



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. **BY**

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Clint Bolick

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