

## JUDICIAL ELECTIONS ON TRIAL

*“The exemption of the judges from that (from election) is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them (the people) not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it (control) from them, but to inform their discretion by education.” Thomas Jefferson*

This document has been prepared to preserve the people’s right to meaningful judicial elections through *informing their discretion by education*. Tim Tingelstad, former candidate for the MN Supreme Court

### THE FOUNDATION HAS BEEN LAID

The Preamble to the Minnesota Constitution, the cornerstone of the foundation upon which our State government is built, boldly proclaims, *“We the people of the State of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings to ourselves and to our posterity, do hereby establish this constitution.”*

Those who founded this State understood that God is sovereign over the affairs of man, and that **our civil and religious liberty comes from God, not from the State. They understood that to preserve these rights, and the blessings they produce for the generations to come, all three branches of our government must serve the people, not rule over them.**

Our State’s Founders understood that the purpose of government is to protect their God given rights. They drafted our State Constitution in the same spirit as our Federal Founders expressed in our Declaration of Independence, *“We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. **That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed...**”* (emphasis added)

The Minnesota Constitution is the contract between “the people” and our three branches of government, the Legislative, Executive and Judicial. **All three branches of government were intended to remain independent of each other, but always accountable directly to the people.** The State Constitution established this Rule of Law for this State, with the legislative branch drafting laws, the executive branch enforcing the laws, and the judicial branch applying and interpreting the laws in accordance with the original intent of the people.

**Constitutions, however, are just pieces of paper, and each generation must remain diligent to retain authority over our government through education and political involvement.** Our Constitution is an anchor, which holds us in the safe harbor of truth and prosperity, not a sail, which takes us anywhere the cultural and political winds may blow. Amending our Constitution is a serious matter, requiring much more consideration than simply the drafting of a statute.

### WE THE PEOPLE MUST REMAIN IN CONTROL

**“We the people” retain control of our government through our right to vote for those who serve us. At the very core of our representative democracy is the right, and responsibility, to vote for our leaders.** Without meaningful elections, all governments will eventually become the rulers over the people. In all of American history, when have the people ever benefited by giving up their constitutional right to vote for their leaders?”

Because credibility is critical in all debates, consider the words of our Founding Father, Thomas Jefferson, on this subject, *““The exemption of the judges from that (from election) is quite dangerous enough. I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them (the people) not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it (control) from*

*them, but to inform their discretion by education.*” Jefferson, Writings, Vol. XV, p.278, to William Charles Jarvis on September 28, 1820.

Thomas Jefferson also made an even more bold observation with regard to the importance of judicial elections, when he wrote, *“It is necessary to introduce the people into every department of government... Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them.”* Jefferson Writings, Vol. VII, pp.422-423, to M. L’Abbe Arnoud on July 19, 1789.

## THE HISTORY OF JUDICIAL ELECTIONS AND APPOINTMENTS

For more than 150 years, the Minnesota Constitution has preserved to the people the right to hold our courts accountable through judicial elections, rather than through political appointments and impeachments, as used in other states. **If a judge in Minnesota does not submit to the will of the people, as expressed through the original intent of the Constitution, or as expressed through the legislative intent of our elected representatives, the people have for 150 years had the right to replace that judge in a meaningful election.**

So why have we not had a history of meaningful judicial elections in Minnesota? Why is it that the vast majority of all Minnesota judges and justices have come to the bench through the process of a Governor’s appointment? **The Minnesota Constitution allows for the Governor to appoint judges only when there is a vacancy on the bench between elections.** How did the exception become the rule in Minnesota? There are several reasons.

The primary reason that Minnesotans have not had meaningful judicial elections for many years is because, since the 1970’s, the Minnesota Supreme Court established rules regarding judicial elections, which in effect prevented judicial candidates from communicating with the voters, prohibited candidates from criticizing the decisions of incumbent judges, prohibited candidates from telling the voters what they believed the law said, and how it should be applied, and even prohibited judicial candidates from speaking to the voters at organized political events. All of these factors have made it difficult, if not impossible, for a challenger to defeat an incumbent judge. The result has been very few judicial elections with more than one name on the ballot. In addition, the prevailing practice of most retiring judges has been to retire within their six year term of office, which has allowed the Governor to appoint their successor rather than to risk allowing the people to choose their replacement.

**In 2002, the United States Supreme Court determined that the Minnesota Supreme Court had created an unconstitutional judicial election system through its judicial election rules.** The U.S. Supreme Court held that Minnesota’s judicial election rules violated the candidates’ First Amendment right to free speech, as well as the people’s right to become informed about the candidates they are voting for. As a result, beginning with the 2004 elections, judicial candidates have been free to tell the voter’s what they believe the law says, and the people of Minnesota have the right to become informed voters. **Change takes time, however, and it will take a few more election cycles for the people to realize that judicial elections can be meaningful if we require the candidates to speak to us about the Constitution and the laws of this State.** Meaningful elections will also require quality judicial candidates who are willing to share their views on the law, without attacking their opponents.

Unfortunately for the people of Minnesota, the Minnesota Supreme Court, along with the Minnesota State Bar Association, and a special interest group called, “The Coalition for Impartial Justice,” has chosen to join forces in an attempt to persuade Minnesotans to choose a path away from meaningful judicial elections. This very powerful and well funded special interest group is lobbying our State legislators to amend our Constitution, and to replace judicial elections with an appointment and impeachment process. **While this plan is being marketed as a new and improved “judicial election” process, the truth is that under their proposal the people of Minnesota will never, ever again elect a judge.**

**This powerful special interest group has implemented a marketing plan to frighten the people of Minnesota into amending the Minnesota Constitution.** The plan takes advantage of the people's current dissatisfaction with the historically meaningless judicial elections we have had in Minnesota, in spite of the fact that our meaningless judicial elections were given to us by those who make up this same special interest group. The plan takes advantage of the fact that the people have not yet had a chance to create a meaningful judicial election system under our current judicial elections rules. The plan takes advantage of the fact that most people do not understand that, in reality, our judges have been appointed, not elected, for more than 36 years.

### **MERIT SELECTION AND RETENTION ELECTIONS**

The proposed plan to replace meaningful judicial elections is called, Merit Selection with Retention Elections, hereafter referred to as MSRE, and appropriately pronounced as “**misery**.” The pending legislation for this plan is in place as House File 224 and Senate File 70. **The MSRE plan is clear, and if adopted, the people of Minnesota will never again elect another judge!**

**This is how MSRE would work.** All judges and justices from the District Court level to the State Supreme Court would be chosen in the same manner. **All of the authority over our judicial branch would be placed into the hands of a committee of 24 unelected and unaccountable people, who will form the “Judicial Performance Commission.”** This Commission will select and evaluate all judges and justices. The Commission will have 8 members chosen by the Governor, 8 members chosen by the Legislature, and 8 members chosen by the Supreme Court. The criteria established for selection to this Commission is intentionally vague and subjective. Control of this committee will require a majority vote of 13 people, who will serve a maximum of 12 years.

This Commission will give the Governor a list of three names for each judicial vacancy, and the Governor will be required to choose a judge from this list. This is a change from the current appointment system where the Governor has the right to appoint a judge who is not on the list. The appointed judge would then serve for 8 years, rather than the current 6 year term, and would be reviewed and evaluated by this Commission every 4 years. In the 8<sup>th</sup> year, the judge may choose to be a candidate for a “Retention Election.” If the judge chooses to seek retention, the Commission would label the judge as “well qualified” “qualified” or “unqualified.” This label would be placed on the “Retention Election” ballot. **There will only be one name on the ballot, and if the people should “un-elect” or “impeach” the judge, the Commission would then have the power to select a replacement judge. The people of Minnesota would never again elect a judge to the bench!**

**The major problem with “Retention Elections” is that they are not elections!** The definition of the word “election”, as used in our Minnesota Constitution, written 150 years ago, is “... the act of choosing one or more from others.” (Webster’s 1828 American Dictionary of the English Language) The average citizen of Minnesota knows that having one name on a ballot does not make an “election” meaningful, or even possible. We never “elect” someone out of office. We elect people to office, and the result is that those who are not “elected” do not serve. **“Retention Elections” under MSRE are really a form of impeachment.** And while the impeachment process is technically another way for the people to hold their elected officers accountable during their terms, impeachments today are highly politicized and almost useless in the eyes of the people.

**The people of Minnesota should be very concerned about the misuse the term “election,” in legislation that would have the effect of taking away the people’s Constitutional right to vote.** The vast majority of voters, who will be voting on this Amendment to our Constitution, if the MSRE legislation is passed, will never really understand what they are voting for or against. Tragically, very few voters will take the time to research what the MSRE definition of the word, “election” really is before they vote. The only education that most voters will have at the time they vote will be the wording of the proposed amendment on the ballot, which will read;

“Shall the Minnesota Constitution be amended to reaffirm the impartiality of the judiciary by providing that judges be appointed by the governor, with their continuation in office determined at a retention **election** after a public, non-partisan evaluation of their performance by a judicial performance commission rather than be determined under the current system of contested elections?” (emphasis added)

Those who have drafted this proposed amendment language have chosen to use the term “election” rather than to use the more accurate term “impeachment” for a reason. The wording of this amendment is very inviting. It will lead the people to believe that they are not giving up their constitutional right to elect their judges, but instead that they are actually getting a new and improved version of judicial “elections.” **But this type of skillful marketing should not be the reason we amend our State Constitution.** The foundational premise presented by those in favor of MSRE has been to preserve the people’s confidence in their judiciary. But how can the people have confidence in their judiciary if it is totally controlled by an unelected, unaccountable committee that is willing to ignore the definition of words to accomplish its agenda. **When we change the legal definitions of our words from their common, accepted definitions we lose the Rule of Law.**

### A CLOSER LOOK AT THE ARGUMENTS

**Those in favor of the MSRE plan argue that we the people should give up our constitutional right to hold our courts accountable through meaningful judicial elections because one day soon judicial campaigns in Minnesota will become too expensive, too negative, too influenced by partisan politics, and too influenced by special interest groups.** They claim that allowing judicial candidates to tell the people what they believe the Constitution and the law mean will make judges impartial and biased. They argue that we the people must give up our right to elect judges so that the peoples’ confidence in an impartial and independent judicial branch will remain high. A closer look at each of these arguments is necessary.

**Meaningful, contested, non-partisan judicial elections are the only way to keep our courts “independent” and accountable to the people. We want our Courts to be independent from the other branches of government, not independent from the people.** Our judicial elections have been nonpartisan for almost 100 years, and they can stay that way. There are two ways to remain nonpartisan, candidates can choose to speak to no political parties, or they can speak to all political parties. But choosing not to speak to political parties is really choosing not to speak to the voters. The role of partisan political parties is to inform the voters, and there should be a robust dialogue between the nonpartisan judicial candidates and all political parties.

**MSRE will make the judicial branch accountable to itself, rather than accountable to the people.** Under MSRE, the members of the Judicial Performance Commission will not receive any compensation for their work, nor will they be entitled to any reimbursement for their travel expenses. The only people who will be able to serve on this powerful Commission will be wealthy individuals, or individuals who’s special interest employers will compensate them for the tremendous amount of time they will need to devote to this task. This Commission of 24 people will be responsible for choosing and interviewing several candidates for every open seat on the Minnesota Courts, and then it will be responsible for evaluating every incumbent judge every four years. This will require almost full-time employment, unless the members are simply in name only, and the Judicial Branch itself does all of the work. But if the Judicial Branch provides the members with all of the information, then the Commission is simply a puppet of the Court’s themselves. **The MSRE plan may promise only “blue-chip” members, but it will clearly not represent “blue-collar” Minnesotans.**

**MSRE will not remove politics from the judicial selection process, it will simply hide the politics from the people.** Under MSRE, the politics will be condensed into one small, unelected and unaccountable Commission. Every person on this Commission will bring their political beliefs into the process and will represent the particular party or branch of government who selected them. The political battleground will move from public elections to a behind the scenes battle to get people with your political persuasion on this powerful Commission. **MSRE will be a**

**system of “unelected super-delegates” who will represent their own special interests in the decision making process.** Those who want to control our courts will need only 13 votes on the Commission rather than 51% of the votes in a public election.

**“Retention Elections” are really impeachments, which will require negative campaigns.** The Commission will be required to inform the public of a judge’s faults and failures if an incumbent judge is labeled “unqualified.” Without this specific information, the people will not be able to cast an informed vote. The incumbent judge who has been so labeled will be helpless in fighting this “unqualified” label. In addition to the Commission’s negative campaign information, there will be no greater restraints on special interest groups from running negative ads than there would be in meaningful judicial elections. If people disliked judicial elections in the past, they will really dislike this impeachment process called “Retention Elections.”

**MSRE will not eliminate special interest groups from impacting the judicial selection process.** Instead, MSRE will increase the influence of one very powerful special interest group, the Judicial Performance Commission. Special interest groups will no longer have to spend large sums of money to influence judicial selection in the public forum. Instead, they will be able to move their efforts to the backroom bargaining of getting their people on this powerful committee. Rather than influencing 51% of the voters, which could be up to 2 million votes, these special interest groups will need only influence 13 votes, a majority of this Commission.

**Any judicial appointment process will be more self-serving than people serving.** A committee which looks first to the best interests of the people should place District Court bench experience as a high priority for a State Supreme Court appointment. However, only one of our seven current Supreme Court Justices has any District Court experience, and the one Justice who has served on the District Court bench did so for less than one year. Additional evidence that committees serve themselves is found in the fact that four of our seven current Supreme Court Justices were appointed only after being members of the Judicial Selection Commission itself. **With judicial appointments, ‘who you know’ is more important than ‘what you know.’** This is not a criticism of any of the current Supreme Court Justices, or of the Governors who appointed them. This is human nature, and is what we should expect from any judicial appointment system such as MSRE.

**MSRE will reduce confidence in our courts, not increase it.** The effect of MSRE will be lifetime appointments. The study cited by the MSBA in its article in favor of MSRE, states that in 10 states with retention elections, from 1964 to 2006, only 56 of 6,306 judges (less than 1%) were “impeached” through retention elections. This study suggests that either judges become almost super-humans when they put on their robes or that the people really don’t know enough about the judges to “unelect” them. The resulting lifetime appointments of our State’s judges would give us a system similar to the lifetime appointments in our federal court system, which is a step backward, not forward in the eyes of most people. **From the District Court level to the State Supreme Court level, the people will have far more confidence in a judge that they have elected, than in a judge that has been appointed by an unelected committee.**

**Expensive judicial campaigns take place because the people reject judges who ignore the will of the people, as expressed through the original intent of our constitutions.** When people invest in judicial campaigns, they are expressing their First Amendment right to freedom of speech. And while Minnesota has not experienced million dollar judicial campaigns, we should be grateful that people are willing to invest their resources to preserve the Constitution. Justice is not free. It has cost millions of American lives to secure our constitutional rights, and the fear of future expensive judicial campaigns is not a valid reason to give away our right to vote.

**Our judges must be “impartial” to the litigants, but “partial” to the will of the people, as expressed through the original intent of the Constitution, and in the clear language of the laws passed by our elected legislators.** Those in favor of MSRE claim that we must give up our right to vote for judges to insure that our courts remain “impartial” and “unbiased.” But there is nothing wrong with a judicial candidate telling the people what he or she

believes the law says. This does not result in a prejudicial judge any more than a sitting judge's ruling on a particular statute would make that judge ineligible to ever rule on that particular statute again. **Impartiality applies to the litigants, not to the law.**

Every judge has a personal belief system that impacts the decisions they make. If this were not true, why do we place such importance on diversity on our courts? We the people should know the belief system of a judicial candidate before they are elected, rather than learning of that belief system after that judge has made an important decision on the bench. While a judge's personal beliefs will impact their discretionary decisions, the real question to be answered by a judicial candidate is whether he or she will submit their will to the will of the people.

### CONCLUSION

The importance of preserving the people's right to hold our courts accountable through meaningful judicial elections cannot be overstated. The money, the power, and the influence are aligned against the people's right to vote. We the people are vulnerable to the marketing plan of those who are supporting MSRE because the people lack knowledge of these issues, and because those in favor of MSRE are willing to redefine words to accomplish their purpose. **"We the people" as Democrats, as Republicans, as Independents, and as Constitution party members may finally have an issue that we can all agree upon. Government by the people, for the people, and of the people is better than government by, for and of committees.**

Respectfully Submitted on behalf of all Minnesotans for Meaningful Judicial Elections.

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For more details with regard to the MSRE plan go to the Minnesota State Bar Association site at [msba.org](http://msba.org).