TESTIMONY
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FOR JUDICIAL SELECTION
AMERICAN JUDICATURE SOCIETY
CHICAGO, ILLINOIS
BEFORE
THE PENNSYLVANIA HOUSE COMMITTEE ON JUDICIARY
HARRISBURG, PENNSYLVANIA
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I thank the members of the committee for giving me the opportunity to speak to you today. Whenever possible we are happy to respond to such invitations. As some of you may remember, American Judicature Society president Guy Zoghby of Pittsburgh testified before the judiciary committee last November.

I am here to explain why the Society supports merit selection as the preferred method of choosing judges and to comment on specific provisions of HB 1320.

But before I do that, I should explain that the American Judicature Society (AJS) is a national, nonprofit, independent court-improvement organization that was founded in 1913. Its members include judges and lawyers, and it is the only national court-improvement organization that includes nonlawyer citizens among its members. Judicial selection reform has been on the AJS agenda for 82 years.

The Hunter Center for Judicial Selection is an endowed entity within the Society that works to improve the judicial selection process. The Center's work is guided by an advisory

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committee consisting of senior federal judge Elmo B. Hunter of the Western District of Missouri, attorneys, a public member, and state judges. Judge Hunter is a past president and board chair of the American Judicature Society. Hunter Center funds made it possible for me to travel here for this hearing.

What is merit selection? This is a selection process that employs a nominating commission composed of attorneys and members of the public, which recruits, investigates, interviews and evaluates applicants for judgeships. The commission then sends a short list of the best-qualified nominees to the governor for appointment. The governor must appoint from the commission's list. After an initial term (in most states a period of one to three years), the merit-appointed judge faces the electorate in an uncontested retention election.

Who uses merit selection? Thirty-three states and the District of Columbia use a merit plan to choose some or all of their judges. Since last summer Rhode Island adopted such a system for selecting all its judges and Tennessee expanded its plan to include all appellate judges and to fill interim vacancies in the trial courts.

Why AJS supports merit selection. AJS supports merit selection of judges for several reasons. First, it is the only selection method that is designed to identify those with the highest personal and professional qualifications such as legal ability, integrity and impartiality. When we consider that judicial decisions affect all aspects of our lives, we must not

settle for less than the best judges. Popular elections are not designed to seek out the best-qualified candidates for judgeships.

Second, this selection method is most suited to the role of judges in our system of government. Unlike the legislative and executive branches, the judicial branch is anti-majoritarian--not responsive to the changing tides of public will. Because of political partisanship, the problem of fund raising and the influence of interest groups, popular election of judges can undermine judicial independence. Since it insulates judges from those influences and because it focuses on the qualifications that matter, merit selection safeguards judicial independence.

Third, merit selection seeks to strike a balance between judicial independence and accountability. Retention elections are designed to allow the public to decide whether, based on their records, judges should be retained in office. AJS recommends a powerful tool to give voters the information they need to make informed decisions in retention elections--a judicial performance evaluation program that is geared not only to improving judicial performance, but also to enhancing voter knowledge in retention elections. Four merit-plan states currently have retention-evaluation programs and Tennessee has a newly established program in place to begin evaluating judges standing for retention in 1996. AJS has distilled their experiences into model legislation. These model provisions also include language for establishing a merit plan.

Commission diversity. Finally, AJS believes in the value of a diverse judiciary. Such diversity can only enhance public trust and confidence in the courts. Merit selection promotes diversity. In a 1993 AJS study of selection methods that brought currently sitting women and African-American judges to the state appellate courts, we found that merit selection was responsible for the selection of more women and African-Americans than any other method. Similar results have emerged from studies comparing elected and merit-selected judges in Florida and New York City.

Regarding diversity, AJS endorses another emerging trend in merit-selection states: Five states now require that the nominating commissions be diverse. (Arizona, Iowa, Massachusetts, Minnesota and Tennessee.) A diverse nominating commission helps send the message that the process is open and inclusive. Functionally, such a commission can be expected to recruit a more representative pool of applicants. If it becomes law, the inclusion of this requirement in HB 1320 would put Pennsylvania among the leaders in this area. Language calling for demographic and geographic representation on nominating commissions has been incorporated in the AJS *Model Judicial Selection Provisions*, a copy of which I will leave at the end of my testimony.

An analysis of HB 1320. This bill incorporates the basics of a merit plan as defined by the American Judicature Society and as implemented in other states: a nominating commission composed of lawyers and laypersons, a requirement that a limited number of

names be sent to the governor, and a requirement that the governor must appoint from the commission's list.

Since AJS is a national organization, our strength is the national overview we have of the operation of the merit plan in other states. Drawing on what we know about merit selection, today I will give you information about how merit-plan states select their appellate judges, and then I will compare and contrast some of the proposed provisions in HB 1320 with our *Model Provisions* and with practice in other states. This analysis will quickly reveal the truth of the "snowflake analogy," which is that no two states' merit plans are identical.

Selection of appellate judges in other merit-plan states. Appended to this testimony is a table that shows the states that initially choose their appellate judges under merit plans, the geographic basis for selection, the number of nominating commissions involved in appellate judge selection, and the geographic basis for retention.

Thus you will see that 23 states have merit selection of appellate judges. Of that number, 14 initially select those judges on a statewide basis, five select them on a regional basis, and four select some appellate judges on a statewide basis and some on a regional basis. In 21 of the 23 states, there is only one appellate nominating commission. In two states, Florida and Nebraska, there are separate nominating commissions for the court of last resort and for each intermediate appellate court district. (In 22 of these 23 states, some or all trial court

judges are chosen under the merit plan. The exception is New York, where the plan applies only to the court of last resort.)

The geographic basis for retention also varies. In most states, all appellate judges stand for retention statewide. However, in four states (Arizona, Florida, Indiana and Missouri) supreme court justices stand statewide and intermediate appellate court judges stand in their districts. In Maryland and Nebraska, both supreme court and intermediate appellate court judges stand for retention in districts.

Comparisons of other provisions in HB 1320 with the AJS Model Provisions and actual practice in other states.

Selection of commissioners. The most common method for choosing commissioners is for the governor to appoint the laypersons and for the bar association to elect or appoint the attorney members. This is the method recommended in the AJS *Model Provisions,* which are silent the use of other commission appointing authorities. In practice, in a few states the attorney general, chief justice or legislative leaders play a role in choosing nominating commissioners. In Connecticut, Hawaii, New Mexico, New York, Rhode Island and Vermont, for example, legislators are involved. For more details, see *Judicial Merit Selection: Current Status September 1994,* Table 2, "Composition of Nominating Commission," which I will leave with you today.

Commissioners' terms of office. The AJS *Model Provisions* offer the option of four or six-year staggered terms, with a two-

term limit. In most states, commissioners serve four or six year terms and are not eligible for an additional term. HB 1320 provides for two four-year terms for commissioners.

Number of nominees' names to be submitted to the governor. Except for situations where each of the regional nominating commissions submits three names to the governor, HB 1320 calls for the commissions to submit a list of five names per vacancy. In practice, many states provide for a range of two to five or three to five names. Those that set a flat number usually require three names. Hawaii's constitution requires that six names be submitted, but because there have been instances where two or three minimally qualified individuals had to be added to the list to make up the required number, they are seeking an amendment allowing for up to six names. The AJS model provisions call for a list of two to five names. Since the intended purpose of a merit plan is to recommend only the best qualified individuals, sponsors of HB 1320 may wish to consider providing some flexibility for the commissions in the number of nominees they recommend.

Rules of procedure for judicial nominating commissions. HB 1320 gives the regional commissions authority to establish their own rules. Similar language appears in the AJS model provisions. In Florida and Nebraska, the only two states with regional nominating commissions such as those proposed in HB 1320, they have uniform rules. In Florida, there are two nearly identical sets of rules, one for the supreme court commission and one for

the intermediate appellate court commissions. Nebraska has one set of uniform rules, which were promulgated by the supreme court. The value of uniform rules is that both applicants and the public can be assured that all commissions are following fair and standard procedures that apply across the state. AJS recommends that procedural rules be made public and be given to all who apply for judgeships. The uniformity and distribution of the rules are especially important when, as is proposed in HB 1320, all commission proceedings are confidential.

Initial term of office for appointed judges. The AJS Model Provisions are silent on the length of the initial term of office. In most merit-plan states the initial term is two or three years, after which the judge stands for retention. However, Connecticut, Delaware, Hawaii, New York and Vermont appoint appellate judges to full terms under their merit plans, so there is precedent for the ten-year terms authorized in HB 1320.

I will close by raising four questions for your consideration. First, would the bill's sponsors want to consider adding language stating that nominating commissioners may not apply for judgeships during their term of office and for a designated period of time thereafter? All commissions exclude commissioners from applying and the "cooling off" period varies from one to three years. Such provisions reassure the public that service as a nominating commissioner is not an inside track to appointment to judgeships.

The second question is whether the sponsors want to provide for a backup appointing authority in case the governor refuses to appoint from the list. Designating a backup appointing authority ensures that appointments will be made from the commission's list and that vacancies will be filled in a timely manner. In practice it usually is the chief justice or the nominating commission that serves as such a backup.

The third questions concerns the manner in which names are submitted to the governor. The commentary in the AJS *Model Provisions* states that the names should be submitted in alphabetical order in order to avoid any indication of a commission's preference. If HB 1320's sponsors do not wish to include this requirement in the bill, if Pennsylvania adopts a merit plan the issue can be raised when procedural rules are being developed.

The final question is whether it would be wise to designate some state agency to provide administrative support to the nominating commissions. In most states, the designated agency is the state court administrator's office.

These are the main points I wanted to make today. Thank you again for inviting me to testify. I will be happy to answer any questions you may have.

A Comparison of States Using Merit Plans for Initial and Interim Appointment of Appellate Court Judges

State	Level of Court Covered	Geographic Basis for Selection	Number of Nom. Comm'ns	Geographic Basis for Retention
Alaska	COLR, IAC	Statewide	1	Statewide
Arizona	COLR, IAC	COLR-Statewide IAC-Divisions (2)	1	COLR-Statewide IAC-Divisions
Colorado	COLR, IAC	Statewide	1	Statewide
Connecticut	COLR, IAC	Statewide	1	See Endnote 1
Delaware	COLR, IAC	Statewide	1	See Endnote 1
Florida	COLR, IAC	COLR-Statewide IAC-Divisions (5)	1 5	COLR-Statewide IAC-Districts
Hawaii	COLR, IAC	Statewide	1	See Endnote 1
Indiana	COLR IAC	Statewide 3 geographic dist. 2 statewide dist.	1	Same as initial selection
Iowa	COLR, IAC	Statewide	1	Statewide
Kansas	COLR, IAC	Statewide	1	Statewide
Maryland	COLR, IAC	Appellate Circuits[2]	1	COLR-Circuits IAC-7 from circuits, 6 statewide
Massachusetts	COLR, IAC	Statewide	1	See Endnote 3
Missouri	COLR IAC	Statewide Districts (3)	1	Statewide Districts
Nebraska	COLR IAC	CJ-statewide Assoc. J.-dists. (6) All from dists. (6)	1 6 6	Same as initial selection
New Mexico	COLR, IAC	Statewide	1	Statewide
New York	COLR	Statewide	1	See Endnote 1
Oklahoma	COLR[4]	Districts (9)	1	Statewide
Rhode Island	COLR	Statewide	1	See Endnote 5
South Dakota	COLR	Districts (5)	1	Statewide
Tennessee	COLR IAC[6]	Divisions (3) Divisions (3)	1	Statewide Statewide
Utah	COLR, IAC	Statewide	1	Statewide
Vermont	COLR	Statewide	1	See Endnote 1
Wyoming	COLR	Statewide	1	Statewide

Key: COLR=Court of Last Resort
IAC=Intermediate Appellate Court

1. Judges are reappointed and do not run in retention elections.
2. COLR divided into seven appellate circuits and consists of a chief judge and six associate judges, one from each circuit; of the 13 IAC judges, one is appointed from each of the seven circuits and six are selected at large.
3. Judges serve until age 70 and do not run in retention elections.
4. Oklahoma has two COLR's—the Supreme Court and Court of Criminal Appeals. Each COLR has nine justices, one from each of nine districts.
5. Rhode Island judges serve life terms.
6. Tennessee has two IAC's, the Court of Appeals and the Court of Criminal Appeals.

Sources: State Court Organization 1993, Williamsburg, VA: National Center for State Courts (1995). The American Bench, Sacramento, CA: Forster-Long, Inc. (1991). Judicial Merit Selection: Current Status, Chicago, IL: American Judicature Society (September 1994). Model Judicial Selection Provisions, Chicago, IL: American Judicature Society (1994). Constitutional and statutory provisions in AJS files and telephone calls to state court administrative offices.