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Can the Legislature Be Trusted with Judicial Selection?

Judge Eric Lipman
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Throughout 2006 and the winter of 2007, a diverse group of state leaders joined former governor Al Quie for a special project. The Citizens Commission for the Preservation of an Impartial Judiciary met to consider three important questions: (1) what changes might be expected to follow the landmark decisions in *Republican Party of Minnesota v. White*; (2) whether these changes are desirable; and (3) whether the changes invite other types of reform.

While all of the commission members agreed that the rulings in the *White* case will likely lead to more spending in campaigns for judicial office, commissioners splintered over what methods would be best to check the corrosive influence of money in these races.

This splintering is significant for two reasons. First, as this issue of *The Hennepin Lawyer* reveals, a wide range of assessments and prescriptions on this problem exists. Second, it is important that readers choose among the competing solutions for themselves. If you share the commission's concerns over fundraising by judicial candidates, your voice and stance are needed. Whether you favor an appointment model, a retention election model, a confirmation model, or another solution entirely, I hope that you will select a reform proposal and make a stand.

I, for one, would be glad to have the company. When the Quie Commission's 30 members broke along the lines of various proposals, I was standing in a subcaucus of one. I argued that the best antidote to fundraising by judicial candidates is to re-tool the federal confirmation process into our own, low-cost selection and retention method. Yet, I could not persuade even one other commissioner on this idea. Undaunted, I am still hoping to persuade you.

The Central Challenges

My analysis began with a simple set of propositions: With a statewide electorate of 3.7 million voters (or in the case of the district courts, very populous judicial districts), any judicial candidate who campaigns becomes—out of practical necessity—a fundraising consultant, a campaign recruiter, and a coalition-builder. In my view, building effective campaign organizations always presents difficult ethical challenges for both incumbent judicial officers and would-be judicial officers. Soliciting campaign help raises doubts that can never be adequately answered—even by honest men and women—and sprays a dingy patina over the whole state court system.

In order to address these effects, I proposed a two-part test—namely, a way to modify our current system of selecting and retaining judicial officers so that:

- (a) it does not require candidates for judicial office to personally contribute, or otherwise raise, money in order to effectively present their qualifications to the decision-



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makers; and,

(b) selection and retention decisions are made by decision-makers who broadly and effectively represent Minnesota as a whole.

Ultimately, I could not join the commission's majority report because it fails this "first test"; nor the Melendez minority report, because it fails the "second test."

The Majority Report

A majority of commissioners favored a system in which judicial officers (a) are appointed by the governor to longer terms; (b) would undergo performance evaluation near the end of that term; (c) receive certain identifiers—"qualified" or "not qualified"—based upon the performance evaluation; and (d) are granted follow-on terms by the voters in retention elections.

I do not believe that a retention election system is our best option because it does not (1) curb a judge's interest in, or reliance upon, fundraising appeals for election campaigns; (2) obviate the need for judges to recruit others to be a part of effective campaign organizations; or (3) reduce the ardor among interest groups to conduct statewide media campaigns on judicial selection and retention. Worse still, I was concerned that by proposing a retention election system, the majority report's message to the broader public was that the key difficulties facing our state's system of judicial selection and retention are *challengers*. Because fundraising, and not willing office-holders, is the source of our difficulties, I thought that retention elections simply excised the wrong features from our process.

The Melendez Minority Report:

The next most sizeable bloc of commissioners favored a system in which (a) the governor would be obliged to appoint judicial officers from among the list of nominees referred by a merit selection commission and (b) a judicial evaluation commission would approve follow-on terms of office.

Because at its root the commission's objective was to urge a system that will preserve and extend public confidence in the state courts, I likewise could not join the minority in support of a proposed appointive system. The Melendez minority report would, in my view, leave much of the selection and retention decision making to a small team that is neither known to nor chosen by the electorate at large.

While conceding that our current process of having 4 million voters participate in judicial selection and retention decisions, has introduced problems into our system, authorizing a team of 20 or so people to make such decisions introduces other shortcomings. As the judicial power is drawn from the citizens of this state, our system for selecting and retaining judicial officers should have better and more meaningful connections to the citizenry than is provided for in the minority report.

A Third Way

At the commission's February 2007 meeting, I circulated a proposal that was based, in large measure, upon Sen. Thomas Neville's Senate File 324 (2007). This proposal included detailed language for:

- Confirmation of initial and successive terms of state court judges by both houses of the Minnesota Legislature;
- Anti-filibuster protections, which assured confirmation if a negative vote by both houses was not taken within short time frames;
- Special sessions of the Legislature to be called to act upon vacancies;
- Permitting incumbent judicial officers to self-nominate for follow-on terms of office;
- Initial and follow-on terms of office to be extended to 10 years;

- Preliminary evaluation of performance by incumbent judicial officers by the Commission on Judicial Selection; and,
- Establishment of a joint House-Senate commission to evaluate the qualifications of gubernatorial appointments and the performance of judicial officers seeking a follow-on term.

Through this proposal I hoped to offer a system that obviated the need for would-be judicial officers to build campaign organizations in order to effectively present their qualifications for office, and yet placed selection and retention decisions with a large, familiar, accountable, and very representative set of decision makers.

It could be that my proposal faltered at the commission because I am a clumsy salesman. While this is a real possibility, my sense is that it had more to do with our collective memories of the confirmation process for Robert Bork, Clarence Thomas, Zoë Baird, and Harriet Miers than anything I said. Any proposal that conjures up the current practice in Washington invites real anxiety—because no one is eager to walk that gauntlet. As humorist Kin Hubbard observed more pointedly: “Now and then an innocent man is sent to the Legislature.”

Yet, a Washington-style process is not a necessary (or inevitable) part of legislative review. As long-time observers of the Minnesota Legislature will tell you, there are examples, both large and small, where the institutional norms of the State Capitol insist upon nonpartisan cooperation. These examples include the annual Revisor’s Bill; the annual Claims Bill; workers compensation reforms that have been proposed by the Workers Compensation Advisory Council; and confirmations to the Campaign Finance and Public Disclosure Board.

There is nothing magical, nor particularly formal, about this list. Rather, these exceptions to “politics as usual” arise out of the culture in St. Paul. The word has gone out that partisanship on these subjects invites more trouble for the institution than can be justified by one or another temporary majority; and so, in the main, the gamesmanship does not occur. A set of unwritten norms polices legislative behavior and this culture yields real results.

And while we all might wish for a broader range of subjects for which there are no political games, it is a fact that the Minnesota Legislature is capable of, and practiced at, feats of genuine collaboration and nonpartisanship. These are matters of culture and of will.

As to the Revisor’s Bill and workers compensation matters, state legislators have also developed a set of institutional controls that ensure transparency and dissuade self-dealing. A series of bipartisan sign-offs keeps everyone honest and the process moving.

There is no reason why judicial selection and retention decisions could not be added to this list of non-political success stories.

Can the Minnesota Legislature be trusted with judicial selection and retention duties? You bet. Because legislators could effectively eliminate fundraising by judicial candidates, and establish a broadly inclusive selection process, we should ask them to perform this important service. Legislators could easily repay the compliment by doing it right.

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