

Pruning Wisconsin's Judicial Branch: Pending Referendum And Legislation

Hannah C. Dugan Serjeant's Inn Milwaukee, WI January 21, 2015

A. Three current legislative efforts affecting the Wisconsin Judiciary, and one former one.

- 1) Spring 2015 Referendum on Election of Chief Justice
- 2) Spring 2015 Legislation on Mandatory Retirement Age of Wisconsin state justices/judges.
- 3) Court's budget for 2015-2017

B. Spring 2015 Referendum on Election of Chief Justice

- 1) Process: Because it is a constitutional amendment, needs to pass in two sessions and sent to voters as a referendum to change the Wisconsin Constitution

Proposed in 2011 but did not pass legislature
Proposed in 2013 and passed both houses on partisan votes
Proposed immediately in January 2015 new session and passed in the Assembly on January 16, 2015 and Senate on January 20, 2015

Needed to be voted in the second round by January 27, 2015 to appear on the April 2015 ballot

- 2) PROPOSED CONSTITUTIONAL AMENDMENT

SECTION 1. Section 4 (2) of article VII of the constitution is amended to read:
[Article VII] Section 4 (2) ~~The justice having been longest a continuous member of said court, or in case 2 or more such justices shall have served for the same length of time, the justice whose term first expires, shall be the chief justice. The~~ chief justice of the supreme court shall be elected for a term of 2 years by a majority of the justices then serving on the court. The justice so designated as chief justice may, irrevocably, decline to serve as chief justice or resign as chief justice but continue to serve as a justice of the supreme court.

- 3) BALLOT REFERENDUM

QUESTION 1: "Election of chief justice. Shall section 4 (2) of article VII of the constitution be amended to direct that a chief justice of the supreme court shall be elected for a two-year term by a majority of the justices then serving on the court?"

- 4) History

1. For 126 years Wisconsin chief justice selected by seniority.
 2. Main duties are:
 - a. Justice's work of hearing cases, writing opinions, etc.
 - b. Head Administrator of the Court System
 - c. Preparing and presenting the biennial budget of the court system
 3. Court system completely overhauled in 1977, effective 1978 via constitutional changes. However, despite major changes to court processes, no change to the selection of the chief justice.
- 5) Initiative Sen. Tom Tiffany (R-Hazelhurst) and Rep. Rob Hutton (R-Brookfield) say, "it's a common-sense approach to running the court." Milwaukee Journal Sentinel January 21, 2015.

Wilcox Former Justice Jon Wilcox testified to lawmakers that the change would make the court more collegial and transparent. "It's sort of like the Golden Rule," he said at the time. "If everybody behaves, maybe someday they get to be chief justice." Milwaukee Journal Sentinel January 21, 2015.

Marquette University Law School professor Janine Geske — a former justice — said that lawmakers shouldn't rush to change the state's charter based on objections to Abrahamson. "For us to amend that document because some are unhappy with the style of a particular justice is a terrible mistake." Milwaukee Journal Sentinel January 21, 2015.

- a. Rationales for the change as presented by Rob Hutton- (R) Brookfield
 - 1) Current system outdated
 - 2) Allowing justice to choose own leader is more democratic
 - 3) Introduces more collaboration and cohesion and would promote collegiality
- b. Reasons for no change
 - 1) 125 years without reason to change
 - 2) Seniority allows leaders to gain experience and knowledge in the job and its demands over time
 - c) two year term will not abate the alleged and actual discord, infighting and non-partisanship
 - d) Every two years is too frequent
 - e) Partisan, political motivation – ad hominem attack on current chief

6) Evaluation of arguments

- a. Current system outdated – no substantiation; review of states’ chief justice processes selection shows no consistency among what is a “current” or “contemporary” process. (Attachment A)
- b. Allowing justice to choose own leader is more democratic – no proof and voters returning a longstanding justice is the core of democracy.
- c. Introduces more collaboration and cohesion rather than promote collegiality no substantiation; introduces judicial popularity at the cost of judicial independence and impartiality.
- d. 125 years without reason to change - not changed in 1977 no immediacy to change it now. However, changes occurring in other states suggest political and partisan reasons
- e) seniority allows for leaders to gain experience and knowledge in the job and its demands over time – issue here is that current chief justice is longest-standing at 31 years so only legislative coup to change the senior justice
- f) two year term will not abate the alleged and actual discord, infighting and non-partisanship- see Attachment A. See above argument about seniority. Allows for partisanship and politics to enter— no reason to overturn every two years because as currently operating, there is no real influence or power advantage. Allegedly, justices in the majority are blocked from administrative rule making but no substantiation provided.
- g) Every two years is too frequent. See attachment A
- h) partisan, political motivation – ad hominem –
3 proposed amendments would have the implementation of the constitutional amendment not be effective until the current chief justice’s elected term is ended
all 3 proposed amendments voted down on partisan votes. See attachment B.

7) Other concerns

Procedural and Substantive Due process: e.g., justice salary differential, justice term and voter return of chief justice in 2009- interference. 5th and 14th Amendments
Separation of powers issue –not a strong argument at the state level.
Legislature micromanaging the court.
Independent judiciary at risk-- Ad hominem legislation
Current partisan cases pending—John Doe probe e.g.

B. Legislation on Mandatory Retirement Age of Wisconsin state justices/judges.

1. Authority for legislation

Wisconsin Constitution Article VII, Section 24 (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.

2. State Rep. Dean Knudson, R-Hudson plans to introduce a bill in the upcoming legislative session setting the mandatory retirement age at 75.

Knudson said his plan isn't aimed at Abrahamson.

"To me, this isn't about people. It isn't about the job that anyone's doing. It's about respecting the will of the people and the oath that we all take to the (U.S.) Constitution" December 1, 2014 Wisconsin State Journal

3. History

a. 1978 Court system overhaul changed the Wisconsin Constitution
Provided minimum age of 70
Provided legislature to pass legislation regarding any mandatory retirement age.

b. 37 years nothing has happened on the mandatory age front.

c. At issue:

Why now?

What's the best age?

Affects all judges, what about other judicial officers such as Commissioners?

Was it "unconstitutional" for the previous legislatures to fail to act?

Whose ox gets gored?

Ages Of Current State Supreme Court Justices:

Shirley Abrahamson: Age 81 (Dec. 17, 1933)

Patrick Crooks: Age 76 (May 16, 1938)

Patience Roggensack: Age 74 (July 7, 1940)

David Prosser: Age 72 (Dec. 24, 1942)

Ann Walsh Bradley: Age 64 (July 5, 1950)

Annette Ziegler: Age 50 (March 6, 1964)

Michael Gableman: Age 48 (Sept. 18, 1966)

What are other states doing about mandatory retirement ages?

If implemented what effect on voter rights and current voter determinations?

What are the implications of possible violations of due process rights of judges with respect to term completion/salary loss?

See attachments

C. Court budget

1. The Wisconsin court system submitted its **2015-17** state budget request to the governor's budget office on Oct. 1, 2014.

“The request advances a commitment to the people of Wisconsin to ensure that the Wisconsin courts have the resources necessary to meet the constitutional obligations of the judiciary” Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson.

2. The budget would provide an additional \$8.6 million annually to the county payment programs to restore the level of state funding to the circuit courts that existed 15 years ago, the time of the last increase to the payment programs.

Counties have increased their share of court funding over the years, and state funding has not kept up.

3. The budget request is designed to help continue the court system's focus on innovative approaches to enhancing public safety, reducing recidivism and addressing underlying issues, e.g. drug courts, mental health courts.

- a. The budget includes state funding for a statewide problem-solving courts coordinator to continue the work being done by a temporary grant-funded position that will end in June 2015. The statewide coordinator provides assistance not only to the court system as a whole, but to the counties and judges using treatment courts, state agencies, and the statewide Criminal Justice Coordinating Council. In addition to Supreme Court support, the Legislative Council's Study Committee on Problem-Solving Courts voted to recommend that permanent state funding be provided for this statewide coordinator position.

- b. The budget request also includes \$2.1 million start-up funding for two years to implement eFiling throughout the circuit courts. As of Oct. 24, 2014 Wisconsin circuit courts provide attorneys and *pro se* litigants with the ability to electronically file and receive court documents for certain case types. This budget item would expand eFiling to all circuit courts for all types of cases, and would provide judges, clerks of court, attorneys and litigants a more efficient, affordable and convenient system.

- c. The Budget includes requests for funds to redesign systems to improve court interpreter services. Specifically a two-year pilot project in three counties that would establish a centralized interpreter station offering centralized scheduling and video and telephone conferencing interpreter services.

4. The budget request also seeks increased compensation for judges to bring their salaries more in line with other Midwest states. Additionally, the budget request calls for the creation of a Wisconsin Judicial Compensation Commission to independently assess and recommend judicial salaries to be set by the state.

5. 2013 biennium budget
 - a. The court system's budget was slashed by \$5 million dollars.
 - b. A 2013 proposed biennium budget included the following:
 1. Proposal that the court system be included in the state's Discretionary Merit Compensation system that was created to give executive branch employees access to pay raises for merit, equity and retention.
 2. Proposed increases to judicial compensation, with judges' salaries be tied to the national average.
 3. Both proposals were denied. Adjusted for inflation, increased contributions to health care etc, the salaries are comparable to the late 1980's, nationally.