

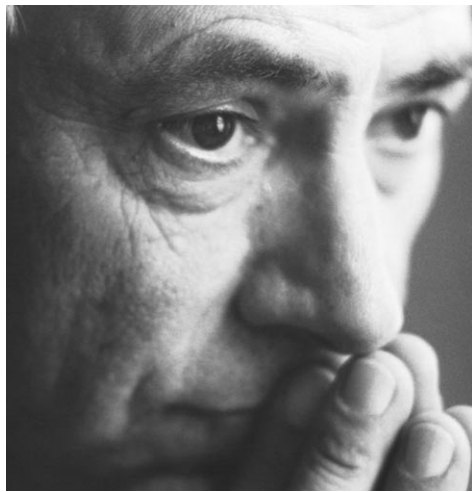
PERSPECTIVES



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Politics Threatens Arizona's Fair & Impartial Judiciary



Protests against an imperial judiciary have existed since the infancy of our country. But an impartial judiciary free from political pressure is essential to our system of checks and balances and protects the rights of each of us. Judicial impartiality gives litigants

comfort, confidence, and trust that all are equal once inside the courthouse.

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

The Merit Selection System

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

Under merit selection, when a judicial vacancy occurs, the appropriate nominating commission interviews applicants and then submits at least three names to the

Arizona Supreme Court Protects Citizens From Boilerplate Release Forms

We've all signed one. You want to ride horses with the family. Your child wants to race around the go-cart track. You take mom for a hot air balloon ride or ride a raft



down the river. In each case, the proprietor, before collecting your money, has you fill out a form which includes "release of liability" language. In essence, the document says that you recognize the activity you are about to engage in is dangerous, you assume the risk of injury while engaging in the activity, and release the proprietor from all liability. If you or your loved one is injured while participating in this activity, are you, in fact, barred from bringing any claim whatsoever against the proprietor? What if the injury occurred because the proprietor was careless and did not properly maintain the equipment, or come to your rescue timely?

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Governor, taking into consideration ethnic, gender, and geographic diversity. No more than 60% of the nominees sent to the Governor may be of the same political party.

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

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

The Challenges to a Fair and Impartial Courthouse

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

In Arizona, it is the conservative Right, notably through groups like the Center for Arizona Policy,

that want to move from the merit selection process to judicial elections where candidates

will be forced to go, hat-in-hand, to donors and run what are sure to be offensive and expensive campaigns. A survey of jurisdictions around the country where judges are selected through raw politics and election reveals that successful candidates spend up to one million dollars to campaign.

Ironically, the Center for Arizona Policy's allies around the country stand on the other side of this issue. For example, the United States Chamber of Commerce, along with other tort reform allies, published a list of "judicial hell-holes" earlier this year. The overwhelming majority

of those jurisdictions, including Illinois, Mississippi, Pennsylvania, Texas, Louisiana, and Florida, select their judges through election. The criticism of those jurisdictions is that plaintiff's lawyer's political donations control the courtroom.

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



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as opposed to the will of the people.

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

Judicial Performance Review

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

Improper Attacks on Controversial Decisions

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

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

Accountability based on how a judge decides matters has no place in American justice.

In the weeks before the November 2004 elections, a website attacking two

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

A more accurate measure of Judges Fields' and Sergeant's judicial performance are the Judicial

Performance Review grades both received from litigants and lawyers who appeared in their courtrooms.

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

Judge Sergeant scored an even more impressive 98.5% average.

Despite these high marks, the attack campaign, started just three weeks before Election Day, managed to add 23,000 more "no" votes than average to the Judges' totals. The average Arizona Judge was retained by a 74/26% margin, but both Judge Fields and Judge Sergeant were retained by an average of 68/32% margin, costing them both an average of 6 percentage points. Despite many early ballots having been cast by the time the campaign started, the campaign had a



measurable impact on the election. We can be sure to expect more of this type of politicalization of the judicial process the next go round.

Through public attacks, proposed legislation, and other threats, ideologs are trying to bully judges into carrying out their will. An impartial judiciary must be a co-equal branch of government. Judges must be shielded from the pressure of mob politics. Their job is



to interpret, fairly and impartially, how the law applies to a particular set of facts, not to bend and twist based on the passions of the moment. In his confirmation hearings, recently appointed Chief Justice John Roberts received universal praise when describing his judicial philosophy: "Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them...They make sure everyone plays by the rules."

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

—Dev K. Sethi

Harsher Penalties for Uninsured Motorists

Unfortunately many drivers on Arizona roads are uninsured, despite the requirement that drivers carry at least a minimum amount of automobile insurance coverage: \$15,000 bodily injury liability for one person, \$30,000 for two or more people, and \$10,000 property damage liability.

New legislation now imposes tougher penalties for those driving on Arizona's streets without insurance. This legislation, which went into effect on August 12, 2005, increases the minimum fine for driving without insurance from \$250 to \$500 for a first offense, from \$500 to \$750 for a second offense and from \$750 to \$1,000 for a third offense. In addition, where these mandatory penalties are imposed, courts will direct the Motor Vehicle Department to suspend the individual's license, registration, and plates for 3 months for the first offense, 6 months for the second offense, and 1 year for the third offense. The new law removes judges' discretion to allow offenders to purchase insurance and have the charges dismissed. Finally, the legislation requires police officers to impound your vehicle for 30 days if you are involved in an accident that causes property damage, injury or death, are driving without or on a suspended license, and are uninsured.

Avoid facing these penalties by carrying proof of insurance in your vehicle at all times. If you are driving someone else's vehicle, it is advisable to bring along your own proof of insurance in the event you are asked to produce proof of financial responsibility.

—Jessica E. Feingold

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www.supreme.state.az.us/jpr/

www.azpolicy.org

www.brennancenter.org

www.thenation.com/doc/20020902/scherer



In Focus Breast Cancer

This insidious disease has struck too many, and now too close to home. Ann Schmidt, wife of managing partner Ted Schmidt, was diagnosed with breast cancer in February. She underwent a mastectomy, has already completed chemotherapy and radiation treatment, and will continue with hormone therapy which, according to her doctors, should keep her cancer free. It has been a long and difficult road to recovery but with the proper care and treatment, Ann has beaten the cancer. Ann's physical and emotional strength, courage, and perseverance helped her win the fight against one of the most dangerous cancers for American women. Her fight is an inspiration yet a warning to us all.

Approximately 211,300 American women are diagnosed annually with breast cancer. Thanks to increasing early detection and technological advancements in care and treatment, more and more women are joining the ranks of breast cancer survivors. Breast self-examinations (BSEs) are one of the key factors in early detection.

Protect your family and loved ones – be an active participant in your health and learn to recognize the signs of breast cancer. Contrary to the popular misconception, not having breast cancer in your family history does not mean you are risk free. All women, starting in their teens, should know how to properly perform a BSE. Studies show that regular BSEs combined with an annual exam by a doctor, improves the chance of early detection which is vital to treatment and recovery.

The American Cancer Society recommends that women have a mammogram performed every one to two years beginning at the age of 40, sometimes before, and once a year from age 50 on. The American Cancer Society also recommends that women perform a BSE every month, approximately one week following menstruation. The following are the recommended five steps to a BSE.

STEP 1: Begin by looking at your breasts in the mirror with your shoulders straight and your arms on your hips.

Here's what you should look for:



- breasts that are their usual size, shape, and color.
- breasts that are evenly shaped without visible distortion or swelling.

If you see any of the following changes, bring them to your doctor's attention:

- dimpling, puckering, or bulging of the skin.
- a nipple that has changed position or an inverted nipple (pushed inward instead of sticking out).
- redness, soreness, rash, or swelling.



STEP 2: Raise your arms and look for the same changes.

STEP 3: While you're at the mirror, gently squeeze each nipple between your finger and thumb and check for nipple discharge (this could be a milky or yellow fluid or blood).

STEP 4: Next, feel your breasts while lying down, using your right hand to feel your left breast and then your left hand to feel your right breast. Use a firm, smooth touch with the first few fingers of your hand, keeping the fingers flat and together.

Cover the entire breast from top to bottom, side to side—from your collarbone to the top of your abdomen, and from your armpit to your cleavage.

Follow a pattern to be sure that you cover the whole breast. You can begin at the nipple, moving in larger and larger circles until you reach the outer edge of the breast. You can also move your fingers up and down vertically, in rows, as if you were mowing a lawn. Be sure to feel all the breast tissue: just beneath your skin with a soft touch and down deeper with a firmer touch. Begin examining each area with a very soft touch, and then increase pressure so that you can feel the deeper tissue, down to your ribcage.

STEP 5: Finally, feel your breasts while you are standing or sitting. Many women find that the easiest way to feel their breasts is when their skin is wet and slippery, so they like to do this step in the shower. Cover your entire breast, using the same hand movements described in Step 4.



Always talk to your doctor about your specific situation. BSEs are only one detection tool but an important tool. If done correctly and regularly, BSEs will save lives. Visit www.komen.org/bse for more information on proper BSE technique.

From Boilerplate, cont. from page 1

Such was the issue in *Phelps vs. Firebird Raceway, Inc.*, 210 Ariz. 403, 111 P.3d 1003 (2005), when an experienced professional racecar driver, Charles Phelps, went to Firebird Raceway on one of many occasions to race a car. He signed the usual release form and then began racing a car around the track. He lost control, crashed and burned. Later he brought suit claiming Firebird was careless in not coming to his rescue quickly enough. He claimed that the delay resulted in far more serious injuries.

In response to the lawsuit, Firebird filed a Motion for Summary Judgment asking the court to throw the case out because Phelps had expressly signed a waiver promising that he was releasing Firebird, even for its own negligence, and that he assumed the risk of being hurt while driving on the racetrack. The trial and appellate courts agreed with Firebird and granted the motion but the Arizona Supreme Court said no, the agreement to assume the risk and release Firebird did not absolutely protect Firebird from liability.

The founders of the State of Arizona created a constitution similar to the United States Constitution, which defines the most basic principles of law by which the State is to be governed including many protections for Arizona citizens. One of these protections, Article 18, Section 5 states that the defense, "assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." Based upon this provision, the Arizona Supreme Court found that even when a party expressly assumes the risk in a written contract, it will still always be left for a jury to decide whether or not the parties signing the agreement did, in fact, assume the risk and whether that assumption should bar a tort claim.

Release and assumption of risk forms have always been strictly scrutinized by our courts, which have long held that these boilerplate and harsh contracts must be construed against the person writing the contract and will only work to bar an injured person's claim if he or she clearly understood and intended to assume the specific risk causing him or her injury. This most recent decision by our Arizona Supreme Court further strengthens the protection of Arizona citizens from careless acts of others by ensuring citizens' right to a jury trial to decide whether their claim should be barred by such contract defenses.

—Ted A. Schmidt

KBSDS – In the Community

Ted Schmidt was recently appointed to serve a second term as the Arizona State Chair for the International Society of Barristers. The society is one of the most prestigious and exclusive organizations honoring the very finest trial lawyers throughout North America. Ted Schmidt is one of only nine Arizona attorneys to be honored by fellowship in this organization. Ted presided over the Arizona delegation at the International Society's Annual Convention last March and will be actively involved in the 2006 Annual Convention to be held in Scottsdale, Arizona.

We are very proud of Karen Finson, R.P.H. and legal assistant. In the wake of Hurricane Katrina, Karen, her husband Lowell, and their daughter Brittany volunteered countless hours assisting those individuals displaced by the disaster. We would also like to recognize our friend David Boyan of Graphics for Litigators for donating an X-Box™ so that the children displaced by Hurricane Katrina, living temporarily at the Tucson Community Center, felt more at home during this unsettling period.

Dev Sethi has been appointed to the Arizona Supreme Court Committee on Rules for Judicial Performance Review. The Committee is taking public comment on the JPR process, the current JPR system and how to better collect information and inform the public. The Committee is set to make its report in December. If you have thoughts or comments on JPR that you would like to share, please get in touch with Dev at dsethi@kbsds.com

KBSDS is pleased to announce that Cindy Merritt has joined the firm as a legal secretary. Cindy comes to us with over eight years of experience in the Tucson legal community. She studied Political Science at the University of Arizona and brings considerable knowledge and ability to the firm. Please help us in welcoming her.

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