



**Testimony of the American Judicature Society
Regarding HB 1815 and HB 1816**

The American Judicature Society (AJS) is a national nonpartisan organization of judges, lawyers, and other citizens dedicated to maintaining the independence and integrity of the courts. Consistent with this mission, AJS since its inception has promoted a commission-based appointment system for selecting judges—a process that has come to be known as “merit selection.” In the current climate, with its significant challenges to public confidence in the courts, AJS believes that merit selection benefits the judiciary in five essential ways:

Selecting highly qualified judges. The independent nominating commission nominates individuals for appointment on the basis of their professional qualifications rather than their political credentials. It evaluates applicants on criteria relevant to a judge’s role, such as impartiality, integrity, judicial temperament, collegiality, industry, and communication skills. At the same time, the commission screens out unqualified applicants. Similar screening and evaluative mechanisms do not exist in elective systems. After an initial term of office, voters assess each appointee’s performance in a nonpartisan retention election and remove from office those who have not fulfilled their judicial responsibilities.

Selecting responsible, ethical judges. In addition to placing the best qualified judges on the bench, merit selection works to foster an ethically responsible judiciary. Our research indicates that merit selected judges are disciplined for ethical violations less often than their elected counterparts. When merit selected judges are disciplined, the infractions cited are generally less severe.

Bringing greater diversity to the bench. Merit selection also brings greater diversity to the courts. The merit selection process may be structured so that opportunities for seating judges who represent the diversity of the state are enhanced. In 2008, 44% of the minority judges and 33% of the women judges serving on state appellate courts were chosen through merit selection. Only 22% of minorities and 27% of women were chosen in partisan elections.

Limiting politics in the selection process. For the past decade, judicial elections have seen unprecedented campaign fundraising and spending, increased special interest group involvement, and relaxed ethical standards for candidate speech. Merit selection minimizes political and special-interest influences in the selection process by eliminating the need for candidates to raise funds, advertise, and make campaign promises. And, judges chosen through merit selection do not find themselves hearing cases brought by attorneys and litigants who supported their election campaigns.

A 2009 decision by the U.S. Supreme Court highlighted this potential problem. The Court was reviewing a West Virginia Supreme Court decision that overturned a \$50 million verdict against an energy company. The CEO of the energy company had spent \$3 million to help elect one of the justices who voted with the 3-2 majority, but the justice did not recuse himself from participating in the case. In *Caperton v. Massey*, the Court ruled that, because of the “serious, objective risk of actual bias,” due process required the justice’s recusal from the case.

In 2010, the Court's decision in *Citizens United v. Federal Election Commission* removed many of the restrictions on corporate and union spending on political campaigns. A subsequent supreme court election in Wisconsin saw the candidates outspent nearly four to one by special interest groups on both sides of the contest. The bitterly contested election, in concert with internal ethical scandals, have caused public confidence in that state's highest court to drop to historically low levels.

Promoting public confidence in the judiciary. Merit selection systems enhance public trust and confidence in the courts. National polls show that citizens are concerned about the role of parties, special interests, and money in judicial elections. According to a 2007 poll by the Annenberg Public Policy Center, between two thirds and three fourths of Americans believe that the need to raise money to conduct their campaigns influences judges' decisions. A 2004 Zogby poll revealed that nine in ten Americans fear that special interests are trying to use the courts to shape economic and social policy. The public seems to view judicial merit selection and retention as the solution to these concerns, with 71% supporting such systems in a 2001 survey.

Judicial merit selection has stood the test of time. It was first adopted in 1940 in Missouri. During the 1960s and 1970s, twenty-three other jurisdictions adopted merit selection. Today, thirty-two states and the District of Columbia use merit selection to choose at least some of their judges. In the 2008 elections, voters in three counties opted to move to merit selection, and voters in another county rejected a switch from merit selection to partisan elections. It is noteworthy that no state that adopted merit selection since 1940 has returned to judicial elections. Governors, legislators, and voters in these states appreciate the benefits of merit selection in identifying the best qualified judges and ensuring that those judges are politically independent and publicly accountable.

