

Rating the Judges

The Work of Lawyers and the Public

Fair Courts Under Fire

A Special Section on Judges and Judicial Independence

BY TIM EIGO

Margaret Kenski had a long and successful career as a college professor, where she taught classes in government and public policy. Now she is a well-known pollster, and she has plunged deep into the realities of American government—in the review of judges' performance and judicial conduct.

We talked with Dr. Kenski about the JPR system, attacks on merit selection, and changes to each that have been proposed.

ARIZONA ATTORNEY: You are the Chair of the Commission on Judicial Performance Review; how long have you been involved with the subject?

MARGARET KENSKI: About 9 years. I had served on the Commission on Trial Court Appointments and did some committee work for them, and that was in the early '90s. And then Governor Symington appointed me to the Commission on Judicial Conduct. And the Court is always looking for public members who are willing to serve. And because by then I was retired from my teaching position—although I work as a political consultant, I'm a pollster, basically—I do have a more flexible schedule. Tom Zlaket, Chief Justice at the Supreme Court at the time, asked if I'd consider going on the JPR Commission.

One of the reasons that I was put on that one specifically was because that's what I do—polling. And a good part of the judicial performance reform process is a form of polling.

AZAT: Though your company, Arizona Opinion, does not do the polling for JPR.

KENSKI: Absolutely not.

AZAT: What attracted you to do service in the legal field in the first place?

KENSKI: For so many years I taught American National Government and National and State Constitutions. I taught at the community college [in Tucson] for 27 years. I think a large component of those courses is trying to get people to see the importance of the judicial system as the third branch of government, so it was kind of a natural from that, I think.

AZAT: The entire merit selection and JPR system has many components. What is the role of the Commission members?

KENSKI: The Commission members establish procedure. They recommend rules to the Supreme Court. And most importantly, they look at all the data that's been gathered and, as a group, decide whether or not we believe that judges who are up for retention meet or do not meet judicial performance standards.

AZAT: It's rare that you decide they do not meet standards.

KENSKI: I think that's true, and I think it's sometimes misunderstood. You'll sometimes get this criticism that the Commission is a rubber stamp, and that's not true. We take that quite seriously.

But I think there's been a change in anticipated behavior [among those seeking to become judges]. Once you have a Commission on Judicial Conduct—and I'm still on my last year on that next year—and a Commission on Judicial Performance, I think that the law of anticipated effect kicks in. I think that

people who go on the bench are aware that they're going to be evaluated, that they can't just do what they want. So you almost filter out because of this the kind of people who might be more of a maverick and want to do their own thing.

That would be like deciding you're going to be a university professor but you have no intention of publishing anything. That doesn't work. Seeking a judicial appointment knowing that you're going to be evaluated, you've got to look at those standards and say, "Hey, this is something I can live with."

AZAT: How often do you meet?

KENSKI: It's variable. Normally, about five or six times in a year.

A lot of the work has been done in subcommittees of the Commission. We have been struggling with a couple of issues. For me, the most important one is how can we present information to voters in such a way that they'll understand the data we have and be able to make their own minds up about it. The fact that 30 members of the Commission say that someone meets judicial performance standards is by no means definitive for everybody else.

AZAT: How long has the Commission existed?

KENSKI: The Court created the Commission in 1993. That was pursuant to Proposition 109, which was passed by Arizona voters in 1992. What it did was further amend or expand the merit selection process mandating that there be a process for evaluating the performance of judges and justices.

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AZAT: At that point, merit selection was about 18 years old. Was JPR in response to concerns about lack of accountability?

KENSKI: Systems move slowly. ... As time went on, the [State] Bar ratings [we]ren't definitive. That's the attorneys speaking. What about citizens? They might take a different view than an attorney does. So that's why they moved toward this system of evaluation.

It was only in 1998 that we finally got funds, through the Secretary of State's good offices, that we were able to join the voter information pamphlet. Before that, we had to put little things in libraries, banks, anybody that would take it. It was a pretty hit-or-miss process.

There is a subgroup on voter education. We'd like to call people's attention to it more. I'd like to hold focus groups with voters to figure out what kind of presentation would be the most effective for them. What would make them actually notice it?

AZAT: Your meetings are public. Does the public show up?

KENSKI: No. Our average meeting, there is absolutely no public interest. [But] when we do the public vote in July on whether or not to recommend the judges had met standards, then we usually have a couple members of the public. The problem with that is, instead of coming to that meeting, it would be so much better if more members of the public would come to the public testimony meetings in March. ...

That's a more appropriate time. Say we do get a major complaint about a judge, we have the time to ask the judge to respond to allegations.

AZAT: If someone attended a regular meeting, outside of the March or July meetings, what would they see the Commissioners doing?

KENSKI: Well, coming up in February, hopefully the Supreme Court will have

ruled on our rule change recommendation; we'll go over that. We are going to talk about our plans for the conference teams that meet to review the interim midterms of the judges. We're going to be talking about voter education again and get a report from the voter education workshop.

AZAT: You mentioned the petition for a rule change to the Supreme Court. But in fact there were two from Commission members. How did the two petitions differ?

KENSKI: Right now, on the public vote, we just do an up or down. The proposal had been that we have a more elaborate system and have a couple different levels of saying that the judge met performance standards: Top judges would be exceeding the standards, middle-tier judges meet [standards], and then if someone didn't, "does not meet."

It was a feeling that it would be a way of conveying more information of who are our superstars.

I think it raised concerns that are valid. The problem is that you can have a judge that on a 4.0 system has a 3.8 average, and you still get 25 percent to 30 percent of the people who vote against him anyway; a judge like that would be in the "exceeds" category and probably would be fine. But what about the more average judge, maybe he's the greatest guy on the face of the earth but he's got a 3.0, and he's in that "meets" [category]. Aren't we inviting a more negative vote against a middle tier?

I see it as two perfectly valid conflicting approaches. One is the concern to give the voters more nuanced information, and the other is what's going to happen to the judges.

That was the specific issue that we [as a majority of the Commission] did not recommend. So those people [a minority of the Commission] sent their own petition up, making the argument for a more nuanced approach. The main petition I signed as chair was to retain the current system.

AZAT: However the Court rules, how did the viewpoint in the minority position arise? Does it resonate with the public because virtually every judge is approved in the current system?

KENSKI: I think it was a feeling of unrest because everyone tends to get approved. As I said, I think that's because [potential judges] filter themselves out. The concern with the "bad judges" from those outside the Commission had nothing to do with the standards that the JPR Commission uses. It had to do with judges making decisions that were disapproved of by political activists. No matter what we do about a rule change, it's not going to get to that. But let's leave that aside.

We have a good evaluation system, but somehow we don't think that we're giving enough or the right kind of information to the voters. This is a big ho-hum for them. We are trying to make it more interesting and more informative. That was what motivates this [the minority petition]. It had nothing to do with the other [political] issue.

AZAT: On the Commission, a majority of members are lay people; there are 30 members, and 18 are public members. What do lay Commissioners bring to judicial performance review?

KENSKI: The 18 members of the public represent the average citizen. It is important to remember that the whole governmental system is supposed to support them and be directed as they wish. If you're a member of any organization, you can tend to become a little bit elitist, and hate to be questioned. We're there to question. We're there to say, "Here's what is important to us. You're performing this service. But we think temperament is very important." Or "We think your ability to communicate is very important."

AZAT: What misconceptions do people have about JPR?

We have a good evaluation system, but somehow we don't think that we're giving enough or the right kind of information to the voters. This is a big ho-hum for them. We are trying to make it more interesting and more informative.

KENSKI: It's a rubber stamp, is one. Another one is that judges control it; not true, not true.

AzAT: Have you ever heard complaints that the public does not have a voice?

KENSKI: I have never heard too much about that. I think activist groups are very well aware that they can come to our public meetings.

I was just on the Supreme Court committee chaired by [former Chief Justice] Bud Jones, and at our public hearings, groups that had been critical of the judiciary were invited to come and comment; they didn't. So what do you do with that?

AzAT: But is devising ways to better inform the public of your data merely tinkering with a good system while JPR overall is being undermined by political interests?

KENSKI: As far as the outside groups you're talking about, it's America, they have a right to do it. Sometimes it can be terribly unfair, but judges are part of the system, and I think you have to have counter-mobilization of groups that are concerned with the independence of the judiciary. I think the State Bar is one of the groups that could counter some of that information.

AzAT: When merit selection was born, many conservative political leaders were in favor of it. But now the pendulum has swung. Why?

KENSKI: It does always focus around the decisions judges make, no question about

it. And sometimes there is a tendency not to realize that courts don't just randomly and arbitrarily go off and come up with decisions: They're somewhat bound by the law and precedent.

I was talking to a legislator one day awhile back and they said, "We just don't like how they interpret a particular law." And I said, "Why don't you draw up a law that doesn't have holes you can drive a truck through? It would help."

AzAT: What are your politics?

KENSKI: I'm a registered Republican. I have been a Democrat in my day.

AzAT: And does your husband still run the Southern Arizona office of Sen. John Kyl?

KENSKI: Yes, he does. They've been friends since they were 18; they were debate partners when they went through the university together.

AzAT: Do you ever get the feeling John Kyl appreciates our judiciary as it is here?

KENSKI: I think he has a high opinion of it, yes.

AzAT: It must help advocates of the current system, including the State Bar, who can point out that there are Republicans who are champions of it, as well.

KENSKI: I think that's true. But weren't there like 34 measures introduced last year [in the Legislature regarding court issues]? And none of them got through. And that means that there had to be "anti" votes

among the Republicans.

Personally—not speaking for the Commission—I liked the compromise suggested last year that would have extended judges' terms in exchange for the Senate confirmation. I thought that, yes, we have separation of powers, but we also have checks and balances. And that would give the Legislature some feeling of a little bit more input into the system. I thought that was a reasonable compromise. It fell through, but the whole point is there are some reforms that could be suggested that might defuse some of the concerns. But probably not altogether; it's just not going to happen.

AzAT: What about other legislative proposals?

KENSKI: I don't agree that the Legislature should rule on the rules of evidence; that one strikes me as really bad. But I would relax some of the rules as far as judges campaigning. If there's an attack, I think they should be allowed to be more vocal than they are. I think they should be able to defend themselves more effectively than they do.

AzAT: But couldn't that be the exception that swallows the rule? If it was known that judges could respond to an attack, wouldn't the attacks increase?

KENSKI: Yes, that's the downside of that one, isn't it?

AzAT: Overall, do you feel the public should have confidence in JPR?

KENSKI: Yes. Is it totally, statistically significant, what we do? No. It can't be. But we get more information about the judges than I think you would get in almost any system. We ask the lawyers, we ask the jurors, the witnesses, the litigants about the [judges]. It may not be a perfectly representative sample. But I always feel that some information is better than no information. 