CITIZENS COMMISSION FOR THE PRESERVATION OF AN IMPARTIAL JUDICIARY

FINAL REPORT AND RECOMMENDATIONS

MARCH 26, 2007

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY 1

A. The Commission and a Summary of Key Recommendations 1

B. The Commission's Recommendations Regarding Judicial Selection 1

C. Existing System of Judicial Selection in Minnesota 4

D. The Threats Posed by the Post-*White* Election Rules to Judicial Impartiality 4

E. Minority Report 7

II. JUDICIAL SELECTION IN MINNESOTA 7

A. The Selection Process 7

B. The Conduct and Cost of Judicial Campaigns in Minnesota 8

III. THE THREATS POSED BY THE *WHITE* DECISIONS TO JUDICIAL IMPARTIALITY 9

A. Post-*White* Election Rules Threaten to Turn Nonpartisan Elections into Partisan Contests 9

B. Minnesota Races Are Likely To Be More Competitive And Costly 10

C. Judicial Candidates Will Have to Raise Money From Those Who May Have Cases Before Them and Signal How They Will Rule on Such Cases 10

IV. COMMISSION PROPOSAL REGARDING THE NOMINATION OF JUDICIAL CANDIDATES FOR GUBERNATORIAL APPOINTMENT BY A NEW APPELLATE COURT MERIT SELECTION COMMISSION 11

A. Key Features of the Proposal for the Initial Selection of Judges 11

B. The Appellate Court Merit Selection Commission 12

C. The Existence of a Judicial Vacancy Triggers Procedures for the Nomination of Judicial Candidates by a Merit Selection Commission 14

V. COMMISSION PROPOSAL REGARDING THE APPOINTMENT OF JUDGES BY THE GOVERNOR 15

A. Key Features of the Proposal for Gubernatorial Appointment of Judges 15

B. The Authority of the Governor to Appoint Judges From a List of Nominees from a Merit Selection Commission 15

VI. COMMISSION PROPOSAL REGARDING THE PERFORMANCE EVALUATION OF JUDGES 16

A. Key Features of Proposal Regarding Performance Evaluation of Judges 16

B. Benefits of the Proposal Regarding Performance Evaluations 17

C. The Commission's Proposal Regarding the Judicial Performance Evaluation Commission 17

VII. COMMISSION PROPOSAL REGARDING THE RENEWAL OF JUDGES' TERMS THROUGH RETENTION ELECTIONS 21

A. Key Features of the Proposal for the Retention of Judges 21

B. The Benefits of Retention Elections 21

C. The Retention Election Proposal 22

VIII. COMMISSION PROPOSAL REGARDING TERM OF OFFICE FOR JUDGES 23

A. Key Features of the Proposal Regarding Length of Terms 23

B. Benefits of Longer Terms 24

C. Initial and Subsequent Terms of Office 24

IX. MINORITY REPORT OF BRIAN MELENDEZ, JOINED BY STEVEN V. BESSER, JUDGE JAMES HOOLIHAN, MARY VASALY, AND JUDGE LUCY WIELAND 25

A. Concurring Views 26

B. Appointment Compared with Retention 29

C. A Retention System's Shortcomings 32

D. Legislative Confirmation 33

E. Conclusion 33

X. SEPARATE COMMENTS OF ADMINISTRATIVE LAW JUDGE ERIC L. LIPMAN 33

A. Background – What the *White* Decisions Mean (and What They Do Not Mean) 34

B. Solving the Fundraising Riddle 37

1. The Majority Report 37

2. The Melendez Minority Report 38

C. A Third Way 38

D. A Short Epilogue for the Minnesota Legislature 39

XI. SEPARATE COMMENTS OF STEVEN V. BESSER, JOINED BY VANCE OPPERMAN, MARY VASALY, AND JUDGE LUCY WIELAND 40

APPENDIX A: COMMISSION'S LEGISLATIVE PROPOSAL

APPENDIX B: COMMISSION'S PROPOSED AMENDMENTS TO ARTICLE VI, SECTION 7 OF THE MINNESOTA CONSTITUTION

APPENDIX C: COMMISSION'S PROPOSED AMENDMENTS TO ARTICLE VI, SECTION 8 OF THE MINNESOTA CONSTITUTION

APPENDIX D: COMMISSION'S PROPOSED AMENDMENTS TO MINNESOTA STATUTES SECTION 480B.01

APPENDIX E: MINORITY'S PROPOSED AMENDMENTS TO ARTICLE VI, SECTIONS 7 AND 8 OF THE MINNESOTA CONSTITUTION: GUBERNATORIAL APPOINTMENT WITH MERIT SELECTION

APPENDIX F: EXHIBIT TO MINORITY REPORT: GUBERNATORIAL APPOINTMENT WITH LEGISLATIVE CONFIRMATION

I. EXECUTIVE SUMMARY

A. The Commission and a Summary of Key Recommendations

The Citizens Commission for the Preservation of an Impartial Judiciary, chaired by Governor Al Quie, is an independent citizens group composed of individuals from diverse backgrounds in law, politics, business, labor, and academics. The Commission was established in February 2006 to review and make recommendations concerning the method of selection of Minnesota's state court judges. More specifically, the Commission's task was to consider the nature and scope of the threats to an impartial court system in the aftermath of *Republican Party v. White*[1] and assess the options for preserving and promoting an impartial court system.

The Commission considered and evaluated several institutional and extra-institutional arrangements for maintaining a fair, impartial, accountable, and qualified judiciary. The Commission recommends that the initial selection of judges occur through a **merit based selection process** and **gubernatorial appointment**. The Commission further recommends the comprehensive **performance evaluation** of all judges to promote the self-improvement of judges and provide voters with information so that they can make informed decisions at the polls. Finally, a majority of the Commission recommends that judges be subject to periodic **retention elections** so that they can be held accountable for their performance in office. The Commission believes that these institutional features will promote and maintain a high quality judiciary accountable to the people and to the rule of law.

B. The Commission's Recommendations Regarding Judicial Selection

The Commission recommends the following method of judicial selection for district court and appellate judges to address the risks posed by the post-*White* election rules:

[1] 536 U.S. 765 (2002).

- **Merit Nominations**: Nomination of qualified candidates for judicial vacancies by a merit selection commission;
- **Gubernatorial Appointment**: Appointment of judges by the governor, from a list of candidates provided by a merit selection commission, for an initial term of approximately four years, and, if retained by the voters, for subsequent terms of eight years;
- **Performance Evaluation**: The creation of a performance evaluation commission, half appointed by the governor and half appointed by the chief justice, a majority of whom will be nonlawyers, to (a) conduct confidential mid-term performance reviews of judges to address ways of improving judicial performance and (b) conduct performance reviews of judges near the end of their terms, with appropriate precautions for confidentiality of certain data and certain deliberations of the commission, and publicize those evaluation results on the ballot and elsewhere to provide information to the public about the qualifications and performance of the judges subject to retention elections and promote public accountability; and
- **Retention Elections**: The renewal of a judge's term through retention elections. Voters will be advised on the ballot as to whether the Performance Evaluation Commission finds the judge qualified or not qualified and will be given an opportunity to vote to retain the judges. In retention elections there will be no challengers on the ballot.

Attached as exhibits to this Report are the Commission's specific recommendations regarding the selection, retention, and performance evaluation of judges, which include:

- Proposed amendments to Article VI, Section 8 of the Minnesota Constitution establishing that judicial vacancies shall be filled by **appointment by the governor** from a list of candidates nominated by a **merit selection commission**;
- Proposed amendments to Article VI, Section 7 of the Minnesota Constitution establishing that a judge's initial term following appointment shall be approximately four years, the renewal of judicial terms shall be decided by the voters in **retention elections**, a judge's term of office following retention shall be eight years, and a **performance evaluation commission** shall evaluate the performance of judges and publish its performance rating on the ballot;
- Proposed legislation detailing (a) when a judicial vacancy exists, (b) the process for nominating judges by the **merit selection commission** and for **gubernatorial appointment**, (c) the conduct of judicial **retention elections**, (d) the composition, selection, and duties of the **Appellate Court Merit Selection Commission**, and (e) the composition, selection, and duties of the **Performance Evaluation Review Commission**; and
- Proposed amendments to Minnesota Statutes 480B.01, subdivision 11, providing that district court vacancies shall be filled by appointment by the governor from a list of candidates nominated by the Judicial Selection Commission.

All of the Commission's recommendations are fully detailed in Sections IV, V, VI, VII, and VIII of this Report.

C. Existing System of Judicial Selection in Minnesota

The Minnesota Constitution provides for judicial elections, but if a vacancy occurs during the judge's term, the Governor may appoint a successor.[2] In practice, most judges initially obtain their offices by appointment rather than by election. Once appointed, the judge must run for election in the next general election occurring more than one year after the appointment.[3] Judges serve a six year term and may run for reelection every six years.[4] Judicial elections are nonpartisan. Under the system of nonpartisan elections, judicial candidates do not have a party affiliation listed on the ballot. Instead, there is an incumbent designation on the ballot. The mandatory retirement age is 70.

D. The Threats Posed by the Post-*White* Election Rules to Judicial Impartiality

In *White*, the United States Supreme Court, in a 5 to 4 decision, held that states may not prohibit judicial candidates from announcing their views on disputed legal or political issues.[5] Following a remand to the U.S. Court of Appeals for the Eighth Circuit, the Eighth Circuit held that states may not prohibit judicial candidates from engaging in certain partisan activities, such as identifying themselves as members of a political party, attending political gatherings, and seeking, accepting, and using political party endorsements.[6] The Eighth Circuit also concluded that states may not prohibit judicial candidates from personally soliciting or accepting campaign contributions or personally soliciting statements of support by personally signing solicitation

[2] Article VI, Sections 7 and 8.

[3] *Id*.

[4] *Id*.

[5] 536 U.S. 765 (2002).

[6] 416 F.3d 738 (8th Cir. 2005) (*en banc*) (*cert*. denied).

letters or asking large gatherings to support particular views through their financial contributions.[7]

The *White* decisions have fundamentally altered the rules of conduct for judicial campaigns in Minnesota. Under *White*, judicial candidates may now choose (without fear of later sanction from the disciplinary authorities) to announce their views on legal and political issues, directly solicit campaign contributions, seek political party endorsements, identify themselves as political party members, attend political party gatherings, and commit themselves to political party platforms. Judicial candidates also may seek endorsements from special interest groups. The Commission's concern is that as campaigns for state judicial office begin to look and operate like campaigns for legislative or constitutional office, the potential increases that special or moneyed interests will influence how cases are later decided. Moreover, even if Minnesota could somehow operate state judicial elections so that contributions to judicial campaigns did not, in fact, influence the results in specific cases, the appearance that campaign contributions had such an effect would in itself justify change to our system. As shown by recent studies, a majority of the public—and judges themselves—believe that contributions to judicial campaigns influence later substantive results for litigants in decided cases. This is intolerable.

The Commission identified the following threats to our system of nonpartisan elections in the post-*White* era:

- The post-*White* election rules threaten to turn Minnesota's system of nonpartisan elections into partisan elections, because candidates may now seek and use political party endorsements, potentially injecting partisan politics into the courtroom.

[7] *Id.*

- The post-*White* elections rules threaten to increase the cost of judicial campaigns, pressing judges and challengers to solicit financial support from those likely to have interests in the outcome of cases before them. This increases the public perception of judicial favoritism and increases the chances that judges will be influenced by contributors in making their decisions.
- The post-*White* election rules invite political parties and special interests to spend millions to influence judicial decisions and elect judges who will serve those interests rather than follow the rule of law. Big money races are no longer confined to perennial battleground states like Texas, Illinois, and Ohio—they are spreading rapidly across the country, with the average cost of winning jumping 45 percent in just the past two years. Nine states have had state supreme court candidates raising more than $1.0 million.
- In order to raise the money needed for judicial campaigns, judicial candidates could be pressured to signal how they will decide cases and state their views on controversial issues that are facing the courts in order to get elected. This increases the perception and reality that justice is for sale.
- The post-*White* election rules invite out-of-state moneyed interests to fund campaigns for the purpose of influencing judicial decisions, increasing the costs of judicial campaigns and the influence of national players in state judicial campaigns.
- The post-*White* election rules invite negative television advertising and negative campaigning, undermining public confidence in the judiciary.

The campaign activities permitted under the *White* decisions threaten a litigant's fair day in court. They also impair the core functions of courts to protect individual rights and liberties, check the legislative and executive branches to ensure they act within the bounds of their authority, protect and uphold the Minnesota and U.S. Constitutions, protect and uphold federal and state laws, and preserve and promote our democratic system of government. In short, post-*White* judicial campaigns have the potential to threaten the very foundation of our constitutional democracy and the rule of law.

E. Minority Report

Also attached is a Minority Report which recommends that the retention decision be made by a commission.

II. JUDICIAL SELECTION IN MINNESOTA

A. The Selection Process

The Minnesota Constitution provides for judicial elections, but if a vacancy occurs during the judge's term, the Governor may appoint a successor.[8] In practice, most judges initially obtain their offices by appointment rather than by election. Once appointed, the judge must run for election in the next general election occurring more than one year after the appointment.[9] Judges serve a six year term and may run for reelection every six years.[10] Judicial elections are nonpartisan. Under the system of nonpartisan elections, judicial candidates do not have a party affiliation listed on the ballot. Instead, there is an incumbent designation on the ballot. The mandatory retirement age is 70.

[8] Article VI, Sections 7 and 8.

[9] *Id.*

[10] *Id.*

The governor may rely on the recommendations of the Commission on Judicial Selection, an independent body, in appointing district court judges.[11] Although use of the Commission in selecting district court judges is not mandatory,[12] in practice, governors have chosen district court judges from a list of candidates recommended by the Commission. The Commission bases its recommendations on an evaluation of the candidates' integrity, maturity, judicial temperament, diligence, legal knowledge, ability, experience, and community service.[13] There is no statute establishing a merit selection process for appellate court judges. Nevertheless, in practice, governors have typically used a merit selection process to select appellate court appointees.

B. The Conduct and Cost of Judicial Campaigns in Minnesota

In practice, under Minnesota's system of nonpartisan elections prior to the *White* decisions, the selection of judges occurred in a manner that reflected and maintained the rule of law. Most judges in the last three decades were appointed by governors who either relied on the merit-based recommendations of the Judicial Selection Commission or their own advisers. Therefore judicial candidates did not take public positions on disputed legal or political issues, seek political party endorsements, commit themselves to a party platform, or directly solicit campaign contributions.

The cost of judicial campaigns in Minnesota has been among the lowest in the nation.[14] Part of the reason for Minnesota's low cost campaigns is its nonpartisan election system. There

[11] Minn. Stat. § 480B.01.

[12] *See id*. at subd. 11.

[13] *See id*. at subd. 8.

[14] Chris Bonneau, Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections, *The Justice System Journal* 25 (1): 21-38 (2004).

is more campaign spending in partisan elections than nonpartisan elections, and judicial races are less likely to be contested in nonpartisan races compared to partisan races.[15]

III. THE THREATS POSED BY THE *WHITE* DECISIONS TO JUDICIAL IMPARTIALITY

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. Under the *White* decisions, judicial 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.

A. Post-*White* Election Rules Threaten to Turn Nonpartisan Elections into Partisan Contests

Currently, Minnesota has a nonpartisan system of judicial selection. This means that the ballot contains no party label next to the name of the judicial candidate. The purpose of eliminating party designations from the ballot is to help maintain the rule of law and promote public confidence in the judiciary. The post-*White* election rules threaten to turn Minnesota's system of nonpartisan elections into partisan elections. Under the *White* decisions, judicial candidates may be involved in partisan activities, including seeking the endorsements of political parties, soliciting funds from parties, and speaking to and attending political party gatherings. This means that the absence of party labels will no longer serve as a barrier to partisan-based

[15] *Id.*

activities by judicial candidates. Because partisan races are more competitive and costly than nonpartisan races, the cost and competitiveness of Minnesota's judicial campaigns should be expected to increase, also increasing the likelihood of bringing partisan politics into the courtroom.

B. Minnesota Races Are Likely To Be More Competitive And Costly

Now that partisan-based activities by judicial candidates are permitted, the absence of party labels on the ballots for judicial campaigns will not ensure that judicial campaigns are nonpartisan contests. Because partisan races are more competitive and costly than nonpartisan races, the cost and competitiveness of Minnesota's judicial campaigns should be expected to increase. Indeed, big money court races are spreading rapidly across the country, with the average cost of winning jumping 45 percent between 2002 and 2004. The cost of winning judicial races continues to increase, and in 2004, over 40 percent of states with contested judicial elections broke candidate fundraising records. Big money races are no longer confined to perennial battleground states like Texas, Illinois, and Ohio. Between 2000 and 2004, 37 state supreme court candidates each raised more than $1.0 million. Even states where judicial candidates historically have raised very little money are now seeing judicial candidates raise more than $1.0 million for their campaigns. In light of the trends of increased campaign expenditures, Minnesota's longstanding practice of low cost campaigns may be at risk.

C. Judicial Candidates Will Have to Raise Money From Those Who May Have Cases Before Them and Signal How They Will Rule on Such Cases

In the new era of costly judicial campaigns, judges and challengers could solicit political and financial support from those likely to have interests in the outcome of cases before them.

Indeed, special interests already spend millions to influence judicial decisions and elect judges who will serve those interests rather than follow the rule of law. Out-of-state moneyed

interests fund judicial campaigns for the purpose of influencing judicial decisions, thereby increasing the costs of judicial campaigns and the influence of national players in state judicial campaigns.

In order to attract support, judicial candidates will be pressured to signal how they will decide cases and state their views on controversial issues that are facing the courts in order to get elected. Because negative campaigning works, judicial candidates will have incentives to engage in negative television advertising and negative campaigning, further undermining public confidence in the judiciary.

In sum, in the post-*White* era, judicial campaigns may be conducted in a manner that increases both the perception and reality that justice is for sale. The essence of the role of the judiciary is to make decisions based on the rule of law and the constitution. Partisan campaign activities and fundraising activities threaten the neutrality of courts and endanger a litigant's fair day in court. They also impair the core functions of courts to protect individual rights and liberties, check the legislative and executive branches to ensure they act within the bounds of their authority, protect and uphold the Minnesota and U.S. Constitutions, protect and uphold federal and state laws, and preserve and promote our democratic system of government. In short, post-*White* judicial campaigns have the potential to threaten the very foundation of our constitutional democracy and the rule of law.

IV. COMMISSION PROPOSAL REGARDING THE NOMINATION OF JUDICIAL CANDIDATES FOR GUBERNATORIAL APPOINTMENT BY A NEW APPELLATE COURT MERIT SELECTION COMMISSION

A. Key Features of the Proposal for the Initial Selection of Judges

The Commission recommends that judicial candidates be nominated by a **merit selection commissio**n for **gubernatorial appointment**. The governor would have the discretion to direct the merit selection commission to provide an additional set of three nominees if the first set was

unacceptable, but would have to make an appointment from a set of nominees provided by the **merit selection commission**. These changes in the judicial selection process are designed to ensure the selection of a high quality judiciary.

This proposal largely mirrors the existing practice of judicial selection in Minnesota and eliminates the initial selection of judges through election. The proposal essentially expands the existing merit selection for district court judges to the selection of appellate court judges and makes it mandatory that the governor fill a vacancy with an individual who has been nominated by a merit selection commission. The proposal calls for the establishment of an **appellate court merit selection commission** to nominate candidates for **appointment by the governor** to the appellate courts. The Commission recommends that the **Appellate Court Merit Selection Commission** be composed of nine members, four of whom would be nonlawyers. The governor and the chief justice would each appoint four members and the governor would appoint the chair of the Commission.

B. The Appellate Court Merit Selection Commission

The Commission recommends that an **Appellate Court Merit Selection Commission** be established for the nomination of candidates for **appointment by the governor** to the appellate courts. The **Appellate Court Merit Selection Commission** is different from the Commission on Judicial Selection established by Minnesota Statutes Section 480B.01 that is used for the nomination of district court candidates. The key differences are that the **Appellate Court Merit Selection Commission** would be composed of nine commissioners, four attorney members and four nonattorney members; the chair of the Commission would be appointed by the governor;

and the governor and the chief justice each would have the authority to appoint four members of the Commission.[16]

More specifically, the Commission recommends the following enabling legislation for the establishment of an **Appellate Court Merit Selection Commission**:

> The Appellate Court Merit Selection Commission shall be a nonpartisan commission composed of 9 commissioners, four of whom shall be attorneys and four of whom shall be nonattorney members of the public. Each congressional district shall be represented on the Commission. The governor and the chief justice shall each appoint four of the members of the Commission, with the governor appointing a ninth person as the chair. In making appointments, the governor and the chief justice shall consider the diversity of the state's population and shall appoint individuals who have outstanding competence and reputation. Members of the Commission shall not hold any governmental office, elective or appointive. Attorney members of the Commission shall have resided in the state and shall have been admitted to practice before the supreme court for not less than five years. Commissioners shall serve staggered four year terms and shall be eligible for reappointment up to two full terms. The initial appointments shall be made as follows: one nonattorney and one attorney member designated by the governor shall be appointed to serve a two year term; one nonattorney and one attorney member designated by the chief justice shall serve a two year term; one nonattorney and one attorney member designated by the governor shall be appointed to serve a four year term; and one nonattorney and one attorney member designated by the chief justice shall serve a four year term.
>
> The Commission shall recommend to the governor qualified persons to fill a vacancy based on the following criteria: integrity, legal knowledge, communication skills, judicial temperament, the ability to promote trust and confidence in the judiciary, common sense, experience, and diversity. The principal consideration in nominating a candidate for a vacancy shall be merit, and the nominations shall be made in an impartial and objective manner, without regard for the political affiliation of the nominee or the governor.
>
> As to matters of procedure regarding participation in meetings, vacancies on the commission, quorum, commission meetings, and notice and time of commission meetings, the Commission shall follow the procedures set forth in Section 480B.01.

[16] Minn. Stat. § 480B.01 establishes the Judicial Selection Commission for district court judges, together with the composition of this Commission, the selection of its members, and the procedures for nominating candidates for appointment by the governor.

C. The Existence of a Judicial Vacancy Triggers Procedures for the Nomination of Judicial Candidates by a Merit Selection Commission

The Commission recommends that the following legislation be enacted identifying when a vacancy exists in the office of district court and appellate court judge:

> **VACANCIES**
> Upon attaining the age of seventy years, a judge shall retire and the judicial office shall be vacant. The office of judge also becomes vacant upon the judge's death, resignation, conviction after impeachment, recall, voluntary retirement, or when an incumbent's term expires without the incumbent being retained.

To establish the specific procedures for filling appellate court vacancies, the Commission recommends the following legislation:

> **VACANCY IN THE OFFICE OF APPELLATE JUDGE**
> Within sixty days from the occurrence of a vacancy in the office of appellate judge, the Appellate Court Merit Selection Commission shall submit to the governor the names of three candidates nominated by the Commission for the vacancy. The governor shall appoint a qualified person to fill the vacancy from that list of three candidates or, in governor's discretion, may direct the Commission to nominate three additional candidates from which the governor shall appoint a qualified person to fill the vacancy. A nominee shall be under sixty-five years of age at the time the nominee's name is submitted to the governor.

With respect to district court vacancies, the Commission recommends that the existing procedures set forth in Minnesota Statutes Section 480B.01 be followed, except that the Commission recommends amending Minnesota Statutes Section 480B.01, subdivision 11, to make it mandatory that the governor appoint district judges from a pool of candidates nominated by the Judicial Selection Commission. The Commission recommends the following amendment to subdivision 11:

> Subd. 11. **Nominees to governor.** ~~Within 60 days after the receipt of a notice of a judicial vacancy, the committee shall recommend to the governor no fewer than three and no more than five nominees for each judicial vacancy.~~ **Within sixty days from the occurrence of a vacancy in the office of judge, the Commission shall submit to the governor the names of three candidates nominated by the Commission for the vacancy.** The names of the nominees must be made public. ~~The governor may fill the vacancy from the nominees recommended by the~~

~~commission. If the governor declines to select a nominee to fill the vacancy from the list of nominees, or if no list is submitted to the governor under this subdivision, the governor may select a person to fill the vacancy without regard to the commission's recommendation. If fewer than 60 days remain in the term of office of a governor who will not succeed to another term, the governor may fill a vacancy without waiting for the commission to recommend a list of nominees.~~ **The governor shall appoint a qualified person to fill the vacancy from that list of three candidates or may direct the Commission to nominate three additional candidates from which the governor shall appoint a qualified person to fill the vacancy. A nominee shall be under sixty-five years of age at the time the nominee's name is submitted to the governor.**

V. COMMISSION PROPOSAL REGARDING THE APPOINTMENT OF JUDGES BY THE GOVERNOR

A. Key Features of the Proposal for Gubernatorial Appointment of Judges

The Commission recommends that judicial candidates be appointed by the governor from a list of candidates nominated by a **merit selection commissio**n. The governor would have the discretion to direct the merit selection commission to provide an additional set of three nominees if the first set was unacceptable, but would have to make an appointment from a set of nominees provided by the **merit selection commission**. These changes in the judicial selection process are designed to ensure the selection of a high quality judiciary. The proposal essentially expands the existing merit selection for district court judges to the selection of appellate court judges and makes it mandatory that the governor fill a vacancy with an individual who has been nominated by a merit selection commission. These changes produce a judicial selection system that largely mirrors the existing practice of judicial selection in Minnesota and eliminates the initial selection of judges through election.

B. The Authority of the Governor to Appoint Judges From a List of Nominees from a Merit Selection Commission

The Commission recommends amending the Constitution and enacting legislation to establish the procedure for filling judicial vacancies by **gubernatorial appointment** from a list

of nominees provided by a **merit selection commission**. Specifically, the Commission recommends amending Article VI, Section 8 as follows:

> **Sec. 8. VACANCY.** Whenever there is a vacancy in the office of judge the governor shall appoint ~~in the manner provided by law~~ a qualified person to fill the vacancy **from a list of candidates nominated by a merit selection commission in the manner provided by law.** ~~until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.~~

VI. COMMISSION PROPOSAL REGARDING THE PERFORMANCE EVALUATION OF JUDGES

A. Key Features of Proposal Regarding Performance Evaluation of Judges

The Commission recommends the establishment of a **Judicial Performance Evaluation Commission** for the purpose of conducting performance evaluations of all judges. The purpose of the performance review process is to assist the voters in evaluating the performance of judges standing for election, facilitate the self-improvement of all judges, and promote the public accountability of the judiciary.

The **Judicial Performance Evaluation Commission** will be a public body of thirty members, the majority of whom will be nonlawyers. It will have two representatives from each judicial district and ten state-wide members, with the governor and the chief justice each appointing half of the members.

The Commission recommends that the **Judicial Performance Evaluation Commission** evaluate all judges at mid-term to provide feedback to judges regarding their performance and to permit judges to address ways to improve their performance. The Commission further recommends that the **Judicial Performance Evaluation Commission** evaluate judges near the end of their terms for the purpose of providing information to the public regarding judicial performance before the filing deadline for the retention election. The results of the end of term evaluation would appear on the ballot in the form of a rating "qualified" or "not qualified." The

Commission proposes certain procedural safeguards to protect the confidentiality of the information upon which the **Judicial Performance Evaluation Commission's** evaluations and recommendations are based, and the confidentiality of the **Judicial Performance Evaluation Commission's** decision-making process.

B. Benefits of the Proposal Regarding Performance Evaluations

The proposed comprehensive performance evaluation review process is designed to (1) provide information to the voters that they can use in making their retention decision at the polls and (2) provide information to judges so that they can take remedial steps to improve performance or address quality issues. This will increase citizen confidence in the judiciary. A further benefit of the performance review process is that it will provide information to the public regarding the quality and performance of the judge in a nonpartisan manner. This not only promotes the rule of law and respect for all parties, litigants, and attorneys, but it also avoids placing pressure on judges to make decisions to please the members of the Performance Evaluation Commission. Although partisan judicial campaigns are possible under *White*, the Commission expects that nonpartisan information regarding judicial performance and quality will be used by voters in making their retention decisions.

C. The Commission's Proposal Regarding the Judicial Performance Evaluation Commission

The Commission recommends the following amendment to Article VI, Section 7, to constitutionally establish a **Judicial Performance Evaluation Commission** and constitutionally require that the **Performance Evaluation Commission**'s performance evaluation rating appear on the ballot next to the name of the judge subject to retention by the electorate:

> Sec. 7. **TERM OF OFFICE; ELECTION.** ~~The term of all judges shall be six years and until their successors are qualified.~~ **Following appointment by the governor, each judge shall initially hold office for a term ending December 31 following the next regularly scheduled general election held more than**

four years after the appointment. Thereafter, the term of office shall be eight years and until a successor is appointed and qualified and shall commence on the first day of January following the judge's retention election. ~~They~~ **Judges' retention** shall be ~~elected~~ **decided** by the voters from the area which they are to serve in the manner provided by law. **A judicial evaluation commission shall evaluate in a nonpartisan manner the performance of judges according to criteria that the commission develops and publishes, and such other criteria as may be established by law, and its performance rating for judges shall appear on the ballot in the manner provided by law.**

The Commission further recommends the following legislation establishing the form of the **Judicial Performance Evaluation Commission's** rating on the ballot:

> Within the time period established by Minn. Stat. § 204(B).09, or such other time period as may be provided by law, a judge seeking to retain judicial office shall file an affidavit of candidacy with the Secretary of State. All judges who have filed an affidavit of candidacy as provided in this section shall be placed on the appropriate official ballot at the next regular general election under a non-partisan designation and in substantially the following form:
>
> Shall _____(name of judge) of the _____(district court, court of appeals or supreme court) be retained in office? Yes _____ No _____ (mark "X" after one). The performance review commission has rated this judge qualified/not qualified.
>
> If a majority of those voting on the question votes "No," then upon the expiration of the term for which such judge was serving, a vacancy shall exist, which shall be filled as provided in this provision. If a majority of those voting on the question vote "Yes," such judge shall remain in office for another term, subject to removal as provided by the Constitution.

Finally, the Commission recommends the following legislation regarding the selection of the **Judicial Performance Evaluation Commission**, the composition of the Commission, and the Commission's standards and procedures for evaluating judges:

> **JUDICIAL PERFORMANCE EVALUATION COMMISSION**
>
> **Purpose of Commission**
>
> The Judicial Performance Evaluation Commission shall adopt, after public hearings, and administer for all judges a process for evaluating judicial performance. The performance review process will assist voters in evaluating the

performance of judges standing for election, facilitate self-improvement of all judges, and promote the public accountability of the judiciary.

Composition of Commission; Appointment; Term of Office

The Commission shall be composed of 30 commissioners, the majority of whom will be nonattorney members of the public. The Commission shall be composed of two members from each judicial district and ten state-wide members. The governor and the chief justice shall each appoint half of the members of the Commission. In making appointments, the governor and the chief justice shall consider the diversity of the state's population and shall appoint individuals who have outstanding competence and reputation. Attorney members of the Commission shall have resided in the state and shall have been admitted to practice before the supreme court for not less than five years. The term of office of Judicial Performance Evaluation Commissioner is four years. If reappointed, Commissioners shall serve up to two full terms. In the case of a vacancy which occurs before the expiration of a term, the member appointed to fill such vacancy shall serve for the duration of the unexpired term. The appointments shall be made as follows: three nonattorney and two attorney members designated by the governor shall be appointed to serve state-wide; three nonattorney and two attorney members designated by the chief justice shall be appointed to serve state-wide; one nonattorney member designated by the governor shall be appointed to serve each judicial district; and one attorney member designated by the chief justice shall be appointed to serve each judicial district. The chief justice shall select the chairperson of the Judicial Performance Evaluation Commission.

Meetings

All meetings of the Commission shall be open to the public except when the Commission meets in executive session to discuss (1) whether a judge meets or does not meet judicial performance standards, (2) a judge's written responses to a finding that the judge does not meet judicial performance standards, (3) a judge's appearance before the Commission, or (4) matters that are confidential by these provisions, court rules, or by law. The substance of deliberations in executive session shall not be disclosed. The Commission may meet in executive session at any other time upon a majority vote of the Commission members then in attendance. All voting shall be in public session.

Authority of Commission

The Commission shall periodically develop, review, and recommend written performance standards to be approved by the supreme court and made available to the public by which judicial performance is to be evaluated. The Commission shall formulate policies and procedures for collecting information and conducting reviews and shall create and implement a program of periodic review of the performance of each judge. The Commission shall request public comment and

hold public hearings on the performance of all judges prior to the public vote meeting where the Commission votes and publicly announces whether a judge meets or does not meet judicial performance standards.
Judicial Performance Evaluation Commissioners shall perform their duties in an impartial and objective manner, and shall base their recommendations solely upon matters that are in the record developed by the Commission.

Performance Evaluation

Midway through the judge's full term and again no less than 9 months before his or her election, anonymous survey forms eliciting performance evaluations shall be distributed to attorneys, litigants, other judges, and other persons who have been in direct contact with each judge surveyed and who have first hand knowledge of his or her judicial performance during the evaluation period. The Commission shall employ qualified individuals to prepare survey forms, process the survey responses, and compile the statistical reports of the survey results in a manner designed to ensure the confidentiality and accuracy of the process. The survey forms shall seek evaluations in accordance with the written performance standards approved by the supreme court, including knowledge of the law and procedure, integrity, impartiality, temperament, administrative skill, punctuality, and communication skills, and shall solicit narrative comments regarding the judge's performance. The survey forms shall be processed in a manner which ensures confidentiality and accuracy. Narrative comments shall not be publicly available. In each election year prior to the public vote meeting, the Commission shall request written public comments and hold public hearings with respect to judges standing for election.

In April of each election year, the Commission shall disseminate a compiled data report to the judge being reviewed and the Commission. The data report shall include the survey results, narratives, written public comments, and testimony from the public hearings. Based on this information, the Commission shall make findings as to whether the judge meets or does not meet judicial performance standards. The Commission shall provide written notice to any judge standing for election who has been found not to meet judicial performance standards. The judge shall have the right to submit written comments to the Commission and to appear and be heard by the Commission prior to the public vote. In each election year, the Commission shall vote in a public meeting on whether a judge who is standing for election meets or does not meet judicial performance standards. Following the vote, the Commission shall compile a factual report on the judicial performance of each judge standing for election and shall make the report available to the public one month before the time period established by Minn. Stat. § 204B.09 for filing an affidavit of candidacy with the secretary of state.

VII. COMMISSION PROPOSAL REGARDING THE RENEWAL OF JUDGES' TERMS THROUGH RETENTION ELECTIONS

A. Key Features of the Proposal for the Retention of Judges

The Commission recommends that the renewal of judicial terms occur through **retention elections**. In **retention elections**, the voters are asked whether or not a particular judge should be retained and are given the option to vote yes or no. The Commission recommends that the name of the judge subject to retention should appear on the ballot together with the performance evaluation rating for that judge indicating whether that judge is qualified or not qualified. The performance evaluation rating would be based on a comprehensive review of judicial performance by the **Judicial Performance Evaluation Commission**.

The Commission's proposal for the renewal of judges' terms through **retention elections** constitutes a change from our current system of nonpartisan elections. Although the vast majority of judicial races are uncontested, challengers may run against sitting judges and obtain a judicial seat through the electoral process. The Commission's proposal for **retention elections** would eliminate the ability to attain office through election and instead rely on a merit-based process of judicial selection. The Commission's proposal for **retention elections** enhances voter participation in the judicial selection process by providing voters with meaningful information regarding judicial performance.

B. The Benefits of Retention Elections

Renewal of judges' terms through **retention elections**, coupled with the quality rating from the **Judicial Performance Evaluation Commission**, ensures that voters will have the information regarding quality and performance to make informed decisions at the polls. Publicizing the quality rating on the ballot ensures that voters have some information about the

qualifications of the judge in making their retention decision. In short, **retention elections** promote judicial accountability based on quality and performance.

The post-*White* election rules permit partisan discourse regarding judges and their decisions, but information regarding the quality and performance of judges is expected to influence voting behavior in judicial retention elections. Indeed, voters are able to differentiate between judges when casting their vote in retention elections. In practice, the defeat of judges in retention elections is not due to some issue or event that mobilizes individuals who do not typically vote in judicial elections to defeat a judge.[17] Instead, it is the voters who regularly vote in judicial elections who vote to defeat a judge in retention elections, rather than those who "roll off" and fail to vote for judicial candidates.[18] Moreover, voters are able to distinguish the judges they wish to defeat, and a losing judge does not drag down other judges to defeat.[19] As one group of scholars who surveyed the results of retention elections over a thirty year period concluded:

> Two initial assumptions/fears were that a campaign by some opposition group would mobilize voters to vote rather than rolloff, resulting in the nonretention of the judge. Furthermore, it was feared that not only would the targeted judge be defeated, but also, because voters are not discriminating, all judges on the ballot could be defeated. Now, it is clear that neither of these assumptions was correct.[20]

C. The Retention Election Proposal

To effectuate retention elections, the Commission recommends amending Article VI, Section 7 as follows:

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[17] Larry Aspin, Jean Bax, and Celeste Montoya, Thirty Years of Judicial Retention Elections: An Update, *Social Science Journal* 37: 1-17, 8-11 (2000).

[18] *Id*.

[19] *Id*.

[20] *Id*. at 8.

Sec. 7. **TERM OF OFFICE; ELECTION.** ~~The term of all judges shall be six years and until their successors are qualified.~~ **Following appointment by the governor, each judge shall initially hold office for a term ending December 31 following the next regularly scheduled general election held more than four years after the appointment. Thereafter, the term of office shall be eight years and until a successor is appointed and qualified and shall commence on the first day of January following the judge's retention election.** ~~They~~ **Judges' retention** shall be ~~elected~~ **decided** by the voters from the area which they are to serve in the manner provided by law. **A judicial evaluation commission shall evaluate the performance of judges according to criteria that the commission develops and publishes, and such other criteria as may be established by law, and its performance rating for that judge shall appear on the ballot in the manner provided by law.**

The Commission further recommends the following legislation establishing procedures for the **retention of judges**:

> Within the time period established by Minn. Stat. § 204(B).09, or such other time period as may be provided by law, a judge seeking to retain judicial office shall file an affidavit of candidacy with the Secretary of State. All judges who have filed an affidavit of candidacy as provided in this section shall be placed on the appropriate official ballot at the next regular general election under a non-partisan designation and in substantially the following form:
>
> Shall _____(name of judge) of the _____(district court, court of appeals or supreme court) be retained in office? Yes _____ No _____ (mark "X" after one). The performance review commission has rated this judge qualified/not qualified.
>
> If a majority of those voting on the question votes "No," then upon the expiration of the term for which such judge was serving, a vacancy shall exist, which shall be filled as provided in this provision. If a majority of those voting on the question vote "Yes," such judge shall remain in office for another term, subject to removal as provided by the Constitution.

VIII. COMMISSION PROPOSAL REGARDING TERM OF OFFICE FOR JUDGES

A. Key Features of the Proposal Regarding Length of Terms

The Commission recommends that following appointment by the governor, a judge's initial term of office be approximately four years. The Commission also recommends that following a judge's retention by the voters, the term of office be eight years. This proposal

differs from the existing system in that it lengthens both the initial term and subsequent terms by approximately two years.

B. Benefits of Longer Terms

One benefit of longer terms is that there will be a larger overall record of performance from which to make renewal decisions and evaluate performance. This is particularly critical for the initial term, which would be lengthened to approximately four years for the purpose of having a larger record from which to evaluate performance in advance of the first retention election. Longer terms also attract higher quality candidates and permit judges to make decisions based on the law rather than on the preferences of the other branches of government or campaign contributors. Based on other state's experience with judicial tenure, longer terms may also increase the chances that judges serve only one term, increasing turnover on the bench and ensuring that judges are closely connected to the public they serve.

C. Initial and Subsequent Terms of Office

The Commission recommends lengthening the initial term to approximately four years. Article VI, Section 8 currently provides that following appointment by the governor, the judge shall stand for election "at the next general election occurring more than one year after the appointment." Under this system, a judge's initial term is at least one year in length but, depending on the timing of the next general election, could be as long as two years. The Commission recommends lengthening the initial term to approximately four years so that the proposed **Judicial Performance Evaluation Commission** will have enough information about a judge's performance to conduct a performance view and provide the results of that review to the public in advance of the deadlines established by the secretary of state for filing affidavits of candidacy.

The Commission further recommends that following **retention by the voters**, a judge's term of office should be eight years, rather than six years, as currently provided by Article VI, Sections 7 and 8.

To effectuate these recommendations, The Commission proposes that Article VI, Section 8 be amended as follows to delete the language specifying the length of the initial term:

> **Sec. 8. VACANCY.** Whenever there is a vacancy in the office of judge, the governor shall appoint ~~in the manner provided by law~~ a qualified person to fill the vacancy **from a list of candidates nominated by a merit selection commission in the manner provided by law.** ~~until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.~~

The Commission further recommends that Article VI, Section 7 be amended as follows:

> Sec. 7. **TERM OF OFFICE; ELECTION.** ~~The term of all judges shall be six years and until their successors are qualified.~~ **Following appointment by the governor, each judge shall initially hold office for a term ending December 31 following the next regularly scheduled general election held more than four years after the appointment. Thereafter, the term of office shall be eight years and until a successor is appointed and qualified and shall commence on the first day of January following the judge's retention election.** ~~They~~ **Judges' retention** shall be ~~elected~~ **decided** by the voters from the area which they are to serve in the manner provided by law. **A judicial evaluation commission shall evaluate the performance of judges according to criteria that the commission develops and publishes, and such other criteria as may be established by law, and its performance rating for that judge shall appear on the ballot in the manner provided by law.**

IX. MINORITY REPORT OF BRIAN MELENDEZ, JOINED BY STEVEN V. BESSER, JUDGE JAMES HOOLIHAN, MARY VASALY, AND JUDGE LUCY WIELAND

I respectfully dissent from the Commission's majority report because of my view—

> *That an appointive system, modeled after the system in the United States Constitution for selecting federal judges, deserves consideration on at least an equal footing with the retention-election system that the majority report recommends.*

I invite my fellow commissioners who share this view, even if they otherwise join the majority report, to join me in bringing this alternative view to the discussion.

A. Concurring Views

While I dissent from the majority report, I share many — perhaps nearly all — of its basic premises. If this report were a judicial opinion, my view would be "concurring in part, dissenting in part." Let me spell out those basic premises that I wholeheartedly share:

1. **Popular government.** A people institutes a government in its society in order to collectively perform those beneficial functions that the people themselves individually cannot perform, or cannot perform as efficiently. Any such government's essential duties are to respect and protect each individual's freedom of conscience, expression, and worship; to establish and guarantee the due process of law; to promote and ensure each individual's equality before the law and equality of opportunity; and to preserve, protect, and defend each individual's liberty, person, and property against injury.

2. **Individual rights.** The genius of the American experiment lies largely in the notion of a government of limited powers, in which the sovereign power derives from the "consent of the governed,"[21] but is nevertheless subject to certain basic rights and freedoms — enshrined in a written constitution — that the individual enjoys. Neither the ordinary legislative power nor the executive power can legitimately interfere with those rights and freedoms.

3. **An independent judiciary.** The rule of law and the scheme of ordered liberty that guarantee our individual rights and freedoms depend essentially upon an

[21] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .").

independent judiciary — independent not only of the legislative and the executive branches, which the judiciary checks and balances, but independent as well of political parties and factions, of moneyed interests, and of popular majorities. The judiciary pronounces and upholds constitutional rights and freedoms.

4. **Accountability to the law.** While the political branches are directly accountable to the people through periodic elections, a judge must be accountable to the constitution and the law, even when (especially when) that accountability results in an exercise of judicial power that displeases the political branches or a popular majority. If a judge must answer too immediately to a political authority, even an electoral majority, then constitutional rights and freedoms may soon become meaningless.

5. **Public confidence in the judiciary.** The judiciary must uphold constitutional and individual rights with such fairness and integrity that the people respect the judicial power even when they disagree with its results. With judges, "the consent of the governed" may come from popular elections, but can also come from public confidence in the process.

6. **Merit selection.** A judge should be selected based on merit — that is, based on his or her aptitude for judicial independence and accountability to the law, and his or her ability to inspire public confidence in the judiciary. The merit-selection process should focus strictly on public and professional considerations without regard to partisan or other political concerns.

7. **A successful culture of judicial selection.** The system by which Minnesota selected its judges at the turn of the millennium — a culture in which most judges

were selected by gubernatorial appointment after recommendations from a merit-selection panel, backed by a constitutional provision for elections in which a judicial candidate could not seek, accept, or use partisan political endorsements and could not "announce his or her views on disputed legal or political issues" — successfully ensured an independent state-court judiciary. For three decades, governors of all three major political parties and their merit-selection panels have respected this culture, and have populated the bench with qualified jurists accountable to the law and generally independent of politics.

8. **A threat to judicial independence.** The decisions by the Supreme Court of the United States and the United States Court of Appeals for the Eighth Circuit in the *White* cases,[22] striking down (among others) the clauses in Minnesota's code of judicial conduct that prohibited a judicial candidate from seeking, accepting, or using a partisan political endorsement and from "announc[ing] his or her views on disputed legal or political issues," have significantly destabilized Minnesota's successful culture of judicial selection. The *White* decisions have increased the opportunities for undue influence upon the judicial-selection process by political parties and factions, moneyed interests, and popular majorities, and have greatly increased the risk that such influence will undermine judicial independence.

9. **A need for reform.** The existing constitutional and statutory framework for selecting judges does not adequately ensure an independent judiciary in the post-

[22] *Republican Party v. White*, 536 U.S. 765 (2002); *Republican Party v. White*, 416 F.3d 738 (8th Cir. 2005) (en banc), *cert denied sub nom.; Dimick v. Republican Party*, 126 S. Ct. 1165 (2006). The majority report summarizes these decisions at 4-5.

White era. Constitutional reform is necessary in order to restore the judicial independence that the *White* decisions have threatened.

With these premises in mind, the Commission's task became a quest for the system of selecting judges that best ensures an independent judiciary, accountable to the law, but still inspiring public confidence.

B. Appointment Compared with Retention

The Commission eventually narrowed its potential recommendation to two alternatives:

- a *retention* system, in which a judge is selected in the first instance by appointment, but must periodically stand for a public "retention" election in which the voters decide whether the judge will remain in office; and
- an *appointive* system, like the system in the United States Constitution for selecting federal judges, in which the judge never faces the voters directly but is instead appointed (and perhaps reappointed) based on merit.

The Commission split almost evenly between these two systems. Ultimately, when the two systems were voted on side by side, 14 commissioners favored a retention system while 11 favored an appointive process, so the retention system prevailed. But the question was very narrowly decided: several commissioners went back and forth between the two alternatives in an hours-long debate, and two commissioners who ultimately voted for retention announced that they could just as easily have voted for appointment (and had indeed favored an appointive system at earlier points in the debate, just not at the crucial moment). If one of them had changed her mind, then the vote would have been 13 to 12, practically a tie. And if they had both leaned the other way, then the appointive system would have prevailed, albeit by an equally narrow margin. With such a close result in mind, I submit that an appointive system deserves

consideration on at least an equal footing with the retention-election system that the majority report recommends.[23]

I chaired the subcommittee that advocated the appointive system. I append a proposed appointive system based on merit selection, in substantially the same form as that subcommittee's final report as modified by the full Commission before it voted between the appointive system and the retention system. (Please see Appendix E.) Several key features define this system:[24]

- A merit-selection commission nominates qualified citizens for judgeships.
- The governor appoints judges from qualified citizens that the commission nominates (unlike the federal system, in which the president can nominate anyone that he or she wants). The governor cannot appoint a judge that the commission has not nominated (unlike the current state system, in which the governor can bypass the commission's recommendations), but the governor may request up to three additional nominees for a vacancy.
- The legislature is not involved (unlike the federal system, which requires senatorial confirmation).
- Judges serve a three- to four-year initial term (not unlike the current state system, in which an appointed judge must stand for election between one and three years

[23] While I personally prefer an appointive system over a retention system, this minority report does not incorporate that preference. I am asking here only that an appointive system get equal time as a viable alternative.

[24] Rather than reinvent the wheel, I have focused on the constitutional provisions, and left the detail to statute. The system leaves the current statutory framework, such as the merit-selection commission's membership (Minn. Stat. § 480B.01), intact.

after appointment; but unlike the federal system, in which the judge holds office "during good behavior").

- A judicial-evaluation commission can reappoint a judge for a nine-year term. A reappointed judge can be reappointed again. The governor and legislature are not involved in reappointment.

Several arguments favor an appointive system over a retention system:[25]

First, because an appointive system involves only a relatively few well-defined players (the governor and two commissions) playing nonpartisan roles, it minimizes the influence that political parties, money, and momentary popular majorities can exert upon judicial selection. No system will totally remove politics from the process, but an appointive system — especially when coupled with a merit-selection process — minimizes the influence of politics.

Second, an appointive system will better insulate judges from electoral politics, and will better insulate judicial selection from political manipulation. A prospective or sitting judge need never fundraise or campaign, and never needs popular approval. Neither a political party, nor a wealthy individual or group, nor a popular majority can punish a judge for an unpopular decision.

Third, because an appointive system involves only a relatively few well-defined players, those players will be better informed about the prospective or sitting judges whom they are evaluating. Neither the candidate nor the state must face the consequences of apathy — in the form of uninterested or uninformed voters, or low turnout — in making a choice as important as selecting a judge.

[25] Again, I am asking here only that an appointive system get equal time as a viable alternative.

Fourth, we know that an appointive system *works* from over two centuries' experience with the federal system. No federal judge has ever faced a popular election. But the federal judiciary commands enormous public confidence.

And we know that the system works from our actual experience in Minnesota, which has functioned for practical purposes as an appointive system for three decades. Minnesota's successful culture of judicial selection owes its success directly to a system in which most judges were selected by gubernatorial appointment after recommendations from a merit-selection panel. Now that the *White* decisions have rewritten the rules, an appointive system is the only way that we can restore the highly successful pre-*White* culture in the post-*White* world.

Surely an appointive system deserves equal time.

C. A Retention System's Shortcomings

A retention system suffers from several shortcomings that infect neither the current system nor an appointive system.[26]

A retention system does not meaningfully insulate a judge from politics, since a judge facing a retention election must nevertheless fundraise and campaign against the possibility of a last-minute challenge from a well-funded faction whom the judge has somehow displeased. The judge can never know until the very last minute whether such a challenge will materialize, and so must anticipate and prepare against such a challenge even if no threat ever surfaces. An open election, on the other hand, pits the incumbent judge seeking reelection against a living, breathing opponent to whom the judge can compare himself or herself — unlike the anonymous,

[26] Most commissioners ranked both an appointive system and a retention system ahead of the current system in the post-*White* world. At least five commissioners who preferred an appointive system over a retention system nevertheless voted for the Commission's report, presumably for this reason. But a few commissioners, including me, actually prefer the current system of open public elections over a retention-election system, even in the post-*White* era. Six commissioners voted against the Commission's report, which 17 commissioners supported.

abstract, idealized future judge that the voter can imagine in a retention election. And an open election comes with a filing deadline, several months before the vote, after which a judge who will not face a challenge can breathe easily and can refrain from fundraising and campaigning.

I make these points not for the sake of arguing that a retention system is inferior to an open election, nor even for the sake of arguing that a retention election is inferior to an appointive system. I offer them merely in order to suggest those possibilities. My actual point is only that an appointive system deserves a hearing along with the retention-election system that the majority report recommends.

D. Legislative Confirmation

The subcommittee that I chaired had, several months before recommending the system that accompanies this minority report in Appendix E, recommended another appointive system that included not only the governor but also the legislature in the judicial-selection process. Both the subcommittee and the full Commission ultimately rejected that approach, and I am not advocating it here. But I include it for the sake of discussion as Appendix F.

E. Conclusion

With all due respect to the Commission majority, I therefore submit this minority report. I thank our chair, former Governor Al Quie, and all my fellow commissioners for a process that was open, candid, thorough, and thoughtful. I look forward to participating in the debate that will hopefully ensure a Minnesota judiciary that preserves its independence from politics, its accountability to the law, and the public's confidence in its fairness and integrity.

X. SEPARATE COMMENTS OF ADMINISTRATIVE LAW JUDGE ERIC L. LIPMAN

I have chosen to write separately because at the end of the Commission's deliberations, I was not able to support either the retention election proposal urged by a majority of

Commissioners, or the appointive system proposal described in the Melendez Minority Report. In my view, neither proposal adequately addresses the challenges that originally drew the Commission together – nor do they represent the best possible choices for reform.

A. Background – What the *White* Decisions Mean (and What They Do Not Mean)

At the outset, it is important to make clear what the decisions in the case of *Republican Party v. White*[27] mean for Minnesota. While the Commission Report touches upon some features of these decisions, a few points deserve special emphasis.

First, it is important to note that both those who celebrate the *White* decisions, and those who bemoan them as horrible errors, are guided by the same underlying goal: Both groups seek to maximize public confidence in the state court system.

For their part, those who celebrate the *White* decisions believe that an end to elite-dominated, low-information campaigns for judicial office is the route to building genuine, broad-based confidence in the state courts. The *White* proponents envision an age where large segments of the public will be educated about the qualifications of judicial candidates through information-rich campaigns, and will, with a real appreciation for their choices, select judicial officers at the polls.

As detailed throughout the Commission Report, those who criticize the *White* decisions (and even many who think that the *White* cases are correctly decided) believe that it is simply not possible to maintain public confidence and esteem in the state courts generally, if individual candidates are obliged to use modern campaigning techniques in order to win judicial office.

[27] As noted earlier in the Report, there are actually two key decisions – *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) and *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) *cert. denied sub nom., Dimick v. Republican Party of Minnesota*, 126 S.Ct. 1165 (2006) – which for ease of reference are together referred to here as "the *White* decisions."

Attempting to build public confidence in the judicial enterprise by campaigning in ways that would-be legislators and governors do, say the *White* critics, is hopeless; and ultimately it is a self-defeating errand.

As divided as the two groups are on their choice of judicial selection methods, and as bitter as their exchanges can be from time to time, it is perhaps not surprising that we often overlook a critical point – namely, that both of these groups seek to improve the esteem in which the state courts are held. In any discussions that follow, this broad agreement as to the overall goal should not be lost; indeed, it should be emphasized again and again. Fractious as we may be whenever this subject comes up, we share a common hope.

Second, while many Commission members point to the decisions in *Republican Party v. White* as the events which made reform necessary, this description is a convenient short-hand more than it is an accurate history. In my view, we would have needed to reform the methods that we use to select and retain state court judges regardless of whether Gregory Wersal and the Republicans prevailed on their 1st Amendment claims. Fundraising by judicial candidates was a problem that predated the *White* decisions and would have continued to be a serious problem for Minnesota, and public confidence in our state court system, if Wersal and his allies had never stepped foot into Federal Court. With a statewide electorate of 3.7 million voters,[28] (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 recruiter and a coalition-builder.

While examples abound as to the corrosive effects of candidate fundraising on the state courts, and some are referenced in the Report, the study published by the *New York Times* last

[28] Minnesota General Election Statistics 1950-2006 (http://www.sos.state.mn.us/docs/election_result_stats.pdf).

year makes the point with sharp clarity. Reporters Adam Liptak, Janet Roberts and Mona Houck compared the contribution histories of parties that had cases before Ohio Supreme Court, with the later results achieved by those parties. The reporters conclude that, over the course of a 12-year period, justices of the Ohio Supreme Court voted in favor of those who had contributed to their respective campaigns 70 percent of the time.[29] Further, to my mind, one need not necessarily subscribe to the *Time*s reporters' underlying premise – namely, that campaign contributions actually drove substantive results for litigants in individual cases – in order to be alarmed. It is intolerable that the public might reasonably believe this to be the case.

The *New York Times* study also makes another, more subtle point, clear: If there are statistical linkages between campaign contributions and substantive results for litigants in Ohio over the course of a dozen years, it is undeniable that the problems associated with fundraising by judicial candidates were present before the decisions in *Republican Party v. White;* and, at bottom, are not brought about by the outcomes in that case. The *White* cases may have prompted new and wider concerns – but the facts were sufficiently alarming before. Indeed, years before the holdings of the *White* cases came into full bloom (in the autumn of 2005),[30] there were efforts underway to end the dependence of judicial candidates on raising money for campaigns[31] – a matter that should continue to be our lodestar today.

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[29] "Campaign Cash Mirrors a High Court's Rulings," *New York Times* (October 1, 2006) (http://www.nytimes.com/2006/10/01/us/01judges.html?ex=1317355200&en=0e956de8a57479c2&ei=5088&partner=rssnyt&emc=rss).

[30] *See, Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005).

[31] *See*, *e.g.*, Minnesota Senate File 599 (February 27, 2003); Minnesota House File 1731 (February 2, 2004); Minnesota House File 1735 (February 2, 2004); Minnesota Senate File 1831 (February 9, 2004); Minnesota Senate File 2095 (February 19, 2004).

B. Solving the Fundraising Riddle

In my view, in order to address the corrosive effects of fundraising by judicial candidates we must meet a two-part test – namely, is there 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-makers; and,

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

As detailed below, I could not join the Commission Majority Report because it fails this "first test;" nor the Melendez Minority Report, because it fails the "second test."

1. The Majority Report

I do not believe that a retention election system is our best option because the Majority's retention election system does not: (a) curb a judge's interest in, or reliance upon, fundraising appeals for election campaigns; (b) obviate the need for judges to recruit others to be a part of effective campaign organizations; or (c) reduce the ardor among interest groups to conduct statewide media campaigns on judicial selection and retention. Building effective campaign organizations always presents difficult ethical challenges for incumbent judicial officers and would-be judicial officers; even if one assumes that these candidates scrupulously follow the law in every instance. Solicitations for campaign help raise doubts than can never be adequately answered – even by honest men and women – and sprays a dingy patina over the whole state court system.

Worse still, I am concerned that by proposing a retention election system, the Majority Report's message to the broader public is that the key difficulties facing our state's system of judicial selection and retention are challengers. As detailed above, fundraising, and not willing

office-holders, is the source of our difficulties. Retention elections simply excise the wrong features from our process.

2. The Melendez Minority Report

Because at its root our objective is to urge a system that will preserve and extend public confidence in the state courts, I likewise cannot join Commissioner Melendez in support of his 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, or 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.

C. A Third Way

For my own part, at the Commission's February 2007 meeting, I circulated a proposal that was based, in large measure, upon Senator Thomas Neuville'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;
- Provision for 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. Not believing there to be even a seconding vote for legislative confirmation of judicial officers, however, I did not seek to substitute this proposal for the Melendez Minority Report.

D. A Short Epilogue for the Minnesota Legislature

As a former Member of the Minnesota House of Representatives, I would urge my colleagues who are now in legislative service to consider why a proposal for the legislative confirmation of judges did not have broader appeal among Commission Members. To the extent that Commission Members might believe that a review of judicial candidates is not a function that could be fairly or reliably completed by the House of Representatives and the Senate, it is a critique that should trouble all Members – both past and present. The Commission Report thus set outs important challenges to improving public confidence in the state courts; and as it happens, the Minnesota Legislature too.

XI. SEPARATE COMMENTS OF STEVEN V. BESSER, JOINED BY VANCE OPPERMAN, MARY VASALY, AND JUDGE LUCY WIELAND

Although I have joined the Minority Report authored by Brian Melendez, I should more appropriately have penned a "Special Concurrence," and I ask that these comments be considered in that vein.

Having had the opportunity to spend the better part of the past four years serving as a member and then chairing and co-chairing a committee of the Minnesota State Bar Association concerned with judicial selection, and also perhaps reflecting having been raised in a "Norman Rockwellesque" small town in Minnesota, where civic responsibility (including civil disobedience – it was the '60's) was taken as a serious obligation, I have come to the inescapable conclusion that while the executive and legislative branches of our government are to be representative of, and responsive to, the constituency, the judiciary is decidedly not. Rather, the judiciary is the referee between the government, the law and the people, answering to the higher calling of fairness – that is, justice blindly administered to the letter of the law.

Henry N. Setzer, attendee of the Minnesota Constitutional Convention, eloquently and concisely expressed this sentiment, during the debates regarding judicial selection:

> *That ours is a government of checks and balances, is a fact which should be always kept in sight. While the people elect their Representatives, who are the servants of the people and who are swayed by every wave of feeling, our Senators are elected by the States, and represent State Sovereignty? But sir, the Judges, in order to give more stability to the government, in order to act as a check upon the varying legislation of the House of Representatives and Senate, are appointed by the President and appointed for life. The Judges represent no constituency and are elected by no constituency. They represent nothing except the abstract ideas of equity and justice, as applied to the affairs of the Commonwealth, and what is more proper than that the Commonwealth should appoint them.*

So why write these separate comments? I cannot advocate continued reliance on the current contested election model originally set forth in Minnesota's Constitution as opposed to the Commission's recommendations, as was suggested in footnote 26 to the Minority Report.

Rather, I, and I suspect, many of my fellow Commission members who support the pure appointive model suggested by the Minority Report, also prefer the Commission's findings and recommendations regarding the implementation of merit selection for all judges followed by retention elections, as superior to the current contested election model originally set forth in Minnesota's Constitution – a model which will at some time in the near future assuredly become subject to much mischief following the *White* decision.

Accordingly, although I prefer the pure appointive model set forth in the Minority Report, in the event our Legislature and the citizens of Minnesota should consider the adoption of the findings and recommendations of the Commission's majority, they will find that I concur and will work tirelessly to see to its passage as a Constitutional amendment.

APPENDIX A

COMMISSION'S LEGISLATIVE PROPOSAL

VACANCY IN THE OFFICE OF APPELLATE JUDGE

Within sixty days from the occurrence of a vacancy in the office of appellate judge, the Appellate Court Merit Selection Commission shall submit to the governor the names of three candidates nominated by the Commission for the vacancy. The governor shall appoint a qualified person to fill the vacancy from that list of three candidates or, in the governor's discretion, may direct the Commission to nominate three additional candidates from which the governor shall appoint a qualified person to fill the vacancy. A nominee shall be under sixty-five years of age at the time the nominee's name is submitted to the governor.

TERM OF OFFICE OF JUDGE

Following appointment by the governor, each judge shall initially hold office for a term ending December 31 following the next regularly scheduled general election held more than four years after the appointment. Thereafter, the term of office of judge shall be eight years and until a successor is appointed and qualified and shall commence on the first day of January following the judge's retention election.

VACANCIES

Upon attaining the age of seventy years, a judge shall retire and the judicial office shall be vacant. The office of judge also becomes vacant upon the judge's death, resignation, conviction after impeachment, recall, voluntary retirement, or when an incumbent's term expires without the incumbent being retained.

ELECTION OF JUDGES

Within the time period established by Minn. Stat. § 204(B).09, or such other time period as may be provided by law, a judge seeking to retain judicial office shall file an affidavit of candidacy with the Secretary of State. All judges who have filed an affidavit of candidacy as provided in this section shall be placed on the appropriate official ballot at the next regular general election under a non-partisan designation and in substantially the following form:

Shall _____(name of judge) of the _____(district court, court of appeals or supreme court) be retained in office? Yes _____ No _____ (mark "X" after one). The performance review commission has rated this judge qualified/not qualified.

If a majority of those voting on the question votes "No," then upon the expiration of the term for which such judge was serving, a vacancy shall exist, which shall be filled as provided in this provision. If a majority of those voting on the question vote "Yes," such judge shall remain in office for another term, subject to removal as provided by the Constitution.

APPELLATE COURT MERIT SELECTION COMMISSION

The Appellate Court Merit Selection Commission shall be a nonpartisan commission composed of 9 commissioners, four of whom shall be attorneys and four of whom shall be nonattorney members of the public. Each congressional district shall be represented on the Commission. The governor and the chief justice shall each appoint four of the members of the Commission, with the governor appointing a ninth person as the chair. In making appointments, the governor and the chief justice shall consider the diversity of the state's population and shall appoint individuals who have outstanding competence and reputation. Members of the Commission shall not hold any governmental office, elective or appointive. Attorney members of the Commission shall have resided in the state and shall have been admitted to practice before the supreme court for not less than five years. Commissioners shall serve staggered four year terms

and shall be eligible for reappointment up to two full terms. The initial appointments shall be made as follows: one nonattorney and one attorney member designated by the governor shall be appointed to serve a two year term; one nonattorney and one attorney member designated by the chief justice shall serve a two year term; one nonattorney and one attorney member designated by the governor shall be appointed to serve a four year term; and one nonattorney and one attorney member designated by the chief justice shall serve a four year term.

The Commission shall recommend to the governor qualified persons to fill a vacancy based on the following criteria: integrity, legal knowledge, communication skills, judicial temperament, the ability to promote trust and confidence in the judiciary, common sense, experience, and diversity. The principal consideration in nominating a candidate for a vacancy shall be merit, and the nominations shall be made in an impartial and objective manner, without regard for the political affiliation of the nominee or the governor.

As to matters of procedure regarding participation in meetings, vacancies on the commission, quorum, commission meetings, and notice and time of commission meetings, the Commission shall follow the procedures set forth in Section 480B.01.

JUDICIAL PERFORMANCE EVALUATION COMMISSION

Purpose of Commission

The Judicial Performance Evaluation Commission shall adopt, after public hearings, and administer for all judges a process for evaluating judicial performance. The performance review process will assist voters in evaluating the performance of judges standing for election, facilitate self-improvement of all judges, and promote the public accountability of the judiciary.

Composition of Commission; Appointment; Term of Office

The Commission shall be composed of 30 commissioners, the majority of whom will be nonattorney members of the public. The Commission shall be composed of two members from each judicial district and ten state-wide members. The governor and the chief justice shall each appoint half of the members of the Commission. In making appointments, the governor and the chief justice shall consider the diversity of the state's population and shall appoint individuals who have outstanding competence and reputation. Attorney members of the Commission shall have resided in the state and shall have been admitted to practice before the supreme court for not less than five years. The term of office of Judicial Performance Evaluation Commissioner is four years. If reappointed, Commissioners shall serve up to two full terms. In the case of a vacancy which occurs before the expiration of a term, the member appointed to fill such vacancy shall serve for the duration of the unexpired term. The appointments shall be made as follows: three nonattorney and two attorney members designated by the governor shall be appointed to serve state-wide; three nonattorney and two attorney members designated by the chief justice shall be appointed to serve state-wide; one nonattorney member designated by the governor shall be appointed to serve each judicial district; and one attorney member designated by the chief justice shall be appointed to serve each judicial district. The chief justice shall select the chairperson of the Judicial Performance Evaluation Commission.

Meetings

All meetings of the Commission shall be open to the public except when the Commission meets in executive session to discuss (1) whether a judge meets or does not meet judicial performance standards, (2) a judge's written responses to a finding that the judge does not meet judicial performance standards, (3) a judge's appearance before the Commission, or (4) matters that are confidential by these provisions, court rules, or by law. The substance of deliberations in

executive session shall not be disclosed. The Commission may meet in executive session at any other time upon a majority vote of the Commission members then in attendance. All voting shall be in public session.

Authority of Commission

The Commission shall periodically develop, review, and recommend written performance standards to be approved by the supreme court and made available to the public by which judicial performance is to be evaluated. The Commission shall formulate policies and procedures for collecting information and conducting reviews and shall create and implement a program of periodic review of the performance of each judge. The Commission shall request public comment and hold public hearings on the performance of all judges prior to the public vote meeting where the Commission votes and publicly announces whether a judge meets or does not meet judicial performance standards.

Judicial Performance Evaluation Commissioners shall perform their duties in an impartial and objective manner, and shall base their recommendations solely upon matters that are in the record developed by the Commission.

Performance Review

Midway through the judge's full term and again no less than 9 months before his or her election, anonymous survey forms eliciting performance evaluations shall be distributed to attorneys, litigants, other judges, and other persons who have been in direct contact with each judge surveyed and who have first hand knowledge of his or her judicial performance during the evaluation period. The Commission shall employ qualified individuals to prepare survey forms, process the survey responses, and compile the statistical reports of the survey results in a manner designed to ensure the confidentiality and accuracy of the process. The survey forms shall seek

evaluations in accordance with the written performance standards approved by the supreme court, including knowledge of the law and procedure, integrity, impartiality, temperament, administrative skill, punctuality, and communication skills, and shall solicit narrative comments regarding the judge's performance. The survey forms shall be processed in a manner which ensures confidentiality and accuracy. Narrative comments shall not be publicly available. In each election year prior to the public vote meeting, the Commission shall request written public comments and hold public hearings with respect to judges standing for election.

In April of each election year, the Commission shall disseminate a compiled data report to the judge being reviewed and the Commission. The data report shall include the survey results, narratives, written public comments, and testimony from the public hearings. Based on this information, the Commission shall make findings as to whether the judge meets or does not meet judicial performance standards. The Commission shall provide written notice to any judge standing for election who has been found not to meet judicial performance standards. The judge shall have the right to submit written comments to the Commission and to appear and be heard by the Commission prior to the public vote. In each election year, the Commission shall vote in a public meeting on whether a judge who is standing for election meets or does not meet judicial performance standards. Following the vote, the Commission shall compile a factual report on the judicial performance of each judge standing for election and shall make the report available to the public one month before the time period established by Minn. Stat. § 204B.09 for filing an affidavit of candidacy with the secretary of state.

APPENDIX B

COMMISSION'S PROPOSED AMENDMENTS TO

ARTICLE VI, SECTION 7 OF THE MINNESOTA CONSTITUTION

ARTICLE VI, SECTION 7

Sec. 7. **TERM OF OFFICE; ELECTION.** ~~The term of all judges shall be six years and until their successors are qualified.~~ **Following appointment by the governor, each judge shall initially hold office for a term ending December 31 following the next regularly scheduled general election held more than four years after the appointment. Thereafter, the term of office of shall be eight years and until a successor is appointed and qualified and shall commence on the first day of January following the judge's retention election.** ~~They~~ **Judges' retention** shall be ~~elected~~ **decided** by the voters from the area which they are to serve in the manner provided by law. **A judicial evaluation commission shall evaluate in a nonpartisan manner the performance of judges according to criteria that the commission develops and publishes, and such other criteria as may be established by law, and its performance rating for judges shall appear on the ballot in the manner provided by law.**

APPENDIX C

COMMISSION'S PROPOSED AMENDMENTS TO

ARTICLE VI, SECTION 8 OF THE MINNESOTA CONSTITUTION

ARTICLE VI, SECTION 8

Sec. 8. VACANCY. Whenever there is a vacancy in the office of judge the governor shall appoint ~~in the manner provided by law~~ a qualified person to fill the vacancy **from a list of candidates nominated by a merit selection commission in the manner provided by law.** ~~until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.~~

APPENDIX D

COMMISSION'S PROPOSED AMENDMENTS TO

MINNESOTA STATUTES SECTION 480B.01

480B.01 COMMISSION ON JUDICIAL SELECTION.

Subd. 1. **Judicial vacancies.** If a judge of the district court or Workers' Compensation Court of Appeals dies, resigns, retires, or is removed during the judge's term of office, or if a new district or Workers' Compensation Court of Appeals judgeship is created, the resulting vacancy must be filled by the governor as provided in this section.

Subd. 2. **Commission established; members.** A Commission on Judicial Section is established. It is composed of permanent members chosen as described in paragraphs (a) to (e).

(a) The governor shall appoint seven at-large members to the commission who serve at the pleasure of the governor. The governor shall appoint one of these members as chair of the commission. The chair may but does not have to be an attorney. The governor may appoint attorneys to fill no more than four of the remaining six positions.

(b) The justices of the Supreme Court shall appoint two at-large members to the commission to serve four-year terms, ending on the same day the governor's term of office ends. The justices may appoint an attorney to fill no more than one of the two positions.

(c) The governor shall appoint two district members to the commission in each judicial district who serve at the pleasure of the governor. The governor may appoint an attorney to fill no more than one of the two positions.

(d) The justices of the Supreme Court shall appoint two district members to the commission from each judicial district to serve four-year terms, ending on the same day the governor's term of office ends. The justices may appoint an attorney to fill no more than one of the two positions.

(e) The appointing authorities shall ensure that the permanent members of the commission include women and minorities.

Subd. 3. **Participation in meetings.** Individuals appointed as district members under subdivision 2, paragraphs (c) and (d), may participate in commission meetings and deliberations only when the commission is considering applicants to fill a vacancy on the district court in the judicial district from which those individuals were appointed.

Subd. 4. **Vacancies**. If a vacancy occurs on the commission by reason of the death or resignation of a member or by the removal of a member appointed under subdivision 2, the appointing or electing authority shall appoint or elect an individual to fill the vacancy for the unexpired term.

Subd. 5. **Quorum**. A quorum of the commission is seven members.

Subd. 6. **Temporary ineligibility for vacancy**. Members of the commission who would otherwise be eligible to hold judicial office may not be considered or appointed to fill a district court judicial vacancy while they are members of the commission or for one year following the end of their membership on the commission.

Subd. 7. **Recruitment process.** The commission shall prepare and make available to the public and file with the clerk of the appellate courts and the secretary of state an outline of the process the commission will follow in recruiting and evaluating candidates to fill judicial vacancies. The commission shall actively seek out and encourage qualified individuals, including women and minorities, to apply for judicial offices.

Subd. 8. **Candidate evaluation**. The commission shall evaluate the extent to which candidates have the following qualifications for judicial office: integrity, maturity, health if job related, judicial temperament, diligence, legal knowledge, ability and experience, and community service. The commission shall give consideration to women and minorities. The commission shall solicit, in writing, recommendations from attorney associations in the judicial district and from organizations that represent minority or women attorneys in the judicial district who have requested solicitation.

Subd. 9. **Commission meetings; notice; time.** Within ten days after a judicial vacancy occurs or the governor has been notified that a vacancy will occur on a named date, the governor shall give notice of the vacancy to the chair of the Commission on Judicial Selection. A meeting of the commission to consider the candidates for the vacancy must be held not less than 21 days nor more than 42 days after the governor provides notification of the vacancy.

Subd. 10. **Notice to the public**. Upon receiving notice from the governor that a judicial vacancy has occurred or will occur on a specified date, the chair shall provide notice of the following information:

(1) the office that is or will be vacant;

(2) that applications from qualified persons or on behalf of qualified persons are being accepted by the commission;

(3) that application forms may be obtained from the governor or the commission at a named address; and

(4) that application forms must be returned to the commission by a named date.

For a district court vacancy, the notice must be made available to attorney associations in the judicial district where the vacancy has occurred or will occur and to at least one newspaper of general circulation in each county in the district. For a Workers' Compensation Court of Appeals vacancy, the notice must be given to state attorney associations and all forms of the public media.

Subd. 11. **Nominees to governor.** ~~Within 60 days after the receipt of a notice of a judicial vacancy, the committee shall recommend to the governor no fewer than three and no more than five nominees for each judicial vacancy.~~ **Within sixty days from the occurrence of a vacancy in the office of judge, the Commission shall submit to the governor the names of three candidates nominated by the Commission for the vacancy.** The names of the nominees must be made public. ~~The governor may fill the vacancy from the nominees recommended by the commission. If the governor declines to select a nominee to fill the vacancy from the list of nominees, or if no list is submitted to the governor under this subdivision, the governor may select a person to fill the vacancy without regard to the commission's recommendation. If fewer than 60 days remain in the term of office of a governor who will not succeed to another term, the governor may fill a vacancy without waiting for the commission to recommend a list of nominees.~~ **The governor shall appoint a qualified person to fill the vacancy from**

that list of three candidates or may direct the Commission to nominate three additional candidates from which the governor shall appoint a qualified person to fill the vacancy. A nominee shall be under sixty-five years of age at the time the nominee's name is submitted to the governor.

Subd. 12. **Commission meetings and data**. Meetings of the commission may be closed to discuss the candidates. The commission shall file an annual tabulation with the governor of the number of applicants for judicial office and the age, sex, and race of applicants.

APPENDIX E

MINORITY'S PROPOSED AMENDMENTS TO ARTICLE VI, SECTIONS 7 AND 8 OF THE MINNESOTA CONSTITUTION: GUBERNATORIAL APPOINTMENT WITH MERIT SELECTION

These provisions replace the current constitutional provisions regarding judicial selection and tenure (Minnesota Constitution, article VI, sections 7–8):

Sec. 7. **Appointment; reappointment.**

(a) **Vacancy.** Whenever a vacancy occurs or will occur in a judgeship, the governor will appoint a successor in the manner provided by law.

(b) **Merit-selection commission.** The legislature will establish by law a commission on judicial selection, whose chair and at least half of whose members the governor appoints. The commission will recruit candidates for appointment as judge, and evaluate each candidate according to criteria that the commission develops and publishes, and such other criteria as may be established by law.

(c) **Appointment.** Judges will be appointed by the governor from qualified citizens that the commission nominates. The commission must nominate at least three qualified citizens for each vacancy. The governor may request up to three additional nominees for a vacancy.

(d) **Judicial-evaluation commission.** The legislature will establish by law a commission on judicial evaluation. The commission will evaluate each judge eligible for reappointment according to criteria that the commission develops and publishes, and such other criteria as may be established by law.

(e) **Reappointment.** A judge may seek reappointment by written notice to the judicial-evaluation commission at least one year before his or her term expires. The commission may reappoint a judge by a two-thirds vote.

Sec. 8. **Term.**

(a) **Initial term.** A judge takes office upon appointment if the judgeship is vacant, or when the vacancy occurs if the appointment precedes the vacancy, and serves until the end of the calendar year in which the third anniversary of his or her appointment occurs and until a successor qualifies.

(b) **Term upon reappointment.** A reappointed judge serves a term of nine years and until a successor qualifies. A reappointed judge may succeed himself or herself.

APPENDIX F

EXHIBIT TO MINORITY REPORT:

GUBERNATORIAL APPOINTMENT WITH LEGISLATIVE CONFIRMATION

These provisions replace the current constitutional provisions regarding judicial selection and tenure (Minnesota Constitution, article VI, sections 7–8):

Sec. 7. **Term of office; election.**

(a) Judges will be nominated by the governor and will take office upon confirmation by the legislature. The legislature may delegate to a joint legislative commission, consisting of legislators from both houses, its authority to confirm judges, or judges of a particular class; but any such delegation expires when the legislature adjourns sine die.

(b) The legislature may act on a nomination to a judgeship during any regular or special session. The governor may call a special session for the sole purpose of confirming a nomination to a judgeship, in which case the legislature may not transact other business in that session.

(c) The term of office of all judges shall be six years and until their successors are qualified. A judge continues in office until the end of the calendar year in which his or her term expires. By November 15 of the preceding year, the judge may apply for another term by written notice to each house's presiding officer, or in any other manner provided by law. A judge who so applies continues in office for another term unless, before the legislature's next regular session adjourns, either house or a joint legislative commission rejects the application, in which case a vacancy results at the end of the calendar year.

Sec. 8. **Vacancy.**

Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is qualified.