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Dallet email

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Subject: Clarification

Chief Justice Ziegler,

I am incredibly disappointed that you have chosen to play games in the media rather than communicate with members of the court privately through our procedures, or with the Director of State Courts throughout the month (despite numerous requests to do so).

Leaving aside your deeply inappropriate, and at times partisan, tone and tenor, I will attempt to clarify the facts. The court will not be impeded in its work by your demonstrated desire to put up roadblocks to effective functioning at every turn.

To begin with, the internal operating procedure (IOP) changes are not proposed, they are currently in effect. A majority of the court voted to amend the IOPs on August 4, and as with all prior changes to the IOPs, those changes were effective immediately. The introduction to the IOPs states that "any internal operating procedure may be suspended or modified by majority vote of a quorum of the court." That is exactly what happened here.

This conclusion is reinforced by the constitutional provision, "[a]ny 4 justices shall constitute a quorum for the conduct of the court's business." Wis. Const. art. VII, § 4(1).

As you know, the court will issue an order memorializing these changes in the future, but it will do that only as a courtesy for those who wish to write separately about the changes; no order is necessary to amend the IOP. Indeed, no orders were issued on either of the two IOP changes the court adopted last year.

The new supreme court administrative committee is perfectly legitimate. A majority of the court has always had the power to change how we

conduct the court's business, and majorities past and present have amended the IOPs and SCRs to make those changes many times over the years, with or without the approval of the chief justice. As you are aware, the constitution is explicit that the chief justice exercises their "administrative authority pursuant to procedures adopted by the supreme court." Wis. Const. art. VII, § 4(3).

And, if there's any confusion on this point, let me repeat, "[a]ny 4 justices shall constitute a quorum for the conduct of the court's business." Wis. Const. art. VII, § 4(1).

The fact that you and other members of the court refuse to participate in the process by which these most recent changes were made, despite having been given multiple opportunities to do so, (including selecting a meeting date, appearing in person or via zoom, or voting by email) doesn't make them illegitimate or illegal. A minority of three justices cannot prevent the court from carrying out its duties by failing to report to work.

The scale of the changes is irrelevant, given that they all comply with applicable law and were properly enacted. The court has a new majority. Under the circumstances the majority is adopting procedures to accommodate your desire to maintain your position as Chief Justice.

Although you have claimed otherwise, no public hearing was required for the meeting on August 4 where we adopted certain administrative reforms. For starters, these provisions were adopted at the same time the Supreme Court Rules were changed, on August 4. Additionally, the IOP provisions you cite apply to "public hearing[s] on petitions for amendment of the Supreme Court Rules," but these changes were made by motion of the court without a petition being filed, as has been done in the past.

Let me remind you that despite the clear wishes of a majority of the court, you refused to schedule a meeting in August. But you do not have the authority to prevent the court from sitting. The Constitution makes clear the majority of the court rules, including when it comes to the process for judicial administration.

It is bizarre to suggest that new IOP provisions "allow the court to keep far

more out of the public eye than ever before." We haven't had an open conference on anything since 2017, when the majority of the court at that time, including you, shut them down.

We are simply creating process so that a majority of the court can effectively work in the face of an intransigent and uncollegial chief who apparently insists on a public debate about issues for political purposes, rather than allow a court majority to function as it always has. When your majority wanted to remove a chief justice, mid-term no less, you had no compunction about doing it. Well, now a majority of the court wants to work differently.

Let me address one additional point. You say that the "Chief Justice is the constitutional administrator of the court," but that is not what the SCRs, the IOPs, the statutes, nor the constitution says. That is made-up language. The constitution clearly states "the chief justice shall be the administrative head of the judicial system," but makes clear that you "shall exercise this administrative authority pursuant to procedures adopted by the supreme court." Id. § 4(3) (emphasis added).

In other words, the chief justice is not, and never has been the administrator of the supreme court—when it comes to administering the court itself, each member of the court has the same power and majority rules. You stand in the company of equals and your vote does not count extra (let alone prevail against four other votes).

For that reason, there is no conceivable argument that the constitution gives you any authority over, for example, our court's schedule—a power that now belongs to the administrative committee. Whether you like it or not is irrelevant. Your frantic emails and public statements notwithstanding, your power has been limited, in accordance with the constitution, which allows a majority to rule and to develop procedures you must respect.

As for the committee's other duties, such as supervising the director of state court, you know perfectly well that the director works for the court as a whole—not any individual justice—and may be hired or fired by a majority of the court at any time. SCR 70.01(1).

Given that, the chief justice has no more say than any other justice about how the director performs her duties, and the constitution doesn't say otherwise. Moreover, even if supervising the director were somehow part of your unique power as "the administrative head of the judicial system," let me remind you again (and we will do so again and again if required), the constitution makes clear that you exercise that administrative power only "pursuant to procedures adopted by the supreme court." Id.

Adopting such procedures is exactly what the court has done. Regardless of your choice not to participate in that process—and regardless of your disagreement with the decisions we reached—our process and conclusions were plainly constitutional.

As for the appointment of Judge Skwierawski as interim director of state courts, that too was lawful. The constitution indeed prohibits a judge or justice from holding "any other office of public trust, except a judicial office, during the term for which [he or she was] elected." Wis. Const. art. VII, §10.

But, as we've made clear, Judge Skwierawski's appointment doesn't violate this provision for two reasons: (1) the position of director is not an "office of public trust," and (2) even if it were, it is a "judicial office," in which she may lawfully serve before the expiration of the term for which she was elected.

As explained in an Attorney General's opinion, OAG 4-08, an "office of public trust" is equivalent to a "public office." A "public office" is one that is created by legislative act, possesses a delegation of a portion of the sovereign power of the state to be exercised independently without the control of a superior power, has some permanency, and is held by virtue of written authority. See Martin v. Smith, 239 Wis. 314, 330-32 (1941).

Under that definition, the director plainly doesn't occupy an "office of public trust." That is true for many reasons. To list just a few here: the director is hired by and serves at the pleasure of the court, her powers are administrative rather than sovereign in nature, and her authority is exercised only under our direct oversight. See Wis. Stat. § 758.19; SCR §§ 70.01, 70.03.

But even if her position were an “office of public trust,” Judge Skwierawski’s appointment would nonetheless be permissible because the director’s position is a “judicial office” as that term is used in Article VII, Section 10.

Here, once again, the Attorney General’s well-reasoned opinion is clear: “The phrase ‘judicial office,’ as used in the Judiciary article of the constitution, should be construed as referring to an office that is located within the judicial branch of government created by that article,” and includes offices “created under ch. 757 or 758 or any agency created by order of the Supreme Court.” Atty. Gen. Op. OAG 4-08, at 7.

SCR 70.01 creates the office of director of state courts, and Wis. Stat. § 758.19 further defines the office and gives it certain additional authority. Moreover, this conclusion just makes sense in light of what this constitutional provision was trying to achieve. As the Attorney General’s opinion says, Article VII, Section 10 was adopted to preserve judicial independence and the separation of powers. What possible threat is there to judicial independence or the separation of powers in having someone like Judge Skwierawski, an independent judge who knows our judicial system and what needs to be done to improve it, serve as director of state courts?

Finally, you claim that judges are not allowed to take leaves of absence. But SCR 70.23(2) says that when “[a]n active judge . . . is going to be absent from his or her court,” she need only obtain approval of the chief judge for her administrative district. Judge Skwierawski did exactly that. She followed the rules. Moreover, that same provision allows the chief judge to “assign an active judge of the judicial administrative district to substitute for the absenting judge.” Id. Given that, there is no risk that Judge Skwierawski’s absence will affect the day-to-day business of the circuit court, and there is no serious basis for arguing that her absence violates any rule of the judiciary.

To be clear, you raise these concerns now, but you refused to participate in meetings on August 4 and other dates to discuss these issues collegially and to share your thinking with us. There was never a question the new majority wanted to move in a different direction. We told you so directly at conference in May and in June, and in numerous subsequent

emails since then.

Let me be crystal clear. **The attempt to obstruct the proper business of the court and the furtherance of justice comes from you.** Judge Skwierawski tried on many occasions to discuss how the Office of State Courts could better serve the people of our State. You not only refused to meet with her but today you send emails (which are then immediately leaked to the media) falsely accusing her of violating the law for doing her job in keeping the courts running in service to the people of the State of Wisconsin.

I will reluctantly release this email to the public because the people of Wisconsin deserve to hear more than your inaccurate view of the situation leaked to the media from an email. For us to work together collegially, I hope we can begin to utilize the processes that the majority of the court has put forward, including the administrative committee.

RFD

Justice Rebecca Frank Dallet

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