

## Judicial Performance Review in Arizona: A Critical Assessment

REBECCA WHITE BERCH\*  
ERIN NORRIS BASS\*

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### Abstract

Judicial performance evaluations are a relatively new tool for assessing judges and providing information to voters to help them determine whether to retain judges in contested or retention elections. Arizona implemented its judicial evaluation program about 20 years ago, and since that time, the state has continually strived to improve its process. The result is that today Arizona has one of the most progressive and comprehensive judicial performance evaluation programs in the United States. This article takes a critical look at the strengths and weaknesses of Arizona's program, keeping in mind two key values that the system seeks to protect: judicial accountability and judicial independence.

### Key words

Judicial Performance Evaluation; Judges; Measurement

### Resumen

Las evaluaciones del rendimiento judicial son una herramienta relativamente nueva para evaluar a los jueces y ofrecer información a los votantes, que les ayude a decidir si quieren reelegir a los jueces en las elecciones. Arizona implementó su

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\* Rebecca White Berch is a member of the Arizona Supreme Court, serving as Chief Justice (2009–2014) and as an associate Justice (2002–2009, 2014–present). Previously, she served on the Arizona Court of Appeals (1998–2002). Justice Berch was on the faculty at Arizona State University College of Law, where she directed the Legal Method and Writing Program (1986–1995) and served as Solicitor General, State of Arizona (1991–1994). She received J.D., M.A. and B.S. degrees from Arizona State University. Justice, Arizona Supreme Court. 1501 West Washington Street. Phoenix, AZ 85007. United States [rberch@courts.az.gov](mailto:rberch@courts.az.gov)

\* Erin Norris Bass is an Associate at Steptoe & Johnson LLP (2013–present). She served as Law Clerk to Chief Justice Berch (2012–2013) and received her J.D. degree from the University of Arizona (2012) and a B.A. from Arizona State University (2009). Associate, Steptoe & Johnson LLP. 201 East Washington Street, Suite 1600. Phoenix AZ 85004. United States [ebass@steptoe.com](mailto:ebass@steptoe.com)



programa de evaluación judicial hace unos 20 años, y desde ese momento, el Estado se ha esforzado continuamente en mejorar el proceso. El resultado es que hoy en día, Arizona tiene uno de los programas de evaluación del rendimiento judicial más progresistas e integrales de los Estados Unidos. Este artículo ofrece una mirada crítica a las fortalezas y debilidades del programa de Arizona, teniendo en cuenta dos valores clave que el sistema trata de proteger: la responsabilidad judicial y la independencia judicial.

**Palabras clave**

Evaluación del rendimiento judicial; jueces; medición

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## 1. Introduction

*Sed quis custodiet ipsos custodios (Juvenal, Satires VI, line 347)?* Who decides whether judges are doing their jobs well? Citizens are torn. They want judges to be independent, yet accountable; insulated from undue influence, yet aware of what is going on in the “real world.” They want judges to dispense impartial justice and effectuate the rule of law. But they also want to be able to hold accountable those judges who fail to follow the law or yield to improper external forces. The struggle to balance these interests has persisted for centuries.<sup>1</sup> A key question in this debate in the United States is how to determine whether our judges are knowledgeable and impartial. How do we know if they are upholding the law?

Judicial evaluation, in its broadest sense, begins with the process of selecting new judges. Jurisdictions use a multitude of methods for determining which judges are qualified to sit on the bench, including written examinations, recruitment commissions, and qualification profiles (e.g., Riedel 2014, p. 978-980). This article does not address judicial evaluation for selection but instead focuses on the evaluation of judges for the purpose of determining which judges should remain on the bench. It views the issue through the lens of the judicial evaluation process of state court judges in Arizona.

Like many citizens of other states in the country, Arizona citizens first sought to hold judges accountable through contested elections, but critics challenged judicial elections as imposing too great a cost on judicial independence (McGregor 2009, p. 385–386). In 1974, Arizonans adopted merit selection as the solution to this problem, at least for judges in a significant part of the state. The state constitutional amendment adopting merit selection provided that superior court (trial level) judges in Arizona’s three largest counties and all appellate judges in the state would no longer run for judicial positions in contested elections, but would be appointed by the governor from a group selected by a commission. After appointment, the merit-selected judges would periodically stand in elections in which citizens would vote to either “retain” or “do not retain” the judges.

Merit selection was not without its own detractors. Critics complained that it gave judges too much independence at the cost of accountability. In an effort to enhance judicial accountability and allay the critics, Arizona voters amended the state constitution in 1992 to provide for a system of Judicial Performance Review (JPR), which requires evaluating the merit-selected judges and informing the public about how these judges were performing in office. The result was one of the most comprehensive and progressive systems for judging judges in the United States (Institute for the Advancement of the American Legal System [IAALS] 2013a).

Since implementing the JPR program in 1994 (Pelander 1998, p. 672), Arizona has continually worked to improve its process, learning by trial and error. For that reason, and because of its comprehensiveness, Arizona’s system offers a worthy subject for a case study of a judicial evaluation system. To facilitate a discussion about how judicial performance evaluations in the United States and other countries can be more effective going forward, this Article identifies the strengths and weaknesses of Arizona’s program within the context of the United States state-level justice systems.

Section 2 of this Article sets forth a brief history of Arizona’s merit-selection system. Section 3 provides an overview of Arizona’s JPR program. Section 4 offers observations about the strengths and weaknesses of the program, as well as other interesting points about how it functions. Part IV addresses ways other than JPR to promote judicial accountability while still protecting judicial independence, some of

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<sup>1</sup> Many have described this struggle (White 2001, p. 1053–1055, O’Connor and Jones 2008, p. 23, Shugerman 2012, p. 5–9). Indeed, the United States’ founding fathers thought that an independent judiciary was a critical principle in the country’s formative years as evidenced by Alexander Hamilton’s (1788) writings in *The Federalist Papers* No. 78.

which Arizona already employs. We address other methods to facilitate discussion about additional ways to impose accountability. Finally, the Article concludes with a brief assessment of Arizona's JPR program.

## 2. History of Arizona's judicial merit-selection system

Through the first 60 years of Arizona's statehood, Arizona judges were elected through a nonpartisan election system (Arizona Constitution art. VI, §§ 3, 5, 9 (1958, repealed 1960)). Judicial elections were common in the United States in 1912, the year Arizona achieved statehood. Although few states employed judicial elections in the United States' founding years, by the 1860s, most states elected their judges (O'Connor and Jones 2008, p. 16).

The theory behind judicial elections is that "elected judges who derived their authority from the people would be more independent-minded than hand-picked friends of governors or jurists subject to the beck and call of the legislature" (O'Connor and Jones 2008, p. 16-17). In Arizona's experience, however, most "elected judges" were not elected by the people—at least not at the start of their judicial careers. Rather, the Governor initially appointed most "elected" judges (Harrison *et al.* 2007, p. 240). The Governor had—and still retains in non-merit-selection counties—unfettered discretion to fill judicial vacancies occurring between election cycles, whether they result from death, retirement, resignation, or the creation of new judgeships. The temporary appointments often translated into lifelong judicial careers because appointees became incumbents, and incumbents are rarely defeated in subsequent elections (Harrison *et al.* 2007, p. 240–242).<sup>2</sup> These temporary-turned-permanent judges were most prevalent in Arizona's most populous counties, where the sheer number of judges made it difficult for voters to know their judges and distinguish among them. To rectify the Governor-selection and incumbency-advantage issues, as well as other perceived problems with the election of judges, such as the influence of campaign contributions and voter indifference, the Arizona State Bar and other advocates sought to establish a merit-based selection system (see O'Connor and Jones 2008, p. 17–19, Shugerman 2012, p. 4).<sup>3</sup>

In 1974, Arizona voters approved a constitutional amendment providing for merit selection of all appellate judges and superior court judges in counties having populations exceeding 150,000—a threshold that has since been raised to 250,000 (Harrison *et al.* 2007, p. 243).<sup>4</sup> The 1974 amendment required creation of three Judicial Nominating Commissions (JNCs): a statewide commission for the appellate courts and county-wide commissions for the superior courts of Pima and Maricopa Counties (the only two counties then meeting the population threshold) (Arizona Constitution, art. VI, § 35 (1960, amended 1974), §§ 36–40). The JNCs, consisting of ten public members and five lawyer members, and chaired by the Chief Justice or her designee, screen candidates for referral to the Governor, who appoints from a list of at least three nominees submitted by the commission (Arizona Constitution, art VI, §§ 36, 41).<sup>5</sup>

<sup>2</sup> Between 1958 and 1972 in Arizona, the incumbent judge was defeated in only 10 out of 215 elections, and over one-half of judicial candidates ran unopposed (Harrison *et al.* 2007, p. 240–242).

<sup>3</sup> Shugerman (2012, p. 208–240) offers a different account of why merit-selection systems gained popularity in the United States.

<sup>4</sup> One thought behind the population threshold was that the problems of judicial elections were less acute in less populous counties, where voters had more opportunity to get to know the smaller number of judges. The population threshold was also a political compromise in the effort to ensure voters would approve the constitutional amendment. When the voters amended the constitution in 1992 to provide for judicial performance evaluation (Pelander 1998, p. 672), they also voted to raise the population threshold to 250,000. Pinal County recently reached this population threshold (Collom 2012).

<sup>5</sup> Originally composed of five nonlawyer and three lawyer members, today's commissions contain ten nonlawyer and five lawyer members, each serving staggered four-year terms. The governor appoints members with approval of the state senate. The Arizona Constitution also proscribes political party and residential requirements for commission membership (Arizona Constitution art VI, §§ 36, 41).

Appellate judges serve six-year terms and trial court judges, four-year terms. At the end of each term, in order to retain a judicial post, a judge appointed under the merit-selection system must stand for retention—that is, the judge must go through an election at which citizens vote “retain” or “do not retain” with respect to each judicial candidate.<sup>6</sup> To remain in office for another term, a judge must receive an affirmative vote from a majority of those who vote in the judge’s retention election (Arizona Constitution, art VI, § 38 (C)). Supreme Court justices stand for retention statewide; court of appeals and superior court judges stand in their respective jurisdictions (Arizona Constitution, art VI, § 38).<sup>7</sup>

Many have praised the merit-selection system as a significant improvement to Arizona’s justice system, principally because it has produced highly qualified judges (see Harrison *et al.* 2007, p. 244–245, 259, O’Connor and Jones 2008, p. 20, American Judicature Society 2012, p. 3, 38). Nevertheless, with the adoption of merit selection, interested parties raised concerns about the lack of judicial accountability and information for voters, among others, and people soon recognized a need for some type of judicial evaluation program (see O’Connor and Jones 2008, p. 17–19, Pelander 1998, p. 655–667, Roll 1990, p. 847–856, 884–890, Shugerman 2012, p. 255–256).<sup>8</sup>

### 3. Arizona’s Judicial Performance Review Program

Judicial performance evaluation (JPE)<sup>9</sup> is a key component of Arizona’s merit-selection system. JPE enhances judicial accountability by collecting information about a judge’s performance, evaluating the judge based on the data, distributing evaluative information to the public, and encouraging each judge to reflect on and improve his or her performance. At the same time, JPE avoids excessive burdens on judicial independence because, in theory, it evaluates judges based on the central facets of judging—e.g., knowledge and impartial application of the law, timely rulings, and clear communication—and minimizes the effect of external factors—such as campaign contributions, public opinion, or political pressure—that may improperly influence judges facing popular election.<sup>10</sup>

Arizona’s JPE program emerged in 1992 when the Arizona Legislature proposed, and the voters approved, a constitutional amendment mandating the creation of a judicial evaluation process, an oversight commission, and a public hearing for each judge that stands for retention (H.R. Con. Res. 2009, 40th Leg., 2d Reg. Sess. (Ariz. 1992); Arizona Constitution, art. VI, § 42).<sup>11</sup> The amendment requires the Arizona Supreme Court to implement the program (Arizona Constitution art. VI, § 42).

To carry out its constitutional mandate, the Arizona Supreme Court in 1993 adopted rules to implement a system of JPR (Pelander 1998, p. 668). The Arizona Rules of Procedure for JPR state that the program seeks to

assist voters in evaluating the performance of judges and justices standing for retention; facilitate self-improvement of all judges and justices subject to retention; promote appropriate judicial assignments; assist in identifying needed judicial education programs; and otherwise generally promote the goals of judicial

<sup>6</sup> Article 6, sections 36 and 41, of the Arizona Constitution details the procedures for gaining retention. Judges initially stand for retention at the first general election following “the expiration of a term of two years in office” (Arizona Constitution art VI, § 37(C)).

<sup>7</sup> This article uses “judge” to encompass both judges and justices.

<sup>8</sup> For further detail on these criticisms, see O’Connor and Jones (2008, p. 17–19), Pelander (1998, p. 655–667), Roll (1990, p. 847–856, 884–890), and Shugerman (2012, p. 255–256).

<sup>9</sup> Because JPE is a more commonly used name for similar judicial evaluation systems in the United States, this Article will use JPE when referring to these programs generally and JPR when referring to Arizona’s program specifically.

<sup>10</sup> Shugerman (2012, p. 1–5) describes some notorious examples of external factors playing a significant role in judicial elections in the United States.

<sup>11</sup> Arizona is the only state to provide for JPE in its state constitution (American Judicature Society 2013b).

performance review, which are to protect judicial independence while fostering public accountability of the judiciary (Arizona Rules of Procedure for Judicial Performance Review [Arizona Rules of Procedure for JPR] 2010, Rule 1).<sup>12</sup>

The Court also established the Commission on JPR (the "Commission") to oversee the evaluation process (Arizona Rules of Procedure for JPR 2010, Rule 2). Today, the Commission is composed of 30 members: 18 public members, 6 attorney members, and 6 judge members (Arizona Rules of Procedure for JPR 2010, Rule 2(a), Arizona Commission on Judicial Performance Review [JPR Commission] 2014d).<sup>13</sup> The Arizona Supreme Court appoints the members, who serve staggered four-year terms (Arizona Rules of Procedure for JPR 2010, Rule 2(a), (c)).

The Commission's chief purposes are to develop performance standards and conduct periodic performance reviews of all judges subject to retention (Arizona Rules of Procedure for JPR 2010, Rule 2(g)). The current performance standards state that judges should

- administer justice fairly, ethically, uniformly, promptly and efficiently;
- be free from personal bias when making decisions and decide cases based on the proper application of law;
- issue prompt rulings that can be understood and make decisions that demonstrate competent legal analysis;
- act with dignity, courtesy and patience; and
- effectively manage their courtrooms and the administrative responsibilities of their office (JPR Commission 2014a).

The performance reviews, which occur twice—midterm and just before the retention election—consist of two main aspects: (1) collecting and reporting data, and (2) meeting with each judge to facilitate self-evaluation and improvement (see Arizona Rules of Procedure for JPR 2010, Rules 4, 6).

The Commission collects data primarily from anonymous surveys distributed to people with first-hand experience with the judge during the evaluation period (see Arizona Rules of Procedure for JPR 2010, Rule 6(b)). For superior court judge evaluations, the Commission solicits responses from attorneys, jurors, represented litigants, pro per litigants, court staff, and other judges (JPR Commission 2014b). For appellate court judge evaluations, the Commission distributes surveys to attorneys, judges, and court staff (JPR Commission 2014b).

The surveys ask respondents to rate judges in four categories: integrity, communication skills, judicial temperament, and administrative performance (see Arizona Rules of Procedure for JPR 2010, Rule 6(b)).<sup>14</sup> In addition, attorney respondents rate judges' legal ability, and trial judges are evaluated on settlement activities (JPR Commission 2014c). Respondents answer several questions within each category, rating the judge on a Likert-type scale: "Superior," four points; "Very Good," three points; "Satisfactory," two points; "Poor," one point; and "Unacceptable," zero points (JPR Commission 2014b). The questions on integrity, for example, ask about the judge's basic fairness and impartiality and equal treatment of those appearing before the court regardless of their race, gender, religion, national origin, disability, age, sexual orientation, or economic status.<sup>15</sup> The questions on temperament ask about the judge's "understanding and compassion," whether the judge is "dignified," "courteous," and "patient," and

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<sup>12</sup> The American Bar Association (2005, p. 1) lists similar goals in its Guidelines for the Evaluation of Judicial Performance with Commentary.

<sup>13</sup> Arizona's Commission is the largest of its kind, with Connecticut having the next largest JPE commission, containing 23 members (IAALS 2013a).

<sup>14</sup> Penny J. White (2009, p. 658–662) provides a comparison of criteria and survey questions used in other states.

<sup>15</sup> To see the full break down of survey questions (and answers), visit <http://www.azcourts.gov/jpr/JudicialPerformanceReports.aspx>. Click on a court, a judge's name and then select a "Detailed Report."

whether the judge's conduct "promote[s] public confidence in the court." Notably, many of these criteria address aspects of procedural fairness, which are factors that research shows most affect court users' views of the fairness and legitimacy of the justice system overall (Tyler 1990, p. 71, 75, 79-80, 94, 104, 110). In addition to the above criteria, attorney respondents rate all judges on legal ability, and they rate trial judges on settlement activities as well. Figure 1 provides an example of the 2012 attorney responses for one Maricopa County Superior Court judge, The Honorable Helene F. Abrams (JPR Commission 2014c).

Figure 1  
Examples of 2012 Attorney Responses

	UN	PO	SA	VG	SU	Mean	Total	No Resp
<b>1. Legal Ability</b>	%	%	%	%	%			
1. Legal reasoning ability	0%	13%	19%	25%	44%	3.00	16	2
2. Knowledge of substantive law	0%	13%	19%	31%	38%	2.94	16	2
3. Knowledge of rules of evidence	0%	7%	27%	33%	33%	2.93	15	3
4. Knowledge of rules of procedure	0%	6%	25%	31%	38%	3.00	16	2
<b>Category Average</b>	<b>0%</b>	<b>10%</b>	<b>22%</b>	<b>30%</b>	<b>38%</b>	<b>2.97</b>		
Key: <b>UN</b> = Unsatisfactory; <b>PO</b> = Poor; <b>SA</b> = Satisfactory; <b>VG</b> = Very Good; <b>SU</b> = Superior								

In addition, respondents may write narrative comments on the survey forms, but only the evaluated judge and self-improvement Conference Team ever see these comments (see Arizona Rules of Procedure for JPR 2010, Rule 6(c)). That is, the comments are used only in the self-evaluation and improvement component of JPR.<sup>16</sup> Finally, the Commission collects comments from the public throughout the year through its website and during election years via public hearings (see Arizona Rules of Procedure for JPR 2010, Rule 6(d)).

An independent data center collects the survey responses and compiles the data to ensure confidentiality, anonymity of the respondent, and integrity of the process (see Arizona Rules of Procedure for JPR 2010, Rule 6(a)). To reduce potential bias for or against a judge, the data center codes the responses so that Commission members do not know the name of the judge whom they are evaluating (see Arizona Rules of Procedure for JPR 2010, Rule 7). The data center also retypes the comments to protect commenters' anonymity (see Arizona Rules of Procedure for JPR 2010, Rule 6(a)).

Commission members then analyze the data and vote, at a public meeting, whether each judge up for retention "Meets" or "Does Not Meet" articulated standards (see Arizona Rules of Procedure for JPR 2010, Rule 6(f)(3)). In addition to the data reports, the Commission considers the following factors when voting: (1) the judge's comments to the Commission; (2) the Commission's own factual report; (3) information from the Commission on Judicial Conduct; (4) the judge's assignment (e.g., civil, criminal, domestic relations, juvenile, administrative, probate, special assignment); (5) how the judge's scores compare with the mean scores of all

<sup>16</sup> The fact that the comments are kept from the Commission and the public was one of the most controversial aspects of Arizona's JPR (Pelander 1998, p. 670). The purpose of preventing the public and the Commission from seeing the comments is to encourage candor and protect the judge from being targeted by false, malicious, or irresponsible anonymous comments (Pelander 1998, p. 670).



judges being reviewed; and (6) any citizen comments received at the public hearing regarding the judge under consideration (see Arizona Rules of Procedure for JPR 2010, Rule 2).

If a judge scores an average of two (a "Satisfactory" rating) or less in any category, the Commission automatically makes a preliminary determination that the judge does not meet the threshold standard and sends him or her a letter asking for a response (JPR Commission 2014b; M. Hellon, personal communication, 2 Dec 2013). Likewise, if a quarter of respondents rate the judge as "Unacceptable" or "Poor" (earnings ratings of zero or one, respectively) in any category, the Commission makes a preliminary determination that the judge does not meet the threshold standard and issues a letter (JPR Commission 2014b; M. Hellon, personal communication, 2 Dec 2013). Settlement activities are not subject to the threshold standard because of difficulty in evaluating this category (JPR Commission 2014b). These threshold standards merely trigger an automatic response from the Commission in the form of a letter; the Commission always considers the full range of factors in its ultimate decision that a judge does or does not meet standards (M. Hellon, personal communication, 2 Dec 2013).

Arizona's constitution requires the Commission to disseminate its findings to voters (Arizona Constitution art. VI, § 42). It performs this task by mailing the Commission's report before the general election to each voter's home in the Secretary of State's voter information pamphlet and by posting results on both the Commission's website and the Secretary of State's website (JPR Commission 2014b).<sup>17</sup> The Commission's website lists the full breakdown of the survey results, along with the Commission's recommendations (JPR Commission 2014c). As seen in Figure 2, the voter information pamphlet contains the Commission's recommendations along with a summary of the survey responses.

Figure 2  
Example of Entry in Voter Information Pamphlet

<b><u>FIELDS, RICHARDS.</u></b> Assignment During Survey Period: Criminal Presiding Appointed to Pima County Superior Court: 1997		<b>30 Commissioners Voted "Meets"</b> <b>0 Commissioners Voted "Does Not Meet"</b>		
<b><u>Judicial Performance Standards Evaluation Categories</u></b>	<b><u>Presiding Judge Responses</u></b> <i>Surveys Distributed: 12</i> <i>Surveys Returned: 7</i>	<b><u>Attorney Responses</u></b> <i>Surveys Distributed: 116</i> <i>Surveys Returned: 74</i>	<b><u>Litigant, Witness, ProPer Responses</u></b> <i>Surveys Distributed: 130</i> <i>Surveys Returned: 36</i>	<b><u>Juror Responses</u></b> <i>Surveys Distributed: 68</i> <i>Surveys Returned: 26</i>
	<b><u>Score (See Footnote)</u></b>	<b><u>Score (See Footnote)</u></b>	<b><u>Score (See Footnote)</u></b>	<b><u>Score (See Footnote)</u></b>
Legal Ability	N/A	97%	N/A	N/A
Integrity	100%	99%	100%	100%
Communication Skills	100%	99%	98%	99%
Judicial Temperament	100%	99%	99%	99%
Administrative Performance	100%	99%	99%	100%
Settlement Activities	N/A	97%	N/A	N/A
Administrative Skills	100%	N/A	N/A	N/A

The voter information pamphlet explains that "[t]he score is the percentage of all evaluators who rated the judge 'satisfactory,' 'very good,' or 'superior' in each of the Commission's evaluation categories" (Arizona Secretary of State [Sec'y State] 2012d). A judge may not have responses in certain categories, depending on his or her assignment, as indicated by the "N/A" (Sec'y State 2012d). As Figure 2 shows,

<sup>17</sup> The Commission is examining ways to improve how it disseminates its information on its website and in the voter pamphlet (D. Byers, personal communication, 21 Nov 2012). Dave Byers is the Director of Administrative Office of the Arizona Courts.

for example, Judge Fields did not evaluate his own legal ability nor did he engage in settlement activities as the Criminal Presiding Judge.

Arizona is one of only seven states that provide performance evaluation results directly to citizens by including JPE information by judge in the voter guide, which is mailed to each voter (Brody 2008, p. 118 n. 34, IAALS 2013a). The remaining ten states with JPE programs do not provide voters with the evaluation results or provide voters with only summary results (i.e., they do not identify the individual judges) (IAALS 2013a). In addition to the voter guide, information about judges often appears in various news outlets (see Berch 2012, Smith 2012) and through the Arizona Supreme Court and the Arizona Secretary of State websites.

The second major part of Arizona's JPR process consists of a program designed to assist merit-selected judges with self-improvement. At each review, the judge completes a self-evaluation, rating him- or herself in the same categories that appear on the surveys (see Arizona Rules of Procedure for JPR 2010, Rule 4(e)). The judge then meets with a Conference Team consisting of one public volunteer, one attorney volunteer, and one judge volunteer to review the survey results and develop a self-improvement plan (see Arizona Rules of Procedure for JPR 2010, Rules 4(a), (g)). The self-evaluation process provides the judges an opportunity to compare their self-perception of their performance with the perception of others. The self-improvement component of the JPR is entirely confidential, and the Commission does not use any of the information from the self-evaluations or Team meetings in its decisions (see Arizona Rules of Procedure for JPR 2010, Rule 4(g)).<sup>18</sup> In contrast, some other states use the judges' self-evaluations in their assessment of the judges' performance (Tennessee Commission on JPE 2012, Colorado Office of JPE 2013).

Arizona's JPR program is more comprehensive than systems in place in most other states. It is also expensive. Arizona's JPR program costs approximately \$269,300 annually (K. Kluge, personal communication, 12 Feb 2013).<sup>19</sup> This figure does not factor in the countless hours spent by volunteers who serve on the Commission or on the self-improvement Conference Teams. Moreover, it includes only an estimate of time spent by court staff.

#### 4. Observations

Through its first 20 years, JPR has been a valuable addition to Arizona's judicial system. Evidence shows that the Commission is achieving, at least in part, two of its chief goals: "assist[ing] voters in evaluating the performance of judges . . . [and] facilitat[ing] self-improvement of all judges" (see Arizona Rules of Procedure for JPR 2010, Rule 1). Nevertheless, Arizona's system could be improved in a number of areas. This section attempts to identify some of the most successful aspects of Arizona's JPR program, as well as its weaknesses.

##### 4.1. Successes

Possibly the greatest success of Arizona's JPR program is the self-evaluation and improvement program, especially from the perspective of the individual judge and

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<sup>18</sup> The Judicial College of Arizona, however, does use the information to guide its judicial education programs (see Arizona Rules of Procedure for JPR. 4(g)). This practice of keeping the information confidential is generally in accordance with the American Bar Association's Guidelines, which provide that "[t]he information developed in a judicial evaluation program should not be disseminated to authorities charged with disciplinary responsibility, unless required by law or by rules of professional conduct" (ABA 2005, p. 2-3).

<sup>19</sup> This figure is a rough estimate as Arizona's JPR program and Judicial Nominating Commissions share a budget line and administrative staff, among other things. This figure includes the cost of statistical data research to process survey results, advertising during the general election campaign, website hosting, mileage reimbursement for volunteers, rent, and staffing for the program (K. Kluge, personal communication, 12 Feb 2013). Kevin Kluge is the Chief Financial Officer for the Arizona Supreme Court. Notes from this communication on are file with the authors.

the state judiciary as a whole (Pelander 1998, p. 690, Tarr 2012, p. 95 tbl. 4.1, 96–97, M. Hellon, personal communication, 7 Feb 2013, M. Harrison, personal communication, 21 Feb 2013).<sup>20</sup> The process of completing the self-evaluation form, reviewing the survey data, and working with a Conference Team to develop performance goals “forces the judges to focus on their own performance” (M. Hellon, personal communication, 7 Feb 2013). In fact, simply knowing that the Commission will periodically review their performance encourages judges to think about and improve their performance (M. Hellon, personal communication, 7 Feb 2013).

The degree to which a judge benefits depends greatly on the judge’s attitude toward the process and the nature of any criticisms (see M. Hellon, personal communication, 7 Feb 2013, M. Harrison, personal communication, 21 Feb 2013). The program is most successful if judges are “candid about their weaknesses and willing to improve” (M. Hellon, personal communication, 7 Feb 2013). Most judges take the process seriously and are receptive to the feedback (M. Hellon, personal communication, 7 Feb 2013). Some judges even take classes or seek mentoring to improve their skills or remedy weaknesses (M. Hellon, personal communication, 7 Feb 2013). A few, however, simply disregard the feedback as being inaccurate, unfair, or discriminatory (M. Hellon, personal communication, 7 Feb 2013). For example, some may attribute the criticism to targeted attacks from particular constituencies (M. Harrison, personal communication, 21 Feb 2013). These claims are difficult to verify but may be valid in some situations (M. Harrison, personal communication, 21 Feb 2013, see also *infra* discussion at page 14).<sup>21</sup>

Arizona’s experience is not unique. In a 2008 survey of the Colorado judiciary, judges reported that the feedback contained in the surveys “was valuable to their professional development” (IAALS 2008, p. 13–14). In fact, more than 85% of trial judges and 50% of appellate judges reported that JPE was either “significantly beneficial” or “somewhat beneficial” to their professional development (IAALS 2008, p. 13–14). The Colorado judges noted that they received little feedback elsewhere, particularly not the kind of frank responses contained in the anonymous surveys (IAALS 2008, p. 13–14). One judge noted that he thought he was “never as good as the most glowing compliments and never as bad as the worst, [but that] it is sometimes possible to find a common thread that alerts you to deficiencies” (IAALS 2008, p. 14).

The Colorado judges, however, disagreed with each other over whether the self-evaluation program as a whole was helpful (IAALS 2008, p. 21–22). The survey revealed that Colorado’s appellate judges expressed concern about the self-evaluation program, whereas trial judges generally had no issue with it (IAALS 2008, p. 21–22). The concerns centered on how the Colorado commission used the information gleaned from the self-evaluations. That is, some judges hesitated to evaluate themselves honestly for fear that their responses would be “used against [them]” (IAALS 2008, p. 22). Arizona’s JPR Commission does not consider the self-evaluations in its decisions, and thus Arizona judges should not share these concerns.

A second major success of Arizona’s JPR program is that the Commission’s information is reaching voters. This is a significant achievement, as a key reason for implementing the JPR program was to remedy voters’ lack of access to relevant information about the judges on the ballot (Pelander 1998, p. 662, 712). As

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<sup>20</sup> Mike Hellon is the current Chair of the JPR Commission. Mark Harrison is an attorney, former State Bar President, Founding Member and President of Justice For All, and Chairman of Justice at Stake. Notes from their interviews are on file with the authors.

<sup>21</sup> Harrison said he has seen some instances of targeted attacks, where a judge receives criticism of such a consistent nature that it almost certainly comes from a particular constituency, such as criminal defense lawyers, who may target a judge who was a former prosecutor and is perceived as favoring the government in criminal cases—or vice versa; prosecutorial offices may target a judge deemed too defense friendly.

evidence that JPR information is reaching potential voters, the Commission's website, which contains the Commission's findings and recommendations, received more than 160 times the number of normal daily page views in the weeks leading up to the 2012 election—from a normal daily average of fewer than 100 views to a daily average of 16,394 views (J. Schrade, personal communication, 13 Feb 2013).<sup>22</sup> That number quadrupled the day before the election, with the website receiving 62,949 page views (J. Schrade, personal communication, 13 Feb 2013). In total, the website received 519,634 page views—more than 99,000 of which were unique visits—between October 11, 2012, and the election (J. Schrade, personal communication, 13 Feb 2013). Some of this increased traffic may have been triggered by a campaign against Arizona Supreme Court Justice A. John Pelander (see Fischer 2012).<sup>23</sup> Regardless of why citizens viewed the website, the data show that large and increasing numbers of people accessed the Commission's information. This suggests that the Commission's data is reaching voters, which is a success in its own right, and it made even more important in the face of possibly skewed information put out by opposition campaigns.

In addition to increased website traffic, a review of Arizona's 2012 retention election data suggests some degree of correlation between the number of "Does Not Meet" votes by the JPR Commission members and the percentage of "No" votes at the subsequent election, at least with respect to trial court judges (Arizona Secretary of State [Sec'y of State] 2012a).<sup>24</sup> For example, Maricopa County Superior Court Judge J.B. received 30 out of 30 "Meets" votes from the Commission, and 71.4% of voters elected to retain him (Sec'y State 2012a). In contrast, Maricopa Superior Court Judge J.H. received 20 "Meets" votes and 10 "Does Not Meet" votes from the Commission, and only 56.2% of voters elected to retain him (Sec'y State 2012a).

In Pima County, the results were similar. Pima County Superior Court Judge K.A. received 30 out of 30 "Meets" votes and 79% of voters elected to retain her (Sec'y State 2012b). By comparison, Pima County Superior Court Judge L.M. received 23 "Meets" and 7 "Does Not Meet" votes, and only 69.9% of voters elected to retain her (Sec'y State 2012b).

These results are consistent with one commentator's estimate that a well-publicized negative performance evaluation lowers the affirmative vote count by 10 to 15 percentage points (Aspin 2011, p. 225). Although this deviation is significant, thus far it has not proved enough to defeat a judge, given that Arizona's average affirmative vote historically has hovered around 74%, or 24 percentage points above the threshold for retention (Aspin 2011, p. 225 and tbl. 1). This may be changing, however, as the average affirmative retention vote continues to decline (Aspin 2011, p. 219–220). In the 2010 retention election, Arizona's average affirmative retention vote declined about 7 percentage points, from an average of 73.4% in 2008, to an average of 66.3% in 2010 (Aspin 2011, p. 219–220). In the 2012 retention elections, on average, Maricopa County Superior Court judges received 68% affirmative vote (Sec'y State 2012a). With these averages, a negative performance review could have sufficient enough impact and to drop the

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<sup>22</sup> These figures were calculated using Google Analytics. Normal daily page views were calculated based on page views after the 2012 general election because the Commission's website joined the website for Arizona's judicial branch in early October. Between October 11, 2012 and November 3, 2012, the Commission's website was viewed an average of 16,394 times each day (J. Schrade, personal communication, 13 Feb 2013). Jeffrey Schrade is the Director of the Education Services Division of the Arizona Administrative Office of the Courts. Notes from this communication are on file with the authors.

<sup>23</sup> Another scholar has noted that the existence of opposition campaigns generally increases voter participation in retention elections (Aspin 2011, p. 221).

<sup>24</sup> This pattern did not appear to extend to appellate-level judges during the 2012 election, as discussed further below. It bears repeating that this conclusion is based on a cursory overview of the election data; the authors did not conduct an extensive statistical study. A thorough analysis is not yet possible given the small number of judges who have received less than a unanimous or near-unanimous endorsement from the Commission (see Klumpp 2008, p. 13).

affirmative vote below the majority threshold for retention. The good news is that voters are noting the Commission's data, and many are voting in ways suggesting that they have taken the data into account.

#### 4.2. Areas for improvement

Despite its overall success, Arizona's JPR program could be improved in some areas. One such area is the Commission members' reluctance to vote that a judge "Does Not Meet" the performance standards (M. Hellon, personal communication, 7 Feb 2013). This is particularly true of the judicial members, who seem to find it difficult to vote against another judge, even one with whom they do not work (M. Hellon, personal communication, 7 Feb 2013). Since its creation, for example, Arizona's JPR Commission has voted only twice that a judge "Does Not Meet" standards (JPR Commission 2008, p. 13, Pelander 1998, p. 695).

At this time, the Commission records and retains the votes of each Commission member and the vote totals for each judge (M. Hellon, personal communication, 11 March 2013). Each Commission member's vote is recorded and preserved for a period of time, and voters can access this information via the Commission's website. A few JPR Commission members have expressed reservations about voting publicly, and some have asked that their individual vote not be recorded. Although this might help ease the Commission members' reluctance to vote "Does Not Meet," Arizona Rule of Procedure for JPR 6(f)(3) requires that the vote be public. Thus, Commission members must vote publicly unless the rule is changed through the Arizona Supreme Court's rule change process.<sup>25</sup> As of the time of the publication of this Article, no rule change petition had been filed.

A second area of concern arises in those cases in which the Commission recommends against retention. In those cases, the voters have thus far voted to retain the judge anyway. Indeed, since adopting merit selection, only two Arizona judges have ever lost their retention elections, and these judges had received positive recommendations from the Commission (Brody 2008, p. 134, Sec'y State 2010a, 2010b, 2012a, 2012b). And only 19 other Arizona judges have come close to losing by receiving less than 60% affirmative vote (Klumpp 2008, p. 13, Sec'y State 2010a, 2010b, 2012a, 2012b).

Arizona's experience with having only a small number of judges lose a retention election is consistent with the results derived in other populous retention-election states in the United States. In Missouri, for instance, only two judges have been defeated under the retention-election system (Klumpp 2008, p. 13). In Illinois, more than 98% of judges have been retained, even though judges in that state must receive an affirmative vote of 60% to be retained (Klumpp 2008, p. 13). In Alaska, the voters have declined to retain only one judge (Brody 2008, p. 134). And in Colorado, six judges have been removed via retention elections (Brody 2008, p. 134). In fact, between 1964 and 2006, only 56 judges were defeated in retention elections across the United States (Aspin 2007, p. 201–211). These figures do not include results from the 2010 retention elections, at which voters removed three Iowa Supreme Court Justices, including the chief justice (Sulzberger 2010).

In light of such statistics, a few have argued that JPR does not work to "weed out" bad judges because the Commission rarely votes that a judge "Does Not Meet" standards. Although that is one way to evaluate the data, an alternative assessment is that the data demonstrate the merit-selection system's success in appointing well qualified judicial applicants.<sup>26</sup> That is, the data may instead show

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<sup>25</sup> The question has not been analyzed whether the requirement to vote in public requires recordation and preservation of the votes of each Commission member, or whether maintaining a tally of the total votes suffices.

<sup>26</sup> Pelander (1998, p. 724) and Harrison *et al.* (2007, p. 244) agreed with this sentiment. But Shugerman (2012, p. 254) noted that "academic studies are mixed or inconclusive about whether merit

that the merit-selection system is attracting and retaining competent judges who are performing well and do not deserve “Does Not Meet” standards votes or to be voted out of office. The data may also provide evidence that the JPR program’s self-evaluation process is helping those judges who do have weaknesses to improve so that, in subsequent years, they meet retention standards. As one commentator put it, it is “not a coincidence” that Arizona’s “transition from a [non-]partisan-elected to a merit-appointed judiciary and the improvement in evaluation scores have occurred simultaneously” (Klumpp 2008, p. 16–17).<sup>27</sup> Another area of concern is the asserted failure of some attorneys who respond to judicial surveys to provide full and honest evaluations of judges (M. Hellon, personal communication, 7 Feb 2013). Mike Hellon, the current Chair of the JPR Commission, noted that attorneys may not be completely forthcoming in their survey responses, possibly fearing that their responses are not entirely anonymous, despite the precautions the Commission takes and the assurances that it gives (M. Hellon, personal communication, 7 Feb 2013). This concern has been echoed in Colorado, where one-third of judges indicated in a 2008 survey that they “d[id] not believe that comments from survey respondents [were] truly anonymous” (IAALS 2008, p. 11–13). The Colorado judges revealed that, where attorneys make narrative comments about a particular judge, the judge can sometimes tell who the attorney is, particularly in rural areas (IAALS 2008, p. 11–13). Although Arizona should have less concern with anonymity because Arizona’s JPR program applies to trial judges only in the three largest counties, attorney candor in the surveys and narrative comments remains a valid concern.

Mike Hellon (personal communication, 7 Feb 2013) noted that non-attorney respondents such as jurors and witnesses were more forthcoming in their survey responses. Despite the value of these groups’ responses, Hellon (personal communication, 7 Feb 2013) stated his belief that there is no replacement for the lawyer’s perspective. The survey asks only lawyers about a judge’s legal ability, for example. Further, lawyers may be better situated to evaluate a judge’s overall performance, given their legal training.

Another concern related to the integrity of lawyer responses is that some judges believe that attorneys target judges whom they deem bad for business. A few judges have expressed concern that groups of attorneys band together to artificially deflate survey responses for judges who, for example, are perceived as being soft on crime (by the prosecutorial community) or too hard on defendants (by the criminal defense community) (M. Harrison, personal communication, 21 Feb 2013). Only anecdotal evidence exists to support this concern.

Finally, the Commission still struggles with its mission to inform voters. Despite its efforts, evidence that voters remain uninformed abounds. Between 1964 and 2010, for example, Arizona’s judges up for retention had an average 42.9% undervote—that is, voters who submitted a ballot but did not cast a vote for a particular judge (Aspin 2011, p. 220 and fig. 1). Undervoting, or voter “roll-off,” remains constant, notwithstanding the implementation of merit selection in 1974 and JPR in 1992 (Aspin 2011, p. 220 and fig. 1). In the 2012 retention election, Maricopa County superior court judges on the ballot had an average 50.7% undervote (Sec’y State 2012a).<sup>28</sup>

Additionally, many voters continue to treat all judges on the ballot the same, voting either for or against all judges on the ballot, as shown in Figure 3. This tendency

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selects more experienced candidates or produced better judges, in part because it is hard to quantify judicial quality.”

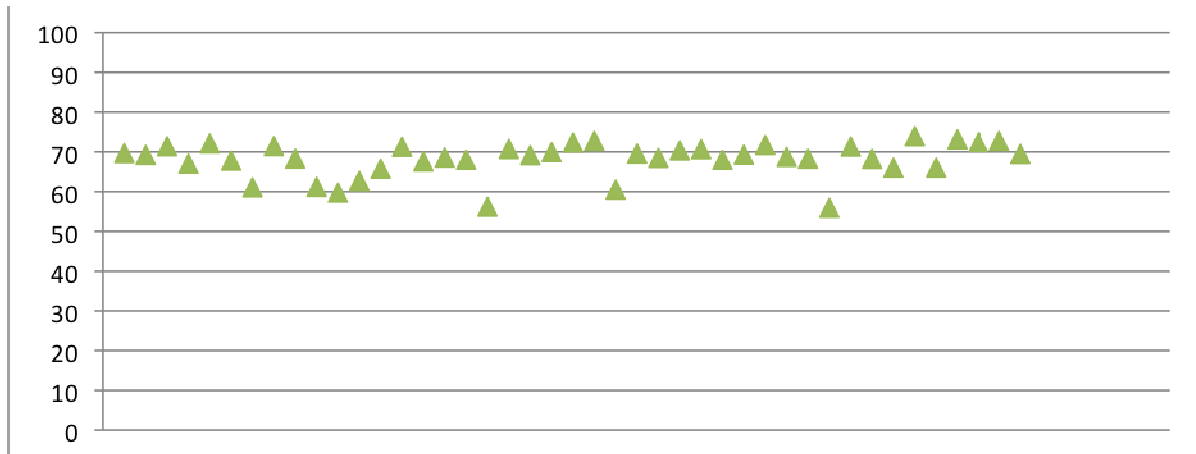
<sup>27</sup> The alteration is needed because Klumpp’s article incorrectly stated that before adopting merit selection, Arizona employed a *partisan* election system for its judges (see generally Lee 1973, p. 53-54). Nonetheless, the author’s point is well taken.

<sup>28</sup> We note our implicit assumption that voters would be more apt to vote on judges if they knew more about them.

has been consistent since about 1990, despite the increasing availability of information about judges' performance from JPE programs (Aspin 2011, p. 221–222 & fig. 3). One commentator has estimated that “approximately 30[%] of the electorate routinely votes ‘no’ in judicial retention elections, no matter who the judge happens to be” (Griffin 1995, p. 62).<sup>29</sup> Arizona’s 2012 election results reflect this trend, with Maricopa County Superior Court judges receiving a median 69% affirmative vote, as seen in Figure 3 (Sec’y State 2012a).

Figure 3\*

Percentage of Affirmative Votes by Judge  
2012 Maricopa County Superior Court Retention Election



\*Underlying data derived from the Secretary of State’s election results, Sec’y State 2012a. N=44.

Further, voters do not always follow the Commission’s recommendations. In the 2012 election, for instance, Court of Appeals Judge V.K. received the highest number of “Does Not Meet” votes out of any appellate judge (two Commission members voted “Does Not Meet”) yet she also received 77.5% of affirmative votes—the highest percentage of affirmative votes of any appellate judge in the 2012 election (Sec’y State 2012c). In contrast, Court of Appeals Judge P.S., who the Commission unanimously recommended for retention, received 64.7% of affirmative votes—nearly 13 percentage points lower than Judge V.K. and the second lowest number of affirmative votes among appellate judges (Sec’y State 2012c). These numbers suggest (unsurprisingly, for those familiar with politics in the United States) that voters consider factors other than the Commission’s recommendations, including judges’ perceived political ideologies.<sup>30</sup> Moreover, the location of the election may play a part. Judge V.K. is from Pima County, whose judges received an average affirmative vote of 77%, while Judge P.S. is from Maricopa County, whose judges received an average affirmative vote of only 68% (Sec’y State 2012a, 2012b).

David Brody posited that it is not possible to accurately analyze the relationship between a negative performance review and voter behavior because of “[t]he manner in which JPR results are reported” (Brody 2008, p. 132). He stated that JPE programs would need to rate the judge numerically, rather than a simple “retain” or “do not retain” vote, in order to make such analysis possible (Brody 2008, p. 132). Nonetheless, the divergence between the Commission’s recommendations and

<sup>29</sup> Although 30% of voters tend to vote against all judges, even those with perfect JPR scores, evidence shows that a negative performance evaluation can nonetheless affect the votes on individual judges, as discussed above.

<sup>30</sup> Although one can only speculate as to what caused the nearly thirteen point difference between Judge V.K. and Judge P.S., we note that they were appointed by governors of different political parties. Some voters use the political party of the appointing governor as a means for intuiting the judge’s political beliefs, and Aspin (2011, p. 222–223 and fig. 4) has noted this phenomenon in Maricopa County.

voters' actions casts doubt on the JPR program's role of providing objective data to guide voters' decisions about judges.

The concerns raised above may suggest that the JPR process fails to ferret out incompetent or unprofessional judges. If attorneys fail to provide critical feedback, then they fail to alert the commissioners to a judge's weaknesses. Commissioners who hesitate or decline to vote "Does Not Meet" with respect to judges who deserve such votes do not fulfill their duty to help the Commission warn voters about a judge's deficiencies, thereby failing to carry out one of JPR's central purposes: promoting judicial accountability by providing accurate information to the voters. If the Commission falls short in disseminating its findings to voters and voters ignore the information they do receive, then voters may retain a weak judge. This, in turn, leads to the potential that "bad" judges remain on the bench indefinitely, essentially resulting in the same lifetime-appointment problem that persisted under the election system—one problem that merit selection was supposed to remedy. Nevertheless, as explained in the observations in the next section, even with these weaknesses, JPR may be achieving its goals in other ways.

#### *4.3. Other observations*

Some additional observations about the JPR process merit discussion. First, despite concerns that JPE commissions rarely recommend against retaining a judge, evidence suggests that Arizona's JPR process works to weed out underperforming judges in other ways. Hellon and others have noted that the prospect of an unfavorable performance review may influence some judges not to stand for retention or to retire (Brody 2008, p. 135, M. Hellon, personal communication, 7 Feb 2013). Other states have similarly reported this phenomenon (Pelander 1998, p. 721). Hellon specifically remembers one judge who quickly retired after the Commission voted that the judge did not meet standards, and others have likely made similar choices (M. Hellon, personal communication, 7 Feb 2013). Thus, the JPR system may accomplish its goals indirectly.

An observation surprising to the Authors of this Article is that the public comment hearings held during election years have proved to be one of the least helpful aspects of the program. Hearings in Arizona have generated little public interest and minimal public attendance (Pelander 1998, p. 678–680, M. Hellon, personal communication, 7 Feb 2013). Further, the Commission rarely obtains useful information from the citizens who address the Commission at the hearings (Pelander 1998, p. 678–680, M. Hellon, personal communication, 7 Feb 2013). Some citizens complain that witnesses against them should not have been believed, that they should have won their cases, or that the judge ruled incorrectly. But they do not explain why or how the judge erred. Hellon (personal communication, 7 Feb 2013) gave the example of a woman who came to the public hearing to explain her concerns about the way a judge handled her case, including the fact that the judge had worked with the other party's lawyer before being appointed to the bench. The Commission listened to her complaints and then asked her opinion on whether the judge should be retained (M. Hellon, personal communication, 7 Feb 2013). The woman said she had no view about whether the judge should remain on the bench (M. Hellon, personal communication, 7 Feb 2013). Hellon said this is true for most speakers at the public hearings: They vent frustrations about the system or individual cases, but rarely address a judge's performance (Pelander 1998, p. 678–680, M. Hellon, personal communication, 7 Feb 2013). Nonetheless, Hellon (personal communication, 7 Feb 2013) said he believed the hearings were necessary for the integrity of the process and to help maintain public confidence in the judicial system.



## 5. Other means for enhancing accountability

Despite the general success of Arizona's merit-selection system and JPR program, and the ability to remove judges via retention elections, critics have increasingly raised concerns about judicial accountability.<sup>31</sup> These attacks are often framed as efforts to eliminate "judicial activism" (Harrison *et al.* 2007, p. 249, Singer 2011, p. 1470–1473, Sec'y State 2012e).<sup>32</sup> In the 2012 election, for example, the Arizona Legislature enacted a referendum known as Proposition 115, which, with the affirmative vote of the public, would have made a number of changes to Arizona's constitution to amend the merit-selection system (Sec'y State 2012e). Among the changes, the proposition required each JNC to send at least eight nominees to the Governor and removed the limits on how many individuals from one political party the JNCs could nominate (Sec'y State 2012e).<sup>33</sup> Proponents maintained that the changes would enhance judicial integrity, "improve the accountability and transparency of how judges are selected," and ensure "that each and every judicial vacancy is filled based on merit, not politics" (Sec'y State 2012e). Arizona voters rejected the proposition by a vote of 72%, or by a margin of nearly 3-to-1 (Sec'y State 2012f).

Nevertheless, in light of the concerns about judicial accountability, we mention some procedures for ensuring judicial accountability other than JPE, some of which Arizona already employs.

### 5.1. Methods already used in Arizona

Arizona's JPR program works alongside other evaluation tools that assess aspects of judicial performance. For example, most Arizona courts measure the number of cases processed. The Arizona Court of Appeals and the superior courts in all of Arizona's most populous counties employ a number of performance measurements adopted from the National Center for State Courts' CourTools program (C. Mitchell, personal communication, 21 Nov 2013, Arizona Judicial Branch 2014a). These surveys measure factors such as the time to disposition per case type and the rate at which cases are completed, and the numbers are reported by case types per judicial group, as opposed to by individual judge (Arizona Judicial Branch 2014a). Similarly, the Supreme Court has created a new Time Standards Committee that is further refining case processing time standards for Arizona's superior and appellate courts (Arizona Judicial Branch 2014b). As another example of case-processing evaluation measures, salaries of justices of the peace are partially based on "productivity credits" (Arizona Revised Statute § 22-125).

Notably, a study of a similar case-processing/salary-reward system in Spain yielded some interesting and unexpected consequences of tying salaries to productivity benchmarks. The Spanish system gave judges a 3% bonus for meeting or exceeding the benchmark by up to 20% and a 5% bonus for exceeding the productivity benchmark by 20% or more (Contini *et al.* 2014). Judges who did not meet the benchmark received no bonus, but were not penalized (Contini *et al.* 2014). The expectation, presumably, was that the incentives would encourage all judges to process more cases more quickly. The result, however, was a reduction in

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<sup>31</sup> Harrison *et al.* (2007, p. 247–250) describes the uptick in attacks against Arizona's merit-selection system.

<sup>32</sup> For example, some proponents of a proposition to amend Arizona's merit-selection system argued that the proposition would eliminate "politics" from the decision (Sec'y State 2012e). Other proponents of amending merit selection have advocated their belief that the current system "result[s] in increased judicial activism" (Harrison *et al.* 2007, p. 249). These concerns are not unique to Arizona, as Iowa voters have similarly voiced their concerns about "judicial activism," despite Iowa's merit-selection system (Singer 2011, p. 1470–1473).

<sup>33</sup> These are generalizations; there were many refinements. The JNC could vote by a two-thirds majority to send fewer than eight nominees. If there was more than one judicial opening, the JNC was required to send at least six nominees for each position. There could be no duplication of judges on the lists, and the Governor could select from any list—including selecting all from one list.

the number of judges who produced above 120% and an increase in judges producing between 100% and 120% (Contini *et al.* 2014). That is, the judges strategically minimized the effort required to get an incentive (Contini *et al.* 2014), suggesting that evaluation tools that quantify productivity may not be the most effective way to encourage productivity from individual judges. This study thus suggests that such programs may encourage productivity when minimal effort is required, but small bonuses are insufficient to encourage judges to achieve the highest levels of productivity. Nonetheless, the Spanish study documented a 7% increase in overall productivity (Contini *et al.* 2014).

Aside from evaluating productivity, Arizona's system offers other accountability measures. Like nearly every other state in the United States, Arizona's system provides for removal of judges by impeachment (American Judicature Society 2013a, Arizona Constitution art. VIII, pt. 2, §§ 1, 2). A few states, including Arizona, have procedures for removing a judge by recall (American Judicature Society 2013a, Arizona Constitution art. VIII, pt. 1, § 1).<sup>34</sup> Although Arizona's broad provision permits the recall of a judge for any reason, the procedure has not often been used against judges.<sup>35</sup> Impeachment and recall are not typically used as primary methods for evaluating the performance of judges; the government and citizens usually employ impeachment and recall *after* they decide that a judge's performance has fallen below their standards. These procedures nevertheless serve as a method for holding judges accountable.

Additionally, the appellate review process provides an internal evaluation of the performance of lower court judges. Reversal rates and reasons for reversal are made public and foster accountability. For appellate courts, whose opinions are published, the public's ability to read those opinions and comment on them, by newspaper editorial or otherwise, also helps hold judges accountable.<sup>36</sup>

Finally, judicial disciplinary commissions offer another mechanism for enforcing accountability. Arizona's Commission on Judicial Conduct (CJC), the entity that seeks to enforce Arizona's Code of Judicial Conduct, can address a range of ethical misconduct and unprofessional behavior (Arizona Commission on Judicial Conduct 2014a). The Code of Judicial Conduct provides a minimum standard—a bottom line or floor—for judicial behavior, below which the ethics system will react and discipline may be imposed on a judge. JPE, on the other hand, sets a different, higher standard and affirmatively encourages judges to perform well above that standard.

The CJC can employ a variety of sanctions, from reprimands to recommendations for suspension with or without pay or even removal from office (Arizona Commission on Judicial Conduct 2014b), but it infrequently uses its disciplinary powers. In 2012, for example, nearly 94% of the 361 complaints filed against judges were dismissed, and of the 23 cases in which discipline was imposed, 22 resulted in a reprimand, the lowest form of discipline (Arizona Commission on Judicial Conduct 2014c). This lack of discipline could suggest that Arizona judges are doing their jobs competently. Alternatively, it could suggest that judicial disciplinary commissions are ineffective as an accountability tool.

## 5.2. Methods not used in Arizona

Other jurisdictions and commentators offer some additional methods of evaluating judges that are not currently used in Arizona. Whether these methods would work

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<sup>34</sup> For the interesting history of Arizona's provisions permitting recall of judges, see *Ross v. Bennett*, 265 P.3d 356, 358 (Ariz. 2011).

<sup>35</sup> For an example of a rare instance in which the procedure was used, see *Abbey v. Green*, 235 P. 150 (Ariz. 1925).

<sup>36</sup> The Arizona Supreme Court publishes nearly all opinions both online and in hard copy reporter volumes. The court of appeals does the same, although most of its opinions are issued as memorandum decisions (i.e., they are not intended for publication).

well alongside or should supplant some aspects of Arizona's current processes is not an issue we address here. We describe these methods to facilitate discussion about alternative ideas.

First, some commentators have recommended that states increase the threshold for winning retention in order to increase accountability (Shugerman 2012, p. 260). For example, instead of requiring that the judge receive at least 50% affirmative vote, as most states do, states could require that a judge receive at least 60% affirmative vote (Shugerman 2012, p. 262). Indeed, two states already do (Shugerman 2012, p. 262). Giving voters a better chance of removing a judge might increase accountability. On the other hand, given the research showing that 30% of voters tend to vote against all judges regardless of the judge's performance, a 60% threshold might make it unduly difficult to retain good judges. This is especially so given the potential for bias to infect the survey responses that are the primary source of information in many JPE programs.<sup>37</sup> And, of course, this solution does not address the problems of voter apathy and misinformation.

Some have also advocated for shorter term lengths for judges (Shugerman 2012, p. 262). This, they argue, would increase accountability by making the judge answer to the voting public more frequently (Shugerman 2012, p. 262). On the other hand, few attorneys are apt to leave law practice to become judges if the terms are too short (Prakash 1999, p. 574, Shugerman 2010, p. 1041). Those whose primary concern is judicial independence and adherence to the rule of law support *longer* terms for judges as a means to keep them free from the pressure of voting according to the popular will (Prakash 1999, p. 475). To strike a balance between accountability and independence, states could require judges to stand for retention only a year or two after being selected and then give retained judges a longer term before requiring them to stand for retention again (Shugerman 2012, p. 262). Arizona uses a version of this model by requiring merit-selected judges to stand for retention at the first general election held after the judge has served two years in office, and then thereafter at the end his or her four- or six-year term (see Arizona Constitution art. VI, § 37(C)).

Apart from modifications to the retention-election apparatus, some commentators have recommended that states strengthen their disqualification and recusal policies (see Tarr 2012, p. 151–154, McKoski 2014). The proposals include taking the recusal decision away from the judge being challenged, permitting counsel to automatically strike one judge per proceeding, and requiring disqualification if a judge has accepted campaign contributions that exceed a threshold amount (Tarr 2012, p. 151–154). Arizona has already adopted the "automatic strike" rule: "each side [in a superior court proceeding] is entitled as a matter of right to a change of one judge" (Arizona Rules of Civil Procedure 2014, Rule 42(f)(1)(A), Arizona Rules of Criminal Procedure 2014, Rule 10.2(a)). This is in addition to the parties' right to remove a judge for cause (Arizona Rules of Civil Procedure 2014, Rule 42(f)(2); Arizona Rules of Criminal Procedure 2014, Rule 10.1).

Finally, four states have added a courtroom observation component to their JPE programs. These states send trained personnel into courtrooms to observe, document, and evaluate judges' performance in the courtroom. Alaska's JPE program receives courtroom observation information through the work of an independent organization (IAALS 2013b). The JPE commissions in Colorado, Missouri, and Utah conduct their own courtroom observation program (IAALS 2013c, 2013d, 2013e). Utah's observation program is possibly the most extensive, relying on the help of numerous volunteers (Woolf and Yim 2011, p. 86-87).

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<sup>37</sup> This article only mentions the potential for problems with bias—an issue which is detailed extensively in other research (Brody 2000, p. 339, Durham 2000, p. 12-13, Gill *et al.* 2011, p. 731, Elek and Rottman 2013, p. 140-141).

These programs have potential value in that they provide a new source of information about judges' performance. Some of these programs train their observers on certain aspects of performance, and the trained observers do not have a stake in the cases in which they evaluate performance. For these reasons, the observers may provide interesting, unbiased data.

Nevertheless, such programs have been criticized as unnecessary and duplicative, as most JPE surveys already include questions covering courtroom performance (Woolf and Yim 2011, p. 85, Elek and Rottman 2013, p. 143). After noting this duplication, Utah altered its program to focus exclusively on procedural fairness and to elicit qualitative, instead of quantitative information (Woolf and Yim 2011, p. 85-86). The difference between qualitative and quantitative information can seem subtle in this context, but it was important to Utah's program. Quantitative data is the kind of information collected by selecting from one of the given choices in a survey, whereas qualitative data comes from unstructured narrative comments (Woolf and Yim 2011, p. 85-86). The changes to Utah's observation program, while an improvement, still do not protect against potential gender and race bias (Elek and Rottman 2013, p. 143, Woolf and Yim 2011, p. 90-91). Finally, these programs also require significant additional resources in terms of implementation, training, and volunteers.

## 6. Conclusion

Assessing judicial performance poses several challenges, not the least of which is determining what makes a "good" judge. But assuming general agreement on the major characteristics and skills possessed by good judges, can we say, after reviewing Arizona's JPR program, that it provides an effective way to assess judicial performance? That is, can we say it is working?

The conclusion depends greatly on how success is defined. The program certainly successfully collects and disseminates information about each judge who stands for retention. Assuming that the program is obtaining useful information, this is a significant step toward increasing judges' accountability.

Social science research suggests that the JPR program asks the right questions and so collects the "right" information: information that voters care about when considering the quality of a judge. The surveys not only collect data from lawyers about judges' knowledge of the law, competence, and ability to rule promptly and soundly, but also collect data from litigants on a number of factors that touch on aspects of procedural fairness, such as whether the judge provided an opportunity to be heard and treated each litigant fairly and courteously (Tyler 1990, p. 138, 163-164). Procedural fairness factors heavily influence a citizen's perception of the system as fair and legitimate (Tyler 1990, p. 71, 75, 79-80, 94, 104, 110). In turn, the effectiveness of the judicial system greatly depends on whether people have confidence in it (Tyler 1990, p. 71, 75, 79-80, 94, 104, 110). Thus, the data collection and dissemination alone likely help satisfy the public's concerns about the judiciary's performance, independence, and accountability.

But beyond that, evidence suggests that the JPR system works effectively. The Commission's information is reaching the voters, and at least some voters rely on this data when voting in judicial retention elections. Judges also appear to benefit from the self-improvement program. Whether this is a product of how Arizona's JPR program functions or a fulfillment of the old adage that "what gets measured gets improved" is not important if the bottom line shows that judges are in fact improving their work or effectiveness.

Evidence also shows that Arizona's JPR program helps to identify and remove, at the very least, those judges at the extreme end of the spectrum—those who fall well below the standard set by the JPR program. The JPR spectrum differs from and is higher than the minimum standards necessary to establish violations of the

canons of judicial conduct. And for the vast majority of judges whose performance is called into question under the judicial ethics system, the judge will not be sanctioned with removal from office. Thus, the JPR system works better than the judicial ethics system to actually weed out poorly performing judges. Although voters rarely vote not to retain judges, the “bad” judges will sometimes remove themselves. Maybe this is all that can be expected of a JPR program; it is, after all, a valuable achievement in its own right.

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