Moreover, the plaintiffs maintain that they are prevented from running for the state's court of general jurisdiction in New York as a result of the party nominating process. In practice, the ability of an individual to run for these courts depends on the nomination or endorsement of a political party. While the endorsement is not legally required, African-American and Hispanic candidates traditionally have been unable to obtain party endorsements. As a result, the lawsuit contends, the political slating system that controls the nominating process for judgeships makes it difficult for African-Americans and Hispanics to become candidates.

Similar lawsuits challenging at-large elections have been filed in other U.S. district courts. In Tennessee, a trial is scheduled for April 1993 to decide if the state's use of at-large elections for judges of both the Eleventh Judicial Circuit and the Court of General Sessions of Hamilton County dilute the strength of African-American voters. The plaintiffs request that the state implement either geographic subdistricting or a cumulative voting system to remedy the situation.

In Arkansas, a challenge under the Voting Rights Act was settled by a consent decree that included additional minority subdistricts to be created and no residency requirement. Because of a Voting Rights Act challenge to the at-large election system in Illinois, the state legislature divided the City of Chicago and Cook County into 15 subdistricts for judicial elections. Six of these subdistricts have a majority of African-American or Hispanic voting age populations. The supreme and appellate court districts were not affected. Subdistricting for these courts would require amending the state constitution. □

NANCY J. SMITH is a Chicago attorney.
JULIE GARMEL is a staff attorney at the American Judicature Society.

Editor's note: For additional background on the Voting Rights Act and judicial elections see the following articles in the August-September 1989 issue of *Judicature*: "Section 2 of the Voting Rights Act of 1965: a challenge to state judicial election systems," by Judith Haydel, page 68; "The Voting Rights Act and judicial elections: an update on current litigation," page 74; "The Voting Rights Act and judicial elections litigation: the plaintiffs' perspective," by Robert McDuff, page 82; "The Voting Rights Act and judicial elections litigation: the defendant states' perspective," by Ronald E. Weber, page 85.

I'd like to plead insanity, Your Honor.
For the life of me I can't figure out why I took this case.

ELECTORAL DISTRICTING UNDER THE JUDICIAL COUNCIL'S SCA 3 PROPOSALS

The Judicial Council believes that, given an elective judiciary, the goal of an independent, yet accountable, judiciary is best promoted by the establishment of judicial electoral districts which are coterminous with the courts' territorial boundaries.

Electoral sub-districting would result in some district judges being exclusively accountable to certain residents of the district and other judges of the same court being exclusively accountable to an entirely different constituency. Electoral sub-districting thus creates the semblance of bias and favoritism towards the interests of a narrow constituency rather than the fact and appearance of judicial fairness based upon electoral accountability to the broadest range of people within the court's jurisdiction. Electoral sub-districting threatens to politicize the trial bench and undermine judicial impartiality. Judges should be accountable to all those within the court's jurisdiction, not just some.

Electoral sub-districts would likely result in a public expectation not only that the trial judge would primarily serve the interests of those within the sub-district but also that the judge would be assigned to any court facility located within the sub-district and to cases arising within the sub-district. Tying judicial assignment to electoral sub-district would impair the very flexibility in judicial assignment which is a primary benefit of trial court unification.

The state's interest in having judges elected by all the voters within the court's territorial boundaries is expressed in the California constitution, which has always provided for this electoral scheme. The desire to avoid the appearance of bias inherent in having judges electorally accountable to only a portion of those within the court's territorial jurisdiction and the desire to permit flexible assignment of judges within a district provide a strong justification for the State's long-standing policy.

The Judicial Council has carefully considered the potential impact of its proposal on the interests of minority voters and judges, giving particular attention to the requirements of the Federal Voting Rights Act.

In the only Supreme Court decision which has considered the application of the Voting Rights Act to the election of trial judges, the Court expressly noted that a state's interest in maintaining a link between the court's jurisdiction and the

area of residency of its voters is "a legitimate factor" to be considered in determining whether a violation of the Act has occurred. Houston Lawyer's Association v. Attorney General, 111 S. Ct. 2376, 2381 (1991).

Drawing electoral sub-districts on the basis of race or ethnicity would not further the interests of even minority voters who are not geographically compact. More importantly, trial judges, unlike legislators, are not members of a collegial body wherein authority is shared. Rather each judge exercises the full authority of the office, independently deciding the cases that come before the court. Consequently, drawing judicial electoral districts on the basis of race or ethnicity would not enhance minority electoral influence in the trial court system as a whole. Electoral sub-districts would leave minority voters with virtually no electoral influence over the majority of judges within the district. Unlike legislators from minority controlled electoral districts,. judges elected from minority controlled sub-districts would have no impact on the decisions of the court rendered by judges elected from non-minority districts.

The precise requirements of the Voting Rights Act for judicial elections are unclear. The United State Supreme Court has held that judicial elections are covered under the Act, but has left open the standards for determining compliance. See, Houston Lawyer's Association v. Attorney General, 111 S. Ct. 2376 (1991). Recent decisions in the federal appellate courts defining these standards are in direct conflict on several key issues. See, Lulac v. Clements, ____, F.2d. ____, 1993 WL 319087 (5th Cir., en banc, August 23, 1993); Nipper v. Childs, ____ F.2d. ____, 1993 WL 326663 (11th Cir., Sept. 15, 1993).

Regardless of the views taken by the various federal circuits on the appropriate standards for judicial elections, all courts recognize that district-wide electoral schemes do not, on their face, violate the Act and that the inquiry in each case is "highly factual and intensely local." In light of the uncertainty concerning the standards, and the need for local assessment, the Council has concluded that it is not possible to predict with any certainty the impact of any statewide proposal on the rights of minority voters in each individual county.

The suggestion that sub-districting along racial or ethnic lines may avoid a subsequent claim under the Act must be questioned after the recent decision in Shaw v. Reno, 61 LW 4818 (June 28, 1993), in which the United States Supreme Court raised questions about the state's use of race in districting plans where no violation had been established. California ethnic and racial demographics are ever-changing and would

require constant change in sub-districts designed along racial and ethnic lines. Such sub-districting would threaten to introduce partisan political factors into the judicial electoral scheme. Thus, any unintended adverse impact of the proposed electoral scheme on minority voters is more effectively addressed at the local level in response to a concrete challenge under the Act.

Should a federal court conclude that an adjustment of the judicial electoral scheme is necessary to comply with the Act in a specific county, the federal court's remedy will not be limited by state law. If a court determines that an alteration in a specific county's electoral scheme is required, the court must under the law permit the legislature to propose a remedial plan, which the court must then adopt unless it also violates the Act.

It is also not possible to predict with any certainty the actual impact of the proposal on the selection of judges who are members of minority groups. However, the Council notes that very few judges are first selected for judicial office through election rather than appointment, and that, in general, the percentage of sitting judges who are minorities compares favorably with the percentage of lawyers with the requisite legal experience to serve as a judge who are minorities. The Council also notes that almost 60% of all sitting minority judges serve on courts with county-wide electoral districts.

In order to meet the challenges which confront the justice system in California, the judiciary should reflect the racial and ethnic diversity of the population it serves. The Judicial Council is fully committed to greater racial and cultural diversity on the trial court bench. But legislative drawing of judicial electoral sub-districts based on race or ethnicity is not an appropriate way to accomplish that goal.

Warren 10/93

The Superior Court
6230 SYLMAR AVENUE
VAN NUYS, CALIFORNIA 91401
CHAMBERS OF
HOWARD J. SCHWAB JUDGE

TELEPHONE
(818) 374-2772

August 2, 1993

Ms. Linda Theuriet
Judicial Council of California
Administrative Office of the Courts
303 Second Street, South Tower
San Francisco, CA 94107

RE: SCA 3, Court Consolidation and Retention Elections

Dear Ms. Theuriet:

In this letter, I wish to share my concerns as to the possible ramifications of the proposed above measure as presently drafted. SCA 3 would unify the Superior and Municipal Courts into one District Court which apparently would be countywide, with certain possible modifications.

While I personally favor the concept of unification of the Superior and Municipal Courts, it is my fear that the proposed constitutional provision, SCA 3, as presently written may possibly end up causing more problems and devastation to trial judges and greater expense to the taxpayers than can presently be envisioned. As it now exists, SCA 3 may arguably be invalid, may cause havoc to California's bench officers, may produce endless litigation, and may end up creating a judiciary that is totally politicized. In Chisom vs. Roehmer (1991) 501 U.S. ___ 115 L.Ed 2d 348 and Houston Lawyers' Association vs. Attorney General of Texas, (1991) 501 U.S. ___ 115 L.Ed 2d 379 the United States Supreme Court held that the provisions of the Federal Voting Rights Act applied to contested State Judicial Elections. In Houston Lawyers' the nation's highest court held that the Voting Rights Act could apply to at large elections such as countywide under certain limited circumstances, (such as a voting district being formulated for improper racial reasons.) If there is to be unification, then it is strongly urged that the election system for state trial judges be changed in SCA 3 from contested elections to that of retention elections such as exists for Appellate Courts.

It may be argued that any initiative calling for unification of the Superior and Municipal Courts (which in turn would abolish the individual municipal court judicial districts to form one countywide district court) would be invalid as being in violation of the Federal Voting Rights Act. Presently there is litigation involving Monterey County where the Municipal Court recently consolidated their individual judicial districts into one countywide Municipal Court district. A lawsuit has been filed in United States District Court challenging the consolidation as being in violation of the Federal law, requesting that all seated municipal court judges therein be removed from office and that new elections be called with the original districts. The theory of the plaintiffs is that consolidation has weakened the minority voters in the old districts and was therefore illegal. If there is unification of the Superior and Municipal Courts in California on a countywide basis, a similar argument could be made that such is a violation of the Voting Rights Act. Whether the claim could prevail is in doubt, but the specter of trial court consolidation being held unconstitutional with the possibility of every single sitting judge losing his or her seat is sobering. Further, judges elected after court unification would face the uncertainty of the possibility of immediate removal from office in the midst of their terms, if, by chance, the elections were to be declared illegal and new elections were ordered.

In addition, it could be posited that SCA 3 is invalid in not seeking advance approval from the Federal Government. As the court in Chisom v. Roemer noted, changes in voting procedures for judges under certain circumstances must first be presented to the appropriate Federal authorities for pre-clearance before being implemented. Chisom v. Roemer, supra 115 L.Ed2nd at pg. 367 Clark Vs. Roemer (1991) 500 U.S.__ 114 L.Ed2nd 691, 700. If it should be determined that unification created a voting change by reason of abolition of individual Municipal Court judicial districts, implementation could be halted if contested elections remain in effect. At the very least, protracted and expensive litigation could occur with the fate of the state trial courts being uncertain for many years.

To add to this confusion, if unification of the Superior and Municipal Courts with contested elections should be ruled in compliance with Federal standards, provisions of SCA 3 as written could itself be struck down. The proposed measure in Section 4 allows the legislature to divide the District Court into one or more branches, while Section 16 states that the Judges shall be elected in their districts or branches at general elections.

Unfortunately, nothing is stated how sitting judges originally appointed or elected to a countywide position would be divided into branches, whether by seniority, lot or other mechanism. The measure is silent as to whether judges would have to live in the branch they serve or whether judges could be assigned far away from their homes on a permenant basis in an electoral sub-division to

which they have no ties.

Refixing the boundaries of branches for electing judges might arguably fall under the scrutiny of the Federal Voting Rights Act leading to expensive lawsuits that could last well into the next century. This, of course, would be in addition to the politicization of the judiciary and the havoc that would be caused by forcing judges who had countywide jurisdiction to all of a sudden be elected with different and smaller boundaries. To break up Los Angeles County into various branches would interfere with the present positions of the sitting Superior Court judges, who had been appointed and/or elected countywide. This could possibly result in some, if not all, incumbent judicial officers not being able to run for their own seats when their terms end, or being forced to run against other sitting judges in order to remain a District Court judicial officer in a branch of choice. Such an apocalyptic scenario would greatly politicize the court, cause massive instability on the trial bench, and result in years of endless litigation.

It is my opinion that many of the above noted problems could be obviated by changing the electoral system for trial judges from contested to retention elections. It would seem that retention elections such as provided for the Appellate Courts are not within the Voting Rights Act. Both the Houston Lawyers' Association and the Chisom cases dealt with contested elections. However, Chisom noted that the State would not be within the Voting Rights Act for judges if judicial officers were appointed. Chisom vs. Roemer, supra 115 L.Ed.2d at p. 367. The Chisom court mentioned nothing about lifetime appointments such as in the Federal Courts. It would therefore appear that the problems discussed in both U.S. Supreme Court cases were limited solely to contested judicial elections and therefore retention elections would not be included in the act. I therefore urge that any change toward unification should also include retention as opposed to contested elections.

It is true that a ballot could be "top heavy" by having so many judges up for retention election at one time on the ballot. However, this problem could be solved by changing the law to reflect that no judge (or justice) would be on the ballot for retention election unless a petition was filed with a minimal number of names (500 names, or 100 names or a number of names based upon the percentage of the persons last voting in the general election), seeking that particular judge be placed upon the ballot. Not only would such a system help insure the propriety of the unification of the courts, it would also help take politics out of the judicial electoral system while still retaining accountability to the public for its bench officers.

I therefore recommend that California Constitution Article VI, Section 16(d) be amended to include trial judges as well as Appellate justices for retention elections with the additional language that no judicial officer's name be put on the ballot except by petition.

Another possible solution if contested elections remain, suggested to me by a Municipal Court judge, would be to "grandfather" the present sitting Superior Court judges so that each would continue to be elected countywide until he or she retired. The present Municipal Court judges would become District Court judges, with the same powers as Superior Court judges and would continue to stand for election in their particular judicial districts. When one of the "grandfathered" Superior Court judges retired, he or she would be replaced by a District Court Judge in one of the several judicial districts. (Such would be similar to the proposed two-tiered retirement system, whereby the present sitting judges would be "grandfathered" into the original plan, while newly appointed or elected judges would be given the newly created retirement program.) The "grandfathering" process would appear to be in compliance with the Voting Rights Act as the present voting communities remain intact, keeping the original judicial districts, while the present sitting Superior Court Judges would retain their countywide status until retirement. However, I still believe that retention elections remain the best alternative and should be supported by the Los Angeles Superior Court as part of any unification initiative.

While I believe that unification of the trial bench could be very productive, it must be done in a constitutional manner which will not drain taxpayer money in endless litigation. Any consolidation of the courts should include a provision to change the contested electoral system for judges to to retention to insure compliance with the Federal Voting Rights Act. Such changes cannot be left to implementative or "clean-up" legislation since State constitutional issues are raised by the elective process for judicial officers.

In conclusion, if the language of SCA 3 is not modified in conformance with the Voting Rights Act, retention elections or similar provisions (as discussed herein) there should be serious consideration of opposition to the proposed initiative in light of potential detrimental effects to the California judicial system. If, on the other hand, such above recommended changes are made, and other similar concerns are adequately addressed, earnest thought should be given to support for the measure.

Very truly yours,

Howard J. Schwab

Howard J. Schwab
Judge of The Superior Court

HJS:pl