

## **Citizens League Statement on Judicial Selection**

### **Summary**

#### **Independence and Impartiality of Minnesota judges**

- Minnesota's constitution provides for judicial elections
- The Supreme Court has ruled that judges cannot be prohibited from disclosing their views on controversial issues
- This ruling enables partisan political campaigns and involvement of special interests in judicial elections, threatening the impartiality of Minnesota's judicial system

#### **Recommendations**

Option 1) Retain judicial appointment system based on a strong merit selection process and remove judicial elections through a constitutional amendment

Option 2) Retain judicial appointment system based on a strong merit selection process and replace traditional elections with a retention election through a constitutional amendment. Voters could vote yes or no to sitting judges, who would run unopposed. The sitting judge would be deemed qualified or not qualified based on a performance evaluation conducted by a commission.

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### **Background**

Minnesota, both historically and at present, enjoys a good reputation for the independence and quality of its judiciary. Although the Minnesota Constitution provides for judicial elections, more than 90 percent of judges are initially appointed by the governor before facing election. Over many years, a quiet consensus has developed among judges and lawyers - and governors - that, because voters usually have little information about candidates for judgeships, governors generally appoint better qualified judges than are produced in contested elections.

In 1988, a Citizens League study committee produced the report, "The Public's Courts: Making the Governor's Nominating Process Statutory." It called for a permanent commission to select judges based on merit and to put a process in law for governors to follow when appointing judges.

In 1990, the Minnesota Legislature enacted Minnesota Statutes Section 480B establishing the Commission on Judicial Selection which is in place today. It is composed of 9 at-large members, 7 appointed by the governor (including the chair) and 2 appointed by the Supreme Court, no more than 5 of whom may be lawyers. The governor and the Supreme Court then each appoint two members from each of the state's ten judicial districts, no more than half of whom may be lawyers, who sit on the commission only when there is a vacancy in their specific judicial district.

The Commission only makes recommendations for district court appointments, not the Supreme Court or Court of Appeals. It recommends from three to five nominees for each vacancy, but the

governor may request a second set of nominees when not satisfied with the first set. The governor is not required to appoint from the list of names provided by the commission.

This process has worked well. Governors Carlson, Ventura and Pawlenty have all adhered to the process, and the general consensus has been that they have made good judicial appointments.

### **So, what's the problem?**

If Minnesota has a good judicial selection process and is still regarded as having an independent, high quality judiciary, why is there pressure to change the way we appoint - and elect - our judges?

In the past twenty years, more and more states have witnessed harshly negative, expensive, partisan elections that threaten the independence of a state's judiciary. These changes have occurred most prominently in states like Texas, Ohio and California, so we in Minnesota have tended to think that it isn't going to happen here. But two events have occurred in recent years that increase the likelihood that it can, and likely will, happen here.

First, the U.S. Supreme Court, in the Minnesota case of Republican Party v. White, held that states may not prohibit judicial candidates from announcing their views on disputed legal or political issues. This decision struck down long-established Minnesota "canons", or ethical requirements, that were designed to prevent judicial candidates from taking positions on issues they might have to rule on, thus preserving the impartiality of judges. As a result, judicial candidates are now free to campaign on controversial social and political issues, and to seek political party endorsements, and to personally solicit campaign contributions.

Second, the expensive, negative, single-issue campaigns have hit closer to home. Last year, in Wisconsin, \$6 million was spent on a single Supreme Court campaign, more than two-thirds of which was spent by special interests. Around the nation, Supreme Court campaigns in Washington cost more than \$5 million, and more than \$13 million was spent in Alabama, most of it on 17,000 negative television ads. This type of campaign is now much more likely to happen in Minnesota and we may not be able to "turn back the clock" to protect the independence and impartiality of our judiciary when it does.

### **Conclusion**

The top requirement of Minnesota's judicial system is to be impartial and interpret the law. The White decision is a direct challenge to that view of the judiciary by creating the mechanism for partisan political campaigns where judges are expected to take positions (make political promises) before they hear the merits of a specific case. This violates the principle of impartiality.

The judicial branch of government is designed to be one of the great checks and balances in our democracy. The courts interpret the laws that are passed by the Legislature and should do so in an impartial manner, yet there is no clear method by which partisan elections serve this function.

For the courts to provide the proper balance in our political system, judges should not be establishing political positions in the same manner as those who are elected to pass laws. The separation in perspective and function of these two branches is vital to our democracy.

### **Recommendation**

To leave the current system in place (the status quo) is unacceptable. The risk to the impartiality of Minnesota's judiciary is too high.

To maintain and ensure an impartial and independent judiciary, the existing merit-based appointment system should continue and a constitutional amendment to remove judicial elections from the Minnesota constitution should be put to the voters in 2008.

A second option to maintain an impartial judiciary is to require all judges, including Supreme Court and appellate court judges, to be initially appointed by the governor, followed later by a retention election. This would require a constitutional amendment to replace the existing general election with a retention election. Voters would use information from a performance evaluation stating whether a sitting judge is qualified or not to retain office which would be conducted by commission. There would not be an opponent. The vote would be whether or not to retain the sitting judge. Although this option would be helpful to maintaining an impartial and independent judiciary and far better than the status quo, it does not fully preclude special interests from becoming involved in judicial elections. Interest groups could still argue and run a campaign supporting or questioning the qualifications of the sitting judge.

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