

# JUDICIAL PERFORMANCE REVIEW IN ARIZONA: A CRITICAL ASSESSMENT

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*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.*

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## INTRODUCTION

Sed quis custodiet ipsos custodes?<sup>1</sup> Who judges the judges, and by what standards should they be judged? 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>2</sup> A key question in this debate is how to determine whether our judges are knowledgeable and impartial. How do we know if they are upholding the law?

Arizona citizens first sought to hold judges accountable through contested elections, but critics challenged election of judges as imposing too great a cost on judicial independence.<sup>3</sup> In 1974, Arizonans adopted merit selection as the solution to this problem, at least for judges in a significant part of the state. The constitutional amendment adopting merit selection provided that superior court judges in Arizona’s 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.<sup>4</sup> 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.<sup>5</sup>

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1. JUVENAL, FOURTEEN SATIRES OF JUVENAL 36 (J.D. Duff ed., Cambridge Univ. Press 2013) (1898).

2. See, e.g., Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1053–55 (2001) [hereinafter *Judging Judges*]; see also THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the importance of an independent judiciary); JED HANDELSMAN SHUGERMAN, THE PEOPLE’S COURTS 5–9 (2012) (explaining the accountability–independence dichotomy); Sandra Day O’Connor & RonNell Andersen Jones, *Reflections on Arizona’s Judicial Selection Process*, 50 ARIZ. L. REV. 15, 23 (2008) (same).

3. See, e.g., Hon. Ruth V. McGregor, *Arizona’s Merit Selection System: Improving Public Participation and Increasing Transparency*, 59 SYRACUSE L. REV. 383, 385–86 (2009).

4. See *infra* note 19.

5. See generally *Judicial Performance Evaluation in the States*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/initiatives/quality-judges-initiative/implementation/judicial-performance-evaluation> (last visited Feb. 13, 2013).

Since implementing the JPR program in 1994,<sup>6</sup> Arizona has continually worked to improve its process, learning by trial and error. Because of Arizona's well-developed program and its reputation for seeking innovation, the authors were asked to detail the Arizona experience for an international conference on evaluation of judicial performance.<sup>7</sup> From that process emerged a critical look at the strengths and weaknesses of Arizona's program.

How do we know whether the program is working? This is difficult to say, in part, because it is difficult to quantify the quality of judging and the character traits that make for good judges. Nevertheless, some indicators suggest that the program is working as part of a larger system to improve judicial performance, inform voters, and identify and weed out underperforming judges.

Part I of this Article sets forth a brief history of Arizona's merit-selection system. Part II provides an overview of Arizona's JPR program. Part III 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. Arizona already employs some of these processes. We discuss other methods to facilitate a discussion about additional ways to improve judicial evaluation processes. Finally, the Article concludes with a brief assessment of Arizona's JPR program.

### I. HISTORY OF ARIZONA'S JUDICIAL MERIT-SELECTION SYSTEM

Judicial evaluation, in its broadest sense, begins with the process of selecting new judges. Other jurisdictions use a multitude of methods for determining who is qualified to sit on the bench, including written examinations, recruitment commissions, and qualification profiles.<sup>8</sup> 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 be retained. It views the issue through the lens of the Arizona judicial evaluation process. For that reason, some background of Arizona's merit-selection system is helpful for a full understanding of the state's JPR system.

Through the first 60 years of Arizona's statehood, Arizona judges were elected through a nonpartisan election system.<sup>9</sup> In theory, such a system gave the

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[hereinafter IAALS] (summarizing the key features of all states' judicial performance evaluation programs).

6. Arizona voters approved an amendment to the state constitution to provide for JPR in 1992, but the program was not implemented until 1994. A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 672-73 (1998).

7. The conference, called "Evaluating Judicial Performance," was hosted by the Oñati International Institute for the Sociology of Law in collaboration with the Academy of the Social Sciences in Australia and was sponsored by the National Center for State Courts.

8. See Johannes Riedel, *Individual Evaluation of Judges in Germany*, OÑATI SOCIO-LEGAL SERIES (forthcoming) (manuscript at 2-7).

9. See ARIZ. CONST. art. VI, §§ 3, 5, 9 (repealed 1960).

people complete power to select state judges. In practice, however, most “elected” judges were not elected by the citizens—at least not at the start of their judicial careers. Rather, the Governor initially appointed most “elected” judges. The Governor had—and still retains in nonmerit-selection counties—unfettered discretion to fill judicial vacancies that occur between election cycles, whether they result from death, retirement, resignation, or the creation of new judgeships. The temporary appointments often transformed into lifelong judicial careers because appointees became incumbents, and incumbents are rarely defeated in subsequent elections.<sup>10</sup> These temporary-turned-permanent judicial positions 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 concerns with the election of judges such as the influence of campaign contributions and voter indifference, the State Bar and other advocates sought to establish a merit-based selection system.<sup>11</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.<sup>12</sup> The 1974 amendment required creation of three Judicial Nominating Commissions (JNCs): a statewide commission for the appellate courts and county-wide commissions for each of the superior courts of Pima and Maricopa Counties (the only two counties then meeting the population threshold).<sup>13</sup> 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.<sup>14</sup>

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10. See Mark I. Harrison et al., *On the Validity and Vitality of Arizona’s Judicial Merit Selection System: Past, Present, and Future*, 34 *FORDHAM URB. L.J.* 239, 240–42 (2007) (noting that, between 1958 and 1972 in Arizona, the incumbent judge was defeated in only 10 out of 215 elections, and more than one-half of judicial candidates ran unopposed).

11. See, e.g., SHUGERMAN, *supra* note 2, at 4 (describing some key concerns with judicial elections generally); O’Connor & Jones, *supra* note 2, at 17–19 (outlining the motivating factors impelling Arizona’s move to a merit-selection system). *But see* SHUGERMAN, *supra* note 2, at 208–40 (providing a different account of why merit-selection systems gained popularity in the United States).

12. Harrison et al., *supra* note 10, at 243. 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 threshold was also a political compromise in the effort to ensure that voters would approve the constitutional amendment. When the voters amended the constitution in 1992 to provide for judicial performance evaluation, see *infra* text accompanying note 13, they also voted to raise the population threshold to 250,000. Pinal County recently reached this population threshold. See Lindsey Collom, *Pinal’s Growth Complicates Selecting Judges*, *ARIZ. REPUBLIC*, Dec. 2, 2012, at A1.

13. ARIZ. CONST. art. VI, §§ 35 (amended 1974), 36–40.

14. See *id.* §§ 36, 41. Originally composed of five nonlawyer and three lawyer members, today’s commissions contain ten nonlawyer and five lawyer members, each

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>15</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.<sup>16</sup> Supreme Court justices stand for retention statewide; court of appeals and superior court judges stand in their respective jurisdictions.<sup>17</sup>

The merit-selection system has been lauded as a significant improvement to Arizona’s justice system, principally because it has produced highly qualified judges.<sup>18</sup> 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.<sup>19</sup>

## II. ARIZONA’S JUDICIAL PERFORMANCE REVIEW PROGRAM

Judicial performance evaluation (JPE)<sup>20</sup> is a key component of Arizona’s merit-selection and retention 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.

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servicing staggered four-year terms. The Governor appoints members with approval of the state senate. The Arizona Constitution also prescribes political party and residential requirements for commission membership. *Id.*

15. *See id.* § 38 (detailing 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.” *Id.* § 37(C).

16. *See id.* § 38(C).

17. *Id.* § 38. This Article uses “judge” to encompass both judges and justices.

18. *See* Harrison, *supra* note 10, at 244–45, 259 (noting the quality of judges appointed since adopting the merit-selection system); O’Connor & Jones, *supra* note 2, at 20 (same); Rachel Paine Caufield, *Inside Merit Selection: A National Survey of Judicial Nominating Commissions*, AM. JUDICATURE SOC’Y 3, 38 (2012), available at [http://www.judicialselection.us/uploads/documents/JNC\\_Survey\\_ReportFINAL3\\_92E04A2F04E65.pdf](http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf).

19. *See, e.g.*, O’Connor & Jones, *supra* note 2, at 21 (noting that “critics charged that the merit-selection system failed to ensure accountability, pointing to the difficulty and rarity of removing an incumbent judge through . . . retention elections”); Pelander, *supra* note 6, at 655–67 (discussing the catalysts for Arizona’s JPR program); John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 847–56, 884–90 (1990) (detailing the attacks on the merit-selection system brought by various groups, including the Arizona Legislature, which regularly considered and proposed bills to change or totally eliminate the system); *see also* SHUGERMAN, *supra* note 2, at 255–56 (outlining some oft-cited flaws with merit-selection systems generally); Caufield, *supra* note 18, at 5.

20. Because JPE is a more commonly used name for similar judicial evaluation systems, this Article will use JPE when referring to these programs generally and JPR when referring to Arizona’s program specifically.

At the same time, JPE avoids excessive burdens on judicial independence because, in theory, it evaluates judges based on the central facets of judging—such as 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>21</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.<sup>22</sup> The amendment requires the Arizona Supreme Court to implement the program.<sup>23</sup>

To carry out its constitutional mandate, the Arizona Supreme Court, in 1993, adopted rules to implement a system of JPR.<sup>24</sup> 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 performance review, which are to protect judicial independence while fostering public accountability of the judiciary.<sup>25</sup>

The Commission on JPR (the “Commission”) oversees the judicial evaluation process.<sup>26</sup> Today, the Commission is composed of 30 members: 18 public members, 6 attorney members, and 6 judge members.<sup>27</sup> The Arizona Supreme Court appoints the members, who serve staggered four-year terms.<sup>28</sup>

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21. See, e.g., SHUGERMAN, *supra* note 2, at 1–5 (describing some notorious examples of external factors playing a significant role in judicial elections).

22. See H.R. Con. Res. 2009, 40th Leg., 2d Reg. Sess. (Ariz. 1992); ARIZ. CONST. art. VI, § 42. Arizona is the only state to provide for JPE in its state constitution. See *Methods of Judicial Selection: Arizona*, AM. JUDICATURE SOC’Y, [http://www.judicialselection.us/judicial\\_selection/methods/judicial\\_performance\\_evaluations.cfm?state=AZ](http://www.judicialselection.us/judicial_selection/methods/judicial_performance_evaluations.cfm?state=AZ) (last visited Feb. 11, 2013).

23. See ARIZ. CONST. art. VI, § 42.

24. See Pelander, *supra* note 6, at 668.

25. ARIZ. R. P. JUD. PERF. REV. 1, available at [http://www.azcourts.gov/portals/20/ramd\\_pdf/r-05-0011Jan06.pdf](http://www.azcourts.gov/portals/20/ramd_pdf/r-05-0011Jan06.pdf). The American Bar Association Guidelines for the Evaluation of Judicial Performance state similar goals. ABA, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINE 2-1 (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec_final.authcheckdam.pdf).

26. See ARIZ. R. P. JUD. PERF. REV. 2.

27. See *id.* 2(a) (limiting membership to “not more than 34 members”); *Commission Members*, ARIZ. COMM’N ON JUD. PERF. REV., <http://www.azcourts.gov/jpr/AboutJPR/CommissionMembers.aspx> (last visited Feb. 13, 2013). Arizona’s Commission is the largest of its kind, with Connecticut having the next largest JPE commission, containing 23 members. IAALS, *supra* note 5.

28. See ARIZ. R. P. JUD. PERF. REV. 2(a), (c).

The Commission's chief purposes are to develop performance standards and conduct periodic performance reviews of all judges subject to retention.<sup>29</sup> 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.<sup>30</sup>

The performance reviews, which occur twice during a judge's term—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.<sup>31</sup>

The Commission collects data primarily from anonymous surveys distributed to people with first-hand experience with the judge during the evaluation period.<sup>32</sup> For superior court judge evaluations, the Commission solicits responses from attorneys, jurors, represented litigants, pro per litigants, court staff, and other judges.<sup>33</sup> For appellate court judge evaluations, the Commission distributes surveys to attorneys, judges, and court staff.<sup>34</sup>

The surveys ask respondents to rate judges in four categories: integrity, communication skills, judicial temperament, and administrative performance.<sup>35</sup> 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.<sup>36</sup> 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

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29. See ARIZ. R. P. JUD. PERF. REV. 2(g).

30. See *Judicial Performance Standards*, ARIZ. COMM'N ON JUD. PERF. REV., <http://www.azcourts.gov/jpr/AboutJPR/JudicialPerformanceStandards.aspx> (last visited Feb. 11, 2013).

31. See ARIZ. R. P. JUD. PERF. REV. 4, 6.

32. See *id.* 6(b).

33. See *JPR Process*, ARIZ. COMM'N ON JUD. PERF. REV., <http://www.azcourts.gov/jpr/AboutJPR/JPRProcess.aspx> (last visited Feb. 11, 2013).

34. See *id.*

35. See ARIZ. R. P. JUD. PERF. REV. 6(b). For a comparison of criteria and survey questions used in other states, see Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 636, 658–62 (2009).

36. See *JPR Process*, *supra* note 33.

economic status.<sup>37</sup> The questions on temperament ask about the judge's "understanding and compassion," whether the judge is "dignified," "courteous," and "patient," and whether the judge's conduct "promote[s] public confidence in the court."<sup>38</sup> Notably, many of these criteria address aspects of procedural fairness, which are the factors that research shows most affect court users' views of the fairness and legitimacy of the justice system overall.<sup>39</sup> 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 attorney responses for one Maricopa County Superior Court judge.<sup>40</sup>

	UN		PO		SA		VG		SU		Mean	Total	No Resp
<b>1. Legal Ability</b>	#	%	#	%	#	%	#	%	#	%			
1. Legal reasoning ability	0	0%	2	13%	3	19%	4	25%	7	44%	3.00	16	2
2. Knowledge of substantive law	0	0%	2	13%	3	19%	5	31%	6	38%	2.94	16	2
3. Knowledge of rules of evidence	0	0%	1	7%	4	27%	5	33%	5	33%	2.93	15	3
4. Knowledge of rules of procedure	0	0%	1	6%	4	25%	5	31%	6	38%	3.00	16	2
<b>Category Total</b>	<b>0</b>	<b>0%</b>	<b>6</b>	<b>10%</b>	<b>14</b>	<b>22%</b>	<b>19</b>	<b>30%</b>	<b>24</b>	<b>38%</b>	<b>2.97</b>	<b>63</b>	

Key:  
**UN** = Unsatisfactory; **PO** = Poor; **SA** = Satisfactory;  
**VG** = Very Good; **SU** = Superior  
# = number of respondents

Figure 1<sup>41</sup>

37. See *Judicial Report*, ARIZ. COMM'N ON JUD. PERF. REV., <http://www.azcourts.gov/jpr/JudicialPerformanceReports/JudicialReport.aspx?courtid=2> (click on a judge's name, then click on "Detailed Report" to see the full breakdown of survey questions and answers) (last visited Feb. 13, 2013).

38. See *id.*

39. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 71, 75, 79–80, 94, 104, 110 (1990).

40. See *Judicial Report*, *supra* note 37.

41. See *id.* This figure shows a portion of The Hon. Helene F. Abrams's 2012 Judicial Report. Note that Arizona's survey is similar to the one recommended by the



Respondents may also write narrative comments on the survey forms, but only the evaluated judge and self-improvement Conference Team ever see these comments.<sup>42</sup> Finally, the Commission collects comments from the public throughout the year through its website and during election years via public hearings.<sup>43</sup>

An independent data center collects the survey responses and compiles the data to ensure confidentiality, anonymity of the respondent, and integrity of the process.<sup>44</sup> 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.<sup>45</sup> The data center also retypes the comments to help protect commenters' anonymity.<sup>46</sup>

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.<sup>47</sup> 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 judges being reviewed; and (6) any citizen comments received regarding the judge under consideration.<sup>48</sup>

At any time, regardless of whether the judge has met the standards, any member of the Commission may request that the Commission Chair write to the judge, asking him or her to respond by letter or in person to questions about scores, public comments, or other concerns.<sup>49</sup> The judge’s anonymity to the Commission is maintained unless the judge chooses to address the Commission in person.<sup>50</sup>

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

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Institute for the Advancement of the American Legal System (IAALS). *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., RECOMMENDED TOOLS FOR EVALUATING APPELLATE JUDGES 4–5, 19–22 (2013).

42. *See* ARIZ. R. P. JUD. PERF. REV. 6(c). The fact that the comments are kept from the Commission and the public was one of the most controversial aspects of Arizona’s JPR. *See, e.g.,* Pelander, *supra* note 6, at 670–71 (stating that the purpose of keeping the comments confidential is to encourage candor and protect the judge from being targeted by false, malicious, or irresponsible anonymous comments). As explained *infra*, text accompanying notes 66–67, these comments are used only in the self-evaluation and improvement component of JPR.

43. *See* ARIZ. R. P. JUD. PERF. REV. 6(d).

44. *See id.* 6(a).

45. *See id.* 7.

46. *See id.* 6(a).

47. *See id.* 6(f)(3).

48. *See id.* 6.

49. *See id.*

50. *See id.* 7.

for a response.<sup>51</sup> 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.<sup>52</sup> Settlement activities are not subject to the threshold standard because of difficulty in evaluating this category.<sup>53</sup> 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.<sup>54</sup>

Arizona’s constitution requires the Commission to disseminate its findings to voters.<sup>55</sup> The Commission performs this task by mailing its report to each voter’s home and by posting results on both the Commission’s website and the Secretary of State’s website.<sup>56</sup> The Commission’s website lists the full breakdown of the survey results, along with the Commission’s recommendations.<sup>57</sup> As seen in Figure 2, the voter information pamphlet contains the Commission’s recommendations along with a summary of the survey responses.<sup>58</sup> In addition, information often appears in various news outlets.<sup>59</sup> Arizona is one of seven states that provides performance evaluation results directly to voters.<sup>60</sup> The remaining ten

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51. See *JPR Process*, *supra* note 33; Telephone Interview with Michael Hellon, JPR Commission Chair (Dec. 2, 2013) [hereinafter First Hellon Interview].

52. See *JPR Process*, *supra* note 33; First Hellon Interview, *supra* note 51.

53. See *JPR Process*, *supra* note 33; First Hellon Interview, *supra* note 51.

54. First Hellon Interview, *supra* note 51.

55. See ARIZ. CONST. art. VI, § 42; see also ARIZ. R. P. JUD. PERF. REV. 6(f)(4) (requiring the report be distributed by “means deemed necessary to reach voters in the state”).

56. See *JPR Process*, *supra* note 33. The Commission is examining ways to improve how it disseminates its information on its website and in the voter pamphlet. See E-mail from Dave Byers, Administrative Director of the Courts, to Rebecca White Berch, Chief Justice of the Arizona Supreme Court (Nov. 21, 2013, 11:26 AM) [hereinafter Byers E-mail] (on file with authors).

57. See, e.g., *Judicial Report*, *supra* note 37 (where voters can click on a judge’s name to see a summary of the report and can see the full survey details by clicking on “Detailed Report”).

58. The Secretary of State produces the voter information pamphlet and distributes it to each voter’s house before the general election. See, e.g., ARIZ. SEC’Y OF STATE, WHAT’S ON MY BALLOT?: ARIZONA’S GENERAL ELECTION GUIDE (2012) [hereinafter, ELECTION GUIDE (2012)], available at <http://www.azsos.gov/election/2012/Info/PubPamphlet/english/e-book.pdf>.

59. See, e.g., Rebecca White Berch, *Agency’s Ratings of Judges Keep Voters Informed*, ARIZ. REPUBLIC, Oct. 19, 2012, at B7; Kim Smith, *18 Pima Superior Court Judges Pass Review, Are Up for Retention on Ballot*, ARIZ. DAILY STAR, Sept. 17, 2012, at A2.

60. See IAALS, *supra* note 5 (listing the other six states as Alaska, Colorado, Missouri, New Mexico, Tennessee, and Utah); see also David C. Brody, *The Use of Judicial Performance Evaluations to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 118 n.34 (2008) (noting that eight states—all of the above plus Kansas—disseminated JPE results to voters in 2008).

states with JPE programs either do not provide voters with the evaluation results or provide voters with only summary results (that is, they do not identify the individual judges).<sup>61</sup>

<b>FIELD, RICHARDS,</b> Assignment During Survey Period: Criminal Presiding Appointed to Pima County Superior Court: 1997		<b>30 Commissioners Voted "Meets" 0 Commissioners Voted "Does Not Meet"</b>		
<b>Judicial Performance Standards Evaluation Categories</b>	<b>Presiding Judge Responses</b> Surveys Distributed: 12 Surveys Returned: 7	<b>Attorney Responses</b> Surveys Distributed: 116 Surveys Returned: 74	<b>Litigant, Witness, Pro Per Responses</b> Surveys Distributed: 130 Surveys Returned: 36	<b>Juror Responses</b> Surveys Distributed: 68 Surveys Returned: 26
	<b>Score (See Footnote)</b>	<b>Score (See Footnote)</b>	<b>Score (See Footnote)</b>	<b>Score (See Footnote)</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

Figure 2<sup>62</sup>

The second major part of Arizona's JPR program 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.<sup>63</sup> 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.<sup>64</sup> The Team and the judge also review the confidential comments written by respondents on the survey form.<sup>65</sup> 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 program is entirely confidential, and the Commission does not use any of the information from the self-evaluations or Team meetings in its decisions.<sup>66</sup> In contrast, some

61. Hawaii and New Hampshire provide voters with summary performance evaluation results. Connecticut, the District of Columbia, Florida, Idaho, Illinois, Massachusetts, New Jersey, Rhode Island, and Vermont do not disseminate any evaluation results to voters. *See* IAALS, *supra* note 5.

62. ELECTION GUIDE (2012), *supra* note 58.

63. *See* ARIZ. R. P. JUD. PERF. REV. 4(e).

64. *See id.* 4(a), (g).

65. *See id.* 4(g), 6(c).

66. *See id.* 4(g). The Judicial College of Arizona, however, does use the information to guide its judicial education programs. *Id.* 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 GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE WITH COMMENTARY 1, GUIDELINES 2-3 (2005),

other states use the judge's self-evaluation in their assessment of the judge's performance.<sup>67</sup>

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.<sup>68</sup> Of course, this figure does not factor in the countless hours donated by volunteers who serve on the Commission or on the self-improvement Conference Teams. Moreover, it provides only an estimation of time spent by court staff.

### III. OBSERVATIONS

Through its first 20 years, the JPR program 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."<sup>69</sup> 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.

#### A. 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 the state judiciary as a whole.<sup>70</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

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available at [http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec_final.authcheckdam.pdf).

67. See, e.g., JUDICIAL PERFORMANCE EVALUATION COMM'N, TENN. APPELLATE JUDGES EVALUATION REPORT (2012), available at [http://www.tncourts.gov/sites/default/files/docs/jpec\\_evaluations\\_2012\\_1.pdf](http://www.tncourts.gov/sites/default/files/docs/jpec_evaluations_2012_1.pdf); *Commissions on Judicial Performance*, COLO. OFFICE OF JUDICIAL PERFORMANCE EVALUATION, <http://www.coloradojudicialperformance.gov/> (last visited Feb. 25, 2014).

68. E-mail from Kevin Kluge, Chief Financial Officer, Arizona Supreme Court, to Rebecca White Berch, Chief Justice of the Arizona Supreme Court (Feb. 12, 2013, 11:44 AM) (on file with authors). 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.

69. See ARIZ. R. P. JUD. PERF. REV. 1; see also *supra* text accompanying note 30 for a list of all of the Commission's goals.

70. G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 95 tbl. 4.1, 96-97 (2012); Pelander, *supra* note 6, at 690; Interview with Mark Harrison, Attorney, former State Bar President, Justice For All Founding Member and President, and Justice at Stake Chairman (Feb. 21, 2013) [hereinafter Harrison Interview]; Telephone Interview with Michael Hellon, JPR Commission Chair (Feb. 7, 2013) [hereinafter Second Hellon Interview].

performance.”<sup>71</sup> In fact, simply knowing that the Commission will periodically review their performance encourages judges to think about and improve their performance.<sup>72</sup>

The degree to which a judge benefits depends greatly on the judge’s attitude toward the process and the nature of any criticisms.<sup>73</sup> The program is most successful if judges are “candid about their weaknesses and willing to improve.”<sup>74</sup> Most judges take the process seriously and are receptive to the feedback.<sup>75</sup> Some judges even take classes or seek mentoring to improve their skills or remedy weaknesses.<sup>76</sup> A few, however, simply disregard the feedback as being inaccurate, unfair, or discriminatory.<sup>77</sup> For example, some may attribute the criticism to targeted attacks from particular constituencies.<sup>78</sup> These claims are difficult to verify but may be valid in some situations.<sup>79</sup>

Arizona’s experience is not unique. In a 2008 survey of the Colorado judiciary, judges reported that the feedback they received from the program “was valuable to their professional development.”<sup>80</sup> 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.<sup>81</sup> The Colorado judges noted that they received little feedback elsewhere, particularly not the kind of frank responses contained in the anonymous surveys.<sup>82</sup> 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.”<sup>83</sup>

The Colorado judges, however, disagreed over whether the self-evaluation program as a whole was helpful.<sup>84</sup> The survey revealed that Colorado’s appellate judges expressed concern about the self-evaluation program, whereas

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71. Second Hellon Interview, *supra* note 70.

72. *Id.*

73. *See, e.g., id.*; Harrison Interview, *supra* note 70.

74. Second Hellon Interview, *supra* note 70; *see also* Harrison Interview, *supra* note 70.

75. Second Hellon Interview, *supra* note 70.

76. *Id.*

77. *Id.*

78. Harrison Interview, *supra* note 70. Harrison said he has seen some instances of targeted attacks, in which 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. *Id.*

79. *Id.*; *see also infra* text accompanying note 126.

80. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE BENCH SPEAKS ON JUDICIAL PERFORMANCE EVALUATION: A SURVEY OF COLORADO JUDGES 13–14 (2008) [hereinafter IAALS SURVEY].

81. *Id.* at i.

82. *Id.* at 13–14.

83. *Id.* at 14.

84. *Id.* at 21–22.

trial judges generally had no issue with it.<sup>85</sup> The concerns centered on how the Colorado commission used the information gleaned from the self-evaluations.<sup>86</sup> That is, some judges hesitated to evaluate themselves honestly for fear that their acknowledgement of any weaknesses would be “used against [them].”<sup>87</sup> Arizona’s JPR Commission does not consider the self-evaluations in its decision, 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.<sup>88</sup> As 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 retention election—from a normal daily average of fewer than 100 views to a daily average of 16,394 views.<sup>89</sup> That number quadrupled the day before the election, with the website receiving 62,949 page views.<sup>90</sup> 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.<sup>91</sup> Some of this increase in traffic may have been triggered by a campaign against Arizona Supreme Court Justice A. John Pelander.<sup>92</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 is 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 correlation between the number of “Does Not Meet” votes by the JPR Commission members and the percentage of “No”

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85. *Id.*

86. *Id.*

87. *Id.* at 22.

88. *See, e.g.*, Pelander, *supra* note 6, at 662, 712.

89. E-mail from Jeffrey Schrade, Director of the Education Services Division of the Arizona Administrative Office of the Courts, to Erin Norris, then-law clerk to Chief Justice Rebecca White Berch (Feb. 13, 2013, 12:03 PM) [hereinafter Schrade E-mail] (on file with author) (calculating web traffic 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. *Id.*

90. *Id.*

91. *Id.*

92. *See* Howard Fischer, *Groups Campaign to Oust Arizona Supreme Court Judge*, EAST VALLEY TRIBUNE, (Oct. 23, 2012, 12:00 PM), [http://www.eastvalleytribune.com/arizona/article\\_caa26250-1d43-11e2-ad7a-0019bb2963f4.html](http://www.eastvalleytribune.com/arizona/article_caa26250-1d43-11e2-ad7a-0019bb2963f4.html); *see also* Larry Aspin, *The 2010 Judicial Retention Elections in Perspective: Continuity and Change from 1964 to 2010*, 94 JUDICATURE 218, 221 (2011) (noting that the existence of opposition campaigns reduced roll-off in retention elections).

votes at the subsequent election, at least with respect to trial court judges.<sup>93</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.<sup>94</sup> In contrast, Maricopa County 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup> This may be changing, however, as the average affirmative retention vote continues to decline.<sup>100</sup> 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.<sup>101</sup> In the 2012 retention elections, on average, Maricopa County Superior Court judges received 68% affirmative vote.<sup>102</sup> With these averages, a negative performance review could have sufficient impact to drop the affirmative vote below the majority threshold for retention. The good news is that voters are noting the Commission’s data, and many are apparently voting in ways suggesting that they have taken the data into account.

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93. See, e.g., ARIZ. SEC’Y OF STATE, PRECINCT LEVEL RESULTS BY COUNTY: MARICOPA (2012) [hereinafter 2012 MARICOPA COUNTY ELECTION RESULTS], available at <http://www.azsos.gov/results/2012/general/Maricopa.txt>. This pattern did not appear to extend to appellate-level judges during the 2012 election. See *infra* text accompanying notes 116–19. 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 Albert J. Klumpp, *Arizona Judicial Retention, Three Decades of Elections and Candidates*, ARIZ. ATT’Y, Nov. 2008, at 12, available at [http://www.myazbar.org/AZAttorney/PDF\\_Articles/1108\\_election.pdf](http://www.myazbar.org/AZAttorney/PDF_Articles/1108_election.pdf).

94. 2012 MARICOPA COUNTY ELECTION RESULTS, *supra* note 93.

95. *Id.*

96. ARIZ. SEC’Y OF STATE, PRECINCT LEVEL RESULTS BY COUNTY: PIMA (2012) [hereinafter 2012 PIMA COUNTY ELECTION RESULTS], available at <http://www.azsos.gov/results/2012/general/Pima.txt>.

97. *Id.*

98. See Aspin, *supra* note 92, at 225.

99. See, e.g., *id.* at 219 tbl. 1 & 225 (noting that, even with negative performance evaluations, voters typically retain judges).

100. *Id.* at 219–20.

101. *Id.* at 219 tbl.1.

102. See 2012 MARICOPA COUNTY ELECTION RESULTS, *supra* note 93.

### *B. Areas for Improvement*

Despite its overall successes, 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.<sup>103</sup> 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.<sup>104</sup> Since its creation, for example, Arizona's JPR Commission has voted only twice that a judge "Does Not Meet" standards.<sup>105</sup>

At this time, the Commission records and retains the votes of each Commission member and the vote totals for each judge.<sup>106</sup> 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.<sup>107</sup> Thus, Commission members must vote publicly unless the rule is changed. 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.<sup>108</sup> 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.<sup>109</sup> And only 19 other

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103. See, e.g., Aspin, *supra* note 92, at 222 (noting that JPEs are "recommending almost all judges be treated the same—retain them"); Pelander, *supra* note 6, at 718 (noting that "[s]ome critics of JPR charge that the process fails to identify 'bad' judges[ and] routinely results in a finding that all judges meet the judicial performance standards"); Second Hellon Interview, *supra* note 70.

104. See *supra* note 103.

105. See ARIZ. COMM'N ON JPR, REVIEW OF JUDGES' PERFORMANCE 99 (2008), available at <http://www.azsos.gov/election/2008/info/pubpamphlet/english/jpr.pdf> (stating that Maricopa County Superior Court Judge C.M. did not meet judicial performance standards); Pelander, *supra* note 6, at 695 (noting that the Commission voted that one judge did not meet performance standards in 1998).

106. 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. Telephone Interview with Michael Hellon, JPR Commission Chair (March 11, 2013) [hereinafter Third Hellon Interview].

107. The question has not been asked 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.

108. See, e.g., Aspin, *supra* note 92, at 225 (noting that "reductions of between 10 and 15 percent [of affirmative votes] are common for well-publicized do not retain recommendations from judicial performance commissions" but that it is usually not enough to defeat the judge); Second Hellon Interview, *supra* note 70 (stating he remembered one judge who the Commission voted "Does Not Meet" that the voters nevertheless retained).

109. See ARIZ. SEC'Y OF STATE, PRECINCT LEVEL RESULTS BY COUNTY: MARICOPA (2010) [hereinafter 2010 MARICOPA COUNTY ELECTION RESULTS], available at [http://www.azsos.gov/results/2010/general/counties/Maricopa\\_2010\\_General.txt](http://www.azsos.gov/results/2010/general/counties/Maricopa_2010_General.txt); ARIZ.



Arizona judges have come close to losing by receiving less than 60% affirmative vote.<sup>110</sup>

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 Missouri, for instance, only two judges have been defeated under the retention-election system.<sup>111</sup> 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.<sup>112</sup> In Alaska, the voters have declined to retain only one judge.<sup>113</sup> And in Colorado, six judges have been removed via retention elections.<sup>114</sup> In fact, between 1964 and 2006, only 56 judges were defeated in retention elections across the United States.<sup>115</sup> These figures do not include results from the 2010 retention elections, at which voters removed three Iowa Supreme Court Justices, including the chief justice.<sup>116</sup>

A few have argued that the JPR program does not work to "weed out" bad judges, because the Commission rarely votes that a judge "Does Not Meet" standards, and when the Commission does issue such a vote, the voters nonetheless retain the judge.<sup>117</sup> 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 high-quality judicial applicants.<sup>118</sup> That is, the data may instead show that the merit-selection system is attracting and retaining highly competent judges who are performing well and do not deserve "does not meet standards" votes or to

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SEC'Y OF STATE, PRECINCT LEVEL RESULTS BY COUNTY: PIMA (2010) [hereinafter 2010 PIMA COUNTY ELECTION RESULTS], available at [http://www.azsos.gov/results/2010/general/counties/Pima\\_2010\\_General.txt](http://www.azsos.gov/results/2010/general/counties/Pima_2010_General.txt); 2012 MARICOPA COUNTY ELECTION RESULTS, *supra* note 93; 2012 PIMA COUNTY ELECTION RESULTS, *supra* note 96; Brody, *supra* note 60, at 134; Klumpp, *supra* note 93, at 13.

110. See Klumpp, *supra* note 93, at 13 (noting through the 2008 election, 7 judges fell below 60%); see also 2012 MARICOPA COUNTY ELECTION RESULTS, *supra* note 93 (3 judges below 60%); 2012 PIMA COUNTY ELECTION RESULTS, *supra* note 96 (no judges below 60%); 2010 MARICOPA COUNTY ELECTION RESULTS, *supra* note 109 (9 judges below 60%); 2010 PIMA COUNTY ELECTION RESULTS, *supra* note 109 (no judges below 60%). This does not include figures from Pinal County's 2012 retention election, as their merit-selection system was not yet in full effect.

111. See Klumpp, *supra* note 93, at 13. Missouri adopted its program, known in other states as the "Missouri Plan," in 1940. Stephen E. Lee, *Judicial Selection and Tenure in Arizona*, 1973 LAW & SOC. ORD. 51, 52 n.5 (1973).

112. See Klumpp, *supra* note 93, at 13.

113. Brody, *supra* note 60, at 134.

114. *Id.*

115. Larry Aspin, *Judicial Retention Election Trends 1964-2006*, 90 JUDICATURE 208, 210-11 (2007).

116. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1, available at [http://www.nytimes.com/2010/11/04/us/politics/04judges.html?\\_r=0](http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0).

117. See Pelander, *supra* note 6, at 718 (detailing some of these arguments).

118. See, e.g., *id.* at 724. But see SHUGERMAN, *supra* note 2, at 254 (noting that "academic studies are mixed or inconclusive about whether merit selects more experienced candidates or produces better judges, in part because it is hard to quantify judicial quality").

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 sufficiently 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."<sup>119</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.<sup>120</sup> 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.<sup>121</sup> 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."<sup>122</sup> 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.<sup>123</sup> 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 noted that nonattorney respondents such as jurors and witnesses were more forthcoming in their survey responses.<sup>124</sup> Despite the value of these groups' responses, Hellon stated his belief that there is no replacement for the lawyer's perspective.<sup>125</sup> The survey asks only lawyers about a judge's legal ability, for example. Further, lawyers are better situated to evaluate a judge's competence and knowledge of the law, 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

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119. Klumpp, *supra* note 93, at 16–17. 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, *supra* note 111, at 53–54 (explaining in more detail the nonpartisan election system that existed). Nonetheless, the author's point is well taken.

120. *See, e.g.*, Second Hellon Interview, *supra* note 70.

121. *Id.*; *supra* text accompanying notes 32–34 (outlining the procedures the Commission takes to ensure anonymity).

122. IAALS SURVEY, *supra* note 80, at 11–13.

123. *Id.*

124. Second Hellon Interview, *supra* note 70.

125. *Id.*

(by the criminal defense community).<sup>126</sup> 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.<sup>127</sup> Undervoting, or voter “roll-off,” remains constant, notwithstanding the implementation of merit selection in 1974 and JPR in 1992.<sup>128</sup> In the 2012 retention election, Maricopa County Superior Court judges on the ballot had an average 50.7% undervote.<sup>129</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 has been consistent throughout the nation since about 1990, despite the increasing availability of information about judges' performances from JPE programs.<sup>130</sup> 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.”<sup>131</sup> Arizona's 2012 election results reflect this trend, with Maricopa County Superior Court judges receiving a median 69% affirmative vote.<sup>132</sup>

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126. Harrison Interview, *supra* note 70. Harrison has counseled several judges who received poor performance reviews and said some have cited this as a concern.

127. Aspin, *supra* note 92, at 220, 221 fig.2.

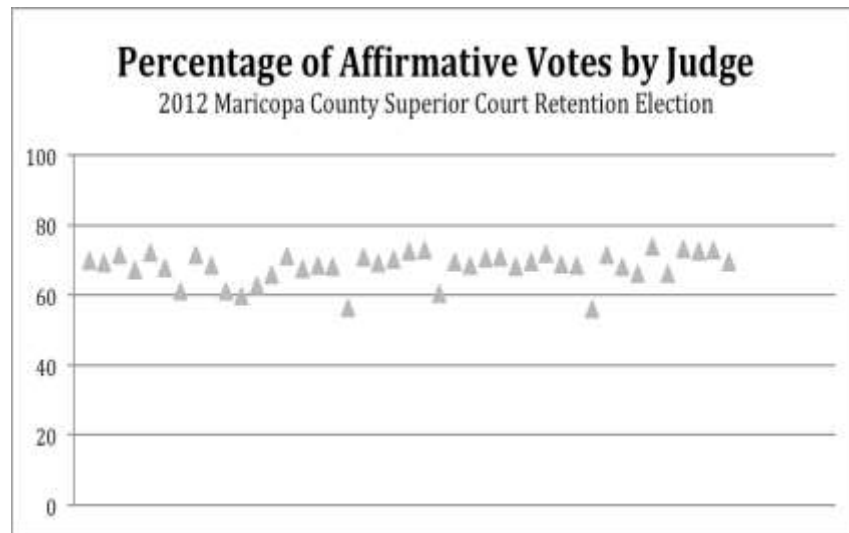
128. *See id.* at 219 fig.1.

129. 2012 MARICOPA COUNTY ELECTION RESULTS, *supra* note 93. We note our implicit assumption that voters would be more apt to vote on judges if they knew more about them. Notably, the JPR Commission recently examined ways to reduce roll-off, such as a “Finish the Ballot” campaign that would use tools like social media to inform voters about judicial retention elections. *See* Byers E-mail, *supra* note 56.

130. Aspin, *supra* note 92, at 221–22 & 222 fig.3.

131. Jacqueline R. Griffin, *From the Bench: Judging the Judges*, 21 LITIG. 5, 62 (1995). 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. *See supra* text accompanying notes 94–103.

132. 2012 MARICOPA COUNTY ELECTION RESULTS, *supra* note 93.

Figure 3<sup>133</sup>

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.<sup>134</sup> In contrast, Court of Appeals Judge P.S., whom 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.<sup>135</sup> These numbers suggest, unsurprisingly, that voters consider factors other than the Commission's recommendations, including judges' perceived political ideologies.<sup>136</sup> Moreover, the location of the election may play a part in causing the discrepancies between the Commission's recommendations and the votes these judges received. Judge V.K. is from Pima County, whose judges received an

133. Underlying data derived from the Secretary of State's election results, 2012 MARICOPA COUNTY ELECTION RESULTS, *supra* note 93.

134. ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS 15 (2012) [hereinafter 2012 OFFICIAL CANVASS], available at <http://www.azsos.gov/election/2012/General/Canvass2012GE.pdf>.

135. *Id.*

136. Although one can only speculate as to what caused the nearly 13-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. See Aspin, *supra* note 92, at 222–23 & 223 fig.4 (noting that Maricopa County voters often differentiate among judges based on perceived political ideologies).

average affirmative vote of 77%, while Judge P.S. is from Maricopa County, whose judges received an average affirmative vote of only 68%.<sup>137</sup>

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.”<sup>138</sup> 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.<sup>139</sup> Nonetheless, the divergence between the Commission’s recommendations and 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 Commission members to a judge’s weaknesses. Commission members 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 judges’ deficiencies, thereby failing to carry out one of the JPR program’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.<sup>140</sup> Nevertheless, as explained in the observations in the next section, even with these weaknesses, the JPR program may be achieving its goals in other ways.

### C. 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.<sup>141</sup> Other states have similarly reported this phenomenon.<sup>142</sup> Hellon specifically remembers one judge who quickly retired after the Commission voted that the judge did not meet standards,<sup>143</sup> and others have

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137. 2012 MARICOPA COUNTY ELECTION RESULTS, *supra* note 93; 2012 PIMA COUNTY ELECTION RESULTS, *supra* note 96.

138. Brody, *supra* note 60, at 132.

139. *Id.*

140. See *supra* text accompanying notes 6–10 (discussing the problems with judicial elections that spurred the merit-selection system).

141. Second Hellon Interview, *supra* note 70.

142. See Pelander, *supra* note 6, at 721 (noting that Alaska and Utah have reported this phenomenon); see also Brody, *supra* note 60, at 135 (stating that although the exact number of such retirements are unknown, “such occurrences take place routinely”).

143. Second Hellon Interview, *supra* note 70.

likely made similar choices. 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.<sup>144</sup> Further, the Commission rarely obtains useful information from the citizens who address the Commission at the hearings.<sup>145</sup> 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 gave the example of a woman who came to the public hearing to explain her concerns about her case, including the fact that the judge had worked with the other party's lawyer before being appointed to the bench.<sup>146</sup> The Commission listened to her complaints and then asked her opinion on whether the judge should be retained.<sup>147</sup> The woman said she had no view about whether the judge should remain on the bench.<sup>148</sup> 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.<sup>149</sup> Nonetheless, Hellon said he believed the hearings were necessary for the integrity of the process and to help maintain public confidence in the judicial system.<sup>150</sup>

#### IV. 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>151</sup> These attacks are often framed as efforts to eliminate "judicial activism."<sup>152</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

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144. Pelander, *supra* note 6, at 678–80; Second Hellon Interview, *supra* note 70.

145. Pelander, *supra* note 6, at 678–80; Second Hellon Interview, *supra* note 70.

146. Second Hellon Interview, *supra* note 70.

147. *Id.*

148. *Id.*

149. Pelander, *supra* note 6, at 678–80; Second Hellon Interview, *supra* note 70.

150. Second Hellon Interview, *supra* note 70.

151. *See, e.g.*, Harrison et al., *supra* note 10, at 247–50 (describing the uptick in attacks against Arizona's merit-selection system).

152. *See, e.g.*, ARIZ. SEC'Y OF STATE, WHAT'S ON MY BALLOT?: ARIZONA'S GENERAL ELECTION GUIDE – PROPOSITION 115 (2012) [hereinafter PROPOSITION 115], available at <http://www.azsos.gov/election/2012/info/PubPamphlet/english/Prop115.htm> (listing proponents' arguments in favor of approving a proposition to amend Arizona's merit-selection system, including some that argue the proposition will eliminate "politics" from the decision); Harrison, *supra* note 10, at 249 (describing how some proponents of amending merit selection believe that the current system "result[s] in increased judicial activism"); Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443, 1470–73 (noting that "judicial activism" is a key concern among voters in Iowa, despite their merit-selection system).

changes to Arizona's constitution to amend the merit-selection system.<sup>153</sup> Among the changes, the proposition required each JNC to send at least eight nominees to the Governor, rather than the minimum of three currently required by the constitution, and removed the limits on how many individuals from one political party the JNCs could nominate.<sup>154</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."<sup>155</sup> Arizona voters rejected the proposition by a vote of 72%, or by a margin of nearly 3-to-1.<sup>156</sup>

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.

#### *A. Methods Already Used in Arizona*

Arizona's JPR program works alongside other evaluation tools that assess aspects of judicial performance. For example, most courts measure the number of cases processed. The Arizona Court of Appeals, as well as the superior courts in Coconino, Maricopa, Pima, and Yuma counties, employs a number of performance measurements adopted from the National Center for State Courts' CourtTools program.<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup> As another example of case-processing evaluation measures, salaries of justices of the peace are partially based on "productivity credits."<sup>160</sup>

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

153. See PROPOSITION 115, *supra* note 152.

154. See *id.* 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 for each position, and the Governor could select from any list—including selecting all from one list.

155. *Id.* (quoting from the "Arguments 'FOR' Proposition 115").

156. 2012 OFFICIAL CANVASS, *supra* note 134, at 17.

157. *Performance Measures*, ARIZ. JUDICIAL BRANCH, <http://azcourts.gov/Default.aspx?alias=azcourts.gov/PerformanceMeasures> (last visited Aug. 21, 2013); E-mail from Carol Mitchell, Arizona Office of the Courts Court Services Specialist, to Erin Bass, former law clerk to Chief Justice Berch (Nov. 21, 2013, 9:44 AM) (on file with authors).

158. *Performance Measures*, *supra* note 157.

159. *Committee on Arizona Case Processing Standards*, ARIZ. JUDICIAL BRANCH, <http://www.azcourts.gov/cscommittees/CommitteeonArizonaCaseProcessingStandards.aspx> (last visited Nov. 24, 2013).

160. See A.R.S. § 22-125 (1981).

or exceeding the benchmark by up to 20% and a 5% bonus for exceeding the productivity benchmark by 20% or more.<sup>161</sup> Judges who did not meet the benchmark received no bonus, but were not penalized.<sup>162</sup> The expectation, presumably, was that the incentives would encourage all judges to process more cases more quickly. The result, however, was a reduction in the number of judges who produced above 120% and an increase in judges producing between 100% and 120%.<sup>163</sup> That is, the judges strategically minimized the effort required to get an incentive,<sup>164</sup> suggesting that evaluation tools that quantify productivity may not be the most effective way to encourage productivity from individual judges. In other words, 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.<sup>165</sup>

Aside from evaluating productivity, Arizona's system provides other accountability measures as well. Like nearly every other state in the United States, Arizona provides for removal of judges by impeachment.<sup>166</sup> A few states, including Arizona, also have procedures for removing a judge by recall.<sup>167</sup> Although Arizona's broad provision permits the recall of a judge for any reason,<sup>168</sup> the procedure has not often been used against judges.<sup>169</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. However, the processes for impeachment and recall do require additional evaluation.

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

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161. Francesco Contini, Richard Mohr & Marco Velicogna, *Individuals, Organisations and Judicial Evaluation*, OÑATI SOCIO-LEGAL SERIES (forthcoming 2014).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. See American Judicature Society, *Methods of Removing State Judges*, <https://www.ajs.org/judicial-ethics/impeachment/>; see also ARIZ. CONST. art. VIII, pt. II, §§ 1, 2.

167. See American Judicature Society, *supra* note 166; see also ARIZ. CONST. art. VIII, pt. I, § 1. For the interesting history of Arizona's provisions permitting recall of judges, see *Ross v. Bennett*, 265 P.3d 356, 358 (Ariz. 2011).

168. See ARIZ. CONST. art VIII, pt. I, § 1.

169. *But see* *Abbey v. Green*, 235 P. 150, 157 (Ariz. 1925) (approving recall election of a superior court judge).



published,<sup>170</sup> the public's ability to read those opinions and comment on them, by editorial or otherwise, also helps hold judges accountable.<sup>171</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.<sup>172</sup> 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,<sup>173</sup> 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.<sup>174</sup> 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.

In sum, Arizona evaluates its judges in many ways in addition to the formal JPR program.

#### ***B. 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 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.<sup>175</sup> For example, instead of requiring that the judge receive at least a 50% affirmative vote, as most states do, states could require that a judge receive at least a 60% affirmative vote.<sup>176</sup> Giving voters a better chance of removing a judge might increase

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170. The Arizona Supreme Court publishes nearly all opinions both online and in case reporters. The court of appeals does the same, although most of its opinions are issued as memorandum decisions.

171. The IAALS recently advocated for another written opinion review process, where trained, two- to three-person teams would review opinions for legal analysis and reasoning, fairness, and clarity. IAALS SURVEY, *supra* note 80, at 14–18.

172. See, e.g., *About Us*, COMM'N ON JUDICIAL CONDUCT, <http://www.azcourts.gov/azcjc/AboutUs.aspx> (last visited April 12, 2014).

173. See, e.g., *id.*

174. See *2012 Public Decisions Summary*, COMM'N ON JUDICIAL CONDUCT, <http://www.azcourts.gov/azcjc/PublicDecisions/2012.aspx> (last visited Aug. 26, 2013).

175. SHUGERMAN, *supra* note 2, at 260.

176. *Id.* (noting that two states already employ this higher threshold).

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>177</sup> And, of course, increasing the retention threshold does not address the problems of voter apathy and misinformation.

Some have also advocated for shorter term lengths for judges.<sup>178</sup> This, they argue, would increase accountability by making the judge answer to the voting public more frequently.<sup>179</sup> On the other hand, few attorneys are apt to leave law practice to become judges if the terms are too short.<sup>180</sup> 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.<sup>181</sup> Arizona employs 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 of his or her four- or six-year term.<sup>182</sup>

Apart from modifications to the retention-election apparatus, some commentators have recommended that states strengthen their disqualification and recusal policies.<sup>183</sup> The proposals include taking the recusal decision away from the judge being challenged, permitting counsel to automatically strike one judge per proceeding, and mandating disqualification if a judge has accepted campaign

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177. This Article only mentions the potential for problems with bias—an issue which is detailed extensively in other research. *See, e.g.*, David C. Brody, *Judicial Performance Evaluations by State Governments: Informing the Public While Avoiding the Pitfalls*, 21 JUST. SYS. J. 333, 339 (2000) (discussing concerns over nonresponse bias); Christine M. Durham, *Gender and Professional Identity: Unexplored Issues in Judicial Performance Evaluation*, 39 JUDGES' J. 11, 12–13 (2000) (discussing concerns over gender and race bias); Jennifer K. Elek & David B. Rottman, *Improving Judicial-Performance Evaluation: Countering Bias and Exploring New Methods*, 49 CT. REV. 140, 140–41 (2013) (same); Rebecca D. Gill, Sylvia R. Lazos & Mallory M. Waters, *Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada*, 45 LAW & SOC'Y REV. 731 (2011) (same).

178. SHUGERMAN, *supra* note 2, at 262.

179. *Id.*

180. *See, e.g.*, Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L. J. 541, 574 (1999) (explaining that one reason supporting life tenure is that it attracts better judges); Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1401 (2010) (noting that shorter term lengths have contributed to weaker judiciaries). 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, *supra*.

181. *Id.*

182. ARIZ. CONST. art. VI, § 37(C).

183. *See, e.g.*, TARR, *supra* note 70, at 151–54; Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411 (2014).

contributions that exceed a threshold amount.<sup>184</sup> Arizona has already adopted the “automatic strike” rule: “[E]ach side [in a superior court proceeding] is entitled as a matter of right to a change of one judge.”<sup>185</sup> This is in addition to the parties’ right to remove a judge for cause.<sup>186</sup>

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.<sup>187</sup> The JPE commissions in Colorado, Missouri, and Utah conduct their own courtroom observation program.<sup>188</sup> Utah’s observation program is possibly the most extensive, relying on the help of numerous volunteers.<sup>189</sup>

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.<sup>190</sup> After noting this duplication, Utah altered its program to focus exclusively on procedural fairness and to elicit qualitative, instead of quantitative, information.<sup>191</sup> The changes to Utah’s observation program, while an improvement, still do not protect against potential gender and racial bias.<sup>192</sup>

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184. See, e.g., TARR, *supra* note 70; McKoski, *supra* note 183.

185. ARIZ. R. CIV. P. 42(f)(1)(A). There is a corollary right in criminal cases. See ARIZ. R. CRIM. P. 10.2(a).

186. See ARIZ. R. CIV. P. 42(f)(2); ARIZ. R. CRIM. P. 10.1.

187. *Judicial Performance Evaluation: Alaska*, IAALS, <http://iaals.du.edu/images/wygwam/documents/publications/AlaskaJPE.pdf> (last visited Feb. 13, 2013).

188. *Judicial Performance Evaluation: Colorado*, IAALS, <http://iaals.du.edu/images/wygwam/documents/publications/ColoradoJPE.pdf> (last visited Feb. 23, 2014); *Judicial Performance Evaluation: Missouri*, IAALS, <http://iaals.du.edu/images/wygwam/documents/publications/MissouriJPE.pdf> (last visited Feb. 23, 2014); *Judicial Performance Evaluation: Utah*, IAALS, <http://iaals.du.edu/images/wygwam/documents/publications/UtahJPE.pdf> (last visited Feb. 23, 2014).

189. Nicholas H. Woolf & Jennifer MJ Yim, *The Courtroom-Observation Program of the Utah Judicial Performance Review Commission*, 47 CT. REV. 84, 86–87 (2011).

190. *Id.* at 85; Elek & Rottman, *supra* note 177, at 143.

191. Woolf & Yim, *supra* note 189, at 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 from selecting from one of the given choices in a survey, whereas qualitative data comes from unstructured narrative comments. See *id.*

192. See Elek & Rottman, *supra* note 177, at 143; Woolf & Yim, *supra* note 189, at 90–91.

Finally, these programs also require significant additional resources in terms of implementation, training, and volunteers.<sup>193</sup>

### 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 the correct 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—that is, information that voters should know in order to vote intelligently on the retention of judges. 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.<sup>194</sup> Procedural fairness factors heavily affect a citizen’s perception of the system as fair and legitimate.<sup>195</sup> In turn, the effectiveness of the judicial system greatly depends on whether people have confidence in it.<sup>196</sup> 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 fulfillment of the adage that “what gets measured gets improved,” is not important if the bottom line shows that judges are in fact improving their work.

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 process works better than the judicial ethics system to actually weed out poorly performing

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193. For additional information, see IAALS, *supra* note 5.

194. See *Judicial Report*, *supra* note 40; TYLER, *supra* note 39 at 138, 163–64.

195. TYLER, *supra* note 37 at 71, 75, 79–80, 94, 104, 110.

196. *Id.*

judges. Although voters rarely vote not to retain judges, the “bad” judges will sometimes remove themselves.<sup>197</sup> Maybe this is all that can be expected of a JPE program; it is, after all, a valuable achievement in its own right.

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197. *See supra* notes 141–43.