

## Abandoning Merit Selection: ‘A Great Step Backwards?’

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The framers of the Arizona Constitution gave little credence to the notion that judges could be kept “out of politics.” One delegate declared: “I believe it is just as impossible to keep the judges out of politics as to get them into heaven.”<sup>1</sup>

For several decades following 1912 statehood, candidates for most judicial offices in Arizona were, as required by the constitution, elected like other office holders through primaries and general elections in which voters often had the opportunity to choose among candidates. By the 1950s, however, state leaders began to complain about elected judges playing to the grandstand or, alternatively, giving into the demands of the rich and powerful rather than pursuing justice.<sup>2</sup>

Hoping to change directions and do what could be done to take judges out of politics, voters – with the encouragement of *The Arizona Republic*, the Arizona Academy and several civic groups – changed the system in 1974 by approving a merit system for selecting judges to the Arizona Supreme Court, the state Court of Appeals, and Superior Courts (general trial courts) in the two largest counties, Maricopa and Pima.<sup>3</sup>

The adopted plan was patterned after one long used in Missouri. Rather than assuming that judges had to be either appointed or elected, Missourians opted for a mixed system that combined the two approaches and added a nonpartisan commission to screen candidates. The idea was that judges could be both expert and responsive to the voters.

So, how does the merit system in Arizona live up to these expectations? And is there a better way to select judges?

### The System

Under Arizona’s merit system plan special nonpartisan judicial nominating commissions comprised of lawyers and lay people screen applicants for vacancies on the different courts involved.

When a vacancy occurs, nominating commissions send to the governor a list of at least three people judged by the panel to be the most highly qualified. The governor must choose from the list to fill a particular vacancy. The governor’s choice, however, later must get through a

retention election if the appointee wishes to remain on the court. In these elections, judges run without partisan identification and without an opponent. If a majority of those voting refuse to retain a judge, a vacancy occurs and the process starts again.

The nominating commissions are comprised of 10 non-lawyers and five lawyers appointed by governor and confirmed by Senate. The governor chooses the lawyers from a pool of candidates nominated by the Arizona State Bar. The law limits the number of commissioners who can belong to the same political party. Nominating commissions are chaired by the chief justice or an associate justice of the Supreme Court.

Commissioners actively recruit applicants individually or in a group setting, and applicants have been known to develop contacts with commissioners. The rules, however, prohibit advanced agreements as to who will be selected and limit communication once an application has been filed. Applicants must meet basic qualifications as to residency, age and legal practice requirements, and are further evaluated in regard to such matters as professional experience, legal knowledge and temperament.

The commission's list must have at least three nominees and all the nominees cannot belong to the same political party. Governors tend to appoint judges from their own party, but this has not always been the case. One notable instance was in 1998 when Republican Governor Jane Hull appointed Democrat Ruth McGregor, who eventually became chief justice of the Arizona Supreme Court.

Members of the Supreme Court and the Court of Appeals serve an initial term of at least two years before facing the voters. After this, they serve six-year terms with voter approval. Superior court judges in the largest counties (Maricopa and Pima) have retention elections at the conclusion of their four-year term.

Another commission, the Judicial Performance Review Commission, comprised of attorneys, judges, and non-lawyer citizens, rates and recommends judges at election time. The Supreme Court appoints the members. Using surveys of lawyers and litigants, it evaluates the actual performance of judges in such categories as legal

### **Pending legislation in Arizona**

There are a number of bills looking to make both small and major modifications to Arizona's judicial system. Potential changes include adding public comment and rulings information to pamphlets created for judicial selection, increasing the number of Supreme Court justices to seven and restricting the Supreme Court's authority. There are also a handful of bills that would directly impact merit selection if they were successful this session.

**HCR2020:** A constitutional change to be referred to voters, this bill would eliminate the list the governor chooses from when appointing judges, allowing the executive the ability to appoint anyone he or she chooses. It would also require the appointment to Senate confirmation.

**HCR2026:** Asks voters to amend the constitution to change the county population thresholds that trigger when a county moves from direct election of judges to the merit selection system. Currently, any county with 250,000 or more residents is to utilize merit selection. This bill would change that to 500,000. If this were successful, it appears Pinal county would be impacted initially, as their population has exceeded 250,000 since the last decennial census, but has not exceeded 500,000.

**SCR1040:** Another referral to voters to change the state constitution, this bill would change the composition of the commission that selects potential candidates and increase the number of candidates the governor could choose from. The key change is making all appointments subject to Senate confirmation.

ability, integrity, temperament and administrative performance. Information is made available to voters. This system grew out of voter adoption of Proposition 109 in 1992 that required the state Supreme Court to submit performance reports on judges to the voters.

Some evidence gathered in Arizona suggests that such recommendations may affect voter decisions if they are reinforced by newspaper coverage and endorsements.<sup>4</sup> Yet, in Arizona as elsewhere, voters are seldom aware of the records of judges running in retention elections. Turnout is generally low, and those who do vote tend to favor the judge already in office.<sup>5</sup> Thus far, the voters have rejected only a few judges. Some observers view this as proof that the system has produced qualified judges. Other observers contend that it signifies that the only way to get rid of judges is to give voters a choice among competing candidates.

### **Is There a Better Way?**

Arizona's merit system is hardly unique. According to the American Judicature Society, 24 states have similar plans for selecting judges to their highest state courts. In another 21 states these judges are elected (either in partisan or non-partisan elections where they may face opponents). In the remaining five states, judges are appointed either by the governor or the legislature.<sup>6</sup>

Though used more often than rival methods, the merit system has become increasingly controversial nationwide and in Arizona in recent years.

Organizations, commentators and politicians, largely from the conservative side of the political spectrum, have contended that the merit system has not, as promised, taken politics out of the judicial selection process, but only shifted it to less visible screening panels. Critics see the merit system as facilitating the selection of activist liberal judges.

These and other critics have attacked the merit system for making judges less responsive than they should be to the will of the people and have called for a return to the direct election of judges as the best way to hold judges accountable. Others prefer turning from the merit system to the model found on the federal level, which has often been highly touted. This would give the

#### **Pending legislation (continued)**

**SCR1042:** This bill would ask voters to amend the constitution so that the Senate President and House Speaker would join the group that has authority to name individuals to serve on commission that screen and submit judicial applicants.

**SCR1043:** Currently, the commissions for appointments forward a screened list of final candidates to the governor for review and selection. This bill would amend the constitution to require all applicants go forward to the governor, ranked for merit by the commission.

**SCR1044:** This change to the constitution would allow the governor to appoint for any judicial vacancy, yet still maintain the role of the commissions.

**SCR1048:** This bill, if approved by voters, would change the constitution to place responsibility for retention decisions with the Senate. Judges could only be removed if two-thirds of the Senate voted to reject retention.

**SCR1049:** This constitutional change would also look to change the population threshold for merit selection. Unlike HCR2026, this would up the population number requiring merit selection to 400,000. In addition to changing the makeup of the commission, all judicial nominees would have to be approved by the Senate.

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governor free reign to appoint judges subject only to Senate confirmation, with no interference from nominating commissions or voters through elections. Some proposals call for periodic reconfirmation by the Senate as terms expire.

## **Battle Over the Merit System**

The merit system has its defenders, including former U.S. Supreme Court Justice Sandra Day O'Connor, who calls the prospect of abandoning the merit system "a great step backwards." She and others argue that Arizona judges chosen under the merit plan are as good as or better than any in the nation. They see no reason to change: the system works, and if it's not broke there's no need to fix it.

Merit system proponents concede that while it is not possible to completely remove politics from the process of judicial selection, merit systems are the best way to minimize the chances of purely political considerations influencing the choice of judges. Defenders of the merit system also tout the notion of an independent judiciary, staffed with judges well versed in the law, who, based on the law, may have to make unpopular decisions. They note the job of the judge is to be objective, fair and impartial, not a politician who bends with the wind.

From this perspective, direct elections, especially partisan ones, are demeaning to judges and in conflict with basic norms of judicial behavior. Also, by making judges hustle for voters and campaign contributions, as often is the case in costly statewide contests, the system invites corruption or the appearance of corruption and thus undermines confidence in the judicial system.<sup>7</sup>

Critics of direct election further argue that nomination commissions, governors and Legislature are better prepared than voters to evaluate judges – that acting alone, voters are likely to be influenced by a variety of factors that have little or nothing do with the candidates' qualifications or job performance. Research on voter behavior offers some support for this view.<sup>8</sup>

Overall, the merit system helps compensate for the lack of voter knowledge and interest in judicial selection. It also may help make a more informed voter in that reports supplied by the Judicial Performance Review Commission are likely to give voters a more objective set of information to make decisions than does the campaign rhetoric one is likely to find in states where judges are elected in the more traditional way.

Replacing the merit system with one in which the governor is free to appoint judges, subject only to senate confirmation, also is likely to be controversial. Doing away with nomination commissions and having no elections at all, retention or otherwise, would free up the governor in making choices. At the same time, it could be argued, this would deprive the system of valuable input from both experts and voters, concentrate too much authority in the governor, and raise the danger of appointments that have nothing to do with judicial qualifications, for example, ones based on purely partisan considerations or on personal favors. Adding senate confirmation of appointees would add a "checks and balances" feature not found in the merit system but would also likely further politicize the process.

Researchers have attempted to evaluate the behaviors of judges chosen by different systems and examine the broader consequences of making the choice among systems but the results of their studies are limited and often inconclusive.<sup>9</sup> There is, beyond this, little agreement about which judicial selection system produces or is likely to produce the “best” judges or even, more to the point, exactly who the best judges are.

Debate over which is the best system reflects philosophical or ideological divisions and different ideas about the role of the judiciary. Still, if the goal is a system that attempts to balance legal expertise and accountability to the voters, the merit system stands out.

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## Notes

<sup>1</sup> Delegate Benjamin Mouer, later governor of the state, quoted by Donald Robinson Van Petten, *The Constitution and Government of Arizona* (Phoenix, AZ: Sun Country Publishing, 1956): 195.

<sup>2</sup> Van Petten: 203-204.

<sup>3</sup> The 1974 constitutional amendment required that the merit system be used in Superior Courts in counties over 150,000. This was changed by a constitutional amendment in 1992 to 250,000. Thus far, only Maricopa and Pima qualified. In the remaining counties, the original system of judicial selection – primaries and contested general elections – is still employed for superior court judges. The primaries are partisan but winners run in the general election without party designation. One justification for having an election system in rural areas is that residents are better prepared than residents in metropolitan areas to choose among judicial candidates because they are more likely to know the candidates personally and be familiar with their qualifications and backgrounds. See: Arizona Academy, *The Adequacy of Arizona’s Court System* (Phoenix: AZ, April 1973: preface).

<sup>4</sup> John A. Stookey and George Watson, “Merit Retention Elections: Can the Bar Influence Voters?” *Judicature* 64 (November 1981): 234-41.

<sup>5</sup> William K. Hall and Larry T. Aspin, “What Twenty Years of Judicial Retention Elections Have Told Us,” *Judicature* 70 (1987): 340-347.

<sup>6</sup> The merit process is generally defined as one in which a nonpartisan and diverse group screens judicial candidates as to their capabilities and qualifications and the appointing authority (usually the governor) chooses among nominees made by the group. By this definition, 33 states currently have a merit selection process to fill at least some judicial vacancies in the larger court system. The various merit systems, however, differ in particulars. Arizona, for example, is one of only eight states with merit systems that have a formal evaluation program for informing voters. Also, avoiding a common criticism of merit plans in other states of lawyer-dominated nominating commissions, Arizona’s commissions are dominated by non-lawyers. Information on selection systems is found online from the American Judicature Society and in “Judicial Selection in the States,” Council of State Governments, June 2010.

<sup>7</sup> Indeed, around the country costly campaigns have encouraged candidates to solicit contributions from lawyers, businesses and others who might someday appear before them in court. In response, several states in recent years – Illinois, Washington, West Virginia and Wisconsin among them – have enacted judicial campaign finance reforms imposing limits on judicial campaign contributions or creating a public financing system for judicial elections. Simple retention elections do not create nearly as much of a problem.

<sup>8</sup> For a recent review of voter behavior in judicial elections see sources in Malia Reddick, “Judging the quality of judicial selection methods: Merit selection, elections, and judicial discipline,” on line, American Judicature Society, 2010.

<sup>9</sup> See review in *Ibid.*

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