



Citizens League Report

THE PUBLIC'S COURTS: Making the Governor's Nominating Process Statutory

*Public affairs
research and education
in the Minneapolis-Saint Paul
metropolitan area*

Citizens League Report

THE PUBLIC'S COURTS: Making the Governor's Nominating Process Statutory

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Judicial Task Force
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Approved by
Citizens League Board of Directors
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SUMMARY

The 1988 Legislature should establish a permanent commission to recommend candidates for judicial appointment, replacing an existing commission established by executive order of the Governor.

1. The commission should be appointed jointly by the Governor and the Minnesota Supreme Court, with the Governor also appointing the chair. It should nominate candidates for the Court of Appeals and the District Courts but not the Supreme Court.
2. When a District Court vacancy occurs, the commission should include additional members appointed from within the district of the vacancy.
3. The commission should nominate three to five persons for each vacancy. A second list should be requested if the Governor declines to appoint from the first list. If the second list is unacceptable, the Governor should be free to make a selection without regard to the commission's recommendation.
4. The commission should actively seek nominees, not merely passively accept applications. All nominees should be identified as having consented to nomination, rather than having applied.

Judges run for election, but the vast majority of them reach office, initially, by appointment from the Governor. Thus, the manner in which these appointments occur is critical. The Legislature is empowered under the constitution to prescribe the appointments process.

Of some 220 district judges in Minnesota in 1987, 86 percent reached office, initially, by appointment. A total of 76 judgeship elections occurred in Minnesota in 1986, of which only 10 were contested. Of the 10 contested seats, six were vacant due to death or retirement. Thus, only four judges up for re-election in Minnesota in 1986 faced opposition. None of the incumbents were defeated.

Minnesota is one of 34 states that have some type of commission for nominating judicial candidates according to merit. In 21 of the 34 states, the commissions are prescribed by law or constitution. In Minnesota and 12 other states, the commissions were created by executive order or some other non-statutory approach.

INTRODUCTION

District Court, Appeals Court, and Supreme Court judges in Minnesota are elected on the non-partisan ballot. However, the vast majority of judicial vacancies occur between elections, because of death or retirement. Under the state constitution, the Governor is responsible for filling interim vacancies by appointment. To remain in office, judicial appointees must be elected at the next regular election. Incumbent judges are identified as incumbents on the ballot, but they rarely are opposed. Consequently, the Governor's decision on who is appointed, initially, is extremely significant.

Gov. Rudy Perpich established a commission by executive order to advise him on appointments. The issue facing the Legislature in 1988 is whether to replace the executive order commission with a statutory commission. A bill for such a commission passed the Minnesota House and a Senate Committee in 1984 and 1985. Bills are expected to be heard again in 1988. The Minnesota State Bar Association, which has favored such a commission since 1974, recently updated its recommendations.

BACKGROUND

1. Judicial selection practices across the nation

Nearly every state has a different system for selecting its' judges. Systems can vary by the type of court. For example, Missouri uses a merit selection commission for its Supreme Court, Court of Appeals and Circuit Courts in five counties, and partisan elections for other courts. Judges selected by the merit commission, later must stand for a retention election.

The selection process can also vary according to whether the selection is an interim, initial, or final selection. In Minnesota, for example, initial selection is usually made by gubernatorial appointment, though all judges face non-partisan election at the end of their initial term.

Though many states use a mixture of strategies, most states fall into one of three rough categories:

A. Gubernatorial or Legislative Appointment

Four states (California, Maine, New Hampshire, and New Jersey) rely primarily on gubernatorial appointment.

Two states (South Carolina and Virginia) use legislative appointment as the predominant selection method.

B. Partisan and Non-partisan Election

Five states (Arkansas, Illinois, North Carolina, Texas and West Virginia) use partisan elections as the primary method of judicial selection.

Five states (Louisiana, Michigan, Ohio, Oregon, and Washington) use non-partisan elections as the primary means of judicial selection.

C. "Weak" and "Strong" Merit Selection

Thirty-four states rely on some sort of merit selection commission as the primary means of selecting judges. Such commissions usually screen and evaluate judicial candidates and recommend a limited number of candidates to an appointment authority, usually the governor.

Fifteen of these states can be categorized as "weak" merit states, meaning that most or all interim appointments are made by a merit selection commission. Interim appointees in most of these states must run for re-election, but rarely lose such elections. These states include: Alabama, Georgia, Idaho, Indiana, Kentucky, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Dakota, Pennsylvania, South Dakota, Tennessee, and Wisconsin.

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Eighteen states can be categorized as "strong" merit states, meaning that nearly all vacancies are filled through a merit selection process. Judges in these states rarely have to run for re-election, though most face a reappointment process or a retention election at the end of a specific term. These states include: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New York, Oklahoma, Utah, Vermont, Wyoming, and Washington D.C.

Twenty-one of the states mandate merit selection constitutionally or by statute. In the remainder, merit selection exists through executive order or some other basis.

In most states, the Governor is bound to choose from candidates selected by the commission. In a few states, appointments are subject to legislative confirmation.

Most states either constitutionally or statutorily designate the balance of lawyers and nonlawyers on the commission, typically calling for a nearly equal number of each. The number of judges is also usually fixed, typically at one or none. The authority to appoint members to the selection commission is frequently split between the Governor and the state bar association. Typically the Governor appoints nonlawyers and the bar or its officers appoint the lawyers. These practices, however, vary widely from state to state.

In nearly all states, the names of potential candidates are kept confidential until the candidate is nominated.

Sources

Judicial Selection in the States-Appellate and General Jurisdiction-1986, The American Judicature Society, November 1987.

Judicial Nominating Systems, The American Judicature Society, October 1986

Judicial Selection: How The States Decide, Council of State Governments, December 1984.

2. Comparison of merit selection plans

At least 34 states have merit selection commissions, according to the American Judicature Society, a non-profit organization that seeks to assist states in developing strong and viable judiciaries. The Society believes that a merit selection plan must contain three elements:

- A commission comprised of both lay and lawyer members to recruit, screen, investigate, and evaluate judicial candidates;
- Nomination, to the appointing authority, of a limited number of candidates;
- Appointment by the Governor or other appointing authority.

As of 1985, the Society reported that some 343 commissions existed in the nation, with more than 2,400 lawyers and nonlawyers serving on them.

A. Courts that are covered

Merit selection applies to lower courts in all 34 states. It also applies to the Supreme Court in 25 states, Minnesota not included.

B. Legal basis for the plan

Merit selection exists by statute or the constitution in 21 of these 34 states. The other 13 states, including Minnesota, are covered by executive order or some other non-statutory approach.

C. Number of commissions per state

Commissions are statewide in 22 states, including Minnesota. Twelve states have separate, districted commissions.

D. Mix of lawyers and nonlawyers

In all states (except Minnesota) the constitutional provision, statute, or executive order prescribing the merit selection plan; spells out how many persons should be lawyers, nonlawyers or judges. In Minnesota, the Governor is free to name whomever he wants, in whatever combination he chooses. Currently, the Minnesota commission includes five lawyers, two judges, and six non-lawyers.

Lawyers and judges make up at least a majority of the commissions in 26 states, including Minnesota.

E. Appointing authority

Appointments are shared by the Governor and others in 29 states. The Governor makes all the appointments in Massachusetts, Minnesota, Pennsylvania, West Virginia, and Wisconsin.

F. Requirement to choose from nominees presented

The Governor is required to choose from the list submitted to him in 24 of the 34 states. In the other 10 states, including Minnesota, he is not bound by the list.

* * * * *

3. Comparison of five approaches to judicial selection in Minnesota

Perpich: The plan now in use in Minnesota, pursuant to executive order by Governor Perpich.

Quie: The plan in effect in the administration of Governor Quie, also by executive order.

House: The plan in a House bill, sponsored by Representative Randy Kelly, passed in 1985. It did not pass the Senate.

Bar: The plan endorsed by the Minnesota State Bar Association.

League: The plan recommended by the Citizens League in this report.

<u>Issue</u>	<u>Perpich</u>	<u>Quie</u>	<u>House</u>	<u>Bar</u>	<u>League</u>
<u>Legal Status</u>	Executive Order	Executive Order	Statute	Statute	Statute
<u>Courts</u>	District	All	Appeals, District	All	Appeals, District
<u>Single or multiple commissions</u>	Single	Multiple	Single	Single	Single
<u>Supreme Court Commission</u>	None	4 by Governor; 1 jdgc, dist. jdges 1 jdgc, cnty jdges 2 attys by bar	None	Covered above	None
<u>Appointing authority</u>	Governor	Governor, others	Governor, others	Governor, others	Governor others
<u>Permanent Membership</u>	10, judicial districts; 2, at-large 1, chair, at-large	2 by Governor; 2 by local bar; 2 by judges; (different group in each judicial district)	4 by Governor; 4 by chf jstce; 1 atty. from dist., by Gov; 1 judge from dist., by jdgs;	4 by Governor; 4 by Supreme Court	5 by Gov. 4 by Sup. Court
<u>District Members</u>	1, affected district	2 in affected dist. by Gov.	2 in affected dist. by Gov.	2 by Gov.; 2 by Dist. Court	2 by Gov.; 2 by Dist. Judge

<u>Issue</u>	<u>Perpich</u>	<u>Quie</u>	<u>House</u>	<u>Bar</u>	<u>League</u>
<u>Chair</u>	Governor designates	Governor designates	Governor designates	Governor designates	Gov. designates
<u>Number of candidates given to Gov.</u>	3 to 5	3 to 5	3 to 5	3 to 5	3 to 5
<u>Non lawyers</u>	6 of 13 (no minimum or maximum req.)	no minimum or maximum	no minimum or maximum	one-half	not more than one-half
<u>Governor's Flexibility</u>	Total; rec's only advisory	Total; rec's only advisory	Gov. picks from list; can request new list	Gov. picks from list; can request new list	Total, if he first rejects two lists
<u>Provisions for women, minorities on comm.</u>	none	none	required	none	none
<u>Provisions for recruiting women, minorities as candidates</u>	"shall actively seek out... women and minorities"	none	"shall give consideration" to women, minorities	"shall actively seek out... women and minorities"	"seek women and minorities as candidates"
<u>Notification procedures</u>	News local bar notified	News local bar notified	News local bar notified	Pub. not. required	Pub. not. required
<u>Seeking candidates</u>	one member assigned job	one member assigned job	not specifically mentioned	commission assigned job	commission assigned job

**RECOMMENDATIONS
TO THE STATE LEGISLATURE**

1. The Legislature should establish a permanent commission on judicial selection to recommend candidates for judicial appointments to the Governor.

A statutory commission would have several advantages:

--Build on the executive-order precedents established by Governors Perpich and Quie.

--Assure, by statute, that a merit selection process continues rather than rely on the pleasure of future governors.

--Fulfill the intention of the state constitution that the Governor should make the appointments "in the manner provided by law". The law now contains no such provision.

--Give stability, continuity, and wider public knowledge to the process. Increase the ease with which individuals or groups can suggest candidates.

--Enhance public confidence in judicial selection because a legislatively-adopted procedure is being followed.

2. Commission recommendations should cover appointments to the Minnesota Court of Appeals and the district courts, but not to the Minnesota Supreme Court. Appointments to the Supreme Court should not fall within the commission's jurisdiction. Under our recommendations, the Supreme Court would select some commission members. If appointments to the Supreme Court were covered, the Court itself would be exerting influence over a group that names its' peers. While nominations from a commission would be helpful for the Supreme Court, such nominations are not as urgent as they are for the other courts. The Supreme Court is much more visible and appointments to the court occur infrequently.

3. The commission should be composed of at-large members and district members. At-large members would participate as voting members on all vacancies. District members would be appointed within the 10 judicial districts of the state, to provide local input. They would participate as voting members, only for district court vacancies within their respective districts. District members would not participate in deciding nominees for the Court of Appeals.

4. Not more than one-half of the commission members, exclusive of the chair, should be lawyers. The chair could be a non-lawyer or a lawyer. It is important that the general public be represented on the commission.

5. The commission should have nine at-large members. The Governor should name the chair and four other at-large members. The Minnesota Supreme Court should name four at-large members. The commission should have four district members in each judicial district of the state. The Governor should name two district members in each district. The chief judge in each judicial district should name two district members from that district.

The Governor and Supreme Court should share in appointments; to increase the likelihood that the commission will consider a broad spectrum of possible nominees and to recognize that under state law the courts are non-partisan offices.

When the commission is meeting to consider nominations to the Court of Appeals, the nine at-large members should serve. When the commission is meeting to consider nominations to a District Court, the nine at-large members plus the four district members from that district should serve, for a total of 13 persons.

Of the four at-large members appointed by the governor, not more than two should be lawyers. Of the two district members, named by the Governor in each judicial district, not more than one should be a lawyer. Of the four at-large members, named by the Supreme Court, not more than two should be lawyers. Of the two district members, named by the chief judge of the affected district court, not more than one should be a lawyer.

The appointing authorities should be encouraged to reflect various segments of society, including women and minorities, in their appointments to the commission.

6. All members appointed by the Governor should serve at the pleasure of the Governor. At-large members, appointed by the Supreme Court and district members appointed by the chief judges of the district courts, should serve four-year terms concurrent with the Governor's term. Because the Governor ultimately is constitutionally responsible for making judicial appointments, it is appropriate for appointees to serve at the Governor's pleasure. Fixed terms for Court appointees assure that these appointments will be reviewed periodically.

7. A member should be prohibited from being appointed to the court within one year after having served on the commission. The motivation of individuals to serve on the commission might be questioned; if members of the commission were eligible for an appointment either while serving or immediately after leaving the commission.

8. Members of the commission should be reimbursed for expenses and receive per diem payments, in the same manner as is provided by statute for other legislatively-created boards and commissions. Such reimbursement will make it easier for individuals from different walks of life to serve on the commission, and for the commission to hold meetings in districts where vacancies occur.

9. The commission should be required to provide public notice when a judgeship is vacant, and should allow at least 30 days for possible nominees to be suggested or to apply for nomination. The commission should be free to establish most of its rules of procedure, but a requirement for public notice and a waiting period is needed to assure

that members of the public are informed of vacancies and have a chance to suggest names. The commission should be strongly encouraged, but not required, to hold meetings in the district where a vacancy is occurring and to conduct personal interviews with candidates.

10. The commission should be required to submit at least three nominees, and not more than five nominees, to the Governor for each vacancy. The names of the nominees should be in alphabetical order and be made public.

The commission should submit enough names so that the Governor has some choice but not so many as to make the commission's advice ineffective.

11. If the Governor declines to select from the first list of nominees submitted by the commission, a second list should be requested. If the second list is unacceptable, the Governor should be free to make a selection without regard to the commission's recommendations. The selection authority of the Governor needs to be protected. That would assure accountability and be consistent with the constitutional requirement that the Governor is ultimately responsible for making the appointments.

12. The commission should actively seek the most qualified individuals, and not merely passively accept applications. It should identify all nominees as having consented to nomination, rather than having applied. Some qualified persons might consent to having their names included on a list submitted to the Governor, but could be reluctant to submit a formal application.

13. The commission should be instructed to seek women and minorities as candidates. The law should strongly direct the commission to seek women and minorities as candidates. Of the 220 district judges in Minnesota, 21 (9.5 percent) are women; eight (3.6 percent) are members of minority groups.

14. The commission should be exempted from the state's open meeting law and the Government Data Practices Act. Exemption from these two laws would mean the commission could legally meet in private and its' files would not be available for public scrutiny. The existing commission, established by executive order, meets privately and its' files are not available to the public. The commission's only function is to evaluate and decide on possible nominees. Members of the commission need to be free to discuss nominees' qualifications candidly. If the commission were required to meet publicly, it would be virtually impossible for it to fulfill its responsibilities.

RECOMMENDATIONS TO THE MINNESOTA STATE BAR ASSOCIATION

Evaluation of judges should be for the public, not only the judiciary.

The Minnesota State Bar Association has begun a study of judicial evaluation. Whatever system that evolves, we recommend that the bar association ensure that information is made available to voters, as they decide whether to retain judges in office. This information should also be provided to the judiciary, for whatever internal quality controls it might seek to implement.

Work of the Task Force

The Community Information Committee of the Citizens League is responsible for implementation of Citizens League reports. In the fall of 1987, the committee determined that existing League reports on the appointment process and government structure did not address the question of judicial selection. Consequently, the president of the Citizens League appointed a special task force to conduct a study of judicial selection and submit recommendations to the Board of Directors.

Task Force Membership

Under the leadership of James Terwedo and Nancy Zingale, co-chairs, 11 members of the Community Information Committee participated in the deliberations of the task force.

John J. Costello
Carl Cummins
Joanne Englund
David Graven
Virginia Greenman
A. Edward Hunter

Susan McCloskey
Judy Oakes
Wayne H. Olson
Tom Swain
Peter Vanderpoel

Task Force Meetings/Resources Speakers

The task force met for the first time on November 3, 1987 and concluded its work at a meeting on January 8, 1988. A total of eight meetings were held. The first three meetings of the committee were conducted as part of a Citizens League public breakfast series. Speakers for those meetings were Gov. Perpich; Michael Sieben, chair of the Minnesota Judicial Merit Advisory Commission; Stephen Cooper, commissioner of the Minnesota Department of Human Rights; Charles Nyberg, chair of a merit selection commission in a judicial district under former Gov. Al Quie; and Helen Kelly, president of the Minnesota State Bar Association.

Subsequently, the task force met with State Sen. Roger Moe and State Sen. Richard Cohen. The task force staff met with State Sen. Larry Pogemiller.

The task force reviewed background material comparing different proposals for selection commissions in Minnesota and then compared practices in different states.

Staff Support

The task force was assisted throughout this study by Citizens League staff members Paul Gilje, Dawn Westerman, and Joann Latulippe

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WHAT THE CITIZENS LEAGUE IS

The Citizens League has been an active and effective public affairs research and education organization in the Twin Cities metropolitan area since 1952.

Volunteer research committees of League members study policy issues in depth and develop informational reports that propose specific workable solutions to public issues. Recommendations in these reports often become law.

Over the years, League reports have been a reliable source of information for governmental officials, community leaders, and citizens concerned with public policy issues of our area.

The League depends upon the support of individual memberships and contributions from businesses, foundations and other organizations throughout the metropolitan area.

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Position _____

Employer's Address _____ YES _____ NO _____

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*Through the Citizens League, thousands of metropolitan citizens
and businesses play a constructive role in dealing with the public
issues our community faces.*

**RESEARCH and
REPORTS**

- Citizen committee research and debate develops new policy ideas which often become law.
- Experts equip the committees with facts and judgments.
- Comprehensive reports make the rounds, inform the public and frequently shape the debates.

PUBLICATIONS

- *Minnesota Journal* — twenty-two issues of engaging public affairs news, analysis and commentary — news you can't find anywhere else.
- *CL Matters* — an update of the League's community activities, meetings and progress on issues.
- *Public Affairs Directory* — a listing of agencies, organizations and officials involved in the making of public policy.

**ACTION and
IMPLEMENTATION**

- Citizens communicate the League's work to the community and public officials, precipitate further work on the issues and get things to happen.

**LEADERSHIP
BREAKFASTS**

- Public officials and community leaders meet with League members in locations throughout the metropolitan area to discuss timely issues.

SEMINARS

- Single-evening meetings offer debate and education covering pending public issues — an opportunity to become fully informed about and have an impact on issues that affect you.

**INFORMATION
RESOURCES**

- A clearinghouse for metropolitan public affairs information and a resource of educational materials and speakers for the community.



*Public affairs
research and education
in the Minneapolis-Saint Paul
metropolitan area*

Citizens League

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