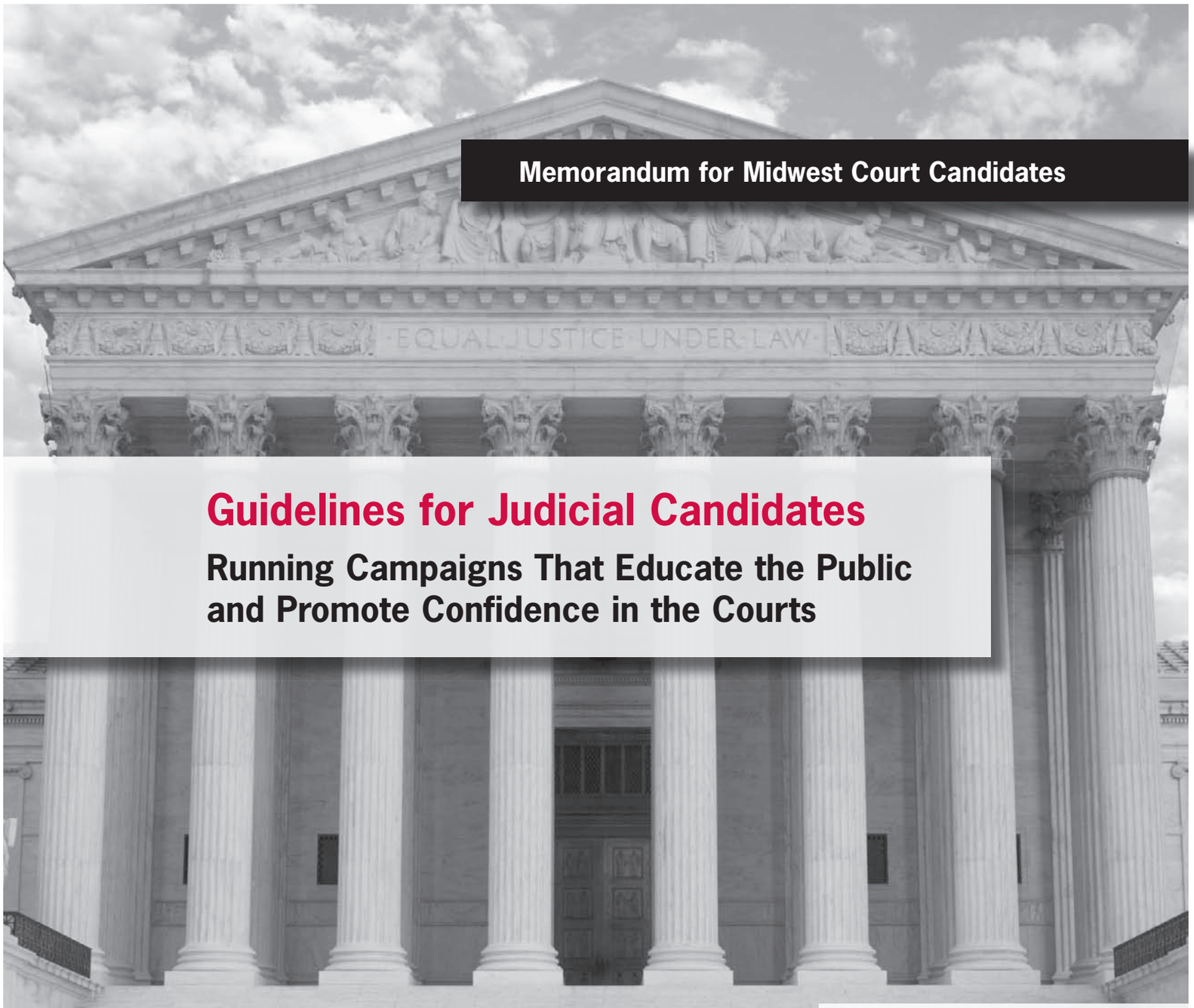

Memorandum for Midwest Court Candidates

Guidelines for Judicial Candidates

Running Campaigns That Educate the Public and Promote Confidence in the Courts

MIDWEST DEMOCRACY NETWORK

in collaboration with

Justice at Stake campaign

About the Midwest Democracy Network

The Midwest Democracy Network is an alliance of political reform advocates committed to improving democratic institutions in Illinois, Michigan, Minnesota, Ohio and Wisconsin. The Network includes state-based civic and public interest organizations as well as prominent academic institutions and respected policy and legal experts. Participating organizations seek to reduce the influence of money in politics; keep our courts fair and impartial; promote open and transparent government; create fair processes for drawing congressional and legislative districts; guarantee the integrity of our election systems; promote ethical government and lobbying practices; and democratize the media.

About the Justice at Stake Campaign

The Justice at Stake Campaign is a nonpartisan national partnership of 50 organizations working to keep our courts fair, impartial and independent. In states across America, Campaign partners work to protect our courts through public education, grass-roots organizing and reform. The Campaign provides strategic coordination and brings unique organizational, communications and research resources to the work of its partners and allies at the national, state and local levels.

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This report was prepared by Frances Zemans, former Executive Vice President of the American Judicature Society, along with the Justice at Stake Campaign and members of the Midwest Democracy Network. It represents their research and viewpoints, and does not necessarily reflect those of all members of the Justice at Stake Campaign or the Midwest Democracy Network. The publication of this report was supported by a grant from the Joyce Foundation of Chicago.

September 2008

Guidelines for Judicial Candidates

Running Campaigns That Educate the Public and Promote Confidence in the Courts

Background and Summary

As Midwestern states prepare for another round of judicial elections, we write as citizens concerned about our courts. The Midwest Democracy Network is an alliance of civic and public interest organizations committed to improving democratic institutions in Illinois, Michigan, Minnesota, Ohio and Wisconsin.[1] We are committed to keeping courts impartial and insulated from inappropriate political pressure.

As judicial candidates, you are in a unique position to educate and reassure the public. We know that changing laws and growing interest group pressure make it challenging to run campaigns that promote public confidence in the integrity, independence and impartiality of the judiciary.

This memorandum is designed as a resource guide in this demanding environment. It offers concrete proposals and common sense wisdom to help candidates keep judicial campaigns from becoming a race to the bottom. Special interest pressure may be rising, and canons of conduct may be loosening, but judicial candidates have all the power they need to preserve public confidence in impartial courts—if their own conduct is guided by a series of best ethical practices designed to keep politics out of the courtroom.

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Elected judges have never faced a more complicated and challenging campaign trail environment. Interest groups are investing millions to elect judges who they believe will serve their interests. Nasty television ads seek to turn judicial elections into referenda on hot-button social issues. And the U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White* has triggered a chain reaction of special interest demands for judicial candidates to state in advance their leanings on issues they may have to rule on in court.

1 The memo was prepared in conjunction with the Justice at Stake Campaign, a national partnership of 50 organizations that works to keep courts fair, impartial and independent.

Our recommendations cover judicial campaign speech, financial contributions, and the growing role of interest groups in judicial elections. In addition, we offer practical advice for judicial candidates to educate voters on the role of the judiciary as they seek electoral support. These include active involvement with judicial campaign oversight committees, appropriate responses to judicial questionnaires, and participation in voters' guides, campaign debates and other public education activities.

Judicial Elections and Behavior: A Golden Opportunity to Educate the Public

Since our recommendations contain a number of cautions, we wanted to begin by underscoring the importance of your role as a public educator. As you promote your candidacy, you are in a unique position to educate Americans about how our courts work, how they protect our liberties, and their unique role in our constitutional system of checks and balances.

For example, we urge you to support and participate in responsibly constructed nonpartisan voters' guides and judicial performance evaluations where they are available. Research shows that voters consider information about candidates' legal and professional experience to be essential in shaping their voting decisions. Illinois now includes Supreme Court candidates in a voters' guide. In Wisconsin, the League of Women Voters has long published "Candidate Answers" in advance of elections. Minnesota has incorporated performance evaluation in its proposals for revising its mechanism of judicial selection. Where these tools are not available, we encourage judges to work toward their establishment. For the same reason, we encourage candidates to use campaign debates to educate voters on their qualifications and the role of the courts. We offer some ethical cautions below in performing this role, but urge you to seek out such opportunities for responsible communications.

Beyond the campaign trail, we hope your efforts to educate the public continue on the bench. Americans report that they respect the statements of judges and law professors more than any other spokespersons when it comes to hearing about issues involving the legal system. Court staff should also be empowered as educators, and every court should engage or have access to qualified public information officers. There are now numerous programs around the country designed to educate the public about the judicial process. Wisconsin was a pioneer in these efforts, and in recent years courts around the country have organized and continue to operate programs for the public.[2] There is a growing appetite among schools and civic organizations for this kind of outreach.

Every one who enters a courthouse should be an education target. Judges should speak and write in plain English that can be understood by the general public and encourage accurate media coverage.[3] Finally, research clearly reveals that litigants' evaluation of judicial proceedings is directly related to how they feel they have been treated in the courtroom—and whether they have had an opportunity to be heard. The judge is the critical actor who determines how these participants view the judicial process and the third branch of government. If the judge is perceived as fair, so too is the courtroom experience.

2 For information about court outreach programs see http://www.ncsconline.org and "Judicial Outreach on a Shoestring: A Working Manual," American Bar Association, 1999.

3 For example, see *Opinion Writing in Controversial Cases*, National Center for State Courts, http://www.ncsconline.org/opinionwriting/.

Recommendations Regarding Judicial Candidate Speech

1. Judges and judicial candidates should avoid expressing their views on issues that may come before the courts.

We urge you to focus your campaign speech on your qualifications for office. The more judicial candidates and judges publicly state their views on justiciable issues, the greater the fear that campaign trail talk will affect courtroom decisions. When a judge has made his or her personal views known, citizens are right to question whether they will receive a fair and impartial hearing. We urge you to strictly avoid statements on issues that may come before the courts, so that you do not even appear to be predetermined or inclined towards a particular result in certain kinds of cases.

When declining to state their personal views on issues that may come before the courts, judicial candidates can explain that they do not want to give the false impression that their personal views will dictate decisions that must be based on the facts and law of an individual case. If candidates feel compelled to announce their personal views on issues, the American Bar Association suggests that they should simultaneously "acknowledge the overarching judicial obligation to uphold the law without regard to his or her personal views."[4]

2. Judges who have spoken publicly on issues that come before them should be ready to recuse themselves from deciding cases involving such issues.

In the *White* decision, Justice Anthony Kennedy suggested that recusal could be a tool for protecting judicial impartiality amid growing pressure on judicial candidates.[5] Of course, the cleanest solution is for judicial candidates to simply avoid speaking about issues that may come before the courts. But judges who choose a different path should be prepared to step aside if a case comes before them involving a topic they discussed on the campaign trail. As the Chief Judge of Missouri puts it, "if a judicial candidate announces a position on an issue – which is his or her First Amendment right to do – that judge may have to recuse (or remove) himself or herself from hearing a case about that issue."[6]

When a judge has made his or her personal views known, citizens are right to question whether they will receive a fair and impartial hearing.

3. All statements made by candidates and their campaign committees should be accurate. Judicial campaigns should avoid false or misleading statements, whether directly or in campaign advertising.

This may seem obvious and unarguable, but at least one appeals court decision has suggested that false statements cannot be barred under canons of ethics. A judicial candidate who is perceived to engage in or to tolerate unfair and misleading campaigns is not likely to be viewed by litigants as fair and impartial.

4 2007 ABA Model Code of Judicial Conduct, Canon 4, Rule 4.1,Comment 13

5 For more information on recusal, see James Sample, David Pozen and Michael Young, *Fair Courts: Setting Recusal Standards*, Brennan Center for Justice, April 2008, at http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/.

6 "Your Missouri Courts," May 30, 2006, http://www.courts.mo.gov/page.asp?id=1077.

Recommendations Regarding Campaign Contributions

1. ***Regardless of their state's regulations, judicial candidates are encouraged to maintain limits on the amount of contributions they will accept from a single source or category of contributors. In states with very high limits on campaign contributions (like Ohio) or no limits at all (like Illinois), they should abide by reasonable contribution limits in the range of $1,000 - $2,300 per individual (the latter number being the individual contribution limits for federal candidates).***

2. ***Solicitation of campaign funds should be based only on the professional qualifications of the candidate and never on promises, explicit or implied, that a judge will decide cases in a particular way.***

3. ***Judicial candidates should solicit campaign funds only through a campaign committee, which must accurately report contributions in a transparent and timely manner, making clear the source of their funding.***

4. ***Judicial candidates who accept large (perhaps $1,000-$5,000) campaign contributions from a single source representing one perspective, or whose campaign benefits from outside expenditures, should recuse themselves when cases of interest to the contributors or supporters come before them.***

Though judges and justices routinely raise millions of dollars from contributors whose cases they decide, they are required to maintain their impartiality and independence. Three of the most expensive Supreme Court races in the nation have occurred in Illinois, Ohio and Michigan. More than half of all television advertisements that have appeared in state Supreme Court races since 2000 have aired in these same three states. Unfortunately, Wisconsin is moving in the same direction; their April 2007 judicial election set a new record for fundraising by candidates.

As judicial candidates you should be aware that the public, and even many judges, believe that campaign contributions affect impartiality in the courts. Public opinion surveys from 2001-2004 found that more than 70 percent of Americans believe that campaign contributions influence judges' decisions; only 5 percent believe that contributions have no influence. What is perhaps even more disturbing is the finding that 26 percent of state court judges surveyed in 2002 said they believe that campaign contributions have at least "some influence" on decisions and 46 percent believe that contributions have at least "a little influence."[7] In 2004, after two Illinois candidates raised $9.3 million, the winner, Justice Lloyd Karmeier, called it "obscene" on election night. "How can people have faith in the system?" he asked.

The public, and even many judges, believe that campaign contributions affect impartiality in the courts.

Little has changed since then. In 2008, 78 percent of voters in Wisconsin believe that campaign contributions influence outcomes in the courtroom. Even in Minnesota, where fundraising for judicial campaigns has been much more restrained, a majority of the voters reached a similar conclusion.

7 *Justice At Stake – State Judges Frequency Questionnaire*, at http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf

A 2006 *New York Times* study seems to support that view. Over a twelve-year period, the Times found that Ohio Supreme Court Justices voted in favor of their contributors more than 70 percent of the time, with one justice doing so 91 percent of the time. It is not surprising that another survey revealed that 90 percent of voters believe that disclosure of campaign contributions would make a difference in how their state government works.[8] When Judge Karmeier won his seat on the Illinois Supreme Court in 2004, he had received $350,000 in contributions from those directly involved with State Farm Insurance, which then had an appeal pending in a $465 million claim. He received an additional $1 million from groups to which State Farm was connected. As noted in a *St. Louis Post-Dispatch* editorial: "Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case."

Recommendations for Dealing With Interest Group Pressure

1. ***Judicial candidates should be particularly wary of interest group efforts to elicit candidates' views on issues that may come before the courts.***

2. ***Judicial candidates should publicly disassociate themselves from groups that assert or imply that the candidate will support the group's point of view when cases of interest to the group come before them as judges.***

3. ***Judicial candidates should publicly disassociate themselves from groups that make false or misleading accusations against an opposing candidate.***

4. ***Judicial candidates should call upon advocacy and interest groups seeking to influence the outcomes of judicial elections (through paid advertising and other means) and operating independently of the candidates, to publicly disclose the sources of their funds.***

5. ***If presented with questionnaires from interest groups, judicial candidates should:***

   - not be rushed in deciding how to handle the questionnaire.
   - never use the pre-printed answers provided on the questionnaire.
   - consider responding with a letter
   - never rely upon a judicial Canon to justify a decision not to respond.
   - distinguish general-interest, non-advocacy groups from special interest advocacy groups—and be consistent.
   - use their responses as an opportunity to explain the role of a judge and why stating one's views on controversial issues is both inappropriate and damaging to public belief in impartial justice.

6. ***In their efforts to maintain the posture of an impartial and independent judge, judicial candidates should take advantage of the opportunity offered by judicial campaign oversight committees.***

8 *Midwestern Attitudes on Political Reform: Highlights From A Five-State Survey*, at http://www.midwestdemocracynetwork.org/templates/media/Five%20State%20Report.pdf?phpMyAdmin=lFwKeYlf6Qcecb7YTzU16lD8Yb8.

Questionnaires are being increasingly abused by interest groups of all political stripes seeking to pressure candidates into making statements about issues before they land in court.

The *White* decision triggered stepped-up activity by groups seeking to pressure judges to rule their way in court, often on hot-button issues like tort reform, capital punishment, abortion, same-sex marriage, and crime control. As former U.S. Supreme Court Justice Sandra Day O'Connor puts it:

> *I am anxious about the state of the judiciary in America. I am not concerned about particular judges or cases, nor am I concerned about the judiciary shifting right or left. What worries me is the manner in which politically motivated interest groups are attempting to interfere with justice.*

Unfortunately, since 2000, Illinois, Michigan, Ohio and Wisconsin have become national symbols of rising special interest pressure on state Supreme Courts. In addition to direct contributions, these groups produce and air their own advertising campaigns in support of their preferred candidates, often without revealing the source of their funding. As television ads have become central to judicial campaigns, all too often they include negative attacks and misleading information. Since 2000, of all the television advertising in state Supreme Court races nationwide, more than half aired in Illinois, Ohio or Michigan. In Wisconsin's spring 2008 campaign, 89 percent of the television advertising was paid for by outside groups.

Questionnaires

Questionnaires are being increasingly abused by interest groups of all political stripes seeking to pressure candidates into making statements about issues before they land in court. Many give short shrift to a candidate's legal experience, education, or approach to the administration of justice–information that could be highly valuable to voters trying to pick a candidate. Instead, they usually call on judicial candidates to distill complex legal issues down to a simple check in a box, and rarely seek a narrative response from the candidates. Would-be judges know that their answers could trigger significant money, political ads, and grass-roots campaigns for or against their candidacy.

In an effort to force a desired result, some interest groups stipulate on their questionnaires that declining to respond is the equivalent of invoking the prohibitions imposed by the state judicial code of conduct, and that the candidate would have responded but for the code. This is designed as intimidation, and as a legal trap for unwary candidates. Invoking the code of conduct subjects states to lawsuits that challenge the constitutionality of their codes.

Candidates seeking to avoid this intimidation racket have other options. In response to a 2006 Tennessee interest group questionnaire, judicial candidates overwhelmingly declined or failed to respond. Many judicial candidates have used the questionnaires as an opportunity to discuss the role of a judge, explaining their declining to respond as a reflection of their belief that to do so would compromise the appearance of their impartiality and would, therefore, be contrary to the rule of law. We strongly recommend that judicial candidates use their responses to questionnaires as an opportunity to explain the role of a judge and make clear why stating one's views on controver-

sial issues is both inappropriate and damaging to public belief in impartial justice.[9]

It's also worth noting that the American Bar Association has warned that responses to questionnaires could lead to disqualification. Judges who express their views on contentious issues during election campaigns are more likely to be subject to recusal motions when those issues surface in litigation.

Finally, not every questionnaire is loaded. Some are appropriate, and are clearly designed to educate voters without pressuring candidates to make statements that may undermine their fairness and impartiality as judges. Examples of responsible questions include:

1. What experiences qualify you to be a judge?

2. In terms of qualifications and judicial philosophy, how would you distinguish yourself from other candidates in the race?

3. How would you define a fair and impartial judge and how would you work to ensure your impartiality?

4. In which instances is it appropriate and desirable for the judiciary to work in cooperation with the other branches of government? In which areas does the judiciary have the obligations to stand apart?

5. What supervisory or administrative experience have you had in the past? How would you maintain and/or improve the efficiency in your courtroom?

6. What can be done to improve access to justice?

7. What role should a judge play in educating the public about responsibilities and functions of the courts?

Judicial Campaign Oversight Committees

Judicial campaign oversight committees offer assistance to candidates who want to insure that judicial election campaigns are consistent with an independent and impartial judiciary. Properly constructed committees are non-partisan (or bi-partisan) and are comprised of prominent community and legal leaders, including non-lawyers. Because they are unofficial organizations, their actions are not affected by the restrictions now imposed on enforcement of portions of state judicial codes of conduct.

At the core of these committees is an agreement by the candidates to follow established standards of behavior for the campaign. In advance of the campaign, candidates are asked to sign a pledge not to violate the standards, understanding that violations will be made public. This takes the burden off the individual candidate to establish ad hoc standards and reasserts the value of appropriate ethical standards unconnected to canons and enforceable norms of campaign trail behavior. Oversight committees may also help resolve disputes over behavior and advertising that arise during the course of a campaign.

Ohio has a statewide committee and Columbus, Ohio has a long-standing local committee; Illinois has a state and a local committee, Hennepin County Minnesota has a local committee, and Wisconsin has recently established an oversight committee. We strongly encourage candidates to commit to upholding the standards that oversight committees establish and to actively participate in improving the committees. While committees vary substantially, all are devoted to encouraging judicial election campaigns that promote the impartiality and independence of the judiciary.

9 For assistance see "How Should Judicial Candidates Respond to Questionnaires?," prepared by the National Ad Hoc Advisory Committee on Judicial Campaign Conduct, at http://www.judicialcampaignconduct.org/Advice_on_Questionnaires-Final.pdf

Courts are supposed to be different from other branches of government: accountable to the law and the Constitution, not partisan and special interest pressure.

For those interested in creating, enhancing and supporting campaign oversight committees, the National Ad Hoc Advisory Committee on Judicial Campaign Oversight offers assistance.

Debates

Here again the cautions we have suggested should apply. Debates should be viewed as opportunities to present appropriate credentials and experience, but not to speak on issues that may come before the courts. There may well be some debate settings that it would be best to avoid, for example, when the clear purpose of a forum is to promote a particular point of view and your participation may give the appearance of bias. However, similar questions may arise in more general public debates and in interviews with the media. In response to questions that attempt to force judges to commit to a point of view, we strongly urge candidates to employ the same cautions and responses we recommended regarding interest group questionnaires. It is the candidate who can and should define himself or herself; do not let others take control of representing who you are and the kind of judge you would be. Do not hesitate to use the internet, perhaps including videos of your participation in debates.

Conclusion

Courts are supposed to be different from other branches of government: accountable to the law and the Constitution, not partisan and special interest pressure. Our goal has been to offer practical guidelines for judicial candidate conduct that will educate voters and uphold the independence that courts need if they are to be fair and impartial. You and your campaign play the role of educator and ambassador, with great potential to boost or undermine public respect and support for an independent judiciary. We appreciate every effort you can make to help Americans protect the courts that protect their rights.

Signed,

Chicago Appleseed Fund for Justice
Citizen Advocacy Center
Heartland Democracy
Illinois Campaign for Political Reform
League of Women Voters of Ohio
League of Women Voters of Wisconsin Education Fund
Michigan Campaign Finance Network
Minnesota Council of Nonprofits
Ohio Citizen Action
Take Action Minnesota
Wisconsin Democracy Campaign

Appendix: Table of Recommendations

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