

# POLICY PAGES

## Arizona Selection and Retention of Judges

August, 2023

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### OVERVIEW

The question of how to select judges has yielded a variety of answers across the country. While not all systems are equal, experiments in the selection and retention of state judges illustrates the genius “of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>1</sup>

For over fifty years, Arizona selected judges through popular election. However, in 1974, Arizona voters amended the state Constitution to provide for the selection of most state judges through a merit-based selection system.<sup>2</sup> Arizona is one of 30 states (plus the District of Columbia) that uses a “merit-selection” system for choosing at least some of their appellate and general jurisdiction judges, although each has minor variations.<sup>3</sup> The remaining states use some form of partisan or non-partisan elections.<sup>4</sup>

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### ANALYSIS

#### CURRENT SELECTION OF JUDGES

In Arizona’s system, there are two methods of selecting judges. Voters elect judges for Superior courts (state trial courts) in counties with less than 250,000 people.<sup>5</sup> These counties are Apache, Cochise, Gila, Graham, Greenlee, La Paz, Mohave, Navajo, Santa Cruz, Yavapai, and Yuma.

By contrast, public committees evaluate judges for the Superior courts in Coconino<sup>6</sup>, Maricopa, Pima, and Pinal counties, Arizona Supreme Court and Arizona Court of Appeals, and send names to the governor for final selection and appointment. These committees—called “commissions”—are composed of 16 members comprised of 10 non-attorneys, five attorneys, and an Arizona Supreme Court justice, who serves as the chair of the commission, selected in accordance with the state constitution.<sup>7</sup> There are currently four commissions: one for each county and a fifth—the Commission on Appellate Court Appointments—for vetting candidates for the Arizona Court of Appeals and Supreme Court.

When vacancies occur in one of these courts, the commission notifies the public, evaluates and interviews applications, solicits comments from the public, deliberates, publicly votes, and forwards at least three recommendations to the governor.<sup>8</sup> No more than two of the three applicants



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recommended, or 60 percent of applicants, can be from the same political party.<sup>9</sup> Commission members are supposed to make recommendations “without regard to political affiliation in an impartial and objective manner” considering “the diversity of the state's population” but focusing on the merit of the candidates.<sup>10</sup> The governor then appoints one of the recommended applicants.

## PAST SELECTION REFORMS

Voters only reformed the merit-based selection system once, in 1992, when they expanded the commission membership and required the commissions to take public testimony and vote in public. However, there have been several significant attempts to reform the system.

In 2011, the Legislature passed CAP-supported SCR 1001 to place what would become Proposition 115 on the 2012 ballot to make changes to Arizona’s judicial selection system. Although Proposition 115 was a consensus measure that sought to improve the system by allowing the governor to select from a larger pool of names, remove the party affiliation restraints, and change the role of the State Bar of Arizona in nominating attorney members for the “merit-selection” commissions, Proposition 115 failed to pass at the ballot.<sup>11</sup>

Then, in 2013, the legislature passed and Governor Brewer signed CAP-supported HB 2600, which improved the current system by ensuring more qualified candidates are forwarded to the governor so that the duly elected representative of the people, the governor, had a larger pool of qualified names to choose from.<sup>12</sup> The bill also added transparency to the selection process by requiring the voting records of the commissions to be recorded in the minutes and made public.<sup>13</sup>

Several former justices of the Arizona Supreme Court and four members of the Commission on Appellate Court Appointments filed a legal challenge against HB 2600. In September 2013, the Arizona Supreme Court struck down the law in toto.<sup>14</sup>

## CURRENT RETENTION OF JUDGES

The other significant piece of the merit-selection system is the retention election of judges. All judges appointed through the merit-selection process can serve until they reach the age of seventy.<sup>15</sup> However, they must periodically face retention elections. Superior court judges come up for retention every four years while appellate court judges come up for retention every six years following their initial appointment. The ballot simply reads: Shall (Name of justice or judge) of the (applicable) court be retained in office? Yes \_\_\_ No \_\_\_ (Mark X after one). A judge must receive the support of a majority of those voting on that judge in order to be retained.<sup>16</sup>

**As an accountability measure, election by retention has been virtually meaningless.** Useful information on judicial performance and philosophy is scarce and not easily accessible. The voting public has found the long list of judges on the ballot puzzling, with very few voters even filling out an answer, and those that do voting to retain virtually every judge with over a two-thirds margin. Until 2022, only two judges have ever failed to be retained,<sup>17</sup> and judges with issues of competency have been retained because the voters simply do not have enough information.

Part of the 1992 reform of the merit-selection system included the constitutional creation of the [Commission on Judicial Performance Review](#) (JPR commission) to provide voters a standard for evaluating judges.<sup>18</sup> The commission is composed of 30 members appointed by the Supreme Court from among the public at large, attorneys, and judges. Jurors, witnesses, litigants, administrative staff, and attorneys answer surveys evaluating such things as the judge’s legal ability, integrity, communication skills, judicial temperament, administrative performance, and settlement activities. The JPR commission compiles the data and scores judges as either “Meets” or “Does not Meet” standards and distributes this information to voters prior to the election. Nearly all judges receive an affirmative rating.

**In addition, CAP-supported laws passed in 2011 offered voters some relief from the problem of inadequate information about judges who are up for retention.**<sup>19</sup> The JPR commission is now required by law to:

- Prepare biographical information on each judge or justice and post this information online on the Secretary of State’s website.
- Prepare a list of the opinions in which the judge ruled a statute constitutional or unconstitutional.
- Publish an [electronic list](#) of all the opinions in which an appellate court judge participated, with a link to the text of that opinion.

These legislative changes have been meaningful to voters. Every election cycle, CAP summarizes this information and publishes it as a part of our Arizona Voter Guide (<https://www.azvoterguide.com/>).

**Retention election hit another roadblock in 2022.** That year, a total of 74 judges were up for retention (three Supreme Court justice, five Court of Appeals judges, 47 Maricopa County Superior Court judges, 12 Pima County Superior Court judges, four Pinal County Superior Court judges, and three Coconino Superior Court judges).<sup>20</sup> Even though the JPR commission determined nearly all the judges “met” the standard for retention, voters rejected three judges including two approved by the commission.<sup>21</sup> Explanations for the rejections included voter confusion, a decline in JPR surveys returned, and partisan voter guides that weaponized JPR scores and attacked judges for ideological bias indicated by such biographical details as past association with the Federalist Society.<sup>22</sup> A 2023 task force has proposed on policy changes to the JPR process. Time will tell whether these proposed changes improve the system or not.

## POTENTIAL RETENTION REFORMS

Nearly fifty years into the merit-selection system, Arizona’s judicial laboratory is still finessing its system to ensure more transparent and accountable judicial selection. One potential policy change is the state-wide election of Arizona’s Court of Appeals judges. Court of Appeals judges are divided into two divisions and state law mandates that a certain number of judges must come from counties other than Maricopa and Pima ([A.R.S. § 12-120.02](#)). The law also requires that a Court

of Appeal judge only appear for retention elections on the ballots of voters who reside in the same geographic area as the judge.

In 2023, the Arizona Legislature passed [HB 2757](#) that required that Court of Appeals judges up for retention election appear on all ballots around the state regardless of the judge's county of residency. Governor Hobbs vetoed the bill, citing voter dilution.

Four Arizona voters filed a special action with the Arizona Supreme Court claiming they should be able to vote on all Court of Appeals judges because the Court of Appeals issues decisions that control the whole state.<sup>23</sup> The current law, they claim, violates the Arizona Constitution that guarantees “free and equal elections”<sup>24</sup> and deprives them of the “privileges or immunities” that “equally belong to all citizens.”<sup>25</sup> The case is currently pending a decision of the Arizona Supreme Court.

## RECALL

In Arizona, all public officials—including judges—hold their offices subject to recall.<sup>26</sup> When judges act beyond the scope of their authority, Arizonans have the right to remove them from office. This process has never been successfully used against a judge.

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## TALKING POINTS

- **Arizona’s merit-selection system for judicial selection has developed over its nearly fifty-year life to provide quality judges. It is an imperfect system that makes it challenging to adequately evaluate the performance of judges.**
- **The selection commissions’ responsibility is to forward all meritorious judicial nominees to the governor, not play politics with their choices.** The commissions should follow the constitution and forward all meritorious picks regardless of inside baseball.
- **Retention elections need continued reform.** Voters have more information about judicial rulings on constitutional matters and easier access to all judicial rulings, enabling them to make a more informed decision on whether or not to retain a judge. But ideological influence has begun to taint the retention process, revealing the need for more improvements.
- **Judges should be retained or rejected based on whether or not they are interpreting the law and not acting as lawmakers.**

## CONCLUSION

Arizona’s current judicial selection and retention process has undergone changes in its fifty years of existence. Arizona voters often still find retention elections frustrating based on lack of information or confusing information from the JPR commission. Center for Arizona Policy will continue to do all it can to provide citizens with accurate and useful information about judicial performance.

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## Endnotes

<sup>1</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (J. Brandeis, dissenting).

<sup>2</sup> *See* Ariz. Const. art. VI.

<sup>3</sup> Ctr. for Justice, *Judicial Selection: An Interactive Map*, <https://www.brennancenter.org/judicial-selection-map> (last visited September 19, 2023). *See also* Alicia Bannon, *Choosing State Judges: A Plan for Reform* (2018), Brennan Center for Justice, <https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform> (last visited September 19, 2023).

<sup>4</sup> *Id.*

<sup>5</sup> Ariz. Const. art. VI. sec. 12.

<sup>6</sup> Coconino County voted to move from elections to merit-selection in 2018 even though it had not reached the threshold population that required it to as allowed by Ariz. Const. art. VI. sec. 40. *Voters in Coconino County choose merit selection for judges*, Associated Press, <https://apnews.com/article/2879b24963bb483a81674f3c225aa252> (last visited on September 19, 2023).

<sup>7</sup> Though billed as non-political, the commissions are political like any governmental entity. County supervisors appoint selection committees to recommend non-lawyer trial court commission candidates and then send recommendations to the Governor. The Governor appoints the selection committee to recommend non-lawyer Appellate Court commission candidates. The selection committee then forwards their recommendations to the Governor. The Board of Governors of the State Bar of Arizona nominates the attorney members of all four commissions to the Governor. The Governor appoints all members of the commissions with the confirmation of the Senate. Thus, appointments to the commission are political appointments with political strings attached. Commissioners have party designations attached to their names just as applicants do. Other members of the commissions, sitting judges, and other contacts in the legal community lobby commissioners about judicial candidates. Further, the judicial candidates themselves wage campaign-style efforts to persuade commissioners and the governor to select them.

<sup>8</sup> The commission can submit more than three candidates to the Governor. HB 2600, passed in 2013, requires commissions to forward at least 5 candidates to the Governor, unless 2/3 of the commission votes to send fewer than 5 candidates. HB 2600 was challenged in court but is set to take effect on September 13, 2013.

<sup>9</sup> Ariz. Const. art. VI. sec. 37.

<sup>10</sup> Ariz. Const. art. VI. sec. 36 and sec. 41.

<sup>11</sup> Proposition 115 Vote Total: 553,132 in favor; 1,446,970 against, State of Arizona Official Canvass, 2012 General Election – November 6, 2012, available at <https://apps.azsos.gov/election/2012/General/Canvass2012GE.pdf>.

<sup>12</sup> H.B. 2600, 2013 Leg., 51st Leg., 1st Reg. Sess., (Ariz. 2013), available at [www.azleg.gov/legtext/51leg/1r/laws/0062.pdf](http://www.azleg.gov/legtext/51leg/1r/laws/0062.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> *Dobson v. State of Arizona*, No. CV-13-022 (Ariz. 2013).

<sup>15</sup> Ariz. Const. art VI. sec. 20.

<sup>16</sup> Ariz. Const. art VI. sec. 38.

<sup>17</sup> Judge Gary Nelson of the Court of Appeals and Judge Fred Hyder of the Maricopa County Superior Court, voted out in 1978, are the only two judges to be voted off the bench since “merit selection” began.

<sup>18</sup> “The Supreme Court shall adopt, after public hearings, and administer for all justices and judges who file a declaration to be retained in office, a process, established by court rules for evaluating judicial performance. The rules shall include written performance standards and performance reviews which survey opinions of persons who

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have knowledge of the justice's or judge's performance. The public shall be afforded a full and fair opportunity for participation in the evaluation process through public hearings, dissemination of evaluation reports to voters and any other methods as the court deems advisable." Ariz. Const. art. VI. sec. 42.

<sup>19</sup> These bills were HB 1472 (now [A.R.S. § 19-123](#)) and SB 1482 (now [A.R.S. § 198-124.01](#)).

<sup>20</sup> Joanna Allhands, *What to know about the 74 Arizona judges on the 2022 ballot* (Sept. 19, 2023), Arizona Republic, <https://www.azcentral.com/story/opinion/op-ed/joannaallhands/2022/09/19/arizona-judges-how-do-you-know-who-retain-2022/10371610002/> (last visited on September 19, 2023).

<sup>21</sup> Kiera Riley, *Taskforce makes recommendations on changes to evaluation process for judges*, Arizona Capital Times, <https://azcapitoltimes.com/news/2023/04/12/taskforce-makes-recommendations-on-changes-to-evaluation-process-for-judges/> (last visited on September 19, 2023).

<sup>22</sup> *Id.*

<sup>23</sup> Petition for Special Action in *Knight, et al. v. Fontes*, <https://www.goldwaterinstitute.org/wp-content/uploads/2023/08/Petition-for-Special-Action.pdf> (last visited on September 19, 2023).

<sup>24</sup> Ariz. Const. art. II, sec. 21.

<sup>25</sup> Ariz. Const. art II, sec. 13.

<sup>26</sup> Ariz. Const. art. VIII.