

# LANDMARK LEGAL FOUNDATION

THE RONALD REAGAN LEGAL CENTER

March 20, 2012

Mr. James C. Alexander, Executive Director  
Wisconsin Judicial Commission  
110 East Main Street, Suite 700  
Madison, WI 53703

## Re: ALLEGATION OF MISCONDUCT, REQUEST FOR INVESTIGATION

Dear Mr. Alexander:

Published reports indicate that 29 Wisconsin circuit court judges appear to have violated the Wisconsin Code of Judicial Conduct by improperly engaging in partisan political activity. Pursuant to Wis. Stat. Sections 757.81 to 757.99 (2011), Landmark Legal Foundation respectfully requests that the Wisconsin Judicial Commission conduct an immediate investigation into this important and timely matter and take all appropriate disciplinary action, including reprimand, censure, suspension, and removal.

### Background

A petition drive is underway advocating Governor Scott Walker's removal from office via recall election. Gannett Wisconsin Media reports that its review of a digital database of recall signatures revealed that "judges from all corners of the state signed on in support of the recall." (Exhibit A, "29 Wisconsin judges sign recall petitions," Gannett Wisconsin Media, <http://www.sheboyganpress.com/article/20120318/SHE0101/203180442/1973&located=rss>, March 18, 2012.) If this report is correct, this inherently political activity implies that these judges are endorsing, if not promoting Governor Walker's recall and calls into question the impartiality and judicial ethics of each signing circuit judge under the Code of Judicial Conduct.

An immediate investigation into the conduct of each of the signatory judges will also determine whether he or she is currently presiding over any cases in which Governor Walker or his administration is a party requiring recusal and whether disciplinary action is appropriate. According to the Gannett investigation, the circuit court judges who have signed the recall petition include:

Mark Warpinski  
Don Zvidmulder  
Charles F. Kahn, Jr.  
D. Todd Ehlers  
J. David Rice  
Andrew Bissonnette  
Bonnie Gordon  
Carl Ashley  
Dale Pasell  
Daniel George

David Flanagan  
Dennis Cimpl  
Gerald Wright  
James Czajkowski  
Michael Dwyer  
James Duvall  
Jane Carroll  
Jean DiMotto  
John Anderson  
John Damon

Karen Christenson  
Marshall Murray  
Michael Rosborough  
Pedro Colon  
Ramona Gonzalez  
Thomas Lister  
Todd Bjerke  
Tom Wolfgram  
Mary Kuhnmuench

### Applicable Wisconsin Code of Judicial Conduct Provisions

The Preamble to the Wisconsin Code of Judicial Conduct, Supreme Court Rule (SCR) Chapter 60, makes very clear that judges are to be held to the highest standard for ethical conduct:

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Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all provisions of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct rules relating to political activities are found in SCR 60.06. The rule provides, among other things, that no judge may "[p]articipate in the affairs, caucuses, promotions, platforms, endorsements, conventions, or activities of a political party or of a candidate for partisan office"; or "[p]ublicly endorse or speak on behalf of its candidates or platforms." SCR 60.06(2)(b)(2) and (4). Signing a recall petition is both "participation" and "public" in political activity implying at a minimum the endorsement of those seeking to remove a candidate for a partisan office.

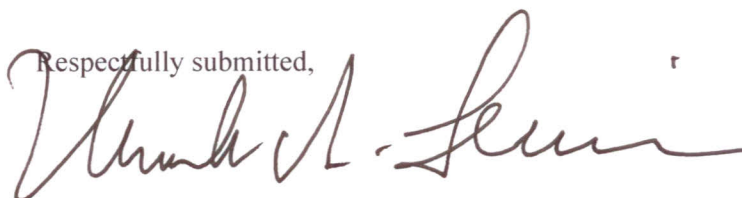
SCR 60.02 provides for the general rules guiding the conduct of judges. In short, "[a] judge shall uphold the integrity and independence of the judiciary." SCR 60.03 requires judges "**to avoid impropriety and the appearance of impropriety in all the judge's activities.**" (Emphasis added.) The accompanying note to SCR 60.02 explains that judges "must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Moreover, because it is not practicable to list all prohibited acts, "the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned" in the code. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

### Request for Investigation

The public endorsement of Governor Walker's recall warrants a full and immediate investigation into each of the 29 circuit court judges who reportedly signed the petition. The endorsement of sitting elected official's removal by recall election is no different than the endorsement of a candidate for office. At a minimum, however, signing the recall petition gives the appearance of a political endorsement, which violates SCR 60.02.

In addition to the apparent violation of the Code of Judicial Conduct political activity prohibition, the Commission should determine whether any of these judges are currently presiding over cases in which Governor Walker or his administration are parties. If so, recusal must be required immediately and any failure by a judge to have already disclosed his or her apparent conflict of interest should be investigated separately by the Commission.

The Commission should send a strong message to the Wisconsin judiciary that violating the Code of Judicial Conduct in this manner will not be tolerated. Landmark respectfully requests that the full range of sanctions be considered for these egregious ethical violations including as appropriate reprimand, censure, suspension, and removal.

Respectfully submitted,  


Mark R. Levin,  
President





March 18, 2012

## 29 circuit court judges signed Walker recall petitions

### Gannett Wisconsin Media Investigative Team Watchdog Report

*By Eric Litke*

*Gannett Wisconsin Media Investigative Team*

Twenty-nine circuit court judges in Wisconsin were among the thousands to sign recall petitions against Gov. Scott Walker, according to a Gannett Wisconsin Media analysis.

Dane County Judge David Flanagan has drawn the lion's share of the scrutiny after issuing a temporary restraining order March 6 against a Walker-backed voter ID law without disclosing his support of the recall, but the analysis shows he was joined by judges from 15 other counties in signing petitions.

Walker supporters were outraged that Flanagan did not disclose his apparent conflict and filed ethics complaints against the judge. However, judges who signed the petition and agreed to interviews defend their decision as constitutionally protected and not explicitly banned by the Wisconsin Code of Judicial Conduct.

Twelve percent of the state's approximately 250 county-level judges signed the petition. By comparison, the 930,000 signatures submitted by recall organizers would represent 21 percent of the state's voting-age population, if all signatures were valid. The Government Accountability Board has so far determined 26,000 were invalid, and the review is ongoing.

The Gannett Wisconsin analysis based on a digital database of recall signatures created by Wisconsin GrandSons of Liberty and We the People of the Republic revealed judges from all corners of the state signed on in support of the recall. The data showed none of the state's 16 appeals court judges or seven Supreme Court justices signed.

Milwaukee County, with one-fifth of the state's circuit court judges, had the most with 11. The county has 47 judges, meaning about a quarter of the judges signed the petition.

Janine Geske, a former Wisconsin Supreme Court Justice and current law professor at Marquette University, said she was surprised by the number of judges who signed the recall petitions.

"I believe the judges had the right to sign the petition, but it creates a problem with the appearance of impartiality if and when they may be called upon to decide any issues involving the governor or the Republican party," Geske said in an email. "We are in a highly politically charged time when many citizens have lost confidence in our governmental bodies. It is critical that judges do everything they can to demonstrate that the judiciary remains independent of the other two branches and will remain free of political influence."

## Commission gave OK

The state's Code of Judicial Conduct says judges cannot "participate in the affairs, caucuses,

promotions, platforms, endorsements, conventions, or activities of a political party or of a candidate for partisan office."

The code, which is part of state statute, also bars judges from being a member of a political party, endorsing candidates or soliciting funds for political parties. It contains general admonitions to avoid "the appearance of impropriety in all of the judge's activities."

Jim Alexander, executive director of the Wisconsin Judicial Commission, which governs judicial conduct, said the code makes no specific reference to recall petitions. He said a "handful" of judges around the state contacted him for advice over the propriety of signing the recall.

Alexander declined to say what advice he gave judges, but Monroe County Judge J. David Rice said he was told signing the recall was OK.

"I did recognize there could be an issue about whether this was ethical, so I contacted (Alexander), told him what I was considering and asked his opinion," Rice said. "He said in his opinion that didn't violate the judicial ethics, so I relied on that in signing. If he'd have said, 'No,' I wouldn't have done it."

Alexander said he did not sign the recall petition because "it's not something proper for my position."

Professor Richard Painter of the University of Minnesota Law School questioned why judges would expose themselves to criticism and a potential perception of bias by signing the recall petition, though he acknowledged there might be wiggle room within the judicial code allowing judges to sign.

"State judges often have to decide cases where the governor is a party to a case, less often where state legislators are a party to a case. Sometimes judges have to rule on close elections," said Painter, who served as chief ethics lawyer in President George W. Bush's administration and has written a book on ethics reform in American government. "For judges to be getting involved in the question of whether the governor ought to be recalled I think is highly inappropriate. Whether it violates an ethics rule or not in Wisconsin, I think it's very inappropriate."

## Judges defend decision

The judges who signed the petition made two basic arguments that signing the petition was merely supporting the electorate's right to vote, and that the recall petition supports neither a specific candidate nor a political party and is allowable.

"I concluded that by signing a recall petition I wasn't advocating for a particular party, I was advocating for the recall process, which I thought was completely separate and apart," said Brown County Judge Mark Warpinski. "I didn't do it lightly. I certainly considered this a very important issue, but in the final analysis I felt that my right to sign a petition didn't implicate any of the ethical considerations that I knew of."

Brown County Judge Don Zuidmulder called criticism of judges signing the petition "the beating of the partisan drum."

"I viewed this simply as a question of whether we should have an election," Zuidmulder said. "I'm in favor of elections any time, any place."

Cynthia Gray, director of the American Judicature Society for Judicial Ethics, said she found no court decision or advisory opinion that directly referenced recall petitions. The American Judicature Society is a clearinghouse for information on judicial ethics and discipline affiliated with Drake University in Des Moines, Iowa.

"The Wisconsin Code of Judicial Conduct does not appear to expressly prohibit signing a recall