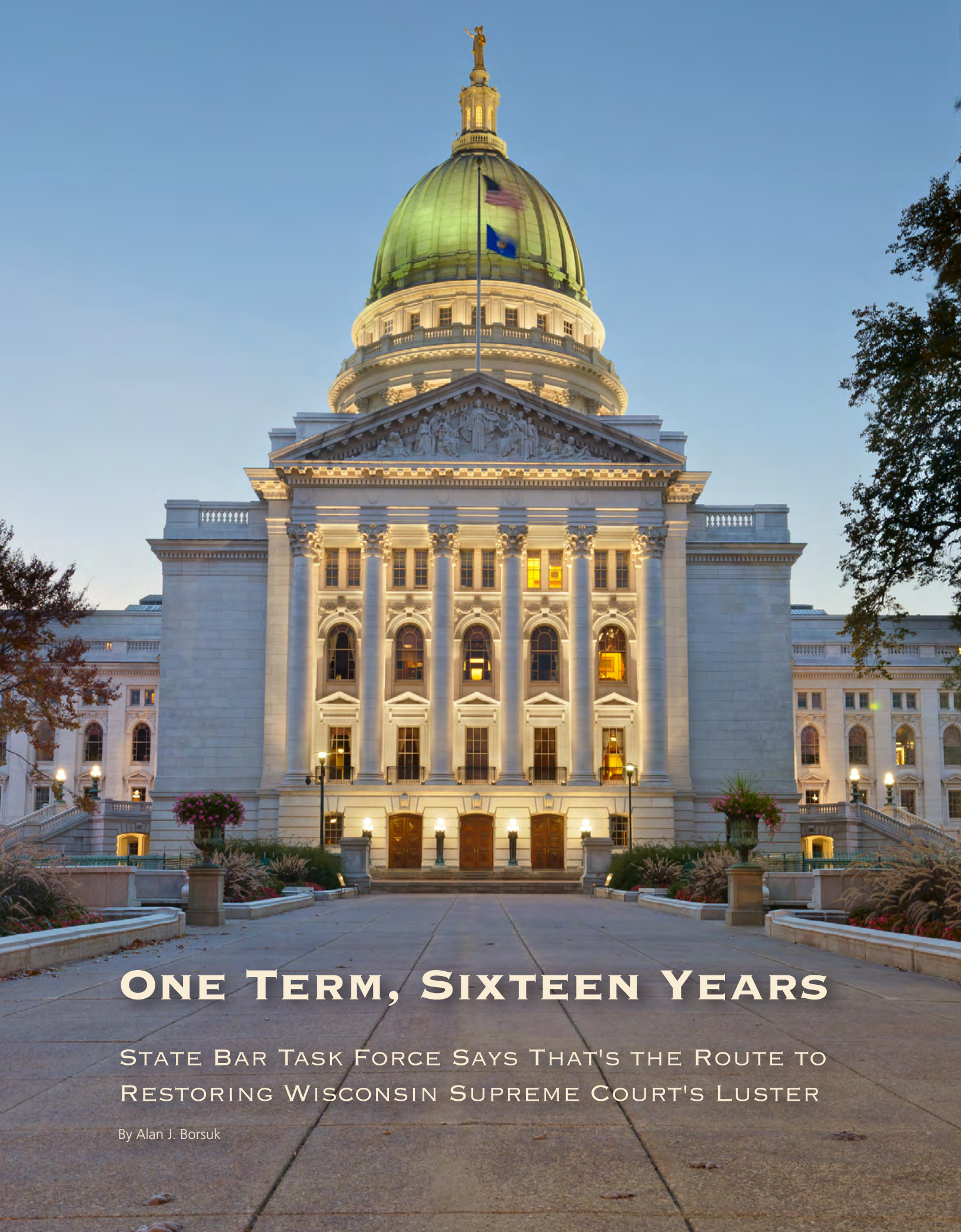

One Term, Sixteen Years

State Bar Task Force Says That's the Route to Restoring Wisconsin Supreme Court's Luster

By Alan J. Borsuk

Christine Bremer Muggli says, "I wouldn't be a plaintiff's personal injury lawyer if I weren't a hopeless optimist." That degree of optimism may be needed in pushing a proposal that the State Bar of Wisconsin has endorsed and which Bremer Muggli helped draft.

The proposal would amend Wisconsin's Constitution so that justices of the Supreme Court would serve 16-year terms, with no possibility of reelection. The plan calls for the seven justices to continue to be picked in statewide elections but would replace the system of justices serving 10-year terms—and as many as they win—that Wisconsin has used during most of its history.

Proponents of the idea say that it would allow justices to focus exclusively on their work, brushing off political considerations. That would go far toward depoliticizing the high court and improving its standing in the eyes of the legal community and the people of Wisconsin.

"It's such a good proposal, and it makes such sense," said Bremer Muggli. "It could have really profound influence on the way our courts are put together in the future." A four-member task force of the State Bar of Wisconsin agreed on the plan unanimously, and the board of governors of the state bar endorsed it by an overwhelming majority.

But will it fly politically? That seems to be the biggest question facing the idea. Critics suggest that it will not gain ground with the Wisconsin Legislature or the public. Debate about the merits of the idea has been muted thus far, but it could become vigorous if the proposal begins to gain momentum. At the earliest, that will be in spring 2015.

But the past and present of the proposal should be described before the future is considered.

Politics, Controversy, and the Declining Court Image

Divisions within the state Supreme Court and the intense politics around court elections are well known. As the report of the bar's task force summarized, "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 the public perception of the integrity of the candidates and, necessarily, of the court itself." The report also referred to "lack of collegiality" within the court.

Leaders of the bar appointed four respected lawyers to come up with proposals "to improve public confidence in the independence of the judiciary." By intention, two of those appointed were generally considered conservative, two liberal. The task force was chaired by Joseph Troy, a former Outagamie County judge now a partner at Habush Habush & Rottier. The other members were Bremer Muggli, of Bremer & Trollop in Wausau; Catherine Rottier, a partner at Boardman & Clark in Madison; and Thomas Shriner, a partner at Foley & Lardner in Milwaukee and adjunct professor of law at Marquette University.

The task force began work in June 2012, with the four members agreeing quickly that they wanted to recommend only ideas that were politically feasible. With that in mind, they agreed to drop from consideration two ideas that have been advocated in recent years: merit appointment of justices and campaign-finance reform.

Wisconsin has elected judges and justices since its founding in 1848, and there is no realistic prospect of legislative approval of eliminating judicial elections, the task force members said.

The members also had concerns about the value of merit selection, which generally involves a nonpartisan panel's recommending qualified candidates and a governor's choosing among them. Plans in other states generally include provision for "retention elections" in which a justice faces voters after serving a period on the court, without an opposition candidate and with a ballot that allows only an up or down vote. The task force's report said, "The problem is that retention elections, with increasing frequency, have developed the same kind of politically charged, special-interest-funded campaigns that the merit selection process was designed to avoid." With no opponent, "challenges are inherently negative and often driven by single-issue special-interest groups."

As for campaign finance, the group concluded, "Many proposed changes are simply constitutionally prohibited." It is a fact that Supreme Court campaigns have seen a huge increase in spending, and there is wide agreement that the dignity of court races has suffered. But the task force said U.S. Supreme Court decisions that shape much of the matter are beyond the influence of the Wisconsin Legislature.

What emerged is the proposal for a single, 16-year term. The four task force members came to the conclusion that it would go far to reduce the intensity of politicking around justices. "[W]e 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," their report said. Under the plan, one justice would be elected in spring elections generally every two years.

During an "On the Issues with Mike Gousha" program at Marquette Law School on November 19, 2013, and in subsequent interviews, the four task force members argued that, without the option of running for reelection, justices would not have to worry about future support from major campaign donors. They suggested that the structure could tamp down spending because donors would feel less incentive to spend money on a justice who, once seated, might not follow the course donors supported. Justices "wouldn't be looking over their shoulders at big donors for next elections," Shriner said. It would mean for a justice that "you can just spend your time being a judge."

Troy said that the founders of the federal system made judgeships lifetime appointments so judges would be immune to political pressure. The 16-year term, he said, would allow election of justices while providing the longevity on the bench that would encourage judicial independence. Troy said a term longer than 10 years is not inherently troubling. The average service of Supreme Court justices in Wisconsin has been about 14 years, Troy said, so the 16-year terms wouldn't change that overall reality by much.

The task force report said that reelection campaigns at times have increased tensions within the court, with some justices openly or privately opposing the reelections of others. "We want a court that operates without the factions and frictions that can result from opposing a colleague's reelection bid," the report said. The single-term provision "will remove the most powerful force interfering with collegiality on the court: the potential for factions developing over the reelection of a fellow justice."

Furthermore, the report explained, even with the recent rounds of heated elections, it is unusual for a justice seeking a new term to fail in the effort. In fact, only once in almost a century has a previously elected justice been defeated: In 1967, Chief Justice George Currie lost his reelection bid, a year after he voted with the majority in a decision that allowed the Milwaukee Braves baseball team to move to Atlanta. The other few instances in this long period of an incumbent's falling short have involved justices appointed to fill a vacancy and thus with only relatively short tenures. In short, the power of incumbency is strong, and the power of previous election is even stronger—some considerable evidence, in the estimation of the task force, that there is not much accountability in the election process.

The Other Proposed Amendment: How the Chief Justice Is Picked

The idea of a single, 16-year term is being readied for consideration while another idea for changing the way the Supreme Court operates is advancing. That proposal calls for the majority of justices every other year to elect who will be the chief justice. It would replace the practice in place in Wisconsin since the 19th century in which the most senior justice is the chief.

The chief-justice-selection plan is described by proponents as nonpartisan. But there is no question that it has attracted strong support from Republicans and almost no support from Democrats. Why the partisan divide? Partisan perspectives on the current chief justice, Shirley Abrahamson, provide a giant clue. Abrahamson

State bar task force members Joseph Troy, Catherine Rottier, Thomas Shriner, and Christine Bremer Muggli were panelists for "On the Issues with Mike Gousha" at Marquette Law School.

has been on the court since 1976 and, as the justice with the most seniority, has been chief since 1996. She is regarded as a powerful figure on the liberal side of the court, with a majority of four justices on the conservative side. As things stand now, if the chief were selected by majority vote, it is all but certain that one of the conservatives would be chief.

To amend Wisconsin's Constitution, the state assembly and senate must each approve the amendment in two consecutive legislatures. Then the amendment must win a statewide referendum vote. The chief-justice amendment was approved in both houses in 2013. Backers hope to have it approved by each house early enough in the 2015 legislative session to go to voters in 2015.

Troy said that the two proposed amendments are not incompatible. "One does not in any way change the other. Both could be passed," he said. He added, "We do like to explain to supporters of that plan, if our plan were adopted, probably that revision wouldn't be necessary." For under the single-term proposal, whichever process were used for the selection, it would be unlikely anyone would serve as chief justice more than about a half-dozen years, at the outside.

Rottier said, "I think ours is a more fundamental and groundbreaking response" than the chief-justice amendment.

Nonetheless, it may prove relevant politically that the chief-justice-selection amendment has already been approved the first time by the legislature, and that it has strong support from the current majority party.

A Nonpolitical Idea in a Political World

Rottier said that some people have said the single-term proposal is too simple. "But that's the beauty of it," she said. All four task force members said a virtue of the plan is that it does not benefit or have greater appeal to either the left or right politically. "It is a good-government idea," Rottier said.

But if the beauty of the plan is its nonpartisan nature, the reality is that, if it is to gain life, it will need to attract support in the highly partisan arena of the legislature, where almost everything seems to advance or fail along party lines.

As Shriner put it, "How do you get a movement going among politicians to do something that isn't political?"

Early indications are that it won't be easy. "It's just a nonstarter politically," said Michael McCabe, executive director of the Wisconsin Democracy Campaign, a nonprofit organization that favors campaign reform. "I don't think there's a realistic possibility that it can gain traction really on either side in the Capitol." Republicans, he suggested, are generally happy with the way court elections have turned out in recent years, and Democrats have focused their interest on public financing of races.

On the political forecast, Richard M. Esenberg, founder, president, and general counsel for the Wisconsin Institute for Law & Liberty, a nonprofit generally associated with conservative legal causes, agreed. "I just think it's going to be really difficult" to attract support, Esenberg said.

For different reasons, McCabe and Esenberg both were critical of the proposal on its merits.

Esenberg said, "The evidence that justices are being influenced by reelection prospects isn't particularly strong. And the theory that reelection causes discord within the court—I'm not convinced that is a very strong argument." He added, "The thing that troubles me about it is if you think that judges should be elected because you believe, in some sense, that holds them accountable, you've lost that accountability [with this plan]. Sixteen years is an awfully long period of time."

McCabe objected to the one-term limit on justices, saying, "We have term limits; they're called elections." He also did not think that the proposal would reduce the intensity of politics or the amount of spending in Supreme Court elections. Candidates for the court would still have to raise large sums, and partisan intensity might even increase because of the single-term element, McCabe said.

The earliest that the proposal will be placed before the legislature is 2015. If passed then, it could come back in 2017, with a statewide vote possible later in 2017. But action in 2015 may be complicated by the second round of votes and, likely, a referendum on the amendment on chief-justice selection. It is not known what effect, if any, the 2015 election for the Supreme Court will have; the seat up for election that April is now held by Justice Ann Walsh Bradley, a member of the liberal side of the court.

Rep. Evan Goyke, a Milwaukee Democrat who is on the Assembly Judiciary Committee, held out hope that the single-term idea would be taken seriously in the legislature at some future point. Republicans and Democrats have both expressed concern about eroding confidence in the Supreme Court. Letting justices pick a chief doesn't restore that, he said, but the single, 16-year term might. And circumstances might open the door to full consideration of the idea in the Capitol.

"It's almost always the signal of a good idea when both parties try to spin their way out of liking it," Goyke said.