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Civic Caucus Statement on Judicial Selection

Summary of Statement

Absolute public confidence in the impartiality of the courts is essential in our democratic form of government. The majority and minority members of the Minnesota Legislature have a clear opportunity in 2008 to set aside excessive partisanship that has plagued them for many years and protect that public confidence. They should enact recommendations by a citizen commission headed by former Gov. Al Quie to change the method for selecting judges to avoid wide-open, expensive, partisan political campaigns for judgeships. In addition they should require a majority of non-lawyers on merit selection panels as well as evaluation panels.

But there's only so much that the Legislature can do. The Minnesota Supreme Court, which oversees the judicial branch, is the only body with power to regulate judicial conduct, within constitutional parameters. Such regulations are essential for campaigns for judicial office this fall (that will be unaffected by anything the Legislature does) and for future elections as contemplated by the Quie commission.

Therefore, the Minnesota Supreme Court ought to explore all options for ways to preserve the independence and impartiality of the judiciary and to minimize the impact of campaign contributions, without interfering with rights of free speech. For example, the Court could determine whether lawyers and litigants from now on should disclose publicly to the appropriate clerks of court the financial contributions—by the lawyers and litigants or their family members—to campaign committees for judges before whom they are appearing or to organizations that make contributions to such campaign committees.

Statement

Over the last two years current and former public officials and others have pointed out to the Civic Caucus emerging difficulties with the state's current system of selecting judges. Many comments and concerns may be reviewed on the Civic Caucus website, www.civiccaucus.org. Under "Issues Pages" click on "Elections" and "Judiciary".

Certain aspects of the judgeship issue make it almost unique among the multitude of topics before the Legislature. Usually, lawmakers are trying to fix things that are broken. With the matter of selecting judges, lawmakers will asked to make sure something doesn't break in the first place. If majority and

minority legislators reach agreement here, they truly will demonstrate that as leaders they are acting to avoid future problems.

The judicial issue also illustrates another need identified by the Civic Caucus: to protect and enhance the influence of a broad spectrum of the population, as distinguished from giving advantage to those who represent narrow political views and causes. Without action it is very possible that judges will be subject to influence from narrow interests.

What brings the issue to the forefront now, in 2008?

Historically, The Minnesota Supreme Court has enforced guidelines for how judges in the state should conduct themselves. Until recently the Supreme Court (a) prohibited candidates for judge from announcing their views on disputed legal or political issues, (b) prohibited judges from identifying themselves with political parties, and (c) prohibited candidates for election as judge from soliciting or accepting campaign contributions. But those provisions have been ruled unconstitutional (*Republican Party of Minnesota v. White)* by the U.S. Supreme Court and the 8th Circuit Court of Appeals.

Candidates for judge in Minnesota now are free to indicate how they might rule on current or future issues, are free to identify themselves with political parties and are free to seek and accept certain campaign contributions, personally, rather than from a campaign, including contributions from lawyers and clients appearing before the court.

"In sum, in the post-*White* era, judicial campaigns may be conducted in a manner that increases both the perception and reality that justice is for sale," the Quie commission said. "Partisan campaign activities and fundraising activities threaten the neutrality of courts and endanger a litigant's fair day in court. They also impair the core functions of courts to protect individual rights and liberties…In short, post-*White* judicial campaigns have the potential to threaten the very foundation of our constitutional democracy and the rule of law."

The *White*-related decisions are recent, so Minnesota has not yet truly experienced partisan political campaigns for offices of judge. However, evidence from states without provisions that protect independence and impartiality of jurists indicates the threat is very real.

In 2004, for example, more than $10 million was spent by both sides in a successful effort to unseat a judge of the West Virginia Supreme Court of Appeals. A dissatisfied litigant contributed more than $3 million of his own money to defeat the judge, according to an article in the *Christian Science Monitor*, January 30, 2008.

More recently, in nearby Wisconsin, a Supreme Court race cost almost $6 million, according to a report in the *St. Paul Pioneer Press*, December 27. 2007.

Vernon Valentine Palmer, a law professor at Tulane University, New Orleans, reviewed cases over a 14-year period ending in 2006. He looked first at cases in which no one involved in the lawsuit had ever made a contribution, before or after the suit was filed, to establish a baseline. Palmer did not review each case individually to evaluate any relationship between a specific decision and a specific

contribution. Some judges tended to vote for plaintiffs, others for defendants. Palmer's findings, to be published in the Tulane Law Review, were discussed in a *New York Times* article on January 29, 2008.

One justice, Palmer said, was slightly pro-defendant in cases where neither side had given him contributions, voting for plaintiffs 47 percent of the time. But in cases where he received money from the defense side (or more money from the defense when both sides gave money), he voted for the plaintiffs only 25 percent of the time. On the other hand, in cases where the money from the plaintiffs' side dominated, he voted for the plaintiffs 90 percent of the time.

"It is the donation, not the underlying philosophical orientation, that appears to account for the voting outcome," Palmer said. Larger contributions had larger effects, the *New York Times* article reported. Palmer found that above-mentioned justice was 300 percent more likely to vote for a defendant with each additional $1,000 donation. "The greater the size of the contribution," Palmer said, "the greater the odds of favorable outcomes."

State courts in Minnesota have a total of 280 judges: 257 District Court judges (spread among 10 judicial districts); 16 Court of Appeals judges, and seven Supreme Court judges. All are subject to election on Minnesota's non-partisan ballot and all serve six-year terms. When a vacancy occurs, the Governor may appoint a replacement to fill out a remaining term. More than 90 percent of judges reach office initially by appointment. In most elections judges are unopposed. With many judicial offices, consigned to the bottom of the ballot, significant voter falloff occurs

Judges have been elected in Minnesota since statehood in 1858 and have been designated as non-partisan—that is, without designation as to political party—since 1913.

In an effort to keep judges impartial and non-political, the Quie commission is recommending the following:

* All judges would reach the bench initially by appointment by the Governor, who would be required to select from a list of candidates prepared by merit-selection panels. A panel of 13 members for district court appointments already exists in statute. Seven members are appointed by the Governor (five attorneys and two non-attorneys); two appointed by the Minnesota Supreme Court (one attorney and one non-attorney), and four from the judicial district in which the vacancy occurs, two by the Governor and two by the Supreme Court, each naming one attorney and one non-attorney. An additional panel recommended by the Quie group for the Court of Appeals and the Supreme Court would have five lawyers and four non-lawyers.

* All judges during their time in office would be evaluated as to their performance by a 30-member evaluation panel, with appointments to the panel shared equally by the Governor and the Chief Justice of the Supreme Court. Each of 10 judicial districts in the state would have two members and 10 would serve at-large. A majority would be non-lawyers.

* At the conclusion of terms, all judges would be subject to retention elections, in which voters would decide, yes or no, whether judges remain in office. There would be no opposing candidates. The ballot would indicate whether, in the judgment of the evaluation panel, judges are "qualified" or "not qualified".

The Minnesota State Bar Association, and a minority of the Quie commission, recommended a similar approach, except they favored appointment only, without retention elections.

Our analysis

Recommendations of the Quie commission should be enacted.

Some persons might argue that changes aren't needed because Minnesota has yet to encounter a situation where judges have been elected in expensive, politically-partisan campaigns. But that is precisely why action should occur now. As soon as a judgeship election occurs where large contributors are involved, supporters of a winning judge will be likely to realize a vested interest in maintaining the present system of electing judges and oppose change.

On paper it might appear as if Minnesota judges have reached office via public vote in the same kind of election every other elected official has had to face since statehood. But that is not the case.

State law provides that judges—and only judges—who are incumbents (someone reaching office by appointment by the Governor is treated as an incumbent) have the word "incumbent" behind their names on the ballot. Obviously, the intent has been to grant sitting jurists an advantage over challengers. Most judges retire before expiration of their terms, giving the Governor an opportunity to make appointments so that newly appointed judges can be identified as incumbents on the election ballot. With so many judges in the state, many judgeships are up for election at any one time. Most elections are uncontested, producing voter impatience with an unnecessarily long ballot.

The Quie recommendations offer advantages over the present system:

* Appointment by merit for all judges becomes a requirement for the Governor. Currently, the Governor isn't bound by merit commission recommendations for district court judges, and no merit commission participates in appointments to the Court of Appeals and the Supreme Court.

* An ongoing, systematic approach for evaluating all sitting judges is established, a practice not followed today.

* A better way is created—retention elections with "qualified" or "not qualified" designated for each judge—to remove judges who aren't doing their jobs well. However, other terms might be chosen, for example, such as "recommended for election" or "not recommended for election".

Additional Recommendations by the Civic Caucus

1. Require that merit selection panels contain a majority of citizens who aren't lawyers —Under the new system the general population only will play a role in retention, not selection, of judges. Today, with judges subject to elections, the general population could play a significant role in selection. To preserve a role for the general population, a majority on merit selection panels should be citizens who aren't lawyers. The merit selection and evaluation panels should be broad-based and non-partisan.

2. The Minnesota Supreme Court should enact all possible safeguards— The heart of the Quie recommendations requires a constitutional amendment. The earliest such an amendment could be voted on is November 2008. Thus, an amendment would have no impact on judicial races on the 2008 ballot.

Therefore, the Minnesota Supreme Court ought do all it can, now, to preserve the independence and impartiality of the judiciary and to minimize the impact of campaign contributions, without interfering with rights of free speech. For example, the Court could determine whether lawyers and litigants from now on should disclose publicly to the appropriate clerks of court the financial contributions—by the lawyers and litigants or their family members—to campaign committees for judges before whom they are appearing or to organizations that make contributions to such campaign committees.

Minnesota should not be faced with unbridled political campaigns for judge. As the *Christian Science Monitor* article stated, "Merit, not money, should sway judicial elections."

Civic Caucus process

A core group from the Civic Caucus prepared a first draft of this statement, after having visited with several civic and governmental leaders over the last two years.

The first draft was submitted to some 750 persons on the Civic Caucus email list. The Civic Caucus thoroughly evaluated all comments and suggestions—which ran to more than 10 pages. Most respondents endorsed the draft as is. Some requested detailed criteria for members on merit selection and evaluation panels. Some felt judges should be appointed only, without retention elections. One person suggested that district judges should continue to be elected as at present with only appellate and Supreme Court judges appointed. One suggested to keep the present elections process but with public financing. Some suggested no change. A complete list of comments is available on request to civiccaucus@comcast.net. The Civic Caucus is very grateful for the input.

See www.civiccaucus.org for background on the Civic Caucus, including biographies of its leaders.

Following are individuals who agreed to have their names listed in support of this statement. Most have extensive experience in public affairs, as elected or appointed officials or in civic organizations.

John S. Adams

Ray Ayotte

Ann Berget

Bob Brown, former state senator

Ellen Brown

Austin Chapman

Charles H. Clay and Audrey J. Clay

Janis M. Clay

Gary Clements

Phil Cohen

Marianne Curry

Senator Kevin Dahle

Sandy and Blake Davis

Ed Dirkswager

Bright M. Dornblaser

Dave Durenberger, former member of Congress

Kent E. Eklund

Ina R. Erickson

John R. Finnegan Sr.

Bill Frenzel, former member of Congress

Paul Gilje

Don Fraser, former member of Congress

Scott W. Halstead

Ruth and Paul Hauge
Peter Heegaard

Roger Heegaard

Susan Herridge

James L. Hetland, Jr.

John Hottinger

Peter Hutchinson

Wayne Jennings

Curt Johnson

Verne C. Johnson

A. M. (Sandy) Keith, former Minnesota chief justice

Jay Kiedrowski

Sheila Kiscaden, former state senator

Patricia J. Litchy

Dan Loritz

Charles P. Lutz

Marina Lyon

Tim R. McDonald

Roger Moe, former state senator

John Mooty

Ed Oliver, former state senator

George Pillsbury, former state senator

Wayne G. Popham, former state senator

John Rollwagen

Steve Rothschild

Larry Schluter

Eric Schubert

David Schultz
Lyall Schwarzkopf

Clarence Shallbetter

Charles A. Slocum

Wy Spano

Tom H. Swain

Rod Tietz

Jim Weaver

Bob Whereatt