



The League of Women Voters of Dane County, Inc.

Annual Lively Issues Luncheon and Forum Saturday, January 16, 2010

The Madison Concourse Hotel, One West Dayton Street, Madison
[Please see separate reservation form.]

Topic:

Judicial Elections or Merit Selection?

Speakers:

Chief Justice Shirley Abrahamson
Wisconsin Supreme Court

Thomas Basting, Past President
Wisconsin Bar Association

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Study Materials Attached:

- Introduction 1
- Recent Statements from LWV-Wisconsin on Wisconsin Supreme Court Issues 1
- Adam Liptak, "Rendering Justice, With One Eye on Re-election," (*The New York Times* May 26, 2008) 3
- "An Alternative Plan"
[concerning the Missouri Nonpartisan Court Plan, presented as an information piece at the LWV-WI Issues Briefing, October, 2009 by Beth Riggert. (Source: <http://www.courts.mo.gov/page.jsp?id=297>) 6

The League of Women Voters of Wisconsin adopted one new study item at its annual meeting on May 30, 2009: to study issues related to the selection of Wisconsin Supreme Court justices, including election vs. appointment; public financing of Supreme Court races.

These materials are provided as background on this issue for the LWVDC Lively Issues luncheon on January 16, 2010. As these materials were printed on December 10, 2009, further news developments in Wisconsin are entirely possible.

The following are recent statements issued by the League of Women Voters of Wisconsin relative to the Wisconsin Supreme Court:

11/06/09

Any citizen who has to appear in court should have absolute confidence that the judge will be fair and impartial. This is the basic right of due process we all expect and deserve. Yet recent Wisconsin Supreme Court elections have made our state a national poster child for runaway campaign spending, creating a growing concern that special interests may have undue influence in our judicial elections. That is why the League of Women Voters of Wisconsin Education Fund petitioned the state Supreme Court to institute new rules that prohibit judges and justices from ruling on cases involving major campaign contributors.

Unfortunately the Court last week denied our petition and granted verbatim the proposals of two business groups, stating that judges need not withdraw from cases involving major campaign contributors or endorsers.

We're disappointed that a majority of our Supreme Court justices ignored the concerns of citizens in our state who legitimately question how a judge can be impartial in a case involving a major campaign contributor. On the other hand, we are delighted that the full Legislature this week passed a bill providing public financing for Supreme Court elections, and we hope Governor Doyle signs it into law. We will continue to work for other reforms, such as issue ad regulation, to reduce special interest influence and return our judicial elections to the voters.

**News Flash from LWVWI
12/01/2009**

The Impartial Justice bill, providing full public financing for state Supreme Court campaigns, was signed into law earlier today by Governor Doyle.

12/07/2009

The Wisconsin Supreme Court met in open administrative conference today to consider proposed amendments to the recusal rule the justices adopted in a 4-3 decision October 28. At that time, the Court voted to adopt verbatim the rules proposed by the business groups Wisconsin Realtors Association (WRA) and Wisconsin Manufacturers and Commerce (WMC).

Usually the Supreme Court will adopt a new rule in principle, leaving open the opportunity to modify the language before the final rule is approved. In this case, the majority rejected suggestions to allow for any flexibility and specified that the rules were to be adopted verbatim.

That may have been more than the original petitioners were bargaining for. In late November WMC submitted an amendment to the rule they had proposed, which dealt with independent expenditures related to a judicial campaign. They said the proposed rewording would simply make the language consistent with that of the Realtors' rule, which dealt with campaign contributions. In addition, Justice Prosser has proposed that other clarifications are needed. Yet the motion that was adopted on October 28 left no room for amendments.

Justice Bradley read a dissenting statement co-signed by Justices Abrahamson and Crooks, saying that they never would have adopted such a rule verbatim. She read headlines from newspapers statewide, decrying the October 28 decision.

Chief Justice Abrahamson asked Justice Prosser several times if he no longer supported the verbatim adoption of the business lobbies' rules. She also asked him to suggest alternative wording to address his concerns, which he was not able to do in today's meeting. He finally agreed that he was retracting that earlier vote. Justices Abrahamson, Bradley and Crooks also voted to rescind the October 28 decision, resulting in a majority.

The Chief Justice announced that the October 28 order will not go out. She asked Justice Prosser to circulate his recommendations to the full Court by the end of the week. We hope the Court will follow Justice Crooks' advice that any amendments receive proper notice and have a hearing before being adopted.

Excerpts from one national article published after the last Wisconsin Supreme Court race follow:

Rendering Justice, With One Eye on Re-election,

NY Times, By [ADAM LIPTAK](#), Published: May 25, 2008

<http://www.nytimes.com/2008/05/25/us/25exception.html?scp=1&sq=Hans+A.+Linde&st=nyt>

The question of how best to select judges has baffled lawyers and political scientists for centuries, but in the United States most states have made their choice in favor of popular election. The tradition goes back to Jacksonian populism, and supporters say it has the advantage of making judges accountable to the will of the people. A judge who makes a series of unpopular decisions can be challenged in an election and removed from the bench.

"If you want judges to be responsive to public opinion, then having elected judges is the way to do that," said Sean Parnell, the president of the [Center for Competitive Politics](#), an advocacy group that opposes most campaign finance regulation.

Nationwide, 87 percent of all state court judges face elections, and 39 states elect at least some of their judges, according to the [National Center for State Courts](#).

In the rest of the world, the usual selection methods emphasize technical skill and insulate judges from the popular will, tilting in the direction of independence. The most common methods of judicial selection abroad are appointment by an executive branch official, which is how federal judges in the United States are chosen, and a sort of civil service made up of career professionals.

Outside of the United States, experts in comparative judicial selection say, there are only two nations that have judicial elections, and then only in limited fashion. Smaller Swiss cantons elect judges, and appointed justices on the Japanese Supreme Court must sometimes face retention elections, though scholars there say those elections are a formality.

"To the rest of the world," Hans A. Linde, a justice of the Oregon Supreme Court, since retired, said at a 1988 symposium on judicial selection, "American adherence to judicial elections is as incomprehensible as our rejection of the metric system."

[Sandra Day O'Connor](#), the former Supreme Court justice, has condemned the practice of electing judges.

"No other nation in the world does that," she said at a conference on judicial independence at Fordham Law School in April, "because they realize you're not going to get fair and impartial judges that way."

The new justice on the Wisconsin Supreme Court is Michael J. Gableman, who has been the only judge on the Burnett County Circuit Court in Siren, Wis., a job he got in 2002 when he was appointed to fill a vacancy by Gov. Scott McCallum, a Republican.

The governor, who received two \$1,250 campaign contributions from Mr. Gableman, chose him over the two candidates proposed by his advisory council on judicial selection. Judge Gableman, a graduate of Hamline University School of Law in St. Paul, went on to be elected to the circuit court position in 2003.

The much more rigorous French model, in which aspiring judges are subjected to a battery of tests and years at a special school, has its benefits, said Mitchel Lasser, a law professor at Cornell and the author of "Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy."

"You have people who actually know what the hell they're doing," Professor Lasser said. "They've spent years in school taking practical and theoretical courses on how to be a judge. These are professionals."

The rest of the world," he added, "is stunned and amazed at what we do, and vaguely aghast. They think the idea that judges with absolutely no judge-specific educational training are running political campaigns is both insane and characteristically American."

But some American law professors and political scientists say their counterparts abroad should not be so quick to dismiss judicial elections.

"I'm not uncritical of the American system, and we obviously have excesses in terms of politicization and the campaign finance system," said Prof. David M. O'Brien, a specialist in judicial politics at the [University of Virginia](#) and an editor of "Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World."

“But these other systems are also problematic,” Professor O’Brien continued. “There’s greater transparency in the American system.” The selection of appointed judges, he said, can be influenced by political considerations and cronyism that are hidden from public view.

A [working paper](#) from the [University of Chicago](#) Law School last year tried to quantify the relative quality of elected and appointed judges in state high courts in the United States. It found that elected judges wrote more opinions, while appointed judges wrote opinions of higher quality.

“A simple explanation for our results,” wrote the paper’s authors — Stephen J. Choi, G. Mitu Gulati and Eric A. Posner — “is that electoral judgeships attract and reward politically savvy people, while appointed judgeships attract more professionally able people. However, the politically savvy people might give the public what it wants — adequate rather than great opinions, in greater quantity.”

Herbert M. Kritzer, who was until recently a professor of law and political science at the [University of Wisconsin](#), said judicial elections had deep roots in the state and the nation.

“It’s a remnant of the populist Jacksonian image of public office,” he said. “We’re crazy about elections. The number of different offices we elect is enormous.”

There is reason to think, though, that the idea of popular control of the government associated with President Andrew Jackson is an illusion when it comes to judges. Some political scientists say voters do not have anything near enough information to make sensible choices, in part because most judicial races rarely receive news coverage. When voters do have information, these experts say, it is often from sensational or misleading television advertisements.

“You don’t get popular control out of this,” said Steven E. Schier, a professor of political science at Carleton College in Minnesota. “When you vote with no information, you get the illusion of control. The overwhelming norm is no to low information.”

Still, judges often alter their behavior as elections approach. A [study](#) in Pennsylvania by Gregory A. Huber and Sanford C. Gordon found that “all judges, even the most punitive, increase their sentences as re-election nears,” resulting in some 2,700 years of additional prison time, or 6 percent

of total prison time, in aggravated assault, rape and robbery sentences over a 10-year period.

In some nations, of course, the judiciary is neither independent nor accountable to the public.

"Take a country like Vietnam," Professor O'Brien said. "Those poor judges are controlled by party officials even at the trial level. That's even worse than we have in Pennsylvania, Ohio and Texas, where the cost of judicial campaigns has just escalated over the last couple of decades."

Judge Baissus, the French judge, said his nation had once considered electing its judiciary.

"It's an argument that was largely debated after the French revolution," he said. "It was thought not to be a good idea. People seeking re-election would not be independent. They are indeed close to the electorate, but sometimes uncomfortably so."

An Alternative Plan

(presented by Beth Riggert at LWVWI Issues Briefing, 2009)

[source: <http://www.courts.mo.gov/page.jsp?id=297>]

Missouri Nonpartisan Court Plan

During the 1930s, the public became increasingly dissatisfied with the increasing role of politics in judicial selection and judicial decision-making. Judges were plagued by outside influences due to the political aspects of the election process, and dockets were congested due to time the judges spent campaigning. Then, in November 1940, voters amended the Missouri constitution by adopting the "Nonpartisan Selection of Judges Court Plan," which was placed on the ballot by initiative petition. The adoption of the plan by initiative referendum resulted from a public backlash against the widespread abuses of the judicial system by the "Boss Tom" Pendergast political machine in Kansas City and by the political control exhibited by ward bosses in St. Louis. The Missouri nonpartisan court plan, commonly called the Missouri Plan, since has served as a national model for the selection of judges and has been adopted in more than 30 other states.

Scope of the Nonpartisan Court Plan

The nonpartisan plan provides for the selection of judges based on merit rather than on political affiliation. Initially, the nonpartisan plan applied to judges of the Supreme Court; the court of appeals; the circuit, criminal corrections and probate courts of St. Louis city; and the circuit and probate courts of Jackson County. In 1970, voters extended the nonpartisan plan to judges in St. Louis County, and three years later, voters extended

the nonpartisan plan to judges in Clay and Platte counties. These changes are reflected in the Missouri Constitution, as amended in 1976. The Kansas City Charter extends the nonpartisan selection plan to Kansas City municipal court judges as well. Under the constitution, other judicial circuits may adopt the plan upon approval by a majority of voters in the circuit. Most recently, in November 2008, Greene County voted to extend the nonpartisan plan to its judges.

Nonpartisan Judicial Commissions under the Plan

Under the Missouri Nonpartisan Court Plan, a nonpartisan judicial commission reviews applications, interviews candidates and selects a judicial panel. For the Supreme Court and Court of Appeals, the [Appellate Judicial Commission](#) makes the selection. It is composed of three lawyers elected by the lawyers of The Missouri Bar (the organization of all lawyers licensed in this state), three citizens selected by the governor, and the chief justice, who serves as chair. Each of the geographic districts of the Court of Appeals must be represented by one lawyer and one citizen member on the Appellate Judicial Commission. Each of the circuit courts in Clay, Greene, Jackson, Platte and St. Louis counties and St. Louis city has its own [circuit judicial commission](#). These commissions are composed of the chief judge of the court of appeals district in which the circuit is located, plus two lawyers elected by the bar and two citizens selected by the governor. All of the lawyers and citizens must live within the circuit for which they serve the judicial commission.

Filling Judicial Vacancies under the Nonpartisan Court Plan

Regardless of the commission handling the applications, the constitutional process of filling a judicial vacancy is the same. With any vacancy, the appropriate commission reviews applications of lawyers who wish to join the court and interviews the applicants. It then submits the names of three qualified candidates – called the “panel” of candidates – to the Missouri governor. Normally, the governor will interview the three candidates and review their backgrounds before selecting one for the vacancy. If the governor does not appoint one of the three panelists within 60 days of submission, the commission selects one of the three panelists to fill the vacancy.

The People Retain a Say over Nonpartisan Court Judges

The nonpartisan plan also gives the voters a chance to have a say in the retention of judges selected under the plan. Once a judge has served in office for at least one year, that judge must stand for a retention election at the next general election. The judge's name is placed on a separate judicial ballot, without political party designation, and voters decide whether to retain the judge based on his or her judicial record. A judge must receive a majority of votes to be retained for a full term of office. The purpose of this vote is to provide another accountability mechanism of the nonpartisan plan to ensure quality judges. If a judge retires or resigns during or at the end of his or her term,

a vacancy is created, which will be filled under the Missouri Nonpartisan Court Plan as described above. To inform voters about the performance of nonpartisan judges, [judicial performance evaluation committees](#), made up of both lawyers and nonlawyers, evaluate objective criteria including decisions written by judges on the retention ballot as well as surveys completed by lawyers and jurors who have direct and personal knowledge of the judges. The judges are rated according to [judicial performance standards](#), including whether they: administer justice impartially and uniformly; make decisions based on competent legal analysis and proper application of the law; issue rulings and decisions that can be understood clearly; effectively and efficiently manage their courtrooms and the administrative duties of their office, including whether they issue decisions promptly; and act ethically and with dignity, integrity and patience. The results of these judicial performance evaluations then are distributed to the public via the media, the League of Women Voters and the Internet.

The success of the plan in selecting qualified judges is evident from the fact that, since its adoption, the public has not voted any appellate judge out of office, and only two circuit judges have been voted out of office.

[\[http://www.courts.mo.gov/page.jsp?id=297\]](http://www.courts.mo.gov/page.jsp?id=297)