

Fw: Re: The Order Appointing Chief Judge of the Court of Appeals

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To: Michaela Paukner <mpaukner@wislawjournal.com>

From: Ann Bradley

Sent: Wednesday, June 30, 2021 4:41 PM

To: Court of Appeals - Judges

Subject: Re: The Order Appointing Chief Judge of the Court of Appeals

To the Judges of the Wisconsin Court of Appeals:

On June 28, the Wisconsin Supreme Court issued an order appointing a new Chief Judge of the Court of Appeals. We did not have the opportunity to attach a separate writing to that order. In the absence of that opportunity, we are sending this email to all court of appeals judges.

By this writing, we do not intend to cast a pall over the beginning of Judge Brash's tenure as Chief Judge. He has provided many years of service both on the circuit court and the court of appeals and we are confident that the court of appeals will be in good hands. Nevertheless, we express our concern regarding the timing and lack of process employed by a majority of this court in the appointment process.

The order provides in part: "WHEREAS, the Honorable Lisa S. Neubauer's term as Chief Judge of the Court of Appeals of Wisconsin will expire July 31, 2021"

But why has her term expired after serving only two terms, comprising six years of service? Never before has this court limited the number of terms that can be served as Chief Judge of the Court of Appeals. Indeed, Chief Judge Neubauer's immediate predecessor served eight years as chief judge, and each of the two chief judges before him served nine years.¹ If there is to be a newly imposed limit on the number of terms, what propels the need for immediate change? Why now?

A consequence of the change now is that it can serve as justification for an otherwise unjustified termination of the tenure of the current Chief Judge of the Court of Appeals, and indeed on July 31, that will come to pass.

Some may point to a patina of symmetry as further justification for this action. Yet one need not scratch too far beneath the surface to see that such a justification holds no water. True, the chief judges of the districts have a limited number of terms (three two-year terms),² but if one had fidelity to symmetry, then the court of appeals judges should elect their own leader, as do the chief judges of the judicial districts.

And if it is symmetry we are searching for, then why not look to the terms of the Chief Justice of the Wisconsin Supreme Court? For that position, there is no limitation on the number of terms. A quest for symmetry simply does not explain this court's ill-conceived timing.

The problem with the timing of the court's order is exacerbated by the lack of process, depriving interested parties of notice and an opportunity to be heard. The Wisconsin Supreme Court should not be implementing such a change through a process that denies everyone an opportunity to be heard. There was no input from the public or any stakeholder—not even from members of the court of appeals.

In contrast, the process employed to limit the number of terms of the chief judges of judicial districts was through the enactment of a Supreme Court Rule (SCR 70.18). The majority takes a different tack, and apparently enacts instead an Internal Operating Procedure to limit the number of terms of the chief judges of the court of appeals. If the court would have pursued this change through an amendment

to the Supreme Court Rules, such a change would have been subject to notice and an opportunity to be heard—possibly even a public hearing. But the court's action circumvents such a process.³

Likewise, there was notice and an opportunity to be heard when the length of terms for the Chief Justice of the Wisconsin Supreme Court was cabined. See Wis. Const. art. VII, § 4(2). Yet neither was offered here. The only process undertaken was a vote behind closed doors.

Because both the curious timing and the lack of process employed in implementing this limitation of terms appear to compromise this court's institutional integrity, we write separately from the June 28 order.

Justices Ann Walsh Bradley, Rebecca Frank Dallet, and Jill J. Karofsky

[1] Wis. Stat. § 752.07 ("The supreme court shall appoint a court of appeals judge to be the chief judge of the court of appeals for a term of 3 years."). Since the establishment of the court of appeals in 1978, there have been six chief judges: Lisa Neubauer (2015-present); Richard Brown (2007-2015); Thomas Cane (1998-2007); William Eich (1989-1998); Burton Scott (1983-1989); and John Decker (1978-1983). As is apparent from their years of service, several chief judges served longer than two three-year terms.

² SCR 70.18.

³ The introduction to the Wisconsin Supreme Court Internal Operating Procedures provides that "these procedures may be changed without notice as circumstances require."

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