

# MSBA



***THE MINNESOTA STATE BAR ASSOCIATION AND  
THE COALITION FOR IMPARTIAL JUSTICE:***

## **White Paper On Proposed Constitutional Amendment Concerning Judicial Selection, Retention, and Evaluation**

*A strong tradition of judicial independence is a key difference between societies that are sincerely committed to the rule of law and those that view the judiciary as one more tool to be manipulated for the benefit of vested economic and political interests. It should never be taken for granted.<sup>1</sup>*

### **I. Introduction and Summary**

**M**innesota has a long and proud tradition of an independent and impartial judiciary. Both the public and the business community view the state's courts as fair, efficient, and largely insulated from outside influences, be they political, economic, or social. For example, the 2008 U.S. Chamber of Commerce survey of corporate counsel ranked Minnesota courts second nationwide for competence and fifth for impartiality.<sup>2</sup>

That tradition, however, is under threat. A combination of recent judicial decisions, the evolution of mass media, and the increasing stridency of some business, political, and social interests threatens to turn Minnesota's judicial election process into a contentious partisan exercise, plagued by mud-slinging ads, distortions of judicial records, and campaign expenditures rocketing into the millions of dollars. Many of these threats are posed by outside parties who are not interested in assuring the fair administration of justice in Minnesota courts, but instead in seating specific judges who would reach specific outcomes on specific issues. Such bitter, expensive, and partisan campaigns raise the spectre of elected judges who would (consciously or not) skew their decisions in favor of litigants who contribute to their campaigns or otherwise aid in their election. Just as importantly, such campaigns would poison the public's perception of the judiciary as a fair, unbiased, and nonpartisan arm of government.

Recognizing these dangers, a broad group of organizations has joined to form the Coalition for Impartial Justice. The members of the Coalition are:

American Judicature Society  
 Amicus  
 Center of the American Experiment  
 Citizens League  
 Common Cause Minnesota  
 Council on Crime and Justice  
 Disability Law Center  
 Growth and Justice  
 Hennepin County Bar Association  
 Joint Religious Legislative Coalition  
 League of Women Voters Minnesota  
 Mid-Minnesota Legal Assistance  
 Minnesota AFL-CIO  
 Minnesota Chamber of Commerce  
 Minnesota Council of Nonprofits  
 Minnesota Second Chance Coalition  
 Minnesota State Bar Association  
 Minnesotans for Impartial Courts  
 O'Connor Judicial Selection Initiative  
 180 Degrees, Inc.  
 Take Action Minnesota  
 WATCH

We in the Coalition urge the Minnesota Legislature to approve and to submit to state voters in November of 2010 a constitutional amendment that would change the way Minnesota judges are evaluated and presented to voters for approval. The proposed amendment would replace the present system of contested multicandidate judicial elections with a simple yes-or-no retention vote on whether each judge should continue in office. The amendment would also establish a system for evaluating judges, with published results aimed at providing voters with information helpful to those retention votes.

In support of the constitutional amendment, we have set forth below a brief history of Minnesota's judicial elections, an analysis of the looming threat, a description of the proposed constitutional amendment and the changes it would bring, and a discussion of the advantages that the proposed retention/evaluation system would provide.

We urge the legislature to act now, before Minnesota has to endure the ordeal of a multi-million-dollar, mud-slinging judicial election campaign. The threat is not theoretical; it is real, and it has happened in nearby states. Unless Minnesota takes action, it *will* happen here.

## II. Factors Presently Affecting Judicial Elections in Minnesota

### A. The Constitutional Provisions

Judicial elections have existed in Minnesota since the state joined the Union in 1858. Minnesota's original state constitution, adopted in 1857, provided that "judges of the supreme court shall be elected by the electors of the state at large"<sup>3</sup> and district (trial court) judges "shall be elected by the electors" of their districts.<sup>4</sup> Although the original language has been revised over the years, Minnesota's constitution still maintains that same basic framework. Article VI, §7, provides: "The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law." Judges must be "learned in the law," that is, they must be admitted or entitled to be admitted to practice as an attorney in Minnesota.<sup>5</sup>

When a vacancy occurs during a judge's term, the governor may appoint a successor.<sup>6</sup> In practice, this is how most Minnesota judges first take office; since 1917, only six of the 53 Minnesota Supreme Court justices attained the bench through election rather than appointment.<sup>7</sup> Any appointed judge must then run for election "at the next general election occurring more than one year after the appointment."<sup>8</sup> Judges must also run for reelection every six years thereafter.

### B. Other Enactments Affecting Judicial Elections

Within that constitutional framework, the state legislature and supreme court have modified the judicial election process in two noteworthy ways. First, in 1912, the legislature required judicial elections to be nonpartisan; that is, judicial candidates may not list party affiliation on the ballot.<sup>9</sup> Under a 1949 rule, judges may designate themselves on the ballot as "incumbent" where appropriate.<sup>10</sup>

Second, in 1974, the Minnesota Supreme Court added an early version of what came to be Canon 5 to the state's Code of Judicial Conduct, providing that a "candidate for a judicial office, including an incumbent judge [shall not] announce his or her views on disputed legal or political issues."<sup>11</sup> This "announce" clause applied both to incumbent judges and lawyers seeking judicial office.<sup>12</sup> Canon 5 also included a "partisan-activities" clause and "solicitation" clause that collectively prohibited judicial candidates from various cam-

<sup>1</sup> D. Lundberg, "Dancin' With Them What Brung Ya: Electing Appellate Judges," *Res Gestae* (March 2009), at 31, 33.

<sup>2</sup> [http://www.instituteformlegalreform.com/component/fibr\\_harris\\_poll/60/lawsuitclimate/6.html](http://www.instituteformlegalreform.com/component/fibr_harris_poll/60/lawsuitclimate/6.html)

<sup>3</sup> Minn. Const. of 1857, art. VI, §3.

<sup>4</sup> *Id.* §4. For a history of the early Minnesota Constitution and judicial elections, see George W. Soule, "The Threats of Partisanship to Minnesota's Judicial Elections," 34 *Wm. Mitchell L. Rev.* 701, 703-09 (2008).

<sup>5</sup> See *In re Scarrella*, 221 N.W.2d 562, 563 (Minn. 1974) (per curiam).

<sup>6</sup> Minn. Const. Art VI, §8.

<sup>7</sup> George W. Soule, *supra* n. 4, at 704.

<sup>8</sup> Minn. Const. Art VI, §8. See also Citizens Committee for the Preservation of an Impartial Judiciary, *Final Report and Recommendations* ("Quie Commission Report") (March 26, 2007), at 4.

<sup>9</sup> See *Republican Party of Minnesota v. White* ("White I"), 536 U.S. 765, 768 (2002), citing Act of June 19, ch. 2, 1912 Minn. Laws Special Sess., pp. 4-6.

<sup>10</sup> George W. Soule, *supra* n. 4, at 704.

<sup>11</sup> Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000). See also *White I*, 536 U.S. at 768.

<sup>12</sup> The lawyers' duties to comply with the announce clause appeared in Minnesota Rule of Professional Conduct 8.2(b): "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct."

paigned and fundraising activities, such as signing solicitation letters, soliciting support, and seeking financial contributions at large gatherings.<sup>13</sup>

Judges who violated the announce clause were subject to removal, censure, suspension, and other forms of civil penalties, and non-judge lawyer candidates who violated the clause faced various sanctions as severe as disbarment.<sup>14</sup> The message of Canon 5 was clear: Politicized judicial elections had no place in Minnesota. Canon 5, one scholar has observed, kept most Minnesota judicial elections “largely devoid of partisanship.”<sup>15</sup>

### C. The *White* and *Citizens United* Decisions

In recent years, courts have held that the benefits of Canon 5 in largely removing politics from judicial elections were outweighed by the free speech guaranteed by the 1st Amendment. Two federal appellate court decisions—including the landmark *Republican Party of Minnesota v. White*<sup>16</sup>—struck down most of Canon 5 as an unconstitutional violation of free speech, and another freed corporations and unions to make unlimited expenditures on judicial election campaigns.

The seeds for *White* were sown in 1996, when Gregory Wersal, campaigning for associate justice of the Minnesota Supreme Court, distributed campaign literature criticizing Minnesota Supreme Court decisions on crime, welfare, and abortion.<sup>17</sup> The Office of Lawyers Professional Responsibility filed a complaint against Wersal under Canon 5’s announce clause, but the complaint was dismissed by the state Lawyers Professional Responsibility Board, which expressed doubt over the announce clause’s constitutionality.<sup>18</sup> When Wersal ran again in 1998, he asked the Lawyers Board whether it planned to enforce the announce clause. When the Board refused to answer, Wersal filed suit in federal district court, seeking a declaration that the announce clause violated the 1st Amendment and an injunction against its enforcement.<sup>19</sup> The district court found that the announce clause did not violate the 1st Amendment, and the 8th Circuit Court of Appeals affirmed.

The United States Supreme Court reversed, concluding that the announce clause was not narrowly tailored to serve a compelling state interest in preserving the impartiality of the state judiciary.<sup>20</sup> If a state chooses to hold judicial elections, held the Court, “it must accord the participants in that

process ... the First Amendment rights that attach to their roles.”<sup>21</sup> In other words, wrote the Court, “states may not prohibit judicial candidates from announcing their views on disputed legal or political issues.”<sup>22</sup>

When the case returned to the 8th Circuit, that court invalidated even more of Canon 5, concluding that the partisan-activities and solicitation clauses also violated the 1st Amendment. The 8th Circuit held that the Supreme Court’s *White* decision barred Minnesota from prohibiting judicial candidates from various campaign and fundraising activities such as signing solicitation letters, soliciting support, or seeking financial contributions.<sup>23</sup> Between them, the two *White* decisions declared most of Minnesota’s Canon 5 unconstitutional.

In the wake of the *White* decisions, a diverse group of citizens with backgrounds in law, politics, business, labor, and academia came together under the leadership of former Governor Al Quie as The Citizens Commission for the Preservation of an Impartial Judiciary (“the Quie Commission”). The Quie Commission examined the issues raised by *White* and related questions and prepared an extensive report, concluding:

The *White* decisions have fundamentally altered the rules of conduct for judicial campaigns in Minnesota. Post-*White* elections may now be conducted and funded in a manner that enhances the ability of political parties, special interest groups, popular majorities, and other moneyed interests to exert control over the judicial decision-making process and obtain rulings that reflect their policy preferences. ... [J]udicial candidates may now choose to announce their views on legal and political issues, directly solicit campaign contributions, seek political party endorsements, seek endorsements from special interest groups, identify themselves as political party members, attend political party gatherings, and commit themselves to political party platforms.<sup>24</sup>

Very recently, on January 21, 2010, the United States Supreme Court issued a landmark decision in *Citizens United v. Federal Election Commission*<sup>25</sup> that further magnifies the threat of partisan judicial elections by declaring that the 1st Amendment guarantees corporations and unions the right to

<sup>13</sup> Minn. Code of Judicial Conduct, Canon 5(A)(1); *id.* Canon 5(B)(1)-(2).

<sup>14</sup> *White I*, 536 U.S. at 768.

<sup>15</sup> George W. Soule, *supra* n. 4, at 709.

<sup>16</sup> 536 U.S. 765 (2002) (“*White I*”). The second decision came from the 8th Circuit: *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005), *cert. denied*, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006) (“*White II*”).

<sup>17</sup> *White I*, 536 U.S. at 768. For a more detailed discussion of the *White* decision and its progeny, see David Schultz, “The State of Judicial Selection: The *White* Cases Revisited,” 67 *Bench & Bar of Minnesota* No. 1 (Jan. 2010), at 40-44.

<sup>18</sup> *White I* at 769-70.

<sup>19</sup> *Id.* at 770.

<sup>20</sup> *Id.* at 776-77; see also George W. Soule, *supra* n. 4, at 711.

<sup>21</sup> *White I* at 788 (citations omitted).

<sup>22</sup> Quie Commission Report, *supra* n. 8.

<sup>23</sup> *White II* at 766.

<sup>24</sup> Quie Commission Report at 9.

<sup>25</sup> *Citizens United v. Federal Election Commission*, \_\_\_ U.S. \_\_\_, 2010 WL 18385 (U.S. Jan. 21, 2010).

make unlimited independent political expenditures. Overruling earlier decisions,<sup>26</sup> the Supreme Court swept away restrictions on corporate and union political expenditures that had ensured relatively modest corporate spending on judicial elections. Although the full impact of *Citizens United* remains to be seen, observers have already commented that the decision will “open the floodgates of corporate and union treasury spending—particularly in state high court elections.”<sup>27</sup> This new right to unfettered spending by corporations and unions raises the spectre of third-party spending in judicial elections running into the tens of millions of dollars, shattering recent seven-figure spending records.

#### D. The Societal Components Influencing Judicial Elections

Our exploration of these issues would be incomplete if we did not acknowledge that an added impetus for the amendment arises not from the constitution or the courts, but from the inexorable evolution of both electronic communication and political discourse in our society.

There can be little question that the election politics of the executive and legislative branches has entered a phase of increased confrontation, if not outright acrimony. For better or worse, the differences between the political parties and their candidates have become both more pronounced and more strident, especially at election time. As a result, candidates, parties, special interest groups, and individuals in Minnesota and elsewhere are pouring more and more effort and money into campaign advertising that is more and more often regarded as “negative” or “attack advertising.” Given the influence and impact of judicial decisions on public policy, on the health of businesses, and on the everyday lives of American citizens, it is not surprising that such massive contributions, single-issue advocacy, and attack advertising have seeped from the overtly partisan executive and legislative races into supposedly nonpartisan judicial elections. (Some examples are discussed in the following section.)

At the same time, the past 25 years have witnessed an explosion in communication perhaps unparalleled in history. No more are the avenues of public discourse restricted to daily newspapers and a limited number of broadcast television and radio stations. Cable television, public access channels, the internet, home publishing, blogs, instant messaging, social networking: All have combined to dramatically increase the ability of individuals and groups to communicate a robust message to a wide audience in a very short time. The coming decades will doubtless bring even more such dramatic jumps forward in communication, the likes of which

we can presently only guess. Along with all their other social effects, these advances in communication have afforded those with strong views on elections a much broader, much cheaper, and much more immediate platform from which to spread those views.

### III. The Nature of the Threat

The convergence of all these factors—Minnesota’s contested judicial elections, the decisions in the *White* litigation and the *Citizens United* case, the present tone of political discourse, and the ever-increasing availability and reach of mass communication—leaves Minnesota poised for judicial elections marked by inflammatory campaigning and divisive rhetoric, driving up election costs and forcing judges to pay more attention to the vagaries of public opinion and less to the rule of law.<sup>28</sup> Such expensive, mud-slinging elections pose a real, serious, and imminent threat to the integrity of the judicial selection and retention process in Minnesota, and in turn to the integrity of the court system itself.

As the Quie Commission suggested, Minnesota will soon find itself among the states with costly, partisan campaigns. “[B]ig money court races,” according to the commission, “are spreading rapidly across the country, with the average cost of winning jumping 45 percent between 2002 and 2004.”<sup>29</sup> In Texas, Illinois and Ohio—“perennial battleground states”—37 state supreme court candidates each raised over \$1 million between 2000 to 2004.<sup>30</sup>

The ultimate concern, of course, is that when partisan judges run issue-based campaigns to appease *du jour* political majorities, certain litigants may not receive a fair hearing—or, nearly as importantly, may not *believe* they have received a fair hearing.<sup>31</sup> The impartiality of the judicial system lies at the foundation of American democracy; as Alexander Hamilton wrote, “No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.”<sup>32</sup> The Minnesota legislature and voters must act now to prevent the erosion of Minnesota’s impartial courts.

#### A. The Spending and the Advertising

Although Minnesota has not yet been subjected to any big-money judicial election campaigns or attack advertising targeting judicial candidates, that escape is only a matter of luck and timing. The danger is real and imminent, and both the extravagant fund-raising for judicial election campaigns and the aggressive attack advertising that such money enables are knocking at Minnesota’s door. For example, three of the six

<sup>26</sup> See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell v. Federal Elections Commission*, 540 U.S. 93 (2003).

<sup>27</sup> American Judicature Society, Media Advisory: Statement of Carole Wagner Vallianos, President, American Judicature Society, Regarding U.S. Supreme Court Decision in *Citizens United v. FEC*, Jan. 21, 2010, available at <http://www.ajs.org/lajs/pdfs/AJSstatement-CitizensUnited1-21-10.pdf>.

<sup>28</sup> George W. Soule, *supra* n. 4 at 724.

<sup>29</sup> Quie Commission Report at 10.

<sup>30</sup> *Id.*

<sup>31</sup> See Quie Commission Report at 11.

<sup>32</sup> Alexander Hamilton, *The Federalist* No. 80.

most expensive, contested judicial election campaigns in recent years have occurred in midwestern states: Michigan, Ohio, and Wisconsin. Ohio voters have been barraged with over \$20 million in total judicial campaign advertising in recent years, and a single 2004 Illinois judicial race prompted the two candidates to raise and spend over \$9.3 million, the most expensive judicial race in American history.<sup>33</sup> As for Wisconsin, the bloody 2007 and 2008 supreme court campaigns spent an estimated combined total of \$6.6 million.<sup>34</sup> And the cost of judicial campaigns is only likely to grow.

These highly financed campaigns have generated attack advertisements (mostly on television) that will profoundly trouble anyone who values respect for the judiciary. For example:

■ In Michigan, supporters of challenger Diane Hathaway ran one ad asking voters to “call [Chief Justice] Clifford Taylor and thank him for protecting wealthy corporations from suits by women who are sexually harassed and raped at work” and another linking Taylor to President Bush and accusing both of being “political soldiers for the rich.”<sup>35</sup>

■ Justice Taylor’s supporters countered with an ad accusing Hathaway of lying and of being “desperate, doing anything to win” and another attacking her sentencing decisions with comments like “remember the low sentence that Hathaway gave a sex predator that targeted a minor?” and “Probation for a terrorist sympathizer? We’re at war with terrorists!”<sup>36</sup>

■ In Alabama, a candidate challenging the sitting Chief Justice Drayton Nabers ran a television ad showing a hand holding a knife and reciting:

Convicted of rape and murder, Renaldo Adams was sentenced to death, but now Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama Supreme Court using a 5 to 4 decision based on foreign law and unratified UN treaties.<sup>37</sup>

■ Some of the most egregious advertising occurred in neighboring Wisconsin, where in 2008 challenger Michael Gableman unseated Justice Louis Butler, the state’s first African-American justice and the first Wisconsin incumbent justice to

lose an election in 40 years. Gableman ran advertisements evoking the racially provocative Willie Horton ads of the 1988 presidential campaign, picturing an African-American offender while the announcer intoned:

Louis Butler worked to put criminals back on the street. Like Ruben Mitchell who raped an 11-year-old girl with a learning disability. Butler found a loophole. Mitchell went on to molest another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?”<sup>38</sup>

The mere text of these television advertisements does not capture the melodramatic music and inflammatory graphics that produced the full effects of the ads: These ads are every bit as hyperbolic and over-the-top as the worst ads in recent presidential and senatorial campaigns. The audio and video of a number of the competing ads from the Michigan race may be found at [http://www.brennancenter.org/content/resource/buying\\_time\\_2008\\_michigan](http://www.brennancenter.org/content/resource/buying_time_2008_michigan), and we urge the reader to view them to judge their full impact. Such television ads have quickly become a major factor in judicial election campaigns. In 2000, only 22 percent of contested state supreme court elections involved television advertising; by 2006, the proportion had risen to 91 percent.<sup>39</sup> And as noted above, the mushrooming of cheap, immediate methods of electronic communication, both text and video, provides yet another avenue for such inflammatory messages.

The problem is not limited to one particular party, interest group, or point of view. In recent years, expensive and vicious campaigns have defeated both conservative/Republican judges (Michigan Chief Justice Taylor, Mississippi Chief Justice Smith) and liberal/Democratic judges (Illinois Judge Gordon Maag, Wisconsin Justice Louis Butler). This is everyone’s problem.

## B. The Threat to an Impartial Judiciary

Such extravagant spending and attack advertising pose a number of threats to Minnesota’s judicial system, but perhaps none is greater than the threat to the impartiality of the judiciary, both actual and perceived. When judges need to spend money to stay in office, the raising of that money and the advertising it buys cannot help but influence judicial decisions and diminish the standing of judges in the eyes of the public.

<sup>33</sup> Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lakes States, 2000-2008* (J. Rutledge, ed.), at 1, available at [http://www.justiceat-stake.org/media/cms/NPJEGreatLakes20002008\\_DE945C4A0839D.pdf](http://www.justiceat-stake.org/media/cms/NPJEGreatLakes20002008_DE945C4A0839D.pdf)

<sup>34</sup> *Id.* at 1, 28-31.

<sup>35</sup> Brennan Center for Justice, “Buying Time—Michigan and Alabama Join Costly Wisconsin as 2008’s Costliest Campaigns,” (Oct. 30, 2008), available at [http://www.brennancenter.org/content/resource/michigan\\_and\\_alabama\\_join\\_wisconsin\\_as\\_2008s\\_costliest\\_court\\_campaigns/](http://www.brennancenter.org/content/resource/michigan_and_alabama_join_wisconsin_as_2008s_costliest_court_campaigns/)

<sup>36</sup> *Id.*; see also [http://www.brennancenter.org/page/-/video/Judicial%20Ads%2008/MI/Boards/10-29-08%20STSUPCT\\_MI\\_TAYLOR\\_LIES\\_ABOUT\\_CHIEF\\_JUSTICE.pdf](http://www.brennancenter.org/page/-/video/Judicial%20Ads%2008/MI/Boards/10-29-08%20STSUPCT_MI_TAYLOR_LIES_ABOUT_CHIEF_JUSTICE.pdf);

[http://www.brennancenter.org/page/-/video/Judicial%20Ads%2008/MI/Boards/10-29-08%20STSUPCT\\_MI\\_MIRP\\_HATHAWAY\\_UNQUALIFIED.pdf](http://www.brennancenter.org/page/-/video/Judicial%20Ads%2008/MI/Boards/10-29-08%20STSUPCT_MI_MIRP_HATHAWAY_UNQUALIFIED.pdf)

<sup>37</sup> Jesse Sample, Lauren Jones, & Rachel Weiss, *The New Politics of Judicial Elections 2006* (New York: Brennan Center for Justice, 2006), at 4, available at [http://www.brennancenter.org/content/resource/the\\_new\\_politics\\_of\\_judicial\\_elections\\_2006/](http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2006/); [http://brennan.3cdn.net/49c18b6cb18960b2f9\\_z6m62gwji.pdf](http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf)

<sup>38</sup> “Toxic Judicial Elections: A Proposed Remedy by Justice Robert L. Brown,” 44 *Ark. Lawyer* No. 4 (Fall 2009), at 2.

<sup>39</sup> Jesse Sample et al., *supra* n. 37, at 2.

Expensive campaigns, especially those employing television ads, are unfortunately highly correlated with election victories. Between 2000 and 2004, 29 of the 34 state supreme court races that involved television advertising ended with the top television advertiser as the victor.<sup>40</sup> Although campaign spending in Minnesota has so far remained far lower than in many of these states, the spending-equals-victory correlation holds true here as well. In the last several election cycles, the top-spending judicial candidates won over three quarters of the time:

#### Effects of Spending on Victory in Contested Minnesota Judicial Elections

	Supreme Court	Court of Appeals	District Court	Total
2008 <sup>41</sup> Bigger spender won Difference in spending	2 of 2 \$127,760	1 of 1 \$15,770	7 of 9 \$79,446	10 of 12 \$222,976
2006 <sup>42</sup> Bigger spender won Difference in spending	— —	1 of 1 \$29,105	4 of 7 -\$5,722	5 of 8 \$23,383
2004 <sup>43</sup> Bigger spender won Difference in spending	0 of 1 -\$20,111	2 of 2 \$89,880	6 of 7 \$79,831	8 of 10 \$149,660
Bigger spender won	2 of 3	4 of 4	17 of 23	23 of 30

These figures send a clear message to judges and judicial candidates: If you want to win, you have to spend money, and if you want to spend money, you have to go out and raise it, preferably in large amounts. But the idea of a judge with his or her hand out for money is deeply troubling. What is going to motivate a contributor to make a contribution to a judicial campaign? A legislative or executive candidate may offer a number of perfectly legitimate things that a contributor might value: a proposal, a program, a policy, a position on a particular issue, a promise to work toward a particular social end.

But a candidate for judge? A judge does not define social policy, or create programs, or set financial priorities; a judge applies the law to a particular set of facts in a particular case. As a result, the only apparent thing of value that a judicial candidate can promise a contributor is that very application of the law, an exchange that is anathema to the rule of law on which American society is premised. Not surprisingly, 75 percent of Minnesota voters believe judicial fundraising is a threat to the fairness of the judiciary.<sup>44</sup>

The accuracy of this view is reinforced by the fact that most of the judicial campaign contributions come from two groups: business interests and trial attorneys.<sup>45</sup> Although these groups sometimes cloak themselves in noble-sounding names, such as Partnership for Ohio's Future (a business group) and Justice for All (a trial lawyer group),<sup>46</sup> no one can seriously doubt that the true motivations for their contributions are particular substantive outcomes that favor their own interests, and *not* the objective interpretation of the law and the efficient administration of the law.

Such independent interest groups can effectively take over a campaign. For example, in the 2008 supreme court races in Wisconsin and Michigan, independent third-party groups, not the candidates themselves, spent the lion's share of the money on advertising. In Wisconsin, outside groups accounted for 91 percent of the spending on advertising, and in Michigan the Chamber of

Commerce and the Democratic Party alone combined to account for 73 percent of campaign spending.<sup>47</sup>

The effect of such intervention by outside interests on the public's perception of judges is manifest. Seventy-six percent of Americans believe that such campaign contributions influence judicial decisions.<sup>48</sup> And in 2008, 59 percent of Minnesotans surveyed believed that campaign contributions have "some" or "a great deal" of influence on courtroom decisions.<sup>49</sup> Business interests agree; 90 percent of executives surveyed nationwide agreed that campaign donations could sway a judge's ruling and

<sup>40</sup> D. Goldberg, S. Samis, E. Bender, and R. Weiss, *The New Politics of Judicial Elections 2004* (New York: Brennan Center for Justice, 2004), at 1, available at [http://brenman.3cdn.net/dd00e9b682e3ca2f17\\_xdm6io68k.pdf](http://brenman.3cdn.net/dd00e9b682e3ca2f17_xdm6io68k.pdf).

<sup>41</sup> State of Minnesota, Campaign Finance and Disclosure Board, "2007/2008 Campaign Finance Summary," available at [http://www.cfboard.state.mn.us/campfin/Summary/CFS\\_2008.pdf](http://www.cfboard.state.mn.us/campfin/Summary/CFS_2008.pdf).

<sup>42</sup> State of Minnesota, Campaign Finance and Disclosure Board, "2006 Campaign Finance Summary," available at [http://www.cfboard.state.mn.us/campfin/Summary/CFSM\\_06.pdf](http://www.cfboard.state.mn.us/campfin/Summary/CFSM_06.pdf).

<sup>43</sup> State of Minnesota, Campaign Finance and Disclosure Board, "2004 Campaign Finance Summary," available at <http://www.leg.state.mn.us/docs/2005/mandated/050416.pdf>.

<sup>44</sup> Decision Resources, Ltd., "Justice at Stake Survey, Minnesota Statewide, Final" (January 2008), at 6, available at [http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey\\_717C253F67D9B.pdf](http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey_717C253F67D9B.pdf).

<sup>45</sup> Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lakes States, 2000-2008*, *supra* n. 33, at 9.

<sup>46</sup> *Id.*

<sup>47</sup> Brennan Center for Justice, "Buying Time—Michigan and Alabama Join Costly Wisconsin as 2008's Costliest Campaigns," *supra* n. 35.

<sup>48</sup> 2001-2002 survey by Greenberg Quinlan Rosner Research and American Viewpoint for Justice at Stake, at 4, available at [http://www.greenbergresearch.com/articles/1617/1412\\_JAS\\_ntlsurvey.pdf](http://www.greenbergresearch.com/articles/1617/1412_JAS_ntlsurvey.pdf); Decision Resources, Ltd. Survey, *supra* n. 44, at 5.

<sup>49</sup> Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lakes States, 2000-2008*, *supra* n. 33, at 22-23, citing [www.JusticeatStake.org/files/MinnesotaJusticeatStatesurvey.pdf](http://www.JusticeatStake.org/files/MinnesotaJusticeatStatesurvey.pdf).

93 percent said judges should not rule on cases involving donors to their campaigns.<sup>50</sup> Even the judges themselves agree; 46 percent of state court judges agree that campaign contributions influence decisions.<sup>51</sup>

These impressions are well-founded: Experience demonstrates that campaign contributions *do* in fact affect judicial decisions. A recent empirical study in *The New York Times* supports the proposition that contributions not only correlate with decisions, but alter them.<sup>52</sup> In some states, judges routinely rule in cases involving friends, former clients and business associates—and in favor of lawyers who fill their campaign coffers.<sup>53</sup> Indeed, in the 1990s, 86 percent of the cases before the Michigan Supreme Court involved at least one contributor to at least one justice.<sup>54</sup> Such correlations are not widespread in Minnesota—yet. But the convergence of circumstances in Minnesota described above has created an open invitation to abuse by interested parties and to temptation by judges.

Although rules for judicial recusal are supposed to prevent judges from hearing cases in which they may have an interest, such recusals are nearly always left up to the judge's own discretion, and thus have not blunted the public perception of the influence of campaign money on judicial decisions. Most states (including Minnesota) require that judges disqualify themselves whenever their "impartiality might reasonably be questioned."<sup>55</sup> In states in which judicial elections have attracted exorbitant spending, however, justices have ignored "reasonable questions" about objectivity arising from huge campaign contributions from parties before the courts.

Certainly the most prominent instance of this problem involved a West Virginia Supreme Court justice in a case that prompted a reversal by the United States Supreme Court. In *Caperton v. A. T. Massey Coal Co., Inc.*,<sup>56</sup> a frequent litigant donated \$3 million to a special interest group that waged a successful campaign to put attorney Brent Benjamin on the West Virginia Supreme Court. When a case involving a \$50 million judgment against the contributor came before the court, Justice Benjamin repeatedly refused a request that he recuse himself, instead casting the deciding vote overturning the award.

The United States Supreme Court reversed the West Virginia decision, holding that because of the contributor's undeniable role in the justice's election, the justice's partici-

pation in the contributor's case violated the due process clause of the 14th Amendment.<sup>57</sup>

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.<sup>58</sup>

The *Caperton* situation is noteworthy for the egregiousness of the conduct involved, but the circumstance unfortunately is not unique. Although other instances may not rise to the level of the constitutional violation found in *Caperton*, the damage to the public's perception of the bench from such pro-contributor decisions is the same. For example, in the 2004 election, now-Illinois Supreme Court Justice Lloyd Karmeier obtained \$1.35 million of his \$9.3 million campaign from an insurance company, its employees and attorneys, and organizations to which the company contributed. Almost immediately after taking office, Justice Karmeier voted to end proceedings on a half-billion-dollar claim against the company. The public perception of a "bought judge" under such circumstances is virtually unavoidable; as the *St. Louis Post-Dispatch* noted in an editorial: "Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case." Similarly, Wisconsin Supreme Court Justice Annette Ziegler received \$2.2 million for her 2007 campaign from Wisconsin Manufacturers & Commerce ("WMC").<sup>59</sup> Nevertheless, Justice Ziegler initially refused to recuse herself from considering a multimillion-dollar case in which WMC was the appellant.<sup>60</sup> And early this year, the Wisconsin Supreme Court voted 4-3 to adopt ethics rules that provide that campaign contributions and other campaign spending by parties to litigation do *not* require judges to recuse themselves from cases.<sup>61</sup>

<sup>50</sup> May 2007 Committee for Economic Development Survey at 6, available at

[http://staging.justiceatstake.sitevcenterprise.com/media/cms/CED\\_FINAL\\_repor\\_ons\\_14MAY07\\_BED4DF4955B01.pdf](http://staging.justiceatstake.sitevcenterprise.com/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf)

<sup>51</sup> J. Sample, "Justice for Sale," *The Wall Street Journal* (March 22, 2008), available at <http://online.wsj.com/article/SB120614225489456227.html>.

<sup>52</sup> *Id.*

<sup>53</sup> M. Goodman & W. Rempel, "In Las Vegas, They're Playing With a Stacked Judicial Deck," *Los Angeles Times* (June 8, 2006), available at <http://articles.latimes.com/2006/jun/08/nation/na-vegas8>.

<sup>54</sup> Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lakes States, 2000-2008*, *supra* n. 33, at 17 (citing study by National Institute on Money in State Politics).

<sup>55</sup> See, e.g., Minn. Code Jud. Conduct Canon 2.11 (2010).

<sup>56</sup> 129 S. Ct. 2252 (2009).

<sup>57</sup> 129 S. Ct. at 2265.

<sup>58</sup> 129 S. Ct. at 2264.

<sup>59</sup> Wisconsin Democracy Campaign website, <http://www.wiscdc.org/pro07-103567.php>

<sup>60</sup> See Mike McCabe, "Wisconsin Now Has the Best Justice Money Can Buy," BizTimes.com Blog, available at <http://www.biztimes.com/blogs/milwaukee-biz-blog/2007/11/29/wisconsin-now-has-the-best-justice-money-can-buy>

<sup>61</sup> Associated Press, "Wisconsin High Court Adopts Rules Allowing Judicial Campaign Donations," Law.com, available at [http://www.law.com/jsp/article.jsp?id=1202439404590&Wisconsin\\_High\\_Court\\_Adopts\\_Rules\\_Allowing\\_Judicial\\_Campaign\\_Donations](http://www.law.com/jsp/article.jsp?id=1202439404590&Wisconsin_High_Court_Adopts_Rules_Allowing_Judicial_Campaign_Donations)

Ethical rules governing judges' conduct should provide a simple solution to the problem of judges hearing contributors' cases: recusal. Ninety-five percent of Minnesotans believe judges should remove themselves from cases involving contributors.<sup>62</sup> Unfortunately, as the examples above show, the real world does not operate as simply as it should. And we have no reason to believe that expensive campaigns and six-figure donors in Minnesota judicial races will not create the same problem here as they have in other states. As one commentator noted: "In the long term, we all lose when any decision reinforces suspicions that the biggest donor, not the best case, wins."<sup>63</sup>

### C. Threat to Independent Judiciary

The exorbitant campaign contributions and attack advertising also pose a threat to the independence of the judiciary. As Alexander Hamilton wrote, "The complete independence of the courts of justice is particularly essential" in American democracy.<sup>64</sup> And as one recent Illinois commentator noted more specifically:

Fueled by huge interest group contributions, increased partisanship, ideological considerations and hot button issues (such as tort reform), recent judicial elections in Illinois, especially at the appellate level, have become distressingly expensive, partisan, and uncivil—a trend which, left unchecked, has the potential of permanently undermining the independence of the judiciary.<sup>65</sup>

Although most Minnesota judges are appointed by a governor who has been elected as the candidate of a political party, the Minnesota judiciary operates with a high degree of independence from the state's political parties and from the vagaries of public opinion that can affect those parties. The *White* decisions, however, have opened the door to much greater involvement by political parties in judicial elections. The former restrictions on candidates' ability to identify party membership, attend political gatherings, and personally ask for campaign contributions in writing or from large groups are gone.<sup>66</sup> Thus, although judicial elections in Minnesota remain technically "nonpartisan," political parties may now play a significant role in judicial campaigns. Indeed, in 2006, the Republican Party offered its endorsements to Minnesota Supreme Court Justices G. Barry Anderson and Christopher Dietzen and Minnesota Court of Appeals Judge Gordon Shumaker, but all three declined the endorsements.<sup>67</sup>

As election cycles continue, however, we believe that it is inevitable that some candidates in contested judicial elections would accept and even seek such party endorsements.

We do not believe that tying judicial candidates to political parties serves either the judicial system or the political system. The justice a person receives from a court should not depend on which political party endorsed the judge. Seventy-eight percent of Minnesota voters believe judicial candidates making pledges to political parties or other special interests on political issues threaten the fairness of the courts.<sup>68</sup> Moreover, when the political bodies or individuals themselves need the courts to resolve an issue between them, as in the recent election dispute involving Al Franken and Norm Coleman,<sup>69</sup> the independence of the judiciary from the political parties is crucial to the public perception of a sound and fair result.

### D. Threat to Integrity of Judicial Process

These impairments of impartiality and independence strike at the very heart of the integrity of the judicial branch. No one suggests that partisan positions and political parties have no place in government. On the contrary, these elements are inherent in the legislative and executive branches and ultimately serve a crucial role in determining public policy.

But judges are and should be different from politicians. The courts do not create public policy; they apply it. We don't need our judges to be good politicians, compromising and trading one public good off against another through "the art of the possible."<sup>70</sup> We need our judges to be fair, and to interpret the laws of the state—whatever they are—to the best of their ability.

A courtroom must be the place where a civilized society can resolve disputes in a civil atmosphere, where parties and their lawyers can calmly and respectfully present their arguments to a neutral and objective decision maker. But how can a litigant believe that the judicial process is fair where the litigant's opponent was a major contributor to the judge's campaign? And how can judges expect the litigants and attorneys who appear before them to behave with civility and respect to opposing parties when the judges themselves are forced into uncivil and disrespectful advertising in their own campaigns? Even the winners recognize the severe institutional cost of these bitter and exorbitant judicial races on the public's perception of the judiciary. "That's obscene for a judicial race," said Illinois's Justice Karmeier of the huge checks that flowed into both sides of his contest. "What does it gain people? How can people have faith in the system?"<sup>71</sup>

<sup>62</sup> Decision Resources, Ltd. Survey, *supra* n. 44, at 5.

<sup>63</sup> J. Sample, "Justice for Sale," *supra* n. 51.

<sup>64</sup> *The Federalist* No. 78.

<sup>65</sup> Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lakes States, 2000-2008*, *supra* n. 33, at 12 citing Kent Redfield, ed., *Democratic Renewal: A Call to Action from America's Heartland* (Springfield: University of Illinois, 2008) p. 27.

<sup>66</sup> See Minn. Code Jud. Conduct Canon 4 (2009).

<sup>67</sup> George Soule, "Judicial Elections in Minnesota: Past, Present, and Future," *Hennepin Lawyer*, Dec. 20, 2006, available at <http://hennepin.timberlakepublishing.com/article.asp?article=1081&paper=1&cat=147>

<sup>68</sup> Decision Resources, Ltd. Survey, *supra* n. 44, at 5.

<sup>69</sup> See, e.g., *In re Contest Of General Election Held on November 4, 2008, for the Purpose of Electing a United States Senator from the State of Minnesota*, 767 N.W.2d 453 (2009).

<sup>70</sup> Otto Von Bismarck, *remark*, Aug. 11, 1867.

<sup>71</sup> Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lakes States, 2000-2008*, *supra* n. 33, at 13 citing Ryan Keith, "Spending for Supreme Court seats renews cry for finance reform," Associated Press (November 3, 2004).

## E. The Lack of Meaningful Public Participation in Judicial Elections

Finally, the current contested-election system in a very real sense works *against* both public oversight of the judiciary and the judicial accountability such oversight encourages.

Since 2000, over 90 percent of judicial elections in Minnesota have been uncontested.<sup>72</sup> Such uncontested elections have offered voters no real opportunity to have any say about whether those incumbent judges should remain on the bench. Under the present system, a voter cannot vote “against” an unopposed candidate; unless there is an opponent to vote “for,” the candidate *will* be reelected. Thus, no matter what good reasons voters might have to want to unseat a sitting judge—competence, temperament, bias, or some other reason—the present system does not provide voters with any real option to remove an incumbent judge from office.

Even in the few races that *are* contested, the public often lacks any useful information about the candidates and their qualifications, and as a result many voters simply do not vote on these races. Only 46 percent of Minnesota voters report they “almost always” vote in judicial races,<sup>73</sup> and only 5 percent of Minnesotans believe they know “a lot” about Minnesota’s court system.<sup>74</sup> Although campaign advertising in contested elections would appear to be a means of providing the public with such information, in fact it is not. First, as the examples above show, such advertising is aimed more often at inflaming passions than at providing truly useful information. In addition, the money for advertising tends to be devoted to statewide races and on the highest state courts. Most judges simply are not in a position to advertise effectively, because the size and nature of their constituency will not support the needed fundraising and in some instances because of the sheer geographical size of the area involved.

In sum, Minnesota voters lack the opportunity to have any meaningful say in the vast majority of judicial elections and lack the necessary information to participate meaningfully in those few that offer a true choice.

## IV. The Proposal

To address these problems, we strongly urge the legislature to adopt House File 224 and Senate File 70, which would replace multicandidate, contested judicial elections with simple judicial-retention elections. Both bills propose to amend Article VI, section 8 of the Minnesota Constitution to change the process for the selection and retention of state court judges, tracking closely the majority recommendations of the Quie Commission Report. The bills’ major provisions are straightforward and may be quickly summarized.

### A. Judicial Merit Selection

Although the proposed constitutional amendment would not directly affect the existing Minnesota system for filling judicial vacancies, a brief summary of how that system works is help-

ful to understanding the proposed amendment and its intended effects. At present, when a judicial seat becomes vacant from death, retirement, or otherwise, the governor appoints a person “learned in the law” to fill the seat.<sup>75</sup> The governor appoints trial court judges from a list of between three and five nominations made by the Merit Selection Commission. The commission evaluates candidates’ qualifications based on nonpartisan factors such as integrity, ability, judicial temperament, experience, maturity, community service, diligence, and legal knowledge.<sup>76</sup> The commission is mandated by statute to have members who are women and persons of color,<sup>77</sup> and is directed to

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seek out, encourage, and consider judicial candidates who are women and persons of color.<sup>78</sup>

Although the Merit Selection Commission statute does not technically apply to gubernatorial appointments to the Minnesota Court of Appeals or the Minnesota Supreme Court, in practice recent governors have employed a similar system of recommendations for most appellate appointments.<sup>79</sup> Whatever the commission’s nominations, the governor makes the final decision of whom to appoint.<sup>80</sup>

<sup>72</sup> Office of the Minnesota Secretary of State, Election Results and Statistics, available at <http://www.sos.state.mn.us/index.aspx?page=137>

<sup>73</sup> Decision Resources, Ltd. Survey, *supra* n. 44, at 4.

<sup>74</sup> *Id.* at 2.

<sup>75</sup> Minn. Const. Art. 6, §§5, 8.

<sup>76</sup> Minn. Stat. §480B.01.

<sup>77</sup> Minn. Stat. §480B.01(2)(f).

Under current law, once appointed, a judge must run for election to a six-year term in the next general election occurring more than one year after the appointment. Other candidates may run against incumbents in those elections. Judges run for reelection every six years thereafter, and must retire when they reach the age of 70.<sup>81</sup>

### B. Judicial Retention Elections

Under the proposed constitutional amendment, the Merit Selection Commission and gubernatorial appointment system described above would remain the same, but contested judicial elections involving multiple candidates would be eliminated. Instead, each appointed judge would be required to stand for a retention election at the next regularly scheduled general election held more than three years after the judge's appointment. The judge would not face a specific opponent, but would be on the ballot alone, along with the simple question of whether the judge should be retained in office. If the majority of voters answering the question were to vote to retain the judge (blank votes do not count either way), the judge would serve an eight-year term, at the conclusion of which the judge would be subject to another retention election. (Judges would still be required to retire at age 70.) If the majority of voters answering the question were to vote against retaining a particular judge, the office would be regarded as vacant and the governor would appoint a new judge to fill the vacancy as under existing law.<sup>82</sup>

### C. Judicial Performance Evaluations

The proposed amendment complements the retention elections by providing for creation of the Judicial Performance Commission to evaluate judges in a nonpartisan manner. The commission would be charged to develop and adopt a process for evaluating judicial performance that will assist voters in evaluating the performance of judges standing for retention elections.

The commission would consist of 24 Minnesota residents appointed for up to three terms each. The members of the commission would be appointed as follows:

1. the governor would appoint eight members, each of whom would serve the shorter of a four-year term or until the governor who made the appointment leaves office;
2. the supreme court would appoint eight members to four-year terms and designate one of the appointees to serve as chair; and
3. the legislature would appoint a total of eight members, no more than four of whom may be attorneys, to serve two-year terms. The selection of the legislative appointees would rotate among the leaders of the two largest political parties.

Current judges and public officials would be ineligible to serve on the commission; any attorney member must have been admitted to practice law in Minnesota for at least five years. The appointing authorities would be charged to consider ethnic, gender, and geographic diversity in making their appoint-

ments. Commission members would not be paid; nor would they be reimbursed for expenses.

The commission would establish written standards for the evaluation of judicial performance, subject to public comment and supreme court approval. It would gather data on judges through anonymous survey forms from a representative sampling of attorneys, litigants, other judges, and others who have direct contact with the judges. Although the survey data would be public, any narrative comments included in the survey forms would be private data. The commission would be barred from basing any evaluation on substantive legal issues or on opinions that are subject to standard appellate processes. The meetings of the Judicial Performance Commission would be public, subject to narrow exceptions. The commission would be authorized to establish five-member panels to conduct the individual evaluations, with each panel including at least one member appointed by each branch of government.

Judges would be evaluated twice during each eight-year term, once halfway through the term and once shortly before the retention election. The proposed midterm evaluation is intended to provide feedback to the judge about the judge's performance and to give the judge an opportunity to improve. The retention-year evaluation (also called a "final evaluation") would include a determination of whether the judge meets the established performance standards. The final evaluation would include a public hearing and opportunity for comment on the judge's performance. A judge who does not intend to seek retention for another term could waive a final evaluation.

If a panel or the full commission would consider a judge to be unqualified, the judge must be given written notice and must be afforded the opportunity to submit written comments and to appear and be heard before a final vote on the rating. Any evaluation that would rate a judge as unqualified would be subject to mandatory review by the full commission, as would an evaluation when any panelist or three commission members request such a review.

The commission would be required to publicly distribute its factual report on the judicial performance of each judge standing for retention at least one month before the judge must file an affidavit of candidacy for the retention election. A judge who has been rated "unqualified" would not be prohibited from seeking retention.

### V. The Benefits of Adopting the Amendment.

In the view of the coalition, the adoption of these measures through the proposed constitutional amendment would benefit Minnesota and Minnesotans in a number of ways.

#### A. Greater and More Informed Voter Participation in Judiciary

Retention elections would allow voters to better fulfill their role in determining whether judges should keep their seats on

<sup>78</sup> Minn. Stat. §480B.01(7) & (8).

<sup>79</sup> Minn. State Bar Ass'n, *For the Record: 150 Years of Law & Lawyers in Minnesota* (Minneapolis: 1999), p. 178.

<sup>80</sup> Minn. Stat. §480B.01(11).

<sup>81</sup> See Minn.Stat. Ann. §490.121, subd. 21d.

<sup>82</sup> A more extensive and detailed summary of the proposed legislation and constitutional amendment appears at [http://www.senate.leg.state.mn.us/departments/scr/bills/summ/summary\\_display.php?ls=86&session=regular&body=Senate&billtype=SF&billnumber=70&ss\\_year=0](http://www.senate.leg.state.mn.us/departments/scr/bills/summ/summary_display.php?ls=86&session=regular&body=Senate&billtype=SF&billnumber=70&ss_year=0)

<sup>83</sup> Justice at Stake Campaign, *The New Politics of Judicial Elections in the Great Lakes States, 2000-2008*, *supra* n. 33, at 22-23 citing

the bench. Ninety-three percent of Minnesotans surveyed in 2008 supported allowing the public to vote on whether judges should remain in office.<sup>83</sup> In contrast to the current system, where unopposed incumbents are all but automatically reelected, the proposed retention elections would require every sitting judge to face the voters on a regular basis, and give the voters an effective opportunity to make their voices heard.

Moreover, the judicial performance evaluations would greatly improve both the nature and the amount of information that voters have when they vote in retention elections. In a 2002 Illinois poll on judicial-selection issues, 78 percent of those polled answered that they lacked adequate information to choose candidates for the Illinois Supreme Court.<sup>84</sup> Among respondents who said that they were unlikely to vote in judicial elections, the number one reason given was lack of information about the candidates, and 80 percent underscored the need for an official state voters' guide. Nationally, 92 percent of voters polled expressed support for a voters' guide.<sup>85</sup> The publicly available findings of the judicial performance evaluations would serve Minnesotans as just such a guide.

States that supply voters with such performance evaluation information find that voters find the guides to be helpful and credible. On average, the higher a judge's performance rating, the more affirmative retention votes the judge receives.<sup>86</sup> Judicial performance evaluations also promote public trust and confidence in the courts. The public is reassured by the accountability that the evaluation process imposes on judges; nearly three-quarters of judges in one survey said that the judicial performance evaluation process provided them with useful feedback on their own judicial practices.<sup>87</sup> The public is also reassured by the favorable evaluations that most judges receive. In 2008, in the seven states that have official retention evaluation programs, only three of 380 evaluated judges received negative evaluations.<sup>88</sup>

### B. Decreased Likelihood of Special-Interest Attacks on Individual Judges

The proposed constitutional amendment would also represent a major step in sparing Minnesota the exorbitant and abusive judicial campaigning to which other states have been subjected. By eliminating the contested judicial race, the amendment would prevent the potentially bitter multicandidate campaigns, campaigns in which the influence of outside money and the bitter character of advertising can demean the candidates and the judiciary and elevate partisanship over performance.

The adoption of retention elections would also lessen the likelihood of campaigns that simply attack an incumbent based on a particular set of substantive rulings. The 1st Amendment of course protects the right of interested persons or organizations, local or otherwise, to advertise their opinions through such "anti-retention" campaigns. But even if such an anti-retention campaign were successful and a particular judge were defeated, the defeated judge's replacement would be appointed

by the governor based on Merit Selection Commission nominations. As a result, those who might wish to unseat an incumbent judge could not necessarily count on that judge's replacement being any more favorable to their particular position than the defeated judge, likely reducing dramatically the amount of money funneled into such campaigns.

In addition, should such attacks occur, judges would be able to use the objectively based, nonpartisan judicial performance evaluations both to protect themselves against unfair special interest attacks and to refocus the voters' attention on the factors properly bearing on whether a judge should be kept in office.

Finally, even if such an anti-retention campaign succeeded in unseating a "targeted" judge based on false accusations or disagreement with the substance of the judge's decisions, that result would not undercut the broader advantages of the retention-election system. After all, the critical issue is not whether a particular judge keeps a particular judicial seat, but whether the judiciary and the judicial system as a whole retain their integrity, both in reality and in the eyes of the public. The loss of a single judge through an anti-retention campaign, however false or unfair, should have little impact on the public's perception of the judiciary as a whole. This is particularly true given that the defeated judge's seat would be filled through the existing system of Merit Selection Commission and gubernatorial appointment, not by the installation of an opposing candidate who has effectively "bought" the seat through the expenditure of hundreds of thousands or millions of dollars.

### C. More Representative Minority Participation in Judiciary

The proposed changes would also encourage and increase the likelihood of a Minnesota judiciary consistent with the increasingly diverse population of the state. Nationwide data show that persons of color are far more likely to reach the bench through merit selection and appointment than through contested elections:

Means of Gaining Seat by Judges of Color Nationwide

	Percent of judges of color who attained seat through contested election	Percent of judges of color who attained seat through merit selection or gubernatorial appointment
State Supreme Courts	2.9%	85.7%
State Courts of Appeal	3.3%	63.3%
State Trial Courts	8.8%	60.8% <sup>89</sup>

[www.JusticeatStake.org/files/MinnesotaJusticeatStatesurvey.pdf](http://www.JusticeatStake.org/files/MinnesotaJusticeatStatesurvey.pdf).

<sup>84</sup> See Cynthia Canary, "Know Before You Go: A Case for Publicly Funded Voters' Guides," 64 *Ohio State L.J.* 81, 90 (2003).

<sup>85</sup> *Id.* At 89.

<sup>86</sup> American Judicature Society, *Judicial retention evaluation programs in four states* (1998).

<sup>87</sup> *Id.*

Minnesota's experience is similar. Only three of the state's 25 sitting judges of color—Justice Alan Page and Judges Susan Burke and Gail Chang Bohr—reached their seats through election; the remaining 22 were gubernatorial appointments.

We believe that the proposed amendment would maintain this diversity. First, the existing statute governing the Merit Selection Commission specifically directs the members to consider and encourage a diverse group of candidates for judicial appointment to the bench.<sup>90</sup> Second, the governor who ultimately makes the judicial appointments is directly elected by a statewide vote, and will be accountable to the electorate for the composition of the judiciary he or she appoints. And finally, the judicial evaluations and the retention elections would serve to keep qualified judges of color on the bench and to insulate them from ethnically or racially motivated attacks.

#### D. Lesser costs to candidates, lesser burden on judicial system

Finally, the proposed amendment would save judges, litigants, and the state money and would not disrupt the operation of the judicial branch.

First, judges would not feel compelled to raise and litigants would not feel compelled to contribute the enormous sums of money that contested elections in other states have involved. Even where anti-retention campaigns might occur, the costs would almost certainly be much less than the costs of contested elections. In contrast to the \$200 million that judges have been forced to raise to compete in *contested* elections like those discussed above, state supreme court justices running in *retention* elections in 12 states between 1999 and 2008 raised and spent a total of less than \$2.3 million.<sup>91</sup>

The monetary costs to the state of the changes would be small. The retention elections themselves would be part of November general elections that already occur, and would cost no more than the current contested-race system. The Merit Selection Commission already exists. The cost of the new Judicial Evaluation Commission would be minimal; administrative help would be provided through the supreme court, and the volunteer members would serve without even reimbursement of their expenses.

Finally, experience nationwide strongly suggests that switching to retention elections would not result in any wholesale displacement of incumbent judges or any disruption of the judici-

ary. A study of retention elections in ten states from 1964 to 2006 found that only 56 of 6,306 judges—less than 1 percent—were not retained by voters. From 1998-2006, only four judges in these ten states were defeated in retention elections.<sup>92</sup> The average affirmative vote in retention elections is greater than 70 percent.<sup>93</sup> The voters usually decide that they like the judges they have, and the retention system allows them to say so.

#### Conclusion

Nearly every Minnesotan has contact at one time or another with Minnesota's court system, in matters as diverse as traffic tickets, divorces, employee disputes, or small claims court. Minnesotans' faith in that judicial system is critical both to the effective operation of that system and to public's confidence in government as a whole. Contested judicial elections under the present combination of constitutional, legal, and societal circumstances pose a very real threat to that faith.

Minnesotans overwhelmingly support merit selection with retention elections. Voters feel strongly that this would level the playing field for those seeking justice, reduce judicial campaign fundraising by lawyers or potential litigants, and stop special interests from influencing judicial decisions. Specifically, 74 percent of Minnesota voters (including 82 percent of Democrats and 76 percent of Republicans) support merit selection with retention elections, with only 16 percent opposed.<sup>94</sup> When the respondents were asked to look at specific elements of the proposed amendment:

- 82 percent supported the creation of a performance evaluation commission.<sup>95</sup>
- 88 percent supported public release of the findings of that commission.<sup>96</sup>
- 93 percent supported a public vote on the retention of judges.<sup>97</sup>

The time to act is now. The recent Wisconsin races are a preview of things to come in Minnesota. And once Minnesota has had a nasty, expensive, contested judicial election it will be difficult to put the genie back in the bottle. As former Chief Justice Russell Anderson told the *Star Tribune*, "If big spending on judicial races doesn't come to Minnesota in this election cycle, it will soon. When it gets here, its going to be very difficult to change."<sup>98</sup>

<sup>88</sup> See <http://www.ajc.state.ak.us/retent08/retgen08.htm> (Alaska, 1 of 12 judges evaluated); Arizona Commission on Judicial Performance Review (1 of 67 judges evaluated); <http://www.coloradojudicialperformance.gov/retentionlist.cfm/year/2008> (Colorado, 1 of 103 judges evaluated); <http://www.kansasjudicialperformance.org/judgesbyyear.cfm> (Kansas, 0 of 81 judges evaluated); <http://www.nmjpec.org/quick> (New Mexico, of 76 judges evaluated, no "do not retain" recommendations, 1 "no opinion," and 1 "insufficient time"); [http://www.tba2.org/tbatoday/news/2008/2008\\_evaluation\\_031008.pdf](http://www.tba2.org/tbatoday/news/2008/2008_evaluation_031008.pdf) (Tennessee, 0 of 5 judges evaluated); <http://elections.utah.gov/VIP.2008.pdf> (Utah, 36 judges evaluated, 0 "do not retain" recommendations).

<sup>89</sup> Leo I. Brisbois, "Judicial Elections are Not Necessarily a More Effective Way Than Merit Selection for Attorneys of Color to Attain a Seat on the Bench," unpublished manuscript on file with Minnesota State Bar Association.

<sup>90</sup> Minn. Stat. §480B.01(7) & (8).

<sup>91</sup> American Judicature Society, Fact Sheet: The Problem: Judicial Elections (on file with author).

<sup>92</sup> Aspin, Larry, T., "Judicial Retention Election Trends: 1964-2006," *Judicature*, 90:208-213 (March April 2007).

<sup>93</sup> *Id.*

<sup>94</sup> Decision Resources, Ltd. Survey, *supra* n. 44, at 8

<sup>95</sup> *Id.* at 7

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> L. Sturdevant, "Judiciary could soon be dripping with politics," *Minneapolis Star-Tribune* (Mar. 15, 2008).