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FOREWORD

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Threats to judicial independence arise when our judiciary becomes intertwined with the political process.

Judicial independence was of the greatest importance to the Framers of our Constitution. One of the main grievances the colonists listed against King George in the Declaration of Independence involved the absence of judicial independence in colonial America.[1] The Declaration of Independence charged the king with "obstruct[ing] the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers [and making] Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."[2] To safeguard against those abuses, the Framers of our Constitution insured that it provides federal judges with tenure during good behavior, which means they can be impeached for serious misconduct, but not for their judicial decisions.[3] The Constitution also ensures that federal judges receive a salary that cannot be diminished during their term of service.[4] The history of the formation of our judiciary emphasizes a point that is often forgotten in the debate over how we select judges. The Framers of the Constitution saw fit to render our federal judges independent of the political departments so they would not be beholden to the political branches in their interpretation of the law and the rights of our citizens.

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1. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

2. *Id.* at paras. 10-11.

3. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

4. *Id.*

The Founders knew that there has to be a place free from political pressure and popular opinion, a place where being right is more important than being popular or powerful, where fairness triumphs over strength. In order for judges to dispense law without prejudice, judges need the assurance they will not be subject to political retaliation for their judicial acts and decisions.

Despite overwhelming historical support for an independent judiciary free from popular election, many states today subject their state and local judges to election to attain or retain office.[5] The amount of money flowing into judicial campaigns is escalating, and with it the threat of turning judges into—or having people *believe* that judges have turned into—politicians in robes. That is no idle fear. The greatest flaw in the scheme of electing judges is that elections are meant to make our courts responsive to electoral politics. If judges are subject to regular and competitive elections, they cannot help but be aware that if the public is not satisfied with the outcome in a particular case, it could hurt their reelection prospects. In short, judicial elections are inconsistent with the United States' commitment to a constitutional democracy in which the majority is bound by the limits and restraints of the law. Judicial elections conflict with the promise that judges' only constituency is the law.

Some states have tried to address the problem by tweaking campaign finance rules or strengthening recusal standards. These steps are helpful, but treat only the symptoms of mixing politics and the judiciary, not the root of the problem. These changes do nothing to address the underlying distrust judicial election campaigns produce among American citizens. The best way to stop the damage done is to eliminate the elections themselves and rely instead on some method of judicial selection based on merit.

Many states, including my home state of Arizona, have already adopted some form of merit selection. Arizona adopted judicial selection by merit in 1974 when I was serving as Senate majority leader. It was one of my projects, and I am proud of it. We referred the proposed law to the voters because it changed the Arizona Constitution.[6] It passed by only a narrow margin; however, merit selection, as adopted in Arizona, has restored confidence in the judiciary in Arizona while also maintaining a democratic aspect in the form of periodic judicial retention elections.[7] The new Arizona system is not perfect. But I lived and

5. *See* MICH. COMP. LAWS ANN. § 168.416c (West 1989).

6. *See* ARIZ. CONST. art. VI, §§ 36-38, 42.

7. The Arizona Constitution provides that a justice or judge has to file a "declaration of his desire to be retained in office" in order to be included on the election ballot. The

practiced law in the state under our former system of judicial election, and I can tell you that the intervening years have produced a better qualified and more diverse judiciary in Arizona.

A merit selection system is not without its shortcomings. For one thing, Arizona has had to make several improvements to the merit system through the years. Arizona changed the commissions that make judicial recommendations, so that they are dominated by lay people instead of lawyers — two to one.[8] Arizona has also made all the meetings and information before the commissions that make the recommendations open and available to the public.[9] The retention election process has been improved because Arizona has managed to collect, and make public, a lot of very useful information about the judges and their performance on the bench:[10] How many times have they been reversed? Are they up to date in their calendar? There are many ways to make the so-called merit selection scheme work more effectively and to give the public a good deal of confidence in the fairness of the system.

Our Framers believed there has to be one safe place in our system of government and that safe space they envisioned was the court room, where decisions would be made based on the law by people who could be fair, impartial and qualified. This is a vision we need to employ. I am pleased to be a part of this symposium because the threats to judicial independence are real and growing, and we cannot afford to lose any more ground in the fight to maintain the independence of the judiciary. Solving this problem will require the attention, creativity, and good ideas of many people, as well as the political will to implement necessary changes. This symposium is a step in the right direction.

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ballot is not contested, however, and the constitution specifies that the question of the judge's retention will appear on the ballot in "substantially the following form": "Shall _____ (Name of justice or judge) of the _____ court be retained in office? Yes __ No __ (Mark X after one)." *Id.* art. VI, § 38(b).

8. *See id.* art. VI, § 36; ARIZ. JUDICIAL NOMINATING COMM'NS, http://www.supreme.state.az.us/jnc/default.htm (last visited Nov. 18, 2010).

9. *See* ARIZ. CONST. art. VI, §§ 36-38, 42.

10. For more information, see the website of the ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW, http://azjudges.info/home/index.cfm (last visited Nov. 18, 2010).