A Perilous Proposal: Retention Elections & Merit Selection

UNDERMINING THE INDEPENDENCE OF OUR COURTS

Special Interests are Looking to Change the Way Judges are Selected in Minnesota

For over one hundred and fifty years, competitive judicial elections have made our state’s highly respected courts the envy of much of the nation and the world. Unfortunately special interest groups with a vested interest in who sits on the bench are working to change that by pushing a plan to change the way we select judges in Minnesota.

They claim that the independence and impartiality of our courts has been placed at risk because electing judges as we have since statehood is too democratic a process; they warn that free speech is somehow dangerous; and they claim that the only way to protect our courts from corrupting outside influences is to amend the Constitution to take away the right of the people to participate in the direct selection of their judges — their right to vote — and instead give that right solely to the Governor and a select committee of well-connected “nonpartisan” political appointees.

THE DIGNITY AND STABILITY OF GOVERNMENT IN ALL ITS BRANCHES, THE MORALS OF THE PEOPLE AND EVERY BLESSING OF SOCIETY DEPEND SO MUCH UPON AN UPRIGHT AND SKILLFUL ADMINISTRATION OF JUSTICE, THAT THE JUDICIAL POWER OUGHT TO BE DISTINCT FROM BOTH THE LEGISLATIVE AND EXECUTIVE AND INDEPENDENT UPON BOTH, THAT SO IT MAY BE A CHECK UPON BOTH, AS BOTH SHOULD BE CHECKS UPON THAT.”

- Thomas Jefferson
Under their proposed merit selection/retention election system, the Governor would fill all judicial vacancies through direct appointment, selecting from a slate of candidates recommended by a merit selection committee composed of appointees of the Governor and other top state political leaders. The appointed judge would then serve a full six year term and only then be placed on the ballot, without competition, with the question “do you wish to retain this judge?” If voters say yes, the judge is granted another term of six years. If voters say no, the judge is removed and the Governor appoints a replacement for another six year term.

Under our current system the Constitution requires judges to be elected by a vote of the people, with the Governor empowered to appoint a temporary replacement to fill any vacancy until the next general election one year from the date the vacancy occurred; the Governor may appoint, but only temporarily, leaving the ultimate choice of who sits on the bench to the people of the state.

Proponents of merit selection and retention elections claim the goal of their proposal is to protect the independence of the courts, but as Minnesota’s Democratic Territorial Attorney General and first Chief Justice of the State Supreme Court, Lafayette Emmett, once stated: “We hear a great deal of talk about an independent judiciary. The phrase is in everybody’s mouth. What does it mean? Independent of whom? Independent of what? Independent of the people?”

Undermining Checks and Balances

Thomas Jefferson believed that the “judicial power ought to be distinct from both the legislative and executive and independent upon both, that so it may be a check upon both, as both should be checks upon that.”

That theory, the idea of checks and balances, a system in which interplay and conflict between three separate but equal branches
prevents any infringement of the people’s liberties has long been an American tradition. But under the proposed merit selection/retention election system, instead of having a court independent enough to serve as a check upon any overreach by the legislative or executive branches, we would instead find ourselves with a court dominated by the executive branch. Why does that matter? As Chief Justice Emmett noted: “I think the facts will show that the people are much better qualified to select your Judges than is the Governor. The Governor always selects men belonging to his own political party, while the people often select them regardless of parties.”

Increasing the Influence of Special Interest Groups and Negative Campaigning

With all judicial appointments being consolidated into the hands of the executive and other top political leaders, the prospect for increased partisanship in Minnesota’s judicial elections is magnified. And by placing a judge on the ballot without a challenger, it becomes far easier for political parties and special interest groups to target good judges for defeat, simply so that a Governor they support can appoint a judge they support.

Despite having contested elections, Minnesotans have historically spent very little on them. In 2010, Supreme Court Justice Helen Meyer spent only around $75,000 in her contested statewide reelection race, winning with 58% of the vote. Contrast that with the nearly three million dollars spent in a contest to unseat an Illinois judge in a retention election, or the almost one million dollars in out-of-state special interest money that was spent to defeat three Iowan Supreme Court Justices in their 2010 retention election.

Instead of allowing good, qualified judges to be reelected without the need to raise money or campaign as many supporters of the proposal originally claimed it would, merit selection/retention elections instead make it so easy for special interest groups to sweep in under the radar.
at the last moment with hundreds of thousands of dollars in negative ads, that an incumbent judge has almost no choice but to seek to raise huge sums themselves – even though they have no opponent. Sums they are not currently seeking to raise.

In a March 2010 commentary in the Star Tribune, Judge Jack Nordby offered some words of wisdom that Minnesotans would do well to mind: “we have never had an over-financed judicial election in Minnesota. One hopes we would at least await some evidence the system is broken before we set out to fix it.”

**Minnesota’s System of Judicial Selection,**
**Still Strong After More Than 150 Years**

Since 1857, opponents of judicial elections have warned that Minnesota’s courts would soon be plagued by every problem they could possibly imagine and yet no truly great calamity has ever materialized. Why has Minnesota not experienced the problems witnessed elsewhere, and warned about by retention election/merit selection supporters? Perhaps the answer itself lies in the character of the Minnesota people, recognized most eloquently by Democratic constitutional convention delegate and later Supreme Court Justice Charles Flandrau in his 1857 defense of judicial elections:

“I believe there is an element in the people of that conservative, contentious character which will not permit an improper man to be inflicted upon them...I believe that the safeguards are greater in an election than through the machinery of the appointing power.”

The defense of individual liberty and the protection of our constitutional rights requires that a strong system of checks and balances be in place between our three branches of government. Minnesota’s founders wisely recognized that the only sure way to create a judiciary independent enough to withstand the encroachment of the other two branches was by making all three branches
accountable and selected directly by the same source – the people of the state.

Opponents of our current system are proposing to do away with that check in the name of addressing theoretical problems Minnesota has never had or experienced; proposing to do way with a system that has served us well for more than 150 years; and a system that has allowed the people to direct choose who they most trust to judge them when their liberty is at risk, and who they most trust to be able to stand up to outside interests and to serve as a check upon any encroachment of our freedoms by an overbearing executive.

These opponents of our current system believe justice is best served when it is administered by robed bureaucrats selected by a committee hand-picked by the state’s political elites and not the people; but in believing so they put themselves at odds with the founders of this state who overwhelmingly concurred with the opinion of constitutional convention delegate and future Chief Justice Emmett who wisely noted: “if the people are incapable of selecting their Judges, they are also incapable of selecting the man who is to appoint the Judges.”

References

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- Charles Flandrau, Democratic constitutional convention delegate and Supreme Court Justice.

This copy of “A Perilous Proposal” was reformatted and made available by Minnesota Citizens for an Independent Judiciary as part of our ongoing educational effort to promote the constitutional heritage, legal and general history of Minnesota through activities that help increase public awareness, understanding of, and confidence in our state’s elected courts. Copies are available for online viewing and self-printing at: www.mncij.org. The views presented herein are those of the author and not necessarily MNCIJ.

Only with a thorough understanding of how our courts work, why they were designed as they were, and the threats they face, can Minnesotans ensure the continued integrity, independence, and accountability of their judiciary.

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**Minnesota Citizens for an Independent Judiciary**

www.mncij.org | info@mncij.org
78 Sixth Ave SW #974, Forest Lake, Minnesota 55025

**About the Author**

Benjamin J. Hedberg is a respected business manager, experienced nonprofit board member, and a former public administrator. Hailing from a family with roots dating back to Minnesota’s territorial days, he has been a strong advocate for the preservation of the state’s history, its public institutions, and a proponent for expanded public appreciation and understanding of our state constitution.