



Summary of Meeting with Al Quie and Mary Vasaly

Civic Caucus, 8301 Creekside Circle, Bloomington, MN 55437

Thursday, January 17, 2008

Guest Speakers: Al Quie and Mary Vasaly, spokespersons for commission recommending changes in the method of selecting judges in Minnesota

Present: Verne C. Johnson, chair; Charles Clay, Bill Frenzel (by phone), Paul Gilje, Jim Hetland, John Mooty (by phone), and Wayne Popham (by phone)

A. Context of the meeting- A significant change in the method by which judges are selected in Minnesota will be recommended to the 2008 Minnesota Legislature. The Civic Caucus has received background on these recommendations in previous meetings. For comments on judicial selection at previous Civic Caucus meetings, go to www.civiccaucus.org. Select "Elections" under "Issues Pages". Select "Judiciary" under "Elections".

B. Introductions- Verne and Paul welcomed and introduced Al Quie and Mary Vasaly. Quie, former Governor of Minnesota, chaired a Citizens Commission for the Preservation of an Impartial Judiciary. Vasaly, a lawyer and co-chair of the Minnesota State Bar Association's Judiciary Committee, served on the commission.

C. Background on judicial selection-

1.—Court decision impacts current system in Minnesota- The Citizens Commission was formed after a 2002 U. S. Supreme Court decision in *Republican Party of Minnesota v. White* and a related decision in 2005 by the Eighth Circuit U.S. Court of Appeals. These decisions overruled provisions in Minnesota that had prohibited judicial candidates from announcing their views on disputed legal or political issues and had prohibited candidates from identifying themselves as members of a political party, attending political gatherings, and seeking, accepting and using political party endorsements.

"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-Vasaly commission report 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."

2. How judges are selected in Minnesota now- Judges of the Minnesota district courts, state court of appeals, and Minnesota Supreme Court currently are selected by direct election and, where vacancies occur between elections, by appointment by the Governor. Because the vast majority of judges choose to retire before the end of a term, to avoid an open contest in an election and to give the Governor an opportunity to appoint a replacement, almost all judges initially reach the bench by appointment. They then stand for election when terms expire with the word "incumbent" by their names.

For appointments to the district courts, a statutory body, the Minnesota Commission on Judicial Selection seeks applicants and makes three to five recommendations to the Governor. For any given district court appointment, the Commission has 13 members, seven 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. Eric Magnuson, an at-large attorney appointed by the Governor, is chair.

Minnesota is one of 24 states using direct election, according to David Schultz, in an article for Bench and Bar in November 2005. Another 15 states use retention elections to determine whether judges, having been initially appointed, should serve additional terms, Schultz reported. The other 11 states use other systems of selection by the Governor and the Legislature, he said.

3. Recommendations for a new system— The above-named Citizens Commission for the Preservation of an Impartial Judiciary, which Quie chaired and of which Vasaly was a member, is recommending that the 2008 Legislature propose changes in the state constitution and in legislation to offset the impact of the White decision:

a. Provide that all judges reach the bench by appointment- Existing provisions allowing judges to run for office in an open election would be amended. This would require a constitutional amendment.

b. Appointment based on merit- All judges, District Court, Court of Appeals, and Supreme Court, would initially reach the bench by appointment by the Governor. The Governor would select from a list of approved candidates submitted by a merit commission. In the case of district court judges, the existing Minnesota Commission on Judicial Selection would continue to recommend a list of approved candidates based on merit. Currently, the Governor may appoint someone who is not on the list; under the changed system, the Governor would not have that option. For appointments to the Minnesota Court of Appeals and the Minnesota Supreme Court a separate Appellate Court Merit Selection Commission would be established, four of whom would be non-lawyers. The Governor and the Chief Justice would each appoint four and the Governor would appoint the Chair.

According to the Quie-Vasaly report, the following criteria would be used in selecting candidates: "integrity, legal knowledge, communication skills, judicial temperament, ability to promote trust and confidence in the judiciary, common sense, experience, and diversity...without regard for the political affiliation of the nominee or the Governor."

c. New proposal for evaluating performance of judges- The report recommends that new procedures be established to evaluate the performance of judges. The evaluation would be carried out by a 30-member Judicial Performance Evaluation Commission, with the Governor and Chief Justice each appointing one-half. A majority would be required to be non-lawyers.

Attorneys, litigants, other judges, and other persons who have been in direct contact with each judge would be periodically surveyed, confidentially, about each judge's performance.

Before a judge's term expires the Judicial Performance Evaluation Commission would decide by a vote in a public meeting whether a judge meets or does not meet judicial performance standards.

d. Differing views on steps to take when a judge's term expires- A majority of participants in the Quie-Vasaly report recommended a retention election, in which the only question is whether a judge should be allowed to remain in office. No candidate would be running against the judge. The ballot would indicate whether, in the opinion of the Evaluation Commission the judge is "qualified" or "not qualified". Quie stood with the majority.

Vasaly and others in the minority recommended against a retention election. The minority recommended that the Evaluation Commission make the final decision on whether a judge should serve another term.

The majority felt some involvement by voters is desirable. The minority felt that a retention election would be subject to the same campaigning abuses that the new system is designed to correct.

In a close vote in a separate inquiry by the Minnesota State Bar Association, a majority-including Vasaly— recommended that the Evaluation Commission make the final decision, without a retention election.

D. Discussion- In Quie and Vasaly's discussion with the Civic Caucus the following points were raised:

1. Governor can ask for three more names- Vasaly clarified that under the proposal the Governor can ask the Merit Selection Commission for three more names if the Governor chooses not to make an appointment from the first three. But the Governor would be required to select from either the first or the second set of three names.

2. Judges likely to fulfill their terms- Quie noted that under the proposal sitting judges won't have an extra incentive to retire before the expiration of their terms, because the Governor appoints all replacements. Now most judges retire before their terms expire so the Governor can make a new appointment. Under the present system, if no such appointment were made, the likelihood of a contested election to fill a vacancy caused by retirement would increase.

3. Independence of the judiciary at risk- Unless changes are made as their report recommends, Quie and Vasaly said judges will become beholden to those who provide financing for their election

campaigns. Judges must be impartial and accountable to the law, not to interest groups who helped elect them, Quie and Vasaly said.

4. Special interests still could try to affect a retention election- Quie acknowledged that in retention elections it still would be possible for judges to accept campaign gifts and state their views on pending cases and it would be possible for special interest to try to unseat a judge. However, he reminded the Civic Caucus that the words "qualified" or "not qualified" as determined by the Evaluation Commission would be next to each judge's name in the retention election. Thus, it would be very difficult for a special interest group to surmount a successful negative campaign against a judge determined to be "qualified". In another state, he said, a "qualified" sitting judge spent no money campaigning but was retained despite a special interest campaign against the judge.

5. No confirmation by the State Senate- It was noted that federal judges appointed by the President for life are subject to confirmation by the U. S. Senate. No such confirmation process would occur in Minnesota under the Quie-Vasaly report.

6. Possibility of a "not qualified" judge winning a retention election- A member of the Civic Caucus wondered whether a judge determined to be "not qualified" by the Evaluation Commission still could survive a retention election. Quie replied that judges in Minnesota no longer rely upon strong local followings for ballot support as, for example, county judges might have had in years past. Such a local following in those days might have been strong enough to offset a negative recommendation from an Evaluation Commission.

It is most likely, Quie said, that a judge ruled "not qualified" would retire voluntarily, without risking defeat in a retention election.

7. Importance of Evaluation Commission- Quie and Vasaly emphasized that the proposed system, with its Evaluation Commission, offers advantages that aren't present today. Sitting judges will be much more careful to be fair and impartial, knowing that they'll all be routinely evaluated for their performance.

8. Difference over retention election not "fundamental"- Quie and Vasaly agreed that while they disagree over the need for a retention election, they remain unified on the other parts of the proposal. Quie restated his view that some semblance of an election should be retained because of the long history in Minnesota of directly involving voters in selection of judges. Vasaly restated her position that many of the problems associated with elections of judges-including the possibility of large campaign expenditures, of judges stating their views on pending issues and of special interests trying to influence the election, thereby compromising the independence of the judiciary-still will be present.

Supporters contend that the retention model will be much easier to "sell" to the Legislature and the people politically because it ensures that the people continue to have the right to vote in connection with retention of judges. They contend that the pure appointive system, which eliminates the right to vote entirely, will be a much harder sell.

9. Commentary on redistricting- During the meeting brief discussion occurred over another matter,

redistricting of legislative and congressional seats. Quie supports relying upon retired judges as proposed by the Mondale-Carlson group at the Humphrey Institute. But Quie believes that retaining geographical unity in districts is more important than encouraging competition. He said Northfield, MN, for example, shouldn't be split into two districts, even though such an action might make districts more competitive (by splitting liberal-oriented students at Carleton and St. Olaf Colleges into two different districts). He'd preserve the unity of the entire Northfield community, even though such action might concentrate more liberal voters in the same district.

E. Thanks- On behalf of the Civic Caucus, Verne thanked Quie and Vasaly for meeting with us today.