

2007

## ON THE VALIDITY AND VITALITY OF ARIZONA'S JUDICIAL MERIT SELECTION SYSTEM: PAST, PRESENT, AND FUTURE

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### Recommended Citation

Mark I. Harrison, Sara S. Greene, Keith Swisher, and Meghan H. Gabel, *ON THE VALIDITY AND VITALITY OF ARIZONA'S JUDICIAL MERIT SELECTION SYSTEM: PAST, PRESENT, AND FUTURE*, 34 Fordham Urb. L.J. 239 (2007).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol34/iss1/9>

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## **Cover Page Footnote**

Mark Harrison is a member and Sara Greene and Meghan Grabel are associates at Osborn Maledon, P.A., Phoenix, Arizona. Keith Swisher is an associate at Osborn Maledon currently on leave to pursue his LL.M. at Harvard Law School. This Article follows and builds on a presentation at the Fordham University School of Law's April 7, 2006 Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges.

## ON THE VALIDITY AND VITALITY OF ARIZONA'S JUDICIAL MERIT SELECTION SYSTEM: PAST, PRESENT, AND FUTURE

*Mark I. Harrison, Sara S. Greene, Keith Swisher, and  
Meghan H. Grabel\**

This Article demonstrates that merit selection is functioning commendably in Arizona and, for the most part, provides the public with a judicial selection process far more informative and generally superior to “traditional elections.”<sup>1</sup> Part I of this Article sketches the history of Arizona’s merit selection of judges and its previous state-wide judicial election system. Part II discusses and analyzes attacks on merit selection and, in addition, assesses the effect of the Judicial Performance Review program initiated in 1992 to enhance the efficacy of the merit selection system. Finally, largely through extensive interviews of many participants in Arizona’s merit selection system, Part III describes the current status of merit selection in Arizona and offers some fresh perspectives on the value of merit selection, with suggestions to assure its preservation in Arizona and its implementation elsewhere. The Article concludes that merit selection, while not a perfect system, is operating commendably and has significant advantages over a system of traditional, partisan or non-partisan elections.

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1. Throughout this article, the phrase “traditional elections” is used as a shorthand term for contested partisan and non-partisan public elections as opposed to retention elections in which voters are asked only whether the (unopposed) candidate should be retained in office.

## I. BRIEF HISTORY OF JUDICIAL ELECTION AND SELECTION IN ARIZONA

### A. Judicial Appointments and Elections Before Merit Selection

Before the implementation of the merit selection system,<sup>2</sup> voters elected judges for limited terms. Vacancies in office prior to election—whether by death, retirement, or the creation of new judge-ships—were temporarily filled until the next general election by gubernatorial appointment.<sup>3</sup> In practice, however, vacancies were filled far more often by these appointments than by popular election. In 1973, sixty-two percent of the sitting Superior Court<sup>4</sup> judges were first appointed—twelve of the previous thirteen judges appointed in Maricopa County were appointed by the governor.<sup>5</sup> Gubernatorial appointments were not subject to senate confirmation or any other checks and balances.<sup>6</sup> Nevertheless, an overwhelming majority of all judges were gubernatorial appointees who remained on the bench. From 1958 to 1972, over one-half of the candidates had no challenger on the ballot, and two-thirds of those who did won their contest.<sup>7</sup> Of the six defeated judges during that same period, three gained reappointment and a fourth was subsequently reelected to an appellate court.<sup>8</sup>

Superior Court judges were elected for terms of four years. Appellate court judges<sup>9</sup> were elected for terms of six years.<sup>10</sup> Although judicial elections were statutorily declared “non-partisan” because political party affiliation was not indicated on the ballot, candidates’ names usually reached the ballot through party primaries.<sup>11</sup> While ethical restraints generally prevented judicial candidates from campaigning with respect to specific issues, many nonetheless ran on platforms supporting longer sentences and harsher treatment of criminal offenders; this despite the fact that most

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2. “Merit selection” refers generally to the system in which judicial candidates are screened and selected on the basis of merit, typically by a diverse group of citizens, including lawyers, and proposed to the appointing authority, typically the governor, for appointment.

3. Stephen E. Lee, *Judicial Selection and Tenure in Arizona*, 1973 L. & SOC. ORD. 51, 52 (1973).

4. The Superior Court is Arizona’s trial court.

5. Lee, *supra* note 3, at 65.

6. *Id.*

7. *Id.*

8. *Id.* at 66.

9. This includes both the Arizona Court of Appeals and the Supreme Court of Arizona.

10. Lee, *supra* note 3, at 53.

11. *Id.* at 53-54.

or all of their post-election judicial service would be devoted to non-criminal matters.<sup>12</sup>

The reality of judicial politics forced most observers to acknowledge that typical voters were unaware of the candidates, the issues, or even the existence of contested judicial races.<sup>13</sup> Campaigning proved cost-prohibitive for judges who made meager salaries. In metropolitan areas, challenged incumbent judges were assigned newsworthy cases in order to increase their exposure in the news media.<sup>14</sup> Incumbent judges had additional practical advantages over challengers: incumbents were identified in campaign advertising as "Judge," and voters often had a tendency to vote to maintain the status quo.<sup>15</sup> While political parties were permitted to support various judges, the Republican party reportedly provided more help to judicial candidates than the Democratic party provided.<sup>16</sup> From 1958 to 1972, the incumbent was defeated in only 10 out of 215 judicial elections.<sup>17</sup> In other words, over ninety-five percent of the time, the election did not change the composition of the bench. This may be in large part due to reported voter indifference. In the 1972 Arizona elections, although judicial races received more publicity than usual,<sup>18</sup> only eighty percent of participating voters actually cast a ballot in the contested state supreme court races.<sup>19</sup> By contrast, ninety-six percent voted for President, ninety percent voted for State Tax Commissioner, and eighty-seven percent voted for State Mining Inspector.<sup>20</sup>

Public opinion polls also reflected voter indifference to judicial elections. In 1972, one such poll showed sixty-five percent of voters undecided about the state supreme court races, while only thirteen percent were undecided about the presidential race and twelve to twenty-five percent were undecided about the various elections for United States Representatives.<sup>21</sup>

Prior to the implementation of the merit selection system, two governors, Sam Goddard and Jack Williams, used an informal but institutionalized system for electing judges through a committee of

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12. *Id.* at 54-55.

13. *Id.* at 55.

14. *Id.*

15. *Id.* at 56.

16. *Id.* at 55-56.

17. *Id.* at 57.

18. Judicial campaigns were undergoing greater public scrutiny as a result of the proposed adoption of merit selection.

19. Lee, *supra* note 3, at 59.

20. *Id.*

21. See *id.* at 59 (citing ARIZ. REPUBLIC, Oct. 15, 1972, at A1).

lawyers from the Maricopa County Bar Association that made recommendations for subsequent appointments.<sup>22</sup> Thus, prior to the adoption of the merit selection system, some of the informal and skeletal mechanisms of such a system were being used. The nominees, however, lacked the same ethnic, gender and political diversity as those selected after the voters' adoption of merit selection in 1974. Nominees prior to 1974 tended to be younger and from large law firms.<sup>23</sup> Furthermore, no committee ever seriously recommended a candidate to the governor who was not of that governor's political party.<sup>24</sup>

### B. The Birth and Evolution of the Merit Selection System in Arizona

As early as 1959, "a merit selection system was proposed in Arizona as part of what ultimately became the 1960 Modern Courts Amendment."<sup>25</sup> The proposal recommended the adoption of the "Missouri Plan"<sup>26</sup> judicial appointment and retention election system.<sup>27</sup> That November, the specific proposal relating to the merit selection of judges was deleted from the Modern Courts Amendment.<sup>28</sup> Voters approved the remainder of the proposed amendment in the 1960 election.<sup>29</sup>

Momentum for merit selection continued for several years. In 1965, a State Bar survey indicated that almost two-thirds of responding lawyers favored the appointment of judges. That same year, the State Bar Convention hosted a debate over merit selection. In 1967, Governor Jack Williams and Charles C. Bernstein, then Chief Justice of the Supreme Court of Arizona, called a citizens' conference on Arizona courts.<sup>30</sup> The conference resulted in a permanent organization called The Citizens' Association on Ari-

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22. *Id.*

23. *Id.*

24. *Id.* at 67.

25. John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 847 (1990). The "Modern Courts Amendment" contemplated a complete reform and restructuring of the court system in Arizona and, with the exception of the merit selection proposal, was adopted intact and implemented by various legislative enactments over the next fifteen years.

26. The "Missouri Plan" refers to the judicial merit selection plan adopted in the State of Missouri—the first to adopt merit selection in lieu of traditional election of judges. Roll, *supra* note 25, at 843-44.

27. *Id.* at 847-48.

28. *Id.* at 848.

29. *Id.*

30. James Duke Cameron, *Merit Selection in Arizona—The First Two Years*, 1976 ARIZ. ST. L.J. 425, 426. The conference was planned and supported by the American

zona Courts,<sup>31</sup> whose primary goal was the establishment of a system for the merit selection of judges.<sup>32</sup> When its first attempts to pass a referendum for a constitutional amendment providing for merit selection legislation proved unsuccessful, the Association went to the people for an initiative measure. In 1974, it gained enough support to be put on the general ballot.<sup>33</sup>

While state and local bar associations and lawyers generally raised much of the money to finance the initiative campaign, the Association provided the leadership and public face of the campaign. Merit selection carried in the election by a vote of 253,756 to 217,709 and out of ten initiative measures, it was one of four that passed.<sup>34</sup>

The 1974 constitutional amendment applied to the selection of superior court judges in counties with a population of 150,000 or more<sup>35</sup> and the selection of all appellate judges throughout the state.<sup>36</sup> The amendment provided for the formation of three nominating commissions—one each for Maricopa and Pima County trial judges, and one for all appellate judges.<sup>37</sup> Each commission consisted of five non-lawyer members selected by the Governor and approved by the Senate, and three attorney members selected by the State Bar and also appointed by the Governor with the Senate's approval. No more than three of the non-lawyer members and two of the lawyer members were permitted to be from the same political party.<sup>38</sup> For the appellate nominating commission, no more than two non-lawyer and two lawyer members could be from the same county.<sup>39</sup> All members served staggered four-year terms. The Chief Justice of the Supreme Court of Arizona presides over at least one of the three commissions and, in practice, votes to break a tie.<sup>40</sup>

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Judicature Society, the National College of State Trial Judges, and the State Bar of Arizona. *Id.*

31. *Id.*

32. *Id.* at 427.

33. *Id.* The League of Women Voters, Arizona Jaycees, Arizona Judges' Association, and the State Bar helped to obtain 82,152 signatures—substantially more than the 61,711 required to put the initiative on the ballot. *Id.*

34. *Id.*

35. *Id.* at 428. At the time, only Maricopa and Pima counties qualified.

36. *Id.* (citing ARIZ. CONST. art. VI, §§ 35 (1960, amended 1974), 36-40).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

The first selections under the new system filled two new vacancies on the Pima County Superior Court. Legal journals and newspaper articles declared the selections a great success.<sup>41</sup> Although both selections were Democrats appointed by a Democratic Governor, the press noted that the fact that both appointees were from the same political party as the Governor “in no way detracts from their qualifications to survive on the bench,” citing as evidence the “critical screening process established by a bipartisan committee” each underwent prior to appointment.<sup>42</sup> According to one journalist, “the screening process in Pima County and the selection of [the appointed judges] . . . has proved that the new system can work to the advantage of the public.”<sup>43</sup>

The initial selections in the first two years of the merit selection system show the caliber of judges such a system recognizes. The selections included Justice Frank X. Gordon, Jr., to the Supreme Court; Judge Mary M. Schroeder to the Court of Appeals (now Chief Judge of the United States Court of Appeals for the Ninth Circuit), and Judge James Richmond to the Court of Appeals.<sup>44</sup> Other selections included Judges Robert Corcoran, I. Sylvan Brown, James Moeller, Stanley Goodfarb, and Val A. Cordova to the Maricopa County Superior Court, and Judges Harry Gin, Jack T. Arnold, Gilbert Veliz Jr., and James C. Carruth to the Pima County Superior Court.<sup>45</sup> A few years later, as the result of merit selection, Judge Sandra Day O’Connor was appointed to the Arizona Court of Appeals, where she served until she was confirmed as a Justice on the Supreme Court of the United States.

Arizona Supreme Court Chief Justice James Duke Cameron, who presided over the first selection commissions, reported that politics played little part in the selection process. He declared in a 1976 journal article that “[t]here has been no hint of political influence in the selection process,” and suspected “that the Governor has been as surprised as the public at some of the names recommended, as well as at some not recommended.”<sup>46</sup> He also noted that the selection process encourages those who, though qualified, would not have attempted to seek judicial office under the election

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41. *See id.* at 429 (quoting TUCSON DAILY CITIZEN, June 30, 1975, at 22, col. 1).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 432 & n.42.



system.<sup>47</sup> The Chief Justice concluded that, as a result, “merit selection bodes well for the quality of Arizona’s judicial system.”<sup>48</sup>

No judge was voted out of office in the 1976 judicial retention election.<sup>49</sup> This trend continued with rare interruption in the subsequent years, following the tendency of states that employ merit selection. Generally, more than ninety-seven percent of judges seeking retention in any election year succeed.<sup>50</sup> Indeed, one newspaper reported that, from 1974 until 1998, only two Arizona judges had been defeated in a retention election.<sup>51</sup>

## II. 1992 CHANGES TO MERIT SELECTION SYSTEM AND JUDICIAL PERFORMANCE REVIEW, AND RECENT ATTACKS ON THE SYSTEM

### A. 1992’s Antidote for the Alleged Problem of “Unaccountability” Attributed to Merit Selection

The merit selection system did not undergo any legislative or citizen initiative changes until the passage of Proposition 109 in 1992.<sup>52</sup> The measure proposed by the legislature was ultimately approved by fifty-eight percent of Arizona voters.<sup>53</sup> Proposition 109 created public committees to screen and recommend candidates for appointment to Arizona’s judicial nominating commissions and increased the number of lawyer and non-lawyer members of the commissions. It also required consideration of the diversity of the state or county’s population in selecting commission members and nominating judicial candidates for the Governor’s deliberation. In addition, Proposition 109 raised the population cutoff that triggers the applicability of merit selection from 150,000 to 250,000. Perhaps most significantly, the Proposition required the Supreme Court to adopt, after public hearings, a process for evaluating judicial performance.<sup>54</sup> Arizona is the only state in the country to have constitutionally mandated performance reviews.

The entity created by the constitutional mandate is known as the Commission on Judicial Performance Review (“JPR Commission”), currently composed of thirty members, each serving four-

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47. *Id.* at 432.

48. *Id.*

49. *Id.* at 433.

50. Roll, *supra* note 25, at 883.

51. A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 699 (1998).

52. See H.R. Con. Res. 2009, 40th Leg., 2d Reg. Sess. (Ariz. 1992).

53. Pelander, *supra* note 51, at 670.

54. *Id.* (citing ARIZ. CONST. art. VI, § 42).

year terms.<sup>55</sup> These members are appointed by the Supreme Court. The members may be judges, attorneys, members of the public and legislators. Legislators are non-voting members serving in an “advisory” capacity.<sup>56</sup> However, a “majority” of the JPR Commission must be non-attorneys, and in no event may there be more than six attorneys and six judges on the JPR Commission.<sup>57</sup>

The JPR Commission is responsible for developing performance standards and thresholds, and conducting performance reviews of justices and judges who are appointed pursuant to merit selection.<sup>58</sup> It surveys the opinions of persons who have knowledge of the judges’ performance (jurors, attorneys, litigants, witnesses, and court staff) and provides additional opportunities for the public to participate in the evaluation process through public input and written comments.<sup>59</sup> Evaluation results are widely distributed throughout the state via media reports and the voter information pamphlet compiled by the Secretary of State and mailed to all voters’ households prior to general elections. The JPR Commission also conducts an ongoing self-improvement program for judges and justices, which includes the collection of additional information from the judges themselves and from others having knowledge of the judge or justice’s performance.<sup>60</sup> This information is reviewed with the individual judge or justice by teams established by the JPR Commission composed of a volunteer public member, attorney member, and judge. The team then identifies areas where the judges or justices could improve their performance and educate each individual by virtue of their performance and experience.<sup>61</sup>

The provision of Judicial Performance Review that drew the most criticism was Rule 6(c),<sup>62</sup> which provides that the anonymous

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55. RULES OF PROCEDURE FOR JUDICIAL PERFORMANCE REVIEW IN THE STATE OF ARIZONA 2(a), (c) (2006), available at <http://www.supreme.state.az.us/jpr/Adopted%20Revised%20Rules%206-1-06.pdf> [hereinafter ARIZ. R.P. JUD. PERF. REV.].

56. *Id.* at 2(a). No legislators currently serve on the Commission, and an informal Attorney General’s opinion has suggested that doing so could violate the prohibition against holding two public offices. E-mail from Annette Corallo, Program Manager, Merit Selection, to Mark Harrison (Sept. 14, 2006, 5:12 PM) (on file with author) [hereinafter Corallo E-mail].

57. ARIZ. R.P. JUD. PERF. REV., *supra* note 55, at 2(a).

58. *Id.* at 2(g).

59. *Id.*

60. *Id.* at 4.

61. *Id.*

62. The rules governing the process were first promulgated by the Supreme Court of Arizona pursuant to ARIZ. CONST. art. VI, § 42, in May 26, 1993, following passage of the initiative measure, and have been periodically amended since their initial adoption.

narrative comments on the survey forms are confidential and are to be used only in connection with the conference team meeting and the related preparation of the self-improvement plan.<sup>63</sup> By making the comments anonymous, the Supreme Court attempted to resolve the tension between encouraging candor and ensuring that inaccurate or irresponsible comments by individuals with malicious motives would not publicly discredit judges who must, because of their position, almost always decide “against” at least one party.<sup>64</sup>

The Judicial Performance Review process is intended primarily to generate the information necessary to enable the public to make informed decisions about whether to retain the judges subject to performance review.<sup>65</sup> The degree to which the process has achieved this objective is the subject of continuing debate. Moreover, Judicial Performance Review has not been universally applauded and is, and has been, the subject of anecdotal criticism by several members of the judiciary. While the initial concern focused on the evaluation's threat to judicial accountability, today many judges complain that the evaluation does not yield reliable results and, therefore, is the basis for questionable if not quixotic reviews. Because judicial performance review is mandated by the constitution in Arizona, the immediate challenge facing those determined to preserve the merit selection system is to improve and enhance the reliability, dissemination, utilization and acceptance of judicial performance review by the judiciary and the public.

### B. Recent Challenges to Merit Selection in Arizona

Although no changes have been made to merit selection since the 1992 reforms, the system has been attacked frequently in the last several years. The greatest flurry of bills introduced occurred between 2003 and 2005, when in the 46th and 47th legislatures, over nineteen bills were introduced that proposed to eliminate or undermine merit selection in one way or another. Several of these bills proposed changing the population cutoff from 250,000 per county, to between 400,000 and 600,000 per county.<sup>66</sup> Other bills proposed more substantial changes, ranging from eliminating merit

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63. ARIZ. R.P. JUD. PERF. REV., *supra* note 55, at 6(c).

64. *Id.*

65. *See id.* at 1; B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1438-39 (2001) (discussing general objectives).

66. *See* H.R. Con. Res. 2015, 47th Leg., 2d Reg. Sess. (Ariz. 2006); S. Con. Res. 1034, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

selection altogether and returning to election of all judges<sup>67</sup> to a variety of less fundamental changes, such as:

Requiring the election of all trial court judges;<sup>68</sup>

Requiring Senate Confirmation of all justices and judges;<sup>69</sup>

Eliminating Nominating Commissions and requiring the Governor to appoint judges to vacancies with Senate confirmation, and requiring justices and judges to be reconfirmed by the Senate every four years;<sup>70</sup>

Requiring that the chairperson of the three Nominating Commissions be the Chairperson of the Senate Judiciary Committee, as a non-voting member;<sup>71</sup>

Changing the membership of the Nominating Commissions to make the Chief Justice a non-voting member, allowing only one attorney member to be appointed by the Governor, and requiring that two of the attorney members be appointed by the President of the Senate, and two by the Speaker of the House;<sup>72</sup>

Requiring judges and justices to receive a 'yes' vote of at least 60 percent to remain in office in a judicial retention election,<sup>73</sup> requiring member attorneys of the commissions to be confirmed by the Senate.<sup>74</sup>

On several occasions, then-Chief Justice Charles E. Jones appeared before the Judiciary Committee to testify in opposition to these measures, all of which he believed to share a theme of injecting politics into the judiciary and the judicial selection process.<sup>75</sup> In testifying against H.R. Con. Res. 2386, which required all Superior Court judges to be elected, Chief Justice Jones stressed that such measures undermined separation of powers, judicial independence, and the ability of courts to render justice equally.<sup>76</sup> Chief Justice

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67. S. Con. Res. 1024, 46th Leg., 2d Reg. Sess. (Ariz. 2004); H.R. Con. Res. 2018, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

68. H.R. Con. Res. 2386, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

69. S. Con. Res. 1023, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

70. H.R. Con. Res. 2056, 47th Leg., 1st Reg. Sess. (Ariz. 2005).

71. H.R. Con. Res. 2057, 47th Leg., 1st Reg. Sess. (Ariz. 2005).

72. H.R. Con. Res. 2040, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

73. As previously discussed, retention elections refer generally to those elections in which candidates run on their record and not against an opponent. In such elections, voters are asked whether the candidate should be retained in office. *See supra* note 1.

74. S. Con. Res. 1037, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

75. *Hearing on H.R. Con. Res. 2386 Before the Comm. on the Judiciary*, 46th Leg., 2d Reg. Sess. (Ariz. 2004) (statement of Charles Jones, C.J., Ariz. Sup. Ct.), available at [http://azleg.state.az.us/legtext/46leg/2r/comm\\_min/house/0212jud.doc.htm](http://azleg.state.az.us/legtext/46leg/2r/comm_min/house/0212jud.doc.htm) (last visited Oct. 30, 2006) [hereinafter *Hearing on H.R. Con. Res. 2386*].

76. *Id.*

Jones considered the proposal a threat to judicial independence and the appearance of impartiality.<sup>77</sup> He illustrated what a non-merit system might look like today by citing the then-recent three to five million dollar campaign price tag for the election of the Chief Justice of the Texas Supreme Court.<sup>78</sup> He showed legislators what he considered a demeaning television advertisement that had been used in the campaign for a position on the Ohio Supreme Court.<sup>79</sup> Chief Justice Jones also cited *Brown v. Board of Education*<sup>80</sup> as a decision that in its day surely would have resulted in the ouster of the Justices deciding that case had they been subject to a political process through traditional elections.<sup>81</sup>

Interested parties on the other side of the debate included, among others, the Center for Arizona Policy, a non-profit organization dedicated to “strengthening the family and restoring traditional moral principles to the public policy and cultural arenas,” and “battl[ing] organizations like Planned Parenthood, the ACLU and gay rights groups that seek to destroy traditional families and traditional moral values.”<sup>82</sup> The Director of Policy of this organization, Cathi Herrod, testified in support of H.R. Con. Res. 2056, which would have eliminated the nominating commissions and would have required the Governor to appoint judges and justices with Senate confirmation.<sup>83</sup> She testified that the merit system resulted in increased judicial activism, less legislative oversight and “no accountability.”<sup>84</sup>

One possible motivation for the flurry of challenges to merit selection in the 46th and 47th legislatures was the decision of the Supreme Court of Arizona in *Bennett v. Napolitano*, where the Court declined to grant relief to several legislators who challenged the Governor’s line item vetoes because the legislators lacked standing.<sup>85</sup> Indeed, one legislator referred to this decision in not-

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77. *Id.*

78. *Id.*

79. *Id.*

80. 349 U.S. 294 (1955).

81. *Hearing on H.R. Con. Res. 2386, supra* note 75.

82. *See* The Center for Arizona Policy, Our Mission, [http://www.azpolicy.org/our\\_mission.php](http://www.azpolicy.org/our_mission.php) (last visited Oct. 26, 2006).

83. *See supra* note 70 and accompanying text.

84. *Hearing on H.R. Con. Res. 2056 Before the Comm. on the Judiciary*, 47th Leg., 1st Reg. Sess. (Ariz. 2005) (testimony of Cathi Herrod, Director of Policy, Center for Ariz. Policy), available at [http://azleg.state.az.us/legtext/47leg/1r/comm\\_min/house/0224jud.doc.htm](http://azleg.state.az.us/legtext/47leg/1r/comm_min/house/0224jud.doc.htm) (last visited Oct. 27, 2006) [hereinafter *Hearing on H.R. Con. Res. 2056*].

85. 81 P.3d 311, 320 (Ariz. 2003).

so-veiled terms while then Chief Justice Jones was testifying before the Judicial Committee on H.R. Con. Res. 2386.<sup>86</sup> Senator Graff called the decision “judicial activism” and noted that the legislature had “tried passing a budget last year” and the Executive Branch “tr[ie]d to change the rules.”<sup>87</sup> He added that one “would think that the courts would have supported the legislative body in the role as the appropriator, and yet that did not happen.”<sup>88</sup>

The efforts to undermine or eliminate the appointive system continue unabated in Arizona because special interests have apparently concluded that those interests are not best served by independent, impartial judges. Thus, the ongoing challenge for Arizonans like Justice Sandra Day O’Connor who passionately believe in the singular importance of an impartial and independent judiciary, is to persuade the majority of our fellow citizens to share that passion and to the extent necessary, effect changes in the current appointive system to ensure its endurance.<sup>89</sup>

### **III. THE STATE OF MERIT SELECTION IN ARIZONA: SOME PRAISE, AND SOME SUGGESTIONS FOR ITS PRESERVATION**

#### **A. Merit Selection Combined with Judicial Performance Review: A Detailed, Ongoing Inquiry to Obtain Pertinent Information on Candidates and Incumbents**

This Part describes the merit selection process, as amended and refined, in some detail. It does so in order to show the reader that

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86. *Hearing on H.R. Con. Res. 2056 Before the Comm. on the Judiciary*, 46th Leg., 2d Reg. Sess. (Ariz. 2004) (statement of Sen. Graff, Member, Ariz. H.R. Comm. on Judiciary), available at [http://azleg.state.az.us/legtext/46leg/2r/comm\\_min/house/0212jud.doc.htm](http://azleg.state.az.us/legtext/46leg/2r/comm_min/house/0212jud.doc.htm) (last visited Oct. 27, 2006).

87. *Id.*

88. *Id.*

89. Former Arizona Chief Justice Jones is the Chair of Justice for All, a 501(c)(3) organization founded last year to assure the preservation of an impartial judiciary in Arizona. See Justice For All, <http://www.jfa.net/> (last visited October 27, 2006). Former Supreme Court Justice O’Connor supports Justice for All and has said [s]election of judges according to the candidates’ merit is, naturally, key to ensuring that a judge will act impartially. Considerations other than merit motivating a political actor to appoint a judge (or voters to elect a judge) are likely to be the very considerations that will prevent a judge from deciding cases fairly and without bias.

Sandra Day O’Connor, Associate Justice, Supreme Court of the United States, Remarks Before the Arab Judicial Forum, Manama, Bahr.: The Importance of Judicial Independence (Sept. 15, 2003) (transcript available at <http://usinfo.state.gov/journals/itdhr/0304/ijde/oconnor.htm>).

the quality and quantity of information produced and disseminated by the merit selection system, including judicial performance review, is far superior to anything provided to voters in a traditional election system. As the following demonstrates, not only the public but also the judges receive in-depth, objective evaluations completely lacking in traditional elections.

1. *The Public Learns More Pertinent Information from the Current Selection Process than from Traditional Elections*

Arizona's merit selection process employs detailed, vetted applications, due diligence, and personal interviews.<sup>90</sup> Applicants customarily undergo this process of detailed scrutiny shortly after submitting their applications. The application is quite thorough, and the application format is subject to public comment.<sup>91</sup> The application includes eighty-six detailed questions covering the applicant's professional experience, business and financial information, conduct and ethics, professional and public service, as well as a request for numerous references. One illustrative question asks the applicant to list the five or six most important cases on which he or she has worked.<sup>92</sup> The substantive portion of the candidate's application is open to the public.<sup>93</sup>

Once applications have been received and processed, individual Judicial Nominating Commission ("JNC") members perform "due diligence" on the applicant. This process includes checking references, asking persons who know the applicant to comment on the applicant, and reading pertinent documents.<sup>94</sup> During this process, the JNC often receives unsolicited comments, some good, some

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90. UNIFORM RULES OF PROCEDURE FOR COMMISSIONS ON APPELLATE AND TRIAL COURT APPOINTMENTS 6, *available at* <http://www.supreme.state.az.us/hr/Uniform%20Rules%20of%20Procedure.pdf> [hereinafter ARIZ. R.P. NOMINATING COMM'NS].

91. *Id.*

92. Chief Justice McGregor noted that she has paid particularly close attention to the types of cases that the applicant listed, which revealed (among other things) the issues that the applicant found important and the complexity of his or her previous experience. Interview with Ruth McGregor, C.J., Chair, App. Ct. Nominating Comm'n, in Phoenix, Ariz. (June 28, 2006) [hereinafter McGregor Interview].

93. ARIZ. R.P. NOMINATING COMM'NS, *supra* note 90, at 7.

94. *See, e.g.*, Telephone Interview with Dewey Schade, Public Member, App. Ct. Nominating Comm'n, in Scottsdale, Ariz. (July 16, 2006) (noting instance in which Commission discovered an applicant's misrepresentation) [hereinafter Schade Interview]; Interview with Patrick McGroder, Attorney Member, Maricopa County Super. Ct. Nominating Comm'n, in Phoenix, Ariz. (June 28, 2006) [hereinafter McGroder Interview].

bad, from persons with knowledge of the applicant's qualifications.<sup>95</sup>

The most meritorious applicants, or all of the applicants if the number of applicants is relatively small, are interviewed personally by the entire JNC. These interviews, which typically last a half-hour to one hour, are open to the public. Public comment is invited and can be heard throughout the process.<sup>96</sup>

The JNC then votes publicly to recommend at least three candidates to the governor, who is required to choose from this list.<sup>97</sup> The governor's choices are diverse, not only because the Arizona Constitution explicitly requires consideration of diversity in the JNC's recommendations, but also because the candidates must represent different political parties.<sup>98</sup> As a Commissioner has noted, one of the JNC's "finest selectees was John Buttrick who was a Libertarian, had run against the then-sitting governor, and was appointed by that governor to a judgeship."<sup>99</sup>

After the governor deliberates, he or she appoints one of the nominees from the JNC's list. Because the JNC has completed an exhaustive inquiry, however, the governor presumably "can have a blindfold on, she could reach into the jar, and she could pull out a name, and whoever she pulls out would serve on the court ably."<sup>100</sup>

## 2. *The Public Receives Even More Pertinent Information Through the Ongoing Judicial Performance Review Process*

The Commission on Judicial Performance Review, as noted above, is a public entity charged with evaluating and educating judges through extensive surveys, reports, and conference teams.<sup>101</sup>

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95. See, e.g., McGroder Interview, *supra* note 94, at 1, 3.

96. ARIZ. R.P. NOMINATING COMM'NS, *supra* note 90, at 8, 9 (allowing public comment following screening and interviews). That is not to imply that the public actually participates, only that the public has notice and opportunity to do so.

97. ARIZ. CONST. art. VI, § 37.

98. Specifically, no more than sixty percent of the nominees may be from one political party. ARIZ. CONST. art. VI, §§ 36-37, 41. Indeed, since the inception of merit selection in Arizona, "the governor has appointed a candidate from another political party 26 percent of the time." Ted A. Schmidt, *Merit Selection of Judges: Under Attack Without Merit*, 42 ARIZ. ATT'Y 13, 17 (2006).

99. McGroder Interview, *supra* note 94, at 4.

100. Schade Interview, *supra* note 94, at 11-12. The governor cannot decide on the basis of political affiliation, and must consider the diversity of the state's population when making the decision. ARIZ. CONST. art. VI, § 37(C).

101. As one author has noted, when compared with other states' program goals, "Arizona's Rules of Procedure for Judicial Performance Review give the most comprehensive statement of commission goals." Seth S. Andersen, *Judicial Retention*

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It is the largest of its kind in the country.<sup>102</sup> The JPR Commission reflects wide diversity; it is comprised mostly of public members, but it also has judges, attorneys, and legislators.<sup>103</sup> To the extent possible, the JPR Commission members also must reflect the diversity of the state's population.<sup>104</sup>

In conducting its evaluations, the JPR Commission surveys virtually everyone who has interacted with the judge in his or her duties, including lawyers and judges' staff, and, where applicable, litigants, jurors, and witnesses.<sup>105</sup> The participants answer questions regarding legal ability, communication skills, judicial temperament, settlement activities, and administrative performance.<sup>106</sup> They must rate the judge on a scale of unacceptable, poor, satisfactory, very good, superior, or "can't rate," for each of the questions.<sup>107</sup> The questions vary by participant; for example, attorneys answer somewhat different questions than litigants.<sup>108</sup> Although many of the questions are redundant, redundancy seems preferable to under-inclusiveness.<sup>109</sup> Thus, the JPR Commission gathers a wealth of pertinent information about every judge subject to judicial performance review.

*Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1379-80 (2001). The Rules list the following goals:

assist voters in evaluating the performance of judges and justices standing for retention; facilitate self-improvement of all judges and justices subject to retention; promote appropriate judicial assignments; assist in identifying needed judicial education programs; and otherwise generally promote the goals of judicial performance review, which are to protect judicial independence while fostering public accountability of the judiciary.

*Id.* (quoting ARIZ. R.P. JUD. PERF. REV., *supra* note 55, at 1).

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102. *Id.* at 1383.

103. ARIZ. R.P. JUD. PERF. REV., *supra* note 55, at 2(a). *But see supra* note 56 (opining that legislators cannot serve because to do so would violate the prohibition against holding two public offices).

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104. ARIZ. R.P. JUD. PERF. REV., *supra* note 55, at 5(a).

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105. *See, e.g.*, Interview with Margaret Kenski, Chair, Comm'n on Judicial Performance Review (July 17, 2006) ("I think that our judges in Arizona undergo more scrutiny than they do almost anyplace in the United States.") [hereinafter Kenski Interview].

106. Pelander, *supra* note 51, at 673; Andersen, *supra* note 101, at 1375, 1384-85 (listing typical question areas); *see also* Judicial Performance Review Archives, <http://www.supreme.state.az.us/jpr/Archives/archives.htm> (last visited Oct. 27, 2006) (providing examples of survey results for various judges) [hereinafter JPR Archives].

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107. Pelander, *supra* note 51, at 673-74; Andersen, *supra* note 101, at 1375, 1384-85.

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108. Pelander, *supra* note 51, at 674; Andersen, *supra* note 101, at 1375, 1384-85.

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109. McGregor Interview, *supra* note 92 (noting that survey probes for prejudice by asking multiple questions to the same effect). Some judges, however, stress that the judicial review questions and process assume a "statistical validity" that is unproven. Interview with Colin Campbell, J., former Presiding Judge, Maricopa County Super. Ct. (June 27, 2006) [hereinafter Campbell Interview].

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The JPR Commission achieved a landmark in 1998 when it received the funds required to place its evaluations in the voter publicity pamphlet, which is mailed to every eligible retention voter.<sup>110</sup> As a result, after the survey results have been collected and summarized and the JPR Commission has voted publicly on the judges up for retention, the voters receive a concise report on each judge in the mail.<sup>111</sup> Voters also can search the JPR Commission's detailed website.<sup>112</sup> The site explains judicial performance review and offers additional reports and information on the judges. Finally, on the ballot, the voters see whether the JPR Commission has voted that the judge "meets" or "does not meet" review standards.

This wealth of carefully compiled statistical information stands in stark contrast to the information generally available in traditional elections, in which candidates attack each other using sound-bites or give the voters biased, laudatory self-assessments. Elections rarely offer objective information, and certainly nothing that is actually tracked and quantified with the detail and consistency of the information gathered by the JPR Commission.<sup>113</sup> Regardless of the nature of the information, however, the quantity of applicable information available to the electorate is far less in traditional elections because independent, diverse, bipartisan commissions do not assess and reassess the candidates and incumbents. Furthermore, judicial performance review evaluations enable voters to make decisions on the basis of "the commonly held value of a competent independent judiciary, rather than on partisanship or ideology."<sup>114</sup>

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110. Tim Eigo, *Rating the Judges: The Work of Lawyers and the Public*, 42 ARIZ. ATT'Y 22, 50 (2006) (comments of Dr. Margaret Kenski).

111. See JPR Archives, *supra* note 106 (providing example reports). The Arizona Constitution requires some publicity. See ARIZ. CONST. art. VI, § 42 ("The public shall be afforded a full and fair opportunity for participation in the evaluation process through public hearings, dissemination of evaluation reports to voters and any other methods as the court deems advisable.").

112. Arizona Commission on Judicial Performance Review, <http://www.azjudges.info/home/index.cfm> (last visited Oct. 26, 2006).

113. These problems are separate from campaign contribution problems. It is no wonder that "three out of four Americans believe judicial campaigning compromises the impartiality of elected judges." Schmidt, *supra* note 98, at 13. In one elective state, Texas, forty-eight percent of judges "believed campaign contributions have a 'significant' impact on judicial decisions." *Id.* Moreover, perhaps in light of the "mudslinging" that occurs in contested election systems, "those most suited by intellect, education, and temperament were often the least likely to politick for the job." *Id.* at 16.

114. Andersen, *supra* note 101, at 1379 (quoting Kevin M. Esterling, *Judicial Accountability the Right Way: Official Performance Evaluations Help the Electorate As Well As the Bench*, 82 JUDICATURE 206, 215 (1999)). Generally speaking, in tradi-

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### 3. *Judges Receive More Pertinent Information on Their Performance*

The voters are not the only beneficiaries of judicial performance review. In addition to the information judges receive through the surveys and JPR Commission voting process, judges receive individualized evaluations through conference teams.<sup>115</sup> The conference team process requires the judge to complete a self-evaluation. Once complete, the teams meet with each judge annually and review his or her survey results and self-evaluation. The judge and team develop a self-improvement plan for the judge. The plan is distributed to the judge's chief or presiding judge and the Chief Justice of the Supreme Court of Arizona.<sup>116</sup> Judges agree that this process is invaluable to the improvement of their judicial performance.<sup>117</sup> Few, if any, elected officials in Arizona receive anything close to this type of tailored performance evaluation; the state legislators who denounce the merit selection system certainly do not have any system for the evaluation of their performance as legislators.

#### **B. Some Fresh Answers to Accountability Concerns**

As the preceding discussion demonstrates, judicial performance review and retention elections assure that judges are more accountable than most public officials. Judges are accountable to the Commission on Judicial Conduct, a public body that investigates and disciplines judges for conduct prohibited by the Code of Judicial Conduct.<sup>118</sup> In addition, judges are further constrained because most of their decisions are subject to appellate review. Finally, the merit selection system, including judicial performance review, places judges among the most highly accountable public officials in

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tional judicial elections, judges simplistically campaign "tough on crime," with a more liberal campaign leaning "tough but fair." Hans Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1988) (citation brought to our attention by Roy Schotland).

115. ARIZ. R.P. JUD. PERF. REV., *supra* note 55, at 4.

116. *Id.* at 4(h). The conference team data are confidential—one of the relatively few instances in the merit selection system that the public could not, if it were so inclined, review. *Id.*

117. Campbell Interview, *supra* note 109; Interview with Pendleton Gaines, J., Maricopa County Super. Ct., Member, Comm'n on Judicial Performance Review, in Phoenix, Ariz. (June 20, 2006) (noting that "you learn from your mistakes, not your victories") [hereinafter Gaines Interview]. Judges Gaines is a trial court judge in Phoenix and sits on the Comm'n on Judicial Performance Review.

118. See Commission on Judicial Conduct, [http://www.supreme.state.az.us/ethics/Commission\\_on\\_Judicial\\_Conduct.htm](http://www.supreme.state.az.us/ethics/Commission_on_Judicial_Conduct.htm) (last visited Oct. 29, 2006).

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the State of Arizona. As one respected judge observed, “[s]ome second graders have more freedom.”<sup>119</sup>

As explained above, the selection process is almost entirely transparent, exacting, and virtually devoid of political influence.<sup>120</sup> No one seriously claims otherwise.<sup>121</sup> Also as explained above, the judicial performance review process is an ongoing and searching inquiry that rates the judge on virtually all of his or her courtroom-related interactions.<sup>122</sup> The judge receives frequent, direct and indirect feedback through the conference teams and survey results. Those interviewed with experience in the system believed that judges view their performance reviews seriously and apprehensively.<sup>123</sup> Both the judicial performance reviews and selection process are public; the former even places the judges’ ratings on the retention ballot and mails the detailed survey reports to every household in the applicable counties.<sup>124</sup> Furthermore, it should not be forgotten that judges do face frequent public elections for their

119. E-Mail from Pendleton Gaines, J., Maricopa County Super. Ct., to Keith Swisher (July 21, 2006, 09:37 MST) (on file with author).

120. This last statement—merit selection is devoid of political influence—hinges on one’s definition of politics. Broadly speaking, the process is subject to political influence in the sense that the Commissioners are influenced by the candidate’s recommendations, and approximately three-fourths of the time the candidate is from the governor’s political party. This occurs even though the Arizona Constitution forbids the practice. ARIZ. CONST. art. VI, § 37(C); see also Schmidt, *supra* note 98, at 17. If politics are defined more narrowly, however, the statement holds true: Interviewees generally agreed that the process lacks partisan influence or favoritism. E.g., McGregor Interview, *supra* note 92; Schade Interview, *supra* note 94; Interview with Cathi Herrod, Director of Policy, Center for Ariz. Policy, in Phoenix, Ariz. (July 20, 2006) [hereinafter Herrod Interview]; McGroder Interview, *supra* note 94.

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121. Even the critics concede that merit selection “vet[s] competency” to an “acceptable level.” Herrod Interview, *supra* note 120.

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122. Appellate judges are surveyed from all contacts during the survey year. Superior Court judges, however, receive a four-month survey period. Corallo E-mail, *supra* note 56.

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123. Gaines Interview, *supra* note 117; McGregor Interview, *supra* note 92; Kenski Interview, *supra* note 105. A few participants indicated that some judges took the reviews more to heart than others, but none observed a careless disregard of the implications or significance of judicial performance review. Campbell Interview, *supra* note 109. But see Interview with Marc Lieberman, Attorney Member, Comm’n on Judicial Performance Review, in Scottsdale, Ariz. (July 5, 2006) (expressing concern that, although most judges pay close attention to the evaluations, a few judges appear indifferent to them) [hereinafter Lieberman Interview].

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124. See JPR Archives, *supra* note 106 (providing copies of previous publicity pamphlets); Schmidt, *supra* note 98, at 17 (“This complaint [that the public is removed from the process] no longer resonates because the interviews, meetings, voting are open to the public and even have been televised.”); see also ARIZ. CONST. art. VI, § 42 (“The public shall be afforded a full and fair opportunity for participation in the evaluation process through public hearings, dissemination of evaluation reports to voters and any other methods as the court deems advisable.”).

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retention.<sup>125</sup> In comparison to other public officials, then, judges in Arizona are more accountable to the public than elected officials. This is particularly true in terms of the ability of the electorate to assess, thoroughly and objectively, the judge's qualifications and performance.

Nevertheless, critics continue to attack merit selection because of the alleged "unaccountability" of the judiciary. To be sure, merit selection offers less direct democracy than pure elections (assuming, among other things, that the elected judge would be subject to reelection as frequently as the current retention elections).<sup>126</sup> Though judges face retention elections, critics frequently denounce judicial performance review and retention elections as a "rubber stamp" by citing the facts that (1) the JPR Commission has never concluded that a judge does not meet standards,<sup>127</sup> and (2) voters rarely do not retain a judge.<sup>128</sup> Both criticisms are misguided, but not just for the reason commonly given by merit selection proponents.<sup>129</sup>

With respect to the first criticism, the JPR Commission has predetermined that a few judges would not meet the standards. Rather than face the public humiliation of such a rating on the ballot and in the voter publicity pamphlet, these affected judges chose

125. See, e.g., Schmidt, *supra* note 98, at 17. These retention elections can be contentious. See, e.g., Andersen, *supra* note 101, at 1378-79 (noting campaign against retention of Tennessee and Nebraska judges). Another benefit of judicial performance review is that it provides the public with "independent, nonpolitical evaluations" that could counterpoint unfair criticism of judges up for retention. *Id.* at 1379.

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126. Of course, this trait does not distinguish judges from the countless other appointed officials in the states.

127. Though commonly touted by critics, this assertion is slightly inaccurate. In 1998, one judge was found not to meet the standards (but he nevertheless was retained). Corallo E-mail, *supra* note 56.

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128. Pelander, *supra* note 51, at 695 (noting that the public did not retain only two judges over a twenty-four year period).

129. That is, most proponents of judicial performance review and retention elections point to the superiority of merit selection, which is corroborated by the fact that judges routinely receive high marks from the Commission on Judicial Performance Review. Though this proposition may be correct, it does leave something to be desired in light of the tendency to perpetuate the status quo and the frequency of human error (no one would think that the Nominating Commissions are immune to human error). See discussion *infra* Part III.C. There is something to be said, however, of judicial performance review's deterrent effect: Judges know that they frequently are subject to peer and public review, which thereby consciously and subconsciously affects their performance for the better. Kenski Interview, *supra* note 105; Telephone Interview with Roger Hartley, Professor, University of Arizona in Tucson, Ariz. (June 29, 2006). Perhaps, then, the less fit judges optimize their performance to avoid public scrutiny and rejection.

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to retire.<sup>130</sup> No one wants to be the first “bad apple” on Arizona’s fine bench.<sup>131</sup>

With respect to the second, it suffers from at least two flaws. First, while it is true that in Arizona only two judges have been voted out of office in retention elections, an increasing number of judges in other states have not been retained.<sup>132</sup> Furthermore, recent campaigns in Arizona against unpopular judges did lower their voter approval.<sup>133</sup> Moreover, when the JPR Commission casts significantly mixed votes on whether the judge meets standards, this also lowers voter approval to some extent.<sup>134</sup>

Second, the criticism presumes that elected judges would be replaced, which was not Arizona’s experience prior to merit selection.<sup>135</sup> Not only were incumbent judges rarely defeated, they were more often appointed than elected in the first place.<sup>136</sup> The public is relatively uninterested in judicial elections, regular or retention.<sup>137</sup> Practically speaking, now the public is assured that Ari-

130. McGregor Interview, *supra* note 92; see Pelander, *supra* note 51, at 722. *But see* Corallo E-mail, *supra* note 56 (noting that one judge was found not to meet standards, but voters nevertheless retained him).

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131. The bad apples are rare. See Pelander, *supra* note 51, at 718-24. As noted above, the critics believe that, in such a large judicial system, there must be more judges who are unfit, and judicial performance review is failing to find them. As one public member of the Appellate Court Nominating Commission responded, “my answer to that is quite clear[:] It’s different because of the process, the time and effort we take to screen these people . . . .” Schade Interview, *supra* note 94.

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132. *E.g.*, Dann & Hansen, *supra* note 65, at 1431-36 (listing judges in California, Tennessee, and Nebraska ousted, or nearly so, for unpopular death penalty and abortion decisions, among others). “Accountability” proponents thus should rest assured that, with adequate campaigning, they can oust judges on the basis of one or two unpopular decisions.

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133. Herrod Interview, *supra* note 120 (estimating that associated organization’s campaign against retention of two judges “dropped their retention scores by six to seven percent”). *But see* E-mail from Ruth McGregor, C.J., Ariz. Sup. Ct., to Mark Harrison (Sept. 15, 2006, 1:43 PM) This percentage may be overstated. Arizona Chief Justice Ruth McGregor’s administrative staff carefully evaluated the scores of the two judges against whom the campaign was mounted, and concluded that the campaign lowered the retention votes on these judges by approximately four percent. This evaluation consisted of examining the past retention scores of the two judges and the relative difference between their scores and those of other judges on the ballot.

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134. See Andersen, *supra* note 101, at 1379 (citing Kevin M. Esterling, *Judicial Accountability the Right Way: Official Performance Evaluations Help the Electorate As Well As the Bench*, 82 JUDICATURE 206, 210 (1999)) (noting “official evaluation information [appears to have] a positive impact on the electorate in terms of increasing participation in retention elections and influencing voting choices”).

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135. Roll, *supra* note 25, at 855-56.

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136. *Id.*; see also discussion *supra* Part I.A.

137. See, *e.g.*, Dann & Hansen, *supra* note 65, at 1437. It is somewhat difficult to blame voters for their apathy and low turnout when the number of judges is so high—it would be the exceptional *attorney* or *judge* who could name all of Arizona’s trial

zona has long-serving judges (less mandatory retirement) who have demonstrated merit. In sum, without regard to the superior scores of judges on their frequent, in-depth evaluations, accountability concerns are misplaced.

We address another common concern in passing—the claim that the judicial performance review process does not involve the public. Though state legislators are often the outspoken source of this criticism, they almost never attend the JPR Commission’s public meetings, even at the Commission’s invitation.<sup>138</sup> More importantly, the public is “involved in the evaluation process as commission members and as respondents to evaluation surveys.”<sup>139</sup>

Therefore, from beginning to end, the merit selection process, including judicial performance review, does involve the public, to which the judges are ultimately accountable.

**C. Merit Selection Going Forward**

Whatever one’s criticisms of merit selection and judicial performance review, one fact is clear: the participants who interact with Arizona’s judges, including witnesses, judges’ staff, and attorneys, rank them very highly. Of the total number of persons who completed JPR surveys regarding Maricopa and Pima County Superior Court judges,<sup>140</sup> over eighty percent ranked the judges “very

and appellate judges sitting in Maricopa (Phoenix) or Pima (Tucson) Counties. The sheer numbers in the urban counties make direct democracy that much more inadequate. The public therefore needs representatives (i.e., the Commissions) to perform due diligence.

138. Interview with Mary Beth Pfister, Member, Comm’n on Judicial Performance Review, in Phoenix, Ariz. (June 27, 2006) [hereinafter Pfister Interview]; Lieberman Interview, *supra* note 123 (noting that only Senator Bill Brotherton responded). Of course, generally speaking, neither do the public. Eigo, *supra* note 110, at 50 (referencing remarks of Dr. Margaret Kenski) (noting little-to-no public turnout at the Commission’s meetings). If the legislators truly wish to help, they should seek to approve more funds for the “widespread dissemination of [judicial performance review] results,” to fine tune those results, and to educate the public of the advantages of the merit selection system and the public’s opportunities to participate in it. Andersen, *supra* note 101, at 1386.

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139. Andersen, *supra* note 101, at 1378. The public members of the Commission add value to the selection and review by (among other things) placing an emphasis on the judges’ community activities. McGregor Interview, *supra* note 92.

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140. Only where the participant answers a particular question on the survey is it counted. Thus, the totals vary depending on the particular question on the survey (legal ability, judicial temperament, integrity, etc.). For Maricopa County, the total number of answers submitted, for each category of performance, varied from over 7,000 (settlement activities) to over 25,000 (integrity), over a five-month period. For Pima County, the total number of answers submitted varied from over 1800 to over 10,000, over a five-month period. *See generally* Arizona Commission on Judicial Per-

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good” to “superior.” In contrast, of the same group, less than five percent ranked the Maricopa and Pima County judges “poor” or “unsatisfactory.”<sup>141</sup> The numbers are similar for appellate judges.<sup>142</sup>

Interestingly, one Arizona legislator who has co-sponsored legislation that would weaken merit selection in Arizona actually reviewed the JPR data (an uncommon exercise among legislators). He concluded that the Arizona judiciary is performing extremely well, both on individual levels and as a whole.<sup>143</sup> His interest in the data stemmed from his background in engineering and personal interest in organizational and group performance, which he says always informs the bills that he sponsors.<sup>144</sup> After reviewing the JPR data, this legislator’s views on merit selection are “in transit,” because, according to him: “if the great majority of individual judges are performing from ‘very good’ to ‘excellent’ [under merit selection], why leave that system for Senate confirmation, which is hardly a charmed system, if the federal experience tells us anything.”<sup>145</sup> Moreover, this same legislator asked Senate analysts to compare the “unit cost” for an Arizona appellate matter to the California unit cost, and found that the Arizona unit cost of an appellate matter is forty percent lower than the unit cost of a California appellate matter.<sup>146</sup> Overall then, this legislator is beginning to believe that retention elections create “enough” tension to ensure judges’ “good behavior,” if nothing else because no judge wants to be one of the first not retained in Arizona. Nonetheless, he remains ambivalent about merit selection.

Other legislators, however, are firmly convinced that elections would be preferable.<sup>147</sup> Some special interest groups, recognizing that elections can create the appearance that a judge can be “bought,” advocate for a modified federal system in which the governor appoints, and the Senate confirms, Arizona judges for life.<sup>148</sup>

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formance Review, <http://www.azjudges.info/reports/index.cfm> (last visited Oct. 18, 2006).

141. *Id.* (select “Maricopa County Judges” or “Pima County Judges” from Judicial Performance Reports menu).

142. *Id.* (select “Appeals Court Judges” from Judicial Performance Reports menu).

143. Interview with John Huppenthal, Ariz. State Senator, in Phoenix, Ariz. (July 16, 2006).

144. *Id.*

145. *Id.*

146. *Id.*

147. See Interview with Chuck Gray, Ariz. State Senator, in Phoenix, Ariz. (July 5, 2006).

148. See Herrod Interview, *supra* note 120.



Cathi Herrod, supports such a system,<sup>149</sup> and has testified before the Judiciary Committee to advocate for it.<sup>150</sup> She believes that because Arizona judges are inclined to “make law rather than interpret the law,” this system is a necessary and overdue change to Arizona’s judiciary.<sup>151</sup>

While acknowledging that merit selection “vets competency” in judges, Ms. Herrod emphasizes that it is an inadequate system to test “judicial philosophy” and hold judges accountable for judicial activism.<sup>152</sup> Commenting on “nobadjudges.com,” a three-week, \$25,000 campaign against certain judges (i.e. an anti-retention campaign), Ms. Herrod noted that the campaign “was enough to send a little bit of shock waves.”<sup>153</sup> Those judges’ retention scores decreased by an estimated six to seven percent.<sup>154</sup> She is optimistic that such efforts may one day succeed because “the minute a judge is not retained, then the public really understands that they can vote a judge out. I mean, all it’s going to take, in a sense, is one scalp, so to speak.”<sup>155</sup>

Merit selection in Arizona will continue to be debated, and efforts to undermine, or undo it, will persist. To defend against these efforts, the work of the Judicial Nominating Commissions must continue to prioritize placing the best-qualified individuals on the bench, and accomplish this in a manner that continues to be transparent but more effectively and pervasively publicized. If Arizonans had more information about how the JNC and the JPR Commission function, they would be less likely to accept the arguments of those opposed to merit selection.<sup>156</sup> Efforts must be made to publicize and explain the purpose and work of the Judicial Nominating Commission as well as the purpose, work, and work-product of the JPR Commission. While the dissemination of the Voter

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149. See Center for Arizona Policy, <http://www.azpolicy.org/aboutus.php> (last visited Oct. 23, 2006). See also *supra* notes 82-84.

150. *Hearing on H.R. Con. Res. 2056, supra* note 84.

151. Herrod Interview, *supra* note 120 (citing, as an example of judicial activism, the Arizona Supreme Court’s decision in *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002), which held that, under privileges and immunities clause of the Arizona Constitution, the state could not refuse to pay for abortions for indigent women whose health was endangered by pregnancy, where it had already funded abortions for indigent women whose lives were endangered, or who were victims of rape or incest).

152. *Id.*

153. *Id.*

154. *Id.* But see E-mail from Ruth McGregor, *supra* note 133.

155. Herrod Interview, *supra* note 120.

156. Interview with Annette Corallo, Program Manager, Merit Selection, in Phoenix, Ariz. (July 19, 2006).

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Publicity Pamphlet to all registered voters is a good start, it is not enough to neutralize the unwarranted concerns about the “accountability” of the judiciary. The interviews conducted by the authors, especially of those people opposed to merit selection, confirm the widespread and basic misunderstanding about the role and function of judges in our society. Those opposed to merit selection not only fail to understand that merit selection and judicial performance review provide far more “accountability” than traditional, contested elections, many of them mistakenly believe that judges should be ideologically accountable to the electorate like members of the legislative and executive branches of government.<sup>157</sup>

Addressing these misconceptions will require more than increased public understanding about merit selection and judicial performance review. This effort will require a renewed and expanded focus in public education about the distinct role of the judiciary in our form of government. If judges are to be independent and impartial in their decision-making, they cannot be appointed and retained on the basis of their ideological accountability. Understanding this basic principle will require pedagogy which starts in primary school and continues through secondary school. It will require the involvement and support of educators, the judiciary, other elected officials, citizen groups interested in good government, the media and ultimately, the public. It will require the expenditure of substantial public funds and public commitment. The preservation of an independent judiciary, however, is clearly worth the effort.

#### IV. CONCLUSION

While not a perfect system, merit selection is functioning commendably and has significant advantages over a system of traditional partisan or non-partisan elections. The public, however, is insufficiently aware of these advantages and is generally unfamiliar with the work and work-product of Judicial Nominating Commissions as well as the detailed information generated and compiled through judicial performance review—the “accountability mechanism” for judges first appointed by merit selection and thereafter

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157. *Id.* (noting that arguments in favor of merit selection can be somewhat “esoteric,” and “you have to have a fairly good sense of basic civics and separation of powers to understand why the judiciary is not like other branches . . . with a little education . . . the advantages of merit selection would seem clear. But in the absence of that education, [it’s] lost on some people.”).

subject to retention election. Of perhaps greater concern, many elected officials and members of the public simply do not understand the role and function of judges in our system of government and mistakenly believe that judges should be ideologically accountable rather than impartial and independent. If fully apprised of the virtues of merit selection and the judicial performance review process (including the wealth of information generated by the process), the public and elected officials would appreciate the value and superiority of merit selection and judicial performance review over traditional elections.<sup>158</sup> The challenge going forward, then, is to create pervasive and more meaningful public awareness and understanding about merit selection and the judicial performance review process,<sup>159</sup> and equally important, the role of impartial, independent judges in American society.

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158. *Id.*; see also Pfister Interview, *supra* note 138 (noting that if the public knew of the Commission's vast amounts of data collection, it would be "supremely confident" in the system). **R**

159. Recent studies "have indicated that voters wish they had more information about judicial candidates." Dann & Hansen, *supra* note 65, at 1437. In Arizona, they do. It is the dissemination of this information, however, that is the "most daunting task." Andersen, *supra* note 101, at 1385. **R**

