Appointive Judicial Retention: The Melendez Minority Report

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In this issue other authors will present fine arguments in support of their respective judicial selection positions. A result of *Republican Party v. White* is that it gives us an opportunity to consider a variety of options. The Quie Commission's Minority Report recommends the adoption of a merit-based appointive procedure that eliminates the scourge of judicial election politicking and ensures that judicial retention is decided by the informed.

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Radical? The establishment of the third branch of government by the founding fathers embraced election-free judicial service. Name one person dissatisfied by the federal model. And the proposal for an appointive approach in Minnesota one-ups the feds: it provides for consequential performance evaluations of sitting judges, a process far better than the federal "remedy" of impeachment. So wipe those long-face *White* frowns away, smile, and support the Quie Commission Minority Report.

Let's be candid. Long ago we adopted an appointive approach to judicial selection and retention. Overwhelmingly, sitting judges are elected without opposition. They are appointed and never face a real election (defined as one unlike the Cuban or North Korean models in which elections involve one candidate). Thus Minnesota judges are essentially appointed "for life" (i.e., age 70). Doesn't it seem silly to see on November ballots the long lists of uncontested judicial races? Consider also the nature of many contested elections. Sometimes electoral opponents choose to run hoping to capitalize on antiquated notions of having last names like mine in Minnesota. Or they target races based upon considerations having nothing whatsoever to do with the sitting judge's judicial record. This is a process we need to defend at the ramparts? Certainly a choice to eliminate direct public participation in judicial selection is weighty and triggers legitimate concerns. But if we peel back our initial reaction that elections always reign supreme, when it comes to judges that reaction may evolve. Remember also that this is Minnesota, and we generally do things right here.

Those who choose to serve the public, give up careers, reduce relationships with lawyers, live the near-cloistered life, separate from the sport of politics and always under a microscope, deserve an added measure of job security. It is not easy to return to the private sector. Client development takes time. Mediation work is uncertain. The risk of loss of a seat on the bench in a judicial election lottery for reasons other than judicial performance is real. An appointive retention process ensures that judicial retention decisions will be based upon informed choices. This reasonably manages the risk of loss and its consequences facing those who choose to serve. The label "incumbent" on a ballot simply is not enough.

Judicial retention can be done without sacrificing our core principles. The Quie commissioners supporting the minority report embrace the shared values of American constitutional

democracy. Minnesotans cherish popular, representative government, individual rights, an independent judiciary accountable to the constitution and the law, and processes that establish public confidence in the courts at the macro (courts are fair to all) and micro (courts are fair even though I lost) levels. Judicial elections may not be one of such essential processes. As noted by the commissioners, for three decades governors of all three political parties and their merit selection panels have respected Minnesota's successful culture of judicial selection. That culture eschewed political activity and partisan policy announcements during campaigns. But *Republican Party v. White* changed all that. As explained in the minority report:

> 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. (Quie Commission Minority Report at 28.)

The *White* threat to judicial independence may best be avoided by use of an appointive, rather than an elective, judicial retention paradigm.

Under the appointive model, a judicial candidate would be appointed based upon merit, and perhaps reappointed, without facing election. As proposed by the minority report commissioners, the merit selection commission established by the legislature would continue to nominate qualified lawyers for judgeships. The chair and at least half of the commissioners would be appointed by the governor. The governor would continue to appoint judges as nominated by the commission. The governor could not appoint a non-nominated judge, but the proposal would allow the governor to request the commission to propose three additional candidates for a vacancy. Appointed judges would serve a three- or four-year term. Then, a separate performance evaluation commission, to be formed by the legislature, could reappoint the judge to a nine-year term by a two-thirds vote. Reappointed judges could be reappointed again.

This plan garnered 11 votes on the Quie Commission; the retention election proposal carried with 14 votes. The commission's reports were then evaluated by the Judicial Elections Committee of the Minnesota State Bar Association in May and June 2007. The committee recommended on a 9 to 2 vote that the MSBA adopt the minority report. At its annual meeting on June 29, 2007, 33 MSBA votes were cast in support of the minority report, and 31 votes were in favor of taking no position. The MSBA further resolved that the performance evaluation commission would focus strictly on public and professional considerations without second-guessing the propriety of the judge's rulings (a subject of appellate review) except for abuses of discretion or other specific improper conduct identified by an appellate court. Further, judges would be given the opportunity to respond to information considered by the commission.

The plan now goes to the legislature and, ultimately, the voters who will decide whether the constitution ought to be so amended.

Several reasons support the minority report. First, it is better than the federal model, and federal courts receive high public approval. There, the president can nominate anyone to the bench; a merit selection process is not present. Second, the appointive plan reduces the influence of politics in judicial retention inasmuch as the nominating and evaluating commissions serve in nonpartisan roles. Third, the judge's dispassionate administration of the law is insulated from concerns of popular passions. Fourth, the stakeholders in the process will recognize they shoulder the heavy burden owed to all Minnesotans in carrying out their nominating, appointing, and evaluating functions. Fifth, the plan eliminates burdensome electoral processes (e.g., committee formation, fundraising and contribution reporting, retail politicking). Sixth, the judges will know their evaluators are focused and knowledgeable. Seventh, a measure of public electoral sanction is presented in that the governor appoints a majority of members of the merit selection commission, the governor makes the appointments, and governors often seek reelection.

Other, less obvious, reasons support implementation of the appointive system. For many lawyers the choice to apply for a judgeship presents risks and rewards. It is not easy to re-establish a client base if one were to leave the bench involuntarily. As that risk is present in all proposals, it is simply fairer to have the retention decision made by informed professionals than by lay voters who could be aroused by partisan passions fueled by strike candidacies. Moreover, it may be that some judicial candidates target incumbent judges for reasons based on electoral gamesmanship and not jurisprudential bona fides—hardly a reason to rally around the voting booth.

Some may fear that an appointive process in which adjudicators are immune from electoral scorn may allow so-called activist judges to create contentious rights with impunity. This fear, though, is overblown. District, and even appellate, judges rarely confront notorious constitutional issues outside of criminal law. It strains credulity to think those who appoint members to selection committees in Minnesota would seek to pack committees with hyper-partisan, hidden-agenda-driven, rights-extremist activists. If that occurred and judges with similar agendas decided cases accordingly, the simple fact is that cases can be overruled.

An appointive approach might also enhance judicial performance. Colleagues on the bench presumably know if a judge is seriously underperforming. One would think candid "inside" reviews of a judge's performance might find their way to members of the performance evaluation commission. But such reviews likely would never make it to tens of thousands of voters. Also, adverse proposed action by the performance review committee may allow for a judge not to continue with the reappointment process and thus avoid the opprobrium of electoral rejection. An added plus is the presumptive elimination of the judicial plebiscites, long a subject of contention between the bench and bar associations. Finally, as we enter courtrooms, no longer would we wonder whether the opposing attorney's name appeared on the judge's reelection committee's letterhead.

All workers face informal retention evaluations or, in a sense, "elections" without appearing on November ballots. If we perform poorly for our employers or clients our careers may change. Of course, judges represent the third branch of government, they perform public duties, and the question is one of constitutional dimension. But the manner in which judges' terms are extended seems less significant. What matters is performance. *White* should be overruled at the voting booth. That is irony.