



Summary of Meeting with Mary Vasaly

Civic Caucus, 8301 Creekside Circle, Bloomington, MN 55437

Thursday, October 4, 2007

Guest speaker: Mary Vasaly, partner, Maslon Law Firm, co-chair Minnesota State Bar Association Committee on Judicial Selection

Present: Verne Johnson, chair; Charles Clay, Paul Gilje, Jim Hetland, and John Mooty

A. Context of the meeting —Among election-related issues that the Civic Caucus might review in detail is that of changing the method of selecting judges in Minnesota. The Civic Caucus previously met to hear the recommendations of the Quie commission. Today the Civic Caucus is learning about the position of the Minnesota State Bar Association.

B. Welcome and introduction —Verne and Paul welcomed and introduced our guest speaker, Mary Vasaly, co-chair of the Bar Association's committee on Judicial Selection, which adopted a new position on judicial selection in June 2007. Vasaly, a partner in the Maslon law firm, has practiced in the areas of appeals, probate/trust litigation and commercial litigation for more than 25 years. Vasaly has been named a Fellow of the American Academy of Appellate Lawyers, a top 25 appellate SuperLawyer by *Minnesota Law & Politics* and, in 2003, was named a Lawyer of the Year by *Minnesota Lawyer*. She is currently President-elect of the Hennepin County Bar Association. She received the 2006 President's Award from the Minnesota State Bar Association, and is a Fellow of the American Bar Foundation, an honor limited to no more than the top 1/3 of 1 percent of attorneys in each state. Vasaly is a 1983 cum laude graduate of the University of Minnesota Law School.

In her comments and in discussion with the Civic Caucus, the following points were raised:

1. Areas of agreement with the Quie commission —Vasaly served on the Quie commission as well as the Bar Association's committee. The Quie commission (Minnesota Citizens Commission for the Preservation of an Impartial Judiciary) was formed with initiative from Associate Justice G. Barry Anderson of the Minnesota Supreme Court, in response to the White decision by the U. S. Supreme Court in Nov. 2005 that overturned MN judicial canons barring judicial candidates from certain political activities during elections, including seeking and using party endorsements.

The Canons did not allow candidates for judicial office to solicit funds for election campaigns personally or to announce their views on issues that might come before them. A great fear exists that without the special rules, candidates for judge in Minnesota could engage in activities that would undermine the public's confidence in the judicial system and that judges could lose their impartiality. This would result from the appearance that the judge could be "bought" through campaign

contributions and that the judge has made "promises" to the public or to contributors as to the outcome of certain cases.

The Bar and the Quie commission agreed that the system needs to be changed. Both agreed on recommending that judges initially reach the bench only via appointment by the governor, from a list of qualified nominees submitted by a merit-selection commission.

2. Reappointment or retention election is area of difference —The two groups differ on how a judge, once appointed, would be kept in office after a term expires. Both groups would establish a judicial-evaluation commission to decide whether a judge is qualified to continue in office. Under the Bar proposal, the judicial-evaluation commission would have the final say as to whether a judge serves another term. Under the Quie proposal the commission would determine whether a judge is "qualified" or "unqualified" to continue to serve. That designation would go on a ballot and the judge would face a retention election. Voters would say yes or no to whether the judge stays in office. If a judge is rejected in an election, appointment of a new judge would be made by the governor, again from a list of qualified candidates submitted by the merit selection commission. Vasaly was a member of a group in the Quie commission that submitted a minority report opposing the retention election.

3. In Texas judges can seek campaign funds from attorneys, even when a case is being heard —To illustrate problems now present, Vasaly said that in Texas, the judiciary is highly politicized. One Texas Supreme Court justice stepped down rather than have to face another election where she would be required to call attorneys seeking financial support. She felt this solicitation of funds greatly compromised her impartiality. In another example, Vasaly recalled a case she had before a Texas court, seeking an injunction. Vasaly said she was told that she could increase her client's chance of winning by hiring a Texas lawyer who had the the same political affiliation as the judge.

4. Keys issue in judicial selection —Two main reasons are present for seeking a change in how judges are selected, Vasaly said, to preserve public confidence in the judiciary, and to preserve the judiciary's ability to represent the rights of all people. Campaign contributions going to judges creates an appearance that judges are available to the highest bidder, she said. She also noted that judges can only protect the rights of the minority if they are free to make unpopular decisions that do not necessarily coincide with the views of the majority. By making judges subject to election, their conduct in office is affected by the possibility of losing their job in the next election if they render opinions that are not popular with majorities or special interest groups. We want judges to be accountable to the rule of law, making decisions based on what the law requires, not because a certain groups wants a particular result.

5. "Incumbent" remains on the Minnesota ballot —Vasaly clarified that the current Minnesota law still is in effect, providing that the word "incumbent" is to be listed on the ballot for incumbent judges. She said such a provision is good because the fact that a judge has had experience on the bench is a relevant criteria for deciding whether the judge should be retained. But since judicial campaigns aren't widely publicized, absent the designation, it is unlikely that the public would know which candidates were incumbents. In the discussion no one could recall more than two incumbent judges ever being defeated for re-election in Minnesota.

6. Problems with a retention election —Vasaly said the retention election as proposed by the Quie commission presents the same kind of problems as would be present in continuing the current

election system. To win a retention election judges would need to seek campaign contributions and would be free to announce their views on issues that might come before them. Judges in office would also be subject to pressure by interest groups and the popular majority to render decisions that were "popular." She cited an example in Pennsylvania, which has retention elections, where a campaign was undertaken to unseat every judge because the court upheld legislation increasing the salaries of all government employees, including legislators and judges.

Discussing further the matter of retention elections, Vasaly said again that a judge needs to be accountable to the law, not the public. Such a principle is vital in the separation of powers, she said. If the Legislature has passed a law that is in conflict with the constitution, judges need complete freedom to strike down such legislation.

7. Why retention election is proposed —In discussion of this question, Vasaly noted that any change requires the electorate to pass a constitutional amendment. She and the group agreed that proponents of a retention election believe moving from a complete election system to no elections whatsoever may not be possible because it will be difficult to obtain enough political support for the constitutional amendment. Some people think that the public will not wish to give up its right to vote for judges. While a retention election leaves open the possibility of campaign abuses, that approach does avoid political campaigns when a judge is initially selected, a member commented.

8. How commission members would be selected —In the case of the merit-selection commission (responsible for recommending candidates to the Governor for initial appointment) and the evaluation commission (responsible for deciding or recommending whether a judge should remain in office, members would be appointed by the Minnesota Supreme Court and the Governor, with a requirement that a majority be non-lawyers.

9. Difficulty in attracting judicial candidates —Whether judges are appointed or elected, it is difficult in Minnesota to attract the most highly qualified persons to serve as judges, Civic Caucus members felt, due to the salaries and to the election process.

10. Read Justice Breyer's "Active Liberty" —Vasaly urged the group to read the book "Active Liberty: Interpreting Our Democratic Constitution " by Justice Stephen Breyer of the U. S. Supreme Court. Breyer contends that judges, in interpreting the Constitution, should consider the purpose of the provision in light of the democratic system that the framers of the constitution sought to build and should not adhere too literally to the 18th Century meaning of the provision.

11. Lack of voter interest in judicial elections —In evaluating whether removing judicial elections means removing power from voters, Vasaly reminded the group that judicial elections produce very little attention and that most judges run unopposed anyway. Vasaly said she was unaware of an idea offered by Lyall Schwarzkopf that a judicial race wouldn't appear on the ballot if only one candidate filed for a given office.

12. No potential relationship to selection of legislators —In discussion it was noted that concerns about too much pressure from special interests aren't confined to judges. But Vasaly said she'd not suggest applying any of the concepts in judicial selection to other elected officials, such as state legislators. In those cases, she said, you want the officials to be responsive to voters. With judges, you want them responsive to the law, not the voters.

13. Thanks —On behalf of the Civic Caucus, Verne thanked Vasaly for meeting with us this morning.

***The Civic Caucus* is a non-partisan, tax-exempt educational organization. Core participants include persons of varying political persuasions, reflecting years of leadership in politics and business.**

A working group meets face-to-face to provide leadership. They are Verne C. Johnson, chair; Lee Canning, Charles Clay, Bill Frenzel, Paul Gilje, Jim Hetland, John Mooty, Jim Olson, Wayne Popham and John Rollwagen.