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Briefly: Electing justice: How to judge judges

Contested judicial elections generally yield uninformed votes

By: Eric J. Magnuson ⚑ December 7, 2022

Last month's elections were hotly contested, suspenseful, and surprising in many respects. There is one thing of which I am certain: We are all extremely happy that they are behind us, and that at least for a while we will not be deluged with campaign ads.

But one election that got almost no attention may have illustrated a significant issue for the public in future elections. And it deserves some thought and discussion.

There were 105 judges on the ballot, ranging from Minnesota Supreme Court justices to Minnesota Court of Appeals judges to district court judges across the state. Those seats were on the ballot by operation of law — every sitting judge must stand for reelection from time to time regardless of whether they have an opponent.

Most voters are understandably a bit confused when they turn over the ballot (if they know to do that) and see a long list of judicial candidates with no opposition. Many choose to skip that part of the ballot. While a sitting judge with no opponent generally gets about 99% of the vote, the total number of votes cast for a statewide judicial office is usually significantly smaller than the total number of votes in the contested nonjudicial elections. This year, roughly 2.5 million votes were cast for the candidates for governor. Only 1.4 million votes were cast for the lone Minnesota Supreme Court seat on the ballot. Justice Gordon Moore had no opponent.

So why am I writing about this apparent anomaly? Well, there was one contested judicial election in the entire state this past November. Charles Webber, a sitting district court judge in the First Judicial District drew an opponent. When election night was over, Weber had received 55% of the vote and his challenger 45%. But that's not the story that needs to be told.

Webber is an exceptional trial court judge. Webber holds a bachelor's degree from the University of Minnesota and a J.D. from the University of Chicago Law School. A lawyer with over three decades of experience, Webber was first appointed to the bench by Gov. Tim Walz in April 2021 to fill a vacancy. At the time of his appointment, he was a partner at Faegre Drinker Biddle & Reath LLP, one of the premier law firms in the country. Webber had a well-established track record as a trial lawyer and brought a wealth of experience to the trial bench. He was a first-rate choice.

His opponent in the election was Matthew Hanson, a Prior Lake attorney. Hanson said he decided to challenge Webber in an effort to keep the judiciary independent by offering voters a choice in their judicial elections. Laudable. But what choice did he offer?

Hanson is a fairly recent law school graduate. After law school, he worked with Thomson Reuters in Eagan, Minnesota, as a reference attorney supporting legal research through WestLaw. He then worked with a trust company in St. Paul as a "Wealth Management Counsel Associate," working with trusts. Most recently he worked with a small law firm in Minneapolis doing commercial litigation. None of his campaign materials indicated that he had ever tried a case.

I spent many years chairing the Judicial Selection Commission, a group that makes recommendations for judicial appointments to the trial and appellate benches. The nonpartisan Commission is appointed by the sitting governor and the chief justice of the Minnesota Supreme Court. The commission accepts applications to fill judicial openings and makes recommendations to the governor. The members of the commission spend hours reviewing the application materials, speaking with references provided by the candidates, and talking to judges and other lawyers who are familiar with the candidate's work and reputation. The commission then interviews applicants, questioning them carefully about their experience and motivation for seeking judicial office. Only after that exhaustive process is completed does the commission recommend three to five candidates to the governor for consideration and final appointment. The process ensures that the governor has the opportunity to make a choice from highly qualified applicants.

There is no comparable process for vetting candidates to throw their hat into the ring for judicial election. Anyone, no matter what their qualifications, may run against an incumbent judge.

So consider again the election for Judge Webber's seat. Webber had gone through the judicial selection process, and had been fully vetted for the job. Hanson had not. He lacked any of the experience that would have made him a viable candidate in the eyes of the Judicial Selection Commission. In fact, it appears that he had only the bare minimum credentials required to be a judge — he had graduated from law school. Is that the kind of person the citizens of Minnesota should entrust to decide their most important legal affairs, including divorce, contracting real estate disputes, and criminal matters that could end up in lengthy prison sentences? Hardly.

So why did he get 45% of the vote? First and foremost, the voters really had no idea who he was. All they had was his name, and the fact that he was running against an incumbent. The most likely explanation for his showing was that 45% of the voters thought that because Webber had drawn an opponent, he must've done something to deserve it. Kathryn Pearson, professor of political science at the University of Minnesota, discussed the upcoming elections on KSTP.com on the morning of Election Day. When asked to comment about judicial elections, Professor Pearson said that the public had to rely on candidates to run against sitting judges "who are not doing a good job." With all due respect to the professor, her comment was both ill-informed and in fact probably harmful. Webber was not doing a bad job — in fact, he was doing a great job. And even his opponent never claimed to the contrary — he ran just to give the voters a "choice."

Webber was not alone in seeing his opponent get a significant share of the votes despite a serious lack of qualifications for the job. In 2016, sitting Justice Natalie Hudson got 59% of the vote while her opponent, Michelle MacDonald, got 41% despite pending questions about whether MacDonald should keep her law license because of misconduct. MacDonald ran again in 2018 against Justice Margaret Chutich and got 44% of the vote despite having her license suspended for 60 days and serving a two-year probation for professional misconduct. In 2020 she ran against Justice Paul Thissen, and again garnered nearly 41% of the vote; in

2021 MacDonald's license was indefinitely suspended for, among other things, knowingly making false statements impugning the integrity of a sitting judge.

What kind of choice is it when the voters have no real information about the merits of a judicial challenge? The answer is "not much."

Of course, this could all be addressed if Minnesotans would amend the state Constitution to provide for retention elections. That's an idea that has been around for a long time. See Elizabeth Stawicki, *Minnesota should change the way it chooses its judges, panel says*, <https://www.mprnews.org/story/2007/02/20/judges>. And it is something about which I have written more than once in the past. See *Electing Justice: Judicial Contests Raise Questions*, Minnesota Lawyer November 17, 2016; *Electing Justice: Minimize Politics in Judge Selection*, Minnesota Lawyer October 12, 2020. So why another article?

It's a better way to choose our judges, both in terms of providing voters with meaningful information about the sitting judge, and in reducing the amount of time and energy that sitting judges now spend in running against an unknown candidate.

In retention elections, a nonpartisan committee would evaluate the performance of the sitting judge and make a recommendation to the public as to whether the judge is qualified or unqualified to continue in the position. Unlike the current system, retention elections would give the voters a real choice with concrete information about the judge up for retention. They would not be required to take what is essentially a stab in the dark in voting for a judicial challenger.

Judge Webber took his challenger seriously and spent a lot of time meeting with the public, lawyers, and other supporters to explain his service and his qualifications. His challenger didn't take even those steps. Campaigning unquestionably came at a personal cost to Judge Webber. It took his time and energy on top of discharging his duties as a judge. To his credit, he seems to have put in the extra time needed to make sure that the campaigning he had to do did not affect his performance as a judge.

Minnesota is justifiably proud of its highly respected judiciary. But to subject sitting judges to judicial elections with no meaningful information upon which the public can make an informed decision is in the best interests of no one. Hopefully, as we reassess where we are in our political system, this is a problem that we can come together to address for future elections.

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