

Defending Our Constitutional Right to Elect Judges

By Minnesota State Senator Julianne Ortman

If you think things are partisan at the Capitol in 2008, you should have been in St. Paul in 1857 during the formation of the State of Minnesota.

Democrats and Republicans were in such deep dispute they refused to meet together for purposes of writing our State's Constitution. In fact we had two Constitutional Conventions!

Our partisan founders disagreed about much, but both constitutions included one key provision for which there was agreement: Democrat and Republican delegates alike agreed that the people of Minnesota should have the direct power of electing our state's judges. At the time of ratification, Minnesota deliberately rejected the federal model of appointing judges for life. We knew exactly what we were doing.

In 1856 – just one year before Minnesota's twin constitutional conventions -- the U.S. Supreme Court issued its opinion in the Dred Scott case (7 to 2), holding that no slave or descendant of a slave could ever be a U.S. citizen (even though at that time at least five states allowed black men to vote, and even though Dred Scott had lived as a free man in the territory of Wisconsin for many years). The Court rejected Scott's right to sue the State of Missouri for his freedom.

Good citizens across the country were outraged by the decision, which many believed was infected by racial prejudice. People lost confidence in our "impartial" and "independent" federal judges who

had been appointed to serve for life.

In consideration of these concerns, Minnesota's Constitution provides for the Governor to fill vacant judicial seats, but requires all judges to stand for election every six years. An amendment offered by B.B. Meeker in the Democratic Convention Debates was intended to protect the impartiality of the Supreme Court by lengthening their terms to ten years, and making the members ineligible for re-election. The Amendment was defeated due to the arguments of Lafayette Emmett, the Attorney General of the Minnesota Territory who became our state's first Chief Justice.

Emmett expressed Minnesota's abiding trust in its people to determine their own course: "If the people are incapable of selecting their Judges, they are also incapable of selecting the man who is

to appoint the Judges." Our framers hoped to find balance between impartiality and accountability in our judiciary.

In our first 50 years, Minnesota judges, including several Chief Justices, ran with an endorsement – "Republican" or "Democrat." Bowing to pressure from anti-prohibition lobbyists, in 1913 the Legislature passed a law making all legislative, judicial, city and county offices non-partisan. For the next 60 years, there were no party designations for any of those offices. In 1973 – the law was amended to allow legislative candidates to show party endorsements; the others remain non-partisan.

One hundred fifty years after Dred Scott, the United States Supreme Court issued another opinion with a profound impact on the selection of Minnesota's judiciary. The Court held in 2002 that the State of



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Minnesota may pass no rule which prohibits judicial candidates from exercising their 1st Amendment right to speech, and may pass no rule which interferes with the voting public's constitutional right to have a meaningful election of judges – which includes the public's right to hear the speech in evaluating judicial candidates.

In practice this means that the State may not interfere with the right of judicial candidates to ask for contributions or to seek partisan or other types of endorsements. It also means that third parties and special interest groups may endorse candidates, make independent expenditures (buy ads), and make contributions.

Clearly the kind of conduct that makes judicial elections meaningful (free speech), for purposes of the constitution, may also make an election political, and even unseemly. In some states it has led to million dollar judicial races, plaintiff and defense bar attack ads, controversial special interest group influence, and a consequent loss of confidence in the impartiality of judges.

Yet, the framers of our constitution were well aware that the electoral process for judges would present political issues. Nonetheless, they decided the public should be entrusted to choose. Minnesotans are very concerned and committed voters, they are capable of choosing wisely, and they can be trusted to filter through the overt politicization of judicial elections. In both 2004 and 2006, we had the highest percentage of voter turnout in the country; in 2004 more than 77%

of eligible voters actually voted. And, the 2006 judicial elections amply demonstrate that Minnesota voters will not reward candidates who politicize judicial races: the three judicial candidates that sought and received major party endorsement were all defeated.

Yet this year members of the Supreme Court and others are promoting legislation to change the Constitution (members of the "Quie Commission" have formed a well-funded group to lobby, advocate and campaign for this change -- the "Justice at Stake Campaign"). They want retention elections, where there is but one incumbent judge's name on the ballot. Voters would be asked to vote whether or not to retain the judge based on a review of judicial performance by a selected commission. The commission would indicate a review of "recommended" or "not recommended" which would appear on our ballots.

Minnesota's District Court judges – more than 90% of judges in Minnesota – disagree with this proposal, and a small group of lawyers on the state bar association's board cast split ballots (33 – 31) about how best to proceed -- yet it sure looks like a lot of power, political machinery and money behind the campaign for changing the Constitution!

In my view we should reject this current attempt to change our constitution. A change to retention elections is a change to elections without meaning. Why should the voters be engaged if we cannot elect a new judge? Or choose between two candidates? What is

proposed is not a real election, but a rubber stamp for the commission that would evaluate judicial performance. Minnesota's legislators and voters should be absolutely certain that any new proposal for our constitution is actually better than the system we currently have. It will have to serve us for hundreds of years; change should not be motivated by whim, reaction, self-interest or political fear.

For the present we should work to protect and defend the current constitution including our constitutional right to participate in judicial elections and to select our state's judges. We can make changes in our campaign finance and judicial disclosure laws as necessary to ensure fair and meaningful elections.

I am hopeful that going forward, candidates and those involved in the judicial elections in 2008 will work vigorously to inform the voting public (for the sake of accountability), and also work vigorously to avoid unnecessary politicization of the elections (for the sake of impartiality). It is in all of our best interests to protect the honor of the distinguished office of judge in the State of Minnesota.

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