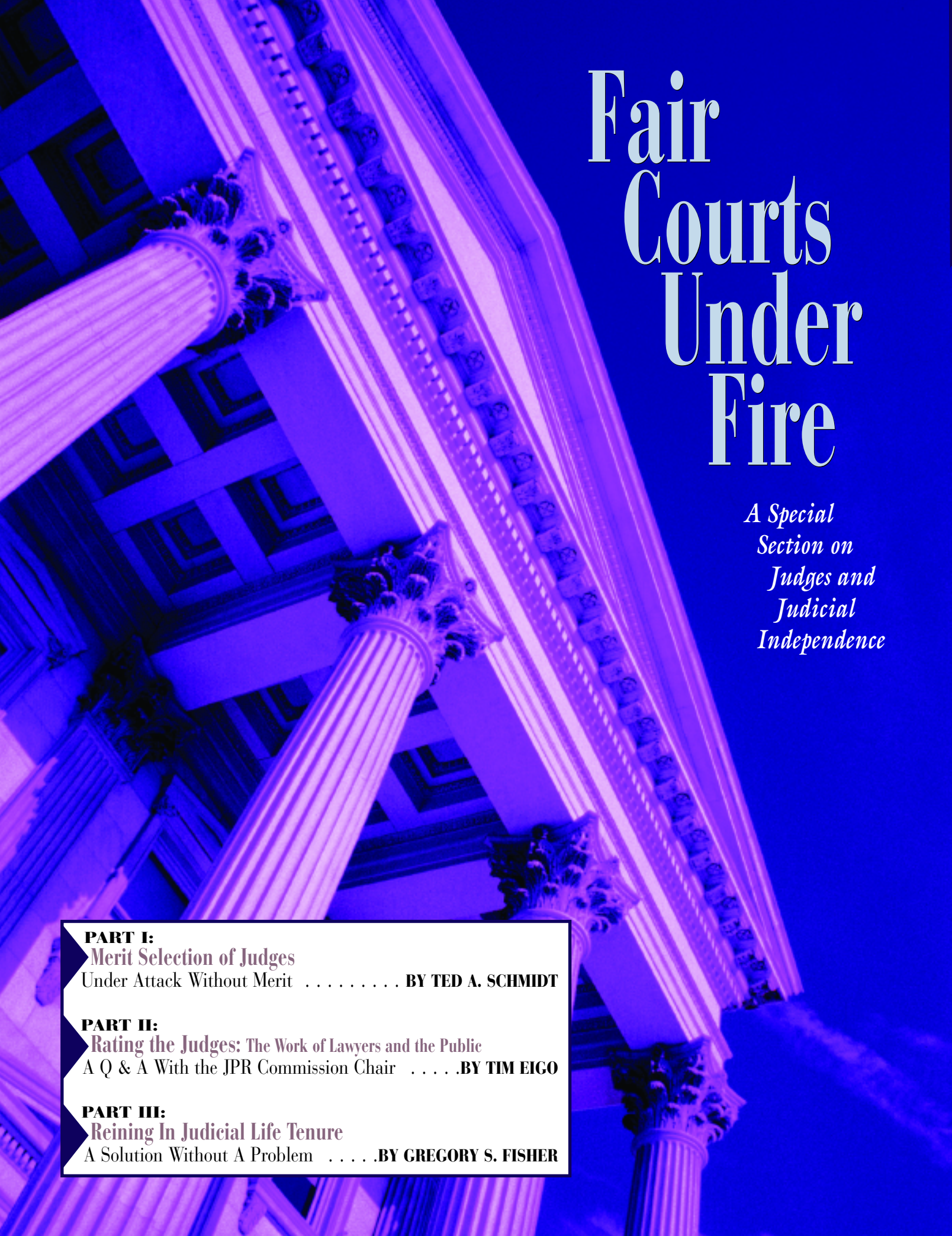

Fair Courts Under Fire

A Special Section on Judges and Judicial Independence

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PART I:

Merit Selection of Judges

Under Attack Without Merit

BY TED A. SCHMIDT

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.

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.[1]

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.[2] 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.[3] The Canons also bar judicial candidates from revealing their views on disputed legal or political issues.[4] 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.[5] 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.[6]

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.[7]

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.[8]
- 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."[9]
- Similarly in Idaho in 1999, Justice Cathy Silak authored a 3–2 decision that upheld federal government control

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."[10]

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.[11]

These are only three examples, but other documented instances of improper and unsavory judicial campaign conduct are abundant.[12] 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."[13]

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

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 1, 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.[14]

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.[15]

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.[16]

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.[17]

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.[18]

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.[19]

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.[20]

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."[21] 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 in1974, 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.[22] Arizona's system also is the model used by the United States when helping other countries reform their judicial system.[23]

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.[24]

To assure diversity, representatives on the trial court commissions must come from five separate districts. There must be diversity among judicial applicants, as well.

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.[25]

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.[26]

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.[27]

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.[28] 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.[29] 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 gov-

ernor 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 judged were elected.[30] 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.[31] 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.[32] 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.[33] 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.[34]

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.[35] 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.[36] When casting votes for judges, voters across the country almost uniformly vote consistent with their party affiliation.[37]

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.[38]

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."[39]

There is no question that the legislative

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."[40]

endnotes

1. 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/merit-selection.pdf. Finally, in the November 2005 issue of *The Writ,* 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.
2. 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.
3. JUDICIAL CODE OF CONDUCT, Canon 5(B)(1)(d)(i)&(ii).
4. *Id.* at Canon 7(B).
5. Justice at Stake, *National Poll of American Voters from 2001, 4, available at* http://fair-courts.org/file/JASNationalSurveyResults.pdf.
6. Michael Scherer, *State Judges for Sale*, THE NATION, Sept. 2, 2002.
7. *Move to Cut Judicial Elections Brings Clash*, NAT'L L.J. (Oct. 17, 2005).
8. SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION, 15-57, 47 (AMERICAN JUDICATURE SOCIETY 1990).
9. *See* Mark Kozlowski, *The Soul of an Elected Judge*, LEGAL TIMES, Aug. 9, 1999.
10. *Id.*
11. *Id.*
12. 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.*
13. *Id.*
14. *See* Todd David Peterson, *Oh, Behave!* LEGAL AFFAIRS, Nov./Dec. 2005.
15. Roll, *supra* note 1, at 839.
16. *Id.* at 841-42.
17. *Id.* at 847.
18. *Id.* at 849.
19. *Id.* at 850-53.
20. *The Adequacy of Arizona's Court System* (Report of the 22nd Arizona Town Hall, Arizona Academy, April 1973), at x.
21. *Id.* at ii.
22. *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.
23. 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 (Dec. 2003).
24. ARIZ. CONST. art. VI; see Sherk, supra note 1.
25. *Id. See* Sherk, *supra* note 1.
26. ARIZ. CONST. art. VI.
27. 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.
28. ARIZ. CONST. art. VI, § 38.
29. 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.
30. Roll, *supra* note 1, at 856.
31. *See* Sherk, *supra* note 1.
32. *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).