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Judicial Merit Selection

Ballot Choice Approaches

BY JOHN PHELPS & KELLEN BRADLEY

Compromises are complicated creatures. All sides want to leave the table thinking they are getting the best deal possible, but still knowing they're going to give up something of value. Proposition 115, which will be on the November 2012 ballot, is no different. If passed, it will change Arizona's constitutional process for selecting judges of the appellate courts and the superior courts in the larger counties.

Prop 115 is the result of a compromise reached by the State Bar of Arizona, the Arizona Judges Association, the Arizona Judicial Council, the Governor and the Legislature. It should come as no surprise that members of the Bar are split on the issue. Some argue the changes will completely undermine merit selection; others view them as evolutionary changes that will improve the process.

What cannot be argued, however, is that in November the voters of Arizona will decide whether to amend their state constitution to modify the way judges are selected. This article provides some historical backdrop to Prop 115, as well as a description of the compromise that led to its formation.

The question of how we pick judges has been no stranger to controversy.[1] For many years, those different methods—by appointment or popular election—have been the subject of close scrutiny, intense public debate and extensive commentary.[2] Likewise, "[t]he pros and cons of judicial retention elections also have been critically examined and questioned."[3]

History of Merit Selection

Long advocated by the American Judicature Society, merit selection in the United States began in 1940 when Missouri voters adopted the Kales–Laski plan for some state courts.[4] Nearly 20 years later, Alaska adopted its own version of the "Missouri Plan" in 1959, becoming the first state to adopt merit selection on a statewide basis. Iowa and Nebraska followed shortly thereafter in 1962 by adopting it for their major trial and appellate judges.[5] Limited jurisdiction courts in Colorado and Florida adopted merit selection plans in 1964.[6] The concept of merit selection of judges would not come to Arizona until 1974.

Beginning in 1910, Arizona appellate and superior court judges were chosen in nonpartisan elections for limited terms. Vacancies in judicial offices, whether by retirement, death or the creation of new judgeships, were filled by gubernatorial appointment until the following general election.[7] In practice, however, vacancies were filled far more often by appointments than by popular election.[8] For example, in 1973, 62 percent of superior court judges were appointed to their seats by the governor.[9] Those appointments "were not subject to senate confirmation or any other checks and balances."[10]

From 1958 until 1972, more than one-half of the appointees ran unopposed, and two-thirds of those who ran were victorious.[11] Some commentators have attributed the retention of appointed judges to the election process itself, which relied heavily on a voter's awareness of the election, the issues and the candidates as a check on the election of appointees.[12] Such reliance might have been misplaced, as evidenced by the 1972 Arizona elections, where "only eighty percent of participating voters actually cast a ballot in the contested state supreme court races," compared to the 96 percent who voted for president.[13]

Particularly in the larger counties, where the typical voter would be hard-pressed to know those running for judicial office, candidates began to look for ways to inform and persuade the electorate. That reality placed pressure on judges, who faced the growing challenge of marketing and financing campaigns. Some incumbent judges were assigned newsworthy cases to maximize media exposure. And incumbents were often identified in campaign advertisements as

"Judge," which translated into a practical edge over challengers.[14]

Although historically Republicans provided more support to judicial candidates than did Democrats, party support may have played little role in the success or failure of election campaigns. From "1958 to 1972, the incumbent was defeated in only 10 out of 215 judicial elections."[15] Thus, elections did not change the composition of the bench more than 95 percent of the time; that may have been due more to voter indifference than to any citizen commitment to non-partisanship.[16]

A harbinger of merit selection, Governors Sam Goddard and Jack Williams appointed judges in Maricopa County by seeking recommendations from the Maricopa County Bar Association.[17] This practice may have provided the foundation for merit selection as we know it today.

After several years of debate and consideration, Arizona's voters passed Proposition 108 in the 1974 general election, adopting a merit selection system for appointment of all state appellate court judges and all superior court judges in Maricopa and Pima Counties.[18]

Today's System

The current system of selecting judges in Arizona is split into two. For superior court appointments in counties with populations of 250,000 or more, and for appellate court appointments, nominations are considered by commissions and then forwarded to the Governor for appointment. In counties of less than 250,000, superior court judges are elected by popular vote.[19]

The process involving commissions has traditionally been called "merit selection." That label might suggest judicial elections involve something less than the candidates' qualifications, or "merits." However, an argument supporting Arizona's hybrid approach is that the qualifications of judicial candidates in smaller counties are subject to the scrutiny of the people who know them best, a level of review every bit as rigorous as that conducted by a commission.

Since the inception of the merit process there have been three court commissions: one each for superior court nominations from Pima and Maricopa Counties, and one for appellate nominations. The 2010 Census changed that longstanding structure as the population of Pinal County increased to 375,770, requiring the creation of a third trial court commission.[20]

The composition of the trial and appellate court commissions is essentially the same. Each is comprised of the Chief Justice of the Arizona

Supreme Court, five attorney members and 10 "nonattorney" members.[21]

The State Bar solicits, reviews and sends nominations to the Governor for attorney members for all commissions. The Arizona Constitution does not specify how many nominees must be provided by the Bar. Under an informal agreement with the Governor, the State Bar Board of Governors generally sends three nominations for each commission vacancy.[22]

For nonattorney vacancies on trial commissions, the member of the county board of supervisors from the affected supervisorial district appoints a nominating committee that solicits, reviews and forwards applications, with recommendations, to the Governor for appointment. The appointment of nonattorney members of the appellate commission is similarly fashioned via a nominating committee appointed by the Governor.[23]

The appointment of attorney and nonattorney commission members by the Governor requires the advice and consent of the Arizona Senate. The Arizona Constitution also prescribes political party and residential requirements for commission membership in an attempt to achieve a balance in political and geographic representation.[24]

Currently, the State Bar President appoints members of the Bar to a committee, aptly named the Appointments Committee. Upon notice of a vacancy or in anticipation of the end of an attorney member's term, the Appointments Committee solicits interested members of the Bar. The only professional qualification under the Arizona Constitution is that an applicant have "resided in the state and shall have been admitted to practice before the supreme court for not less than five years."[25] Depending on the vacancy, the applicant pool also may be limited by party affiliation and location of residence.[26] The Appointments Committee reviews all applications and sends its recommendation for nominations to the Board of Governors as vacancies arise. The board may disregard the recommendation of the committee, and does so on occasion. Under an informal agreement, as mentioned above, the board generally votes to send three names to the Governor.

The question of how we pick judges has been no stranger to controversy. For many years, those different methods have been the subject of intense public debate.

Although judges selected via the merit process forego the election process faced by their colleagues in Arizona's smaller counties, those who wish to remain on the bench must face retention elections at the end of their terms.[27]

Challenges to Merit Selection

There have been two amendments to the merit provisions of the Arizona Constitution since they were adopted by initiative in 1974.[28] The most substantial changes to the original structure occurred in 1992, when Arizona voters approved Proposition 109.[29] Those changes included:

- an increase in number of commission members: attorneys from 3 to 5 and nonattorneys from 5 to 10;
- an increase in the population floor for trial court commissions from 150,000 to 250,000;
- an added requirement that commissions and judicial nominees consider "the diversity of Arizona's population"; and
- the creation of a judicial performance review process.

Perhaps the most significant of these changes was the creation of judicial performance review. What may have been a response to legislative pressure for more public accountability of judges, this created a process of review, including publication of the results of review, for each judge facing retention election.

Then, as now, Proposition 109 flowed from a compromise negotiated among virtually the same stakeholders: the bench, bar, Legislature and Governor. And since 1992, merit selection has continued to be the subject of intense political debate.

Before 2011, the most aggressive opposition "occurred between 2003 and 2005, when in the 46th and 47th legislatures, over nineteen bills were introduced that proposed to eliminate or undermine merit selection in one way or another."[30] Some bills proposed increasing the population cutoff from 250,000 per county to between 400,000 and 600,000 per county.[31] Others proposed changes such as removing merit selection entirely and returning to election of all judges.[32]

Those propositions were all contested. In fact, then-Chief Justice Charles E. Jones testified before the Judiciary Committee in opposition to these measures, citing a theme of "injecting politics into the judiciary and the judicial selection process."[33] In testifying against House Concurrent Resolution (HCR) 2386, which would require election of superior court judges, Jones emphasized that the proposal "undermined separation of powers, judicial independence, and the ability of courts to render justice equally."[34]In the next legislative session, Rep. Chuck Gray sponsored HCR 2056, proposing to eliminate the merit selection system by instituting the "federal model" of direct executive (governor) appointment with Senate confirmation.[35] Among the most consistent and influential advocates for changing Arizona's merit system, the Center for Arizona Policy (CAP), represented by its chief executive, Cathi Herrod, supported the bill as necessary to undo a merit system that it claimed had "resulted in increased judicial activism, less legislative oversight and 'no accountability.'"[36]

The full-court press by the 46th and 47th Legislatures to change merit selection was likely a result, in part, of the decision in *Bennett v. Napolitano*, where the Arizona Supreme Court

asserted a lack of standing to deny relief to several legislators who challenged then-Gov. Napolitano's line-item veto of some provisions from the 2004 budget bills.[37] During the House Judiciary Committee's hearing on HCR 2386, Representative Graff alluded to the case in an exchange with Chief Justice Jones, expressing his disappointment in the Court's failure to support the Legislature in fulfilling its role as "appropriator."[38]

Despite these efforts, merit selection opponents were unsuccessful in marshaling the votes in the Legislature to get anything on the ballot to change the state Constitution.

All of that would change in 2011 with a majority of legislators in both houses primed to change a system they claimed had politicized the selection of members to the Arizona Redistricting Commission.

The Origins of the 2011 Compromise

The 2010 Census triggered the creation of a new trial commission for the selection of superior court judges in Pinal County; it also required Arizona to reconfigure its electoral districts. Under the Arizona Constitution, that reconfiguration is accomplished via an independent redistricting commission. Rather than create another process for selecting members to that commission, the Constitution directs that the appellate court commission serve that function.[39]

As the appellate court commission took this task on in late 2010, a political firestorm arose when an attorney member of the commission, former Arizona superior court judge Louis Araneta, reportedly questioned a redistricting commission candidate, Christopher Gleason. Araneta, it was reported, asked Gleason about his religious affiliations and whether they might affect his work on the commission. Gleason subsequently failed to win nomination. Lawmakers in both houses cried foul and publicly condemned Judge Araneta, demanding that the appellate commission reconvene to reconsider Gleason. Although Judge Araneta resigned from the commission to "prevent the issue from becoming a distraction," the commission affirmed its decision not to forward Gleason's name to the Governor.[40]

This flap rekindled the effort to attack merit selection. Although it was unrelated to the selection of judges, advocates for change pointed to this incident as proof that the selection of attorney members to the court commission was flawed; they claimed that the State Bar had politicized the process by nominating attorneys who opposed religious liberty and conservative ideals.[41] Where these advocates had failed in the past to gain support for "reform," they now had overwhelming support.

The Compromise

As is true of all compromises, none of the parties involved in forging it got everything they wanted. Those involved in negotiations, however, shared the goal of maintaining Arizona's merit selection of judges for its larger counties and appellate courts.

In 2011, the Legislature considered 13 bills designed either to modify or eliminate the current system of judicial selection.[42] There were strong advocates, including then-Senate President Russell Pearce, for returning Arizona to an all-elections state. Senate Judiciary Chair Ron Gould also proposed a number of changes. His bill, Senate Concurrent Resolution (SCR) 1040, which garnered the most support, proposed a new system of judicial selection that would have raised the population trigger for trial court commissions to 400,000 and required trial and appellate judges selected via merit selection to seek reappointment by the Governor and reconfirmation by the Senate at the end of every judicial term. Also under SCR 1040, the Bar would be required to send at least three nominees to the Governor for attorney positions on the commissions, with a majority from the same party as the Governor.[43] If SCR 1040 had been placed on the ballot and passed by the voters, there was a belief that it would not only result in a loss of the merit system but of judicial independence itself. Requiring judges to be reappointed and reconfirmed at the end of each term was considered too great a risk to maintaining a quality system of impartial justice.

As the prospects for putting SCR 1040 on the ballot grew with the Senate's vote to support it, leaders from the bench and bar were compelled to intervene. Although some consideration was given to fighting SCR 1040 at the ballot, experienced political experts advised that it would be difficult

during a presidential election year (when the measure would go to the ballot) to raise enough money and awareness to successfully defeat it at the polls.

After meeting with judicial leaders, Arizona House Speaker Kirk Adams agreed to broker a compromise that would maintain the fundamental structure of merit selection, but would also address some of the concerns of its critics.[44] First among the complaints about the system was that the Bar and the commissions were unaccountable and politicized in nominating commission members and judicial officers, respectively. Although no data or incidents supporting this criticism were offered at Senate hearings, the complaints resonated with majorities in both houses, due in no small part to the controversy surrounding the redistricting commission.

Initially, the State Bar was not involved in negotiations. It was thought that the Bar was viewed with such animus by the Legislature that its participation would harm rather than help the effort. After several talks—primarily involving representatives from House and Senate leadership, the Governor's Office, the Arizona Judges Association and the Arizona Judicial Council—the Bar was invited to the table.[45] The Legislature's opening position was a "strike everything" amendment by the House Judiciary Committee to SCR 1001, which converted what had been a bill regarding school funding to one changing the process for selecting judges. SCR 1001 would limit the Bar's involvement to simply making recommendations to the Governor for attorney appointments to the commissions. And that was a firm position backed by leaders in both houses.[46]

Representatives from the Bar took the position that SCR 1001 as proposed by the Judiciary Committee eliminated any meaningful Bar role in the selection of attorney members, and it was therefore unacceptable.[47] However, the Bar supported other aspects of the compromise that would extend the retirement age and tenure of judges.

Ultimately, those advocating the elimination of the Bar from the process agreed to a modification of the Bar's current role, as well as a new role. Representatives from the various parties discussed draft language that would modify SCR 1001 to permit the Bar to directly appoint one of the five attorney members for each commission. For the remaining four attorney positions, the Bar would solicit applicants, verify qualifications and send all qualified applicants to the Governor for consideration. The Bar would lose its gatekeeper role but gain a direct voice on each commission.[48]

Because the Legislature is proposing changes to the Arizona Constitution, it must use the referendum process. Prop 115 must go to the voters of Arizona if it is to become law.

Proposition 115

SCR 1001 was filed with the Arizona Secretary of State on April 19, 2012, and relabeled "Proposition 115" in preparation for the 2012 general election. Prop 115 will be on the general ballot in November 2012. If Prop 115 passes, the following changes will take effect:[49]

- The State Bar will have a designated seat appointed by the Bar President on each of the court commissions. This seat would be one of the five lawyer positions (which already exist) on each commission. As in the past, the other four lawyer positions will be appointed by the Governor. The Bar's role in vetting the four lawyers appointed by the Governor for the commissions would be limited to collecting and reviewing applications and then forwarding all of them with recommendations to the Governor. Under the current system, the Arizona Constitution gives the Bar the authority not only to vet attorney candidates for nomination to each commission but to limit the number considered for appointment by the Governor. Under Prop 115, the Bar would lose its "gatekeeper" role with respect to the other four lawyers on the commissions.
- The qualifications for lawyer members of the commissions would increase the practice requirement from 5 to 10 years of practice and would add requirements of good standing with the State Bar of Arizona to include no history of formal disciplinary complaints or formal sanctions.
- Terms for appellate judges would be increased from six to eight years; and superior court judges from four to eight years.
- The retirement age for judges would increase from 70 to 75.
- The minimum number of judicial nominees that each commission must send to the Governor would increase from three to eight; and for multiple vacancy situations involving the same court, the requirement would drop to six, with the additional limitation that a person cannot be submitted for more than one vacancy. On two-thirds vote, however, commissions could reject an applicant and send fewer than eight names.
- The Supreme Court would be required to make all opinions and orders accessible to the public on its website.
- A joint legislative committee that could conduct hearings on judges prior to retention elections would be created. Such hearings would not be required and would be conducted for the purpose of taking "testimony on the Justices and Judges who are up for retention."

The Way Ahead

Because the Legislature is proposing changes to the Arizona Constitution, it must use the referendum process. Prop 115 must go to the voters of Arizona if it is to become law.

As part of the compromise, the Bar agreed to include its support of the change in the voter information pamphlet prepared by the

Secretary of State—the same thing the Bar did in 1992 when Prop 109 was on the ballot.[50]

It is difficult to predict the result. Although the Bar as an organization has agreed to support the proposition, there are members on both sides of the issue. Former Arizona Chief Justice Stanley Feldman has publicly opposed the measure and garnered some following within the Bar. Other prominent Bar members and members of the judiciary support the proposition for a variety of reasons—some on the merits and others as a necessary means of preserving the fundamental structure of merit selection in Arizona.[51]

If the proposition passes, the Bar and the commissions will have to adjust their processes and procedures to align with new provisions of Article VI of the Arizona Constitution. In particular, the Bar will have to develop a process for vetting and selecting its attorney representatives for each commission, and it will need to consider to what extent it provides and publicizes guidance regarding judicial nominations to its representatives. The Bar has never had such a direct line of communication to the judicial commissions.

Should the proposition fail, the authors believe Arizona will see another round of challenges to merit selection in the next legislative cycle. The nature of those challenges—whether they come in the form of a renewed call for elections or some other system—will surely depend on the makeup and leadership of the Legislature.

If Prop 115 were to pass, there is of course no guarantee that the Governor or Legislature will "leave merit selection alone." But we believe it is unlikely that any political capital would be spent in seeking additional changes right on the heels of a successful system "reformation."

Conclusion

Prop 115 would result in significant changes to how we select judges in Arizona. However, the authors believe that the essential structure and quality of the merit selection process would not be mortally wounded by the changes. In 1992, some believed that the compromise would ruin merit selection—but, by all accounts that did not happen. If Prop 115 passes, it will cause an adjustment on the part everyone involved, but Arizona will continue to benefit from a process that reduces partisanship and advances our best lawyers for consideration as judicial officers.

endnotes

1. To juxtapose the benefits of merit selection with those of judicial election, *compare* Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility To Pay for Justice*, 24 Geo. J. Legal Ethics 225 (2011) *with* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675 (2009).
2. A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 Ariz. St. L.J. 643, 645 (1998).
3. *Id.*
4. Rebecca White Berch, *A History of the Arizona Courts*, 3 Phoenix L. Rev. 11, 31 (2010); *see also* Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. Miami L. Rev. 1, 10 (1994) (The Missouri Plan affected its appellate courts, the circuit and probate courts of St. Louis City and Jackson County, and the St. Louis courts of criminal correction.).
5. Goldschmidt, *supra* note 4, at 10.
6. *See* Denver, Colo., Home Rule Charter, A13.8 to -3 (1964); Bipartisan Commission to Select Denver Judges, 48 J. Am. Judicature Soc'y 117 (1964); Dade County, Fla., Home Rule Charter, 6.01 (1964); Dade County Voters Approve Plan, 47 J. Am. Judicature Soc'y 117 (1963).
7. Ariz. Const. art. VI, §§ 4, 5 (1910).
8. Mark I. Harrison, Sara S. Greene, Keith Swisher & Meghan H. Grabel, *On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future*, 34 Fordham Urb. L.J. 239, 240 (2007).
9. *Id.*
10. *Id.*
11. Berch, *supra* note 4, at 30-3.
12. *Id.* at 31.
13. Harrison *et al.*, *supra* note 8, at 241.
14. *Id.*
15. *Id.*
16. *See* Harrison *et al.*, *supra* note 8, at 241. (In 1972, one poll showed 65 percent of voters undecided about state supreme court races, whereas only 13 percent were undecided about the presidential race and 12 percent to 25 percent undecided about the various elections for United States Representatives.).
17. Stephen E. Lee, *Judicial Selection and Tenure in Arizona*, 1973 L. & Soc. Ord. 51, 52 (1973) (citing Ariz. Republic, Oct. 15, 1972, at A1).
18. *See* Pelander, *supra* note 2, at 654.
19. Ariz. Const. art. VI, §§ 36, 37.
20. U.S. Census Bureau, State & County, QuickFacts, Pinal County, Arizona, *available at* http://quickfacts.census.gov/qfd/states/04/04021.html.
21. Ariz Const. art. VI, §§ 36, 41.
22. On April 21, 2009, Gov. Jan Brewer, in a letter to then-State Bar President Ed Novak, asked

that the State Bar forward "a balanced list of at least three names for each appointment." *See* Letter, Janice K. Brewer, Apr 21, 2009, on file at offices of the State Bar of Arizona. This letter was in response to Ed Novak's letter to the Governor expressing a willingness to work with her and Senate Judiciary Chair Jonathan Paton in finding candidates for appointment. Minutes of the State Bar's May 2009 Board of Governors meeting reflect the board's recognition of the Governor's request, followed by efforts to satisfy the request. *See* Special Meeting of the Board of Governors of the State Bar of Arizona, May 15, 2009, *available at* www.azbar.org/media/52276/bog_0905.pdf.

23. ARIZ. CONST. art. VI, §§ 36, 41.
24. *Id.*
25. *Id.*
26. For the appellate commission, not more than three attorney members may be members of the same party; and not more than two may hail from the same county. ARIZ. CONST. art. VI, § 36A. For trial commissions, not more than three attorney members may be from the same party, and none may be from the same supervisorial district. *Id.* art. VI § 41B.2.
27. *Id.* art. VI, §38.
28. Amendments were made in 1976 and 1992 (both by referendum). The 1976 amendment was limited to § 36 and added the words "in the manner prescribed by law" after the provisions concerning Senate confirmation of commission appointments.
29. For details of the 1992 changes *see* 1992 Ballot Propositions (Publicity Pamphlet), *available at* www.azsos.gov/election/1992/Info/PubPamphlet/PubPam92.pdf
30. Harrison *et al.*, *supra* note 8, at 247.
31. *Id.*
32. *Id.* Additional proposed changes included: requiring the election of all trial court judges; requiring Senate confirmation of all justices and judges; eliminating nominating commissions and requiring the Governor to appoint judges to vacancies with Senate confirmation, and requiring justices and judges to be reconfirmed by the Senate every four years; requiring that the chairperson of the three nominating commissions be the chairperson of the Senate Judiciary Committee, as a non-voting member; changing the membership of the nominating commissions to make the Chief Justice a non-voting member, allowing only one attorney member to be appointed by the Governor, and requiring that two of the attorney members be appointed by the President of the Senate, and two by the Speaker of the House; requiring judges and justices to receive a "yes" vote of at least 60 percent to remain in office in a judicial retention election; and requiring member attorneys of the commissions to be confirmed by the Senate.
33. *Id.* at 248. *See also* Hearing on H.R. Con. Res. 2386 Before the Comm. on the Judiciary, 46th Leg., 2d Reg. Sess. (Ariz. 2004), *available at* http://azleg.gov/legtext/46leg/2r/comm_min/house/0212jud.doc.htm.
34. *Id.*
35. Hearing on H.R. Con. Res. 2056 Before the Comm. on the Judiciary, 47th Leg., 1st Reg. Sess. (Ariz. 2005), *available at* http://azleg.gov/legtext/47leg/1r/comm_ min/house/0224jud.doc.htm.
36. *Id. See also* Harrison *et al.*, *supra* note 8, at 249.
37. Harrison *et al.*, *supra* note 8 at 250.
38. *Id. See also* Hearing on H.R. Con. Res. 2386, *supra* note 33.
39. ARIZ. CONST. art. IV, part 2, § 1(4).
40. *See* Mary Jo Pitzl, *Redistricting Panel's Work Questioned*, ARIZ. REPUBLIC, Dec. 12, 2010, *available at* www.azcentral.com/arizonarepublic/local/articles/2010/12/14/20101214arizona-redistricting-panel-member-quits.html. *See also* Editorial, *Panel Stands Firm vs. Pearce, Adams,* ARIZ. REPUBLIC, Dec. 30, 2010, *available at* www.azcentral.com/arizonarepublic/opinions/articles/2010/12/30/20101230thur2-30.html.
41. Using this incident to renew her call for reform of merit selection, Cathi Herrod (President, Center for Arizona Policy) wasted no time in pointing out that this incident was symptomatic of a larger problem with judicial selection. *See* Charlie Butts, *Religious Litmus Test Applied in Ariz.*, Dec. 15, 2010, *available at* www.onenewsnow.com/culture/default.aspx?id=1254508 . *See also* Howard Fischer, *Election May Alter Judge Selection Process,* ARIZ. BUS. GAZETTE, Jul. 5, 2012, *available at* www.azcentral.com/business/abg/articles/20120705election-may-alter-judge-selection-process.html
42. *See* Senate Bill (SB) 1472 (publicity pamphlets, judicial performance); SB 1482 (appellate judge performance); House Concurrent Resolution (HCR) 2020 (repeal of merit selection, gubernatorial appointment and senate confirmation); HCR 2026 (increase threshold population from 250,000 to 500,000); Senate Concurrent Resolution (SCR) 1040 (reappointment and reconfirmation of justices/judges); SCR 1042 (commission appointments divided among Governor, Senate President and House Speaker); SCR 1043 (commissions required to send all qualified names to Governor); SCR 1044 (Governor not limited to nominees submitted by commissions); SCR 1045 (State Bar eliminated from commission nomination process); SCR 1046 (change to appellate commission composition and process); SCR 1048 (Senate approval of judicial retentions); SCR 1049 (increase threshold population from 250,000 to 400,000, change to composition and processes of commissions); and SCR 1001 (change to nomination

process for commissions and process for commission nominations).

43. One of the many bills proposed by Sen. Ron Gould, Senate Judiciary Chair, SCR 1040 passed in the Senate Government Reform Committee, rather than the Senate Judiciary Committee, by an overwhelming majority. On Feb. 16, 2011, Chief Justice Rebecca White Berch, on behalf of the judiciary, spoke in opposition to the bill, as did Arizona Judges Association Executive Director Pete Dunn. President of the Center for Arizona Policy (CAP) Cathi Herrod registered as neutral on the bill. *See* Minutes of the Committee on Government Reform, Ariz. Senate, 50th Legislature Regular Session, *available at* www.azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/1R/comm_min/Senate/021611%20GR.DOC.htm&Session_ID=102. On Mar 8, 2011, the Senate passed SCR 1040 on a vote of 19 to 11, *see* Arizona State Senate Daily Posting Sheet, Mar. 8, 2011, *available at* www.azleg.gov/legtext/50leg/1r/posting/posting%20sheet%2058.doc.htm.
44. Sources close to then-Speaker Kirk Adams confirmed that former Chief Justice Ruth McGregor and U.S. Supreme Court Justice Sandra Day O'Connor met with the Speaker to plead for compromise.
45. The following persons represented the various stakeholders involved in the compromise: Arizona Judicial Council: Dave Byers, Director of the Arizona Administrative Office of the Courts ("AOC"), and Jerry Landau, Government Affairs Director, AOC; Senate: Katy Procter, Legislative Adviser to Senate President Russell Pearce; House: Peter Gentala, Counsel to Speaker of the House Kirk Adams; Gov. Jan Brewer: Joe Kanefield, General Counsel; Arizona Judges Association: Pete Dunn, Executive Director; State Bar of Arizona: John Phelps, CEO, and Janna Day, State Bar lobbyist.
46. SCR 1001, originally drafted to amend Article XI, § 8 of the Arizona Constitution, regarding school funding, was converted by the House Judiciary Committee via a strike-everything amendment on Mar. 28, 2011, to a new resolution to amend the merit provisions of the Constitution. Senate President Russell Pearce sponsored the strike-everything amendment, giving witness to the ongoing compromise efforts. The effort to compromise was especially notable given Pearce's consistent and public support of elections over merit selection. The first version of the new SCR 1001 reduced the State Bar's involvement in the process to simply providing recommendations to the Governor on attorney commission member appointments. It also mandated a legislative review, via a joint committee, of all judges facing retention election 60 days prior to a primary election. *See* SCR 1001, *available at* www.azleg.gov/legtext/50leg/1r/adopted/h.scr1001-se-jud.doc.htm.
47. The House Judiciary Committee considered SCR 1001 at a hearing on Mar. 24, 2011. State Bar CEO John Phelps spoke in opposition to the bill. Senate President Russell Pearce spoke in support of the bill as its sponsor. During the hearing Rep. Cecil Ash, a longstanding member of the State Bar, suggested in his line of questioning that the Bar be included in negotiations to further improve the bill. The Center for Arizona Policy, via its legal counsel Deborah Sheasby, spoke in support of the bill. Pete Dunn, Executive Director of the Arizona Judges Association, registered his organization as "neutral" on the bill. The bill was passed by the committee by an overwhelming majority. *See* Minutes of the Committee on Judiciary, House of Representatives, Mar 24, 2011, *available at* www.azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/1R/comm_min/House/032411%20JUD.DOC.htm&Session_ID=102.
48. *See* Farnsworth Floor Amendment House of Representatives Amendments to S.C.R. 1001, Apr. 12, 2011 (The provision putting the Bar back into process was added via a floor amendment by House Judiciary Chair Ed Farnsworth on April 12, 2011), *available at* www.azleg.gov/legtext/50leg/1r/adopted/h.1001ef1.doc.htm .
49. *See* Ballot Number 115, April 19,2011, *available at* www.azsos.gov/election/2012/General/ballotmeasures.htm.
50. Then-State Bar President Robert Schmitt and Immediate Past President Roxana Bacon signed a statement in support of Prop 109. The statement said, in part, "By restructuring the process for appointing Commissions on Court Appointments, and by including diversity along with merit as a factor to be considered in the selection of judges, the proponents of this referendum hope to ensure that the courts of Arizona more closely reflect the diversity of our counties." It is interesting to note that although the State Bar was listed in the voter pamphlet as a supporter of the proposition, the language used by its leaders to describe that support was indirect, if not lukewarm, as demonstrated by their use of third-person language (proponents … hope to …), rather than stating that they, on behalf of the Bar, supported the proposition. There were no statements, for or against, Prop 109 registered by the judiciary. *See* 1992 Ballot Propositions (Publicity Pamphlet) *available at* www.azsos.gov/election/1992/Info/PubPamphlet/PubPam92.pdf.
51. *Compare* Clint Bolick, *Improving Merit*, ARIZ. ATT'Y, Sept. 2011, at 76, *with* Stanley Feldman, *Improving Merit, Revisited*, ARIZ. ATT'Y, Jan. 2012, at 68 (Former Chief Justice Feldman writes in opposition of SCR 1001, criticizing State Bar leadership and the judiciary, and responding to Clint Bolick's earlier article in support of SCR 1001).