JUDICIAL SELECTION AND RETENTION:

Minnesota and Other States

February 1988

Research Department
Minnesota House of Representatives

The Research Department of the Minnesota House of Representatives is a non-partisan professional research office serving the entire membership of the House and its committees. The Department assists all members and committees in developing, analyzing, drafting and amending legislation.

The Department also conducts in-depth research studies and collects, analyzes, and publishes information regarding public policy issues for use by all House members.

Research Department
Minnesota House of Representatives
600 State Office Building, St. Paul, MN 55155
(612) 296-6753

JUDICIAL SELECTION AND RETENTION:

Minnesota and Other States

February 1988

This report examines judicial selection in the context of selection and retention methods in Minnesota and elsewhere. It emphasizes those aspects of judicial selection that are of interest to legislators as reflected in pending bills and legislators' questions.

This report was prepared by LISA LARSON and DEBORAH K. McKNIGHT, Legislative Analysts.

Questions may be addressed to LISA at 296-8036 and to DEBORAH at 296-5056.

Research assistance was provided by CHRIS LOWE.

Secretarial support was provided by RUTH EMERSON.

CONTENTS

LIST OF TABLES

INTRODUCTION

During the past decade the Minnesota Legislature has addressed the issue of judicial selection from a number of perspectives, including bills for creation of a merit selection commission and repeal of the ballot incumbency designation. This report examines judicial selection in the context of selection and retention methods in Minnesota and elsewhere. It emphasizes those aspects of judicial selection that are of interest to legislators as reflected in pending bills and legislators' questions.

Part I of the report is an overview of state judicial selection and retention models. It begins by tracing the historical development of methods used in the American colonies and states. It describes the basic methods of judicial selection used today and summarizes the advantages and disadvantages of each. It closes with a discussion of the varying tensions between the values of accountability and independence inherent in any model for judicial selection.

Part II of the report focuses on Minnesota judicial selection experience and issues. The report describes the process of becoming a judicial candidate, of being elected, and the possible ways of leaving office. Next is an examination of the incumbency designation on judicial ballots, a frequent topic of legislative interest that includes a legislative history, a summary of the policy issues, and a review of relevant constitutional questions related to the incumbency designation. The report concludes with a section on judicial merit selection commissions in Minnesota. The section summarizes bills and proposals by study groups and describes the major features of judicial selection commissions implemented by executive order in the past decade.

I. OVERVIEW OF STATE JUDICIAL SELECTION METHODS

HISTORICAL PERSPECTIVE ON JUDICIAL SELECTION

This section describes the evolution of the four major systems states currently employ to select their judges: (1) appointment; (2) partisan election; (3) nonpartisan election; and (4) nomination, appointment and nonpartisan re-election. The section lists the advantages and disadvantages of each system and explores the systems' competing goals of electoral accountability and judicial independence. Inherent in a state's choice of which selection system to use is a decision about whether to maximize the public accountability of judges, or their independent decisionmaking role.

The Effect of the English Experience

American methods for selecting judges are rooted in English history and law. For centuries, English sovereigns held absolute power over the appointment and removal of judges. Judges were creatures of the sovereigns, holding office at their pleasure and subject to instant dismissal at their displeasure. When a sovereign died, judges were dismissed, to be replaced by new judges appointed by a new sovereign.

Opposition to this absolute power led to two important events: the revolution of 1688, which encouraged judges to begin to assert their disagreements with the sovereign and struggle for a separation of power between the crown and other branches of government; and the Act of Settlement in 1701, which established judicial tenure during good behavior and made removal of judges impossible without action by Parliament. Judges, no longer serving at the sole prerogative of the sovereign, expanded their independence in the eighteenth century. In 1761, the passage of a new statute permitted judges to remain in office after the death of the appointing monarch.

The Early American Practice: Appointment

Judicial independence, reflected in the terms of the Act of Settlement, did not extend to the American colonies, where the colonial judges were dependent upon the English sovereign for their appointment and tenure. After the American Revolution, the original 13 states were wary of both executive despotism and the tyranny of the public. They rejected executive appointment and popular election as methods for selecting judges. Instead, borrowing from the Act of Settlement, some states vested the power to appoint judges in one or both houses of the legislature. Other states gave the appointment power to the legislature and gave the governor the responsibility of confirming the appointment. A few states limited judges' tenure to a term of years.

In contrast to judicial selection processes adopted by the individual states, the appointment power at the federal level of American government rested exclusively in the executive branch. The United States Constitution contained safeguards necessary for judicial independence: judges would remain in office during good behavior, and their compensation would not be decreased during their tenure. U.S. Const., Art. III, section 1.

The Jacksonian Era Legacy: Popular Election

Legislatures, composed of men of the upper class, continued to appoint judges at the state level until the advent of the Jacksonian era in the 1820's. The philosophy of egalitarianism changed the character of the courts by making public appeal a judicial qualification. Public officials, including judges, were

elected to office on a partisan ballot. In 1832, Mississippi became the first state to change its method of selecting judges, abandoning the appointment process in favor of popular election. In 1846, New York followed Mississippi's example. Within the next ten years, 15 of the nation's 29 states had, by constitutional amendment, provided for the popular election of judges. The states joining the nation after 1846 became part of the Jacksonian era legacy; most, if not all, state judges were popularly elected for a term of years.

Immediately after the Civil War and continuing through the turn of the century, political machines such as Tammany Hall in New York began to dominate the politics of the nation's largest cities. City bosses controlled a partisan elective system that allowed voters merely to ratify slates of judicial nominees selected by political party leaders. This system of "popular" election, short terms and small salaries worked to lower the quality and character of the judiciary.

The public's loss of respect for the bench ultimately led to calls for judicial reform. A number of bar associations were formed in response to such calls. Some localities adopted a nonpartisan system for nominating and electing judges. They hoped to take politics out of government, promote voter rationality and raise the caliber of candidates willing to seek office. The nonpartisan election system permitted opponents to run against sitting judges, but prohibited the use of party labels.

The Missouri Plan: Nomination, Appointment and Nonpartisan Re-election

Early in the twentieth century, a new plan for judicial selection was developed, incorporating elements of both appointment and election. The plan called for a governor to select judges from a list of qualified candidates prepared by a commission. After a specified time judges would stand for retention. A system of nonpartisan re-election without an opponent allowed voters to approve or reject the incumbents and their records by placing on the ballot the question "Should Judge X remain in office?". A vacancy created by a candidate the electorate did not approve was filled by the appointive process. In 1940, Missouri became the first state to adopt this nominative-appointive-elective plan, known as the "merit" or "Missouri" plan. Gradually, this method of judicial selection made inroads against other selection methods used by the states.

CURRENT STATE METHODS OF JUDICIAL SELECTION

The following table classifies the 50 states according to four general categories of judicial selection.

Table 1

Judicial Selection Within the 50 States

(Classifications are based upon the system used initially to select the largest number of state judges.)

Nonpartisan Election	Partisan Election	Commission Selection	Governor/ Legislature Appointment
California*	Alabama	Alaska	Connecticut
Florida*	Arkansas	Arizona	Delaware
Georgia	Illinois	Colorado	Maine
Idaho	Mississippi	Hawaii	New Hampshire
Indiana*	New Mexico	Iowa	New Jersey
Kentucky	New York	Kansas	Rhode Island
Louisiana	North Carolina	Maryland	South Carolina
Michigan	Pennsylvania	Massachusetts	Virginia
Minnesota	Tennessee*	Missouri	
Montana	Texas	Nebraska	
Nevada	West Virginia	Utah	
North Dakota		Vermont**	
Ohio		Wyoming	
Oklahoma*			
Oregon			
South Dakota*			
Washington			
Wisconsin			

*Some or all appellate court judges selected by commission.
**Judges retain office unless legislature votes for removal.

Source: Book of the States 1986-87

Most states use hybrid methods for selecting judges, with the result that almost no two are exactly alike. For example, in a single state, judges at different levels within the same state court structure can be selected by different methods. One method may be used to fill an existing vacancy and another to select a candidate to serve an entire judicial term. Within a single method of judicial selection there are variations among states as well: the power to appoint judges may rest with the governor, the legislature or sitting judges.

States currently employ four basic methods to select and retain judges.

- nonpartisan elections
- partisan elections
- nominating commissions
- appointment processes

A majority of states select their judges by popular election. Of this group, more states hold nonpartisan elections than partisan elections. A large minority of states relies on one of two commission selection plans, followed by noncompetitive retention elections. Under the Missouri plan a commission prepares a list of nominees for the governor to select and, after a period of time, the judge appointed by the governor runs for office unopposed. Under the California plan, a commission retains veto power over the governor's nominee. A smaller minority of states selects its judges through a predominantly appointive process followed by reappointment without any election. The strengths and weaknesses of each method are summarized below. A state survey of public satisfaction with the various models concluded that both the perceptions of the general public and the legal profession regarding the quality of judges were largely unaffected by the manner in which judges were selected in a particular state.[1]

Nonpartisan Election

The purpose of a nonpartisan election is to remove judicial offices from party politics and allow voters to cast their ballots on the basis of candidate merit instead of merely party affiliation. The advantages of a nonpartisan election system include:

- allowing candidates to be independent of party politics;
- avoiding straight party voting;
- reducing the popularity of the candidate at the top of the party ticket.

The disadvantages of a nonpartisan election system include:

- forcing candidates without party affiliation to spend large sums of money to reach voters;
- numerous uncontested races;
- reducing voter participation, apparently by denying voters a familiar voting cue in the form of a party label.

Data collected from judicial elections in 25 states between 1948 and 1974, including Minnesota, consistently show a much lower proportion of voter participation in states with nonpartisan races, even when the race is contested, than in states with partisan judicial races.[2]

Partisan Election

The purpose of a partisan election system is to make judges accountable to voters by subjecting them to the electoral process. The advantages of a partisan election include:

- insuring that judges will be accountable to the people;
- increasing the rate of participation in judicial elections by providing voters with a familiar voting cue in the form of a party label;
- providing information about candidates through the use of party labels so that voters can make reasonable choices.

---

[1]Wasman, Lovrich, Jr., and Sheldon, "Perceptions of State and Local Courts: A Comparison Across Selection Systems." The Justice System Journal 168 (1986).

[2]Dubois, "Voter Turnout in State Judicial Elections: An Analysis of the Tail of the Election Kite," 41 Journal of Politics 865, 875 (1979).

The disadvantages of a partisan election system include:

- forcing judges to represent a party constituency when they should be independent of the popular will;
- permitting voters who lack sufficient information in judicial elections to hold judges accountable on the basis of party affiliation.

Commission Selection

The purpose of a commission selection system is to guide the appointment power of the governor and to effect a compromise between selection of judges by the public and judicial independence from the electoral process. The advantages of a commission selection system include:

- making judges less subject to public opinion than they would be in a more partisan electoral process;
- respecting the principle of accountability through retention election;
- enhancing the concern for appointing professionally qualified individuals to the bench.

The disadvantages of a commission selection system include:

- allowing governors to appoint commission members from their own party, who may in turn recommend more judicial nominees affiliated with that party;[3]
- permitting commission members to "fix" the list of prospective nominees to achieve personal, political or bar association goals;
- eliminating gubernatorial choice by enabling commission members to resubmit the same nominees rejected by the governor;
- increasing tensions between plaintiff and defense bars by having lawyers serve as commission members;
- reducing voter participation rates, even below the participation levels in states with nonpartisan elections;[4]
- nearly eliminating incumbent electoral defeats. Out of all the judges who stood for retention around the United States between 1936 and 1980, only 40 were rejected.[5] The Minnesota nonpartisan contested election model reflects the experience of other states: no sitting Supreme Court justice or district judge was defeated in this state between 1954 and 1986.

---

[3] Missouri's experience illustrates the disadvantage of allowing governors to appoint commission members from their own party: more judges were affiliated with Missouri's majority party during the first 26 years after adoption of the commission plan than in previous days of partisan elections. Watson and Downey, The Politics of the Bench and Bar, 6 (1966).

[4]Dubois, "Voter Turnout in State Judicial Elections: An Analysis of the Tail of the Election Kite," 41 Journal of Politics 865, 875 (1979).

[5]Hall, Judicial Retention Elections: Do Bar Association Polls Increase Voter Awareness?, 2 (1985).

Appointment

The purpose of an appointment system is to promote judicial independence by having no substantial check on a judge after the initial confirmation process. The advantages of an appointment system include:

- maximizing judicial independence from the general public;
- eliminating confusing retention election ballots or nominally contested elections.

The disadvantages of the appointment system include:

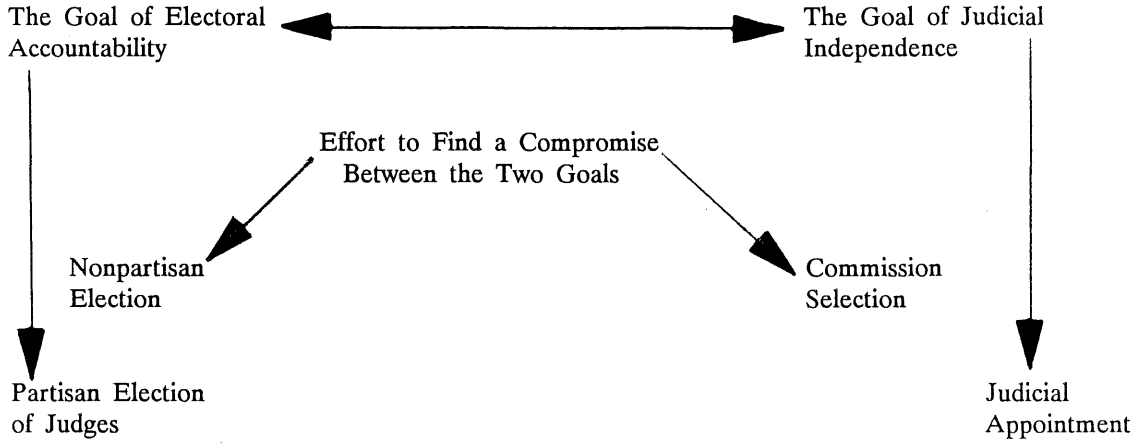
- making judges accountable to the public only indirectly through the responsiveness of appointing and confirming officers.

ELECTORAL ACCOUNTABILITY VERSUS JUDICIAL INDEPENDENCE

The diversity of the states' systems of judicial selection reflects the conflicts inherent in having judges participate in the political process. The four basic methods of judicial selection fit along a continuum ranging from electoral accountability via partisan election of judges to judicial independence via judicial appointment. It is not clear which model produces the best judges or whether any model can remove political judgments from the process of choosing judges. In theory, selection of judges by competitive election suggests that a state highly values judicial accountability to the public, while a state using a nonelective method places a higher value on judicial independence. States using a nonpartisan election system or a commission selection system fall in the middle of the continuum between accountability and independence.

Table 2

Major Systems of Judicial Selection and Their Goals



Source: Anthony Champagne, The Selection and Retention of Judges in Texas

Electoral Accountability

The proper balance between electoral accountability and judicial independence has been the subject of much discussion. While electoral accountability is desirable in the executive and legislative branches of government, subjecting the judicial branch to voters' power to punish may be less desirable. Arguably, judges who make unpopular decisions involving sensitive issues must be freer than a governor or a legislator to defy public opinion and adhere to important principles; complete political accountability undermines this freedom. Other potential problems inherent in a system of electoral accountability include:

- voter decisions unrelated to judicial competence or judicial decision making;
- overly lengthy judicial ballots;
- expensive campaigns and reliance on large donations, especially in partisan election models;
- inadequate or ineffectual means of informing voters.

Judicial Accountability

Judicial independence may be problematic as well. Arguably, while the pressure for accountability can threaten judicial independence, the lack of accountability can threaten the responsiveness of government. Judges under a purely appointive system can hear test cases and decide crucial political and social issues without taking into account contrary views or the social unrest that can result from an unpopular decision. Other potential problems inherent in a system of judicial independence include:

- appointment without an effective check on the appointing power;
- partisanship surfacing in nonpartisan elections where party affiliation can provide campaign financing and support;
- lack of information for voters in nonpartisan elections;
- expensive election campaigns;
- failure of commission selection to represent all segments of the bar;
- manipulation of commission decisions.

II. MINNESOTA EXPERIENCE AND ISSUES

This part of the report focuses on judicial selection issues of particular interest to Minnesota legislators, as reflected by members' questions and the bills introduced over the past decade. The most significant issues appear to be the ballot incumbency designation and the judicial selection commission/ retention election concept. Each issue is discussed in a separate section below. The first section provides an outline of the current Minnesota judicial election process and campaign finance regulations.

OUTLINE OF THE MINNESOTA JUDICIAL ELECTION PROCESS

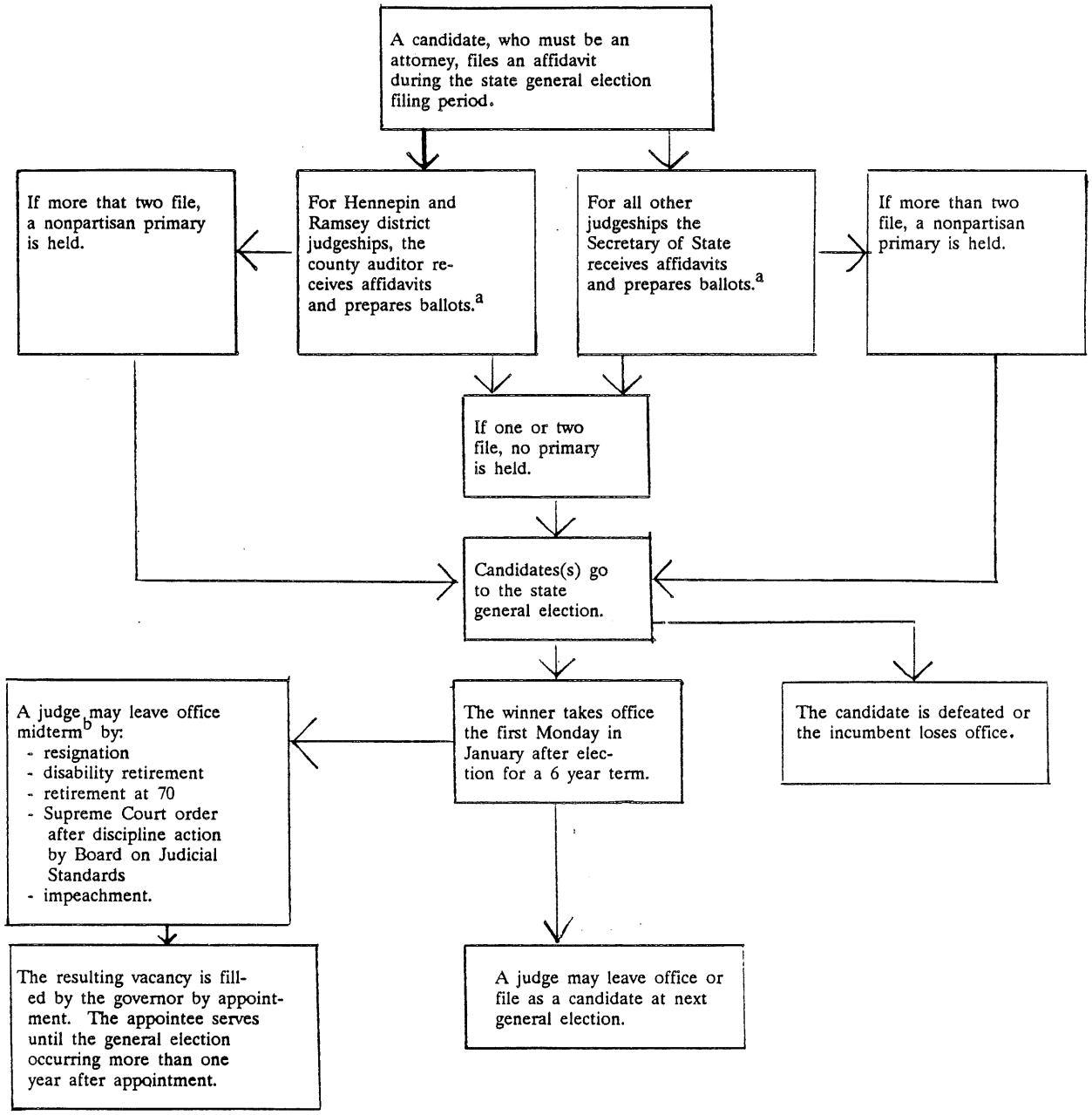
This section describes the procedure for conducting judicial elections and filling judicial vacancies, and lists the ways judges leave office.

From Filing to Leaving Office

Table 3 depicts the process of becoming a candidate, of being elected, leaving office in midterm, and filling the resulting vacancy. It applies to all judicial offices: the Supreme Court, Court of Appeals, and district court. Because a merger of the county and district courts was completed in September 1987, all previous county judge offices will be identified as district judgeships beginning with the 1988 election.

Table 3

Judges: From Filing to Leaving Office



[a]On both the primary and general election ballot the judicial office is identified by the incumbent's name, the office appears on the nonpartisan ballot, and the names are rotated.

[b]Most judges leave office by resigning during their term. To receive a pension, judges must retire at their 70th birthday, without completing the term. Judges who choose to pursue another career before retirement also usually leave office by resigning midterm rather than serving to the end.

Campaign Regulation: Finance and Conduct

This section discusses the statutory regulations governing the financing of judicial candidates' campaigns and the rules contained in the code of ethics applicable to judicial candidates.

Judicial candidates are bound by the campaign finance reporting requirements of Minn. Stat. Chapter 10A. They are exempted from filing the statement of economic interest that other candidates must supply to the Ethical Practices Board. Judicial candidates are not eligible for public financing of their campaigns and therefore are not subject to spending limits.[6] There is also no limit on the size of a contribution to a judicial candidate's campaign.

Besides these statutory regulations, judicial candidates must comply with the Code of Judicial Conduct, adopted by the Minnesota Supreme Court. The code prohibits judicial candidates and incumbents from participating in a political organization as a leader, speaker, fund raiser, or contributor. However, during the year of a judicial election, incumbents or candidates are allowed to speak on their own behalf at other than partisan political gatherings. Individuals may not solicit funds on their behalf but may establish a committee to do so. The code prohibits judicial candidates from using campaign contributions for the private benefit of themselves or their families.

When campaigning, judges or challengers are prohibited by the code from making promises about how they would act in office, announcing views on disputed legal or political issues, or making misrepresentations about themselves or any other fact.

Violations of the code are investigated by the Board on Judicial Standards, which was created by statute. The board recommends a disposition to the Supreme Court.

INCUMBENCY DESIGNATION ON JUDICIAL BALLOTS

Since no other officials seeking re-election are identified on the ballot as incumbents, legislators periodically inquire about the origin and rationale of the statute providing for judicial ballots to designate incumbents as such. This section explores the history of the statute permitting the incumbency designation, the policy arguments for and against the provision and constitutional issues raised by the provision.

The Statutory History

The statute was enacted in 1949 and first applied at the 1950 election. Besides the incumbency designation, the act provided that each judge was deemed to have a separate office. Previously any individuals in a number equal to twice those who were to be elected could run against each other for all the judicial offices on the ballot in an election district or, in the case of the Minnesota Supreme Court, statewide. If there were one position open, the top vote getter won. If more than one seat was to be filled in a district or on the Supreme Court, the candidates who polled the highest votes were declared the winners in a number equal to the available seats.

---

[6]The U.S. Supreme Court has ruled that spending limits violate a candidate's right of free speech unless the candidate is given public financing in exchange for agreeing to limit campaign expenditures. Buckley v. Valeo, 424 U.S. 1 (1976).

Policy of the Incumbency Designation Statute

Incumbent Visibility.

There is no record of the legislative history of the 1949 incumbency designation--alley system bill. However, rationales in court opinions and other sources on the topic of judicial incumbency designation suggest one practical reason for the designation: to highlight the occupant of an office with an inherently low profile, where the occupant is bound by ethical rules designed to maintain that low profile.

Except for the rare occurrence of a trial that commands significant public attention, judges are not often known to anyone who does not appear in their courtroom. This contrasts with holders of other offices where official duties or common expectations include constant public exposure. Besides the nature of their work, judges' visibility is also reduced by judicial ethical rules. In order to preserve their neutral role, judges are not allowed to speak publicly on controversial political or legal issues. They may not make specific promises about anything they would do in office, nor take positions on matters they might have to decide in court. Judges are subject to these latter restrictions because, unlike other officials, they are not allowed to have a program or agenda other than to make fair decisions in each case. It has been argued that since ethical rules bar judicial candidates from methods often used by other candidates to educate voters about themselves, judges need a device to attract attention. The incumbency designation, in the opinion of some observers, can serve as that device.

An entirely opposite argument is also made for the value of the incumbency designation: that it helps voters identify unpopular or misbehaving incumbents and thus defeat them. The very low incidence of serious challenges to incumbent district judges (8 percent of the total races) and the relatively low rate of challenge to Supreme Court justices (44 percent of the total races), coupled with the fact that no Supreme Court or district court incumbents have been defeated in the past 17 elections in Minnesota suggests that this argument does not apply to the Minnesota experience with these courts. (See Table 4.) In the case of justices and district judges accused of wrongdoing, removal from office is more likely to occur through a Supreme Court order or the judge's own decision to resign after an investigation by the Board on Judicial Standards. (See Table 5.) In the case of county judges at least four have lost re-election attempts after Supreme Court disciplinary action. (See Table 5.)

Table 4

Challenges to Incumbent Justices and District Judges in Minnesota*
No Incumbents Defeated
1954 - 1986

YEAR	SUPREME COURT		DISTRICT COURT	
	Total Races	Challenged Incumbents	Total Races	Challenged Incumbents
1954	4	2	18	3
1956	2	2	27	4
1958	1	1	15	2
1960	4	2	12	2
1962	2	2	22	1
1964	3	1	24	3
1966	2	2	17	1
1968	2	0	29	2
1970	2	1	28	0
1972	2	0	11	0
1974	5	2	14	0
1976	2	0	29	1
1978	2	2	17	2
1980	4	1	15	1
1982	1	1	20	0
1984	5	1	42	3
1986	2	0	36	5

* Because county judge election data is not readily accessible and Court of Appeals judges have only run in two elections, the table excludes those two offices. Beginning with the 1988 election there will no longer be county judges; former county judges will all be designated district judges.

Table 5

Judicial Career After Supreme Court Disciplinary Action 1977 - 1987*

Year	Office	Grounds for Action	Court Order	Later Career
1977	District judge	Borrowing money from lawyers who appeared before the judge; delay in handling cases; filing conflicting orders in cases	Censured and suspended three months without pay	Resigned
1978	District judge	Unethical conduct as a lawyer before becoming a judge	Removed from office	
1979	County judge	Abusive statements about another judge; lack of judicial temperament	Censure	Lost next election
1980	District judge	Use of adult prostitutes	Censure	Re-elected
1981	County judge	Inappropriate remarks about a case; altering terms of the judge's own divorce by misleading another judge	Reprimand	Lost next election
1982	County judge	Sexual harassment of women attorneys and county employees; drinking that affected judicial performance	Permanent probation	Lost next election
1983	County judge	Adulterous relationship	Public censure and required to pay costs of disciplinary action	Re-elected
1984	County judge	Discourtesy to female attorneys; tardiness; conducting judicial business with liquor on the breath	Censure	Lost next election
1984	County judge	Failure to perform duties as a judge and previously as a lawyer	Censure and fine	Did not seek re-election
1984	District judge	Use of adult and juvenile prostitutes	Removed from office	
1985	Associate justice	Cheating on the bar exam (for another state) while in office	Special Court of Appeals finding that cheating occurred	Resigned before Supreme Court acted

*These years account for all judges in Minnesota history who have been removed from office by Supreme Court order. Only one judge appears to have been removed by impeachment: a district judge in 1882, for alcohol use that interfered with judicial duties. As of the publication date for this report, the Board on Judicial Standards has recommended that the Supreme Court remove a district judge from office for sexual harassment of a court employee and other misconduct.

Incumbent Continuity.

Political science studies of the incumbent re-election rate in states with nonpartisan judicial elections and incumbency designation show that voters prefer incumbents by a four to one margin.[7] For this reason, legislators who value continuity in judicial office might support the Minnesota combination of nonpartisan election and incumbency designation.[8]

However, it is not possible to conclude that the ballot incumbency designation has been a factor in re-election rates for Minnesota district court and Supreme Court races over the past thirty years. Consistent with results in other states, the returns for 17 Minnesota judicial elections following adoption of the incumbency designation (1954-86) reveal that no incumbent Supreme Court justices or district judges were defeated during that period. However, results of the four elections prior to adoption of the incumbency designation show the same perfect re-election rate for sitting judges. During the 1940s, no Supreme Court or district court incumbent was defeated at an election.

Criticism of Incumbency Designation

Critics of the incumbency designation argue that it gives incumbents a form of recognition which provides an unfair advantage over relatively anonymous challengers. The advantage is believed to exist because voters with no particular knowledge of individual candidates are thought more likely to approve the incumbent than to choose a new, unknown contender. If legislators would like to encourage greater turnover in judicial offices for any reason or are concerned that less competent incumbents are retained in office at the expense of competent but unknown challengers, a possible bias in favor of incumbents would be deemed undesirable.

One response to criticism of the incumbency designation has been to question whether a bias in favor of incumbents is necessarily unfair, given that experience in office is highly relevant when considering an individual's qualifications for the office. A response to the concern that ignorant voters will always select the incumbent has been to propose that candidates can overcome ignorance by educating the voters and thus eliminate the tendency to vote merely for the known quantity. This strategy should be possible for judicial candidates, despite their restrictive ethical code. The code does not prevent advertising for name recognition or publicizing the candidate's education, publications, years and type of experience and other professional qualifications.

Constitutional Issues

Minnesota Case.

The constitutionality of the Minnesota judicial ballot incumbency designation and the system of identifying separate judicial offices was unsuccessfully challenged in Gustafson v. Holm[9]. In Gustafson, on the issue of identifying individual offices, the Minnesota Supreme Court explained that the state constitution does not address whether all judicial candidates should run against each other or whether designation of separate offices is permitted. Therefore, the court found that the choice

---

[7]Dubois, "Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment," 18 Law and Society Review 395, 403 (1984).

[8]The American Judicature Society, a court study organization, supports judicial continuity but has no position on incumbency designation for judicial ballots. The organization prefers merit selection to any type of contested elections. Telephone conversation with research assistant for House Research Department, July 23, 1987.

[9]44 N.W.2d 443 (Minn. 1950).

is up to the Legislature. The court noted that identifying each individual office would have the benefit of eliminating possible voter confusion between "judges" and "courts," in that a court is one entity which may have several judges.

The petitioner in Gustafson also argued that the incumbency designation was unconstitutional because it gave sitting judges an undue advantage over non-incumbent candidates. The court responded:

> *In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is. If he then believes that the judge should be returned, he has the opportunity of expressing his opinion by his vote. If he feels that the present judge should be replaced, he has a like opportunity...In order to enable the electorate to know who candidates are, it is not always possible to treat all candidates with absolute equality.*[10]

The court's rationale was that the incumbency designation gives voters valuable neutral identifying information which they can use to decide whether to retain or reject each sitting judge. If the result of this approach is that non-incumbents are not treated exactly like incumbents, the distinction was found not to rise to the level of an unconstitutional discrimination against challengers.

Cases Elsewhere.

There are apparently no other cases dealing specifically with an incumbency designation for judicial candidates. However, in a challenge to a Massachusetts statute dealing with candidates for other than judicial office, a more recent case than Gustafson came to a similar conclusion. In Clough v. Guzzi the incumbency designation was challenged as a violation of equal protection.[11] The court agreed that an incumbency designation benefits incumbent candidates, but it could not find a sufficient infringement of the voters' ability to choose so that strict scrutiny of the statute was required. Applying the rational relation test, the court upheld the statute on the following reasoning:

> *the most important decision which the voter must make is whether to retain or to replace the incumbent. [The statute] serves to underscore that decision...The Commonwealth also asserts that if there is an uninformed segment of the voters, those votes should go to the incumbent candidate who at least has some experience in the business of government.*
>
> *We cannot say that those are illegitimate considerations beyond the authority of the Commonwealth properly and lawfully to advance.*[12]

Opposing case law exists in California. A Los Angeles city ordinance designated incumbents as such on the ballot but did not allow opponents to designate their occupation. In Rees v. Layton it was challenged as a violation of state and federal equal protection guarantees.[13] The California Court of Appeals noted that a state statute allowed state office candidates to include their occupation on the ballot. In the case of an incumbent, this would amount to an incumbency designation. The court found the state provision was constitutional because it treated all candidates alike, by letting both incumbents and challengers be labeled with their occupation. However, the court distinguished the

---

[10]Ibid. at 447.

[11]416 F.Supp. 1057 (D. Mass. 1976).

[12]Ibid. at 1068.

[13]86 Cal.Rptr. 268 (Cal. App. 1970); cited with approval Gould v. Grubb, 122 Cal.Rptr. (Cal. 1975).

city ordinance from the state law. Without giving reasons, the court concluded that the ordinance gave an unfair advantage to office holders, by permitting only incumbents to be designated as such and not allowing challengers the analogous privilege of being labeled with their occupation. The court found no rationale for this difference, so it ruled that the ordinance violated equal protection under both the state and federal constitutions.

The California courts implicitly seem to reject the analysis that incumbency is a unique piece of information relevant to the voters. They appear to find it acceptable only as a form of occupational data that should be available about all candidates.

MINNESOTA JUDICIAL MERIT SELECTION COMMISSION EXPERIENCE

For at least the past two decades the topic of judicial selection by merit commission has been under discussion in Minnesota. Since 1979 commissions of various types have been in operation by executive order.

Following is a description of:

- study group proposals on judicial selection commissions
- executive orders providing for merit selection commissions
- bills introduced since 1979

Study Group Proposals

Minnesota Citizens' Conference to Improve the Administration of Justice (1966).

In 1966 the consensus of the 135 members of this conference, none of whom were lawyers or judges, was reflected in a report on the courts which included a recommendation that a state judicial selection committee be created. The conference perceived a strong political influence at the time in the selection of judges and believed this influence should be replaced by an emphasis on professional competence. The conference urged that judicial selection committee members be chosen to minimize undue influence by any political or professional interest. The committee would refer nominees to the Governor, who would make a judicial appointment from the recommended list. The Citizens Conference took the position that gubernatorial appointment is essential to give those chosen greater dignity and respect, as well as to preserve participation by the executive branch. The report envisioned a selection committee with staggered terms to insure continuity. Committee members were to be ineligible for judicial appointment for a certain period after their committee service.

The conference proposed that after appointment, a judge should be subject to review at stated intervals either by direct citizen election, review of the judge's performance record by vote of the citizens (apparently retention election), or review by a removal commission. The conference expressed no preference among these three options.

Minnesota Constitutional Study Commission (1973).

In 1973 the Judicial Branch Committee of this Commission proposed that judicial vacancies be filled by gubernatorial appointment from nominees recommended by a judicial nominating commission. The Judicial Branch Committee suggested that a nominating commission should consist of six gubernatorial lay appointees and four lawyers appointed by the bar, with the Chief Justice as chair. The rationale for suggesting the commission was to (1) enhance the independence of the judicial branch by diluting

the total control of the executive branch over appointees and (2) shift the appointment emphasis from "political affiliations and personal ties" to a broader spectrum of community views.[14]

The Constitutional Study Commission as a whole rejected the Judicial Branch Committee's judicial nominating commission proposal. It was unwilling to dilute the governor's power and responsibility for judicial appointments, especially given common criticism that state governments suffer from weak executives. The Commission also noted that a nominating commission might be as prone to making "political" nominations as the governor.

Instead of a judicial nominating commission, the Constitutional Study Commission recommended permitting the governor to fill judicial vacancies caused when an incumbent does not file for re-election, formalizing what was then and remains today common practice. The Commission's rationale was that the public is less qualified to evaluate unproven judicial candidates than is the governor, who has the opportunity to consult experts about nominees' professional qualifications. After serving four years, a judicial appointee would stand for retention election. If approved, the appointee would stand for retention again at six-year intervals. The Commission believed that a retention election best maximizes the conflicting values of judicial independence and the public's need for a way to remove incompetent judges.

Executive Orders Creating Judicial Nominating Commissions

Since 1979, both governors who have served in Minnesota have issued executive orders creating judicial merit selection commissions. Governor Quie created separate commissions to deal with Supreme Court and trial court judgeships. The Court of Appeals did not exist during his term. Governor Perpich created one commission to deal only with trial court judgeships.

By statute, executive orders expire 90 days after the issuing governor leaves office. The following table summarizes major features of the respective gubernatorial commissions. Of course, both commissions operated only in the event of a vacancy. It would be impossible, even if a governor so desired, to implement retention elections by executive order.

[14]Minnesota Constitutional Study Commission, Final Report 22 (1973).

EXECUTIVE ORDERS CREATING JUDICIAL NOMINATING COMMISSIONS

	Governor Quie's Committee on Supreme Court Nominations	Governor Quie's Committees on Judicial Nomination (Trial Courts)	Governor Perpich's Judicial Merit Advisory Commission*
MEMBERS	Eight - 4 appointed by the governor - 2 judges (members of the Minnesota District and County Judges Association or their designees) - 2 attorneys (selected by the State Bar Association Board of Governors)	Eight - 6 permanent members of whom: 2 reside or do business in the district and are appointed by the governor for terms concurrent with the governor's term; 2 are attorneys elected by the local bar association to serve staggered 4-year terms; and 2 are resident judges elected by resident judges to serve staggered 4-year terms - 2 "special member" residents of the locality appointed by the governor to serve until the current vacancy in the locality is filled	Twelve - 1 governor's appointee from each of the 10 judicial districts - 1 chair appointed by the governor - 1 temporary member who resides in a district where a vacancy exists and serves while vacancy is being filled
ESTABLISHMENT	- The Committee is constituted by the governor when a vacancy occurs	- A permanent or standing committee is located in each of the ten judicial districts	- Permanent or standing committee
DUTIES	- Seek out, evaluate and recommend candidates for Supreme Court vacancies - Members receive no per diem or expenses	- Seek out, evaluate and recommend candidates for trial court vacancies - Consider each candidate in an impartial objective manner - Members receive no per diem or expenses	- Actively seek out and encourage qualified applicants, especially women and minorities - Consider each candidate in an impartial, objective manner - Members receive no per diem or expenses

* Trial Courts

	Governor Quie's Committee on Supreme Court Nominations	Governor Quie's Committees on Judicial Nomination (Trial Courts)	Governor Perpich's Judicial Merit Advisory Commission*
OFFICERS	- Governor designates chair from among committee members; chair calls, presides over meetings	- Governor designates a chair from among committee members; chair presides over meetings - Committee selects from among its members a secretary to prepare minutes, keep record of official actions and maintain list of applicants' names - Committee selects from among its members a candidate solicitor to actively recruit candidates - Each officer serves a two year term	- Commission selects from among its members a secretary to prepare minutes, keep records of official actions and maintain list of applicants' names - Chair selects from among commission members candidate solicitor(s) to actively recruit candidates
PROCEDURES WHEN VACANCIES OCCUR Immediate Vacancy	No parallel provisions	- Within 10 days after a vacancy occurs in the district, the governor notifies the committee chair of the vacancy and the appointment of the two special members - Committee chair notifies members, calls meeting between 15-20 days of receiving governor's notice	- Within 10 days after a trial court vacancy occurs, the governor notifies the chair of the vacancy and appoints the special member - Commission chair notifies the members and calls a meeting to consider candidates between 15-25 days of receiving the governor's notice
Future Vacancy		- Governor notifies chair of a future vacancy and the appointment of the two special members - Committee chair calls a meeting to consider candidates no more than 45 days before the vacancy occurs nor less than 15 days after the chair issues a news release about the vacancy	- Governor notifies commission chair of a future vacancy and the appointment of the special member - Commission chair calls a meeting to consider candidates no more than 45 days before the vacancy occurs nor less than 15 days after the chair issues a news release about the vacancy

* Trial Courts

	Governor Quie's Committee on Supreme Court Nominations	Governor Quie's Committees on Judicial Nomination (Trial Courts)	Governor Perpich's Judicial Merit Advisory Commission*
	Same for Both Committees		
COMMITTEE/ COMMISSION PROCEDURES	- Chair convenes, presides over meetings, designates members to preside in the chair's absence and member to be acting secretary in the secretary's absence - Six members constitute a quorum - Committee recommends 3-5 nonranked candidates to governor - Committee's recommendations are advisory - Each person must complete an application to be considered and the committee may obtain additional information on candidates - Committee may establish additional rules and procedures for evaluating candidates - Committee must conduct a personal interview with a candidate nominated for appointment		- Chair convenes, presides over meetings and designates members to preside in chair's absence - Six members constitute a quorum - Commission recommends 3-5 nonranked candidates - Commission's recommendations are advisory
STANDARDS FOR CANDIDATE EVALUATION	- Integrity and moral courage - Legal education and training - Legal and trial experience - Patience and courtesy - Common sense and sound, mature judgment - Ability to be objective and impartial - Capacity for work - Mental and physical health as relevant to performing judicial duties - Personal habits compatible with judicial dignity - Knowledge of human nature - Ability to work with others	Same as Governor Quie's Committee on Supreme Court Nominations	Same as Governor Quie's Committee on Supreme Court Nominations

*Trial Courts

	Governor Quie's Committee on Supreme Court Nominations	Governor Quie's Committees on Judicial Nomination (Trial Courts)	Governor Perpich's Judicial Merit Advisory Commission*
TRANSMITTING NAMES TO GOVERNOR	- Within 30 days after a vacancy occurs, or within 45 days after the governor notifies the chair that a vacancy will occur, the committee secretary sends the governor the list of nominees in alphabetical order and all applications submitted to the committee - The governor may consult with or seek information from committee members - If a vacancy occurs in the same court within six months after the governor appoints a person from the committee's list of nominees, the governor may appoint a person from that list to fill the vacancy	Same as Governor Quie's Committee on Supreme Court Nominations	- Within 30 days after the governor notifies the chair that a vacancy has occurred, or when the commission completes its work before an expected vacancy occurs, the commission secretary sends the governor a list of nominees in alphabetical order and all applications submitted to the commission - If a vacancy occurs in the same court within six months after the governor appoints a person from the commission's list, the governor may consider the names previously submitted for the pending vacancy, but must inform the chair of this action

*Trial Courts

Bills Creating a Judicial Merit Commission

Legislative History.

Except for 1987, when no bills were introduced, bills creating a judicial merit selection commission have been introduced in both the House and Senate during at least one year of each biennium for the past ten years. No bill was recommended to pass by either a House or Senate committee until 1984. In that year a bill passed the House and the Senate Judiciary Committee but did not receive Senate floor action. In 1985 a bill passed the House floor upon motion to reconsider an initial defeat. The bill was then defeated on the Senate floor.

Major Features of Bills.

Bills have taken one of two basic approaches for authorizing a merit commission: either a constitutional amendment or a statute. Bills have differed in whether they provided for one commission to review candidates for all judicial offices or for separate commissions for the trial and appellate courts.

Several bills included candidate evaluation criteria similar to those contained in the executive orders of Governors Quie and Perpich. It has been common for bills, whether in the form of a statute or a constitutional amendment, to provide a merit commission with more than an advisory role. For example, several bills have required the Governor to appoint a judge from a non-ranked list of nominees provided by a commission; most of these bills also would permit the Governor to ask a commission for additional nominees if none from the first group were satisfactory.

Commission membership under some bills would have included gubernatorial appointees, Supreme Court appointees, trial judges' appointees, and lawyer members elected by lawyers. At least two bills would have made commission members ineligible for judicial appointment for a specified period after the end of their commission service.

Bills have approached the subject of judicial retention in various ways. One provided for judges to submit to a retention election periodically after appointment. Some commission bills did not address the subject of retention. Had one of these been enacted, once appointed an incumbent would have faced a challenger at re-election time, as under the current system. Based on the experience of recent decades, this mechanism would not have seriously undercut the merit selection approach because challengers would be unlikely to win. Similarly, since in practice a judge nearly always leaves office before the end of the term, there would be very few situations where the merit system was by-passed through two non-incumbents running for an open seat at the general election. Only 2 percent of Supreme Court races and 3 percent of district court races involved two nonincumbents, in the period from 1954 to 1986. (See Table 7.) As noted elsewhere in this report, retention election is considered a logical counterpart of merit selection. In practice Minnesota has experienced a form of retention election for the Supreme Court and district court for some decades.

Table 7

Minnesota Supreme Court and District Court Races with Two Non-Incumbents* 1954 - 1986

	SUPREME COURT		DISTRICT COURT	
Year	Total Races	2 Non-Incumbents	Total Races	2 Non-Incumbents
1954	4	0	18	0
1956	2	0	27	0
1958	1	0	15	0
1960	4	0	12	1
1962	2	0	22	2
1964	3	0	24	2
1966	2	1	17	2
1968	2	0	29	0
1970	2	0	28	0
1972	2	0	11	1
1974	5	0	14	0
1976	2	0	29	1
1978	2	0	17	1
1980	4	0	15	0
1982	1	0	20	0
1984	5	0	42	0
1986	2	0	36	2

*Because county judge election data is not readily accessible and Court of Appeals judges have only run in two elections, the table excludes those offices. Beginning with the 1988 election, there will no longer be county judges; all former county judges will be designated district judges.

Constitutional Issues in Merit Commission Bills.

Several merit commission bills introduced in the past decade raise two potential constitutional issues. One issue is possible interference with the Governor's appointing power. The other issue involves restricting subsequent judicial office holding by selection committee members.

Governor's Appointment Power Several bills would have established a commission by statute rather than constitutional amendment. This procedural choice has the advantage of taking effect sooner and more easily than a constitutional amendment. However, it may have the constitutional flaw of interfering with the gubernatorial appointment power. The Minnesota Constitution provides for the Governor to fill judicial vacancies by appointment "in the manner provided by law."[15] A reasonable interpretation of this language could include the use of a nominating commission as "the manner provided by law" for filling the vacancies. However, an argument can be made that if a statute requires the Governor to choose only from the names submitted by the commission, it would invalidly restrict the Governor's constitutional appointment power by defining the choices. One response to this argument is that the Governor would have a field of three to five to consider, which is a highly significant decision making role.

[15]Minnesota Constitution, Article VI, section 8.

If concerns remain over the validity of limiting the Governor to choosing from the commission's nominees, a bill taking the statutory approach could be drafted to require that the Governor consider those nominees, but not be limited only to those nominees. Of course, a second option for eliminating concern about the gubernatorial appointment issue would be to implement the commission by constitutional amendment rather than by statute. Legal questions only arise when a power granted in the constitution is limited by a statute. There is no such problem if a power granted in one part of the constitution is modified by another constitutional provision.

Restrictions on Commission Members Some statutory merit selection commission bills have prohibited commission members from being appointed to the judiciary for a stated period after the end of their committee service. The purpose of this provision is to insure the objectivity of lawyer members and prevent them from using commission service for their personal advancement.

At least two states, Colorado and Indiana, have restrictions like this in their state constitutions. Florida enacted such a restriction by statute. Unfortunately, if the restriction is in statute rather than in the constitution, it runs the risk of being found unconstitutional in Minnesota. Minnesota case law indicates that when the state constitution specifies office holding requirements, as it does for judges, these requirements are the only ones permitted for candidates for the office. A statute cannot create additional, more restrictive requirements. Pavlak v. Growe, 284 N.W.2d 174 (Minn. 1979). In effect, by requiring commission members to wait a certain period before they may seek judicial office, the statute would be adding another qualification those individuals must meet in order to hold office. As a result, although it may be good policy to impose a waiting period before nominating commission members could be appointed to the bench, putting such a requirement in statute would probably be held invalid by the Minnesota Supreme Court. Of course, if a commission were created by constitutional amendment and the waiting period for seeking judicial office were placed in the constitution, the waiting period would be valid as one of the constitutional requirements for judicial office.