

**JOINT WORK SESSION  
FLAGSTAFF CITY COUNCIL/COUNTY BOARD OF SUPERVISORS**

**AGENDA**

**A M E N D E D**

**4:00 P.M. - MONDAY  
MAY 21, 2018**

**COUNCIL CHAMBERS  
211 WEST ASPEN AVENUE**

- 1. Call to Order**
- 2. Roll Call**

NOTE: One or more Councilmembers may be in attendance telephonically or by other technological means.

**COCONINO COUNTY BOARD OF SUPERVISORS:**

CHAIRMAN RYAN

VICE CHAIRMAN BABBOTT

SUPERVISOR ARCHULETA

SUPERVISOR FOWLER

SUPERVISOR PARKS

**FLAGSTAFF CITY COUNCIL:**

MAYOR EVANS

VICE MAYOR WHELAN

COUNCILMEMBER BAROTZ

COUNCILMEMBER MCCARTHY

COUNCILMEMBER ODEGAARD

COUNCILMEMBER OVERTON

COUNCILMEMBER PUTZOVA

- 3. ~~Update on recent news regarding Wildfire Mitigation efforts in and around the City and County.~~**
- 4. Census 2020 Coordination and Outreach for the City of Flagstaff and Coconino County**
- 5. Update on Wildfire activity and preparedness in the City and County.**
- 6. Presentation and discussion regarding invoking Article 6, §40 of the Arizona Constitution to change from a partisan election process to a merit selection process of judges.**

**7. Adjournment**

CERTIFICATE OF POSTING OF NOTICE

The undersigned hereby certifies that a copy of the foregoing notice was duly posted at Flagstaff City Hall on \_\_\_\_\_, at \_\_\_\_\_ a.m./p.m. in accordance with the statement filed by the City Council with the City Clerk.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_  
Elizabeth A. Burke, MMC, City Clerk

## **CITY OF FLAGSTAFF STAFF SUMMARY REPORT**

**To:** The Honorable Mayor and Council  
**From:** Sara Dechter, AICP, Comprehensive Planning Manager  
**Co-Submitter:** Kim Musselman, Special Assistant to County Manager  
**Date:** 05/17/2018  
**Meeting Date:** 05/21/2018



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### **TITLE:**

**Census 2020 Coordination and Outreach for the City of Flagstaff and Coconino County**

### **DESIRED OUTCOME:**

Inform the public, Board of Supervisors and City Council about the importance of local participation in Census 2020, and answer questions related to funding, City-County-federal government coordination, Complete Count Committee formation, and outreach.

### **EXECUTIVE SUMMARY:**

The decennial Census is important to local governments throughout the United States because it helps our community get its fair share of the more than \$675 billion per year in federal funds spent on schools, hospitals, roads, public works and other vital programs. Federal funds, grants, and support to states, counties, and communities are based on population totals and breakdowns by sex, age, race and other factors. The community benefits the most when the census counts everyone. Businesses use census data to decide where to build factories, offices, and stores, and this creates jobs. Developers use the census to build new homes and revitalize old neighborhoods. Local governments use the census for public safety and emergency preparedness. Residents use the census to support community initiatives involving legislation, quality-of-life and consumer advocacy (Source Census 2020 website). Detailed operational plans for the Census can be viewed on their webpage:

<http://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/op-plans.html>

### **INFORMATION:**

In Arizona, funding allocations from the federal government are based on the Census and are approximately \$1,979 per capita. These funds are transferred to the State for transportation, to the State and local school districts to fund education and nutrition programs, and to senior and low-income households to support families. There is not a straight linear relationship between federal funding and the population but the relative population of each State is used to determine the representation in the House and is used by many federal programs for determining the State level allocation of the total money available nationwide. See Attachment A for more information.

Local jurisdictions throughout Arizona are preparing to support Census 2020 operations. Coconino County and the City of Flagstaff each have an assigned Census coordinator and have started forming a local government and Complete Count Committee (Community Census Team) to support the Local Update of Census Addresses (LUCA) and in anticipation of forming sub-committees to carry out the specific strategies of the Community Census Team to ensure a complete count of all residents of Coconino County. The City and County have already prepared data to cross-reference with the Census geographic boundaries and address databases. LUCA data was transmitted to both agencies at the beginning of March and is due back to the federal government within 120 days. See Attachment B for more information on LUCA.

Local government involvement in Census 2020 preparation is very important. Prior to Census 2010, there was federal funding available for this work, but that will not be the case for Census 2020. The City and County Census coordinators have submitted budget requests for funding to support Census activities and outreach at a cost of approximately \$2 per person expected to be counted. Attachment C provides a summary of how Census 2010 and Census 2020 are different.

The Community Census Team (Complete Count Committee) is established by county and local governments, community leaders and volunteers to increase awareness about the 2020 Census and to motivate residents in their communities to fill in and return their Census forms. They provide high-level oversight for Census 2020 participation, provide "trusted voices" to counter misinformation and mistrust, serve as knowledgeable contact points, and provide "boots on the ground" to support outreach and promotion of self-reporting to the Census. See Attachment D for more information on CCCs.

The Census coordinators for the County and City are proposing an Informal Framework committee with various subcommittees to be termed the Community Census Team. This framework would include:

- Quarterly Updates to Management Team consisting of a Board of Supervisor representative, Mayor or Council member, and the County and City Manager who will provide direction to coordinators and provide oversight of expenditures of County/City dollars.
- A geographic area will be inclusive of all of Coconino County
- Sub-committee efforts will be based on local demographics and expected self-response rates and may include activities such as:
  - Developing messaging specific to targeted populations
  - Canvassing areas with concentrations of targeted populations
  - Organizing and incorporating Census promotion into community events, such as parades, carnivals, booths at the fair, etc.
  - Sponsor advertising for Census 2020
  - Be ears and boots on the ground to spread the word and ensure accurate information is available throughout the community.

To accomplish these tasks across a broad portion of the targeted population, the Census Bureau recommends that the Community Census Team have subcommittees, such as:

- Government- provides resources and staff to support the CCT
- Education- Local school districts, Charters, Head Start, CCC, NAU etc.
- Faith-based organizations
- Media Relations
- Community-based organizations
- Businesses
- Recruiting-advertises job opening with the Census and availability of training

The Community Census Team may also review the Participant Statistical Area Program (PSAP), which determines the boundaries of Census tracts, blocks and block groups. See Attachment E on PSAP.

It is up to the City and County to determine the framework, roles, and participation in the Community Census Team. The presentation today will introduce these concepts and staff will follow up at future work sessions with both governing bodies to seek further direction. Attachment F: provides a broad timeline for Census 2020 key dates.

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**Attachments:**      [Census 2020 PowerPoint](#)  
                              [Attachment A: Counting for Dollars \(GWU\)](#)  
                              [Attachment B: LUCA flyer](#)  
                              [Attachment C: Summary of differences between 2010 and 2020 Census](#)  
                              [Attachment D: Complete Count Committee handout](#)  
                              [Attachment E: PSAP flyer](#)  
                              [Attachment F: Census Timeline](#)





# Census 2020

## Coordination and Outreach

*May 21, 2018*

*Joint City-County Meeting*

*Kim Musselman, Special Assistant to County Manager*

# Census Coordinators

Kim Musselman, Coconino County

[kmusselman@Coconino.az.gov](mailto:kmusselman@Coconino.az.gov)

928-679-7128

Sara Dechter, City of Flagstaff

[sdechter@flagstaffaz.gov](mailto:sdechter@flagstaffaz.gov)

928-213-2631



# Why do local governments care about an accurate Census?

Nearly \$590 billion in FY 2015 federal funding was distributed on the basis of Census-guided data.

Program	Amount (in billions)
Medicaid	\$312.0
Supplemental Nutritional Assistance Program	\$69.5
Medicare Part B – Physicians Fee Schedule Services	\$64.2
Highway Planning and Construction	\$38.3
Section 8 Housing Choice Vouchers	\$19.1
Title I Grants to Local Education Agencies	\$13.9
National School Lunch Program	\$11.6
Special Education Grants (IDEA)	\$11.2
State Children’s Health Insurance Program	\$11.1
Section 8 Housing Assistance Payments Program	\$9.2
Head Start/Early Head Start	\$8.3

Source: Andrew Reamer, *Counting For Dollars: The Role of the Decennial Census in the Geographic Distribution of Federal Funds*, initial analysis, George Washington University, June 2017

# How does that break down in Arizona?

About \$13.5 billion is sent to Arizona. For each person counted in Arizona, \$1,979 of federal funding is sent to the State, local government, providers, grant recipients, and individuals.

Program	Who receives the money?	AZ Obligation (in millions)
Highway Planning and Construction	DOT	\$826
Grants for Title I, Special Ed, School Nutrition and Head Start	AZEd, School District, Providers	\$982
S-CHIP, Medicare, Medicaid	DES, Providers	\$9,586
SNAP, WIC	Households	\$1,590
Section 8 and other Housing assistance	Households	\$252

# How will Census 2020 be different?

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- Bureau was mandated to conduct the 2020 Census at a lower cost per household than 2010.
  - Fewer local offices and field staff
  - *Flagstaff will have an Area Census Office*
- Use of administrative records and other third-party data for address canvassing and *non-response follow-up*.

# How will Census 2020 be different?

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- Initial responses will be accepted by:
  - Internet (primary response option)
  - Telephone
- If no response:
  - Use of administrative records and other third-party data for address canvassing and non-response follow-up
  - Paper (follow-up if no response electronically)

# How will Census 2020 be different?

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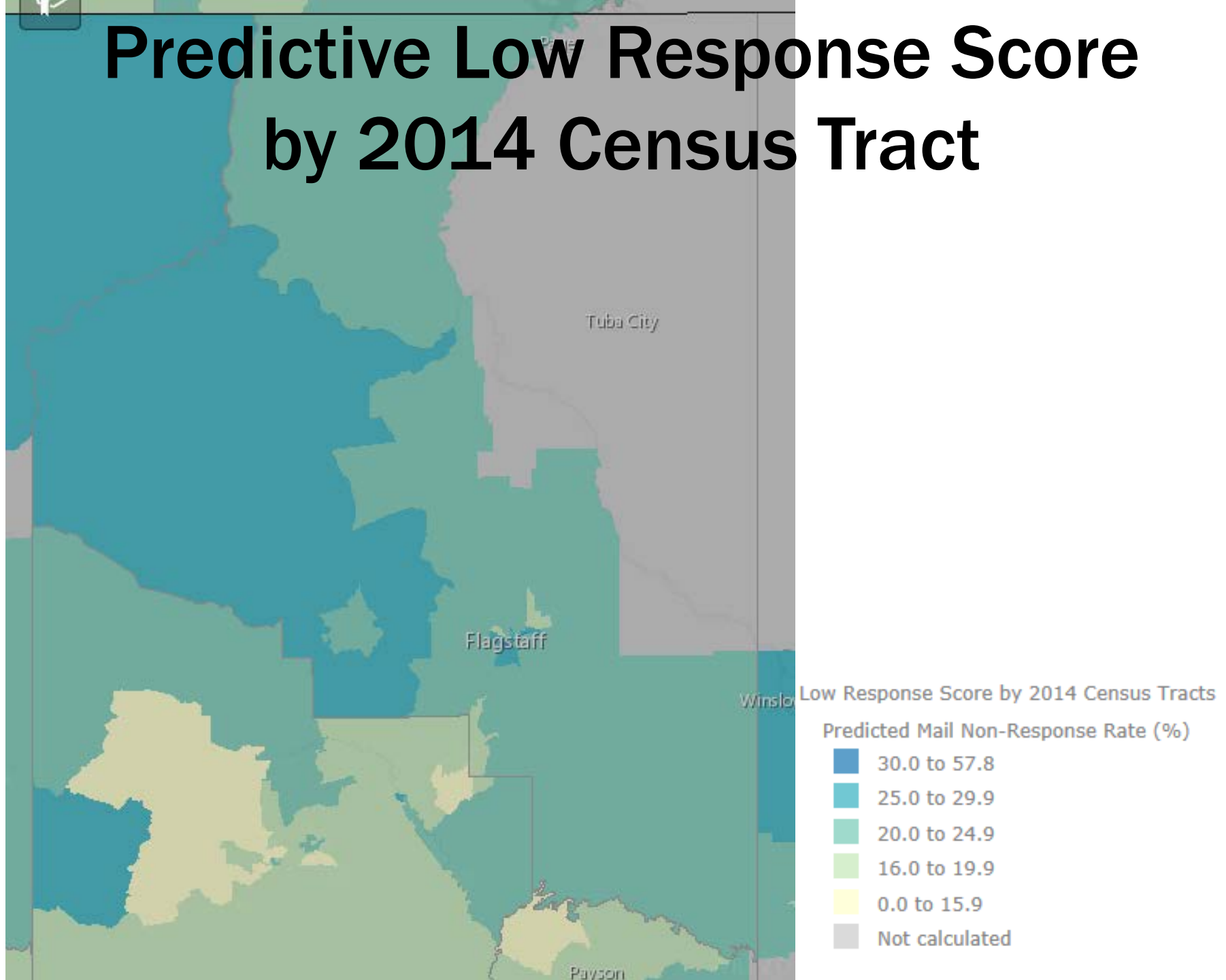
- Last minute addition of Citizenship Question
  - Concern that the adoption of question is untimely and decision made too late to allow testing of question's impact, or for planning approaches to minimize a decrease in response rate
  - Concerns about confidentiality
  - Legal challenges

# Issues for Coconino County

- Undercount risk is high for Coconino County and Flagstaff
  - Large percentage of adults are NAU students
  - Large percentage of renters
  - Large percent of minority populations
  - Large geographic area with remote rural populations
- An undercount similar to 2000 Census of 3,000 people represents a ~\$6 mil loss in funding



# Predictive Low Response Score by 2014 Census Tract



# ACTIONS

- Coconino County and the City of Flagstaff have each assigned a Census coordinator
- Complete Count Committee –Community Census Team formation underway
- Funding for Census 2020 is being allocated by Coconino County and the City of Flagstaff during budget actions in amount of \$150,000 (\$75,000 each entity) for FY19 and another \$150,000 to be requested for FY20
  - About \$2 per person we expect to count
- Money would be spent primarily on advertising, education and assisting in providing access for electronic self response.

# **Complete Count Committee Community Census Team**

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## **PURPOSE**

Established by county and local governments, community leaders and volunteers to increase awareness about the 2020 Census and to motivate residents in their communities to complete and return their Census forms.

**Targets areas and population less likely to respond independently.**

# Community Census Team

## Proposed Framework

- Informal framework committee with various sub-committees.
  - Quarterly Updates to Management Team
    - Board of Supervisor representative
    - Mayor or Council member
    - City and County Manager
    - Management team to provide direction to coordinators and provide oversight of expenditures of County/City dollars.
  - Geographic area will be inclusive of all of Coconino County
  - Sub-committee efforts will be based on local demographics and expected self-response
    - Develop messaging specific to targeted populations
    - Organizing and incorporating Census promotion into community events, such as parades, carnivals, fairs etc.
    - Sponsor advertising for Census 2020
    - Be ears and boots on the ground to ensure accurate information

# Community Census Team



Who is at the table already:

- County and City govts.
- UNWAY
- Interfaith Council
- NACOG
- NAIPTA
- NAU

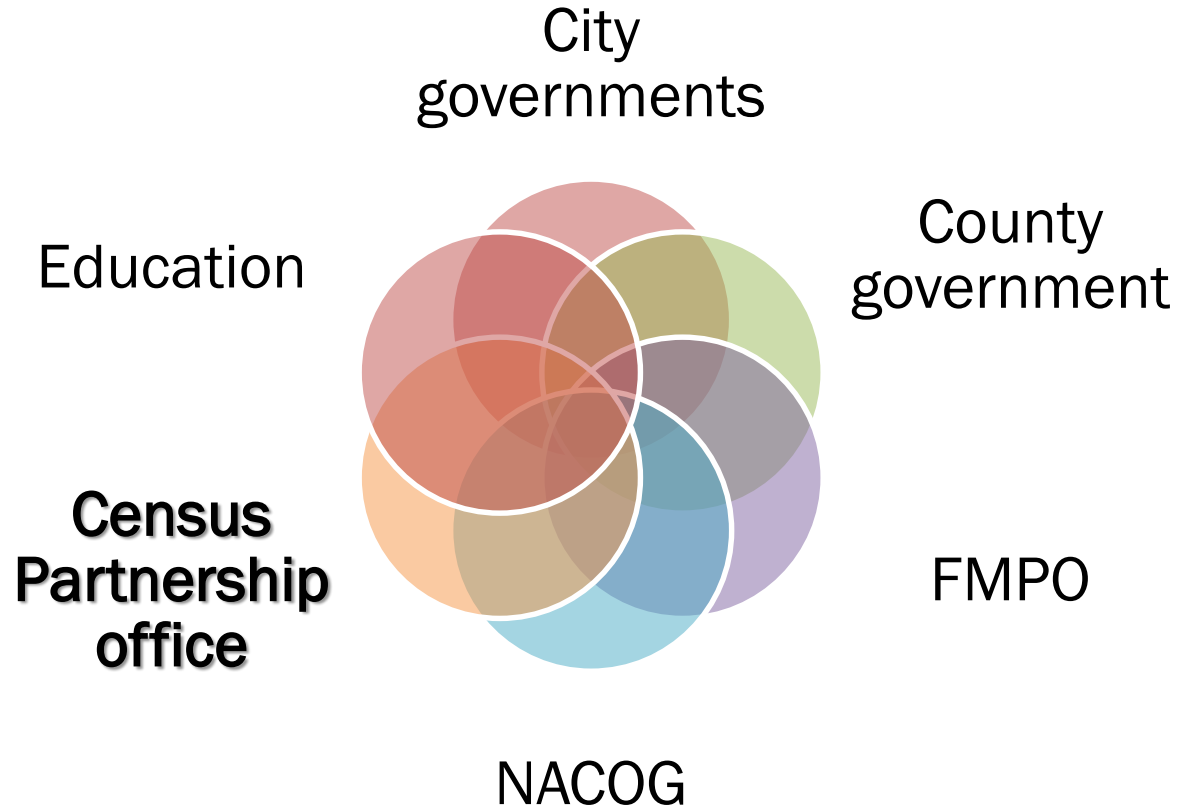
Representation still needed:

- CCC
- PTA/PTO
- School Districts/Charters
- Business
- Media
- Others?

# Census Key Dates

- Local Update of Census Addresses (LUCA) - March to June 2018
- Recruit and form Community Census Team – 2018 to 2019
- Participant Statistical Areas Program (PSAP) materials and response – January 2019
- Promote Census 2020 locally – Fall 2019 to Spring 2020
- On-the-ground Census operations – March 2020 to July 2020

# Intergovernmental Partnership Coordination



# Census Partnership Office

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## ■ Partnership Specialist- Fred Stevens

Partnership Specialist-2020 Census

U.S. Census Bureau-Denver Region

(303) 801-8030

[Frederick.M.Stevens@census.gov](mailto:Frederick.M.Stevens@census.gov)





# Questions

# Comments

# Direction

# THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

## Counting for Dollars 2020

16 Large Federal Assistance Programs that Distribute Funds on Basis of Decennial  
Census-derived Statistics (Fiscal Year 2015)

### Arizona

Total Program Obligations: \$13,513,326,539

Per Capita: \$1,979 (see note for proper use)

<u>CFDA #</u>	<u>Program Name</u>	<u>Dept.</u>	<u>Type</u>	<u>Recipients</u>	<u>Obligations</u>
93.778	Medical Assistance Program (Medicaid)	HHS	Grants	States	\$8,130,525,593
10.551	Supplemental Nutrition Assistance Program (SNAP)	USDA	Direct Pay	Households	\$1,459,584,642
93.774	Medicare Part B (Supplemental Medical Insurance) – Physicians Fee Schedule Services	HHS	Direct Pay	Providers	\$1,375,195,883
20.205	Highway Planning and Construction	DOT	Grants	States	\$825,800,857
84.010	Title I Grants to Local Education Agencies	ED	Grants	LEAs	\$332,102,583
10.555	National School Lunch Program	USDA	Grants	States	\$270,341,686
93.600	Head Start/Early Head Start	HHS	Grants	Providers	\$190,460,250
84.027	Special Education Grants (IDEA)	ED	Grants	States	\$188,817,764
14.871	Section 8 Housing Choice Vouchers	HUD	Direct Pay	Owners	\$174,235,000
93.658	Foster Care (Title IV-E)	HHS	Grants	States	\$145,861,000
10.557	Supplemental Nutrition Program for Women, Infants, and Children (WIC)	USDA	Grants	States	\$130,901,450
93.767	State Children's Health Insurance Program (S-CHIP)	HHS	Grants	States	\$80,667,000
93.527/ 93.224	Health Center Programs (Community, Migrant, Homeless, Public Housing)	HHS	Grants	Providers	\$73,592,792
93.596	Child Care and Development Fund-Entitlement	HHS	Grants	States	\$57,074,000
14.195	Section 8 Housing Assistance Payments Program (Project-based)	HUD	Direct Pay	Owners	\$55,722,792
93.568	Low Income Home Energy Assistance (LIHEAP)	HHS	Grants	States	\$22,443,247

### Notes and Findings:

- The [Counting for Dollars Project](#) will identify all federal financial assistance programs relying Decennial Census-derived data to guide the geographic distribution of funds.
- As an initial product, the project is publishing tables on the distribution, by state, of FY2015 funds from 16 large Census-guided programs.
- For every program but the National School Lunch Program, the equitable distribution of funds to a state depends on the accurate measurement of its population count and characteristics.
- There is not a straight linear relationship between state population count and federal funds flow. The per capita figure allows cross-state comparisons of fiscal reliance on census-guided programs. *It does not indicate the amount by which federal funding increases for each additional person counted.* (See The Leadership Conference Education Fund, [“Counting for Dollars: Why It Matters.”](#))

### Definitions:

- Census-derived statistics – federal datasets that are extensions of or otherwise rely on the Decennial Census (list available on [project website](#))
- Census-guided financial assistance programs – programs that rely on Census-derived statistics to determine program eligibility and/or allocate funds to states and localities
- Per capita – total FY2015 obligations for the 16 programs divided by population as of July 1, 2015 (per the Census Bureau)

### Abbreviations:

- CFDA – Catalog of Federal Domestic Assistance
- USDA – U.S. Department of Agriculture
- ED – U.S. Department of Education
- HHS – U.S. Department of Health and Human Services
- HUD – U.S. Department of Housing and Urban Development
- DOT – U.S. Department of Transportation

### Sources:

- USAspending.gov (20.050, 84.010, 84.027, 93.224/93.527, 93.568, 93.600, 93.778)
- President’s Budget Request for FY2017 or program agency (10.511, 10.555, 10.557, 14.871, 93.596, 93.658, 93.767)
- Center on Budget and Policy Priorities (14.195)
- Centers for Medicare & Medicaid, HHS (Physicians Fee Schedule Services of 93.774)

Prepared by Andrew Reamer, Research Professor, GWIPP, with data analysis provided by Sean Moulton, Open Government Program Manager, Project on Government Oversight (POGO)

August 18, 2017

# The 2020 Census Local Update of Census Addresses Operation (LUCA)

## What is LUCA?

LUCA is the only opportunity offered to tribal, state, and local governments to review and comment on the U.S. Census Bureau's residential address list for their jurisdiction prior to the 2020 Census. The Census Bureau relies on a complete and accurate address list to reach every living quarters and associated population for inclusion in the census.



## Why participate in LUCA?

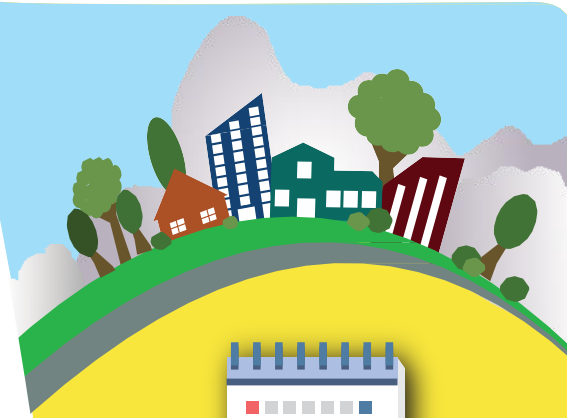
- To help ensure an accurate decennial census count in your community.
- To help the federal government distribute more than \$400 billion in funds annually for infrastructure, programs, and services.
- To help your community plan for future needs.

## Who can participate in LUCA?

Active, functioning, legal governments can participate in LUCA. These include:

- Federally recognized tribes with a reservation and/or off-reservation trust lands.
- States.
- Counties.
- Cities (incorporated places).
- Townships (minor civil divisions).

If you are unable to participate in LUCA, you may designate an alternate reviewer for your government, such as your county, state data center, or regional planning agency.



## Schedule

- January 2017: Advance notification of LUCA mailed to the highest elected official (HEO) or Tribal Chairperson (TC) of all eligible governments and other LUCA contacts.
- March 2017: LUCA promotional workshops begin.
- July 2017: Invitation letter and registration forms mailed to the HEO or TC of all eligible governments.
- October 2017: Training workshops begin. Self-training aids and Webinars will be available online at the LUCA Web site.
- February 2018: Participation materials mailed to registered participants. Participants have 120 calendar days from the receipt of materials to complete their review.
- August 2019: Feedback materials offered to participants with the results of Address Canvassing.
- **April 1, 2020: Census Day.**

For more information about LUCA, call 1-844-344-0169, e-mail us at <GEO.2020.LUCA@census.gov>, or visit our Web site at <[www.census.gov/geo/partnerships/luca.html](http://www.census.gov/geo/partnerships/luca.html)>.

## LUCA Materials

The Geographic Update Partnership Software (GUPS) is new for LUCA. The GUPS is a self-contained Geographic Information System (GIS) update and processing package. In addition to the software, you will receive the Census Bureau's address list, address count list by



census block, and Topologically Integrated Geographic Encoding and Referencing (TIGER) partnership shapefiles.

The Census Bureau offers its address list in digital or paper formats. The digital format requires the use of spreadsheet or database software. The paper format is available only to governments with 6,000 or fewer addresses.

Maps are offered in digital (TIGER partnership shapefiles that require GIS software) or paper (large format maps are 42 X 36 inches and include a DVD of small format [8.5 X 14 inches] block maps in Adobe PDF) formats.

The Census Bureau offers in-person training using LUCA materials. Self-training aids and Webinars are available online at the LUCA Web site.

## What's new for LUCA?

- Pre-LUCA activities provide more opportunities to submit address information and receive feedback through the continuous Geographic Support System (GSS) Program.
- Streamlined participation through the Full Address List Review provides the opportunity to review and update the Census Bureau's address list.
- The Census Bureau's digital address list is available in new, convenient standard software formats.
- Comprehensive data that includes ungeocoded address and residential structure coordinates.



## Preparing for LUCA

You will receive only the addresses within your jurisdiction's boundaries that are currently on file with the Census Bureau. By participating in the 2017 Boundary and Annexation Survey (BAS), you have the opportunity to verify or update your jurisdiction's boundaries. Doing this will ensure that you receive the complete list of addresses for your jurisdiction in LUCA.

To prepare your address list before you receive your LUCA materials:

- Ensure that your address list contains multiunit structure identifiers (such as apartment numbers for individual units) and that you can distinguish between residential addresses and nonresidential addresses.
- Identify local address sources, such as building permits, E-911 address files, local utility records, annexation records, and assessment or taxation files.
- Visit the LUCA Web site or plan to attend a LUCA promotional workshop to get more information about participating in the program.

## Connect With Us





A CAMPAIGN OF **NALEO**  
Educational Fund

## Invest Now in a Cost-Effective and Modern 2020 Census

If the Census Bureau is adequately funded, it will carry out a modern 2020 Census that is different than any other Census in our nation's history. Innovative approaches using new technology and streamlined operations may save more than \$5 billion on what the full cost of the decennial Census would otherwise be. However, the Census will not be able to implement these approaches unless it has the necessary resources to test and fine-tune the innovations in Fiscal Year 2018.

### THE PROPOSED DIFFERENCES BETWEEN DECENNIAL CENSUSES INCLUDE:

## 2010

Information gathered on paper forms, and through phone and face-to-face contact.

Staff walked every Census geographic block to update addresses for the master list used for mailings and by canvassers.

Census staff called households that did not return paper forms, and may have visited them multiple times.

Field operations consisted of 12 regional offices, 494 area offices, and more than 515,000 Census takers.

Respondents were asked about race and Hispanic origin in separate questions; Census Bureau research indicates that this format results in lower response rates to the questions, and incomplete data.

## 2020

Information gathered primarily through self-response on the Internet.

Census staff will use tools including imagery review and new mapping programs to improve the master address list; only a small number of addresses will be visited and confirmed in-person.

Census staff may import information from administrative records maintained by other government agencies and third-party sources to update the master list, and to minimize the follow-up with non-responders.

Smaller temporary workforce and fewer offices needed because canvassing and non-response follow-up will be replaced by more centralized computerized procedures.

Census Bureau envisioned revising the Hispanic origin and race questions to obtain better quality data; Office of Management and Budget decision has prevented Bureau from doing so. Bureau will retain separate question format and need to expend greater resources in follow up to obtain complete information.



## *Structure of a Complete Count Committee*

The mayor/county official appoints the members of the Complete Count Committee. The key elements of a successful CCC are:

- **Outreach** – People who can communicate to hard-to-count groups
- **Resourceful** – People who can bring resources to the table
- **Decision-makers** – People who can approve initiatives
- **Credibility** – People of influence and respect
- **Commitment** – People willing to doing the work
- Bipartisan
- Representative of all major races and ethnicities within the community/emerging population
- Creation of a coalition of businesses, community groups, government officials and large university representatives

Once the committee is formed, the Census Partnership staff member serves as liaison and advisor to the Complete Count Committee. The Partnership staff member will attend the meetings in an advisory capacity.



### **Census Staff**

- Partnership Specialist in each State
- Tribal Specialists
- Regional Data Dissemination Specialists
- Support local efforts (Complete Count Program)

### **State/Local Community**

- Provide Trusted Voices
- Form Complete Count Committee
- Form County, Local, Tribal Complete Count Committees
- Provide Local Resources for Your Tailored Promotion

## Suggested Subcommittees

**Government subcommittee** – Assists in all activities between the Census Bureau and the local government, such as participation in decennial geography programs, providing free space for Mobile Response Tables, recruitment and training, and identifying other resources for CCC activities.

**Education subcommittee**—Facilitates census awareness for local schools from prekindergarten through twelfth grade, as well as postsecondary education institutions in the area. Encourages school administrators, teachers, and students to use Statistics In Schools materials where appropriate.

**Faith-based subcommittee**—Creates and coordinates activities and materials that can be used by any local faith-based institution in the promotion of the 2020 Census for awareness and participation purposes.

**Media subcommittee**—Creates and facilitates ways to get the census message to all community residents, using all available sources such as social media, local newspapers, newsletters, fliers, local festivals, billboards, radio, and television.

**Community-based organizations subcommittee**—Collaborates with community organizations to inform residents of the importance of participating in the 2020 Census and the benefits derived from census data.

**Business subcommittee**—Creates and coordinates activities that involve businesses in census awareness, such as distribution of census information and census messages on packaging (grocery bags), and the inclusion of the census logo and message on sales promotion materials.

**Recruiting subcommittee**—Disseminates information about census job openings for the 2020 Census. Information will include the number of jobs available, types of jobs available, and the locations of testing and training sites.

The subcommittee chairpersons may recruit members for their respective teams. The ideal candidates for a **Complete Count Committee** are community members who have expertise, influence, and experience in the area of the respective committee. Committees are more productive and successful when they invest time, resources, and energy to this effort.

## Suggested Complete Count Committee Activities

**Develop an action plan** that will include activities, events, etc., which will support your efforts and help you meet your goals and objectives.

**Create ways to dispel myths** and alleviate fears about the privacy and confidentiality of census data.

**Encourage corporations and foundations** to become official sponsors of your census activities.

**Implement special events** that will generate interest and participation in the census.

**Plan a Census Day** event to motivate community response.





# Participant Statistical Areas Program (PSAP)

PSAP offers federally recognized tribes, state tribal liaisons, local governments, councils of governments, and regional planning organizations the opportunity to review and modify select statistical boundaries that the U.S. Census Bureau uses to count people in your community, so that we can give you the most relevant, useful data possible.

Statistical boundaries let us give you the small-area statistics and spatial data you need. You know your local community best. By participating in PSAP, you can help us provide relevant, useful data about population, income, and housing for small-area geographic analyses.



The Census Bureau uses these boundaries to tabulate data for the 2020 Census, the American Community Survey, and the Economic Census. Data tabulated to PSAP geographies are used by tribal, federal, state, and local agencies for planning and funding purposes, as well as by the private sector, academia, and the public.

Standard statistical geographies include:

- Census tracts
- Census block groups
- Census designated places (CDPs)
- Census county divisions (CCDs)

Tribal statistical geographies include:

- Tribal census tracts
- Tribal block groups
- Tribal designated statistical areas (TDSAs)
- State designated tribal statistical areas (SDTSAs)
- State reservations
- Oklahoma tribal statistical areas (OTSAs)
- OTSA tribal subdivisions
- Alaska Native village statistical areas (ANVSAs)



## What is a statistical boundary?

A *statistical boundary* breaks down large geographical areas into smaller, local areas. These small-area boundaries let you compare poverty, health, education, and many other topics across local areas.

The Census Bureau also tracks *legal boundaries*—such as state and county borders, city limits, and federally recognized American Indian Reservations—through the Boundary and Annexation Survey (BAS).

To learn about PSAP and to obtain the most up-to-date schedule, please visit [www.census.gov/programs-surveys/decennial-census/about/psap.html](http://www.census.gov/programs-surveys/decennial-census/about/psap.html).

For additional assistance, please contact the Census Bureau at [<geo.psap@census.gov>](mailto:geo.psap@census.gov) or 844-788-4921.

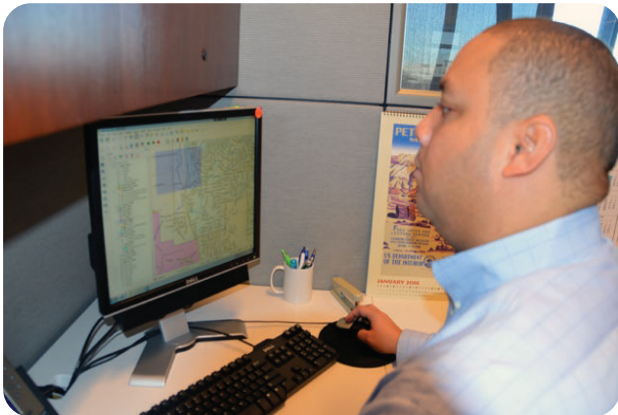
## How can I participate?

In July 2018, the Census Bureau will invite regional planning agencies, councils of governments, local governments and organizations, and all federally recognized tribes and state tribal liaison offices to participate in PSAP.

If you are interested in PSAP and do not receive an invitation, please visit the PSAP Web site to locate the contact information for your participating local planning agency, council of government, or other organization. Once you have identified and contacted the proper PSAP participant, you will work directly with the PSAP participant and the PSAP participant will work with the Census Bureau to review and modify statistical boundaries for your locality. An updated list of PSAP participants will be published on the PSAP Web site in the fall of 2018.

Before the start of PSAP, the Census Bureau will create a proposed 2020 PSAP plan of modified PSAP geographies for PSAP participants to review. We will send participants both the 2010 PSAP geography and the proposed 2020 PSAP plan to review.

During the program, participants will work with interested local parties to review the 2020 PSAP plan and send modifications back to the Census Bureau. The Census Bureau provides a free software called Geographic Update Partnership Software (GUPS) for participants to review the boundaries and generate the final 2020 PSAP plan.



## Other Census Bureau Geography Programs

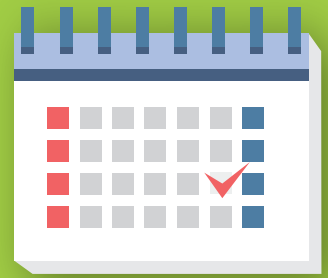
As the 2020 Census approaches, tribal, state, and local governments will have several opportunities to provide input on Census Bureau geographic programs. In addition to PSAP, you may hear about these important programs:



The Local Update of Census Addresses (LUCA) is the only opportunity offered to tribal, state, and local governments to review and comment on the Census Bureau's residential address list for their jurisdiction prior to the 2020 Census.



The Boundary and Annexation Survey (BAS) is the primary way that tribal, state, and local governments ensure that their legal boundaries are correctly recorded with the federal government.



## Upcoming Key Dates

- March–May 2018: The Census Bureau contacts 2010 Census PSAP participants to inquire about 2020 Census PSAP participation.
- July 2018: The Census Bureau sends an official letter to PSAP participants and state, county, or local points of contacts.
- Fall 2018: List of local planning agencies, councils of governments, and organizations published on the PSAP Web site.
- January 2019: PSAP participants receive materials to provide input on the 2020 PSAP plan for statistical boundaries.
- February 2019: PSAP webinar training begins.
- January 2020: PSAP participants receive an updated 2020 PSAP plan in order to verify that the statistical boundaries are correct.
- December 2020: The Census Bureau begins to release geographies from the 2020 Census.

## 2020 Census Key Dates

### Community Involvement - Offices - Data Collection Operations

January 2018 through September 2019	Engage & Educate Local Leaders, Partners & Communities
April 2019 through January 2020	Promote Participation in the Census Locally
January 2019 & February 2019	Early Area Census Offices Open (these offices run the Address Canvass Operation)
June 2019 through August 2019	Area Census Offices Open (ACOs)
August 2019 through October 2019	Address Canvass Operation in Select areas (~30% of country, high growth & change areas and not part of hand delivery, see below)
March 2020 through June 2020	Call To Action for Residents to Respond (starting March 23)
February 2020 through June 2020	Group Quarters Operations (Count of Residents in Shelters, Dorms, Nursing Homes, Transitory Locations, Prisons, Military Bases, RV Parks, etc. Local governments & Census identify & plan these operations)
Mid-March 2020	Residents Invited to Respond
<b>Individual Housing Units (HUs) Invited by either:</b> <div style="display: flex; justify-content: space-between;"> <div> <u>Mail</u> (to USPS Mailable Addresses)           <ol style="list-style-type: none"> <li>Letter Mailed</li> <li>Reminder Postcard</li> <li>Then Paper Questionnaire</li> </ol> </div> <div>or</div> <div> <u>Hand Delivery</u> (to Rural/PO Box, non-USPS HU delivery)           <ol style="list-style-type: none"> <li>List Housing Units (operation is called Update Leave)</li> <li>Leave Questionnaire (Spanish in certain areas) &amp; Letter w/other Response Options (internet &amp; phone)</li> </ol> </div> </div>	
<b>Options to Self-Respond (all residents will have these 3 options &amp; decide what is best for them)</b> <div style="display: flex; justify-content: space-around;"> <span>Internet</span> <span>Telephone</span> <span>Paper</span> </div>	
March 23, 2020	Self-Response Begins & Continues through July 2020
APRIL 1, 2020	<b>Census Day – Reference Date = where you live on April 1</b>
Mid-April 2020	Early Non-Response Follow-up (primarily areas around Colleges/Universities where the population leaves before early May)
May 2020 through July 2020	Non Response Follow-up (NRFU) to HUs that do not self-respond (HUs can continue to self-respond during this time)
Late August 2020 through September 2020	Area Census Offices Close
August 2020 through December 2020	Quality Evaluation (re-contact of select HUs)
December 31, 2020	Deliver Counts to the President

**CITY OF FLAGSTAFF  
STAFF SUMMARY REPORT**

**To:** The Honorable Mayor and Council  
**From:** Mark Gaillard, Fire Chief  
**Date:** 05/16/2018  
**Meeting Date:** 05/21/2018



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**TITLE**

**Update on Wildfire activity and preparedness in the City and County.**

**STAFF RECOMMENDED ACTION:**

No action is required. Discussion only.

**EXECUTIVE SUMMARY:**

Coconino County Director of Emergency Management and Flagstaff Fire Department Staff will provide a short update on Wildfire preparedness and season activities to date.

**INFORMATION:**

No required. Information only.

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**Attachments:**

## CITY OF FLAGSTAFF STAFF SUMMARY REPORT

**To:** The Honorable Mayor and Council  
**From:** Stacy Saltzburg, Deputy City Clerk  
**Co-Submitter:** Kim Musselman, Special Assistant to County Manager  
**Date:** 05/17/2018  
**Meeting Date:** 05/21/2018



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### TITLE

**Presentation and discussion** regarding invoking Article 6, §40 of the Arizona Constitution to change from a partisan election process to a merit selection process of judges.

### STAFF RECOMMENDED ACTION:

The Honorable Judge Dan Slayton, Division II of the Superior Court in Coconino County will be presenting information related to the pros and cons of invoking Article 6, §40 of the Arizona Constitution and the specifics of the merit selection process.

### EXECUTIVE SUMMARY:

The Arizona Constitution provides that merit selection will be used to select judges in counties with a population greater than 250,000 people. At this time only Maricopa, Pima and Pinal counties exceed that population threshold. Other counties may choose to adopt merit selection by popular vote. When a county's population exceeds 250,000 as documented by the U.S. Census, that county automatically enters the merit selection system. Currently, Superior Court judges are elected in a partisan primary, then face nonpartisan general elections in all counties except Maricopa, Pima and Pinal.

The Arizona Constitution, as stipulated in Article 6, §40, allows for counties with a population under 250,000 persons to choose to select its judges of the superior court as if it had a population of 250,000 or more persons. This choice is to be determined by vote of the qualified electors of the county at an election called by resolution of the board of supervisors of the county. If the qualified electors approve, the provisions of the Arizona Constitution pertaining to merit selection of judges, shall apply as if such county had a population of 250,000 persons or more.

To date no other county in Arizona has chosen to invoke this article of the constitution.

This presentation is intended to provide information to the public, City Council and Board of Supervisors about the merit selection process along with an overview of some of the potential arguments for and against invoking Article 6, §40.

### INFORMATION:

**ALTERNATIVES:**

Continue to have judges be elected through the current partisan election process until Coconino County population exceeds 250,000.

**FISCAL IMPACT:**

Anticipated expenses of \$35,000-\$70,000 for Information Pamphlet preparation, translation, and dissemination and associated community education efforts related to ballot measure referral.

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**Attachments:**     [Merit Selection Position Paper](#)  
                         [Pro/Con for Invoking Article 6](#)  
                         [Why Arizona Has Some of America's Best Judges](#)  
                         [Merit Selection for Local Judges Worth a Close Look](#)  
                         [Improving Merit](#)  
                         [Arizona Judicial Retention](#)  
                         [Merit Selection of Judges](#)  
                         [Merit Selection: The Arizona Experience](#)

**I. Issue: Should Coconino County invoke Article 6, §40 of the Arizona Constitution to select superior and justice court judges?**

**II. Law: Article 6, §40 Arizona Constitution states:**

Notwithstanding any provision of this article to the contrary, any county having a population of less than two hundred fifty thousand persons, according to the most recent United States census, may choose to select its judges of the superior court or of courts of record inferior to the superior court as if it had a population of two hundred fifty thousand or more persons. Such choice shall be determined by vote of the qualified electors of such county voting on the question at an election called for such purpose by resolution of the board of supervisors of such county. If such qualified electors approve, the provisions of §§ 12, 28, 30, 35 through 39, 41 and 42 shall apply as if such county had a population of two hundred fifty thousand persons or more.

**III. Arguments Favoring Invocation of Article 6 §40:**

1. The current system of electing judges is partisan/political in nature. Most citizens would agree that of all county/local elections, judicial elections should be as free as possible from political or partisan character. Judicial candidates must declare their political party on their nomination petitions. Judicial candidates invoke the assistance of their respective political party for assistance with their campaigns. They may be asked by their respective political parties to appear at political functions. This further increases and deepens the political nature of their elections and gives the appearance of politically-based (biased?) elections. The public's trust and confidence in a judiciary free from political influence is questionable. The merit selection/judicial retention process would end the subtle partisan/political nature of a judicial campaign.

2. The current system of electing judges lends itself to misuse of campaign funding and assistance. Some candidates running a contested campaign for a judicial office have sought financial and campaign assistance from law firms that routinely appear in front of them. In a previous campaign, a (former) mayor served for a brief time as the campaign manager for a judicial candidate while that candidate had a significant pending case involving the city in their court. The merit selection/judicial retention process would end the pressure to seek campaign funding and assistance.

3. Maintaining retention elections allows all citizens to hold judges accountable. A significant concern of all citizens is the ability to hold their judges accountable for their decisions. An election by itself grants citizens the right to hold their elected officials accountable for their acts and decisions. A non-partisan retention election would allow all citizen voters, not just those belonging to one dominant party, to voice approval or disapproval for a judge. In the past, some partisan judicial elections involved candidates from a single party, thus not allowing all citizens

the opportunity to vote for a judge. Merit selection/judicial retention elections may increase the sense of importance and involvement the voting public has in monitoring judges.

#### IV. Arguments against invocation of Article 6 §40:

1. The initial selection of judicial candidates could be subject to political partisanship due to the make-up of the selection committee. If the selection committee were made up of partisan leaders, the majority of whom were from a particular party, citizens may assume the selection was partisan from the outset.
2. Identifying a judicial candidate by their party affiliation would give voters some information on how an elected judge may rule on issues they consider politically significant to them. This argument has been more accurately raised in judicial elections for appellate/supreme court positions rather than the trial court judicial elections and may be of less concern due to recent changes in the law. (For example, until a few years ago, trial court judges made the decision to impose the death penalty in capital criminal cases. For those voters politically opposed to the death penalty, a judge's political party affiliation may have been believed by voters to give them some information as to how that judge would decide a death penalty case. Now, the citizen-voter serving as juror decides whether to impose the death penalty).
3. The current system allows the voters to select from any number of potential candidates rather than a single candidate giving more choice to citizens. The current system allows for any qualified judicial candidate to run for a judicial position. For example, in justice of the peace elections for Coconino County, Flagstaff Precinct, this has resulted in at least two candidates campaigning for election in the last four elections, giving voters a choice between at least two candidates. A retention election would necessarily give voters only one candidate.

#### V. Discussion

Much of the research read by this writer centered upon the election of state supreme court judges. In this context, the research is mixed. Partisan/non-partisan elections did not seem to play a significant outcome in how the public perceived judges. It also did not seem to impact how judges rendered their decisions, finding that judges ruled according to their perceived political beliefs or affiliations regardless of whether they were elected on a non-partisan or partisan ticket. One research paper found that non-partisan supreme court justices were more effected by public opinion than those elected on a partisan basis. The conclusion by the researchers was that partisan justices exhibited more judicial independence. This writer had significant concerns with how judicial decisions were categorized and quantified for data analysis. Judicial decisions do not always lend themselves to easy political categorizations for research. Second, comparisons of those decisions to a snap-shot of public opinion on any given day may lead to over-generalizations of a judge's decisions based upon their political affiliation and the public opinion poll on any given day.

The question presented for Coconino County only concerns whether superior and/or justice court judges should cease running for partisan election and be selected by a committee and then stand



for a retention election. This writer anticipates that much of the concern will center on whether invoking Article 4 §60 will reduce the level of information that voters have about a particular judicial candidate. Candidly, either system will continue to provide as much information about a particular judge currently on the bench. Given the interaction of judges in their communities, many voters will already know something about them simply from their involvement in community activities. In addition, as opposed to a metropolitan county such as Maricopa, the local news media is much more active in bringing public attention to local judges' decisions and cases than the news media in a major metropolitan county.

Further, if Coconino County chooses to move to retention elections, the county will necessarily have to partake in the Judicial Performance Review which will give the public probably more information than they now possess. Under the current system, judicial candidates reveal only what they want their campaign to promote. The Judicial Performance Review collects information from a wider variety of participants in a particular judge's courtroom and then issues a recommendation. How much this concern about not enough information weighs against the concerns about the political nature of the current judicial selection process and its possible disenfranchising voters not of a particular party remains to be seen.

## VI. Conclusion

Election of judges, whether by retention or stand-alone, serves an important function in promoting accountability of those judges to the citizens they serve. The process by which the election takes place should be analyzed in terms of which system will promote greater confidence in the judicial selection/election process and confidence in the judiciary. This writer has been involved in both processes albeit the selection process for both *pro tem* positions as a justice of the peace and superior court judge obviously did not involve a judicial retention election. The selection committees were comprised of a wide-ranging and diverse group of attorneys, judges, elected officials and citizens. In addition this writer had also run two contested elections for partisan judicial positions. Given the media attention to last year's election for justice of the peace and the Arizona Daily Sun's editorial regarding judicial selection, it is suggested that the Coconino County Board of Supervisors consider invoking Article 6 §40 and place the question before the voters of Coconino County.

### **Arguments for invoking Article 6, §40 of the Arizona Constitution:**

1. It comports with citizens' basic belief that judicial elections should be non-partisan in nature thus increasing the public's trust and confidence in judicial decisions.
2. It would allow for a broader and more diverse range of qualified judicial candidates to apply and serve without the expense and time of running a campaign as well as working as a judge or an attorney.
3. It removes issues of funding by outside sources who may appear before that judge in contested judicial campaigns.
4. It alleviates judicial candidates and judges from having to appear at political functions thus deepening citizens' belief that judicial candidates and campaigns are political in nature rather than non-partisan.
5. It would allow all citizens to select and hold their judges accountable, not simply those who belong to a particular party. In the past, some partisan judicial elections involved candidates from a single party, thus not allowing all citizens the opportunity to vote for the judges who will preside over their cases.
6. Ultimately, and inevitably this process will be *mandatory* for Coconino County to select their judges. Switching to this process early and allowing for open debate will assist the citizens in understanding this ultimate process for selecting judges.

### **Arguments against invoking Article 6, §40 of the Arizona Constitution:**

1. The initial selection of judicial candidates could be subject to political partisanship due to the make-up of the selection committee. If the selection committee were made up of partisan leaders, the majority of whom were from a particular party, citizens may assume the selection was partisan from the outset. Further, the sitting governor makes the final appointment and may make the final appointment on the basis of party affiliation rather than merit.
2. Identifying a judicial candidate by their party affiliation would give voters some information on how an elected judge may rule on issues they consider politically significant to them. This argument has been more accurately raised in judicial elections for appellate/supreme court positions rather than the trial court judicial elections and may be of less concern due to recent changes in the law.
3. The current system allows the voters to select from any number of potential candidates rather than a single candidate giving more choice to citizens. The current system allows for any qualified judicial candidate to run for a judicial position. A retention election would necessarily give voters only one candidate.
4. This writer anticipates that much of the concern will center on whether invoking Article 6 §40 will reduce the level of information that voters have about a particular judicial candidate. Given the interaction of judges in their communities, many voters will already know something about them simply from their involvement in community activities. In addition, as opposed to a metropolitan county such as Maricopa, the local news media is much more active in bringing

public attention to local judges' decisions and cases than the news media in a major metropolitan county.

Further, if Coconino County chooses to move to retention elections, the county will necessarily have to partake in the Judicial Performance Review which will give the public probably more information than they now possess. Under the current system, judicial candidates reveal only what they want their campaign to promote. The Judicial Performance Review collects information from a wider variety of participants in a particular judge's courtroom, rates those judges and then issues a recommendation. How much this concern about not enough information weighs against the concerns about the political nature of the current judicial selection process, and its possible disenfranchising voters not of a particular majority party, remains to be seen.

## **Why Arizona has some of America's best judges**

Scott Bales, *The Arizona Republic*, Sept. 12, 2014

*Chief justice: Forty years ago, Arizona voters adopted a merit selection system with lots of transparency and accountability.*

Arizonans casting votes this year will mark the 40th anniversary of one of their most successful efforts to improve state government.

In 1974, voters adopted a merit selection system for choosing judges for the appellate courts and the Superior Courts in our largest counties. This system incorporates public involvement, transparency and accountability. And it has allowed Arizona's judiciary to earn a national reputation for fairness, efficiency and innovation.

My views may reflect that I was appointed to Arizona's Supreme Court under merit selection, and now, as chief justice, I oversee a judicial branch that includes 153 other merit-selected judges. But I am far from alone in praising Arizona's system.

Since 1974, merit selection has enjoyed the support of public figures like Justice Sandra Day O'Connor (who was appointed to the Arizona Court of Appeals in 1979 under merit selection), business leaders, civic groups like the League of Women Voters, and the general public. The U.S. Chamber of Commerce has said that "Arizona leads the nation" with its procedures for implementing nonpartisan merit selection.

At a recent Arizona Town Hall meeting, a broad cross-section of citizens concluded that Arizona has "one of the best state judiciaries in the nation" and that "this is mostly owing to the effects of merit selection, which produces high-quality, skilled judges who are independent of interests that would otherwise fund judicial elections."

Merit selection has succeeded because it involves the public in selecting well-qualified judges who are committed to fairly applying the law. When a judicial vacancy occurs, the position is publicly announced and interested lawyers are invited to apply. Lengthy applications describe each candidate's education, professional experience and other qualifications. The applications are posted on a court website for public review and comment.

Applications are then considered by a 16-person, nonpartisan judicial-nominating commission. There are now four such commissions, one for appellate judges and one each for Maricopa, Pima, and Pinal counties.

The chief justice or another justice chairs each commission but does not vote except when necessary to break a tie. The other 15 members include 10 non-lawyers and five lawyers, all of whom are appointed by the governor and confirmed by the state Senate.

Under our state Constitution, the commission members must include people from different political parties and geographic areas. Having chaired three of the commissions, I know that members work very hard to identify the most highly qualified candidates for judicial office.

Each commission meets in public to review applications and to interview selected candidates. At each stage, the public can submit written or oral comments, and commission members themselves seek input from lawyers, judges and the community. The commission publicly discusses the candidates and then votes to send a list of nominees to the governor. The list must include at least three nominees, and no more than two (or 60 percent if there are more than three nominees) can be from the same political party. The governor appoints one of the nominees from the list to fill the judicial vacancy.

Through this process, merit selection has resulted in the appointment of competent, impartial judges who are diverse in their personal and professional backgrounds.

Public input in ensuring the quality of our judiciary does not end once a judge is appointed. All merit-selected judges are subject to Judicial Performance Review, which the voters established in 1992.

As part of JPR, people who have appeared before judges are invited to complete written surveys on different aspects of judicial performance. The surveys are sent not only to lawyers, but also to litigants, witnesses, jurors, court staff and other judges. The responses are compiled and reviewed by a 30-person JPR commission, which includes 18 public members who are neither judges nor lawyers. The JPR commission solicits other public input and, after public meetings, considers whether judges meet judicial performance standards.

At the general election, the voters decide whether appellate judges will retain their offices for another six-year term and trial judges for another four-year term. People sometimes say they don't know much about the judges named in a long list at the end of the ballot. The list, I admit, can be daunting, but information about the judges is readily available.

The JPR commission's reports on whether judges meet the performance standards, as well as summaries of the survey results, are included in the Arizona Secretary of State's Office's publicity pamphlet for the election. This pamphlet is mailed to households that have one or more registered voters. Even more information about judges is available at the JPR commission's website: [azjudges.info](http://azjudges.info).

Some have observed that Arizona's voters do not often reject judges who are up for retention. This is true, but it is not a flaw in merit selection.

The system aims to identify well-qualified people for appointment. Their performance as judges is periodically reviewed with public input. Based on the surveys and the JPR commission's findings, all merit-selected judges work with the commission to develop plans to improve their judicial performance. Judges who violate their duties may be disciplined and even removed through a separate Commission on Judicial Conduct.

Retention elections serve as a backstop, allowing voters to reject those judges who, despite the other safeguards, do not meet the public's standards for holding judicial office. That the voters rarely do so suggests the system works.

This fall, I hope you will join me in celebrating the 40th anniversary of our merit selection system. I urge you to review the JPR reports and other information at [azjudges.info](http://azjudges.info) and to exercise your right to vote on the judges seeking retention. It's worth the time to finish your ballot.

*Scott Bales is chief justice of the Arizona Supreme Court.*

[http://azdailysun.com/news/opinion/editors-column/merit-selection-for-local-judges-worth-a-close-look/article\\_cb89009e-2047-11e4-9722-001a4bcf887a.html](http://azdailysun.com/news/opinion/editors-column/merit-selection-for-local-judges-worth-a-close-look/article_cb89009e-2047-11e4-9722-001a4bcf887a.html)

## **Merit selection for local judges worth a close look**

Aug 10, 2014

Why are judges being asked to campaign for a position that demands the kind of impartiality that electoral politics simply can't deliver?

We ask that question because, for the second election cycle in a row, Flagstaff-area voters have been held captive to judicial campaigns that have focused not on legal issues but on the campaigning itself. The campaigns have divided the legal and lay communities alike, raising doubts about the integrity of our local legal system.

Take away the need to run expensive campaigns and replace it with merit

selection and retention, as is done with state judgeships and some judges in Arizona's three biggest counties, and those campaign-related problems go away.

The Flagstaff examples are instructive. In 2012, Superior Court Judge Joe Lodge had his nominating petitions challenged by a supporter of his opponent. The resulting appeals and barring of Lodge from the ballot overshadowed any substantive subsequent campaign.

### Direct Solicitations barred

This year, the Justice of the Peace race has seen challenger Warren Sanford, himself a pro tem JP, file a formal ethics complaint against the incumbent JP, Howard Grodman. It concerns not Grodman's performance as a judge but as a candidate in using a court email account for campaign activities, including the alleged solicitation of an endorsement from a court contractor. Both camps have been soliciting campaign endorsements and contributions, and some of those parties, especially attorneys, will have business before the court.

We suppose that the political process does not by definition have to exclude judges — state rules of judicial conduct do prohibit candidates from campaigning on issues or cases that could come before their courts. They also bar judge candidates from directly soliciting contributions, leaving that up to campaign committees. And judge candidates cannot make false or misleading statements about themselves or their opponents, and they are supposed to disavow such statements made on their behalf by third parties.

So it's not the mudslinging that is problematic in judge races that is a concern, nor any overt campaigning on hot-button issues like abortion or gun control. What's missing is any credible way for voters to know whether judges and their opponents meet the relevant performance standards for a judge, which should be the main criteria for casting a vote.

### Commission sets standards



Those standards, as set by the state judicial ethics commission, are:

- administer justice fairly, ethically, uniformly, promptly and efficiently;
- be free from personal bias when making decisions and decide cases based on the proper application of law;
- issue prompt rulings that can be understood and make decisions that demonstrate competent legal analysis;
- act with dignity, courtesy and patience; and
- effectively manage their courtrooms and the administrative responsibilities of their office.

Those are standards that are far removed from the horse-trading and vote counting that marks modern politics. They are best evaluated by the people who actually come before the judges or know them professionally: fellow judges, lawyers and court staff, plus the claimants or respondents whose cases are on the dockets.

In Arizona, those groups are enlisted to evaluate and help select judges for Supreme Court, the Court of Appeals and the superior courts in Maricopa, Pima and Pinal counties. Nonpartisan commissions use questionnaires and interviews to screen candidates and submit the names of the top three candidates to the governor for appointment. They then are evaluated in 10 years by the same commissions and their names and ratings are submitted to voters for ratification.

### Merit selection not foolproof

The merit selection process is not entirely immune to politics — a governor could use political affiliation as a litmus test for appointment. Also, outside partisans like the Koch Brothers are now campaigning in other states against sitting judges they consider too “liberal” when they come up for 10-year voter ratification.

But in Arizona, which began merit selection in 1974, the process appears to have worked well in creating an independent and generally high-quality judiciary at the upper levels. The smaller counties were left out 40 years ago in part because they weren't likely to generate the higher campaign contributions and partisan campaigning seen as compromising judicial integrity.

But things have changed over four decades, starting with populations of well over 100,000 apiece in the next three most populous counties, including Coconino. That's enough of a donor base to mount expensive campaigns for judgeships.

In addition, judicial salaries have risen to the point where attorneys in rural counties see them as competitive with what they can earn in private practice or government service. The salary for a Justice of the Peace in the Flagstaff district is \$101,500 and for Superior Court, \$145,000.

Not grassroots enough?

Some might worry that a formal merit selection process for Justice of the Peace would remove the last vestiges of its grassroots origins as "the People's Court." It does, after all, handle mainly misdemeanors, and many defendants are not represented by attorneys. There is also no requirement in statute for a JP to be a licensed attorney.

We are not unsympathetic to that concern. But the duties of a Justice of the Peace have advanced far beyond assessing traffic fines and officiating at weddings. Accused felons often make initial appearances before them for the setting of bail, and exploding caseloads have made managing a justice court a complex task. In order to cast informed votes and be assured of impartiality, voters need far more information than is provided in a partisan political campaign.

Perhaps, as a halfway measure for JP races, a selection commission for judges in smaller counties might evaluate and publish ratings of candidates and incumbents even though the choice is left to voters. For superior court

judges, we urge adding Coconino County to the list of counties subject to merit selection. If the current election cycle is any example, these are changes that voters are likely to support as long overdue.

Our View: Campaigning can undermine the integrity and impartiality of an office that should be above politics.

FROM THE WEB

Powered By ZergNet



The Shady Truth About Guy Fieri



Stars You May Not Know Passed Away



This is the Cast of 'Christmas Vacation' Today



Why You Should Always Ask Your McDonald's Cashier for a Receipt



The Shady Truth About Olivia Munn



The Truth About Rachael Ray

## 48-SEP Ariz. Att'y 76

Arizona Attorney  
September, 2011

Back  
The Last Word  
Clint Bolick<sup>a1</sup>

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## IMPROVING MERIT

Many of my experiences in courts in other states made me a fan of **merit selection** before I even knew what it was.

Try litigating in a Texas court where every lawyer in the courtroom except you has contributed to the judge's re-election campaign.

Or the Illinois court where the newly appointed judge was freshly plucked from the state legislature, where he publicly opposed the policy you're advocating.

Or the New York court that sent mail to the Institute for Justice, my prior firm, addressed to the "Institute for Injustice."

Best of all was the Florida judge nicknamed "Bubba" whose son was about to marry the daughter of the president of the union we were up against. Not only wouldn't he recuse himself, but at the first hearing the judge entered the courtroom from his chambers with the union's lawyer in tow!

Predictably, none of those experiences turned out well, save the last one, in which the Court of Appeals intervened to remove the judge from the case.

This may be standard operating practice in other states; but happily, it is not here. Since moving to Arizona 10 years ago, I've never once felt like the fix was in. The scales of justice in Arizona generally are well balanced.

Arizona voters placed **merit selection** of judges into our Constitution 37 years ago. By creating independent commissions to send judicial nominations to the Governor, **merit selection** provides for a pre-screening of judicial qualifications and reduces the overt influence of politics by allowing candidates to apply rather than having their nominations initiated by the Governor or confirmed by the Legislature.

But there are two major flaws in the process. First is the outsized role of the State Bar of Arizona, which controls the names of lawyers who are presented to the Governor to serve on the commissions. Though the Bar is not partisan, it is also not apolitical.

Second is that the number of judicial candidates the commissions send forward is limited to three, from which the Governor must choose. The commissions often emphasize geography, partisan affiliation and other non-merit factors in winnowing the field, thus sometimes eliminating candidates who are unquestionably meritorious. Moreover, the process rarely produces commission members or judicial nominees with nontraditional or controversial legal backgrounds or with strongly liberal or conservative views, regardless of their merit.

The Legislature, which perceives that the Bar has a liberal tilt in the judicial selection process, considered referring to the voters a wholesale replacement of **merit selection**. Given that the public views both lawyers and legislators with disdain, it's anyone's guess what would have happened.

Fortunately, despite this era of political rancor, the Legislature and the Bar reached a compromise that would preserve the essence of **merit selection** while reducing the role of the State Bar and increasing the pool of commission members and qualified judicial nominees. If the proposed referendum is passed by the voters in November 2012, the Bar would make one appointment to the nominating commissions, while making recommendations to the Governor for the remaining four lawyer positions without controlling who is nominated. The commissions, in turn, would send eight rather than three judicial nominations for each vacancy to the Governor. At the same time, the measure would increase judicial terms to eight years and retirement age from 70 to 75.

Former State Bar President Alan Bayham Jr. says the compromise "preserved **merit selection**, which is what we all were working so hard to do." He's right: We dodged a bullet. Our judiciary will continue to be high-quality and independent, and perhaps reflect even more diverse philosophical viewpoints. Judicial nominees will not have to run the gauntlet of elected officials to win confirmation. And best of all, they will not have to become politicians to win or keep their jobs.

#### Footnotes

- <sup>a1</sup> **Clint Bolick** is director of the Goldwater Institute Scharf-Norton Center for Constitutional Litigation and a research fellow with the Hoover Institution. His cases have included defense of school vouchers and a challenge to interstate barriers to wine shipments in the U.S. Supreme Court. His most recent books are *David's Hammer: The Case for an Activist Judiciary* and a novel, *Nick's Girl*.

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## 45-NOV Ariz. Att'y 12

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Feature

Albert J. Klumpp<sup>a1</sup>

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### ARIZONA JUDICIAL RETENTION Three Decades of Elections and Candidates

Judicial retention elections have been part of Arizona's governmental system for more than 30 years. Enacted in 1974 as an element of the state's judicial merit selection plan, retention elections are held for all judges in Maricopa and Pima counties and for appellate and Supreme Court judges statewide. Since their debut in 1976, 16 sets of retention elections have occurred in Arizona, and a total of 735 candidates have run for retention.

What, if anything, can we learn from these elections? The question is far from academic.

For one thing, the issue of judicial selection has been a perpetual source of controversy in Arizona, dating back even before the state's admission to the union and continuing to this day.<sup>1</sup> In addition, \*13 retention elections are generally not well understood. Surprisingly little research has been done on the topic, which has hampered an informed debate on the relative merits of different judicial selection methods.<sup>2</sup>

In my doctoral dissertation and subsequent research, I have sought to address the latter problem, analyzing in detail the results of judicial retention elections in many different jurisdictions. In this article are the results of my analysis of Arizona's retention elections. For the most part, I find that their outcomes are comparable to those of other retention jurisdictions—but not entirely so. Moreover, in examining data on the judges who have run for retention, I have uncovered limited but undeniable evidence that Arizona's switch to merit selection has resulted in a measurable improvement in the quality of the state's judiciary.

#### Retention Approval Rates

The voter approval rates for Arizona retention candidates exhibit three general characteristics.

First, defeats of judges have been rare occurrences, and even near-defeats have been rare. Only two judges have failed to attain the 50 percent requirement for retention, and only seven others have fallen even as low as 60 percent. This is in line with the results of other populous retention-election states. In Missouri, for instance, only two judges have been defeated since retention elections were instituted in 1948. And in Illinois, which in 1972 raised its approval requirement from 50 percent to 60 percent, more than 98 percent of judges have been retained, even under the more stringent requirement.

Second, the approval rates for most or all of the judges who \*14 appear on the same ballot cluster tightly together. This, too, is par for the course among the retention-election states. It occurs because most voters cast blocks of all-yes or all-no votes rather than singling out any particular candidates (though there are exceptions; see the next section).

Third, in 1990 there was a sudden and substantial drop in approval rates statewide. Figures 1 and 2 illustrate the extent of the drop for the various categories of Arizona candidates. This drop occurred not only in Arizona but in nearly every retention jurisdiction in the nation.<sup>3</sup> Its cause was an influential national anti-incumbent campaign, a grassroots campaign that was the precursor for Ross Perot's 1992 presidential candidacy. The campaign was directed only against the U.S. Congress, but in my dissertation research I discovered that it had a huge spillover effect, causing the defeats of state and local incumbents in unprecedented numbers all over the country. And it also affected approval rates for retention judges. This is not surprising, because retention candidates are specifically identified on the ballot as incumbents.

**FIG. 1 Arizona Superior Court Retentions, 1976-2006 Median Approval Rates**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

**FIG. 2 Arizona Appellate Court Retentions, 1976-2006 Median Approval Rates**

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It is significant that although approval rates in every other retention state rebounded quickly from the 1990 drop,<sup>4</sup> Arizona's rates fell even lower in 1992. And while a rebound did occur in Arizona two years later, in Maricopa County the rates have to this day remained substantially below their pre-1990 levels. Polling data that would conclusively explain these unique results does not exist; however, I believe there are two obvious suspects.

One is the 1992 Perot candidacy, which reinforced the government-is-broken message of the 1990 campaign and which was more successful in Arizona than in all but a handful of the other U.S. states. As for \*16 Maricopa County, there may well be a hardening of the attitudes of a portion of the local electorate toward the criminal justice system in the wake of the 1992 election of a new Maricopa County sheriff. Joe Arpaio's high-profile, controversial tenure and the contemporaneous reduction in Maricopa's retention approval rates seem unlikely to be coincidental.

Studies on all types of judicial elections have found that voters are not well informed about judicial candidates.<sup>5</sup> The events of 1990 and thereafter suggest that many voters in retention elections rely on general attitudes toward politics or government as a substitute for specific information about judges.

**Voter Targeting of Individual Judges**

One focus of my research has been on instances in which a judge is singled out for negative votes by a significant proportion of the electorate. What causes voters to target a specific retention candidate?

In Arizona, as in the other states I have studied, the answer is clear. Information about a judge's performance has only a minimal impact on its own—it is never sufficient to defeat a judge. Rather, it is negative publicity, whether due to performance alone or otherwise, and usually occurring just before the election, that in every case explains the most substantial voter reactions. In Arizona, this is the case for all nine of the instances of defeats or near-defeats.<sup>6</sup> In two other instances, negative publicity was counteracted by visible campaigns of support for retention candidates, significantly reducing the “hit” that the candidates would have taken at the polls.<sup>7</sup>

As for performance information, evaluations of the job performance of retention candidates have been available to Arizona voters throughout the state's retention history. From 1976 to 1992, the state's major bar associations conducted lawyer surveys on the performance of retention candidates. Since 1994, the evaluation function has been performed by the state's Judicial Performance Review Commission. But despite the reliable provision of detailed information from

these sources, candidates who have received poor evaluations without any accompanying negative publicity have seen only a slight voter reaction. This has been the case under both systems of evaluation.

To be fair, the current system of distributing performance information through the state's Voter Information Pamphlet may yet prove to be influential with more voters. A full analysis is not yet possible because the number of judges who have received anything less than a unanimous or near-unanimous endorsement from the JPR Commission has simply been too small. Nonetheless, the unequivocal record from Arizona and from other populous retention states offers a strong message to groups that evaluate retention candidates: Even the most negative of performance evaluations is by itself of little electoral consequence.

### Improvement in Judicial Performance

As part of my overall analysis, I gathered and reviewed historical data from the performance evaluations of Arizona retention candidates. My original purpose in doing so was to compare evaluation results to election results, as discussed above. But in taking a closer look at the evaluation results, I found that they have an important story to tell on their own.

Regrettably, the original source materials from the 1976-1992 bar surveys have been destroyed, and I was unable to locate a complete set of scores from any other source. Fortunately, however, back issues of *Arizona Attorney* provided me with sets of summary scores from the 1976, 1978 and 1990 elections. I also acquired the JPR Commission's vote results for the five elections between 1998 and 2006. These eight elections allow for at least a partial analysis, based on the percentages of attorneys or commission members who favored the retention of each candidate.

Table 1 summarizes the scoring data (see p. 18). The table shows that between the 1976-1978 period and 1990, mean and median ratings for judges increased noticeably, and the proportion of judges receiving particularly low scores declined considerably. The same also occurred between 1990 and the 1998-2006 period. Statistical testing of the full sets of scores found that in both instances the score increases are formally statistically significant.

**TABLE 1 Evaluation Scores of Arizona Retention Candidates**

YEAR	NUMBER OF CANDIDATES	MEAN SCORE	MEDIAN SCORE	CANDIDATES SCORING BELOW 75	CANDIDATES SCORING BELOW 50
1976	20	82.3	87	5	1
1978	36	83.5	87	7	2
1990	49	89.3	93	5	0
1998	50	97.1	100	2	1
2000	56	98.3	100	1	0
2002	60	98.6	100	2	0
2004	73	97.5	100	3	0
2006	64	99.6	100	0	0



NOTE: 1976-1990 scores are percentages of responding attorneys favoring retention; 1998-2008 scores are calculated from JPR Commission votes.

What makes these increases so important? In the 1970s, nearly all of the judges who were being evaluated had reached the bench through partisan elections. As time passed, though, judges chosen through merit selection became a larger and larger proportion of the judiciary, and today they comprise 100 percent of the retention candidates. In other words, the transition from a partisan-elected to a merit appointed judiciary and the improvement in evaluation scores have occurred simultaneously. This is doubtless not a coincidence.

Remarkably, the increases have occurred even as the judicial system has steadily expanded in size. The growing numbers of retention candidates throughout the 1976-2006 period mean that there have been higher proportions of newer, less experienced judges than if the system were more stable size-wise. It could reasonably be expected that new judges with little or no experience <sup>18</sup> would receive relatively lower scores, reducing the overall averages. But this has not happened.

Two further comments should be made regarding the figures in Table 1.

First, it has been suggested by some critics that the JPR Commission has been too lenient in its voting; if true, that would contribute to the high scores seen in the 1998-2006 period.<sup>8</sup> However, even if this accusation has merit, it would not explain the score improvements that predate the commission's establishment.

Second, the scores that I analyzed are based simply on the question of whether a judge performs at a baseline level worthy of retention. The scores do not indicate whether judges are performing at higher-than-minimal levels. While more research is needed on the question, Table 1 suggests indirectly that there are more judges worthy of "A" and "B" grades today than in the past, and that there are fewer "D" and "F" judges.<sup>9</sup>

## Conclusion

I should make clear that the goal of my research is not to advocate for or against any particular type of judicial selection system. And in fact, some of what I have presented here will be well received by advocates of partisan judicial elections. In particular, the near-100 percent success rate of retention candidates certainly does not refute the argument that retention elections by themselves are inadequate to hold substandard judges accountable to the public. Similarly, considering that the whole point of retention elections is to protect incumbent judges from facing challengers and to retain or remove them based on performance, the rates of performance-based voting are extremely low.

Nevertheless, the bigger picture here suggests that the sets of candidates who have sought retention have become more competent and more retention-worthy under the state's merit selection plan. Furthermore, anecdotal evidence suggests that the rigorous judicial performance evaluation programs that were adopted in 1992 have discouraged questionable judges from even seeking retention in the first place.<sup>10</sup> To the extent that this is the case, then a retention election process without removals is actually a desirable consequence. Whether or not a substandard judge occasionally seeking and winning retention is an acceptable tradeoff for these improvements is an issue that Arizonans will have to weigh carefully.

Debate in the states over judicial selection systems is invariably long on rhetoric and argument and short on factual support. Continued research of the type presented here can play an invaluable role in evaluating the claims made by proponents and opponents of different systems. Ideally, such research will help Arizona address the subject with less conflict in its second century than in its first.

## Footnotes

- a1 **ALBERT J. KLUMPP** holds a Ph.D. in public policy analysis and is a research analyst in the Chicago office of McDermott Will & Emery LLP. His 2005 doctoral dissertation was the first ever written on the topic of judicial retention elections. He thanks Mark Harrison for his encouragement and assistance with this article.
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- 8 A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643 (1988).
- 9 A full set of the 1976-1992 survey results would allow for such an analysis. If any reader happens to be in possession of those results, please contact the author.
- 10 Harrison et al., *supra* note 1.

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**42-FEB Ariz. Att'y 13**

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Special Feature  
Fair Courts under Fire  
A Special Section on Judges and Judicial Independence  
Ted A. Schmidt <sup>a1</sup>

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## **PART I: MERIT SELECTION OF JUDGES** **Under Attack without Merit**

Prior to 1974, what did Morris Udall, Sandra Day O'Connor, William Browning and Stanley Feldman want that Missouri had? And what is now claimed by some to have resulted in judicial activism and the demise of judicial accountability in Arizona?

The answer to both questions is the same: **merit selection** of judges. <sup>1</sup>

Since its inception in 1974, Arizona's system for **merit selection** of judges has been seriously attacked in the state legislature at least 13 times. <sup>2</sup> So why, while other states fight to enact **merit selection** of judges, is there serious discussion in Arizona about emasculating or abolishing it? Will Arizona become the first of 31 states with **merit selection** to abandon it?

To understand why those questions are so important, we should begin by viewing a world without **merit selection**, one in which judges and potential judges scrap publicly as they seek to reach the bench.

### **The Stench of Judicial Campaigning**

First of all, what purportedly guides those seeking to be a judge?

The Canons of the Judicial Code of Conduct prohibit candidates for judicial office from having constituents or making any pledges or promises of conduct in office other than that they will "faithfully and impartially" perform their duties. <sup>3</sup> The Canons also bar judicial candidates from revealing their views on disputed legal or political issues. <sup>4</sup> Despite the Canons, campaigns and campaign funding accompany judicial elections.

Sentiment on the topic is strong. A recent survey by the American Bar Association demonstrates that three out of four Americans believe judicial campaigning compromises the impartiality of elected judges. <sup>5</sup> Similarly, a 1999 poll sponsored by the Texas Supreme Court demonstrated that 79 percent of lawyers and 48 percent of judges in that state believed campaign contributions have a "significant" impact on judicial decisions. <sup>6</sup>

If Pima and Maricopa Counties returned to the election of judges, Arizona could join the ranks of states such as Alabama, which has raised \$41 million since 1993 for Supreme Court elections, or Texas, which spent \$27 million over that same period. <sup>7</sup>

Needless to say, the costs associated with contested judicial elections have escalated exponentially since Arizona last held such elections in the early 1970s. Where do judges raise these funds? From lawyers and litigants, of course. Might this create an appearance of impropriety, if not outright judicial misconduct? Absolutely, and recent cases offer interesting case studies.

- Pennzoil filed suit against Texaco in Texas, where judicial campaigning is legend. Within days of filing the action, Pennzoil's attorney donated \$10,000 to the campaign fund of the trial judge. Before judgment was awarded, attorneys for both sides began to donate hundreds of thousands of dollars to members of the Texas Supreme Court. Pennzoil's attorneys donated \$315,000, whereas those from Texaco donated only \$75,000. Pennzoil was awarded \$10.3 billion, most of which was upheld by the Texas Court of Appeals. To very little surprise, the Texas Supreme Court refused to hear Texaco's appeal.<sup>8</sup>

- In Louisiana, the Supreme Court enacted rules in 1999 that prohibited student clinics from representing community organizations unless at least 51 percent of the organization's members could demonstrate incomes below 200 percent of federal poverty guidelines. Other rule changes the same year allowed the Supreme Court to terminate "without any showing of cause" a law school dean's certification of a student's capacity to practice in Louisiana courts. These rule changes were particularly directed at the Tulane Environmental Law Clinic at the Tulane Law College.

What had the Clinic done to warrant such harsh treatment? It had brought a lawsuit to block the construction of a polyvinyl-chloride and ethylene-dichloride production facility near a residential neighborhood. Rather than fight this litigation, the chemical manufacturer decided to build the plant elsewhere. The Louisiana business community was incensed and determined to ensure that future businesses considering Louisiana as a home would not be hampered in this manner. Consequently, individual businesses and the Louisiana For Business and Industry Organization made significant contributions to Louisiana Supreme Court justices who were up for re-election. Shortly thereafter, the rule amendments were enacted.

When the Tulane Clinic challenged these new rules in federal court, the case was assigned to District Court Judge Eldon Fallon. Judge Fallon readily acknowledged "the close temporal relationship between the business community's expression of outrage and the subsequent changes" to court rules. Judge Fallon said that although these issues probably warranted closer examination, the proper forum was in the political arena and not federal court. Most interesting, however, Judge Fallon emphasized in his ruling that "in Louisiana where state judges are elected, one can not claim complete surprise when political pressure somehow manifests itself within the judiciary."<sup>9</sup>

- Similarly in Idaho in 1999, Justice Cathy Silak authored a 3-2 decision that upheld federal government control \*14 over water rights in certain wilderness areas. Despite earlier decisions by Silak favoring states' rights on water issues, the 1999 ruling sent the mining and real estate interests and the Idaho Christian Coalition to work. They launched an expensive campaign to oust Silak, suggesting that she was inclined to support same-sex marriage and partial-birth abortions, and that Idahoans could end up "pretty dry" if they did not vote Silak off the bench. Simultaneously, a "push poll" was instituted throughout the state

asking voters if they “support the move by the courts to transfer control over Idaho water rights to the federal government.”<sup>10</sup>

This campaign was successful, and Silak was voted out of office by a 20 percent margin. Months later, when the mining interests filed a motion for rehearing in the water rights case, Justice Linda Trout, who had joined Silak in the original 3-2 vote, changed her vote and swung the majority to the other side of the issue.

It is not surprising that Trout was up for re-election at the time of the rehearing.<sup>11</sup>

These are only three examples, but other documented instances of improper and unsavory judicial campaign conduct are abundant.<sup>12</sup> As District Judge Jim Parsons, a candidate last fall for the Texas Supreme Court, explained: “I’m afraid that justice is still for sale in Texas and other states.”<sup>13</sup>

### Why All the Fuss?

The examples cited previously may be unfortunate, you may think, but how often do they occur? And who says that **merit selection** is under attack, anyway? Is this a tempest in a teapot?

Although some opposition to judicial independence has always existed, recent developments indicate that diverse hostility to just and impartial courts is coalescing. Our fair and neutral courts are under threat as never before.

Historically, the principal challenges to **merit selection**, and particularly those that advocate partisan judicial elections, have come from legislators who must run for office and feel that judges should not be exempt. Other historical attacks have come from citizens who simply believe that all government officials in a democracy should be directly accountable to the public at the polls.

More recently, “value voters” have become a significant political force on the landscape. These are voters guided less by party affiliation and more by certain strongly held ideological beliefs surrounding “hot-button” issues—such as abortion, separation of church and state, and the Fourth Amendment rights of accused criminals—are organizing and flexing their political muscle. The object for many of these voters is not judicial competence, neutrality or faithfulness to the Constitution and laws. To the contrary, many opponents of **merit selection** candidly acknowledge that their object and values come from a “higher source” than the United States or Arizona Constitutions. These opponents of **merit selection** insist that the Constitution and laws of Arizona must be interpreted and applied in harmony with those values. And when judges make decisions that are inconsistent with opponents' ideology, they seek an easier way to remove judges than is permitted by **merit selection**.

### The Basic Philosophical Difference

A major philosophical conflict is at the heart of this debate.

Proponents of **merit selection** argue that our founding fathers were right in placing judicial independence above all else in Article III of the United States Constitution. Quite simply, the job of judges is to fairly apply and interpret the law, guided by knowledge and wisdom, yet absolutely uninfluenced by popular opinion, campaign contributors or the input of those who sign paychecks.

As Chief Justice John Roberts recognized in his recent confirmation hearings before the United States Senate, judges can be analogized to umpires calling balls and strikes at baseball games. Imagine how respect for these arbiters would erode if fans were allowed to vote on the calls or the umpires' tenure. Imagine the effect on the integrity of the game, if as an amenity for those fans in the luxury suites, these viewers were offered disproportionately weighted votes.

A popular vote is appropriate for the legislative and executive branches of government. Under our democratic system, these institutions are properly subject to the will of the people. That is absolutely not the case when it comes to the judiciary. An independent judiciary, free from political pressure, is essential to the separation of powers. Knowing that judges are not influenced by political pressures or campaign contributors allows litigants and their attorneys to trust that judicial decision-making will be based on merit and a reasoned interpretation of the law, and not on judicial fears of unemployment should decisions be unpopular.

There is nothing more fundamental to our system of government than that we are governed by laws and not by individuals. This precept will only be true in practice if those who are charged with interpreting and applying the laws are neutral, impartial and stand uncorrupted by improper influence.

Finally, opponents of **merit selection** do not suggest the system produces judges who lack knowledge, intelligence or the ability to be fair and impartial. Rather, their motivation is ideological: They are unhappy with decisions made by particular judges that do not jive with their ideology, regardless of what the Constitution or laws command. Opponents want a better vehicle for retaliating at the polls against judges who decide cases contrary to their views.

Put simply, detractors of **merit selection** are not looking for better-qualified judges; they are looking for a way to influence decision-making.

Accountability and control of judges based on how they decide matters has no place in American jurisprudence. When we speak of accountability, we must respect that the very cornerstone of our judicial system requires judges to first and foremost be accountable to the Constitution and law.

On the other side of the aisle, those unhappy with **merit selection** say the system is a thinly disguised political appointment that, as a practical matter for most judges, turns out to be a lifetime appointment. They argue that retention elections do not flush out the issues or educate voters as opposing candidates would. Consequently, judges, once appointed, become arrogant activists, legislating from the bench, letting \*16 criminals walk the streets and issuing rulings that are directly contrary to the values of the electorate.

Judges are public servants just like legislators, so goes this argument, and they ought not be exempt from the rigors of campaigns and the will of the public. Judges should be sensitive to the fact that their decisions might influence an electorate to vote them out of office. This is the democratic way. In short, **merit selection** fails to properly balance accountability against what opponents argue is unfettered judicial independence.

### **A Brief History**

A description of the long history of judicial independence is in order.

It is not surprising that the American colonists were staunch supporters of judicial independence. In fact, a paramount complaint raised in the Declaration of Independence was that colonial judges depended on the King of England for appointment, tenure and the amount of their salaries. Therefore, Article III, Section I, of the Constitution provides that federal judges shall serve indefinitely as long as they exercise "good behavior." This section also forbids Congress from diminishing judicial salaries during judges' terms in office. Judges in the federal system can only be removed by impeachment, which requires a trial in the Senate and two-thirds vote by the House of Representatives.<sup>14</sup>

Following the Jacksonian Movement in the mid-1800s, states began to mandate partisan elections for judges. Party politics took over, and Tammany Hall and similar political machines across the country dictated which judges would be elected. The fact that selected judges were beholden to the party bosses was less than veiled. In direct response, many states moved to nonpartisan elections in the early 1900s as part of a so-called Progressive Movement.<sup>15</sup>

By the mid-1900s, however, it was widely recognized that the promise of accountability through judicial elections was mostly an illusion. These elections also promoted the unsavory practice of judges raising campaign funds from litigants and lawyers, along with the obligatory attention grabbing advertisements and campaign promises. Observers recognized that the best campaigners were often not the best judges, and those most suited by intellect, education and temperament were often the least likely to politick for the job.<sup>16</sup>

The move to do something about this in Arizona began in 1959 under the guidance of Tucson attorney Morris Udall, who chaired a State Bar Committee on the Courts. Udall's committee proposed that Arizona adopt the Missouri model for **merit selection**, which had first been enacted in that state in 1940.

Under the Missouri plan, a committee of laypersons and lawyers screened judicial applicants and sent three or more names to the governor for appointment. The governor was required to appoint the new judge from the commission's list. The appointed judge would then sit subject to an unopposed retention vote before the expiration of his or her term. Udall was ahead of his time on this and many other things, and the proposal failed to gather adequate support.<sup>17</sup>

In 1971, a nearly identical proposal was submitted to the state legislature by then-State Senator Sandra Day O'Connor. The bill never left committee, but the seed Udall planted was continuing to grow.<sup>18</sup>

In 1972, State Bar President-Elect William Browning made **merit selection** a priority of his presidency. He created and chaired a State Bar committee on **merit selection**, and when renewed efforts failed in the legislature, Browning also formed a Citizens' Committee. With the help of ensuing State Bar President Stanley Feldman, Browning and the Citizens' Committee led the charge to secure placement of Proposition 108 on the ballot. In fall 1974, Arizona voters passed this proposition with 54 percent of the vote: Missouri had come to Arizona.<sup>19</sup>

One event in the evolution of our truly fair courts is instructive. On April 8, 1973, more than 100 Arizonans gathered at the Rio Rico Inn in Nogales. The occasion was the 22nd Arizona Town Hall, whose topic that year was "The Adequacy of Arizona's Court System." The assembled participants assessed the effectiveness of all court components, including court management, treatment of jurors, the public's perception of courts, and the selection and tenure of judges.

On that last point, the Town Hall was unequivocal:

Town Hall overwhelmingly recommends that the present system of judicial selection in the metropolitan counties of Arizona be changed and become appointive rather than elective.

Our present method of selecting judges by popular elections has serious deficiencies. ... There is a clear and recognizable danger to the integrity of the court when the candidate for judge is required to solicit funds with which to finance his race.<sup>20</sup>

What else, some may ask, would a cabal of lawyers say on the eve of a state constitutional amendment? But they would be mistaken for concluding that attorney self-interest likely fueled such a position. The vast majority of Town Hall participants were laypeople, not lawyers. In fact, "The opinions of the housewives, doctors, engineers, business leaders

and all others who are invited participants receive equal consideration.”<sup>21</sup> Thirty-three years of Arizona history have not altered the fact that the majority of state residents—lawyer and nonlawyer alike—recognize that judicial campaigning is a bad idea.

It is interesting that when Arizona first adopted the Missouri plan in 1974, only 22 states had adopted it. Since then nine more states have followed suit, bringing the current number to 31. No state that adopted merit selection has ever abandoned it. In fact, this system is the one that judicial reformers seek to emulate in states where partisan elections still rule the day.<sup>22</sup> Arizona's system also is the model used by the United States when helping other countries reform their judicial system.<sup>23</sup>

### How Does Merit Selection Work?

Under Arizona's system, there are separate nominating commissions for Pima County Superior Court and Maricopa County Superior Court and a third for appellate court appointments. Each nominating commission includes five lawyers appointed by the State Bar and 10 lay persons appointed by the governor.<sup>24</sup>

To assure diversity, representatives on the trial court commissions must come from five separate districts. There must be diversity among judicial applicants, as well. \*17 Amendments passed in 1992 require the Supreme Court to establish means for evaluating judicial performance, and they also raised the county population threshold for mandatory merit selection from 150,000 to 250,000.<sup>25</sup>

The process is the same for all three commissions. Lawyers and judges who are interested in a judicial opening submit detailed applications to the commission. All applications are posted on the Internet for public view and comment. The commission reviews the applications, accepts written and verbal input from members of the legal community and community at large, interviews each of the applicants in a public setting, and then recommends a minimum of three candidates for appointment by the governor. No more than 60 percent of the nominees may be from the same political party. The governor is then obligated to select one of the commission's nominees, and if the governor fails to do that, the Chief Justice of the Arizona Supreme Court makes the appointment.<sup>26</sup>

### If It Ain't Broke ...?

Arizona's merit selection plan is designed to assure that quality candidates are not turned away by the distastefulness of fund-raising and politicking. But of course, politics are not completely divorced from the process. The 10 lay members, who outnumber lawyer members two-to-one on commissions, are appointed by the governor. And the governor also makes the final selection, most often choosing someone from the governor's own political party. Since 1974, however, the governor has appointed a candidate from another political party 26 percent of the time.<sup>27</sup>

The public also is not divorced from the process. As noted, public members outnumber lawyers on nominating commissions, and all members of the public are welcome to submit comment on judicial candidates. Before the expiration of each judicial term, the judge must stand before the electorate for retention and must garner 50 percent or more of the vote.<sup>28</sup> All judicial decisions are subject to review by an appellate court, giving the public a double and sometimes triple check on the propriety of court rulings. Judges are also held accountable by virtue of the Commission on Judicial Performance Review (see the Q & A on page 22) and the Commission on Judicial Conduct, with heavy input from members of the public.



So, if the system produces the most-qualified, interested candidates without regard to their ability to engage in the surly side of politics, and if the electorate has the power to remove judges if they are not performing as expected, why would anyone advocate dumping the system?

The fact is, those opposing **merit selection** do not seriously contend that the system produces unqualified or incompetent judges. Rather, once you sift through their rhetoric, the most salient point raised by those opposing **merit selection** is that it creates elitist judges who legislate from the bench because they are not easily turned out of office. Unhappy with the results of prior attempts to remove judges at retention elections, opponents of **merit selection** advocate changes to the current system, including:

- putting party designations on the ballot,
- conducting **merit selection**, but allowing the governor to appoint anyone the governor wishes without regard to the candidates recommended by the nominating committee,
- giving the legislature final say on court rules,
- requiring a two-thirds rather than majority vote to win a retention election,
- making the governor's appointment subject to senate confirmation,
- requiring judges up for re-election to pass muster again before the senate before they are eligible to run for retention,
- returning to contested elections for judges.

The proposal for senate confirmation particularly warrants discussion. This is the system we have at the federal level, and we all have seen recently how poorly that can work. Clearly, if a judge's ability to get on the bench and stay there will be subject to the political whims of the Arizona senate, many of the best candidates simply will not apply. And, of course, the selection of judges will then become more political than ever. Judges whose ideology does not conform to the majority in the senate will be vulnerable to rejection without regard to their qualifications, competency, neutrality and fairness in decision-making.

So what can we look at *objectively* to determine whether the system needs to be "fixed"?

In 1992, the Arizona Supreme Court created a Judicial Performance Review Commission to develop a detailed and exhaustive questionnaire evaluating judges' decision-making, administrative abilities, demeanor, fairness and neutrality in the courtroom. This questionnaire has been disseminated over the years to thousands of lawyers, litigants, witnesses, jurors and other courtroom observers to thoroughly evaluate judicial performance.

Not surprisingly, since the institution of the JPR survey, 95 percent of nonlawyers responding to the survey, as well as 95 percent of all lawyers, rate both trial and appellate judges in Arizona as performing their job satisfactorily or better. This is a true testament to **merit selection**.

### **Voter Apathy**

The biggest fallacy in attacks on **merit selection** is that returning to the election of judges will somehow assure that judges will indeed be more accountable to the public. History and common sense belie this assertion.

Another misconception advanced by abolitionists is that **merit selection** removes the public from the process. Opponents initially alleged the **merit selection** process was too secretive. This complaint no longer resonates because the interviews, meetings and voting are open to the public and even have been televised. More important, all appointed judges must stand for retention by voters. They are required to obtain 50 percent of the vote in favor of retention to continue in office.

Although it is true that only two judges have lost a retention vote, the mechanism obviously works when sentiment is strong enough.<sup>29</sup> Those unhappy with a particular judge for any reason have the ability to campaign against that judge when the retention vote is taken.

This is as it should be. Under **merit selection**, only the best-qualified, interested applicants are submitted to the governor for appointment. And although a governor's appointment may be political, the system assures that candidates from whom the governor \*18 must select are all highly qualified. Once appointed, the well-qualified judge ought not be removed, so long as the judge proves to be competent and strives for fairness, neutrality and faithfulness to the laws and Constitution.

For 62 years prior to 1974, all Arizona judges were elected.<sup>30</sup> Despite this fact, 68 percent of all judges who first sat during that time were appointed by the governor. By 2004, 51 of the 76 Maricopa County Superior Court judges first took office by virtue of gubernatorial appointment.<sup>31</sup> Most judges, by far, serve for life or until they wish to retire under either system. Judges also rarely vacate office precisely at the end of a term. As a result, successor judges before 1974 were most often appointed by the governor with no involvement of a **merit selection** commission. And due to population growth, which still continues in Arizona, new court divisions were created regularly that required initial appointments by the governor. Those appointments were always purely political.

Once on the bench, most judges historically ran unopposed or without substantial opposition.<sup>32</sup> Even when opposed, America's tendency to re-elect incumbents, particularly when little is known about the candidates, usually assured that an elected judge remained in office for life, barring some scandal or impropriety.

The reality of American voting behavior is that voters will make a reasonable effort to become informed before casting ballots, but they are uniquely uninformed about judicial candidates, and they are apathetic about judicial candidates despite easily available information that would educate them.<sup>33</sup> There currently are 90 Maricopa County Superior Court judges, 27 in Pima County and 22 appellate court judges statewide. The effort required of voters to become adequately informed about this many candidates is beyond daunting.

Several studies confirm that while voters across the country can readily tell you whom they voted for in executive and legislative races, most do not recall judges for whom they voted, or they simply abstain from voting in judicial elections altogether.<sup>34</sup>

For example, in the last seriously contested Arizona Supreme Court election pitting Fred Struckmeyer against Harold Riddell and Howard Peterson against William Holohan, 20 percent of the electorate that cast votes for governor failed to vote for Supreme Court Justice, while only 10 percent failed to vote for tax commissioner.<sup>35</sup> This trend continues under the **merit selection** retention-vote criteria. When voters cast votes of “yes” or “no” on retention, the vast majority vote either “yes” for all judges on the ballot or “no” for all judges.<sup>36</sup> When casting votes for judges, voters across the country almost uniformly vote consistent with their party affiliation.<sup>37</sup>

Even more troubling is that numerous studies across the country have demonstrated the American public does not understand much about how the judicial system works and are flat wrong in their understanding of the judiciary's role in our government. These studies show that people react to and are most influenced by personal experiences with courts, inaccurate and incomplete media characterizations of judges and court decisions, and what they see in television dramas and at the movie theater.<sup>38</sup>

It turns out that voters do not really want to choose their judges, no more than fans really want to be involved in the hiring and firing of umpires. Fans know they want competent, fair-minded umpires, but they trust Major League Baseball to handle the technical issues of what it takes by way of training and experience to make a good umpire. Similarly, voters appreciate that judging involves highly technical skills and expertise beyond their knowledge. There is more involved than they even care to know.

The fact of voter apathy is not a rub on voters; it is an expected consequence of the highly technical nature of the job of judging and of the Judicial Canons, which prohibit judges from imparting meaningful information to voters during an election outside of their qualifications to serve. Consequently, other than general and rather meaningless rhetoric, judicial candidates cannot seriously discuss any “issues” or make commitments to voters to assist them in their making decisions at the polls.

But don't we live in a democracy? Shouldn't judges be elected like everyone else? The truth is that we live in a representative form of government. We elect our legislators and governors, and we expect them to make wise choices when it comes to appointing judges and other public officials. If they make bad choices, voters exercise their franchise on the issue when voting for their governor and legislators.

### **A Call to Action**

So what can concerned members of the State Bar do to assure that **merit selection**, one of the hallmarks of Arizona's judicial system, envied and copied worldwide, is preserved?

First and foremost, talk or write to members of the legislature. Articulate thoughtfully to legislators why it is imperative that this system be preserved for the good of our entire legal system.

Second, take the time to inform your clients, especially those with political influence, as to why **merit selection** is important not only to the public at large, but to them particularly. Explain to them how the current system best assures them a fair shake before a qualified jurist when they find themselves in litigation. Make sure they are aware of the economic costs and risks involved in a system in which litigants compete with political contributions to their judges. Urge them to actively support **merit selection** with their elected officials, the chamber of commerce and in their business groups.

Third, be proactive in educating relatives, friends and other members of your community about how our judicial system works. Explain what “judicial independence” really means and why it is essential to the administration of justice under our representative form of government. Volunteer to speak at schools, clubs and other civic organizations to help citizens understand how the judicial system works. This will help voters make more intelligent decisions at the polls, whether

voting on proposed changes to the Constitution or on the retention of sitting judges. Take a stand. Stand up and speak. People will listen.

Like the colonists and our forefathers, we must make sure that our judges are free to follow the law and make decisions they believe are right, without concern for public opinion and political reprisal. As John Adams stated many years ago, “[Judges should not] be distracted with jarring interests; they should not be dependent upon any man or body of men.”<sup>39</sup>

There is no question that the legislative \*20 and executive branches were designed to respond to cries of the public. The judiciary, however, was designed with quite different objectives. As Justice Felix Frankfurter explained, “The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.”<sup>40</sup>

#### Footnotes

<sup>a1</sup> Ted A. Schmidt is the managing shareholder of the law firm Kinerk, Beal, Schmidt, Dyer & Sethi. He is a Fellow in the American College of Trial Lawyers and was named State Bar Co-Member of the Year in 2002.

<sup>1</sup> There have been five significant articles published concerning Arizona's merit selection of judges since 1974. The seminal article was written in 1990 by then-Arizona Court of Appeals Judge, and now Federal District Court Judge, John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837 (1990). Subsequently, Court of Appeals Judge John Pelander authored *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643 (1998). Later, in 1999 Ed Hendricks authored a piece in ARIZONA ATTORNEY magazine. Hendricks, *Merit Selection Is Worth Keeping*, ARIZ. ATT'Y, Aug.-Sept. 1999, at 24. In June 2004, Ken Sherk wrote an interesting piece with facts, figures and informative anecdotal support in the Maricopa County Lawyer. Sherk, *Merit Selection After 30 Years: A Proven Success But With Ever Present Detractors*, available at [www.maricopabar.org/maricopa-lawyer/meritselection.pdf](http://www.maricopabar.org/maricopa-lawyer/meritselection.pdf). Finally, in the November 2005 issue of The Writer, Pima County Bar Association President Chris Smith, in his “From the Desk of the President” column, wrote a pithy and thought-provoking view of the subject from the perspective of the trial lawyer. C. Smith, *From the President's Desk*, THE WRIT, Nov. 2005.

<sup>2</sup> Mr. Sherk points out in his article that merit selection has been seriously attacked in 1978, 1980, 1981, 1982, 1984, 1985, 1990, 1992, 1993, 1994, 1995, 1996 and 2004. *Supra* note 1.

<sup>3</sup> JUDICIAL CODE OF CONDUCT, Canon 5(B)(1)(d)(i)&(ii).

<sup>4</sup> *Id.* at Canon 7(B).

<sup>5</sup> Justice at Stake, National Poll of American Voters from 2001, 4, available at <http://faircourts.org/file/JASNationalSurveyResults.pdf>.

<sup>6</sup> Michael Scherer, *State Judges for Sale*, THE NATION, Sept. 2, 2002.

<sup>7</sup> *Move to Cut Judicial Elections Brings Clash*, NAT'L L.J. (Oct. 17, 2005).

<sup>8</sup> SARA MATHIAS, *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION*, 15-57, 47 (AMERICAN JUDICATURE SOCIETY 1990).

<sup>9</sup> See Mark Kozlowski, *The Soul of an Elected Judge*, LEGAL TIMES, Aug. 9, 1999.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> For example, in Pennsylvania, a judge running for office promised to “remember” a union official's “friend” in exchange for a cash contribution, the repayment of debts and a promise to support her spouse's future judicial candidacy. This official's union was a frequent litigant in the judge's court. See MATHIAS, *supra* note 8, at 4. In Michigan, a trial judge solicited a

donation from an attorney and his firm over the telephone. The judge informed the attorney that his decision to donate could affect the outcome of his case, which was scheduled to be heard in that judge's court. *Id.* at 54. In Florida, a former president of the state bar association endorsed a trial judge's campaign committee. The committee called to thank the attorney but noted that no check was enclosed. All of this transpired one day before the attorney was scheduled to try a case before this judge. *Id.*

*Id.*

See Todd David Peterson, *Oh, Behave!* LEGAL AFFAIRS, Nov./Dec. 2005.

Roll, *supra* note 1, at 839.

*Id.* at 841-42.

*Id.* at 847.

*Id.* at 849.

*Id.* at 850-53.

The Adequacy of Arizona's Court System (Report of the 22nd Arizona Town Hall, Arizona Academy, April 1973), at x.

*Id.* at ii.

Move to Cut Judicial Elections, *supra* note 7. Judicial Merit Selection: Current Status (American Judicature Society, Jan. 2004); Another Look at Elected Judges, HOUSTON CHRON., Nov. 2, 2005.

Roger F. Noriega, Assistant Secretary of State for Western Hemisphere Affairs, U.S. Official Encourages Continued Legal Reform in Latin America, Remarks before the American Bar Association's Latin America & Caribbean Law Initiative Council, available at <http://usinfo.state.gov/wh/Archive/2005/Apr/14-804469.html> (April 14, 2005); Transparency and Rule of Law in Latin America: Hearings Before the H. Comm. on Int'l Affairs, 109th Cong. 1 (2005) (statement of Adolfo A. Franco, Assistant Administrator, Bureau for Latin America and the Caribbean, United States Agency for International Development); International Information Programs, Argentine Journalists Discuss Judicial Reform in Their Country, available at [http://usinfo.state.gov/dhr/democracy/rule\\_of\\_law/Argentina\\_Justice\\_Undergoing\\_Change](http://usinfo.state.gov/dhr/democracy/rule_of_law/Argentina_Justice_Undergoing_Change) (Dec. 2003).

ARIZ. CONST. art. VI; see Sherk, *supra* note 1.

*Id.* See Sherk, *supra* note 1.

ARIZ. CONST. art. VI.

The total number of judges appointed from a party different from that of the appointing governor was 68 (out of 260 total appointees). However, though this list obviously includes Democrats appointing Republicans and vice versa, it also includes a few Independents and one Libertarian. There were 5 Independents: (1) Susan Bolton, appointed on Sept. 14, 1988, by (D) Gov. Rose Mofford; (2) A. Craig Blakey II, appointed on Nov. 20, 2001, by (R) Gov. Jane Hull; (3) Margaret R. Mahoney, appointed on April 18, 2002, by (R) Gov. Jane Hull; (4) Helene F. Abrams, appointed on May 2, 2005, by (D) Gov. Janet Napolitano; and (5) John R. Hannah, Jr., appointed on Aug. 9, 2005, by (D) Gov. Janet Napolitano. The lone Libertarian was John A. Buttrick, appointed on Mar. 27, 2001, by (R) Gov. Jane Hull.

ARIZ. CONST. art. VI, § 38.

The two judges who have not been retained obtained a bar survey approval rating of 34 percent and 48, respectively. With these very low marks, the Maricopa County Bar Association successfully campaigned against their retention.

Roll, *supra* note 1, at 856.

See Sherk, *supra* note 1.

See Roll, *supra* note 1, at 855-56, 860. "According to one legal scholar, the only reason that the popular election of judges has survived nationally is because judges first take office by appointment, then run unopposed. ... In Arizona from 1958 through

1972, contested elections occurred in only one-third of the general elections for judges." See also Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U. L. REV. 1, 37 (1956) *Id.* at 860.

33 As part of the 1992 amendments, the Supreme Court was charged with the responsibility of establishing a process for evaluating judicial performance. Article VI, § 42. In response, a judicial performance review committee was established and an elaborate and detailed questionnaire was created. Input is sought from lawyers, litigants, witnesses and courtroom observers regarding a plethora of issues reflecting upon the performance and judicial suitability of judges at all levels in the Arizona court system. The results of these surveys are tabulated and published for dissemination with the media and public to assist voters in selecting judges. For an excellent article concerning judicial performance reviews, see Pelander *supra* note 1. Judge Pelander concludes in his article that the problem with voter apathy persists despite the creation of the judicial performance review procedures. "Notwithstanding the commission's good intentions and substantial efforts, the adage that 'you can take the horse to water but you can't make it drink' applies to JPR as well." *Id.* at 713.

34 Roll, *supra* note 1, at 849, 860.

35 *Id.* at 860.

36 See Pelander, *supra* note 1, at 714.

37 See Roll, *supra* note 1, at 861.

38 See Roll, *supra* note 1, at 857; see MATHIAS, *supra* note 8.

39 John Adams, on government, in C.F. ADAMS, *THE WORKS OF JOHN ADAMS*, 1850-56 181 (4th ed. 1988).

40 *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952) (Frankfurter, J., in chambers).

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## **\*837 MERIT SELECTION: THE ARIZONA EXPERIENCE**

### **TABLE OF CONTENTS**

#### **I. INTRODUCTION**

#### **II. OVERVIEW OF JUDICIAL SELECTION IN THE UNITED STATES**

##### **A. The Four Phases of Judicial Selection in the United States**

###### **1. Appointment**

###### **2. Partisan Election**

###### **3. Nonpartisan Election**

###### **4. Merit Selection**

##### **B. Judicial Selection in Arizona**

##### **C. Current Systems of Judicial Selection in the United States**

#### **III. THE MERIT SELECTION CAMPAIGN IN ARIZONA**

##### **A. The 1960 Modern Courts Amendment**

##### **B. Momentum for Merit Selection Increases**

##### **C. Legislative Proposals**

##### **D. Proposition 108**

#### **IV. THE PROS AND CONS OF MERIT SELECTION**

##### **A. Merit Selection—Pros**

1. Merit Selection Improves the Quality of Applicants
2. Merit Selection Provides Pre-appointment Screening Process
3. Judges Are Removed from Politics
4. Judges No Longer Need To Solicit Campaign Funds
5. Elected Judges Face Voter Apathy
6. Meaningful yet Ethical Discussion of Issues Is Impossible
7. The Large Number of Judicial Offices Makes Contested Judicial Elections Impractical
8. Judicial Stability
9. Retention Elections Guarantee Democratic Participation

##### **B. Merit Selection—Cons**

1. Merit Selection Is Undemocratic
2. Judges Are Nominated by a Select Few
3. Merit Selection Allows Removal but Not Selection
4. Merit Selection Still Permits Political Affiliation To Be a Factor at the Nomination Level



5. Politics Is a Factor at the Appointment Level

6. Merit Selection Is a Secretive Process

7. The Bar Poll Is of Dubious Value

8. Contested Elections Keep Judges Responsive

9. Alternatives Exist to Having All Judges Run at Large

## **V. MERIT SELECTION IN OPERATION**

A. Commission Members

B. First Judicial Appointments

C. Surveys

D. Retention Elections

E. One Judge's Perspective

## **VI. PROPOSALS FOR CHANGE**

## **VII. THE FUTURE OF MERIT SELECTION**

## **VIII. CONCLUSION**

### **I. INTRODUCTION** Ariz. St. L.J. 838>>I. INTRODUCTION

The history of the various competing methods of judicial selection may well represent the tension between judicial independence and judicial accountability. This tension reflects the search for a system that minimizes politics but maximizes public participation in the selection process.<sup>1</sup>

\*839 The primary thrust of this article is the history of the selection of superior court and appellate court judges in Arizona. The experiences of the forty-nine sister states, the District of Columbia, and the federal system furnish important background information.

This article reviews the period during which merit selection of judges gathered momentum, culminating in debate over and voter approval of Proposition 108 in 1974<sup>2</sup>. This article also discusses the implementation and operation of the

merit selection system, including appointment of commission members, operation of the commission process, retention elections, and judicial evaluation surveys. The perceived strengths and weaknesses of the present merit selection system and proposals for change are analyzed. Finally, the article concludes with a critical evaluation of merit selection in operation.

## II. OVERVIEW OF JUDICIAL SELECTION IN THE UNITED STATES

### A. The Four Phases of Judicial Selection in the United States

The evolution of judicial selection processes in the United States has been characterized as undergoing four separate stages: (1) the appointment of judges by the executive and/or legislative branches immediately after the Revolutionary War; (2) the prevalence in the mid-1800s of selecting judges through partisan election, a result of the Jacksonian Revolution; (3) the use of nonpartisan elections to select judges, a result of the Progressive Movement of the early 1900s; and (4) a trend toward merit selection of judges, commencing with Missouri's adoption of the first merit selection system in 1940.<sup>3</sup>

#### 1. Appointment

Certain public attitudes permeated early American society after the thirteen colonies won the freedom to decide how their respective judges would be selected. The public felt hostility toward lawyers and the judiciary. Hostility toward lawyers arose from the pro-loyalist stance assumed by many lawyers during the Revolution. This hostility was evidenced by the large number of lawyers who left the country or ceased practice.<sup>4</sup> Public anger toward the judiciary arose from the large number of lawsuits against debtors who were unable to meet the postwar demands of creditors.<sup>5</sup> Public perception that the King of England \*840 had abused his power led to public sentiment disfavoring placing sole responsibility for judicial selection in one individual.<sup>6</sup> The Declaration of Independence articulates this attitude: "King George III has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."<sup>7</sup>

In England, the power of the judiciary was derived from the monarch, so that until 1701, judges served at the pleasure of the King.<sup>8</sup> After 1701, judges served for the life of the appointing King, assuming good behavior.<sup>9</sup> In 1761, a statute was enacted that authorized judges to continue in office even after the death of the King.<sup>10</sup>

Although the colonists disfavored a judiciary selected exclusively by the executive branch, they were reluctant to have the populace elect judges.<sup>11</sup> Accordingly, the original thirteen states instituted systems of checks and balances in selecting their judges. Eight of the thirteen states gave appointment power to their legislatures,<sup>12</sup> and five provided for appointment by the governor with consent of either the legislature or a council.<sup>13</sup> None of the original thirteen states elected judges.<sup>14</sup>

#### 2. Partisan Election

After the election of Thomas Jefferson to the Presidency in 1801, an assault began on the political monopoly enjoyed by the upper class. \*841 A democratic spirit swept the young nation. Many states extended suffrage to non-landholders.<sup>15</sup> The prevailing democratic attitude clashed with the judiciary when Chief Justice John Marshall announced in *Marbury v. Madison*<sup>16</sup> that judges could nullify laws enacted by popularly-elected legislators.<sup>17</sup> Jefferson's criticism of that decision and his feud with Marshall nurtured public resentment toward the power of the judiciary.<sup>18</sup> Georgia amended its constitution in 1812 to provide for the election of trial judges.<sup>19</sup> When Andrew Jackson ascended to the Presidency

in 1829, the public fervor for democracy continued to prevail. This passion led to more states utilizing popular elections to select judges.<sup>20</sup> In 1846, New York changed to a system of electing judges.<sup>21</sup> By 1860, twenty-four of the thirty-four states elected at least some, if not all, judges.<sup>22</sup> Every new state admitted to the Union between 1846 and 1912 elected most, if not all, judges.<sup>23</sup> Commentators have theorized that the election of judges was more a manifestation of the populist movement than a method intended to improve the administration of justice.<sup>24</sup> This movement favored the election of judges as well as many other public officials.<sup>25</sup>

Nationally, the widespread practice of electing judges was not without accompanying difficulties. Although representing a democratic ideal, in practice it oftentimes devolved into base politics. One example of politics pervading judicial selection was the activity of the so-called Tammany Hall Organization in New York City in the 1860s.<sup>26</sup> Tammany Hall, a powerful political machine, controlled the political process that selected the judiciary.<sup>27</sup> Tammany was able to hand-pick judicial candidates, which resulted in ousting competent judges and replacing them with incompetent but politically-responsive judges.<sup>28</sup>

\*842 Political machines in other large cities also began to change “judicial election into judicial appointment by party leaders.”<sup>29</sup> Elections “became rubber-stamp confirmations of the political machine's slate, not the Jacksonian ideal of individual and equal expression of free will through the ballot.”<sup>30</sup> The long ballot, which presented voters with a large number of candidates for a myriad of public offices, caused many voters to abstain from casting votes in judicial races. This increased the influence of the political machines.<sup>31</sup>

### 3. Nonpartisan Election

As party leaders gained control of judicial selection in metropolitan areas, bar associations formed to improve the quality of the judiciary.<sup>32</sup> Bar associations attempted to obtain reform of judicial selection within the framework of popular elections by supporting nonpartisan ballots, thereby reducing the influence of political parties.<sup>33</sup>

### 4. Merit Selection

In the early 1900s, reform of the judiciary became a national issue. In 1906, Roscoe Pound told the American Bar Association (ABA) that “compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.”<sup>34</sup> In 1913, ex-President William Howard Taft told the ABA that even the non-partisan election of judges was a failure because unqualified persons without political support could be elected through aggressive campaigning.<sup>35</sup> That same year, the American Judicature Society (AJS) was founded for the purpose of improving the administration of justice.<sup>36</sup> AJS's first Board of Trustees included Pound, John H. Wigmore, and Northwestern University law professor Albert M. Kales.<sup>37</sup>

\*843 Kales developed the commission plan for the selection of judges.<sup>38</sup> Kales' plan called for (1) the nomination of judicial candidates based solely on merit by a commission of presiding judges, (2) the selection of judges from this list of nominees by an elected chief justice, and (3) retention elections conducted on a noncompetitive (that is, without an opposing candidate) basis.<sup>39</sup> In 1926, British political scientist Harold Laski suggested that the Kales plan be modified in certain respects. Laski recommended that the Governor rather than the chief justice appoint judges and that the advisory committee consist of a judge or judges from the state supreme court, the attorney general, and the president of the state bar association.<sup>40</sup>

In 1934, California approved the "California Plan" by voter referendum.<sup>41</sup> Under this plan, which applies only to seats on the supreme court and the court of appeals, the Governor submits the name of one nominee to the Commission on Judicial Appointments. The Commission consists of the chief justice of the California Supreme Court, a presiding judge of the court of appeals, and the attorney general. If the Commission approves the nominee, then the nominee is appointed until the next general election, at which time a non-competitive retention election is held.<sup>42</sup>

In 1940, Missouri became the first state to adopt the complete commission plan, now generally known as the "Missouri Plan."<sup>43</sup> This plan, despite idiosyncracies adopted in various states, has the following components: (1) a commission consisting of lawyers and lay persons appointed by various public and private individuals or groups; (2) nomination of judicial candidates, based on merit; (3) selection of judges by the Governor from a list of nominees submitted by the commission; and (4) appointed judges standing for continuation in office in noncompetitive retention elections.<sup>44</sup> This plan requires approval of a majority of those casting votes in retention elections.<sup>45</sup> The \*844 percentage vote required for retention may be greater than a bare majority.<sup>46</sup>

## B. Judicial Selection in Arizona

The populist spirit that prevailed throughout the United States in the 1800s was present in the territory of Arizona, as evidenced by a constitutional provision authorizing the recall of judges.<sup>47</sup> President Taft dashed Arizona's quest for statehood when he vetoed a joint resolution of Congress admitting Arizona to the Union because of the judicial recall provision.<sup>48</sup> In explaining his veto, President Taft stated: "This provision is so pernicious in effect, so destructive of the independence of the judiciary, that it is likely to subject the rights of individuals to possible tyranny."<sup>49</sup> The territory of Arizona reluctantly withdrew the recall provision and was admitted to the Union on February 14, 1912.<sup>50</sup> Within nine months, however, the Arizona Constitution was amended once again to include the recall provision.<sup>51</sup> In 1912, judges were elected to the Arizona Supreme Court and inferior courts.<sup>52</sup>

One benign yet appalling example of election of judges in Arizona, involving Donald L. Cunningham, has become part of Arizona folklore.<sup>53</sup> D.L. ("Dangerous Lawyer" to his detractors) Cunningham was the Cochise County Attorney shortly before Arizona was admitted to the United States. Cunningham made public his ambition to become judge of the superior court. Reputedly, those who feared he might be elected as their superior court judge prevailed upon him to instead seek election to the Arizona Supreme Court. Cunningham sought election \*845 to the supreme court position and surprised his detractors by succeeding.<sup>54</sup>

Although the public elected judges, the Governor was given unfettered discretion to appoint judges to fill unexpired terms. As a practical matter, the majority of Arizona judges were first appointed to judicial office before ever standing for election. Between 1912 and 1974, of 210 judges to assume office, 113 were first appointed.<sup>55</sup> Notwithstanding the freedom given the Governor, at least two Arizona Governors voluntarily chose to create blue-ribbon committees composed of Phoenix lawyers. In 1965, Governor Samuel P. Goddard selected a committee to evaluate applicants and make recommendations regarding Maricopa County Superior Court vacancies.<sup>56</sup> Like Goddard, all committee members were Democrats.<sup>57</sup> In 1967, Republican Governor Jack Williams created committees to make recommendations for appointment to Maricopa County and Pima County Superior Court benches and to Division One of the Court of Appeals. Governor Williams included at least one Democrat as a member of each commission. Neither Goddard nor Williams always followed committee recommendations. Serious nominees were always members of the respective Governor's political party.<sup>58</sup>

In 1974, Arizona voters approved a judicial merit selection system. As a result, the Governor appoints all appellate judges statewide and all superior court judges in Maricopa County and Pima County, the state's two largest metropolitan areas, from a list of nominees submitted by the appropriate merit selection committee comprised of lawyers and lay persons.<sup>59</sup> These judges then stand for retention in noncompetitive elections.

### C. Current Systems of Judicial Selection in the United States

Currently, five general systems exist in the United States for selecting state appellate judges. These systems are: (1) nonpartisan elections,<sup>60</sup> \*846 (2) partisan elections,<sup>61</sup> (3) appointment by the Governor and/or the legislature without merit selection,<sup>62</sup> (4) appointment with merit selection,<sup>63</sup> \*847 and (5) selection by other judges.<sup>64</sup> Variations exist in some states regarding the filling of unexpired terms as compared to original appointment. Some states use one selection method for supreme court appointments and a different system for selection of intermediate appellate court judges.

Nineteen states use a merit selection system to appoint all appellate judges.<sup>65</sup> Three additional states appoint some appellate judges and elect others.<sup>66</sup> In merit selection states, all appointees then stand for retention in noncompetitive popular elections.<sup>67</sup> An additional seven states elect appellate judges but use merit selection to fill appellate court vacancies.<sup>68</sup>

Although states using merit selection to appoint appellate judges are still in the minority, the trend is clearly toward appointment using a merit selection system.

## III. THE MERIT SELECTION CAMPAIGN IN ARIZONA

The campaign for merit selection in Arizona began slowly; several legislative proposals met with heated debate and ultimate failure. Voters finally approved a constitutional initiative that allowed all appellate court judges and those superior court judges in Pima and Maricopa counties to be appointed through a merit selection system.

### A. The 1960 Modern Courts Amendment

In 1959, a merit selection system was proposed in Arizona as part of what ultimately became the 1960 Modern Courts Amendment.<sup>69</sup> In April 1959, Tucson attorney Morris K. Udall was chairperson of a State Bar \*848 Judicial Committee that submitted a proposal to the state bar recommending the adoption of a Missouri Plan judicial selection system. In November 1959, this specific proposal was deleted from the proposed Modern Courts Amendment, with the hope it could be resurrected at a later date.<sup>70</sup> Voters approved the Modern Courts Amendment on November 8, 1960. Because the Missouri Plan was separated from the other proposals, it never came to a vote.<sup>71</sup>

### B. Momentum for Merit Selection Increases

In 1965, a state bar survey indicated that nearly two-thirds of the lawyers responding favored appointment of judges.<sup>72</sup> During that year's annual bar convention, a debate over merit selection was conducted. Phoenix attorneys J. Early Craig and Webb Crockett argued in favor of judicial appointment while Tucson attorneys Richard Grand and Jack Arnold argued in favor of judicial elections.<sup>73</sup>

By 1967, Arizona had elected its judges for the entire fifty-five years of statehood. In that year, Governor Jack Williams and Arizona Supreme Court Chief Justice Charles C. Bernstein called a citizens' conference on Arizona courts.<sup>74</sup> B.

Victor Sturdivant was elected president.<sup>75</sup> The American Judicature Society, the National College of State Trial Judges, and the State Bar of Arizona planned and supported the conference.<sup>76</sup> At the conclusion of the conference, Sturdivant stated that a consensus had been reached favoring the appointment of judges, at least in the more populous counties.<sup>77</sup> The Arizona Republic reported that participants from rural counties were "loathe to give up the elective process."<sup>78</sup> A permanent organization, Citizens' Association on Arizona Courts, was created as a result of this conference.<sup>79</sup>

In 1970, the Citizens' Association on Arizona Courts and its president, B.V. Sturdivant, campaigned for the passage of Proposition 103, providing for creation of a commission on judicial qualifications and discipline.<sup>80</sup> \*849 Voters approved Proposition 103.<sup>81</sup> The newly created Commission on Judicial Qualifications was entrusted with the responsibility of removing judges no longer qualified to sit as judges.<sup>82</sup> The Arizona Town Hall would later deem it an available method for removal of "bad" judges should a merit selection system be adopted.<sup>83</sup>

### C. Legislative Proposals

Over a period of time, the Arizona Legislature entertained various merit selection proposals. In 1969, House Concurrent Resolution (HCR) 10, which provided for a popular vote on merit selection,<sup>84</sup> died in committee.<sup>85</sup> Senate Concurrent Resolution (SCR) 6, providing for the appointment of judges, was introduced in the Arizona Legislature in 1971.<sup>86</sup> Senator Sandra Day O'Connor co-sponsored the proposal. SCR 6 proposed that (1) an appellate commission be created to screen applicants for appellate vacancies and that trial commissions be created in counties having populations over 200,000 to screen applicants for superior court vacancies; (2) membership on each commission include the chief justice of the supreme court as chairperson, four attorney members selected by the Board of Governors of the State Bar of Arizona, and four lay members appointed by the Governor with the advice and consent of the Senate; (3) nominations be "made on the basis of merit alone without regard to political affiliation"; (4) the commission forward the names of at least three nominees to the Governor with no more than two from the same political party; and (5) merit selection of judges on courts inferior to the superior court be available in counties having populations of 200,000 or more.<sup>87</sup> This proposal died in committee.<sup>88</sup>

On January 11, 1972, merit selection legislation was introduced once again.<sup>89</sup> House Concurrent Resolution 2001 was co-sponsored by Representative Richard Burgess (R-Phoenix), who declared that because more than seventy-five percent of the judges in Arizona were "appointed at the \*850 whim of the governor," the state needed a commission to submit names to the Governor from which the Governor could make a selection.<sup>90</sup>

Under the Burgess proposal, the Governor was to appoint all supreme court, intermediate appellate court, and superior court judges from a list of two or more nominees. A judicial council, consisting of seven members, including the chief justice of the supreme court, three lay members, and three attorney members, was to submit the list of nominees. Thereafter, appointees were to stand for retention or removal in the first general election held more than three years after appointment.<sup>91</sup>

The State Bar of Arizona and the Citizens' Commission on the Courts supported merit selection. State Bar President-elect William D. Browning<sup>92</sup> pointed to a 1966 New York City Bar Association survey as proof of the need for such a method. This survey indicated that while 100% of the voters polled remembered for whom they voted for Governor, only twenty-five percent remembered the names of the judges for whom they voted.<sup>93</sup> Browning contended that judges were elected based upon good looks and their ability to raise money from attorneys. Although some claimed that elections

help judges be responsive, Browning disagreed: "Judges shouldn't be responsible to the people. It's a dangerous idea because it turns the concept of justice over to mobs."<sup>94</sup> House Concurrent Resolution 2001 died in committee.<sup>95</sup>

Sometime following the defeat of HCR 2001, William Browning, past State Bar Presidents Robert W. Browder and Howard H. Karman, and Richard A. Segal, Browning's successor as state bar president, met to discuss merit selection. This committee concluded that any proposal providing for commissions consisting of an equal number of lawyers and lay persons would be distasteful to many because of the perception that lawyers would control the commissions. Accordingly, the committee suggested that the nominating commissions be comprised of three lawyers, five lay persons, and the chief justice. The chief justice would vote only to break a tie.

These bar leaders also viewed merit selection as preferable for all counties, but concluded that it was impractical to seek merit selection in counties other than Maricopa and Pima. Anticipated resistance in the \*851 smaller counties to any proposal that would take away their right to elect judges made an all-inclusive Missouri plan impractical.<sup>96</sup> The committee also concluded that the most successful approach would be to place a constitutional amendment on the ballot<sup>97</sup> because the Democratic-controlled House Judiciary Committee consistently resisted merit selection proposals.

Senate Concurrent Resolution 1001, introduced on January 9, 1973,<sup>98</sup> differed in several important respects from previous bills. Under that resolution, superior court judges in counties with populations of less than 150,000 would continue to be elected. The respective nominating commissions would consist of the chief justice of the supreme court, five lay members, and three attorney members. Although the Senate Judiciary Committee easily passed the proposal,<sup>99</sup> the measure once again faced strong opposition in the House of Representatives.<sup>100</sup>

Arizona Court of Appeals Judge William E. Eubank endorsed the proposal, stating: "The intent of the bill is to take the judges out of politics. If it were to deny the election of judges entirely, I would be totally opposed to it."<sup>101</sup> The proposal was also given preliminary approval by the State Senate and all but one Republican, Senator Dave Kret (R-Scottsdale), supported it.<sup>102</sup> Senate Minority Leader Harold Giss (D-Yuma) denounced SCR 1001, stating: "The two large counties which have a population in excess of 150,000 would be disfranchised in choosing their judges, while those in smaller counties would elect them."<sup>103</sup> He also asserted that this "hybrid" system "would be unconstitutional."<sup>104</sup> On February 2, 1973, the Senate passed this bill by an eighteen to ten vote and sent it to the House of Representatives.<sup>105</sup>

Professor Charles E. Ares, former dean of the University of Arizona College of Law, maintained that the public was unaware of the qualifications \*852 or aptitude of judges on the ballot.<sup>106</sup> Supreme Court Justice Fred C. Struckmeyer, a former opponent of merit selection, supported this legislative proposal, as did Supreme Court Justices Jack D.H. Hays, James "Duke" Cameron, and William A. Holohan.<sup>107</sup> The 1973 Arizona Town Hall participants "strongly recommended" passage of Senate Concurrent Resolution 1001.<sup>108</sup> Despite a groundswell of support, this measure died in committee.<sup>109</sup>

Representative Charles King (R-Tucson) joined Democrats opposing the measure. King stated: "We have a system that's working in Arizona where we don't have the trouble with corruption that some states in the East have had. I certainly won't vote for a bill that would deprive people of their right to choose their own judges."<sup>110</sup> William Browning argued, however, that it was precisely because Arizona had not been afflicted with a judicial corruption scandal that the time was ripe to consider an alternative to election of judges. Browning maintained that the atmosphere lent itself to a thoughtful, panic-free discussion of available alternatives.<sup>111</sup>

#### D. Proposition 108

Shortly after the House Judiciary Committee effectively terminated Senate Concurrent Resolution 1001, B.V. Sturdivant announced that the Citizens' Association on Arizona Courts favored a statewide initiative vote on the appointment of judges.<sup>112</sup> R. Stanley Lowe, Associate Director of the American Judicature Society, said that the proposed system was needed \*853 to cut campaign costs and eliminate the creation of artificial issues during judicial campaigns.<sup>113</sup>

In 1974, the Citizens' Joint Conference on Merit Selection and Election of Judges filed notice with Arizona Secretary of State Wesley Bolin that it would circulate petitions for a constitutional amendment regarding the appointment of judges. Sturdivant was the chairperson of the committee.<sup>114</sup>

At least 61,711 signatures were required to put the matter on the November 5, 1974 ballot.<sup>115</sup> The League of Women Voters initially attempted to obtain the requisite number of signatures. After approximately one month of the allotted three-month period elapsed, State Bar President Stanley G. Feldman authorized the appropriation of \$28,000 to gather the signatures.<sup>116</sup> Ultimately 82,152 signatures were obtained.<sup>117</sup>

The constitutional initiative provided for the merit selection of all appellate judges and of superior court judges in counties with populations over 150,000. The measure called for the immediate creation of three nominating commissions: one appellate court nominating commission and one superior court nominating commission apiece for Pima and Maricopa counties, the only two counties then having populations over 150,000.<sup>118</sup> Five lay persons, three lawyers, and the chief justice of the Arizona Supreme Court comprised the membership of each commission.<sup>119</sup> Counties having populations of less than 150,000 could also adopt merit selection by approving the measure in any election called for that purpose by the county's board of supervisors.<sup>120</sup> The Tucson League of Women Voters, the Citizens' Association on Arizona Courts, the Arizona Junior Chamber of Commerce, the Arizona Judges Association, and the State Bar of Arizona supported the constitutional initiative.<sup>121</sup>

As the November 1974 election neared, opponents of the initiative mobilized. In October 1974, a Pima County administrative assistant, Emil Franzi, and Tucson attorney William Risner announced the formation of a twenty-five-member steering committee dubbed Arizonans Against Political \*854 Appointment of Judges.<sup>122</sup> Pima County Attorney Dennis DeConcini was named a member of the group's statewide steering committee.<sup>123</sup> Pima County Supervisors Ron Asta (D) and Conrad Joyner (R) were selected as Pima County chairpersons for the committee.<sup>124</sup> Other Tucson politicians expressed opposition to the initiative, including Pima County Assessor Stephen E. Emerine (D), Tucson City Councilman Emmett McLoughlin (R), and State Senator John Ulm (D).<sup>125</sup> The organization's premise was that once the voters realized that passage of the initiative would cause them to lose the power to nominate and recall judges, they would defeat the constitutional initiative.<sup>126</sup> Democratic members of the Tucson City Council opposed the measure on the grounds that it would deprive the people of the power to elect judges and give it to a select group of unelected citizens with no check or balance on their power.<sup>127</sup> William Browning, however, pointed out that since statehood, a clear majority of the judges to take office were first appointed by governors without the assistance of nonpartisan commissions.<sup>128</sup> Browning declared: "We now have a king maker who appoints judges. The Governor appoints them without the advice of anyone."<sup>129</sup>

During a debate between Browning and Franzi held in late October 1974, Franzi denounced the proposal, stating that politics would come into play whether judges were appointed or elected.<sup>130</sup> He noted that most attorneys favored the



initiative because forty percent of the commissions would consist of attorneys. He also opined that judges would be picked based upon who worked hardest to get the Governor elected.<sup>131</sup>

On the eve of the 1974 election, Tucson attorney Raymond R. Hayes filed a lawsuit on behalf of his law partner, Bruce Bridegroom, seeking to invalidate the election on the ground that State Bar money was used to finance the campaign for merit selection.<sup>132</sup> State Bar President Stanley Feldman declared, "it is proper to use the funds of the Bar Association for the purpose of improving the administration of justice."<sup>133</sup> Feldman \*855 stated that over two-thirds of the members of the State Bar favored the proposal.<sup>134</sup>

On November 5, 1974, voters approved Proposition 108 by a margin of 255,914 to 220,462. Although voters in Maricopa County approved the measure by 52,181 votes, a majority of the voters in Pima County, the second most populous Arizona county, narrowly disapproved it by 6,037 votes.<sup>135</sup> After sixty-two years of electing judges and the repeated defeat of legislative proposals to establish a merit selection system, Arizona voters had approved a constitutional amendment providing for the merit selection of all appellate judges and of superior court judges in Pima and Maricopa Counties.

#### IV. THE PROS AND CONS OF MERIT SELECTION

##### A. Merit Selection—Pros

Advocates maintain that the merit selection process is an important improvement in the administration of justice.

##### 1. Merit Selection Improves the Quality of Applicants

Two years after merit selection became operative, Chief Justice Duke Cameron of the Arizona Supreme Court commented that merit selection was producing " 'hard working, younger, more professional' " judges.<sup>136</sup> Chief Justice Cameron also pointed out that since the adoption of merit selection, far more attorneys were seeking judicial office than under the elective process.<sup>137</sup>

##### 2. Merit Selection Provides Pre-appointment Screening Process

As of 1974, sixty-eight percent of all sitting judges had been appointed,<sup>138</sup> and fifty-one of seventy-six Maricopa County Superior Court judges had first taken office through gubernatorial appointment.<sup>139</sup> This de facto appointment system also occurred in other states.<sup>140</sup> According to one legal scholar, the only reason that the popular election of judges has survived \*856 nationally is because judges typically first take office by appointment, then run unopposed.<sup>141</sup>

Under merit selection, the Governor is no longer free to appoint to judicial office any lawyer he or she chooses. Prior to 1974, even when Governors created commissions to make judicial recommendations, they were not bound by those recommendations. Chief Justice Cameron has observed that "[t]here are some who couldn't be elected dog catcher, yet are good judges."<sup>142</sup> The merit system offers these people the opportunity to enter the judiciary.

##### 3. Judges Are Removed from Politics

Although no system for the selection of judges, including the merit selection system, is totally removed from politics, the present merit system is a vast improvement. Commission politics undoubtedly plays a role in the selection process. On

the other hand, this may be much preferred to party politics and electioneering. In addition, once appointment under merit selection has been obtained, a judge does not need to campaign or raise funds to ensure re-election. Judges, at least in theory, are divorced from politics and can presumably devote full time to their judicial responsibilities.<sup>143</sup>

In addition, the merit selection system furthers judicial independence. The Constitutional Congress designed the legislative and executive branches to be responsive to the needs and the demands of the populace. The judiciary was obviously designed with different objectives. The federal judiciary was sculpted so as to achieve independence, stability, and removal from the day-to-day pressures of politics. Alexander Hamilton wrote: "The complete independence of the courts of justice is peculiarly essential in a limited [C]onstitution."<sup>144</sup>

In 1986, Chief Justice Norman Krivosha of the Nebraska Supreme Court emphasized that contested elections and the judiciary are incompatible because, inter alia, (1) judges, unlike Governors and legislators, are not accountable to particular constituents<sup>145</sup> and (2) judges should \*857 decide cases based upon the law and not based on the will of the people.<sup>146</sup> Chief Justice Krivosha analogized the role of judges to that of a referee at a basketball game and pondered the resulting chaos should the fans be permitted to vote on each call the referee makes.<sup>147</sup>

Although politics undeniably plays a role in the initial selection of judges in a merit selection system, the significance of politics is greatly mitigated once selection has occurred. In stark contrast, politics remains important in those states where judges are elected and must campaign for re-election. Even in the judicial election system previously used in Arizona, critics of judicial elections claimed that the nonpartisan nature of such elections was merely a facade because the candidates who ran against each other in the general "nonpartisan" election were the survivors of partisan primary campaigns. Accordingly, knowledgeable voters were aware of the political party of the respective judicial candidates.<sup>148</sup> Merit selection minimizes the importance of the judges' political affiliations.

#### 4. Judges No Longer Need To Solicit Campaign Funds

Merit selection also vitiated the requirement that judges facing contested elections solicit campaign contributions.<sup>149</sup>

An attorney's appearance before a judge after contributing to that judge's campaign raises serious ethical questions.<sup>150</sup> Many consider solicitation of campaign funds by judicial candidates distasteful and fraught with ethical perils.<sup>151</sup>

In 1974, the last year judges were elected in Arizona, the trend toward runaway campaign expenditures had yet to filter down to judicial races.<sup>152</sup> Nevertheless, in 1973, the cost to wage a contested campaign for superior court in Maricopa County ranged from \$5,000 to \$10,000; a campaign for the supreme court required a minimum of \$25,000.<sup>153</sup>

Sister states continuing to elect judges have experienced runaway campaign expenditures. The 1988 Texas Supreme Court election campaigns \*858 indicate that in many states judicial campaigns have become as expensive as campaigns for the United States Congress. During that election, candidates for six seats on the Texas Supreme Court collectively spent ten million dollars. Three million dollars was spent on the race for chief justice.<sup>154</sup> Three law firms reportedly contributed over \$100,000 to supreme court election campaigns and a fourth firm contributed \$99,800.<sup>155</sup> A partner in a firm that contributed over \$100,000 was quoted as saying: "We're two guys who grew up on west Texas farms. We learned as kids that you've got to plow back for the next season."<sup>156</sup> A political action committee of the Texas Medical Association known as TEXPAC reportedly contributed at least \$106,765 to the candidates,<sup>157</sup> and competing lawyers in the Pennzoil litigation contributed approximately \$400,000.<sup>158</sup>

In 1988, many candidates for the trial court bench in Michigan expected to spend \$100,000 in judicial election campaigns.<sup>159</sup> In 1986, 2.7 million dollars was spent in the Ohio race for chief justice between Frank Celebrezze and Thomas Mayer.<sup>160</sup> After Mayer defeated Celebrezze, rehearing was granted in thirty cases in which Celebrezze was involved during his last weeks in office.<sup>161</sup> That same year, seven candidates for one seat on the Pennsylvania Supreme Court spent \$630,000.<sup>162</sup>

Even less populous states have experienced escalating judicial campaign costs. For instance, two Montana candidates for chief justice in 1986 spent \$250,000.<sup>163</sup> In 1983, three incumbents on the Alabama Supreme Court spent \$600,000.<sup>164</sup> Were Arizona to return to a system under which judges are elected, one could reasonably expect that judicial campaigns would be quite costly. This raises the matter of the source of campaign contributions.

Lawyers and litigants tend to be the source of judicial campaign contributions.<sup>165</sup> In 1988, Dean Gerald F. Uelmen of Santa Clara University School of Law offered one reason why campaign expenditures in judicial elections have skyrocketed:

Those who spend money to influence public policy have suddenly discovered that a lot of public policy is made by Supreme Court judges \*859 and it's a lot cheaper to influence the outcome of this selection of Supreme Court justices than it is to influence the outcome of the selection of a governor or a legislator.<sup>166</sup>

Former Judge A. Melvin McDonald, who was elected to the Maricopa County Superior Court in 1974 and who was a proponent of the election system, now favors merit selection. In opposing a 1981 Arizona petition campaign to return to election of judges, McDonald responded: "How would you feel to have your case presented to a judge, when your lawyer did not support that judge in the preceding election and your opposing counsel donated \$300 and served on the judge's election committee?"<sup>167</sup> McDonald stated that this situation was not uncommon. He continued: "In short, the elective system reeks with the potential for attorneys with pending cases to obtain advantage over opposing litigants due to campaign contributions, either consciously or unconsciously."<sup>168</sup>

Nor did the possibility that attorneys learned to contribute to both judicial candidates remove the possibility of unfair advantage for contributing lawyers. For example, if a lawyer contributes to both candidates in a contested judicial election, that lawyer will most certainly have supported the victor. However, the contributing lawyer may be opposed by an attorney who failed to contribute to either candidate. In such a case, a judge will be required to rule on a case in which one litigant's attorney has contributed to his campaign while the other litigant's attorney has not.

Even assuming that judges can "insulate" themselves from knowledge of the identities of their contributors, the public is unlikely to be convinced of this fact. This erodes public confidence in the judicial system.<sup>169</sup>

## 5. Elected Judges Face Voter Apathy

Advocates of merit selection point to voter apathy regarding judicial elections as yet another reason for merit selection.

Contested judicial elections are often characterized by a lack of public interest and knowledge. In 1972, campaigns were waged for two seats on the Arizona Supreme Court. Republican Harold Riddel, described in the Arizona Republic as a "political unknown," opposed incumbent Justice Fred C. Struckmeyer, a Democrat. Incumbent Justice William A. Holohan, a Republican, was opposed by Maricopa County Superior Court Judge \*860 Howard V. Petersen, a "perennial Democratic candidate." A survey conducted one month before the election indicated that sixty-four percent

of those polled were undecided in the Struckmeyer-Riddel contest and sixty-five percent were undecided in the Holohan-Peterson race.<sup>170</sup> When the statewide results were tabulated, twenty percent of those casting votes did not vote in either supreme court contest. By contrast, only four percent failed to vote in the presidential race, ten percent failed to vote in the contest for state tax commissioner, and thirteen percent failed to vote in the race for state mine inspector.<sup>171</sup> Roll-off, defined as the difference between the number of voters casting ballots for the lead partisan office on the ballot and the total number of votes cast in judicial elections, is a common occurrence.<sup>172</sup> When large segments of voters ignore judicial races, special interests and political insiders play a dominant role in choosing nominees.

Studies show that many voters are unfamiliar with judicial candidates. For example, a 1976 Texas survey reflected that eighty-five percent of the voters were unable to name a single judicial candidate.<sup>173</sup> In 1954, Elmo Roper surveyed New York City voters immediately after the election. The survey indicated that eighty-one percent of the voters were unable to name a single judicial candidate for whom they had voted.<sup>174</sup>

Uncontested elections may contribute to voter apathy in judicial elections. In Arizona from 1958 through 1972, contested elections occurred in only one-third of the general elections for judges.<sup>175</sup>

## 6. Meaningful yet Ethical Discussion of Issues Is Impossible

Because of the restrictions imposed upon candidates for judicial office, "meaningful dialogue" between respective candidates, and between candidates and the public, is unlikely. Canon 7B of the Code of Judicial Conduct prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of \*861 the duties of the office."<sup>176</sup> This same canon also forbids judicial candidates from announcing their "views on disputed legal or political issues."<sup>177</sup>

In 1988, one candidate for the Texas Supreme Court stated: "I was looking forward to speaking about the court, but I was surprised to learn how little I could say.... There's just not much you can talk about except qualifications."<sup>178</sup> Because issues cannot be discussed during judicial campaigns, little remains for judicial candidates to use ethically to sway the loyalties of the electorate.

Some commentators say judges have traditionally been elected based upon name identification, billboard slogans, and an effective media blitz containing only generalities and platitudes.<sup>179</sup> An exit poll conducted in Texas in 1986 indicated that the political party of the candidates was the most common basis voters used in deciding for which judicial candidate to vote.<sup>180</sup>

Although some suggest that restrictions on judicial campaigning are too stringent, the current restrictions recognize certain realities. Incumbent judges entrusted with the obligation of deciding complex issues are easy targets for simplistic campaigns that ask questions that cannot be answered simply. Even judicial contests between nonincumbents could otherwise result in popular, yet unrealistic and inappropriate promises such as holding all insurance companies accountable or helping to eliminate the insurance crisis by scrutinizing all plaintiffs' awards and reducing them in the appropriate fashion.

## 7. The Large Number of Judicial Offices Makes Contested Judicial Elections Impractical

In December 1990, there were sixty-five Maricopa County Superior Court judges and twenty-three Pima County Superior Court judges. These figures constitute nearly a 100% increase since contested judicial elections were last conducted in 1974. Arizona also has twenty-one judges on the court of appeals and five supreme court justices. A system

of electing judges would require the public to make informed decisions regarding an enormous number of incumbent judges and their challengers. The current \*862 system diminishes demands placed upon voters by requiring them to evaluate the performance of incumbents only.

## 8. Judicial Stability

Proponents of merit selection maintain that the necessity of standing for election brings instability to the bench.<sup>181</sup>

Under the merit system, candidates are screened prior to appointment. This produces more uniform quality among judges and makes retention likely. By contrast, contested elections can lead to the defeat of competent judges<sup>182</sup> or prevent the election of good judges who are poor candidates.<sup>183</sup>

## 9. Retention Elections Guarantee Democratic Participation

Although opponents of merit selection denounce that system's inherently undemocratic nature, the system offers several safeguards. First, a majority of the members of all three commissions are lay members appointed by the Governor. This assures public representation. Further checks are placed on the selection of commission members because the Senate must confirm all members, including each commission's three attorney members nominated by the State Bar. Finally, and perhaps most importantly, retention elections provide a vehicle for the public to remove judges.

In 1978, then-Maricopa County Superior Court Presiding Judge Robert C. Broomfield stated that retention elections do offer voters a choice. He asked: "What does the voter do if there is no opposition (to someone on the ballot)? ... He has absolutely no choice. (Under merit selection), the voter gets to express his views on every judge, not just those someone chooses to run against."<sup>184</sup> Under an elective system, an unopposed judge needs only one vote to gain re-election.<sup>185</sup> In a merit selection system, voters can cast votes for or against every judge on the ballot. If a majority of those voting cast votes against any judge's retention, that judge is removed.

## B. Merit Selection—Cons

Critics argue that the merit system is undemocratic and has created new areas for concern without eliminating the perceived evils of contested judicial elections.

### \*863 1. Merit Selection Is Undemocratic

One recurring criticism of merit selection, one having tremendous emotional appeal, is that nothing is more American than entrusting to the voters the selection of their public officials. In 1972, Maricopa County Superior Court Judge Marilyn A. Riddel wrote:

[T]he arguments advanced for the appointment of judges might just as well be advanced for the appointment of other presently elected officials. Why not create a universal system of appointments? Why not select a committee to appoint our governor, legislators, county officials, the mayor, and councilmen?

Why not appoint our senators and congressmen? For that matter, why not appoint the President of the United States?

The reason is crystal clear. Each time the appointive system is substituted for the elective process, the people are that much more disenfranchised, and power is proportionately concentrated in the hands of a select few.<sup>186</sup>

Proponents of merit selection counter that while under our federal system presidents, senators, and congressmen are indeed elected, members of the federal judiciary, including the members of the United States Supreme Court, have always been appointed.<sup>187</sup> Furthermore, nothing would cause a more rapid degeneration of the democratic system than the election of all public officials, such as deputy county attorneys, assistant attorneys general, ambassadors, and cabinet members. Such a system would make unrealistic demands on the electorate and would place a premium on the political activity of office holders.

## **2. Judges Are Nominated by a Select Few**

Another argument raised against merit selection is that it disenfranchises the electorate and places the responsibility for selecting judges in the hands of a select few.<sup>188</sup> Certainly one valid concern is that commissions nominating judicial candidates should be both responsible and independent in evaluating applicants and submitting the names of nominees. The potential exists for attorney members to represent only the organized bar and for lay members to blindly follow the governor's perceived wishes.<sup>189</sup>

\*864 Critics suggest that under merit selection systems, traditional politics is replaced with bar politics, as evidenced by merit selection in Missouri. In Missouri, commission members for the St. Louis and Kansas City metropolitan trial bench are elected by lawyers within their respective counties. These lawyers typically belong to one of two rival bar associations with distinctively different membership interests.<sup>190</sup> In addition, members of the appellate nominating commission are elected by attorneys statewide. In Arizona, however, lawyers do not elect attorney members of these commissions. No competing bar associations exist in either Pima or Maricopa Counties, nor does there appear to be polarization at the bar level regarding selection of attorney members.

## **3. Merit Selection Allows Removal but Not Selection**

During the 1974 initiative campaign, the argument was made that although merit selection allows the public to vote a judge out of office, it does not allow the public to select that judge's successor.<sup>191</sup> This criticism has continued since merit selection was adopted.<sup>192</sup> However, merit selection is intended to screen judicial candidates so as to guarantee "competency and capability."<sup>193</sup> A return to contested judicial elections would preclude this screening of candidates and return judges to the political arena.

## **4. Merit Selection Still Permits Political Affiliation To Be a Factor at the Nomination Level**

In Arizona, the current merit selection system requires that no more than two of the nominees be of the same political party unless more than four nominees are submitted to the Governor, in which case no more than sixty percent shall be of the same political party.<sup>194</sup> Critics charge that this requires the commission to focus on the political affiliation of each applicant. They suggest that this requirement can operate to preclude the commission from forwarding the names of the three best qualified candidates.<sup>195</sup>

\*865 This provision, however, does ensure that the Governor will receive a politically heterogeneous list of nominees. In addition, assuming that a significant number of attorneys apply for each judicial opening, at least one member of each political party should possess sufficient qualifications to fall within the top three nominees. This requirement also prevents the situation that existed prior to merit selection, when the non-binding nominating commissions, created by Governors Goddard and Williams, never nominated a serious candidate from other than the Governor's party.<sup>196</sup>

The role of politics under the merit selection system is minuscule when compared to its previous role when judges were elected.<sup>197</sup>

### 5. Politics Is a Factor at the Appointment Level

Arguably, merit selection results in a disproportionate number of lawyers who share the Governor's political affiliation being appointed to the bench.<sup>198</sup> One newspaper editorial observed that Democratic Governors "beget" Democratic judges and Republican Governors "beget" Republican judges.<sup>199</sup> Statistics verify this statement. Since merit selection went into effect in January 1975, Arizona has had Democratic Governors for all but a fifteen-month period.<sup>200</sup> Democrat Raul Castro, the first Governor after merit selection was adopted, appointed only one Republican to the bench during his tenure from January 1975 to October 1977.<sup>201</sup> Democrat Bruce Babbitt, who served as Arizona's Governor from 1978 through 1986, was criticized for appointing over seventy percent Democrats to the Maricopa County Superior Court and over eighty percent Democrats to the Pima County Superior Court during his first five years in office.<sup>202</sup> \*866 During that brief period in which Arizona had a Republican Governor, seven judicial appointments were made under merit selection, and each appointee was a Republican.<sup>203</sup>

Of justices and judges presently sitting who were appointed through merit selection by Democratic Governors, the vast majority have been Democrats. For example, through 1989, Democratic Governors appointed Democrats to all three vacancies on the Arizona Supreme Court.<sup>204</sup> Between 1975 and 1989, only twenty-one of sixty-six merit-selected Maricopa County Superior Court judges were Republicans, while three of eighteen merit-selected judges in Pima County were Republicans.<sup>205</sup>

Although such partisanship in judicial appointments may be deplorable, it is not a phenomenon unique to merit selection. For example, the last Arizona Governor prior to enactment of merit selection was Republican Jack Williams. Governor Williams made thirty-nine judicial appointments, thirty-six of which were Republicans.<sup>206</sup> Phoenix attorney David C. Tierney, one of the first Maricopa County Trial Court Commission members and a Democrat, has emphasized the importance of political balance in merit selection appointments.<sup>207</sup>

### 6. Merit Selection Is a Secretive Process

Critics also suggest that all hearings of nominating commissions, including interviews, should be public.<sup>208</sup> Merit selection proponents have been sensitive to complaints that the nomination phase of merit selection has been shrouded in secrecy. In the early stages of development, the names of applicants being considered by the various commissions were not publicized until the commissions submitted the names of nominees to the Governor.<sup>209</sup> More recently, however, the commissions must make public the names of those applicants that the commissions will interview.<sup>210</sup> \*867 In addition, efforts have been undertaken to educate the public regarding the selection process and judicial candidates. For example, in November 1988, the Appellate Court Commission conducted televised interviews of supreme court applicants.<sup>211</sup> The Pima County Bar Association has conducted televised interviews of superior court candidates.<sup>212</sup>

## 7. The Bar Poll Is of Dubious Value

Critics argue that bar polls do not accurately reflect the best interests of the citizenry.<sup>213</sup> Although alternatives to the bar survey have been discussed, to date no sound proposals have surfaced. In any event, even assuming the existence of flaws in the bar poll, one might question whether survey difficulties warrant a return to contested elections.

## 8. Contested Elections Keep Judges Responsive

Critics of merit selection maintain that contested elections prevent judges from becoming too distant from the public. One legislator opposed to merit selection stated that he feared appointment is now tantamount to "anointment."<sup>214</sup> Critics of merit selection also argue that retention elections are a poor substitute for popular elections because only a very small fraction of all judges standing for retention are removed.<sup>215</sup> Contested elections, however, present a constellation of problems. The absence of genuine campaign issues prevents meaningful campaign dialogue and the number of judicial offices on which the electorate must vote contributes to the "roll-off" in votes cast. Voters who do cast votes for judicial candidates often do so because of their special interests and heightened awareness<sup>216</sup> or in reliance upon superficialities such as party affiliation, name identification, appearance, or campaign slogans.<sup>217</sup> Contested judicial elections are costly, and litigants and attorneys typically shoulder the expense. Even under an elective system, the "only way to get a bad judge \*868 out of office was to attempt to find a candidate, and a better one at that, to oppose and defeat the judge."<sup>218</sup> Although few judges are removed through retention elections, if commissions nominate qualified candidates, few removals are appropriate.<sup>219</sup>

## 9. Alternatives Exist To Having All Judges Run at Large

Although proponents of merit selection argue that the large number of superior court judgeships make a return to elections impractical, critics of merit selection point out that alternatives exist, such as the formulation of judicial districts for election purposes.

Another alternative is to elect only appellate judges. Merit selection critics argue that such an approach would be advantageous because public responsiveness is most important at the appellate level. Critics of merit selection note that appellate courts make broad policy determinations and set forth the principles of law that trial courts follow. This argument overlooks the fact that in the last contested supreme court elections conducted in Arizona, twenty percent of the voters chose not to cast votes.<sup>220</sup>

## V. MERIT SELECTION IN OPERATION

The Arizona judicial merit selection system established three nominating commissions: one for the nomination of appellate court judges and one each for the nomination of superior court judges in Pima and Maricopa Counties. Each commission consists of five lay members, three attorney members, and the chief justice of the Arizona Supreme Court. The membership of each commission is different.<sup>221</sup> The commissions evaluate candidates for judicial vacancies and forward the names of the three or more most qualified to the Governor.<sup>222</sup> The Governor is required to appoint from this list of nominees. Failure of the Governor to appoint from the list of nominees results in the chief justice of the Arizona Supreme Court making the appointment.<sup>223</sup> The appointee must later \*869 participate in a noncompetitive, nonpartisan retention election.<sup>224</sup>



### A. Commission Members

Attorney members of the three commissions are nominated by the State Bar and confirmed by the Arizona State Senate. Lay members are nominated by the Governor and are also subject to Senate confirmation.<sup>225</sup> Because of the immediate prominence of the three commissions, it is little wonder that the first significant developments in implementing the merit selection system in Arizona involved the selection of commission members.

In the 1974 gubernatorial election, former Pima County Attorney Raul Castro, a Democrat, defeated incumbent Republican Governor Jack Williams. Before leaving office, Williams attempted to appoint the lay members of the Pima County Trial Court Commission<sup>226</sup> and the Appellate Court Commission.<sup>227</sup> Democrats denounced Governor Williams' appointments as an effort to deprive Governor-elect Raul Castro of the opportunity to appoint commission members.<sup>228</sup> Nominees were subject to confirmation by the Democratic-controlled Senate, which refused to confirm the nominees because of Williams' lame duck status.<sup>229</sup> When Castro assumed office in January 1975, he promptly submitted his own list of nominees for the Maricopa and Pima County Trial Court Commissions and the Appellate Court Commission.<sup>230</sup>

**\*870** In January 1975, the State Bar nominated commission members for the Pima County Trial Court Commission,<sup>231</sup> the Maricopa County Trial Court Commission,<sup>232</sup> and the Appellate Court Commission.<sup>233</sup> William Browning, one of the principal proponents of merit selection, expressed concern about the nomination of lawyers who were prominent in the merit selection effort or who practiced with major Arizona law firms. Browning feared that the public would perceive that lawyers from big firms ran the commissions.<sup>234</sup> Notwithstanding these concerns, merit selection advocate William Browning and attorney John P. Frank, a scholarly member of a large Phoenix law firm, were two of the three attorneys nominated by the State Bar for the first appellate commission.<sup>235</sup>

Although most commission members have been nominated and confirmed without fanfare, a few recent attorney member nominations have generated controversy.<sup>236</sup> For instance, in 1987, Governor Evan Mecham became embroiled in a dispute with the State Bar regarding two of the bar's nominees. Mecham objected to the nomination of Janice A. Wezelman to the appellate commission and Phoenix attorney James J. Leonard, Jr., to the Maricopa County Trial Court Commission.<sup>237</sup> Both Wezelman and Leonard primarily represented plaintiffs in civil litigation. Wezelman is a prominent Tucson attorney and the wife of then-Representative David Bartlett (D-Tucson).<sup>238</sup>

The State Bar maintained that the Governor's role was limited to merely acting as a conduit for attorney nominees and that the Senate alone had the power to confirm or reject nominees. Mecham asserted that he was not required to forward to the Senate the names of nominees he found objectionable.<sup>239</sup> Attorney General Robert K. Corbin opined that the

**\*871** Governor could reject the State Bar's nominees.<sup>240</sup> Eventually, a compromise was reached whereby the State Bar agreed to submit to the Governor three nominees for any vacancy on the judicial commissions and Mecham agreed to forward one of the State Bar's three nominees to the Senate for confirmation.<sup>241</sup>

All commission members must receive Senate confirmation.<sup>242</sup> In 1989, for the first time since the merit selection system was adopted, the Arizona Senate refused to confirm a State Bar nominee for the Appellate Court Commission. On June 2, 1989, the Senate refused to confirm the nomination of Bruce E. Meyerson. Meyerson had been an Arizona Court of Appeals judge for four and one-half years and was general counsel to Arizona State University. A sixteen to thirteen partisan vote allowed Senate Republicans to defeat Meyerson's confirmation.<sup>243</sup>

Senate Judiciary Chairman Leo Corbet's opposition to Meyerson was based upon Meyerson's role in the 1972 effort to recall Governor Jack Williams. Meyerson represented the United Farm Workers, an organization that actively pursued the recall of the Republican governor. Meyerson stated: "I feel sorry for Jack Williams because he's obviously held a grudge against me for 17 years."<sup>244</sup> Meyerson characterized the Senate vote as "a manifestation of Williams' political vengeance."<sup>245</sup> Senator Tom Patterson (R-Phoenix) asserted that his vote against confirmation was based upon Meyerson's "stridently liberal agenda" and an "overreaching judicial philosophy."<sup>246</sup> Senator Jesus Higuera (D-Tucson) described the Senate's refusal to confirm Meyerson as "immoral, unethical and embarrassing."<sup>247</sup>

During the sixteen years merit selection has been in operation, lay member nominees have been appointed without major incident. State Bar nominees, however, have occasionally encountered opposition.

### B. First Judicial Appointments

The first two judicial vacancies under the merit selection system both arose on the Pima County Superior Court bench in 1975. Before the Pima County Trial Court Commission held its first meeting to consider nominees, \*872 rumors abounded that Pima County Judge Pro Tempore Harry Gin and attorney Manuel H. Garcia would be appointed.<sup>248</sup>

In response to the rumors, Governor Castro's administrative aide, Alfred J. Rogers, stated, "[Gin's] got a lot of support [in Tucson] and he's probably well qualified."<sup>249</sup> However, Pima County Supervisor Conrad Joyner, who had opposed merit selection, took a dimmer view: "I knew this was going to happen and it only bears out what I predicted during the campaign: what we've done is moved the politics from the open process by the governor and the people and put it into the back rooms."<sup>250</sup> William Browning, although he was unaware of any politicking involved, agreed that if any occurred, it would "defeat the entire purpose of the process."<sup>251</sup>

In June 1975, Castro named Gin and attorney Jack Arnold the first appointees under the merit selection process. Arnold, a well-regarded Tucson attorney, was also a former chairperson of the Pima County Democratic Party and was active in Castro's election campaign.<sup>252</sup>

The first vacancy on the Arizona Supreme Court to be filled through merit selection received considerable attention. Pima County Superior Court Judge John P. Collins, a very prominent and politically well-connected Democrat, was considered for this vacancy. The Appellate Court Commission nominated two Republicans and one Democrat. The Republican nominees were Arizona Court of Appeals Judges Eino M. Jacobson and Levi Ray Haire. The only Democratic nominee was Mohave Superior Court Judge Frank X. Gordon, Jr. On August 4, 1975, Governor Castro appointed Frank Gordon to the Arizona Supreme Court.<sup>253</sup> John P. White, a professor of political science at Arizona State University, stated that the commission's choice of nominees amounted to the commission naming the next justice of the Arizona Supreme Court because it was a foregone conclusion that a Democratic Governor would appoint a Democrat to the "plum" position of justice on the Arizona Supreme Court.<sup>254</sup>

This analysis may be incorrect, however. The commission could have politically embarrassed Castro by forwarding to him the names of both Collins and Gordon, thereby requiring Castro to select from between them. \*873 Instead, the commission sent the names of three highly regarded judges whom they viewed as the three best applicants, within the requirement that at least one of the three be from each political party.<sup>255</sup> Allegations that the nominations were politically skewed thus may be unfounded.

Pima County Supervisor Conrad Joyner again protested a merit selection appointment when, on July 7, 1978, Governor Bruce Babbitt selected Judge Pro Tempore Tom Meehan as the newest Pima County Superior Court Judge.<sup>256</sup> After

Babbitt announced the appointment, Joyner declared that Meehan's appointment had been "rigged," because Meehan had told Joyner months earlier that his appointment was a certainty.<sup>257</sup> At the time Meehan allegedly made the statement to Joyner, Wesley Bolin was Governor. Shortly thereafter, Babbitt succeeded Bolin as Governor. Joyner claimed that Meehan made the initial statement while Bolin was Governor, then later told Joyner that the change in Governors made no difference. Joyner asserted that the judgeship was promised Meehan because Meehan had been the 1976 campaign chairman for Pima County Board of Supervisors Chairman E.S. "Bud" Walker.<sup>258</sup>

Pima County Trial Court Commission Chairman Reg Morrison, a Republican, denied receiving any pressure to submit Meehan's name to Governor Babbitt. Meehan also denied Joyner's allegations, saying that it was unrealistic to think that anyone could control both the commission and the Governor so as to "fix" an appointment.<sup>259</sup>

In 1986, another supreme court vacancy to be filled through merit selection received considerable publicity. That year Justice Jack D.H. Hays, a Republican serving on the Arizona Supreme Court, did not file a declaration of candidacy indicating his intent to seek retention in the November 1986 election. A declaration must be made by any judge or justice seeking retention, and the declaration must be made not less than sixty nor more than ninety days before the generalelection.<sup>260</sup> Justice Hays' failure to file a declaration of candidacy resulted in his office becoming vacant at the expiration of his term, on the first Monday in January 1987.<sup>261</sup>

In November 1986, Republican Evan Mecham was elected Governor of Arizona. Mecham's election meant that for the first time since merit \*874 selection was enacted, Arizona would have a Republican Governor. In December 1986, the Appellate Court Commission included five lay members appointed by outgoing Governor Babbitt.

At the request of then-Chief Justice William A. Holohan, who was chairperson of the Appellate Court Commission, Attorney General Robert Corbin, a Republican, rendered an opinion regarding the propriety of the Appellate Court Commission submitting the names of three supreme court nominees to the Governor prior to Justice Hays' resignation becoming effective. On December 8, 1986, the Attorney General rendered a formal opinion stating that the commission could not submit the names of nominees to the Governor prior to a vacancy occurring.<sup>262</sup>

After the opinion was issued, the commission proceeded with interviews of applicants for Justice Hays' seat and forwarded to Governor Babbitt the names of two Democrats and one Republican.<sup>263</sup> A howl of protest arose, with one newspaper editorializing that the Democrats were attempting to put a Democrat on the supreme court before the newly-elected Republican Governor took office and, more importantly, before the judicial office was even vacant.<sup>264</sup> Although this may well be a fair interpretation, Babbitt chose to abstain from making an appointment, thereby enabling the new Governor to fill the vacancy. Babbitt's decision, in retrospect, may have done much to preserve the integrity of the merit selection system, and it probably averted a monumental lawsuit.

After Republican Governor Evan Mecham took office, the Appellate Court Commission forwarded the same three names to Mecham.<sup>265</sup> Governor Mecham indicated that he wanted new lay members appointed to the Appellate Court Commission and the names of new nominees forwarded to him for the Arizona Supreme Court vacancy.<sup>266</sup> Although Mecham was criticized for this position, he found an unlikely ally in the Democratic-oriented newspaper, the Arizona Daily Star. A Star editorial noted that although Mecham was being accused of playing politics with judicial appointments, "it had been politics that motivated the commission's decision to send the names to Babbitt prior to Hays' resignation becoming effective."<sup>267</sup> In mid-February, Governor Mecham relented and \*875 agreed to appoint a justice from the three nominees submitted by the commission.<sup>268</sup> He selected Maricopa County Superior Court Judge Jim Moeller, the lone Republican, as his choice to fill the supreme court vacancy.<sup>269</sup>

### C. Surveys

Arizona's merit selection system is typical of that used by other states in that retention elections, in which sitting judges run unopposed, are conducted. Although voters are given the opportunity to vote, interest and information about sitting judges is substantially reduced because of the absence of a competing candidate. Voters must obtain information from secondary sources in order to intelligently vote regarding retention of these judges. Judicial evaluation surveys are one method used to spark public interest and to communicate to the public information regarding the performance of sitting judges.

Attorney Francis J. Slavin, past chairperson of the State Committee on Judicial Evaluation, views judicial evaluation surveys as an integral part of the merit selection system, stating: "Merit selection without judicial evaluation is like one hand clapping without the other—it's the flip side of the coin."<sup>270</sup>

Judicial evaluations in other merit selection states have been conducted by bar associations, citizens' organizations, lawyers' groups, special interest groups, the media, and permanent commissions on the judiciary.<sup>271</sup> In 1989, the Arizona Commission on the Courts proposed the creation of a judicial performance evaluation commission. Under this proposal, a commission consisting of both public members and lawyers would offer evaluations for improvement and provide the public with clear and accurate information about judicial performance.<sup>272</sup>

Prior to adopting judicial merit selection, Arizona utilized a bar survey to evaluate judicial candidates in certain contested elections. The respective county bars in Pima and Maricopa Counties conducted bar polls in contested superior court elections; the State Bar conducted similar polls \*876 in contested appellate court elections. Between 1958 and 1972, the State Bar conducted preferential surveys involving thirteen contested appellate elections.<sup>273</sup> Two criticisms of this survey were that all lawyers were polled, not just those familiar with the candidates, and that lawyers were not the best judges of judges.<sup>274</sup>

After merit selection was adopted in 1974, the Survey Research Laboratory of Arizona State University (SRL) assumed responsibility for the bar surveys. The SRL conducted its first official survey in 1976.<sup>275</sup> Since its inception, the SRL has conducted its judicial evaluation poll in Arizona every two years. Dr. Morris Axelrod, former director of SRL, helped design the poll.<sup>276</sup>

The pre-merit selection bar survey only inquired about attorneys' preferences as to those judicial candidates embroiled in contested elections. The post-merit selection judicial evaluation survey, conducted by the SRL on behalf of the State Bar of Arizona, rates trial and appellate judges on various criteria. Attorneys are asked to answer yes or no to the following three questions for both trial and appellate judges: (1) whether the particular judge's age and health are such that the judge can effectively discharge the duties of office, (2) whether the judge has sufficient integrity to carry out the duties of office, and (3) whether the judge should be retained in office.<sup>277</sup>

Trial judges are evaluated on ten additional criteria. These are: (1) punctuality; (2) attentiveness to testimony of witnesses and arguments of counsel; (3) promptness in making rulings and rendering decisions; (4) fairness toward all litigants; (5) courteousness to litigants, witnesses, jurors, and lawyers; (6) courtroom discipline; (7) knowledge and application of rules of evidence and substantive law; (8) knowledge and application of rules of procedure; (9) consideration of briefs and authorities; and (10) judicial temperament and demeanor.<sup>278</sup>

The survey rates appellate judges on seven additional criteria: (1) attentiveness to arguments of counsel, (2) fairness toward all litigants, (3) courteousness to litigants and lawyers, (4) knowledge of the law, (5) consideration of briefs and authorities, (6) quality of written opinions, and (7) judicial temperament and demeanor.<sup>279</sup>

\*877 The questions asked on the survey have not changed since the first SRL poll was conducted in 1976.<sup>280</sup>

Trial judges are rated only by attorneys who have practiced before them, but an appellate judge may be rated by any attorney familiar with that appellate judge's opinions.<sup>281</sup> The requirement that attorneys be familiar with the respective judges before evaluating them may blunt the criticism of the pre-merit selection judicial survey in which all attorneys evaluated all judges facing contested elections. Of course, an important premise is that attorneys answering the surveys will honor the avowal they must make that they are familiar with the judges they have evaluated. Lawyers are asked to evaluate appellate judges with whose opinions they are familiar even if they have not practiced before those judges, because the SRL feared that the sampling would otherwise be too small.<sup>282</sup> Survey responses are confidential and anonymous.<sup>283</sup> State Bar members who are inactive, judicial, out-of-state, or recent admittees are excluded.<sup>284</sup> Surveys are sent to a representative sampling of Maricopa and Pima County lawyers to evaluate all appellate judges and superior court judges in their respective counties. A representative sample of attorneys in the remainder of the state is surveyed regarding all appellate judges.<sup>285</sup>

In 1988, approximately one-fourth of all practicing attorneys were surveyed,<sup>286</sup> while in 1990, approximately one-third were surveyed.<sup>287</sup> Participation in the bar survey has been remarkable. For instance, in 1976, ninety-two percent of the attorneys sampled returned the survey material. This ranked Arizona first in participation of thirty-six judicial polls \*878 conducted in the United States.<sup>288</sup> In 1990, the survey received an eighty-five percent response rate.<sup>289</sup> A high response rate is critical in order to obtain the evaluation of a random representative sample of Arizona attorneys.<sup>290</sup> A recent random survey of Arizona attorneys indicates that nearly seventy percent of Arizona lawyers have responded to an evaluation poll questionnaire.<sup>291</sup>

Nationally, bar survey results are used in two manners: the public service method and the special interest approach. Under the public service method, bar associations utilize a passive approach, simply providing survey results to the public. Under the special interest approach, on the other hand, the bar associations actively campaign to defeat judges with unfavorable survey results.<sup>292</sup>

Bar surveys present two related problems. The first is survey validity and whether the bar survey adequately reflects the attitudes of the legal community.<sup>293</sup> The number of attorneys surveyed and random sampling both affect validity. A second issue is whether the responses of the lawyers truly represent the best interests of the citizenry who will use the survey results.<sup>294</sup> As an indication of survey validity, Dr. Axelrod pointed to the consistency between the 1976 and 1978 surveys, even though in many cases different lawyers were surveyed.<sup>295</sup> In 1990, W. Shepard Wolf, Jr., current SRL director, observed that polls between 1976 and 1990 show "an extremely close correspondence of ratings from year to year for most of the judges," even though the ratings involved were obtained from eight different samples of attorneys.<sup>296</sup>

The SRL judicial survey has been criticized for the same reason that the pre-merit selection survey was faulted: Only lawyers are surveyed. In 1979, Newton Rosenzweig, vice-president of Citizens' Association on Arizona Courts, suggested that the judicial evaluation poll should not be left entirely to lawyers and the bar. Rosenzweig suggested that a committee consisting of representatives from the non-lawyer population of the state, including the League of Women Voters, labor, education, the Citizens' \*879 Association on Arizona Courts, and others might help draft questions and set standards for judges.<sup>297</sup>

Others have suggested that non-lawyers such as jurors and law enforcement agents, and even the public at large, should be surveyed.<sup>298</sup> In 1981, Joe Cesare, Secretary of the Pima County Trial Court Commission, suggested that the merit selection system could be modified to permit the nominating commission to review the overall performance of previous appointees, including the length of time it takes to get a ruling and the number of cases overturned on appeal.<sup>299</sup> The formulation of meaningful polls of knowledgeable non-lawyer groups or individuals has not been forthcoming, however.

In 1978, then-Representative Peter Kay stated that another problem with bar surveys is that "large segments of the public will do exactly what the Bar says not to do, because lawyers are suspect."<sup>300</sup> Kay stated that this public reaction is unfortunate because under merit selection, attorneys are in the best position to evaluate judges.<sup>301</sup> It has been suggested that an attorney approval rating of over fifty percent should be adequate, because every time a judge rules he potentially upsets at least one of the parties before him.<sup>302</sup> Competent judges may not fare well in a popularity contest,<sup>303</sup> but, as Wolf points out, in 1990, twenty-one judges received ratings of ninety-eight percent or higher.<sup>304</sup>

Bar surveys assume that what the lawyers find pleasing or disagreeable about judges mirrors how the public should feel about those same judges. This assumption is obviously an extremely important premise in determining the efficacy of bar surveys. In 1980, Arizona State University Political Science Professors John A. Stookey and George Watson wrote:

[W]e must ask whether the concepts of justice and fairness that lead the bar to make particular evaluations are the same as the general public would use. If systematic differences exist, then the public, in following the bar poll, will not only be judging the merit of particular judges, but also unknowingly accepting a view of the American judiciary different from their own.<sup>305</sup>

Past State Bar President Thomas A. Zlaket questions the value of the bar survey, suggesting that it (1) causes tension between bench and bar and (2) can cause judges to be unduly concerned about their ratings, to the detriment of effective case management when unpopular action is required. He also suggests that the danger exists that the bar survey can devolve into a mere popularity contest.<sup>306</sup>

The public must receive information in order to cast an informed vote in retention elections. The SRL survey is intended to meet this need.

#### D. Retention Elections

Once appointed, a judge must stand for retention in the next general election preceding the expiration of the judge's term of office. Retention elections are nonpartisan. The judge must receive a "yes" vote from a majority of those voting in order to be retained for another term.<sup>307</sup> Lawyers statewide are surveyed regarding supreme court justices, and the justices stand for retention statewide. Although lawyers are surveyed statewide regarding court of appeals judges and those results are publicized in connection with the forthcoming retention elections,<sup>308</sup> voters statewide are not asked to decide whether court of appeals judges should be retained. Rather, court of appeals judges residing in Pima or Maricopa Counties stand for retention before the voters of their respective counties. Court of appeals judges residing in counties other than Pima or Maricopa stand for retention in all of the remaining counties in their division excluding Pima and Maricopa.<sup>309</sup> Superior court judges from Maricopa and Pima Counties stand for retention in their respective counties.

**\*881** The first Arizona retention election occurred in 1976. The State Bar published the results of the first judicial poll.<sup>310</sup>

Following the 1976 election, in which all judges standing for retention were retained, some concluded that the election of 1978 would decide the future of merit selection. One article reported:

There are many who say that the [merit selection system] may face its final test in the November 5 [1978] elections—that if every judge is retained in office, despite the educational efforts of the media and the Bar Association, the system will be proven defective—at least in its retention provisions.<sup>311</sup>

In 1978, the Maricopa County and Pima County bar associations actively campaigned against the retention of those judges receiving an approval rating of below sixty-five percent.<sup>312</sup> The Maricopa County Bar Association opposed the retention of three judges<sup>313</sup> and the Pima County Bar Association opposed the retention of one superior court judge.<sup>314</sup> The State Bar made no recommendations.<sup>315</sup>

The three Maricopa County judges opposed for retention were Maricopa Superior Court Judges Fred J. Hyder and Kenneth C. Chatwin and Division One Court of Appeals Judge Gary K. Nelson.<sup>316</sup> The 1978 bar survey results gave these judges approval ratings of thirty-four percent, sixty percent, and forty-eight percent, respectively.<sup>317</sup> Judges Hyder and Nelson were defeated,<sup>318</sup> while Judge Chatwin was retained.<sup>319</sup> In Pima County, Superior Court Judge Norman S. Fenton was opposed for retention based upon a bar approval rate of fifty-seven percent.<sup>320</sup> Judge Fenton was retained.<sup>321</sup>

**\*882** In 1980, the Maricopa County Bar Association unsuccessfully opposed the retention of Maricopa County Superior Court Judge Dorothy Carson based upon a low rating in the bar survey.<sup>322</sup>

In 1982, the Pima County Bar Association waged a vigorous campaign against the retention of Superior Court Judge Lillian Fisher. Judge Fisher received an approval rating of forty-three percent on the bar survey.<sup>323</sup> Supporters of the judge included Pima County Attorney Stephen D. Neely, Pima County Sheriff Clarence Dupnik, and Tucson Mayor Lew Murphy. Critics of the bar survey charged that Judge Fisher's forty-three percent approval rate arose from her clamping down on attorney's fees and pro-law enforcement stance in criminal matters. Two of Judge Fisher's supporters wrote: "If 57 percent of 180 lawyers 'voted' against you—to us that is an endorsement."<sup>324</sup> Voters retained Judge Fisher by a margin of 96,063 to 35,617.<sup>325</sup>

Following Judge Fisher's retention, Pima County Bar Association President Carol Wilson stated that the campaign against Judge Fisher's retention had failed because opponents had not enlisted the support of the two Tucson newspapers with the largest circulation.<sup>326</sup> In post-election editorials discussing the campaign against Judge Fisher, the Arizona Daily Star asserted that a more meaningful method was needed to inform voters about judges<sup>327</sup> and that the bar survey reflected only the legal community's views on judges.<sup>328</sup> The Star pointed out that Judge Fisher was rated on thirteen different matters; on twelve she received an approval rating of seventy-three percent, but on the all-important "should this judge be retained?" she received a forty-three percent rating.<sup>329</sup>

In 1990, the Pima County Bar Association chose to endorse those judges receiving a favorable bar survey response of seventy percent or better, but to take no position as to any judge receiving an approval rating below seventy percent.<sup>330</sup>

The Maricopa County Bar Association announced that \*883 it endorsed those judges receiving an approval rating of at least eighty percent on the 1990 bar survey, took no position as to those judges scoring sixty-five percent to seventy-nine percent, and opposed those scoring sixty-four percent or less.<sup>331</sup>

One criticism of the merit selection process has been that organized campaigns against a particular judge are a rarity. In 1978, Arizona State University Political Science Professor John P. White stated:

Al Smith, I think, made the famous statement you can't beat somebody with nobody. That is what you have to do [under merit selection]. You have no opponent to rally around. No opponent to say well, here's the way the incumbent acts and if I'm elected I'll do one, two, three.<sup>332</sup>

In what became an oft-quoted saying, one political writer declared: "Short of committing incest at high noon at Central and Van Buren, it would appear our honorable judges now have lifetime sinecures."<sup>333</sup> Arizona's experience with retention elections mirrors that of other states utilizing merit selection systems, prompting one commentator to ask, "Who wins when no one loses?"<sup>334</sup>

University of Virginia Professor of Government Henry J. Abraham reported that in the first forty-six years of retention elections in various states, only thirty-three judges were not retained.<sup>335</sup> In 1976, a total of 353 judges stood for retention in thirteen states and only three were rejected.<sup>336</sup> Under merit selection, more than ninety-seven percent of judges seeking retention in any election year succeed.<sup>337</sup> Arizona Supreme Court Justice Duke Cameron defends this phenomenon, pointing out that because merit selection is designed to procure a more professional, less political judiciary, "as long as qualified individuals are chosen, they should not be easily turned out."<sup>338</sup> Since 1978, no Arizona judge failed to attain retention.

#### **\*884 E. One Judge's Perspective**

Although few judges appointed under the merit selection process have granted interviews regarding the process, one notable exception exists. In 1980, Tucson attorney Robert J. Hooker was appointed to the Pima County Superior Court.<sup>339</sup> Hooker's experience with the merit selection process is significant because some law enforcement personnel and some prosecutors opposed his candidacy.<sup>340</sup>

Hooker faced opposition from the Pima County Attorney and the head of the Tucson branch of the United States Attorney's Office.<sup>341</sup> Hooker stated that in order to balance his liberal appearance, he obtained support from the Pima County Sheriff, a former Pima County Sheriff whom Hooker helped to elect, five superior court judges, and several city, county, state, and federal prosecutors.<sup>342</sup> Hooker also stated that the support of several prominent attorneys was required for a successful judicial candidacy.<sup>343</sup>

Hooker praised the merit selection system because judges do not have to campaign for office and raise money. Hooker stated: "I may owe favors to people ... [b]ut I don't have to pay up. If they had donated money to my campaign, it would be different. The alternative to this selection process is that judges have to go out and run for election."<sup>344</sup> Hooker's candidacy offers an interesting glimpse into a successful campaign for appointment under merit selection.

## **VI. PROPOSALS FOR CHANGE**



Although advocates of Arizona's merit selection system anticipated that opponents would seek revocation in 1976, no serious assault was forthcoming that year.<sup>345</sup> Commencing in 1978, however, legislation to repeal or modify the Arizona merit selection system has been introduced repeatedly.

\*885 Following an unsuccessful attempt in 1978 to pass legislation that would have once again placed merit selection before the voters,<sup>346</sup> opponents of merit selection mounted their next serious challenge in 1981. That year, opponents of merit selection undertook a petition drive to reinstate the election of judges.<sup>347</sup> The measure was supported by, among others, the Maricopa County Republican Committee.<sup>348</sup> The plan called for having the proposal appear on the 1982 ballot.<sup>349</sup>

Pat Hartnett, co-chairperson of the petition drive, favored electing judges because election "makes them responsible to the general public and not just to their peers."<sup>350</sup> In November 1981, Pima County Republican Chairman Emmet McLoughlin said Republicans favored a return to judicial elections because of the "absence of direct accountability to the voters" under merit selection.<sup>351</sup> Lars Pedersen, Pima County Democratic Party Chairman and an attorney, said that the Democratic Executive Committee favored election of judges because it believed that "judges should be responsible to the electorate and someone should be allowed to run for judge if he or she wants to."<sup>352</sup> Pedersen, however, said that he personally favored merit selection because it has produced good judges and screened out incompetent applicants.<sup>353</sup>

Attorney David Bradshaw, a proponent of the election of judges, stated that elections enabled judges' capabilities to be scrutinized because contested elections put the judges' performance under the "spotlight."<sup>354</sup> As the year ended, the petition drive continued.

In January 1982, the legislature revisited the topic of judicial selection. House Concurrent Resolution 2001, co-sponsored by Representative Jim Skelly (R-Scottsdale), called for the abolition of merit selection and the election of supreme court justices and judges of the court of appeals and all superior courts. Interim appointments were to be made by the Governor.<sup>355</sup> House Concurrent Resolution 2001 died in committee.<sup>356</sup> Representative \*886 Skelly said: "It's the same old philosophy that the people are stupid."<sup>357</sup>

During this same period of time, a similar measure, Senate Concurrent Resolution 1004, was being considered by the Senate. Then-Senator Jim Kolbe (R-Tucson) questioned whether it was asking too much of voters in Maricopa County to be familiar with all forty-three Maricopa County Superior Court judges and their opponents or, in Tucson, all candidates for the eighteen Pima County Superior Court judgeships.<sup>358</sup> However, Senator John Mawhinney (R-Tucson) suggested that judicial districts could be formed in order to avoid a voluminous number of candidates appearing on the ballot.<sup>359</sup> William Browning stated that a more important concern should be fine tuning the present system rather than returning to a system rejected by the public only seven years earlier.<sup>360</sup> The Senate proposal was held in committee.<sup>361</sup> Then-Senator Jacques Steiner (R-Phoenix) observed: "There is strong evidence that the quality of judges has improved, and good judges aren't necessarily good politicians."<sup>362</sup> Senator Jeff Hill (R-Tucson), an opponent of merit selection, stated: "Somehow it's all ok for us to run for office and solicit campaign contributions but it would be dirty for judges to do it."<sup>363</sup>

In February 1982, the petition drive to eliminate merit selection continued. Supporters of the petition had gathered 70,000 of the 83,000 signatures needed to place the election of judges issue on the ballot.<sup>364</sup> Chairperson Ron DeShalit described the merit selection system as "a snow job perpetrated on the public" and as "just a case of backroom elitist politics—a small group making a big decision for everyone."<sup>365</sup> The drive ended, however, when opponents of merit selection were unable to gather a sufficient number of signatures to place the issue on the ballot.<sup>366</sup>

Governor Bruce Babbitt praised the merit selection system and pointed out that Supreme Court Justice Sandra Day O'Connor was appointed to <sup>\*887</sup> the Arizona Court of Appeals through merit selection. Babbitt also stated that judicial elections can lead to "simplistic and emotional campaigns that don't really show the judge's ability" and "[a] perfectly competent judge could [then] be penalized [for] one or two unpopular decisions."<sup>367</sup>

Merit selection faced its next serious challenge in 1984. Representative Skelly co-sponsored House Concurrent Resolution 2015, a bill nearly identical to the 1982 House Concurrent Resolution 2001.<sup>368</sup> The House Judiciary Committee, by a nine to six vote, approved House Concurrent Resolution 2015.<sup>369</sup> Much of the debate regarding merit selection and election of judges focused on an unpopular decision by a Pima County Superior Court judge. The judge had ordered that one defendant be given pretrial release in connection with the robbery of a grocery store.<sup>370</sup> While out on bond, he and his brother proceeded to rob a bank and murder the bank's manager.<sup>371</sup> Representative Skelly stated that head-to-head competition between a judge and a contender would insure that a judge's bad decisions would be pointed out to the public.<sup>372</sup>

In denouncing merit selection, Skelly stated: "What this has done is take politics out of the public forum where it belongs and put it in the back room where it doesn't belong."<sup>373</sup> Representative Art Hamilton (D-Phoenix) disagreed, pointing out that the same superior court judge, in dismissing another case, "reinforce d my faith in the merit selection system.... Decisions are made on what the law requires and not on the amount of support to win re-election."<sup>374</sup>

During hearings on House Concurrent Resolution 2015, then-Deputy Pima County Attorney James M. Howard told the House Judiciary Committee that in the two years before merit selection, the Arizona Supreme Court reversed only about thirty percent of the criminal convictions; between 1982 and 1984, the supreme court reversed seventy percent of criminal convictions.<sup>375</sup> Howard stated that "t he appointive system has resulted in an appellate court which is philosophically quite liberal and does not reflect the community standards in the S tate of Arizona."<sup>376</sup> <sup>\*888</sup> Representative Hamilton maintained, however, that judges had to interpret the law "whether or not the state of the law happens to be consistent with the current standards of the state."<sup>377</sup> Howard replied that it was not interpreting of, but twisting of, the law to which he objected.<sup>378</sup> House Consurent Resolution 2015 failed to clear the Committee of Whole.<sup>379</sup>

In 1986, two senate bills were introduced requiring that the appointment of judges be subject to senate confirmation.<sup>380</sup> One of these two bills, Senate Concurrent Resolution 1002, would also have permitted attorneys to run against appointed judges by merely declaring their candidacy. This proposal died in committee.<sup>381</sup>

The other bill, Senate Concurrent Resolution 1003, was introduced by Senators Mawhinney, Kay, and others, and would have required that the Governor's appointments to the supreme court, court of appeals, and superior court be subject to senate confirmation.<sup>382</sup> The Senate Judiciary Committee approved the proposal,<sup>383</sup> but it died in House committees.<sup>384</sup>

In 1987, the legislature again considered a proposal requiring Senate confirmation of judges.<sup>385</sup> This measure, Senate Concurrent Resolution 1001, was amended in several important respects when it moved to the House. Senate Concurrent Resolution 1001, as amended, would have also (1) removed the chief justice from the appellate and trial court commissions, (2) increased membership on the appellate commissions by adding one additional lawyer member and ten lay members, (3) increased the number of lay members of the trial commissions from five to fifteen, and (4) had the supreme court, rather than the State Bar, select attorney members of the commissions.<sup>386</sup> House Judiciary Committee Chairman Skelly, the sponsor of the amended bill, expressed frustration over previous unsuccessful efforts to return to

election of judges and stated that the \*889 proposed changes would reduce the inordinate influence of lawyers in the merit selection system.<sup>387</sup> State Bar lobbyist Charles T. Stevens, who also represented the Arizona Judges Association, called the proposal "nothing more than a blatant attempt at court packing."<sup>388</sup> The proposal was criticized as a "step toward returning the state to a spoils system dominated by courthouse politics" and the "trashing" of an independent judiciary.<sup>389</sup> Chief Justice Francis X. Gordon, Jr., of the Arizona Supreme Court labeled the proposal a " 'blatant attempt' to pack the state's courts."<sup>390</sup> This measure was approved by the Senate but failed to pass the House Committee of Whole.<sup>391</sup> Nevertheless, this proposal progressed further than any previous attempt to modify the merit selection system.

In 1988, "Court Watch," an arm of the crime victims' rights group, "We The People," urged Pima County voters to reject all judges running for retention, including nine superior court judges, three court of appeals judges, and one justice of the Arizona Supreme Court.<sup>392</sup> The group maintained that in several cases, judges would have ruled differently had they been required to stand for election.<sup>393</sup> The group likened the merit selection system to one of life tenure, pointing out that in Pima County no judge had ever been denied retention. No mechanism existed to bring the judges' records forward, the group argued.<sup>394</sup> Senator Mawhinney agreed, saying that the present system turns the selection of judges over to a group of lawyers who rate them every two years.<sup>395</sup> Despite this opposition, all judges standing for retention were retained.

Also in 1988, Chief Justice Gordon appointed a thirty-four member Commission on the Courts to study the Arizona court system and to recommend changes.<sup>396</sup> In 1989, the Commission on the Courts announced its recommendations. One recommendation of the Commission was that judicial merit selection be extended statewide to all judges.<sup>397</sup>

\*890 The next major legislative proposal to jeopardize judicial merit selection was Senate Concurrent Resolution 1022, introduced on February 6, 1990. This proposal would have abolished merit selection in Arizona for judges of the supreme court, court of appeals, and superior court. The proposal also provided for the creation of judicial districts, with no more than three court of appeals and superior court judges residing in each district.<sup>398</sup> Senate Concurrent Resolution 1022 ultimately died awaiting committee reference.<sup>399</sup>

Although opponents of judicial merit selection continue to seek abolition or modification, the system has thus far prevailed.

## VII. THE FUTURE OF MERIT SELECTION

Recent events have raised questions regarding certain features of merit selection. The system is not perfect. Certain aspects of the merit selection process may need improvement.

Commission hearings have been the subject of experimentation. Local stations have televised commission interviews and bar interviews of judicial candidates. Whether these procedures result in the dissemination of worthwhile information or constitute a return to the elusive search for political charisma remains to be seen.

The nominating commissions' conscientious and independent exercise of their responsibilities is of paramount importance if judicial merit selection is to operate as intended. Under the current merit selection system, the danger exists that the Governor might influence the nominating commission and cause the nomination of a favored candidate.<sup>400</sup> In Arizona, the Governor selects all five commission lay members for staggered terms. A Governor with longevity can select all five lay members on each of the three commissions. The Governor's appointees could override the wishes of the other

members. Senate approval of the Governor's lay nominees is one check on the Governor's structuring of the nominating commissions, although the Senate has rejected no lay nominees to date. Commission independence is essential if merit selection is to avoid deteriorating into a system attaining the worst of both worlds; that is, unrestrained selection of judges by the Governor without the benefit of subsequent contested elections.

\*891 Some critics of merit selection argue that it requires too much behind-the-scene campaigning from applicants. In 1988, Tucson attorney Stephen L. Weiss, then-secretary of the Pima County Trial Court Commission, commented that fewer individuals appeared to be applying for superior court judgeships.<sup>401</sup> One former candidate was quoted as saying: "People don't apply because ... the lawyers on the street have the perception that the system is wired from the get-go."<sup>402</sup>

On the other hand, lay member Joe Cesare, who was recently reappointed to the Pima County Trial Court Commission, commented on the operation of the commission: "I'm always told by local politicians, newspaper reporters, lawyers are the worst, that so and so's wired in with us. That's ridiculous. A lot of that's sour grapes on the people who don't get picked."<sup>403</sup>

Weiss observed that politics never can be removed entirely, and that behind-the-scene campaigning is a necessary evil that gives the commission "insight into the breadth of a candidate's appeal in the community and a candidate's abilities."<sup>404</sup> Regarding the need for campaigning, Weiss stated: "I can't discount that as a reason why certain people might not apply.... But for the same reason, if you had an elective position, those same people wouldn't run for office either."<sup>405</sup>

The constitutional requirement that no more than two of the nominees be of the same political party unless the commission submits the names of more than three, in which case no more than sixty percent of the nominees can be from one political party, has been criticized on the ground that it (1) prevents the nominating commissions from simply forwarding the names of the top three applicants to the Governor and (2) requires the commission to be cognizant of the political affiliation of applicants.<sup>406</sup>

Much of the efficacy of the retention aspect of the Arizona merit selection system depends upon the validity and reliability of the bar poll and whether it accurately measures the quality of judges. Suggestions for change include re-evaluating the questions asked of attorneys, polling \*892 groups other than lawyers, and abolishing the survey. Once survey results are tallied, the question remains as to how the results should be publicized. Absent an aggressive, adversarial campaign directed by the bar and published by the media against judges with unsatisfactory ratings, retention of all judges is likely. Critics charge that high ratings might reflect pandering to the bar and fear that bar polls can make judges too responsive to the whims of attorneys appearing before them.<sup>407</sup>

Public apathy toward retention elections is another matter deserving of consideration. For example, in 1988, a Maricopa County Superior Court judge was narrowly approved for retention by just over fifty percent of the vote, despite having been convicted of possession of marijuana in Texas that year.<sup>408</sup> Opponents of merit selection argue that a judge being retained following a conviction is symptomatic of voters' indifference and ignorance and highlights a need for organized opposition from an election day adversary. However, the media campaign against this judge was relatively benign when compared with the aggressive campaign waged against some judges by the media in 1978.

Once voters deny a judge's retention, the impact of that decision remains an unanswered question. In 1978, fifty-two percent of the attorneys surveyed by the State Bar of Arizona opposed retention of a court of appeals judge. Attorneys gave him low marks on a number of traits, including knowledge of the law (thirty-nine percent rated him poor or very poor) and quality of written opinions (forty-one percent rated him poor or very poor).<sup>409</sup> Two years earlier, fifty-eight percent of the attorneys surveyed said that retention should be denied this judge.<sup>410</sup> In 1978, voters denied him

retention by a vote of 130,302 to 93,486.<sup>411</sup> One issue during the 1978 campaign against this judge involved allegations of misconduct.<sup>412</sup> After voters denied retention to this judge, he was cleared of any wrongdoing.<sup>413</sup>

In June of 1981, the Appellate Court Commission nominated this individual for the Arizona Court of Appeals.<sup>414</sup> A commission member offered the following explanation: "He was rejected under a false assumption by the voters and is entitled to the same consideration as any \*893 other qualified candidate."<sup>415</sup> The ousted judge acknowledged that he was once addicted to gambling and was heavily in debt, but contended that federal and state investigations had cleared him of ties to criminal elements.<sup>416</sup> In 1986, the Appellate Court Commission again nominated him for the court of appeals<sup>417</sup> and, in 1988, nominated him for the Arizona Supreme Court.<sup>418</sup>

This scenario necessarily raises questions. In those rare instances when the public denies a judge's retention, should the merit selection commission thereafter renominate that individual for appointment to the bench? Even assuming that the commission concludes that voters denied retention due to erroneous reports of personal misconduct, how does this change low bar ratings on matters of competence? It is interesting to note, however, that during the ten-year period preceding adoption of merit selection, it was not unheard of for the governor to reappoint judges defeated at the polls.<sup>419</sup>

## VIII. CONCLUSION

In 1974, Arizona followed the modern trend and adopted a judicial merit selection system. Since its adoption, the merit selection system has been a perennial target of individuals and groups who wish to return to the election system or substantially modify the current method. They argue that merit selection undermines judicial accountability and public participation.

In retrospect, the merit selection process takes into account several important considerations. Merit selection recognizes the need for judicial independence and depoliticization of the judiciary. It frees judges from the need to solicit campaign contributions for re-election campaigns. Campaign contribution scandals in other states with judicial election systems offer an important lesson regarding the hazards of an elected judiciary. That lawyers and litigants are the primary contributors to such campaigns heightens the distasteful nature of an elected judiciary.

\*894 Formerly, Arizona had a system which, in practice, resulted in the Governor appointing a majority of judges without benefit of a screened list of nominees or any confirmation process. Merit selection guarantees that judicial candidates are screened by a committee composed of lawyers and lay persons. Once appointed, a vehicle exists to remove judges deemed unacceptable.

Even when Arizona elected judges, the vast majority of races were uncontested. When judicial elections were contested, ethical rules required that candidates focus on nonissues. In addition, polls showed that the public was far less interested in judicial campaigns than in campaigns for other elected offices. Voter abstention in contested judicial elections was alarming.

These factors tip the scales in favor of judicial merit selection. Although many outstanding Arizona judges were elected, merit selection was a reform designed to address substantial flaws inherent in the popular election of judges. Merit selection recognizes that, at least ideally, judges should uniformly meet certain minimal requirements, and, once appointed, they should be divorced from politics. Retention elections result in few judges being voted out of office. This hopefully will free judges from political pressure in applying the law and deciding cases. It undeniably makes judges less responsive, but as the late Arizona Supreme Court Justice Lorna E. Lockwood wrote on the topic of judicial independence: "The independence of the judiciary is the technique—the end to be achieved is equal protection and justice under the law."<sup>420</sup> Merit selection serves this end well.

## Footnotes

- <sup>a</sup> Judge, Arizona Court of Appeals, Division Two. This article is based upon a Master's thesis written by John M. Roll, under the supervision of Professor Henry J. Abraham, James Hart Professor of Government and Foreign Affairs, University of Virginia, in connection with the University of Virginia School of Law Graduate Program for Judges.
- <sup>1</sup> Jenkins, Retention Elections: Who Wins When No One Loses?, 61 JUDICATURE 79, 79 (1977).
- <sup>2</sup> SECRETARY OF STATE, STATE OF ARIZONA, OFFICIAL CANVASS, GENERAL ELECTION NOV. 5, 1974 (compiled & issued by Wesley Bolin, Nov. 29, 1974).
- <sup>3</sup> See E. HAYNES, THE SELECTION AND TENURE OF JUDGES 80-135 (1944); J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 123-24 (1950); R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR 2-3 & n. 8 (1969).
- <sup>4</sup> See E. HAYNES, *supra* note 3, at 96. Haynes reports that after the Revolution, Massachusetts had only 10 lawyers continue their pre-Revolution law practice. *Id.* at 97.
- <sup>5</sup> *Id.* at 96-97.
- <sup>6</sup> COMMITTEE OF 70, JUDICIAL SELECTION GOVERNANCE STUDY 10 (1983) [hereinafter JUDICIAL STUDY]; S. ESCOVITZ, JUDICIAL SELECTION AND TENURE 4 (1975).
- <sup>7</sup> The Declaration of Independence para. 11 (U.S.1776).
- <sup>8</sup> S. ESCOVITZ, *supra* note 6, at 3-4.
- <sup>9</sup> *Id.* at 3.
- <sup>10</sup> *Id.* at 3-4.
- <sup>11</sup> *Id.* at 4.
- <sup>12</sup> See generally SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (W. Swindler ed. 1973) [hereinafter W. Swindler]. The following states gave judicial appointment power to their legislatures: Connecticut, CONN. CONST. of 1818, art. V, § 3; Delaware, DEL. CONST. of 1776, art. 12; Georgia, GA. CONST. of 1798, art. III, § 4; New Jersey, N.J. CONST. of 1776, art. 12; North Carolina, N.C. CONST. of 1776, art. 13; South Carolina, S.C. CONST. of 1776, art. XIX, XX; and Virginia, VA. CONST. of 1776. See generally W. Swindler, *supra*. Although the Rhode Island charter of 1663 did not specifically address the selection of judges, other sources indicate that judges were elected by general assembly. E. HAYNES, *supra* note 3, at 127-28.
- <sup>13</sup> See S. ESCOVITZ, *supra* note 6, at 4; E. HAYNES, *supra* note 3, at 101-35. See generally W. Swindler, *supra* note 12. The following states provided for the Governor, with approval of the state legislature or council, to appoint judges: Maryland, MD. CONST. of 1776, art. XLVIII; Massachusetts, MASS. CONST. of 1780, ch. II, § 1, art. IX; New Hampshire, N.H. CONST. of 1784, pt. 2 (1793) (Executive Power—President); New York, N.Y. CONST. OF 1777, ART. XXIII; AND PENNSYLVANIA, Pa. Const. OF 1776, § 20. SEE GENERALLY W. SWINDLER, *SUPRA*.
- <sup>14</sup> See L. BERKSON, S. BELLER & M. GRIMALDI, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 3 (1980); S. ESCOVITZ, *supra* note 6, at 4; Winters, Selection of Judges—An Historical Introduction, 44 TEX.L.REV. 1081, 1082 (1966).
- <sup>15</sup> E. HAYNES, *supra* note 3, at 88.
- <sup>16</sup> 5 U.S. (1 Cranch) 137 (1803).
- <sup>17</sup> See *id.* at 180.

- 18 See E. HAYNES, *supra* note 3, at 88-89.
- 19 L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 14, at 3.
- 20 E. HAYNES, *supra* note 3, at 88-89.
- 21 Niles, *The Popular Election of Judges in Historical Perspective*, 21 REC. OF THE A. OF THE BAR OF THE CITY OF N.Y. 523, 526-27 (1966).
- 22 L. BERKSEN, S. BELLER & M. GRIMALDI, *supra* note 14, at 4.
- 23 J. HURST, *supra* note 3, at 122.
- 24 Winters, *supra* note 14, at 1082; see also E. HAYNES, *supra* note 3, at 100.
- 25 E. HAYNES, *supra* note 3, at 89-90.
- 26 Winters, *supra* note 14, at 1083.
- 27 See *id.*; S. ESCOVITZ, *supra* note 6, at 6.
- 28 S. ESCOVITZ, *supra* note 6, at 6; see also Winters, *supra* note 14, at 1083.
- 29 See J. HURST, *supra* note 3, at 132 (discussing political machines in Chicago).
- 30 S. ESCOVITZ, *supra* note 6, at 6 (discussing elections in New York).
- 31 J. HURST, *supra* note 3, at 132.
- 32 *Id.* at 129-30.
- 33 R. WATSON & R. DOWNING, *supra* note 3, at 8.
- 34 Address by Roscoe Pound in 1906 at the annual convention of the American Bar Association on *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 46 J.A.M. JUDICATURE SOC'Y 55, 66 (1962).
- 35 See Taft, *The Selection and Tenure of Judges*, 1913 REP.A.B.A. 418, 422-23; see also Winters, *supra* note 14, at 1083.
- 36 Belknap, *From Pound to Harley, The Founding of AJS*, 72 JUDICATURE 78, 85 (1988); Winters, *supra* note 14, at 1083-84.
- 37 Belknap, *supra* note 36, at 83, 88.
- 38 L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 14, at 5; JUDICIAL STUDY, *supra* note 6, at 18; A. KALES, *UNPOPULAR GOVERNMENT IN THE UNITED STATES* 225-51 (1914); Winters, *supra* note 14, at 1084.
- 39 See Winters, *supra* note 14, at 1084.
- 40 Laski, *The Technique of Judicial Appointments*, 24 MICH.L.REV. 529, 539 (1926); see also L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 14, at 5.
- 41 H. ABRAHAM, *THE JUDICIAL PROCESS* 34-36 (5th ed. 1986).
- 42 *Id.* at 37.
- 43 L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 14, at 6; JUDICIAL STUDY, *supra* note 6, at 18-19.
- 44 See L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 14, at 6.
- 45 *Id.* Arizona requires that judges standing for retention receive the approval of at least a majority of those voting on the question. ARIZ. CONST. art. VI, § 38.

- 46 Illinois, for instance, requires voter approval by at least 60% of the votes cast. ILL. CONST. art. VI, § 12; see also *Lefkowitz v. State Bd. of Elections*, 400 F.Supp. 1005, 1006 (N.D.Ill.1975), *aff'd*, 424 U.S. 901 (1976); *Sixty Per Cent Retention Vote Upheld in Illinois*, 59 JUDICATURE 256, 256 (1975).
- 47 See J. WAGONER, *ARIZONA TERRITORY 1863-1912: A POLITICAL HISTORY* 459-64, 476-78 (1970).
- 48 *Id.* at 478.
- 49 *Id.* (quoting "Congressional Record, 62d Cong., 1st Sess., 1912, XLVII, Pt. 4, pp. 3964-66 (1912)").
- 50 Cameron, *Merit Selection in Arizona—The First Two Years*, 1976 ARIZ.ST.L.J. 425, 426 n. 9.
- 51 *Id.*; ARIZ. CONST. art. VII, § 1 (1910, amended 1912); ARIZONA SUPREME COURT, *THE ARIZONA COURTS SUMMARY REPORT* 3 (1977) [hereinafter ARIZONA COURTS SUMMARY REPORT]. The only Arizona judge ever recalled was Pinal County Superior Court Judge Stephen H. Abbey. *Abbey v. Green*, 28 Ariz. 53, 235 P. 150 (1925); T. Kleinschmidt, *Populism, Progressive Reform, and the Arizona Judicial System* 17 (1984) (unpublished LL.M. thesis, copy on file at Arizona State Law Journal).
- 52 ARIZ. CONST. art. VI, §§ 3, 5, 9 (1958, repealed 1960); see also Cameron, *supra* note 50, at 425. Judges continued to be elected until 1974. See *infra* text accompanying note 59.
- 53 See Interview: Martin Gentry, ARIZ. ATTY., June 1989, at 50.
- 54 *Id.*
- 55 SECRETARY OF STATE, *PUBLICITY PAMPHLET, INITIATIVE PETITION 108*, at 29 (1974) [hereinafter *PUBLICITY PAMPHLET*]; Ariz. Daily Star, Oct. 30, 1974, at 2, col. 3.
- 56 ARIZONA ACADEMY, *TWENTY-SECOND ARIZONA TOWN HALL ON THE ADEQUACY OF ARIZONA'S COURT SYSTEM* 32-33 (1973) [hereinafter ARIZONA TOWN HALL].
- 57 *Id.*
- 58 *Id.*
- 59 See ARIZ. CONST. art. VI, §§ 36, 37.
- 60 States in which appellate judges are selected by nonpartisan election for full term are Georgia, Idaho, Kentucky, Louisiana (by tradition only), Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma (court of appeals only), Oregon, Washington, and Wisconsin. See GA. CONST. art. VI, § 7, para. 1; IDAHO CONST. art. V, § 7, art. VI, § 7; IDAHO CODE § 1-2404 (1990), § 34-716 (1981); KY. CONST. § 117; KY.REV.STAT.ANN. § 118A.030 (Baldwin 1983); LA. CONST. art. V, § 22; LA.REV.STAT.ANN. § 13:312.1 (West Supp.1989); MICH. CONST. art. VI, §§ 2, 8; MINN. CONST. art. VI, § 7; MINN.STAT.ANN. § 204B.06, subd. 6 (West Supp.1990); MONT.CODE ANN. §§ 3-2-101, 13-14-111 (1989); NEV. CONST. art. VI, § 3; NEV.REV.STAT. § 293.195 (1987); N.D. CONST. art. VI, § 7; N.D.CENT.CODE § 16.1-11-08 (1989); OHIO CONST. art. IV, § 6(A)(1), (2), (3); OHIO REV.CODE ANN. § 3505.04 (Page 1988); OKLA. CONST. art. VII, § 3; OKLA.STAT.ANN. tit. 20, §§ 3, 30.15 (West 1962 & Supp.1989); OR. CONST. art. VII, § 1; OR.REV.STAT. § 249.002(6) (1989); WASH. CONST. art. IV, § 3; WASH.REV.CODE ANN. §§ 2.06.070, 29.21.070 (1989); WIS. CONST. art. VII, §§ 4, 5, 9; WIS.STAT.ANN. § 5.60(1)(a) (West 1986); see also JUDICIAL STUDY, *supra* note 6, at 41 n. 64. See generally American Judicature Society, *Judicial Selection in the States* (rev. Feb. 2, 1989) (unpublished monograph, copy on file at Arizona State Law Journal) [hereinafter *Judicial Selection*]; CONFERENCE OF STATE COURT ADMINISTRATORS AND NATIONAL CENTER FOR STATE COURTS, *STATE COURT ORGANIZATION* (1987).
- 61 States in which appellate judges are selected by partisan election for full term are Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Tennessee (Supreme Court only), Texas, and West Virginia. See ALA. CONST. amend. 328, art. VI, § 6.13; ARK. CONST. art. VII, § 6; ARK.STAT.ANN. § 16-12-102 (1987); ILL. CONST. art. VI, § 12; ILL.ANN.STAT. ch. 46, para. 2A-9 (Smith-Hurd Supp.1990); MISS. CONST. art. VI, §§ 145, 145A, 145B; MISS.CODE ANN. § 23-15-995 (1972 & Supp.1989); N.C. CONST. art. IV, § 16; N.C.GEN.STAT. § 7A-10 (1989), §§ 163-140(b)(4), (5),



163-140.1 (1987); PA. CONST. art. V, § 13(a); PA.STAT.ANN. tit. 25, §§ 2752, 2867 (Purdon Supp.1990); TENN. CONST. art. VI, §§ 3, 4 (Tennessee Supreme Court only, initial selection for full term); TEX. CONST. art. V, §§ 2, 4, 6; W.VA. CONST. art. VIII, §§ 2, 5; W.VA.CODE § 3-5-4 (1990), § 3-1-17 (Supp.1989), § 51-1-1 (1981); see also JUDICIAL STUDY, *supra* note 6, at 41 n. 63. See generally Judicial Selection, *supra* note 60.

- 62 In Maine, New Hampshire, and New Jersey, the Governor appoints judges with the approval of some other body. ME. CONST. art. V, pt. 1, § 8; N.H. CONST. pt. 2, art. 46; N.J. CONST. art. VI, § 6, para. 1; see also JUDICIAL STUDY, *supra* note 6, at 41 nn. 67-68. In Rhode Island, South Carolina, and Virginia, the state legislature selects judges. R.I. CONST. art. X, § 4; S.C. CONST. art. V, §§ 3, 8, 9; VA. CONST. art. VI, § 7. In the District of Columbia, the President of the United States appoints all judges with the advice and consent of the Senate. D.C.CODE ANN. § 11-1501(a) (1981). In California, the Governor appoints appellate judges with the consent of a Commission on Judicial Appointments. CAL. CONST. art. VI, § 16.
- 63 States adopting a merit plan in their constitution or by statute as a means of initially selecting appellate judges are Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Oklahoma (supreme court and court of criminal appeals only), South Dakota, Tennessee (intermediate appellate courts only), Utah, Vermont, and Wyoming. See ALASKA CONST. art. IV, §§ 5, 7; ALASKA STAT. § 22.05.080(a) (1988); ARIZ. CONST. art. VI, §§ 30, 37, 39; COLO. CONST. art. VI, § 20(1); CONN. CONST. art. V, § 2; CONN.GEN.STAT.ANN. §§ 2-40, 2-42 (West 1988); FLA. CONST. art. V, § 11; HAW. CONST. art. VI, § 3; IND. CONST. art. VII, § 10; IOWA CONST. art. V, § 15; IOWA CODE ANN. § 46.15 (West Supp.1989); KAN. CONST. art. III, § 5; KAN.STAT.ANN. § 20-3004 (1988); MD. CONST. art. IV, § 5; MO. CONST. art. V, § 25(a); NEB. CONST. art. V, § 21; N.M. CONST. art. VI, §§ 35, 36, 37 (vacancies only); N.Y. CONST. art. VI, § 2; N.Y.JUD.LAW § 68 (McKinney 1983); OKLA. CONST. art. VII-B, §§ 1, 4; S.D. CONST. art. V, § 7 (supreme court only); S.D. CODIFIED LAWS ANN. § 16-1-2 (1987); TENN.CODE ANN. § 17-4-109 (Supp.1989); UTAH CONST. art. VIII, §§ 8, 9; UTAH CODE ANN. §§ 20-1-7.1 to -1-7.7 (Supp.1990); VT. CONST. ch. II, § 32; VT.STAT.ANN. tit. 4, §§ 444, 603 (1988); WYO. CONST. art. V, § 4. States adopting a merit plan by executive order as a means of initially selecting appellate judges are Delaware, see Del.Exec.Order No. 104, 24 (July 21, 1981) (Governor Pierre S. DuPont IV); Massachusetts, MASS. CONST. pt. 2, ch. 3, § 82, Mass. Exec.Order No. 114 (Jan. 3, 1975) (Gov. Michael S. Dukakis); and New York, N.Y. CONST. art. VI, § 4; N.Y.JUD.LAW § 71 (McKinney 1983) (for appellate division of supreme court and court of claims); N.Y.Exec.Order No. 5 (February 21, 1975) (Governor Hugh L. Carey) (superseded by N.Y.Exec.Order No. 9 (March 4, 1983) (Governor Mario M. Cuomo)); see also JUDICIAL STUDY, *supra* note 6, 31-32 nn. 74, 75 & 77. See generally Judicial Selection, *supra* note 60.
- 64 See Berkson, Judicial Selection in the United States: A Special Report, 64 JUDICATURE 176, 178 (1980). Louisiana, LA. CONST. art. 5, § 22(B), and Illinois, ILL. CONST. art. 6, § 12(c), have supreme court judges make appointments to fill interim vacancies on their appellate courts.
- 65 See generally Judicial Selection, *supra* note 60. States using a merit selection system to appoint all appellate judges are Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, South Dakota, Utah, Vermont, and Wyoming. *Id.*
- 66 These states are New York, Oklahoma, and Tennessee. *Id.*
- 67 *Id.*
- 68 States adopting a merit plan in their constitution, by statute, or by executive order to fill appellate judicial vacancies include Georgia, Idaho, Kentucky, Montana, Nevada, North Dakota, and Pennsylvania. See GA. CONST. § 2-3303; Ga.Exec.Order of Apr. 28, 1975 (Governor George Busbee); IDAHO CONST. art. IV, § 6, art. V, §§ 6, 19, art. VI, § 7; IDAHO CODE §§ 1-2102, 1-2404 (Supp.1989); KY. CONST. §§ 117, 118, 152; MONT. CONST. art. VII, § 8; MONT.CODE ANN. §§ 3-1-1001, 3-2-1003 (1989); NEV. CONST. art. VI, §§ 3, 20; NEV.REV.STAT. § 2.040 (1986); N.D. CONST. art. VI, §§ 7, 13; PA. CONST. art. IV, § 8(b), art. V, § 13(b); PA.STAT.ANN. tit. 71, § 67.1 (Purdon Supp.1989); Pa.Exec.Order No. 1979-1 (Feb. 17, 1983) (Governor Robert P. Casey); see also JUDICIAL STUDY, *supra* note 6, at 31 & nn. 76-77.
- 69 See ARIZONA TOWN HALL, *supra* note 56, at 35.
- 70 See Hink, Judicial Reform in Arizona, 6 ARIZ.L.REV. 13, 16 (1964).
- 71 *Id.* at 17, 24.

- 72 See Ariz. Republic, May 1, 1965, at 12, col. 1.
- 73 See *id.* at col. 2.
- 74 Cameron, *supra* note 50, at 426.
- 75 *Id.* at 426 n. 15. Vice-chairpersons were Lew Davis, Newton Rosenzweig, and Roland Wheeler. The treasurer was Sam Maridian, Jr., and the secretary was Mrs. Gordon Matteson. *Id.*
- 76 *Id.* at 426.
- 77 Ariz. Republic, Nov. 19, 1967, at A13, col. 1.
- 78 Ariz. Republic, Nov. 18, 1967, at 26, col. 6.
- 79 See Cameron, *supra* note 50, at 426; ARIZONA COURTS SUMMARY REPORT, *supra* note 51, at 5.
- 80 See Ariz. Republic, Oct. 31, 1970, at 44, col. 2.
- 81 SECRETARY OF STATE, STATE OF ARIZONA, OFFICIAL CANVASS, GENERAL ELECTION Nov. 3, 1970 (compiled & issued by Wesley Bolin, Nov. 27, 1970); see also ARIZ. CONST. art. VI, § 1.
- 82 See Ariz. Republic, Oct. 31, 1970, at 44, col. 2. This commission was renamed the Commission on Judicial Conduct following voter approval in 1988. SECRETARY OF STATE, STATE OF ARIZONA, OFFICIAL CANVASS, GENERAL ELECTION Nov. 8, 1988 (rev. Jan. 13, 1989).
- 83 ARIZONA TOWN HALL, *supra* note 56, at 30.
- 84 See H.Con.Res. 10, 29th Leg., 1st Reg.Sess., 1969 J. OF THE HOUSE 197.
- 85 *Id.* at 910.
- 86 See S.Con.Res. 6, 30th Leg., 1st Reg.Sess., 1971 J. OF THE SENATE 85 (introduced Jan. 19, 1971).
- 87 See *id.*
- 88 *Id.* at 1214; Ariz. Daily Star, Apr. 21, 1972, at 9B, col. 2.
- 89 H.Con.Res. 2001, 30th Leg., 2d Reg.Sess., 1972 J. OF THE HOUSE 29.
- 90 Ariz. Daily Star, Apr. 21, 1972, at 9B, col. 2.
- 91 See H.Con.Res. 2001, 30th Leg., 2d Reg.Sess., 1972 J. OF THE HOUSE 29 (introduced Jan. 11, 1972).
- 92 William D. Browning is presently Chief Judge of the United States District Court, District of Arizona.
- 93 Rawlinson, Judges' Appointment Urged, Ariz. Daily Star, Apr. 11, 1972, at 1B, col. 1.
- 94 *Id.*
- 95 H.Con.Res. 2001, 30th Leg., 2d Reg.Sess., 1972 J. OF THE HOUSE 1613.
- 96 See Interview with William D. Browning, former state bar president, in Tucson, Arizona (Aug. 17, 1989) [hereinafter Browning Interview]; ARIZONA TOWN HALL, *supra* note 56, at 35; Cameron, *supra* note 50, at 428 n. 21.
- 97 Browning Interview, *supra* note 96; ARIZONA TOWN HALL, *supra* note 56, at 2; see Alley, The Merits of Merit Selection, Ariz. Bus. Gazette, June 1, 1987, at SS10, col. 3.
- 98 S.Con.Res. 1001, 31st Leg., 1st Reg.Sess., 1973 J. OF THE SENATE 29. Once again, Senator Sandra Day O'Connor was a co-sponsor. *Id.*

- 99 Ariz. Daily Star, Jan. 30, 1973, at 1A, col. 4.
- 100 Id.
- 101 Id.
- 102 Ariz. Daily Star, Feb. 2, 1973, at 6A, col. 6.
- 103 Id. Until 1983, Arizona consisted of 14 counties. They were Apache, Cochise, Coconino, Gila, Graham, Greenlee, Maricopa, Mohave, Navajo, Pima, Pinal, Santa Cruz, Yavapai, and Yuma. ARIZ.REV.STAT.ANN. §§ 11-103 to -116 (1990). In 1983, a fifteenth county, La Paz, was created. Id. § 11-117.
- 104 Ariz. Daily Star, Feb. 2, 1973, at 6A, col. 6.
- 105 Ariz. Daily Star, Feb. 2, 1973, at 1B, col. 5.
- 106 MacNitt, Who Is Best Qualified To Judge the Judges, Ariz. Daily Star, Feb. 4, 1973, at 1F, col. 1.
- 107 Id.
- 108 ARIZONA TOWN HALL, *supra* note 56, at xi. The list of prominent Arizonans participating in this Town Hall included distinguished banking, mining, business, professional, legislative, legal, newspaper, and civic leaders. Members of the legal community participating in this Town Hall included attorneys Richard M. Bilby (currently a judge on the United States District Court, District of Arizona); then-State Bar of Arizona President William D. Browning; then-Arizona Supreme Court Chief Justice Jack D.H. Hays; Judge William E. Bubank, Arizona Court of Appeals, Division One; then-Maricopa County Superior Court Judge Donald F. Froeb (later appointed to the Arizona Court of Appeals, Division One); then-Greenlee County Superior Court Judge Lloyd Fernandez (currently Chief Judge, Arizona Court of Appeals, Division Two); the late Ben C. Birdsall (who was then Presiding Judge of Pima County Superior Court and who was later appointed to the Court of Appeals, Division Two); then-Arizona Attorney General Gary Nelson; and then-University of Arizona College of Law Dean Charles E. Ares. B.V. Sturdivant was also a participant. The report committee was chaired by Stephen C. Shadegg. Other members included Phoenix attorneys Charles E. Jones, Lex J. Smith, Norman C. Storey, and Tucson attorney Edmund D. Kahn. Id. at xix-xxiv.
- 109 S.Con.Res. 1001, 31st Leg., 1st Reg.Sess., 1973 J. OF THE HOUSE 2099-2100.
- 110 Ariz. Daily Star, Mar. 17, 1973, at 1A, col. 5.
- 111 Browning Interview, *supra* note 96.
- 112 St. Cyr, Vote Asked on Judicial Selection, Ariz. Daily Star, Apr. 13, 1973, at 17A, col. 1.
- 113 Id.
- 114 Ariz. Daily Star, Apr. 3, 1974, at 7A, col. 9.
- 115 Id.
- 116 Browning Interview, *supra* note 96; *Bridegroom v. State Bar*, 27 Ariz.App. 47, 48, 550 P.2d 1089, 1090 (1976); see Ariz. Daily Star, Nov. 2, 1974, at 7A, col. 1. Stanley G. Feldman is currently Vice-Chief Justice of the Arizona Supreme Court.
- 117 Cameron, *supra* note 50, at 427.
- 118 Id. at 428.
- 119 PUBLICITY PAMPHLET, *supra* note 55, at 26.
- 120 See id. at 29; ARIZ. CONST. art. VI, § 40.
- 121 Lindsey, Appointive Judge Issue Takes over Election Talk, Ariz. Daily Star, Oct. 4, 1974, at 2A, col. 5.

- 122 MacNitt, Group Forms To Oppose Appointment of Judges, *Ariz. Daily Star*, Oct. 8, 1974, at 2A, col. 2.
- 123 Dennis DeConcini is presently a United States Senator (D-Ariz.).
- 124 Hatfield, 5 Politicians Join Against Prop. 108, *Ariz. Daily Star*, Oct. 19, 1974, at 5B, col. 1.
- 125 *Id.*
- 126 See MacNitt, *supra* note 122, at 2B, col. 2.
- 127 *Ariz. Daily Star*, Oct. 19, 1984, at 5B, col. 1.
- 128 *Ariz. Daily Star*, Oct. 30, 1974, at 2A, col. 3.
- 129 *Id.*
- 130 *Ariz. Daily Star*, Oct. 31, 1974, at 2A, col. 1.
- 131 *Id.*
- 132 See *Bridegroom v. State Bar*, 27 Ariz.App. 47, 48, 550 P.2d 1089, 1090 (1976).
- 133 *Ariz. Daily Star*, Nov. 2, 1974, at 7A, col. 1.
- 134 *Id.*
- 135 SECRETARY OF STATE, STATE OF ARIZONA, OFFICIAL CANVASS, GENERAL ELECTION Nov. 5, 1974 (compiled by Wesley Bolin, Nov. 29, 1974).
- 136 Shultz, *The Judges and the System*, ARIZ.B.J., Oct. 1978, at 26 (quoting Chief Justice Cameron).
- 137 See *id.*
- 138 PUBLICITY PAMPHLET, *supra* note 55, at 29.
- 139 *Phoenix Gazette*, Oct. 4, 1978, at A6, col. 1 (editorial—A Better System).
- 140 See J. HURST, *supra* note 3, at 123.
- 141 Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U.L.REV. 1, 37 (1956); see also Krivosha, *Acquiring Judges by the Merit Selection Method*, 40 SW.L.J. 15, 19 (1986).
- 142 See Shultz, *supra* note 136, at 26.
- 143 *Id.*
- 144 THE FEDERALIST NO. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961).
- 145 ARIZ.CODE OF JUDICIAL CONDUCT Canon 3, contained in ARIZ.SUP.CT.R. 81, 17A ARIZ.REV.STAT.ANN. (1988). Section (A)(1) states in part that a judge “should be unswayed by partisan interests.” *Id.*
- 146 Krivosha, *supra* note 141, at 17-18.
- 147 *Id.* at 18.
- 148 ARIZONA TOWN HALL, *supra* note 56, at 30; Barber, *Ohio Judicial Elections—Nonpartisan Premises with Partisan Results*, 32 OHIO ST.L.J. 762, 776 n. 52 (1971).
- 149 See Shultz, *supra* note 136, at 26.

- 150 Cf. *Breakstone v. MacKenzie*, 561 So.2d 1164, 1166-67, 1173 (Fla.Dist.Ct.App.1988), quashed in part sub nom. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla.1990) (district judge should have recused herself from two cases in which lawyers had contributed to husband's judicial campaign).
- 151 See *Breakstone*, 561 So.2d at 1168-69 & n. 6; *ARIZONA TOWN HALL*, supra note 56, at x.
- 152 See *ARIZONA TOWN HALL*, supra note 56, at 24-25.
- 153 *Id.*
- 154 Hill, *A Time of Challenge: Judicial Reform in Texas*, 52 *TEX.B.J.* 165, 165 (1989).
- 155 Borges, "The Big-Money Club" Strikes Again, *Tex.Law.*, Oct. 10, 1988, § 3, at 2, col. 1.
- 156 *Id.* at 3, col. 1.
- 157 *Id.* at 3, col. 2.
- 158 Chen, *For Judges, the Stakes Are Rising*, *L.A. Times*, Mar. 4, 1988, at 1, 27 (pt. 1), col. 4.
- 159 See *id.* at 26 (pt. 1), col. 2.
- 160 *Id.* at 1 (pt. 1), col. 1.
- 161 *Id.* at 26 (pt. 1), col. 1.
- 162 *Id.*
- 163 *Id.*
- 164 *Id.*
- 165 See *ARIZONA TOWN HALL*, supra note 56, at 25; Chen, supra note 158, at 1 (pt. 1), col. 1.
- 166 Chen, supra note 158, at 1 (pt. 1), col. 1.
- 167 Wynn, *Return to Direct Election of Judges Backed on Both Sides of Political Fence*, *Ariz. Republic*, Oct. 25, 1981, at AA1, col. 4.
- 168 *Id.*; Letter from Melvin McDonald to Robert Bauer (Sept. 18, 1981).
- 169 Krivosha, supra note 141, at 20.
- 170 *Ariz. Republic*, Oct. 15, 1972, at A12, col. 4.
- 171 See *ARIZONA TOWN HALL*, supra note 56, at 26. Eighty percent of the voting population voted for supreme court candidates while 87% voted for a state mine inspector candidate. See Fioramonti, *A Look at the Proposed Judge Selection System*, *Summation*, Sept. 1974, at 1, col. 1.
- 172 See Hall & Aspen, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 *JUDICATURE* 340, 343-47 (1987) (concluding that roll-off is also a common phenomenon in retention elections at the major trial court level); see also Lovrich & Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 *JUST.SYS.J.* 235, 238 n. 9 (1984).
- 173 See Shultz, supra note 136, at 26.
- 174 See *How Much Do Voters Know or Care About Judicial Candidates?*, 38 *J.A.M. JUDICATURE SOC'Y* 141, 141 (1955).
- 175 See *ARIZONA TOWN HALL*, supra note 56, at 25.

- 176 ARIZ. CODE OF JUDICIAL CONDUCT Canon 7B(1)(c), contained in ARIZ.SUP.CT.R. 81, 17A  
ARIZ.REV.STAT.ANN. (1988).
- 177 Id.
- 178 Borges, *supra* note 155, at 4, col. 4.
- 179 See ARIZONA TOWN HALL, *supra* note 56, at 24.
- 180 Johnson, Voter Survey: Judges Unknown, *Tex.Law.*, Nov. 10-14, 1986, at 8, col. 1. The survey indicated that although 20%  
declined to vote for judges, of those who did, 39.8% voted based upon party affiliation. *Id.* at 1, col. 1.
- 181 Champagne, Judicial Reform in Texas, 72 JUDICATURE 146, 151 (1988).
- 182 See *supra* notes 26-31 and accompanying text.
- 183 See Shultz, *supra* note 136, at 26.
- 184 *Id.* at 27. Judge Broomfield is now a United States District Court judge for the District of Arizona.
- 185 Fioramonti, *supra* note 171, at 3, col. 4.
- 186 Barrett, Selected Not Elected, *Ariz. Republic*, July 23, 1978 (Magazine), at 15, col. 1.
- 187 See U.S. CONST. art. II, § 2, cl. 2 (providing for the appointment of members of the United States Supreme Court); cf.  
Krivosha, *supra* note 141, at 16 (discussing the advantages of appointment rather than election of the judiciary).
- 188 See Shultz, *supra* note 136, at 28-30.
- 189 See Henschen, Moog & Davis, Judicial Nominating Commissioners: A National Profile, 73 JUDICATURE 328, 334 (1990);  
Jenkins, *supra* note 1, at 85-86 (discussing bar politics); Shultz, *supra* note 136, at 28.
- 190 R. WATSON & R. DOWNING, *supra* note 3, at 20. One group primarily consists of corporate lawyers and attorneys  
representing civil defendants while the second group primarily consists of plaintiffs' lawyers and the criminal defense bar. *Id.*  
at 22-24.
- 191 See PUBLICITY PAMPHLET, *supra* note 55, at 30-31.
- 192 See, e.g., Barrett, *supra* note 186, at 10.
- 193 PUBLICITY PAMPHLET, *supra* note 55, at 29.
- 194 ARIZ. CONST. art. VI, § 36; Barrett, *supra* note 186, at 8.
- 195 Critics of this requirement include Justice Cameron and Commission member Robert W. Paulin. Telephone interview with  
Robert W. Paulin, Appellate Court Commission member (Mar. 12, 1990); Shultz, *supra* note 136, at 30.
- 196 ARIZONA TOWN HALL, *supra* note 56, at 32-33.
- 197 In September 1981, Arizona Republican Committeeman Robert R. Bauer wrote, in opposition to a return to election of judges:  
Direct election unnecessarily increases work load for precinct committeemen. Merit selection eliminates the need to circulate  
from 20 to 25 additional petitions every two years, organize and staff 20 to 25 campaign committees, raise \$20,000.00 to  
\$35,000.00 for each of 20 to 25 campaigns and find candidates to run for judge.  
R. Bauer, Merit Selection Works—Keep It (Sept. 18, 1981) (unpublished, copy on file at Arizona State Law Journal).
- 198 See Magistad, Babbitt Backs Merit System for Judiciary, *Ariz. Daily Star*, Jan. 20, 1982, at 1B, col. 5; Wynn, *supra* note 167,  
at AA1, col. 3.
- 199 See *Ariz. Daily Star*, Feb. 29, 1984, at 14A, col. 1 (editorial—Judicial Merit).

- 200 Republican Evan Mecham was Governor from January 1987 to April 4, 1988.
- 201 Barrett, *supra* note 186, at 10. Castro appointed Republican James Moeller, now a justice on the Arizona Supreme Court, to the Maricopa County Superior Court. *Id.*
- 202 Fischer, Panel OKs Plan Requiring Senate To Confirm Judicial Appointees, *Ariz. Daily Star*, Jan. 29, 1986, at 1B, col. 4. Wesley Bolin served as Governor from October 1977 to March 1978. H.J.Res. 2003, 33d Leg., 2d Sess., 1978 *Ariz.Sess.Laws* 1240-41.
- 203 The seven Republican appointees were James Moeller (Arizona Supreme Court), John M. Roll (Arizona Court of Appeals, Division Two), John F. Kelly (Pima County Superior Court), Jeffrey A. Hotham, Michael O. Wilkinson, Norman D. Hall, and Mark W. Armstrong (Maricopa County Superior Court).
- 204 See K. Sherk, Political Affiliations of Judges Appointed Under Merit Selection 1-2 (Mar. 8, 1990) (unpublished, copy on file at Arizona State Law Journal) (statistics compiled by former state bar president); see also T. Kleinschmidt, *supra* note 51, at 53-54 & app. III.
- 205 K. Sherk, *supra* note 204, at 2.
- 206 See T. Kleinschmidt, *supra* note 51, at 54.
- 207 Winn, Return to Direct Election of Judges Backed on Both Sides of Political Fence, *Ariz. Republic*, Oct. 25, 1981, at AA1, col 2.
- 208 Shultz, *supra* note 136, at 28.
- 209 *Id.*
- 210 See, e.g., ARIZ. JUDICIAL NOMINATING COMMISSIONS RULES OF PROCEDURE Rule 6, contained in 17B ARIZ.REV.STAT.ANN. (1988).
- 211 See Kelly, 3 Finalists Chosen for High Court, *Ariz. Republic*, Dec. 3, 1988, at B1, col. 1.
- 212 See THE WRIT, Aug. 1989, at 2, col. 2.
- 213 See *Ariz. Republic*, Sept. 15, 1976, at A6, col. 1 (editorial—Judging the Judges); *Ariz. Republic*, Nov. 12, 1978, at A6, col. 1 (editorial—Judging the Judges); see *infra* text accompanying notes 270-306.
- 214 See Shultz, *supra* note 136, at 28.
- 215 See Williams, Selecting Michigan's Justices, 1983 *DET.C.L.REV.* 1489, 1495.
- 216 See Barrett, Campaign Practices in Judges' Elections Spark Drive for Merit Appointments in Pennsylvania, *Wall St.J.*, Dec. 9, 1988, at A16, col. 2.
- 217 Browning Interview, *supra* note 96; see R. Bauer, Why Merit Selection Is Better Than the Direct Election of Judges in Maricopa County and Pima County (Sept. 14, 1981) (unpublished, copy on file at Arizona State Law Journal) [hereinafter *Why Merit Selection Is Better*]; ARIZONA TOWN HALL, *supra* note 56, at x; JUDICIAL STUDY, *supra* note 6, at 49-50.
- 218 *Why Merit Selection Is Better*, *supra* note 217, at 3.
- 219 Cameron, *supra* note 50, at 435; see also Carbon, Judicial Retention Elections: Are They Serving Their Intended Purpose?, 64 *JUDICATURE* 210, 221 (1980). Even when judicial elections were conducted, the defeat of incumbents was a rarity. For example, in Arizona between 1958 and 1972, only five of 50 superior court judges who had first been appointed were defeated when they stood for retention election. See ARIZONA TOWN HALL, *supra* note 56, at 31.
- 220 See ARIZONA TOWN HALL, *supra* note 56, at 26.
- 221 ARIZ. CONST. art. VI, § 36.

- 222 Id. § 37.
- 223 Id.
- 224 Id. § 38.
- 225 Id. § 36(A).
- 226 Ariz. Daily Star, Dec. 28, 1974, at 1B, col. 6. The members selected by Williams were the following: Irish Hill, Pima County Democratic Party Leader; Cressworth Lander, a development director; Peter Herder, a contractor; Bella Elias Lumm, a real estate and insurance woman; and Donald Diamond, a telecaster. Id.
- 227 Ariz. Daily Star, Jan. 3, 1975, at 5C, col. 7. Governor Williams selected five commission members for the Appellate Court Commission. These individuals were the following: Newton Rosenzweig, Phoenix; Jacqueline Egan, Tucson; Joe C. Dale, Yuma; Marvin Rohrer, Prescott; and Oliver Leininger, Sierra Vista. Id.
- 228 See id.; see also Ariz. Daily Star, Dec. 28, 1974, at 1B, col. 6.
- 229 Phoenix Gazette, Feb. 3, 1975, at B10, col. 2.
- 230 Ariz. Daily Star, Feb. 21, 1975, at 12A, col. 1. Governor Castro nominated the following five lay people for the Pima County Trial Court Commission: Duane Anderson, M.M. Sundt Construction; Reginald Morrison, president of Tucson Memorial Park; Dorothy S. Fannin; Joe Cesare, president of Broadway Realty and Trust and Viva Development Corporation; and Martin Leon, Sr., superior court bailiff. Id. Castro nominated the following five lay people for the Maricopa County Trial Court Commission: Jean Hunnicutt, vice president of the Arizona chapter of American Association of University Women; Dwight Patterson, a Mesa rancher; Dr. Robert C. Shapiro, a psychiatrist; Mrs. Eugene Tompane, Chairperson of the Parks and Recreation Division of the Phoenix Bond Advisory Committee; and Augustus Shaw, a Phoenix elementary school principal. Phoenix Gazette, Feb. 3, 1975, at B10, col. 2. Castro's nominees for the appellate commission were the following: Robert A. Pancrazi, Yuma, real estate and insurance; Thomas C. Morse, Flagstaff, marketing manager for Southern Union Gas Company; Jean Matthews, associate director of the Miss Arizona Pageant; Ernest Scott, Jr., owner of Mojave Amusement Vendors; and Elizabeth Jones, president of the Ocotillo Club. Ariz. Daily Star, Mar. 4, 1975, at 12A, col. 1.
- 231 Four Tucsonans Nominated To Select State Judges, Ariz. Daily Star, Jan. 9, 1975, at 1B, col. 5 [hereinafter Four Tucsonans Nominated]. The State Bar nominated the following three lawyers for the Pima County Trial Court Commission: D. Burr Udall, Gilbert Gonzalez, and Jack A. Ettinger. Id.
- 232 Id. The State Bar nominated the following three lawyers for the Maricopa County Trial Court Commission: David C. Tierney, Nicholas Udall, and Lawrence Fleming. Id.
- 233 Id. The State Bar nominated the following three lawyers for the Appellate Court Commission: John P. Frank, Phoenix; James Boyle, Prescott; and William D. Browning, Tucson. Id.
- 234 Browning Interview, *supra* note 96.
- 235 Four Tucsonans Nominated, *supra* note 231, at 1B, col. 5. Frank had clerked for Justice H.L. Black of the United States Supreme Court.
- 236 See Ariz. Republic, Mar. 10, 1987, at A10, col. 1 (editorial—Keep Merit System Intact); Ariz. Daily Star, Mar. 28, 1987, at 3B, col. 1.
- 237 Ariz. Daily Star, Mar. 28, 1987, at 3B, col. 1; Ariz. Republic, Mar. 10, 1987, at A10, col. 1 (editorial—Keep Merit System Intact).
- 238 See Ariz. Daily Star, Mar. 28, 1987, at 3B, col. 1. David Bartlett is presently a state senator.
- 239 See Ariz. Republic, Mar. 10, 1987, at A10, col. 2 (editorial—Keep Merit System Intact); Ariz. Daily Star, Mar. 28, 1987, at 3B, col. 1.



- 240 Op.Ariz.Att'y Gen. 187-043 (1987).
- 241 See Ariz. Daily Star, Mar. 28, 1987, at 3B, col. 1.
- 242 See ARIZ. CONST. art. VI, § 36(A).
- 243 Lavelle & Murphy, 'Grudge' Amazes Meyerson, Phoenix Gazette, June 3, 1989, at B1, col. 1.
- 244 Id.
- 245 Id.
- 246 Id. at B2, col. 2.
- 247 Id.
- 248 Hatfield, Merit Selection of Judges Criticized, Ariz. Daily Star, May 7, 1975, at 1B, col. 3.
- 249 Id. Alfred J. Rogers is currently a Maricopa County Superior Court Judge.
- 250 Id.
- 251 Id.
- 252 Hatfield, Arnold, Gin To Be Judges, Ariz. Daily Star, June 26, 1975, at 1A, col. 3. Other nominees were Lawrence K. Bret Harte, Arthur J. Hutton, William K. Richey, and William N. Sherrill. Id. at 16A, col. 1.
- 253 Cameron, *supra* note 50, at 429.
- 254 See Barrett, *supra* note 186, at 10.
- 255 Browning Interview, *supra* note 96.
- 256 See Ariz. Daily Star, July 8, 1978, at 1B, col. 2 (describing Meehan's appointment). The other two nominees were Republicans James M. Wilkes and William K. Richey. Id.
- 257 Johnsen, Joyner Alleges 'Fix' in Meehan Choice for Judge, Ariz. Daily Star, July 12, 1978, at 1B, col. 1.
- 258 Id.
- 259 Id.
- 260 ARIZ. CONST. art. VI, § 38.
- 261 See id.; Op.Ariz.Att'y Gen. I86-117 (Dec. 8, 1986).
- 262 See Op.Ariz.Att'y Gen. I86-117 (Dec. 8, 1986).
- 263 Phoenix Gazette, Dec. 23, 1986, at 12A, col. 1 (editorial—Something is Awry). The nominees were trial attorney Robert Myers and Court of Appeals Judge Robert Corcoran, both Democrats, and Maricopa County Superior Court Judge James Moeller, a Republican. Id.
- 264 See id.
- 265 Ariz. Daily Star, Jan. 11, 1987, at 2C, col. 1 (editorial—Quality First); Ariz. Daily Star, March 14, 1987, at 4B, col. 3.
- 266 Asseo, Supreme Court Nominees Are Rejected by Mecham, Ariz. Daily Star, Jan. 8, 1987, at 1A, col. 2.
- 267 See Ariz. Daily Star, Jan. 11, 1987, at 2C, col. 1 (editorial—Quality First).
- 268 Ariz. Daily Star, Feb. 12, 1987, at 5B, col. 1.

- 269 Ariz. Daily Star, Feb. 14, 1987, at 2B, col. 1.
- 270 Shultz, *supra* note 136, at 31.
- 271 Reath, Judicial Evaluation—the Counterpart to Merit Selection, 60 A.B.A. J. 1246, 1247 (1974).
- 272 COMMISSION ON THE COURTS, REPORT OF THE COMMISSION ON THE COURTS, 3.3, at 24 (1989) (Recommendation 3.3). The Arizona Supreme Court approved Recommendation 3.3, for appellate and district court judges. Arizona Supreme Court, Summary Arizona Supreme Court Decision on Commission on the Courts Recommendations, Rationale, at 4-5 (1989) (unpublished report, copy on file at Arizona State Law Journal).
- 273 ARIZONA TOWN HALL, *supra* note 56, at 28.
- 274 See *id.*
- 275 Telephone interview with W. Shapard Wolf, Jr., Director of Survey Research Laboratory at Arizona State University (Feb. 27, 1990) [hereinafter Wolf Interview on Feb. 27, 1990].
- 276 Slavin, Judicial Evaluation in Arizona, ARIZ.B.J., Summer 1976, at 42.
- 277 *Id.* at 45.
- 278 *Id.*
- 279 *Id.*
- 280 Telephone interview with W. Shapard Wolf, Jr., Director of Survey Research Laboratory at Arizona State University (Nov. 27, 1989) (copy on file at Arizona State Law Journal) [hereinafter Wolf Interview on Nov. 29, 1989]. However, the 1990 questionnaire expanded the “Explanation of Terms” to add the words “and is prepared for hearing and/or trial” to the section on “Consideration of Briefs and Authorities.” Interview with W. Shapard Wolf, Jr., Director of Survey Research Laboratory at Arizona State University (Aug. 24, 1990) [hereinafter Wolf Interview on Aug. 24, 1990].
- 281 See Slavin, *supra* note 276, at 42.
- 282 Wolf Interview on Aug. 24, 1990, *supra* note 280.
- 283 See W. Wolf, Comments About the Methods of the 1990 Arizona Judicial Evaluation Poll 2 (1990) (unpublished manuscript, copy on file at Arizona State Law Journal).
- 284 See Wolf Interview on Feb. 27, 1990, *supra* note 275; Wolf Interview on Nov. 27, 1989, *supra* note 280.
- 285 See Wolf Interview on Feb. 27, 1990, *supra* note 275.
- 286 W. WOLF, COMMENTS ABOUT THE METHODS OF THE 1988 ARIZONA JUDICIAL EVALUATION POLL 1 (1988). In 1988, after inactive, judicial, out-of-state, and most recent admittees were excluded, the following were the number of active State Bar members: 5528 in Maricopa County (73%), 1438 in Pima County (19%), and 622 in the remainder of the state (8%). One thousand nine hundred thirty-eight survey forms were mailed as follows: 1383 to Maricopa County, 383 to Pima County, and 172 to the remainder of the state. Wolf Interview on Feb. 27, 1990, *supra* note 275.
- 287 W. Wolf, *supra* note 283, at 1. In 1990, surveys were sent to 2712 attorneys. *Id.*
- 288 See Shultz, *supra* note 136, at 30-31.
- 289 See W. Wolf, *supra* note 283, at 2.
- 290 Slavin, *supra* note 276, at 43.
- 291 See 1990 State Bar General Membership Survey, ARIZ. ATT’Y, July 1990, at 38.

- 292 See Stookey & Watson, Merit Retention Elections: Can the Bar Influence Voters?, 64 JUDICATURE 235, 236 & n. 9 (1980) (citing GUTERMAN & MEIDINGER, IN THE OPINION OF THE BAR: A NATIONAL SURVEY OF BAR POLLING PRACTICES 8-10 (1977)).
- 293 Stookey & Watson, *supra* note 292, at 241.
- 294 *Id.*
- 295 Shultz, *supra* note 136, at 31.
- 296 See W. Wolf, *supra* note 283, at 3.
- 297 Memorandum from Newton Rosenzweig to Don Kenney, Sam A. McConnell, Jr., and Marjory Ollson (Feb. 15, 1979) (Merit Selection of Judges) (unpublished, copy on file at Arizona State Law Journal).
- 298 Ariz. Republic, Sept. 15, 1976, at A6, col. 2 (editorial—Judging the Judges); Shultz, *supra* note 136, at 32.
- 299 Holmes, Selecting Judges: To Vote or Not To Vote, 16 ARIZ.ADVOC., Nov. 1981, at 1, col. 1.
- 300 Shultz, *supra* note 136, at 31-32.
- 301 *Id.* at 31.
- 302 See Ariz. Republic, Sept. 15, 1976, at A6, col. 2 (editorial—Judging the Judges); Ariz. Republic, Nov. 12, 1978, at A6, col. 1 (editorial—Judging the Judges).
- 303 See Ariz. Republic, Sept. 15, 1976, at A6, col. 2 (editorial—Judging the Judges).
- 304 See W. Wolf, *supra* note 283, at 3.
- 305 Stookey & Watson, *supra* note 292, at 241.
- 306 Telephone interview with Thomas A. Zlaket, practicing Arizona attorney (Aug. 22, 1990) [hereinafter Zlaket Interview].
- 307 ARIZ. CONST. art. VI, § 38.
- 308 See Wolf Interview on Feb. 27, 1990, *supra* note 275.
- 309 This dichotomy in retention elections involving court of appeals judges exists because the Arizona Court of Appeals is divided into two divisions. Division One encompasses the counties of Apache, Coconino, La Paz, Maricopa, Mohave, Navajo, Yavapai, and Yuma Counties. Division Two encompasses Cochise, Gila, Graham, Greenlee, Pima, Pinal, and Santa Cruz Counties. ARIZ.REV.STAT.ANN. § 12-120 (Supp.1989). Judges from either division may participate in matters before the other division. *Id.* Of the 15 Division One judges, five must not be residents of Maricopa County but must reside in one of the remaining seven Division One counties. Of the six Division Two judges, two must not be residents of Pima County, but must reside in one of the remaining six Division Two counties. *Id.* § 12-120.02.
- 310 Slavin, Judicial Evaluation Poll, ARIZ.B.J., Aug. 1986, at 18-19. Harold D. Martin received a retention approval vote from only 33% of lawyers voting in the Maricopa County Bar Association poll while only 42% of lawyers said Gary Nelson should be retained. *Id.* at 68, 80.
- 311 Shultz, *supra* note 136, at 25.
- 312 *Id.* at 33.
- 313 Stookey & Watson, *supra* note 292, at 237.
- 314 Beard, 'Victory' Over Bar Poll Wasn't Cheap, Fenton Finds, Ariz. Daily Star, Nov. 9, 1978, at 10A, col. 1.

- 315 See Barrett, *supra* note 186, at 103. The State Bar does not take positions regarding the retention of judges. See Stookey & Watson, *supra* note 292, at 237; telephone interview with Donald Daughton, current chairperson of the State Bar's Judicial Evaluation Committee (Aug. 22, 1990).
- 316 Shultz, *supra* note 136, at 33; Stookey & Watson, *supra* note 292, at 237; see also Slorim, Bar Association Judicial Polls—Do They Make a Difference?, *B. LEADER*, Jan.-Feb. 1981, at 19.
- 317 Shultz, *supra* note 136, at 33.
- 318 See *Ariz. Daily Star*, Nov. 9, 1978, at 12A, col. 1.
- 319 *Id.* at col. 2.
- 320 Beard, *supra* note 314, at 10A, col. 1.
- 321 *Id.*
- 322 Winters, Triumphant Judge Carson Advises Lawyers To Alter Evaluation Method, *Ariz. Republic*, Nov. 6, 1980, at A14, col. 1.
- 323 See Turner, Fisher's Retention Race Heating Up, *Ariz. Daily Star*, Oct. 17, 1982, at 2E, col. 2.
- 324 *Id.*
- 325 *Ariz. Daily Star*, Nov. 4, 1982, at 3B, col. 1.
- 326 *THE WRIT*, Nov. 1982, at 2, col. 1 (editorial—The Judicial Evaluation Poll); see also *Ariz. Daily Star*, Nov. 29, 1982, at 12A, col. 1 (editorial—What Wasn't Done).
- 327 See *Ariz. Daily Star*, Nov. 14, 1982, at 2C, col. 1 (editorial—The 43 Percent Judge).
- 328 *Ariz. Daily Star*, Nov. 15, 1982, at 10A, col. 1 (editorial—The 43 Percent Judge).
- 329 *Id.*
- 330 Telephone interview of Michael D. Mandig, member of the Pima County Bar Association's Judicial Selection Committee (Aug. 22, 1990). Two Pima County judges standing for retention in 1990 received approval ratings below 70%. Judges Lillian Fisher and Harry Gin received approval ratings of 52% and 59% respectively. Huff, County Bar Association Releases Poll on Judges, *Ariz. Daily Star*, Aug. 22, 1990, at 1B, col. 4.
- 331 Whiting, Judge Peterson Is Taken to Task in Poll of Lawyers, *Ariz. Republic*, Aug. 22, 1990, at B3, col. 1. One Maricopa County judge standing for retention received an approval rating below 64%. Judge Howard V. Peterson received a 58% approval rating on the 1990 bar survey. *Id.* at B3, col. 2. Judge Peterson won retention with 55% approval for retention. *Phoenix Gazette*, Nov. 7, 1990, at A7, col. 5.
- 332 Barrett, *supra* note 186, at 10.
- 333 Kolbe, Results of Arizona's Election '76 Defy Any Logical Interpretation, *Phoenix Gazette*, Nov. 8, 1976, at A6, col. 5.
- 334 Jenkins, *supra* note 1, at 79.
- 335 See H. ABRAHAM, *supra* note 41, at 40; Carbon, *supra* note 219, at 221. Professor Abraham is the James Hart Professor of Government at the University of Virginia.
- 336 Jenkins, *supra* note 1, at 80.
- 337 Griffin & Horan, Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming, 67 *JUDICATURE* 68, 77 (1983).

- 338 See Cameron, *supra* note 50, at 435.
- 339 Maddux, Attorney Hooker Named as New Judge, *Ariz. Daily Star*, Aug. 8, 1980, at 1B, col. 3.
- 340 See *id.*
- 341 See Evans, Contacts Eased Way for Liberal onto the Bench, *Tucson Citizen*, June 22, 1981, at A4, col. 1. Assistant U.S. Attorney A. Bates Butler III and Pima County Attorney Stephen D. Neely were among those prosecutors opposing Hooker's candidacy. *Id.*
- 342 *Id.* at col. 3. Sheriff Clarence Dupnik and former Sheriff Richard Boykin supported Hooker. *Id.*
- 343 *Id.* at col. 4. Hooker identified these attorneys as S. Thomas Chandler, Stanley G. Feldman, Donald Pitt, Jack A. Ettinger, Clague A. Van Slyke, and William D. Browning. *Id.*
- 344 *Id.*
- 345 See Browning Interview, *supra* note 96.
- 346 See *Ariz. Daily Star*, Apr. 29, 1978, at 3B, col. 3.
- 347 See *Ariz. Daily Star*, Apr. 24, 1981, at 1B, col. 5.
- 348 Wynn, Return to Direct Election of Judges Backed on Both Sides of Political Fence, *Ariz. Republic*, Oct. 25, 1981, at AA1, col. 1.
- 349 See *Ariz. Daily Star*, Apr. 24, 1981, at 1B, col. 5.
- 350 *Id.*
- 351 Holmes, *supra* note 299, at 1, col. 1.
- 352 *Id.*
- 353 *Id.*
- 354 *Id.*
- 355 H.Con.Res.2001, 35th Leg., 2d Sess., (1982); HOUSE JUDICIARY COMMITTEE, 35th LEG., 2D SESS., COMMITTEE MINUTES, 2 (Feb. 8, 1982).
- 356 H.Con.Res.2001, 35th Leg., 2d Sess., 1982 J. OF THE HOUSE 29; HOUSE JUDICIARY COMMITTEE, 35th LEG., 2D SESS., COMMITTEE MINUTES, 2 (Feb. 8, 1982).
- 357 DeWitt, Group Pushing for Election of Judges Loses House Test, *Ariz. Daily Star*, Feb. 9, 1982, at 1B, col. 1.
- 358 *Id.*; see also S.Con.Res.1004, 35th Leg., 2d Sess., SENATE JUDICIARY COMMITTEE, 35th LEG., 2D SESS., COMMITTEE MINUTES, 4 (Feb. 8, 1982). Jim Kolbe is now an Arizona congressman.
- 359 DeWitt, *supra* note 357, at B1, col. 1.
- 360 *Id.*
- 361 S.Con.Res.1004, 35th Leg., 2d Sess., 1982 *Ariz.Sess.Laws* 929; DeWitt, Pima, Maricopa Judge Ballot Defeated, *Ariz. Daily Star*, Mar. 19, 1982, at 2B, col. 3.
- 362 DeWitt, *supra* note 361, at 2B, col. 3.
- 363 *Id.*

- 364 DeWitt, *supra* note 357, at 1B, col. 1.
- 365 Magistad, Babbitt Backs Merit System for Judiciary, *Ariz. Daily Star*, Jan. 20, 1982, at 1B, col. 5.
- 366 Telephone interview with David C. Tierney, practicing Arizona attorney (Mar. 13, 1990).
- 367 Magistad, *supra* note 365, at 1B, col. 5.
- 368 H.Con.Res.2015, 36th Leg., 2d Sess., 1984 J. OF THE HOUSE 103.
- 369 Fischer, House Panel Wants Judges Back on Ballot, *Ariz. Daily Star*, Feb. 28, 1984, at 1A, col. 5; see also H.Con.Res.2015, 36th Leg., 2d Sess., 1984 J. OF THE HOUSE 235.
- 370 See Fischer, *supra* note 369, at 4A, col. 5.
- 371 See *id.* See generally *State v. LaGrand (Walter)*, 153 Ariz. 21, 734 P.2d 563 (1987); *State v. LaGrand (Karl)*, 152 Ariz. 483, 733 P.2d 1066 (1987).
- 372 Fischer, *supra* note 369, at 4A, col. 5.
- 373 *Id.* at 4A, col. 4.
- 374 *Id.*
- 375 *Id.* at 4A, col. 5.
- 376 *Id.*
- 377 *Id.*
- 378 *Id.*
- 379 H.Con.Res.2015, 36th Leg., 2d Sess., 1984 J. OF THE HOUSE 1077.
- 380 S.Con.Res.1002, 37th Leg., 2d Sess., 1986 J. OF THE SENATE 17 (introduced Jan. 13, 1986); S.Con.Res.1003, 37th Leg., 2d Sess., 1986 J. OF THE SENATE 17 (introduced Jan. 13, 1986).
- 381 S.Con.Res.1002, 37th Leg., 2d Sess., 1986 J. OF THE SENATE 1005.
- 382 See S.Con.Res.1003, 37th Leg., 2d Sess., 1986 J. OF THE SENATE 17.
- 383 Fischer, Panel OKs Plan Requiring Senate To Confirm Judicial Appointees, *Ariz. Daily Star*, Jan. 29, 1986, at 1B, col. 5; S.Con.Res.1003, 37th Leg., 2d Sess., 1986 J. OF THE SENATE 1005.
- 384 S.Con.Res.1003, 37th Leg., 2d Sess., 1986 J. OF THE SENATE 1005.
- 385 See S.Con.Res.1001, 38th Leg., 1st Sess., 1987 J. OF THE SENATE 23 (introduced Jan. 14, 1987).
- 386 ARIZONA LEGIS. REPORT, AMENDMENT RECORD, AMEND. NO. 978, 38th Leg., 1st Sess., 269 (1987) (amendment to S.Con.Res.1001); see also S.Con.Res.1001, 38th Leg., 1st Sess., 1987 J. OF THE HOUSE 399; Yozwiak, Fight Looms on Naming of Judges, *Ariz. Republic*, Apr. 15, 1987, at A1, col. 4. Then-Arizona Supreme Court Justice William A. Holohan wrote some of the proposed changes. Yozwiak, *supra*, at A1, col. 4.
- 387 Yozwiak, *supra* note 386, at A6, col. 1.
- 388 *Id.*
- 389 *Phoenix Gazette*, Apr. 18, 1987, at A12, col. 2 (editorial—Don't Mess with Merit).
- 390 Yozwiak, *supra* note 386, at A1, col. 4.

- 391 S.Con.Res.1001, 38th Leg., 1st Sess., 1987 J. OF THE HOUSE 515.
- 392 Nett, Court Watch Urges Voters To Reject 9 Judges, *Ariz. Daily Star*, Nov. 2, 1988, at 1B, col. 1; Warren, Court Watch Group Tells Voters To Reject All Judges Because They Run Unopposed, *Ariz. Daily Star*, Nov. 4, 1988, at 2B, col. 2 [hereinafter Court Watch Group]. Pima County Sheriff Clarence Dupnik, a member of the advisory board of "We [T]he People," resigned in protest of the group's opposition to retention of every judge, saying the proposal was "ludicrous." Warren, Dupnik Quits Victim Rights Group, *Ariz. Daily Star*, Nov. 5, 1988, at 1B, col. 4.
- 393 Nett, *supra* note 392, at 1B, col. 2.
- 394 Court Watch Group, *supra* note 392, at 2B, col. 2.
- 395 *Id.*
- 396 COMMISSION ON THE COURTS, REPORT OF THE COMMISSION ON THE COURTS 1 (1989).
- 397 *Id.* at 26-27 (Recommendation 3.5). The Arizona Supreme Court approved Recommendation 3.5, as to "all counties in which the district court system will exist." Arizona Supreme Court, *supra* note 272, at 5 (Rationale of Recommendation 3.5).
- 398 S.Con.Res.1022, 39th Leg., 2d Sess., 1990 J. OF THE SENATE.
- 399 See *Ariz. Capitol Times*, July 4, 1990, at 11, col. 4.
- 400 See Shultz, *supra* note 136, at 28; Henschen, Moog & Davis, *supra* note 189, at 334.
- 401 Warren, Fewer Lawyers Want To Sit on the Bench, *Ariz. Daily Star*, Oct. 30, 1988, at 1B, col. 4. The comments were made in reference to the fact that only 18 attorneys had applied for the single superior court opening. *Id.* at col. 5.
- 402 *Id.* at 3B, col. 1. Another attorney stated: "It takes a great deal of politicking and work to make the kind of impression to the commission that you want. A lot of well-qualified applicants either won't do that at all or find it so distasteful that they do it once and won't do it again." *Id.*
- 403 Evans, *supra*, note 341, at 4A, col. 4.
- 404 Warren, *supra* note 401, at 3B, col. 2.
- 405 *Id.*
- 406 See *supra* notes 194-95 and accompanying text.
- 407 See, e.g., *Ariz. Republic*, Nov. 12, 1978, at A6, col. 1 (editorial—Judging the Judges); Zlakat Interview, *supra* note 306.
- 408 *In re Matter of Marquardt*, 161 Ariz. 206, 212, 778 P.2d 241, 247 (1989).
- 409 Shultz, *supra* note 136, at 33.
- 410 See Slavin, Judicial Evaluation Poll, *ARIZ.B.J.*, Oct. 1976, at 68.
- 411 *Ariz. Daily Star*, June 7, 1981, at B9, col. 1; *Ariz. Daily Star*, Nov. 9, 1978, at A12, col. 1.
- 412 *Ariz. Daily Star*, June 7, 1981, at B9, col. 1.
- 413 *Id.*; *Ariz. Republic*, Jan. 10, 1980, at A6, col. 1 (editorial—A Touch of Irony).
- 414 *Ariz. Daily Star*, June 7, 1981, at B9, col. 1.
- 415 *Id.*
- 416 *Id.*

- 417 See Phoenix Gazette, Dec. 23, 1986, at A12, col. 2 (editorial—Something is Awry).
- 418 Kelly, 3 Finalists Chosen for High Court, Ariz. Republic, Dec. 3, 1988, at B1, col. 2.
- 419 Spriggs, Judges Often Unchallenged for Position, Ariz. Republic, June 23, 1974, at A1, col. 1. In 1963, Irwin Cantor was appointed to the Maricopa County Superior Court by Governor Paul Fannin. He was defeated in 1964 and reappointed in 1965. In 1969, Williby Case was appointed to the Arizona Court of Appeals by Governor Jack Williams. He was defeated in 1972 and appointed to the Maricopa County Superior Court in 1973. Id.; see also ARIZONA TOWN HALL, supra note 56, at 31-32.
- 420 Lockwood, An Independent Judiciary, 51 WOMEN LAW. J. 117, 134 (1965) reprinted in HANDBOOK FOR JUDGES 54 (G. Winters ed. 1975). In this article, Justice Lockwood was not advocating either method of judicial selection.

22 AZSLJ 837

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