



Eric Magnuson, Former Chief Justice, Minnesota Supreme Court

Civic Caucus, 8301 Creekside Circle #920, Bloomington, MN 55437

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Notes of the discussion

Present: Verne Johnson (chair), David Broden, Janis Clay, Paul Gilje, Jim Hetland, Dan Loritz, Tim McDonald, Brenna Murphy, Al Quie, Clarence Shallbetter

Summary of discussion: Lawyer and former Chief Justice of the Minnesota Supreme Court Eric Magnuson argues that Minnesota's judicial system is at risk of becoming weakened through the influence of money and political campaigns to elect judges. He presents an alternative proposal advocated by the Coalition for Impartial Justice calling for a constitutional amendment regulating the process of judicial appointment, review and retention.

A. Welcome and introductions -Eric Magnuson is a partner with Briggs and Morgan. After serving as Chief Justice of the Minnesota Supreme Court from 2008 to 2010, he rejoined Briggs' Business Litigation Section, and is a member of the firm's Appellate Practice Group.

Magnuson earned his B.A. degree in history from the University of Minnesota. After graduating *cum laude* from William Mitchell College of Law in 1976, Magnuson clerked for the Chief Justice of the Minnesota Supreme Court, Robert Sheran. A year later, Magnuson joined the Minneapolis law firm of Rider Bennett where he practiced for the next thirty years. Governor Tim Pawlenty appointed him chair of the state Commission on Judicial Selection from 2003 to 2008. After Rider Bennett dissolved in 2007, he joined Briggs & Morgan. Governor Pawlenty named him the 21st Chief Justice of the Minnesota Supreme Court in June 2008.

B. Background - In the past, the Civic Caucus has dealt with the issue of judicial selection at some length. A 2008 Civic Caucus position statement on the topic of judicial selection argued that public confidence in the impartiality of the courts is essential to democratic governance and that such confidence is at risk of erosion if money and political influence enter into judicial selection.

The Minnesota Supreme Court has power to regulate judicial conduct through such means as limiting the political nature of judicial campaigns. The court's constitutional parameters have become defined more narrowly in recent years through United States Supreme Court decisions. Consequently the Caucus has publicly advocated that the legislature should enact the recommendations from a citizen commission headed by former Gov. Al Quie to change the method for selecting judges.

The Caucus's statement on this issue, with signatures of support, may be found on the Civic Caucus website: <http://tinyurl.com/75538cc>

The Caucus's position is reflective of the view of former Chief Justice Magnuson in his role as a member of the Coalition for Impartial Justice. The coalition is a broad-based, non-partisan organization advocating for a constitutional ballot question calling for a merit selection process for judges, public performance evaluations and retention elections. The coalition includes member organizations that represent business, labor, religious and other non-profit organizations.

C. Discussion - During the course of the discussion the following points were raised:

"I was interested to see your approach to these issues," Magnuson said, commenting on the format of the day's meeting. "It's not often that you have discussions of this topic that can progress in a rational and ordered way." Often when he engages in debates about this topic the smoke can cover the battlefield, he said.

"I like the process: What is the problem, what are the goals, and what are the strategies to address the specific goals. It's much like making a legal argument."

So what is the problem?

THE PROBLEM: The concept of judicial elections is deeply flawed in today's political environment .

Judgeships are at risk of becoming overly political.

In 2005 the United States Supreme Court found in its *White* decision that Minnesota judicial elections rules preventing the candidates' soliciting donations and making promises were unconstitutional.

Judicial campaigns in Minnesota are now exposed to the campaign tactics of elections for political office, Magnuson said. Once high-priced negative campaigning commences it will be difficult to reverse.

The more recent *Citizens United* decision has exacerbated the problem, Magnuson added, and increases the likelihood that money will begin to distort judicial selection and erode public confidence in the courts.

Spending on judicial races grows; confidence wanes.

Twenty years ago contested races across the country spent \$85 million, Magnuson cited. The past ten years it has increased to \$206 million.

"If you don't think a big infusion of money into a race could happen here look to Wisconsin. The only African American judge on the state supreme court got knocked out of office by ads calling him liberal, citing a decision that was technically correct and legally right."

Some argue that everyone has a bias, and if it's known publicly where contributions are coming from then the bias is in the open. Magnuson called that view deeply cynical, and not reflective of reality.

"They're saying that the alternative to judicial selection is that you have to know who bought your judge."

When large sums of money are involved in the election of judges, public confidence drops.

"Involving big money and politics in judicial elections just looks so bad that we can't let it stand, because the public won't have confidence that the courts will be impartial." The argument against is not an indictment of free elections, he said. It's about assuring that citizens retain their confidence in the judicial system.

Judging is not a popularity contest.

Magnuson described a case decision in which he wrote that under current statute the case must result a certain way - though he disagreed personally with that result. Similarly with the "unallotment" decision, he said while he had great respect and personal affection for then Governor Pawlenty he nonetheless had to rule against his action because it was not within the bounds of what was allowed by law.

This presents a basic marketing problem for would-be campaigns. "If a judge makes a technically correct ruling that releases an alleged criminal, that comes out in the media as being soft on crime, not strong on the constitution."

The current trend of funneling more money into judicial elections does nothing to increase one's knowledge of candidates; it just points out who has the most yard signs.

Judges can't run on platforms so people are left making decisions based on name recognition only. "Every judge's campaign should say 'If you elect me I will be fair and work hard.' But with more money in the process, negative campaigns can be particularly effective."

THE GOAL: Make the system resistant to political and financial influence

Minnesota has a strong judiciary now.

National surveys find that Minnesota decisions fare well when they are tested elsewhere in the country. And when the judiciary performed a survey to see how they were doing 80 percent of people said they had good experience - despite the circumstances that brought them to court.

The state needs judges that are not just competent but are passionate about doing the job the right way, Magnuson argued. Do people want the title of judge, or do they want to do the work of a judge?

Magnuson recalled that when he chaired the commission on judicial selection commission members did "tremendous amounts of work" that included interviews and investigations of potential candidates. They would bring to the governor three top choices assuring that any he selected would do a good job, and "have the right heart. I told Governor Pawlenty that my job is to make sure he didn't screw up."

This kind of process is necessary. "It's very difficult for a judge to be evaluated by the general public," Magnuson said. He argues that the state should continue to use the judicial selection commission approach, but that this alone will not sufficiently minimize potential political and financial influence.

THE STRATEGY: A constitutional amendment for judicial retention elections

The question becomes then, what system can bring in the most highly qualified judges? Retention elections are a better system than contested elections for deciding which judges should remain in office, Magnuson argued. Retention elections would offer citizens the chance to vote on whether a judge should continue to serve after a given term. By relying on panel-selection, then gubernatorial appointment followed by formal evaluation, the public interest is maintained. Then judges stand for retention elections under the light of a fair, public evaluation conducted by an appointed judicial performance commission. Twenty states use such a system now.

Legislation proposed for a constitutional amendment

The coalition has prepared a bill for the 2012 legislative session proposing an amendment to the Minnesota Constitution to establish retention elections for judges and creating a judicial performance commission.

The Senate version of the bill may be found on the Minnesota Senate revisor's website: <http://tinyurl.com/7fbcjxk>

How retention elections work

Terms for judges would be set at eight years, and at the end of that time a judge seeking to retain judicial office would file an affidavit of candidacy with the secretary of state. At the next election if a majority of people voting on the retention of a judge vote "Yes" the judge would remain in office; otherwise, the governor would appoint a new judge at the end of the non-retained judge's term.

Retention elections don't necessarily protect judges, Magnuson observed. In Iowa three justices were derailed by a high-priced negative campaign. "Big money got them out, but the saving grace is that the big money wasn't able to put their preferred candidates in. The three new ones that went in went through the process for selection and are extremely good; all are fair and impartial."

Publish report cards on the judges up for retention election.

While mitigating the effects of big money in judicial campaigns is a serious problem, we also have the related problem of voters not having enough information to make informed decisions about judges' performance.

In the proposed system there is a private evaluation of new judges when they're early in the job, then a public evaluation when the judge comes up for election. These evaluations will provide voters with clear information about a judge's performance, and a recommendation on whether or not the judge should remain in office.

What the judges are worried about is that two weeks before the election they may have nobody running against them, but then ads from opponents start running and there is no way to defend against those ads.

That may be the lesser evil - "When I speak to judges I tell them not to put their own self-interest ahead of all else. If you're so scared that you may lose your job for doing the right thing then you shouldn't be a judge."

Form a citizens' commission with lawyers and laypersons on it that evaluates the evidence and produces a report card on each judge for the retention election, Magnuson suggested. That would enhance the public's ability to cast meaningful, informed votes.

D. Conclusion -

When bad things start to happen, that often means that an awful lot of pain and abuse will eventually occur. Minnesota hasn't had the problem of big money swaying judicial elections yet, Magnuson observed, but we probably will have it unless we get out ahead of it.

"In my view a large majority of judges support the recommendations, but there is a small core in the judicial and political leadership that don't," Magnuson said. The district judges have not yet come along to support the position publicly. This proposal has to get through the legislature to be put on the ballot for the coming election.

To convince the public to vote for the necessary amendment, he suggested a campaign ad that might say something like: "Aren't you sick of politics? Aren't you sick of politics infesting every aspect of life? Then get politics out of judicial elections."

Magnuson closed, "Thank you. This is the most rational discussion I've had so far on this topic."

The chair thanked Magnuson for the discussion of this important issue.