

Politics Threatens Arizona's Independent Judiciary

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Protests against an imperial judiciary have existed since the infancy of our country. But an independent judiciary free from political pressure is essential to our system of checks and balances and protects the rights of each of us. Judicial impartiality gives litigants comfort, confidence, and trust that all are equal once inside the courthouse.

Recently, our State's fair and impartial judiciary has come under attack. What is troubling is these attacks are not aimed at judges' abilities to sit fairly and impartially, or to understand and apply the law. Instead, these attacks are grounded in ideological disagreement and are accompanied by threats of retaliation and retribution. Most troubling is that those taking aim at Arizona's Judiciary threaten to swap our transparent, merit based judicial selection with judicial elections.

The Merit Selection System

In 1974, Arizona voters amended our State Constitution to create a merit selection and retention system for selecting Appellate and certain Superior Court Judges. Under merit selection, the Governor appoints Superior Court Judges in counties with more than 250,000 people and Appellate Court Judges, statewide, from a list of nominees submitted by a judicial nominating commission.

Under merit selection, when a judicial vacancy occurs, the appropriate nominating commission interviews applicants and then submits at least three names to the Governor, taking into consideration ethnic, gender, and geographic diversity. No more than 60% of the nominees sent to the Governor may be of the same political party.

Once appointed, judges keep their job through retention elections. Superior Court Judges face retention elections every 4 years and Appellate Court Judges face retention elections every 6 years.

Since its creation 21 years ago, Arizona's merit selection has stood as a model. Nationwide, jurisdictions look to Arizona as an example of a system that has effectively and efficiently minimized undue political and ideological battles. Understanding that judges are free from political pressures, and not beholden to campaign contributors, allows lawyers and parties to go through the process confident that a judge's decision is based on the merits, not prevailing political winds or outside influence.

The Challenges to a Fair and Impartial Courthouse

Interest groups in Arizona have begun making attacks aimed at individual judges whose decisions they disagree with. Those disagreements come not from any evaluation of the judge's reasoning or capability as a fair and impartial jurist, but rather from ideological disagreement. These critics denounce merit selection and advocate a destructive alternative - - the return to judicial elections.

In Arizona it is the conservative Right, notably through groups like the Center for Arizona Policy, that want to move from the merit selection process to judicial elections where candidates will be forced to go, hat-in-hand, to donors and run what are sure to be

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offensive and expensive campaigns. A survey of jurisdictions around the country where judges are selected through raw politics and election reveals that successful candidates spend up to one million dollars to campaign.

Ironically, the Center for Arizona Policy's allies around the country stand on the other side of this issue. For example, the United States Chamber of Commerce, along with other tort reform allies, published a list of "judicial hell-holes" earlier this year. The overwhelming majority of those jurisdictions, including Illinois, Mississippi, Pennsylvania, Texas, Louisiana, and Florida, select their judges through election. The criticism of those jurisdictions is that plaintiff's lawyer's political donations control the courtroom.

The goal of those in Arizona seeking a change from merit selection is improper. Election advocates are not looking for more qualified judges. They are looking for a way to hold judges accountable. Accountability based on how a judge decides matters, though, has no place in American justice. Election advocates believe they can influence outcomes by funding ideological allies. The move has nothing to do with selecting good judges - - it has everything to do with controlling judges. This is dangerous and in complete conflict with what every middle school student learns in civics class: judges apply the law as opposed to the will of the people.

Citizens certainly have a right and a duty to express disagreement with judicial decisions, but threats and direct retaliation against judges cross the line. Honest and open debate about a judge's capacity to sit fairly and impartially, to comprehend, digest and apply the law, to run a courtroom in a professional and respectable manner are all fair game for debate and discussion.

Judicial Performance Review

Arizona has a process that allows citizens and lawyers to comment on a judge's performance and capability. Judicial Performance Review allows anonymous input on six important areas vital to accurately measuring a judge's abilities. Information collected through the Judicial Performance Review is then digested and presented to the public in advance of retention elections. The process is not perfect, and there is certainly room for improvement in how information is collected and communicated to the public. But the review system, like merit selection, stands head and shoulders above others with regard to informing the public about the judiciary and allowing the public to have its voice heard.

Improper Attacks on Controversial Decisions

Recent attacks on individual judges grounded in ideological disagreement on "hot button" social issues such as religion, abortion, and race are a dangerous sign that some in our state seek to wrest control of the court and destroy any concept of an independent judiciary. In fact such threats have become an accepted way of criticizing decisions. Doubt that? Next time you are in the area, swing by the Arizona Courts Building and head to the library. You'll know you are there when you reach the dark basement full of rows and rows of empty shelves. That's right. The Arizona Supreme Court and Division

Two of the Court of Appeals have no law library. It was stripped from them by the Republican controlled legislature in retaliation for certain decisions.

In the weeks before the November 2004 elections, a website attacking two Maricopa County Judges sprung up. Described by the Center for Arizona Policy as an “unprecedented campaign,” the site sought the defeat of two Maricopa County Judges, William Sergeant and Kenneth Fields, on the basis of two controversial decisions each had made. In the case of Judge Sergeant, one of the rulings came a decade before the election. All the decisions in question that went up on appeal were affirmed. I suspect both Judges wrestled long and hard with the difficult decisions they were faced with in the cases that lead them to be labeled as “bad judges.”

A more accurate measure of Judges Fields and Sergeant’s judicial performance are the Judicial Performance Review grades both received from litigants and lawyers who appeared in their courtrooms.

For the 2004 election cycle, the Judicial Performance Review Voter Information Guide shows that Judge Fields scored a 97% average when ranked by attorneys, parties, witnesses and jurors in the important categories of legal ability and integrity. Judge Sergeant scored an even more impressive 98.5% average.

Despite these high marks, the attack campaign, started just three weeks before Election Day, managed to add 23,000 more “no” votes than average to the Judges’ totals. The average Arizona Judge was retained by a 74/26% margin, but both Judge Fields and Judge Sergeant were retained by an average of 68/32% margin, costing them both an average of 6 percentage points. Despite many early ballots having been cast by the time the campaign started, the campaign had a measurable impact on the election. We can be sure to expect more of this type of politicalization of the judicial process the next go round.

Through public attacks, proposed legislation, and other threats, ideologs are trying to bully judges into carrying out their will. An impartial judiciary must be a co-equal branch of government. Judges must be shielded from the pressure of mob politics. Their job is to interpret, fairly and impartially, how the law applies to a particular set of facts, not to bend and twist based on the passions of the moment. In his confirmation hearings, recently appointed Chief Justice John Roberts received universal praise when describing his judicial philosophy, “Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them...They make sure everyone plays by the rules.”

In winning broad approval, Chief Justice Roberts told the Senate Judiciary Committee and the United States public that he had “no agenda.” The loud voices clamoring for control over the Judicial Branch would do well to close their mouths and listen.