

# CITIZENS COMMISSION FOR THE PRESERVATION OF AN IMPARTIAL JUDICIARY

## MEETING SUMMARY

APRIL 24, 2006

**Present:** Gov. Al Quie – Chair, Justice G. Barry Anderson, Steve Besser, Greg Bulinski, Wil Fluegel, Michael Ford, Judge James Hoolihan, Doug Johnson, Judge Thomas Kalitowski, Patrick Kelly, Eric Lipman, Brian Melendez, Dean Thomas Mengler, Dan Mikel, Jann Olsten, Justice Alan Page, Helen Palmer, George Soule, John Stanoch, Mary Vasaly, Judge Lucy Wieland

**Staff:** Sue Dosal, John Kostorous, Kelly Mitchell, Chris Ruhl – Minnesota Supreme Court; Tim Groshens and Nancy Mischel – MSBA

**Guest Speaker:** Dr. Rachel Paine Caufield, American Judicature Society

**Commission Publicity:** Mr. Kostorous distributed a one-page statement to be used in response to inquiries from the public regarding the Commission. Commission members agreed to make a few minor changes to the document. Gov. Quie requested that members should feel free to talk about the Commission and answer inquiries from the public and media but should not quote others on the Commission. Members should use their own judgment as to whether or not to inform Gov. Quie or Commission staff about any media inquiries or communications.

**National Overview of Judicial Selection/Retention Systems and Analysis of Factors to Consider in Crafting an Optimal System:** Dr. Caufield gave a comprehensive powerpoint presentation which opened with the caveat that no system of judicial selection is perfect, and it is important not to get stalled because the group cannot come up with the ideal system. It is important to define terms, such as “independence” and “accountability.”

Originally, most states followed the federal model, with executive appointment and/or legislative confirmation. But in the 1830’s, states began changing to elective systems and Minnesota chose that model in 1858. Problems with party politics negatively influencing elections led to reforms in many states starting in the mid to late 1800’s and early 1900’s. Minnesota adopted nonpartisan elections for all of its judges in 1912, with judges serving for 6-year terms. But even nonpartisan elections began to be seen by many as problematic in light of the desire for an independent judiciary. The American Judicature Society proposed merit selection in 1914, but no state adopted that method until Missouri in 1940.

By executive order in the late 1970’s, and by statute in 1983, Minnesota adopted a merit selection system to fill vacancies, so that in practice, most judges are appointed and not elected. The majority of states (33) now use merit selection to choose some or all of their judges. Along with eight other states, Minnesota has a “hybrid” system – a combination of merit selection and elections where judges at different levels are selected by different methods.

The *White* decisions in 2002 and 2005 struck down parts of the judicial canons, including the “announce” clause prohibiting judicial candidates from announcing their opinions on disputed political issues. Under *White*, there is no longer assurance that “nonpartisan” elections can be truly prevented from becoming partisan. The problem with partisan elections is that they have been increasingly interest-group driven and expensive. States with partisan elections systems are spending a vastly increased amount of money on judicial elections, and interest groups are exerting increasing influence. Dr. Caufield will forward to

Commission staff statistics regarding the correlation between amount of money spent and campaign success rates in both partisan and non-partisan judicial elections.

Statistics show that incumbent judges do much better in retention election states. In addition, evidence shows that ballot placement matters; whoever is listed first on the ballot has a significant advantage. In merit selection states the issue is who chooses those on the selection committee. It is difficult to change a system of judicial selection once it is in place.

Performance evaluations can be built into the process, such as the Arkansas model. They are traditionally done in one or more of several different ways:

- By media organizations, such as newspapers (informal process)
- Bar polls (sometimes printed and distributed to voters)
- Public surveys
- Some states make much more information available, such as voter guides in North Carolina

To reduce subjectivity in reviews, it is important to clearly identify performance evaluation criteria. It is also possible to build into the process a discussion of the content of the reviews with the judge, giving them an opportunity to respond before public release. Some states put results from performance evaluations on the ballot. Alaska has an objective Commission that reviews judges; ballots note the Commission's recommendation as to whether or not the judge should be retained.

In closing, Dr. Caufield noted that the Commission should not make recommendations that would be perceived as favoring incumbent judges. The Justice at Stake Campaign's recent polling indicates that voters care about "fairness", and that is what should be emphasized, rather than judicial "independence". Polling also shows that public confidence in the judiciary has been slowly declining. Other states are watching to see how Minnesota will proceed; the opportunity exists to open up a new discussion and exploration of an appointive system.

#### **Decisions, Action Steps, Other Business:**

Members agreed that after the November elections, any new legislators will be invited to share their ideas regarding judicial elections before the Commission finalizes their recommendations.

Public hearing dates will be set by the time of the May 16 meeting.

The meeting adjourned at 5pm. The Commission's next meeting is Tuesday, May 16 from 2-5 pm at the Minnesota Judicial Center, Room 230, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul.