Preserving Judicial Independence by Barring Re-Election to the Supreme Court

June 2015

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About the Presenters

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PRESERVING JUDICIAL INDEPENDENCE BY BARRING REELECTION TO THE WISCONSIN SUPREME COURT: THE LAW UNDERLYING THE BAR'S PROPOSAL

Presented By Judicial Election Steering Committee:
John Danner (Moderator)
Christine Bremer Muggli
Catherine M. Rottier
Thomas L. Shriner, Jr.

In late September 2013, the State Bar Board of Governors overwhelmingly adopted this resolution:

> ***To enhance the confidence of the people in the independence and integrity of Wisconsin's highest court, the State Bar of Wisconsin recommends the adoption of a constitutional amendment that would change the term of office for supreme court justices to a single elected 16-year term.***

I. What We Propose.

To show the precise change that the State Bar and its Judicial Election Steering Committee (JESC) advocate, here is the constitutional provision on election of justices as it now reads and as we propose to amend it.

Current Language

ART. VII, § 4, Wis. Constitution

(1) The supreme court shall have 7 members who shall be known as justices of the supreme court. Justices shall be elected for 10-year terms of office, commencing with the August 1 next succeeding the election. Only 1 justice may be elected in any year. Any 4 justices shall constitute a quorum for the conduct of the court's business.

Proposed New Language

ART. VII, § 4, Wis. Constitution

(1) The supreme court shall have 7 members who shall be known as justices of the supreme court. Justices shall be elected for 16-year terms of office, commencing with the August 1 next succeeding the election. Only 1 justice may be elected in any year. No person shall be elected to the office of justice more than once, but this provision shall not prevent any person who may be holding the office of justice during the term within which this provision becomes operative from being elected to the office of justice for one additional term. Any 4 justices shall constitute a quorum for the conduct of the court's business.

II. Why We Propose It.

The rationale for this proposed constitutional amendment is explained at length in the September 2013 Judicial Task Force Report and Recommendation, a copy of which is provided with your materials. The report identifies six key reasons why this proposed amendment will enhance public confidence in the judicial system. Here are those six reasons:

1. Sitting justices will not need to become political candidates for reelection.

Because reelection campaigns will be eliminated, sitting justices will not be required to seek support and approval from groups with identifiable political perspectives and economic interests that may be affected by the outcome of cases pending before the court.

2. The amendment eliminates the perception that court decisions are motivated by concern for reelection.

3. The amendment lessens the likelihood of unfair campaign attacks on sitting justices.

The more the state bar can do to avoid campaign ads that demean any sitting justice, the better.

4. The amendment will structurally improve collegiality on the court.

Think how much better it will be if current members of the court have no need or reason to privately or publicly oppose a colleague's reelection.

5. The amendment preserves Wisconsin's tradition of nonpartisan elections but reduces the frequency of those elections.

6. The amendment may encourage new faces to seek positions on the court and result in changes to the court's composition.

Under the current system, the reality is that incumbent justices serve as long as they want, with only one elected justice losing a reelection campaign in the last 98 years. The move to a single 16-year term will change this dynamic.

A statewide campaign for a 16-year term on the court may still be a rough-and-tumble affair but one with a defined beginning and end and one that a successful candidate need not repeat. More well-qualified candidates may be willing to seek judicial election, knowing that only one campaign would have to be endured and that the person elected would have a full 16 years to contribute to the development of Wisconsin law and create a legacy of legal scholarship.

III. Why We Think Merit Selection Is Not the Answer.

A. Merit selection usually involves some form of retention election following a period of appointed service on the court. Through the retention elections, citizens maintain a role in deciding who serves on the highest court in the state. The problem is that retention elections can generate the same kind of politically charged, special-interest-funded campaigns that the merit selection process was designed to avoid. Because the incumbent justice has no opponent, retention election challenges are inherently negative and often driven by single-issue special interest groups.

Examples: Iowa in 2010 (homosexual rights). California in 1986 (death penalty). Florida in 2012 (judicial activism).

B. The merit selection process in many states involves a gubernatorial or legislative appointment based on a recommendation from a select committee. The process can be cumbersome, expensive, and politically-charged. Politics could play or be perceived to play a decisive role in determining the composition of the selection panel itself.

C. Political opposition to a merit selection plan would likely be insurmountable. Wisconsin has elected its justices since the state was admitted to the union. Switching to a merit selection plan is not a realistic option, particularly in today's political climate.

D. For an interesting discussion of this issue, you might want to read Melissa S. May, "Judicial Retention Elections After 2010," Ind. L. Rev., Vol. 46:59 (2013).

IV. Why 16 Years Is A Reasonable Term Length For An Elected Justice.

More than 80% of all supreme court justices since 1950 have served 16 years or less. The average term over the last 60 years is approximately 13 years. Our proposed limit will not reduce the actual average tenure of justices or their ability to influence the development of the law. A single 16-year term is long enough to attract highly qualified candidates but not so long as to create nearly life tenures.

V. Why Campaign Finance Reform Is Not the Answer.

Tilting against windmills is not our thing. The five cases identified below, all decided within the last thirteen years, establish that candidates for judicial office may identify themselves as members of a political party, express opinions during their election campaigns on disputed legal and political issues, and engage in campaigns that are largely funded, directly or indirectly, by corporations, unions, single-issue organizations, and out-of-state interests.

Congress passed the McCain-Feingold law, officially called the Bipartisan Campaign Reform Act of 2002, in hopes of curbing the influence of money in political campaigns. But major portions of that law have been found unconstitutional, so the prospect of staunching the flow of money into legislative and judicial campaigns is limited indeed.

Here are five decisions important to the conversation on campaign finance reform:

1. Republican Party of Minnesota v. White, 536 U.S. 765 (2002). This is a 5-4 decision authored by Justice Scalia. In Minnesota, a supreme court canon of judicial conduct prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues. A candidate challenged the constitutionality of the Minnesota canon as being violative of the First Amendment guarantee of free speech.

HELD: A prohibition on a judicial candidate's stating views on disputed legal or political issues is unconstitutional. Strict scrutiny applies. Thus, the proponents of the speech restriction had the burden to show both that the prohibition was narrowly tailored and that it was designed to serve a compelling state interest. The proponents failed to satisfy their burden. The restriction was not narrowly tailored and the asserted state interest was not sufficiently compelling.

Accordingly, if a state is going to have elections for its supreme court, the state cannot forbid candidates from stating opinions on disputed legal or political issues.

2. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). Decision written by Justice Kennedy. All justices joined part of the decision, but there were multiple dissents and concurrences as well.

Citizens United was a nonprofit corporation that released a documentary in January 2008 critical of Hillary Clinton, who was then a candidate for the Democratic Party's presidential nomination. Citizens United was concerned that advertisements for and the release of the documentary might violate § 203 of the Bipartisan Campaign Reform Act of 2002. This section prohibited corporations and unions from using general treasury funds to make independent expenditures for speech that constitutes an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. Citizens United filed suit for injunctive and declaratory relief, arguing that § 203 was an unconstitutional violation of its First Amendment rights.

HELD: § 203 of the McCain-Feingold Act is unconstitutional. The Court concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. 558 U.S. at 314.

Citizens United overrules Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), which had held that political speech may be banned based on the speaker's corporate identity. According to the Court, "Austin interferes with the 'open marketplace' of ideas protected by the First Amendment." 558 U.S. at 354.

3. Seifert v. Alexander, 608 F.3d 974 (7th Cir. 2010). This case was decided five months after Citizens United was decided. John Seifert, a Milwaukee County Circuit Court judge, wanted to publicly announce that he was a Democrat. Also, he wanted to endorse partisan candidates and personally solicit contributions for his next election campaign. He was concerned that these activities might be prohibited by the Wisconsin Code of Judicial Conduct, so he filed a lawsuit seeking declaratory and injunctive relief. The defendants in the case were the members of the Wisconsin Judicial Commission, which enforces the code.

The district court agreed with Judge Seifert, found the challenged judicial code provisions unconstitutional, and enjoined their enforcement. On appeal, the Seventh Circuit affirmed the district court's holding that the partisan affiliation ban was unconstitutional. However, the Seventh Circuit reversed the district court ruling with respect to the provisions of the judicial code that banned a judicial officer from endorsing political candidates and personally soliciting contributions. The Seventh Circuit held that those bans were constitutionally sound.

"We see a dividing line between the party affiliation rule, which impermissibly bars protected speech about a judge's own campaign, and the public endorsement rule, which addresses a judge's entry into the political arena on behalf of his partisan comrades." 608 F.3d at 984.

In reaching its decision, the Seventh Circuit emphasized that Wisconsin has an important interest in preserving impartiality and preventing corruption among those who serve in its judiciary.

4. McCutcheon v. Federal Election Commission, ___ U.S. ___, 134 S.Ct. 1434 (2014). This 5-4 decision was written by Chief Justice Roberts. The case involved a challenge on First Amendment grounds to another section of the Bipartisan Campaign Reform Act of 2002. The challenged section imposed an aggregate limit on the amount of money a donor could contribute to all candidates or election committees. 2 U.S.C. § 441a.

Plaintiff Shaun McCutcheon contributed to sixteen different federal candidates but wanted to contribute to twelve more. The aggregate limits in the McCain-Feingold law prevented those additional contributions, so McCutcheon, along with the Republican National Committee, filed a complaint in federal court, asserting that the aggregate limits were unconstitutional under the First Amendment. The district court dismissed the claim, holding the aggregate limits survived First Amendment scrutiny. On appeal, the Supreme Court reversed and held the limitation on aggregate contributions to be unconstitutional.

In large part, McCutcheon was a referendum on the continued vitality of Buckley v. Valeo, 424 U.S. 1 (1976), a case that had found constitutional congressional efforts to regulate campaign contributions to protect against corruption or the appearance of corruption. Buckley survives the decision in McCutcheon but just barely. As the Court explains:

> The government has a strong interest, no less critical to our democratic system, in combatting corruption and its appearance. We have, however, held that this interest must be limited to a specific kind of corruption – *quid pro quo* corruption – in order to ensure that the government's efforts do not have the effect of restricting the First Amendment rights of citizens to choose who shall govern them. For the reasons set forth, we conclude that the aggregate limits on contributions do not further the only governmental interest this court accepted as legitimate in Buckley. They instead intrude without justification on a citizen's ability to exercise "the most fundamental First Amendment activities." (citation omitted)

5. Williams-Yulee v. Florida Bar, No. 13-1499, decided April 29, 2015. This is a 5-4 decision authored by Chief Justice Roberts. This time, Justices Scalia, Kennedy, Thomas, and Alito are the dissenters.

Petitioner Lanell Williams-Yulee mailed and posted online a letter soliciting financial contributions to her campaign for judicial office. The Florida Bar disciplined her for violating a canon of its Code of Judicial Conduct that prevented judicial candidates from personally soliciting campaign funds. This same canon allowed candidates to establish committees to raise campaign money for them. Only personal solicitation by the candidate was out of bounds.

Yulee contended that the First Amendment protected her right to personally solicit campaign funds. She lost that argument before the Florida Supreme Court and again before the United States Supreme Court. Its decision was issued just a few days ago.

Williams-Yulee has some important things to say about the election of judges. First, the Court is deferential to state control of judicial elections:

> … [W]e are mindful that most States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary. These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance – how to select those who "sit as their judges." (citation omitted)

Next, the Court weighs in on whether recusal rules would better suit the State's compelling interest in preserving the integrity of its judiciary. The Court finds recusal rules ineffective, writing as follows:

> … A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would

> disable many jurisdictions. And a flood of post-election recusal motions could "erode public confidence in judicial impartiality" and thereby exacerbate the very appearance problem the State is trying to solve. (citation omitted) Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal – a form of peremptory strike against a judge that would enable transparent forum shopping.

And finally there is this:

> … [I]n any event, a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians. (Emphasis added.)

BOTTOM LINE: Citizens United and McCutcheon limit campaign finance reform efforts. White, Siefert and Williams-Yulee recognize a State's compelling interest in regulating judicial elections and judicial candidates without squelching free speech but offer no easy path to controlling the influence of outside money in judicial campaigns.

VI. What Is the Process for Adopting Our Proposal?

As noted, the terms of Wisconsin Supreme Court justices are prescribed by the Wisconsin Constitution. Thus, any change in those terms can be accomplished only by an amendment to the Constitution.

Article XII, § 1 provides for a three-step process: (1) the proposed amendment must be agreed to by "a majority of the members elected to each of the two houses" of the Legislature, which causes the proposal to be referred to the Legislature elected at the next general election; (2) if the proposal is then agreed to by "a majority of all the members elected to each house" of the new Legislature, then (3) the Legislature must submit the proposed amendment "to the people," and if a majority of the electors voting on it approve and ratify it, the amendment "shall become part of the constitution."

Under general law, the validity of which was upheld in State v. Gonzales, 2002 WI 59, 253 Wis. 2d 134, 645 N.W.2d 264, unless the Legislature provides for a different effective date in the amendment itself, an amendment approved by the people becomes operative when the chairperson of the Government Accountability Board certifies, under Wis. Stat. § 7.70(3)(h), that it has been approved. The proposed amendment addresses the most important timing question that might arise by virtue of its adoption by providing that it does not bar any sitting justice from running for another 16-year term. This language, intended to emphasize that the proposed amendment is a long-term reform measure with no partisan or other political aspect to it, is taken from the 22nd Amendment to the United States Constitution, which limited the length of time that any person may serve as President. Under the federal constitution, the states have plenary

authority to prescribe the length of service of their state judges, including their Supreme Court justices. See Gregory v. Ashcroft, 501 U.S. 452 (1991) (Missouri may impose age limits on judicial service).

Judicial Task Force
Report and Recommendation

September 2013

STATE BAR OF WISCONSIN

Leaders in the Law. Advocates for Justice.®

JUDICIAL TASK FORCE

On Judicial Independence

The genius of our state and federal constitutions is most evident in the principles of separation of powers among the three co-equal branches of government and the system of checks and balances. The unique role of the judicial branch is to uphold the rule of law independent of the political forces that, rightly, influence the legislative and executive branches. Separating the judiciary from politics is the key to its independence, a principle Chief Justice William Rehnquist referred to as "the crown jewel of our system of government." We were asked to examine this crown jewel in Wisconsin to see if there is a way to help it shine more brightly. We invite you to consider our idea of how this can be accomplished.

Task Force Members

- **Joseph Troy**, former Outagamie County Circuit Court and Chief Judge and currently a partner at Habush, Habush & Rottier, S.C., is the chair of the task force
- **Catherine Rottier,** a partner at Boardman & Clark LLP in Madison and a former president of Wisconsin Defense Counsel
- **Thomas Shriner,** a commercial litigator and partner at Foley & Lardner LLP in Milwaukee, an adjunct professor at Marquette University Law School, and a former president of the Seventh Circuit Bar Association
- **Christine Bremer Muggli**, a plaintiffs' personal injury lawyer with Bremer & Trollop, S.C. in Wausau and a former president of Wisconsin Association for Justice

(More complete biographies and photos of task force members can be found in Attachment A.)

Executive Summary

The Case for a Single, Extended Term of Office for Supreme Court Justices

In the pages that follow, we explain our process, the alternatives we considered, and how our views have been informed by the history of our supreme court. We worked to develop a feasible and politically neutral proposal to improve public confidence in the independence of the court. We believe that changing our constitution to provide for a single 16-year term for supreme court justices will engender greater confidence in the independence of the court and respect for the office. In very summary form, here's why.

- **Justices Will Not Become Political Candidates for Reelection.**

  Once elected, justices would be free to focus fully on the law and their vital role under the constitution. Justices will not need to seek support for reelection from individuals and groups with identifiable political perspectives and economic interests. In the past 96 years only one previously elected justice has actually lost a reelection *(Chief Justice Currie in 1967, the year after he joined the decision to allow the Braves to move to Atlanta).* Historically, our present system results in expensive, polarizing reelections that end with the all-but-certain reelection of the incumbent justice.

- **The Proposal Eliminates the Perception that Court Decisions Are Motivated by Concern for Reelection.**

  Because justices will not stand for reelection, their decisions cannot be attacked or distorted by allegations that justices were motivated by concerns to maintain favor with those who would support their reelection.

- **The Proposal Is Structurally Consistent with the Constitutional Principles of Separation of Powers and Checks and Balances.**

  Unlike the executive and legislative branches of government, the judicial branch should be nonpolitical. This plan structurally reinforces the separate nonpolitical role of our highest court.

- **Collegiality Will Be Structurally Supported.**

  The single extended term will promote collegiality on the court by eliminating the potential that justices will publicly or privately oppose a colleague's reelection. It also means that there will be a periodic change in leadership of the chief justice as the terms of the longer serving justices come to an end.

- **The Proposal Is Politically Neutral and Feasible.**

  To earn the broad bipartisan support necessary to amend the Constitution, the proposed amendment must result in a change that is politically and ideologically neutral and widely accepted as a reform that will enhance public confidence in the court's independence.

- **Nonpartisan Elections Are Preserved; Frequency Is Reduced.**

  The proposal maintains Wisconsin's tradition of nonpartisan election of supreme court justices but reduces the frequency of often politically charged and costly elections.

- **Campaigns Are Less Likely to Generate Unfair Attacks on Sitting Justices.**

  The negative advertising that frequently accompanies a challenger's campaign against an incumbent justice demeans the office as well as the incumbent justice. Under this proposal, elections will not involve justices who have served an elected term. Instead, elections will involve candidates who have never served on the court or a candidate who has served only a short time following an appointment to fill a vacancy. Either way, the campaigns are much less likely to generate negative attack ads that distort a justice's record on the court.

- **Election Reform Is Largely Controlled by U.S. Supreme Court Decisions.**

  The role of special interests and money in state supreme court elections is largely controlled by U.S. Supreme Court decisions interpreting the First Amendment and cannot materially be changed by state constitutional amendment, legislation, or judicial decisions. Many proposed changes are simply constitutionally prohibited. Our efforts focus on a plan that improves public confidence in the judiciary, is consistent with current constitutional law, and is politically feasible.

- **Why a 16-Year Term Limitation**?

  More than 80% of all supreme court justices since 1950 have served 16 years or less. The average term over the last 60 years is approximately 13 years. Our proposed limit will not reduce the actual average tenure of justices or their ability to influence the development of the law. A single 16-year term is long enough to attract highly qualified candidates, but not so long as to create nearly life tenures.

- **Why Not Merit Selection?**

  We considered the various merit selection plans used or proposed in other states. These plans usually have some form of retention election following a period of appointed service. Through the retention elections, citizens maintain a role in deciding who serves on the highest court in the state. The problem is that retention elections, with increasing frequency, have developed into the same kind of politically charged, special-interest-funded campaigns that the merit selection process was designed to avoid. Because the incumbent justice has no

opponent, retention election challenges are inherently negative and often driven by single-issue special-interest groups.

- **Politics Plays a Prominent Role in Merit Selection Plans.**

  Politics plays a decisive role in determining the composition of the selection panel. In addition, either the governor or the legislature selects a choice recommended by the panel. Clearly, these choices are made with political ramifications in mind.

  Beyond that, we believe political opposition to a merit selection plan would be insurmountable. Wisconsin citizens are loath to give up their right to vote. Opponents of merit selection would be able to characterize such a plan as nondemocratic. Previous legislative proposals have fallen under the weight of this very argument. In addition, a constitutional amendment to determine the composition of a merit selection panel is unlikely to find consensus in our polarized political climate.

REPORT OF
STATE BAR OF WISCONSIN JUDICIAL TASK FORCE

Introduction

We think that the justices of the Wisconsin Supreme Court should be freed from the pressures of seeking political and financial support for reelection, so that they can devote themselves fully to their constitutional duties of developing the law and improving the administration of justice. We believe in retaining the people's right to vote for those who serve on our highest court, but we do not see the people's interest as best served by requiring elected justices to become politicians in search of support for a reelection campaign. We want a court that operates without the factions and frictions that can result from opposing a colleague's reelection bid. We would like to improve the chances that the court's work will be conducted in an atmosphere of collegiality and mutual respect, even in the face of deeply held philosophical differences. The proposal described in this report offers a simple but profoundly important structural change to our state constitution to help secure the supreme court that the people deserve. The change that we propose will allow future justices to function in a respectful professional atmosphere, and it should engender greater public confidence in the court's ability to pursue justice independently of political influence. We believe that these ideals can be achieved by changing the term of office for justices to a single 16-year term.

The Proposal

We urge the Board of Governors of the State Bar of Wisconsin to adopt the following resolution:

> ***To enhance the confidence of the people in the independence and integrity of Wisconsin's highest court, the State Bar of Wisconsin recommends the adoption of a constitutional amendment that would change the term of office for supreme court justices to a single elected 16-year term.***

The members of the Judicial Task Force are unanimous and enthusiastic in our conviction that this proposal will improve confidence in the independence of the Wisconsin Supreme Court. Our proposal is politically neutral in intent and effect and should enjoy bipartisan and widespread public support. It will remove the most powerful force interfering with collegiality on the court: the potential for factions developing over the reelection of a fellow justice. Removing this incentive to discord will help enhance public respect for the court and the decisions it makes.

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Who we are, what we were asked to do, and how we arrived at our recommendation for a constitutional amendment are explained below.

Formation of the Judicial Task Force

In the fall of 2011, State Bar President Jim Brennan, in an effort to address concerns expressed by many lawyers and others over flagging public confidence in the independence of the judicial system, authorized the formation of a task force to study the issues and come up with a proposal to achieve meaningful change. Presidents Brennan, Kevin Klein, and Pat Fiedler, in successive years, have approved the composition of the task force, and they and the Board of Governors have endorsed our efforts.

In addition, the strategic plan adopted by the Board of Governors expressed its intent to address the issue of confidence in the court system by including this specific goal for the task force:

> ***By June 30, 2013, present recommendations to the Board of Governors on ways the State Bar can promote a fair and impartial judiciary in order to improve the administration of justice for all persons.***

Task Force Members

To maximize the prospect for deep discussion during our deliberations, the task force was comprised of only four voting members, all of us practicing Wisconsin attorneys. Two of us have professional and personal backgrounds that are more business-oriented and politically conservative, and two have more consumer-oriented and politically liberal backgrounds. This was purposeful. It resulted in vigorous debate and ended with clarity and consensus on key points of intersecting beliefs and principles.

Joseph Troy, a former Outagamie County circuit judge, now a partner at Habush, Habush & Rottier, S.C., is the chair of the task force. The other three attorney members are: (1) Christine Bremer Muggli, a plaintiffs' personal injury lawyer with Bremer & Trollop, S.C. in Wausau and a former president of Wisconsin Association for Justice; (2) Thomas Shriner, a commercial litigator and partner at Foley & Lardner LLP in Milwaukee, an adjunct professor at Marquette University Law School, and a former president of the Seventh Circuit Bar Association; and (3) Catherine Rottier, a partner at Boardman & Clark LLP in Madison and a former president of Wisconsin Defense Counsel. A more complete biography of each task force member can be found in Attachment A.

The task force was assisted by Lisa Roys and Andrea Gage, both attorney staff members for the State Bar, and by Scott Minter, a senior lecturer at the University of Wisconsin Law School, who joined the task force in late 2012 to serve as its reporter.

The Rationale For Our Proposal

A. The Problem Presented to the Task Force: How to Improve Public Confidence in the Independence of the Judiciary

Since early June 2012, the members of the Judicial Task Force have been examining public confidence in the independence of the judicial system and formulating recommendations for changes designed to restore or enhance public trust in Wisconsin courts. Concerns about public confidence in the judiciary arose after a series of bruising and expensive elections for seats on the Wisconsin Supreme Court. Recent elections appeared to many to have been dominated by special-interest spending on negative attack ads that collectively undermined public perception of the integrity of the candidates and, necessarily, of the court itself. Some believe that the negative aspects of recent supreme court races have bled over into the functioning of the court, leading to polarization, lack of collegiality, and a general decline in the court's prestige and reputation. All these are matters of great concern to the State Bar and, we believe, to the people of Wisconsin.

The members of the task force agreed almost immediately on two principal, closely connected guideposts for our work. First, we did not want to recommend any change to Wisconsin's supreme court selection process whose adoption was not politically feasible. Second, we did not want to author another report that, because it identified problems but offered no concrete way to improve the system, would be doomed to sit on a shelf. Thus, from the outset, the task force focused on making a recommendation that could actually be adopted and that would materially improve the process by which Wisconsin selects supreme court justices.

B. What We Propose

To show the precise change that we advocate and its narrow scope, here is the constitutional provision on election of justices as it now reads and as we propose to amend it.

Current Language

Art. VII, § 4, Wis. Constitution

(1) The supreme court shall have 7 members who shall be known as justices of the supreme court. Justices shall be elected for 10-year terms of office commencing with the August 1 next succeeding the election. Only one justice may be elected in any year. Any 4 justices shall constitute a quorum for the conduct of the court's business.

Proposed New Language

Art. VII, § 4, Wis. Constitution

(1) The supreme court shall have 7 members who shall be known as justices of the supreme court. Justices shall be elected for 16-year terms of office commencing with the August 1 next succeeding the election. Only one justice may be elected in any year. No person shall be elected to the office of justice more than once, but this provision shall not prevent any person who may be holding the office of justice during the term within which this provision becomes operative from being elected to the office of justice for one additional term. Any 4 justices shall constitute a quorum for the conduct of the court's business.

C. Why We Think This Proposal Will Enhance Public Confidence in the Judicial System

In bullet-point form, here is our rationale.

- **Sitting Justices Will Not Become Political Candidates.**

  The independence of supreme court justices will not be undermined by sitting justices becoming political candidates for reelection, required to seek support and approval from individuals and groups with identifiable political perspectives and economic interests that are likely to be affected by the outcome of cases that come before the court.

- **The Proposal Eliminates the Perception that Court Decisions Are Motivated by Concern for Reelection.**

  Supreme court decisions will not be subject to attack or distortion by allegations that justices' votes were motivated by concern for their reelection.

- **Campaigns Are Less Likely to Generate Unfair Attacks on Sitting Justices.**

  Since previously elected incumbents will not be candidates, campaigns will feature fewer attack ads that demean a sitting justice.

- **Collegiality Will Be Structurally Improved.**

  The single extended term promotes collegiality on the court by eliminating the potential that justices will publicly or privately oppose a colleague's reelection. Also, because of the new limit to a single term, more justices will have the opportunity to serve as chief justice.

- **Nonpartisan Elections Are Preserved, and Frequency Is Reduced.**

  The proposal maintains Wisconsin's tradition of nonpartisan election of supreme court justices but reduces the frequency of often politically charged and costly elections.

- **Elections Will Result in Justices New to the Court.**

  Elections will not involve long-term incumbents, so the proposal will result in the periodic and predictable introduction of new justices. The proposed amendment helps to insulate justices from the political pressures of reelection, while avoiding the potentially negative aspects of life terms.

D. What We Learned During Our Deliberations

1. The historical perspective

History informs the judgments of the task force as to both what it proposes and what it does not propose.

Our proposal for a single term of 16 years is based not only on a strong sense that 16 years is long enough, but also on an awareness that the average term of justices over the last half-century has been 13.4 years. (The average is 14.8 years, if the terms of the four justices who resigned mid-term to take federal judicial appointments are not included.) As we will discuss, justices elected under the current system to 10-year terms *are not in fact defeated for re-election*, so the notion that extending the 10-year term to 16 years would make it impossible to get rid of a justice is unfounded. History shows that it is already effectively impossible to defeat an elected incumbent for reelection.

The task force does not propose to replace election with any kind of appointment system. The original 13 states retained the judicial appointment systems inherited from colonial days, replacing the king with either the governor or the legislature as the appointing authority. By the time Wisconsin adopted a constitution in 1848, the popular will demanded the right to elect judges, both as a reform of perceived corrupt judicial appointment practices in the East and as an assurance of democratic government in all three branches. Wisconsin has *always* elected its judges. But from the beginning, we have separated judicial elections from partisan state and county elections, Wis. Const. art. VII, § 9, and Wisconsin judges do not run under party labels. Wis. Stat. § 5.60(1)(ar) ("No party designation may appear on the official ballot.").

In many other states that elected their high courts, the elections became overtly partisan, with judges nominated by party conventions or primaries and running in the general election as Republicans or Democrats. Starting with Missouri in 1940, a number of states adopted judicial retention systems as a remedy for shortcomings in both appointment systems and partisan election systems. The details differ from state to state, but the common feature is that the governor can only appoint from among candidates certified as qualified by a nominally nonpartisan commission, and the person appointed must periodically stand for a retention election, with the ballot question asking whether that justice should be retained in office.

A strongly backed proposal to adopt a retention plan in Wisconsin appeared in the aftermath of the 1967 judicial election, when, for the only time in the last 96 years, a previously elected justice[1] was defeated for re-election. Chief Justice George Currie was part of the 4–3 majority of the court that allowed the Milwaukee Braves to move to Atlanta, his opponent attacked him for his vote, and it was popularly believed that this vote strongly contributed to his defeat.

[1] Since 1855, despite frequent challenges, only one other previously elected justice (in 1917) has ever lost a reelection bid. And only four other incumbents (running for a first term after appointment in 1908, 1946, 1958, and 2008) have been defeated in the last 105 years.

A few years later, in 1971, a blue–ribbon citizens' committee appointed by the governor recommended creation of our current judicial system, with a single trial court, an intermediate appellate court, and the supreme court's jurisdiction made entirely discretionary. The committee also recommended adoption of a modified "Missouri plan" under which the governor could appoint judges found qualified by a nonpartisan commission. A retention election could be compelled after four years.

The appointment and retention proposal fell flat on its face. Widely opposed, notably by organized labor, its inclusion threatened to scuttle the whole reform package, and the appointment and retention plan died in the Legislature. The task force learned a lesson from this history and does not propose to eliminate election of justices.

Finally, although we would prefer never to have an incumbent justice face reelection, that preference must bend to the governor's right to fill vacancies on the court by appointment. Art. VII, § 9. The appointee must, under a constitutional provision that we do not propose to change, face election at the next judicial election when no elected incumbent's term is expiring. Art. VII, §4(1). Both of these provisions satisfy important institutional needs. Because we see no evidence that they are not working, we do not propose to change them. Vacancies on the court must be filled promptly, and gubernatorial appointment serves that need. The infrequency of electoral defeat of a supreme court appointee (only four times in the last 105 years) suggests that the electorate has usually been satisfied with the governor's selection. Lengthening the supreme court term to 16 years from 10 will reduce the frequency of elections and, over time, should make the gap between elections longer than it is now. As a result, appointees under the new system will usually face election within a year or two, thereby furthering our desire to keep a justice's past votes from being campaign fodder during an election.

2. An appointment process followed by retention election is not the answer.

As the task force quickly learned, concerns about judicial integrity and independence are not unique to Wisconsin. In recent years, many states, including neighboring Minnesota and Michigan, have established commissions to recommend ways to improve their high-court selection process. The recommendations from Wisconsin's sister states are set forth in many well-reasoned reports.[2] They largely favor a process in which appointment of justices is followed some years later by elections at which voters weigh in on whether to retain them.

Recent experiences around the country, however, have shown that appointment followed by retention election is not a cure-all for concerns about real or perceived independence of the judiciary. Public perception that state high-court justices are impartial and independent remains at risk when a justice's decision on a divisive legal issue has the potential to create social and political backlash at a retention election. In such circumstances, the retention election can become less a referendum on a justice's legal abilities and integrity and more a vote on the popularity or unpopularity of a particular decision. The task force thought there should be a better way.

[2] These reports are identified in Attachment B, a bibliography of studies, articles, commentaries, and legal decisions considered by the Judicial Task Force.

We acknowledge that the general idea of merit selection has appeal, but we note that few of its advocates discuss the details of the process, especially as they relate to the composition of the merit selection panel and the political influences at work during the retention elections. We conclude that the devil truly is in the details.

Retention elections can easily develop into the same kind of politically charged, special-interest-funded campaigns that the merit selection idea was intended to avoid. Worse, retention election challenges are inherently negative. There is no alternative candidate with a different judicial philosophy or base of experience for opponents to support, so opposition devolves into a direct assault on the sitting justice. Retention elections can become single-issue attacks on a justice without regard for his or her legal acumen and contribution to the justice system.

Of course, a system could be proposed in which there is no retention election and only a lifetime appointment, but such a system would remove completely the opportunity of voters to have input on who serves on our supreme court. In our judgment, a proposal like that would not find broad support in Wisconsin.[3]

We concluded, too, that the merit selection alternative is not politically feasible in Wisconsin. Opposition to any appointment process for justices would come from many corners: (1) those who resist any plan that diminishes the fundamental right to vote in a democratic society, which is a particularly strong tradition in our state; (2) those who might support a governor's discretionary power to appoint but would not support a more circumscribed power to appoint from a list of names chosen by a select commission whose own composition will be viewed by some as politically suspect; and (3) those who are satisfied with the results of our current system and oppose any changes in it for that reason.

Even those who support the use of a merit selection commission generally acknowledge the significant difficulty of creating a constitutional framework for it that does not favor, or seem to favor, one party over the other. Differences over the proper composition of the merit panel would likely paralyze any initiative. In short, we concluded that, for any change to be successful, it had to be perceived as politically neutral. Any proposal to abandon the elective process would not pass that test and would be futile.

Once we concluded that a merit selection alternative would not be politically feasible, we considered other alternatives that would improve the perception of independence and fairness of the court, structurally enhance collegiality, and have a genuine chance of gaining broad political support. For the reasons we explain in this report, we believe a single 16-year elected term for supreme court justices accomplishes these goals.

[3] A chart showing the state-by-state methods for selecting high-court justices is provided as Attachment C.

3. Campaign finance reform is largely outside state control.

There is substantial concern about the huge amounts of money being spent for judicial elections in recent years. Many want the campaign finance system reformed to curb the influence of big money interests. Here is why the task force has chosen not to address this goal.

Any effort to reform campaign financing laws to limit the influence of big money interests will run into the interpretation of the First Amendment expressed in such cases as *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); and *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010). Taken together, these decisions establish that candidates for judicial office may identify themselves as members of a political party, express opinions during their election campaigns on disputed legal and political issues, and engage in campaigns that are largely funded, directly or indirectly and even against the candidates' wishes, by corporations, unions, single-issue organizations, and out-of-state interests. The task force has chosen to be realistic in recognizing what the law of the land provides. Therefore, we have declined to tilt at campaign reform windmills.

4. High-court reelection campaigns come with a heavy price, but they almost never result in an incumbent's defeat.

The fact that only one previously elected justice has been defeated in the last 96 years—and then only when he had the bad luck to come up for reelection shortly after joining the court's decision allowing the Milwaukee Braves to move to Atlanta—is strong evidence that election to an initial 10-year term under our current system effectively insures an unlimited term and that the power of incumbency for sitting justices is nearly absolute.

Although all other reelection campaigns in the last 96 years have been successful, they have come at an increasingly high cost to the candidates, the public, and the court itself. Incumbent justices, elected to serve full time on the court, must still expend tremendous time and energy on their reelection campaigns, seeking support from interest groups and the funding necessary to sustain a multi-media statewide campaign. To the public, campaigning incumbent justices seem like every other partisan political candidate. The very different role that the supreme court plays in our governmental system from the governor and the legislature has become obscured and demeaned by this common perception.

E. Why This Proposal at This Time?

Given Wisconsin's unbroken history since statehood of electing justices by popular vote, the task force concluded that—whatever the merits or drawbacks of a system of appointment to the supreme court—a switch to an appointment process would face insurmountable political obstacles and fail. The task force wanted above all else to recommend something emblematic of the Wisconsin ideal: that is, a real improvement that can garner the support of divergent constituencies and actually become part of Wisconsin's basic law.

The Wisconsin idea that the task force proposes is to amend Article VII, § 4 to create for justices a single term of elected office of 16 years. If a vacancy occurs and the governor appoints someone to fill it, the appointee will retain the seat only by standing for election at the next open spring election and facing whatever candidates emerge to contest the seat.

A constitutional amendment is never a small matter or easy to achieve, but the one that the task force proposes has the virtues of simplicity, even-handedness, and bipartisanship, so its chances of passage should be greatly enhanced. Further, the task force believes that the proposed constitutional amendment would change the dynamics for electing our supreme court justices in significant ways. First, it should enlarge the pool of excellent lawyers and judges who might seek the office, because potential candidates would know that although they would have to live through the trial-by-fire experience of a statewide campaign they would have to do so only once. Second, the candidate who wins election is instantly freed from political pressures that might otherwise work or seem to work to undermine judicial independence. This achieves a huge public benefit. Third, the newly elected justices would know that their time on the court will be lengthy enough to produce a legacy of legal scholarship, thoughtfulness, and collegiality but not so long as to create a lifetime appointment on a factionalized court.

Single 16-year terms for supreme court justices, the task force believes, would create a stable court but not a stagnant one. Moreover, when elected justices no longer face the prospect of gearing up for and engaging in reelection campaigns, the members of the court will lose all reason to lobby, either publicly or privately, for their colleagues' reelection success or defeat. Tensions among members of the court are likely thereby to be reduced and collegiality enhanced.

Another obvious benefit of the proposed constitutional amendment is that there would be fewer elections for the supreme court and, therefore, fewer expensive and debilitating judicial campaigns. This is not an insignificant benefit of the proposal. Campaign spending on judicial elections has skyrocketed in Wisconsin (and other states) in recent years. There were five supreme court elections in Wisconsin between 2007 and 2013 and, for three of them, the amount spent on the campaigns exceeded $5 million. The Butler/Gableman contest in 2008 and the Clifford/Ziegler contest in 2007 each neared $6 million in total campaign spending. By contrast, there were four supreme court elections between 1997 and 2003 and only one of those, the Abrahamson/Rose contest in 1999, exceeded $1 million in total campaign spending.[4]

[4] There are no official sources for these numbers, which come from the Wisconsin Democracy Campaign and the Brennan Center for Justice, but we have no reason to doubt their approximate reliability. They comport with what we observed about the relative intensity of these campaigns.

The task force understands that judicial elections after adoption of this proposal may turn out to be just as expensive and hotly contested as in recent years. But, because a candidate would have to stand for election only once, highly qualified individuals unwilling to subject themselves and their families to serial campaigns of negative advertising might well conclude that service on the court is worth the rough and tumble of a single campaign. If the proposed amendment has the effect of encouraging additional qualified candidates to seek this important post, the amendment will, for that reason alone, have achieved a significant public benefit.

Because the task force thinks that a 16-year nonrenewable term is the single change to supreme court tenure that would have the best long-term effect on the court, the task force has intentionally decided not to tinker around the edges of the current system in other respects. Our proposal does not, therefore, seek to change the constitutional provisions by which the governor fills all vacancies until the next judicial elections. Art. VII, § 9. Thus, an appointed justice would have the advantage of incumbency when running for election, but for only a relatively modest amount of time. The appointed justice would not have such an entrenched position as to dissuade others from coming forward. The short tenure of an appointed justice before facing election also lessens the possibility that a single decision on a divisive social or political issue would consume the campaign and drive the election results.

The proposal likewise does not change the feature of the constitution that allows only one election for justice in any year, a provision designed to promote stability on the court. Art. VII, § 4(1). If a justice appointed to fill a vacancy would otherwise come up for election at the same time that a current term is expiring, filling the seat of the justice whose term is expiring would continue to take precedence, and the appointed justice would not come up for election to his or her single term until the next year when no term is ending. Under the current system, with seven justices serving 10-year terms, end-of-term elections occur every year or two, so an appointed justice can, by virtue of the prohibition on two elections in the same year, accumulate four or five years of incumbency before having to stand for election. The task force expects that, over time, the elections of seven justices for 16-year terms will lead to a new pattern of two or three years between each election. Thus, it should become less likely than it is now that any appointed justice will serve more than a year or two before facing election.

Consistent with its own composition, the task force has strived to be even-handed and nonpartisan. This proposal is not targeted at any incumbent justice and, out of fairness, we do not propose to apply its single-term limit to any incumbent.[5] Amending the Wisconsin Constitution requires passage of the amendment by two successive legislatures, followed by popular vote. Art. XII, § 1. The process takes at least two years and often more. Even in a best-case scenario, the amendment that the task force proposes is unlikely to take effect before 2016. Whether the incumbent justices whose terms expire after adoption would seek a final 16-year term is unknown.

The idea behind proposing a 16-year term is to create a long but not unending period of service during which a talented jurist could make a significant contribution to the development of Wisconsin law. Sixteen years is twice the length of time that a president can serve and is equivalent to four gubernatorial terms. It is, in short, a substantial amount of time in which to develop a legacy

[5] We take our lead on this point – and borrow language – from the 22nd Amendment to the U.S. Constitution.

of scholarly, impartial, and nonpartisan opinions. And it represents a significant commitment to public service.

A person elected to the court would know that he or she would have a fully vested state pension at the end of the 16-year term, with, in many cases, a number of productive years left to pursue interests in government, business, or the private practice of law. Anyone interested in serving on the court could make the other personal calculations that a fixed term creates and factor those calculations into the decision to run. Finally, a 16-year term is in line with the average tenure of most justices during the last 50 years.[6] Therefore, the proposed term length will not be a radical departure from historical norms of service on the court.

In line with its commitment to simplicity in its proposal for a constitutional amendment, the only change the task force proposes would be to Article VII, § 4. That single textual change is shown on page 8 of this report and is repeated in Attachment E. Other constitutional provisions relating to gubernatorial power to make appointments to fill supreme court vacancies would be left unchanged.[7]

The task force considered whether to recommend some check on the governor's appointment power, such as a requirement for senate confirmation or the formation of a bipartisan panel to forward a slate of nominees from which the selection must be made. While there is something to be said for either senate confirmation or select panel input, each would require more cumbersome changes than the simple and straightforward proposal the task force recommends.[8]

Also, the history of gubernatorial appointments in this state does not clearly demonstrate a problem that needs fixing. Many distinguished justices have started their service with gubernatorial appointments. We would expect the governor to appoint a justice who shares his or her political philosophy, but that provides no reason to believe that a governor would appoint someone unqualified for the office. In the highly unlikely event that someone unqualified were appointed, the error could be corrected by the voters during the ensuing election that this proposal leaves in place.

This proposal surely does not solve all concerns with our state's judicial system or even with the supreme court. Nonetheless, the proposal is a big step in the right direction, and it has the virtue of being achievable. We in Wisconsin see problems and try to fix them. The question that the task force members have asked themselves repeatedly during their deliberations is whether what we are suggesting constitutes a material improvement over the current system. We are confident that it does.

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[6] Attachment D lists the justices who have begun their service on the court since 1956 and the length of their service.

[7] Other constitutional provisions relevant to the selection of supreme court justices are also set forth in Attachment E to this report.

[8] The proposal to leave the filling of judicial vacancies in the governor's hands is likewise not partisan. There has been regular turnover in the party holding the governorship over the last 60 years, and there is no way of knowing who the governor will be when this proposal takes effect. Moreover, gubernatorial appointment is itself simple and prompt. Some states requiring legislative or select panel approval of gubernatorial appointments have had to concern themselves with avoiding partisan gridlock and delay at the appointment stage.

While the task force is certainly open to suggestions on how the proposal can be improved, we think there is great merit to our proposal and that the time to move forward with it is now.

This proposal creates the opportunity for the State Bar and Wisconsin lawyers in general to work toward something significant: an improvement in the method of selecting supreme court justices that is both modest and profound at the same time. We urge the Board of Governors to look favorably on the proposed resolution.

Attachment A

Task Force Members

Christine Bremer Muggli

Chris graduated magna cum laude from Loyola University, Chicago and received her J.D. from Loyola University School of Law. She currently practices law in Wausau, Wisconsin, and has branch offices throughout central and northern Wisconsin. Chris is the past-President of the Wisconsin

Association for Justice and has served on the Board of Directors since December of 1991. She is the past-President of the Wisconsin Civil Justice Education Foundation and is currently Chair of the Justice Fund. She has served on the Federal Nominating Commission, as well as the Military Academy Selection Board. She was also appointed to Governor Doyle's Advisory Council on Judicial Selection. She was a delegate to the Democratic National Convention in 2008 and 2012 and served as a member of the Electoral College in 2009 and 2013. She has been elected a member of the Democratic National Committee for the State of Wisconsin. She is a frequent guest on Wisconsin Public Radio. In 2010, Ms. Bremer was awarded the Robert L. Habush Trial Lawyer of the Year by the Wisconsin Association for Justice. Ms. Bremer has repeatedly been named one of the top 25 women lawyers in the state by Super Lawyers. Ms. Bremer also serves on the Board of the Litigation Section of the State Bar of Wisconsin. She is a member of the Development Committee of the Marshfield Clinic, as well as the Vice Chair of the Advisory Board of the Wisconsin Institute for Public Policy & Service of the University of Wisconsin.

Thomas L. Shriner, Jr.

Tom Shriner has practiced with the Milwaukee office of Foley & Lardner LLP for his entire career. He has undergraduate and law degrees from Indiana University (Bloomington) and was a law clerk to Judge John S. Hastings of the Seventh Circuit. Tom has an active trial and appellate practice and has appeared before the Wisconsin Supreme Court many times. He is a fellow of the American College of Trial Lawyers, a former governor of the State Bar, and a past president of the Seventh Circuit Bar Association. Tom is an adjunct professor at Marquette University Law School, teaching civil procedure and federal courts. He is a member of the Wisconsin Judicial Council and of the Board of Curators of the Wisconsin Historical Society and a trustee of Cardinal Stritch University. He has been an active Republican for many years, working on and advising campaigns and candidates.

Catherine M. Rottier

Cathy is a partner at Boardman & Clark LLP in Madison, where she has practiced for over 25 years. She graduated from the University of Wisconsin Law School with honors in 1986. Her practice involves all facets of civil litigation, primarily on the defense side, with a focus on torts and insurance law. Cathy is a member and past chair of the Litigation Section Board of Directors. She also moved up the ranks and served in all officer positions for the Western District Bar Association and Wisconsin Defense Counsel. She is a frequent contributor to State Bar publications and CLE offerings on tort-related topics. In years past, she served as a director for Wisconsin Special Olympics and the Wisconsin Board of Bar Examiners.

Joseph M. Troy, Chair

Joe served as a state Circuit Judge in Outagamie County for 20 years. He was Chief Judge of the 8th Judicial District and as Chair of the Committee of Chief Judges. In 2004, he was chosen Wisconsin Trial Judge of the Year by the American Board of Trial Advocates (ABOTA), which is comprised of an equal number of civil law plaintiff and defense attorneys. In 2007, Joe returned to private practice and is a shareholder with Habush, Habush & Rottier. Joe is on the faculty of the National Judicial College and the Center for Justice and the Rule of Law. He has lectured at the University of Wisconsin Law School, the University of Mississippi Law School and the University of Nagoya Law School (Japan). Joe was Chair of the Public Trust and Confidence Task Force in 2000, sponsored by the State Bar of Wisconsin, the Supreme Court and the Wisconsin League of Women Voters. In 2011, he was awarded the State Bar President's Public Service Award. Joe is currently Chair of the Litigation Section of the State Bar.

Attachment B

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Attachment C

Judicial Selection in the States

Appellate and General Jurisdiction Courts

Initial Selection, Retention, and Term Length

	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
State and Court	**Merit Selection**	**Gubernatorial (G) or Legislative (L) Appointment**	**Non-Partisan Election**	**Partisan Election**		
ALABAMA						
Supreme Court				X	6	Re-election (6 year term)
Court of Civil App.				X	6	Re-election (6 year term)
Court of Criminal App.				X	6	Re-election (6 year term)
Circuit Court				X	6	Re-election (6 year term)
ALASKA						
Supreme Court (10 year term)[1]	X				3	Retention election
Court of Appeals	X				3	Retention election (8 year term)
Superior Court	X				3	Retention election (6 year term)
ARIZONA						
Supreme Court	X				2	Retention election (6 year term)
Court of Appeals	X				2	Retention election (6 year term)
Superior Court (county pop. greater than 250,000)	X				2	Retention election (4 year term)
Superior Court (county pop. less than 250,000)				X	4[2]	Re-election (4 year term)
ARKANSAS						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
CALIFORNIA						
Supreme Court		X(G)			12	Retention election (12 year term)
Courts of Appeal		X(G)			12	Retention election (12 year term)
Superior Court			X		6	Nonpartisan election (6 year term)[3]

1. In a retention election judges run unopposed on the basis of their record.
2. Although party affiliations for judicial candidates are not listed on the general election ballot, candidates are nominated in partisan primary elections.
3. If the election is uncontested, the incumbent's name does not appear on the ballot.

State and Court	APPOINTIVE SYSTEMS: Merit Selection	APPOINTIVE SYSTEMS: Gubernatorial (G) or Legislative (L) Appointment	ELECTIVE SYSTEMS: Non-Partisan Election	ELECTIVE SYSTEMS: Partisan Election	INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
COLORADO						
Supreme Court	X				2	Retention election (10 year term)
Court of Appeals	X				2	Retention election (8 year term)
District Court	X				2	Retention election (6 year term)
CONNECTICUT						
Supreme Court	X				8	Commission reviews incumbent's performance on noncompetitive basis; governor renominates and legislature confirms
Appellate Court	X				8	Same
Superior Court	X				8	Same
DELAWARE[4]						
Supreme Court	X				12	See Footnote 5
Court of Chancery	X				12	See Footnote 5
Superior Court	X				12	See Footnote 5
DISTRICT OF COLUMBIA						
Court of Appeals	X				15	Reappointment by judicial tenure commission[6]
Superior Court	X				15	Reappointment by judicial tenure commission[6]
FLORIDA						
Supreme Court	X				1	Retention election (6 year term)
District Court of Appeal	X				1	Retention election (6 year term)
Circuit Court			X		6	Re-election for additional terms
GEORGIA						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Superior Court			X		4	Re-election for additional terms
HAWAII						
Supreme Court	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)
Intermediate Court of Appeals	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)
Circuit Court and Family Court	X				10	Reappointed to subsequent term by the Judicial Selection Commission (10 year term)

4. Merit selection established by executive order in Delaware, Maine, Maryland, Massachusetts, and New Hampshire. In all other jurisdictions merit selection estab-lished by constitutional or statutory provision.

5. Incumbent reapplies to nominating commission and competes with other applicants for nomination by the governor.The governor may reappoint the incum-bent or another nominee.The senate confirms the appointment.

6. Initial appointment is made by the President of the United States and confirmed by the Senate. Six months prior to the expiration of the term of office, the judge's performance is reviewed by the tenure commission.Those found "Well Qualified" are automatically reappointed. If a judge is found to be "Qualified" the President may nominate the judge for an additional term (subject to Senate confirmation). If the President does not wish to reappoint the judge, the District of Columbia Nomination Commission compiles a new list of candidates.

	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
State and Court	**Merit Selection**	**Gubernatorial (G) or Legislative (L) Appointment**	**Non-Partisan Election**	**Partisan Election**		
IDAHO						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
District Court			X		4	Re-election for additional terms
ILLINOIS						
Supreme Court				X	10	Retention election (10 year term)
Appellate Court				X	10	Retention election (10 year term)
Circuit Court				X	6	Retention election (6 year term)
INDIANA						
Supreme Court	X				2	Retention election (10 year term)
Court of Appeals	X				2	Retention election (10 year term)
Circuit Court				X	6	Re-election for additional terms
Circuit Court (Vanderburgh County)			X		6	Re-election for additional terms
Superior Court				X	6	Re-election for additional terms
Superior Court (Allen County)			X		6	Re-election for additional terms
Superior Court (Lake County)	X[7]				2	Retention election (6 year term)
Superior Court (St. Joseph County)	X				2	Retention election (6 year term)
Superior Court (Vanderburgh County)			X		6	Re-election for additional terms
IOWA						
Supreme Court	X				1	Retention election (8 year term)
Court of Appeals	X				1	Retention election (6 year term)
District Court	X				1	Retention election (6 year term)
KANSAS						
Supreme Court	X				1	Retention election (6 year term)
Court of Appeals		X			1	Retention election (4 year term)
District Court (seventeen districts)	X				1	Retention election (4 year term)
District Court (fourteen districts)				X	4	Re-election for additional terms
KENTUCKY						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Circuit Court			X		8	Re-election for additional terms
LOUISIANA						
Supreme Court				X	10	Re-election for additional terms
Court of Appeals				X	10	Re-election for additional terms
District Court				X	6	Re-election for additional terms

7. Judges of the county division run in partisan elections for 6 year terms then have to be re-elected for additional terms.

	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
State and Court	Merit Selection	Gubernatorial (G) or Legislative (L) Appointment	Non-Partisan Election	Partisan Election		
MAINE[8]						
Supreme Judicial Court subject to legislative confirmation	X				7	Reappointment by governor,
Superior Court subject to legislative confirmation	X				7	Reappointment by governor,
MARYLAND[8]						
Court of Appeals	X				See fn 9	Retention election (10 year term)
Court of Special Appeals	X				See fn 9	Retention election (10 year term)
Circuit Court	X				See fn 9	Nonpartisan election (15 year term)[10]
MASSACHUSETTS[11]						
Supreme Judicial Court	X[12]				to age 70	
Appeals Court	X[12]				to age 70	
Trial Court of Mass.	X[12]				to age 70	
MICHIGAN						
Supreme Court				X[13]	8	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
MINNESOTA						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
District Court			X		6	Re-election for additional terms
MISSISSIPPI						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Chancery Court			X		4	Re-election for additional terms
Circuit Court			X		4	Re-election for additional terms
MISSOURI						
Supreme Court	X				1	Retention election (12 year term)
Court of Appeals	X				1	Retention election (12 year term)
Circuit Court				X	6	Re-election for additional terms
Circuit Court (Jackson, Clay, Platte, Saint Louis, Greene Counties)	X				1	Retention election (6 year term)
MONTANA						
Supreme Court run for retention			X		8	Re-election; unopposed judges
District Court run for retention			X		6	Re-election; unopposed judges
NEBRASKA						
Supreme Court	X				3	Retention election (6 year term)
Court of Appeals	X				3	Retention election (6 year term)
District Court	X				3	Retention election (6 year term)

8. Merit selection established by executive order in Delaware, Maine, Maryland, Massachusetts, and New Hampshire. In all other jurisdictions merit selection established by constitutional or statutory provision.
9. Until the first general election following the expiration of one year from the date of the occurrence of the vacancy.
10. May be challenged by other candidates.
11. Merit selection established by executive order in Delaware, Maine, Maryland, Massachusetts, and New Hampshire. In all other jurisdictions merit selection estab-lished by constitutional or statutory provision.
12. The appointment is subject to approval by an eight-member governor's council.
13. Although party affiliations for Supreme Court candidates are not listed on the general election ballot, candidates are nominated at party conventions.

State and Court	APPOINTIVE SYSTEMS: Merit Selection	APPOINTIVE SYSTEMS: Gubernatorial (G) or Legislative (L) Appointment	ELECTIVE SYSTEMS: Non-Partisan Election	ELECTIVE SYSTEMS: Partisan Election	INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
NEVADA						
Supreme Court			X		6	Re-election for additional terms
District Court			X		6	Re-election for additional terms
NEW HAMPSHIRE[14]						
Supreme Court	X[15]			to	age 70	
Superior Court	X[15]			to	age 70	
NEW JERSEY						
Supreme Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
Appellate Division of Superior Court[16]		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
Superior Court		X(G)			7	Reappointment by governor (to age 70) with advice and consent of the Senate
NEW MEXICO						
Supreme Court				X	8	See Footnote 17
Court of Appeals				X	8	See Footnote 17
District Court				X	6	See Footnote 17
NEW YORK						
Court of Appeals	X				14	See Footnote 18
Appellate Division of the Supreme Court	X				5	Commission reviews and recommends for or against reappointment by governor
Supreme Court				X	14	Re-election for additional terms
County Court				X	10	Re-election for additional terms
NORTH CAROLINA						
Supreme Court			X		8	Re-election for additional terms
Court of Appeals			X		8	Re-election for additional terms
Superior Court			X		8	Re-election for additional terms
NORTH DAKOTA						
Supreme Court			X		10	Re-election for additional terms
District Court			X		6	Re-election for additional terms

14. Merit selection established by executive order in Delaware, Maine, Maryland, Massachusetts, and New Hampshire. In all other jurisdictions merit selection established by constitutional or statutory provision.

15. The governor's nomination is subject to the approval of a five-member executive council.

16. The chief justice of the supreme court assigns superior court judges to serve on the appellate division of the superior court.

17. All vacancies are filled through a merit selection process. At the next general election, the appointee competes in a partisan election to serve the remainder of the unexpired term.The winner runs in a retention election for subsequent terms.

18. Incumbent reapplies to nominating commission and competes with other applicants for nomination to the governor.The governor may reappoint the incumbent or another nominee.The senate confirms the appointment.

State and Court	APPOINTIVE SYSTEMS: Merit Selection	APPOINTIVE SYSTEMS: Gubernatorial (G) or Legislative (L) Appointment	ELECTIVE SYSTEMS: Non-Partisan Election	ELECTIVE SYSTEMS: Partisan Election	INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
OHIO						
Supreme Court				X[19]	6	Re-election for additional terms
Court of Appeals				X[19]	6	Re-election for additional terms
Court of Common Pleas				X[19]	6	Re-election for additional terms
OKLAHOMA						
Supreme Court	X				1	Retention election (6 year term)
Court of Criminal Appeals	X				1	Retention election (6 year term)
Court of Appeals	X				1	Retention election (6 year term)
District Court			X		4	Re-election for additional terms
OREGON						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
Tax Court			X		6	Re-election for additional terms
PENNSYLVANIA						
Supreme Court				X	10	Retention election (10 year term)
Superior Court				X	10	Retention election (10 year term)
Commonwealth Court				X	10	Retention election (10 year term)
Court of Common Pleas				X	10	Retention election (10 year term)
RHODE ISLAND						
Supreme Court	X				Life	
Superior Court	X				Life	
Worker's Compensation Court	X				Life	
SOUTH CAROLINA						
Supreme Court		X (L)[20]			10	Reappointment by legislature
Court of Appeals		X (L)[20]			6	Reappointment by legislature
Circuit Court		X (L)[20]			6	Reappointment by legislature
SOUTH DAKOTA						
Supreme Court	X				3	Retention election (8 year term)
Circuit Court			X		8	Re-election for additional terms

19. Although party affiliations for judicial candidates are not listed on the general election ballot, candidates are nominated in partisan primary elections.

20. South Carolina has a 10 member Judicial Merit Selection Commission that screens judicial candidates and reports the findings to the state's General Assembly. Since 1997, the Assembly is restricted to voting only on those candidates found qualified by the Judicial Merit Selection Commission. However, the nomi-nating commission itself is not far removed from the ultimate appointing body, and cannot be considered to be nonpartisan as control over member nominations is vested in majority party leadership. Although most nominating commissions contain members appointed by the governor or legislature, no other commissions actual-ly contain the governor or current legislators who have final approval over the candidate as voting members of the commission. In contrast, the Judicial Merit Selection Commission in South Carolina contains 6 current members of the General Assembly appointed by the Speaker of the House of Representatives, the Chairman of the Senate Judiciary Committee, and the President Pro Tempore of the Senate. State legislators also choose the remaining 4 members of the Commission who are selected from the general public.

	APPOINTIVE SYSTEMS		ELECTIVE SYSTEMS		INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
State and Court	Merit Selection	Gubernatorial (G) or Legislative (L) Appointment	Non-Partisan Election	Partisan Election		
TENNESSEE						
Supreme Court	X				until next biennial general election	Retention election (8 year term)
Court of Appeals	X				until next biennial general election	Retention election (8 year term)
Court of Criminal Appeals	X				until next biennial general election	Retention election (8 year term)
Chancery Court				X	8	Re-election for additional terms
Criminal Court				X	8	Re-election for additional terms
Circuit Court				X	8	Re-election for additional terms
TEXAS						
Supreme Court				X	6	Re-election for additional terms
Court of Criminal Appeals				X	6	Re-election for additional terms
Court of Appeals				X	6	Re-election for additional terms
District Court				X	4	Re-election for additional terms
UTAH						
Supreme Court	X				First general election	Retention election (10 year term)
Court of Appeals	X					Retention election (6 year term)
District Court	X					Retention election (6 year term)
Juvenile Court	X				3 years after appointment	Retention election (6 year term)
VERMONT						
Supreme Court	X				6	Retained by vote of General Assembly (6 year term)
Superior Court	X				6	Retained by vote of General Assembly (6 year term)
District Court	X				6	Retained by vote of General Assembly (6 year term)
VIRGINIA						
Supreme Court		X(L)			12	Reappointment by legislature
Court of Appeals		X(L)			8	Reappointment by legislature
Circuit Court		X(L)			8	Reappointment by legislature
WASHINGTON						
Supreme Court			X		6	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Superior Court			X		4	Re-election for additional terms
WEST VIRGINIA						
Supreme Court				X	12	Re-election for additional terms
Circuit Court				X	8	Re-election for additional terms

State and Court	APPOINTIVE SYSTEMS: Merit Selection	APPOINTIVE SYSTEMS: Gubernatorial (G) or Legislative (L) Appointment	ELECTIVE SYSTEMS: Non-Partisan Election	ELECTIVE SYSTEMS: Partisan Election	INITIAL TERM OF OFFICE (YEARS)	METHOD OF RETENTION
WISCONSIN						
Supreme Court			X		10	Re-election for additional terms
Court of Appeals			X		6	Re-election for additional terms
Circuit Court			X		6	Re-election for additional terms
WYOMING						
Supreme Court	X				1	Retention election (8 year term)
District Court	X				1	Retention election (6 year term)

Attachment D

Justices Joining Supreme Court Since 1956

Name	Appointment/ Election	Length of Service	Retirement/ Election Loss	Prior Service	Age First Term	Service as Chief Justice	Notes
Emmert L. Wingert	Appointed by Gov. Walter Kohler (1956)	1956-1958 (2 years)	Defeated for election 1958	Private practice (32 years)	57	None	Defeated 1958 by Justice Dieterich
Thomas E. Fairchild	Elected 1956	1957-1966 (10 years)	Resigned 1966	Atty. General; U.S. Atty.	44	None	Elected 1956 and 1966; appointed to 7th Circuit
E. Harold Hallows	Appointed by Gov. Vernon Thompson (1958)	1958-1974 (16 years)	Mandatory retirement[9]	Private practice; Marquette law professor	54	1968-1974 (6 years)	Appointed 1958; elected 1959 and 1969
William H. Dieterich	Elected 1958	1959-1964 (5 years)	Died 1964	Private practice (36 years)	61	None	Defeated appointed Justice Wingert
Myron L. Gordon	Elected 1961	1962-1967 (5 years)	Resigned 1967	Civil and Circuit Judge	43	None	Appointed to Eastern Dist. of Wisconsin
Horace W. Wilkie	Appointed by Gov. Gaylord Nelson (1962)	1962-1976 (14 years)	Died 1976	Private practice; State Senator	45	1974-1976 (2 years)	Appointed 1962; elected 1964 and 1974
Bruce F. Beilfuss	Elected 1963	1964-1983 (19 years)	Retired 1983	District Atty.; Circuit Judge	49	1976-1983 (7 years)	Elected 1963 and 1973; declined to seek reelection 1983

[9] For a time, Wis. Stats. § 41.11(2) (1969-1981) provided a mandatory retirement age of 70 for a supreme court justice. Chapter 41 was repealed by ch. 96, § 31, Laws of Wisconsin (1981), effective January 1, 1982.

Name	Appointment/ Election	Length of Service	Retirement/ Election Loss	Prior Service	Age First Term	Service as Chief Justice	Notes
Nathan S. Heffernan	Appointed by Gov. John Reynolds (1964)	1964-1995 (31 years)	Retired 1995	Dep. Atty. General; U.S. Attorney	43	1983-1995 (12 years)	Appointed 1964; elected 1965, 1975, and 1985; declined to seek reelection 1995
Leo B. Hanley	Appointed by Gov. Warren Knowles (1966)	1966-1978 (12 years)	Retired 1978	Circuit Judge	58	None	Appointed 1966; elected 1968; declined to seek reelection 1978
Connor T. Hansen	Appointed by Gov. Warren Knowles (1967)	1967-1980 (13 years)	Retired 1980	County Judge	54	None	Appointed 1967; elected 1970; declined to seek reelection 1980
Robert W. Hansen	Elected 1967	1968-1978 (10 years)	Retired 1978	District and Circuit Judge	57	None	Only candidate since 1917 to unseat a sitting justice; declined to seek reelection 1977
Roland B. Day	Appointed by Gov. Patrick Lucey (1974)	1974-1996 (22 years)	Retired 1996	Private practice (24 years)	55	1995-1996 (1 year)	Appointed 1974; elected 1976 and 1986; declined to seek reelection 1996
Shirley Abrahamson	Appointed by Gov. Patrick Lucey (1976)	1976 - present	N/A	Private practice; U.W. law professor	43	1996-date	Appointed 1976; elected 1979, 1989, 1999, and 2009; term expires 2019

Name	Appointment/ Election	Length of Service	Retirement/ Election Loss	Prior Service	Age First Term	Service as Chief Justice	Notes
William G. Callow	Elected 1977	1977-1992 (15 years)	Retired 1992	County Judge	56	None	Elected 1977 and 1987; resigned midterm 1992
John L. Coffey	Elected 1977	1978-1981 (3 years)	Resigned 1981	Circuit Judge	56	None	Appointed to 7th Circuit
Donald W Steinmetz	Elected 1980	1980-1999 (19 years)	Retired 1999	County and Circuit Judge	56	None	Elected 1980 and 1990; resigned midterm 1999
Louis J. Ceci	Appointed by Gov. Lee Dreyfus (1982)	1982-1993 (11 years)	Retired 1993	State Representative; County and Circuit Judge	55	None	Elected 1984; resigned midterm 1993
William A. Bablitch	Elected 1983	1983-2003 (20 years)	Retired 2003	District atty.; State Senator	42	None	Elected 1983 and 1993; declined to seek reelection 2003
Jon P. Wilcox	Appointed by Gov. Tommy Thompson (1992)	1992-2007 (15 years)	Retired 2007	State Representative; Circuit Judge	56	None	Appointed 1992; elected 1997; declined to seek reelection 2007
Janine P. Geske	Appointed by Gov. Tommy Thompson (1993)	1993-1998 (5 years)	Retired 1998	Circuit Judge	44	None	Appointed 1993; elected 1994; resigned midterm 1998
Ann Walsh Bradley	Elected 1995	1995 - present	N/A	Circuit Judge	45	None	Elected 1995 and 2005; term expires 2015
N. Patrick Crooks	Elected 1996	1996 - present	N/A	Circuit Judge	58	None	Elected 1996 and 2006; term expires 2016

Name	Appointment/ Election	Length of Service	Retirement/ Election Loss	Prior Service	Age First Term	Service as Chief Justice	Notes
David T. Prosser, Jr.	Appointed by Gov. Tommy Thompson (1998)	1998-present	N/A	District Atty.; State Representative; Tax Appeals Commissioner	56	None	Elected 2001 and 2011; term expires 2021
Diane S. Sykes	Appointed by Gov. Tommy Thompson (1999)	1999-2004 (5 years)	Resigned 2004	Circuit Judge	42	None	Appointed 1999; elected 2000; appointed to 7th Circuit 2004
Patience D. Roggensack	Elected 2003	2003-present	N/A	Court of Appeals Judge	63	None	Elected 2003 and 2013; term expires 2023
Louis B. Butler, Jr.	Appointed by Gov. Jim Doyle (2004)	2004-2008 (4 years)	Defeated for election 2008	Municipal and Circuit Judge	52	None	Defeated 2008 by Justice Gableman
Annette K. Ziegler	Elected 2007	2007-present	N/A	Circuit Judge	43	None	Elected 2007; term expires 2017
Michael J. Gableman	Elected 2008	2008-present	N/A	Circuit Judge	42	None	Elected 2008; term expires 2018

Attachment E

RELEVANT PROVISIONS OF WISCONSIN CONSTITUTION

Current Language

Art. VII, § 4, Wis. Constitution

(1) The supreme court shall have 7 members who shall be known as justices of the supreme court. Justices shall be elected for 10-year terms of office commencing with the August 1 next succeeding the election. Only one justice may be elected in any year. Any 4 justices shall constitute a quorum for the conduct of the court's business.

Proposed New Language

Art. VII, § 4, Wis. Constitution

(1) The supreme court shall have 7 members who shall be known as justices of the supreme court. Justices shall be elected for 16-year terms of office commencing with the August 1 next succeeding the election. Only one justice may be elected in any year. No person shall be elected to the office of justice more than once, but this provision shall not prevent any person who may be holding the office of justice during the term within which this provision becomes operative from being elected to the office of justice for one additional term. Any 4 justices shall constitute a quorum for the conduct of the court's business.

Other Relevant Constitutional Provisions Which Would Not Be Changed

Art. VII, § 9, Wis. Constitution

When a vacancy occurs in the office of justice of the supreme court or judge of any court of record, the vacancy shall be filled by appointment by the governor, which shall continue until a successor is elected and qualified. There shall be no election for a justice or judge at the partisan general election for state or county officers, nor within 30 days either before or after such election.

Art. VII, § 10(1), Wis. Constitution

No justice of the supreme court or judge of any court of record shall hold any other office of public trust, except a judicial office, during the term for which elected. No person shall be eligible to the office of judge who shall not, at the time of election or appointment, be a qualified elector within the jurisdiction for which chosen.

Art. VII, § 24, Wis. Constitution

(1) To be eligible for the office of supreme court justice or judge of any court of record, a person must be an attorney licensed to practice in this state and have been so licensed for 5 years immediately prior to election or appointment.

(2) Unless assigned temporary service under subsection (3), no person may serve as a supreme court justice or judge of a court of record beyond the July 31 following the date on which such person attains that age, of not less than 70 years, which the legislature shall prescribe by law.[10]

(3) A person who has served as a supreme court justice or judge of a court of record may, as provided by law, serve as a judge of any court of record except the supreme court on a temporary basis if assigned by the chief justice of the supreme court.

[10] For about the last 30 years, the legislature has not prescribed a mandatory retirement age for supreme court justices.