



Merit Selection: The Best Way to Choose the Best Judges

What is “merit selection” of judges?

Merit selection is a way of choosing judges that uses a nonpartisan commission of lawyers and non-lawyers to locate, recruit, investigate, and evaluate applicants for judgeships. The commission then submits the names of the most highly qualified applicants (usually three) to the appointing authority (usually the governor), who must make a final selection from the list. For subsequent terms of office, judges are evaluated for retention either by a commission or by the voters in an uncontested election.

What “merit selection” isn’t.

Merit selection is not a system that grants lifetime judgeships, like the federal system. While details differ from state to state, most merit selection systems have a provision for appointed judges to face the voters after they have established a judicial record.

Merit selection is not a system that ensures the total elimination of politics from judicial selection. But merit selection does minimize political influence by eliminating the need for candidates to raise funds, advertise, and make campaign promises, all of which can compromise judicial independence.

Why is it called “merit selection”?

It is called “merit selection” because the judicial nominating commission chooses applicants on the basis of their qualifications, not on the basis of political and social connections.

Who picks the commissioners?

Commissioners are usually chosen by panels of public officials, attorneys, and private citizens. The panels may include the governor, the attorney general, judges of the state’s highest court, bar association officers, private citizens, and in some instances, members of the state legislature.

What’s wrong with electing judges? Isn’t that the democratic way?

What’s democratic about having to choose from more than 100 candidates to fill 40-odd judicial seats, as voters in one urban area did recently? Democracy requires an informed choice, and with the large number of candidates in some areas, it is impossible for even the best-intentioned voter to be well informed. At the same time, in many jurisdictions, candidates run unopposed and the voter has no choice at all.

Other problems arise in judicial elections. Public expectation of getting a fair hearing in the courts is a cornerstone of the judicial system, so it is essential that judges be impartial and free of economic and political pressure. But in many states a candidate has to campaign first to get nominated and then to get elected. This can compromise a future judge’s independence. Some problem areas are:

Getting nominated

In partisan election states, political credentials come first. Campaign work in previous party primaries and elections, support of party functions, fundraising, and precinct work may have more

to do with who the party slates for a judgeship than how good a judge the candidate will be. A Pennsylvania judge, who ran (and won) in a partisan election, said this about party-controlled selection of judges:

“Since a judicial candidate brings little strength to the ticket but is likely to rise or fall with the fortunes of the other candidates, it is natural for a party leader to conclude that it doesn’t much matter who the candidate (for judge) is, so long as he or she will not HURT the ticket. From this conclusion it is a short step to awarding the nomination as a political favor, with little reference to qualifications.”

In many states that is precisely what judgeships are: political favors. An elected judge can carry to the bench a load of obligations to those who helped him or her get there. At the same time, many well-qualified attorneys without the proper political credentials never get to the bench. Merit selection increases the pool from which the nominating commission can choose.

Getting money

Because most candidates can’t afford to personally finance their election campaigns, they have to raise the money they need. Much of this money comes from attorneys, and some of them will be appearing in front of those judges. This relationship can raise questions about the judge’s impartiality. How would you like it if your opponent in a lawsuit were represented by someone who gave \$500 to help the judge get elected?

Getting elected

In many urban areas there are so many candidates on the ballot that no voter can be informed enough to make intelligent choices. Many rural areas are controlled by one party or the local bar association, and the person they put on the ballot is assured of election; in this case the voters have virtually no choice. And, judicial campaigns don’t help the voters choose either. Ethical rules say judges and judicial candidates can’t make traditional campaign promises—like promising to decide certain cases a certain way. It would undermine our belief in the judicial system if we had judges making rulings based on campaign promises, not facts and the law. Since candidates can make only general statements like, “I believe in law and order,” judicial campaigns are usually meaningless and uninformative.

In states with truly nonpartisan elections, candidates don’t have to rely on political credentials or the support of a political party. All they have to do is file to get on the ballot (in some cases they must present a petition with a minimum number of signatures); yet, there is no guarantee of even minimum competence. They still must raise money to finance their campaigns, and participate in the campaign process. And in some states nonpartisan candidates are tacitly, if not openly, endorsed by political parties.

So, in practice, the elective system, whether partisan or nonpartisan, is not more democratic. Traditional campaign rhetoric and promises have no role in judicial elections, so voters have little or no information on which to base their choices. A process that often requires proven party loyalty to get slated, forces candidates to be fundraisers, and makes them run in campaigns where no issues can be raised is not the best way to choose our judges.

Why is merit selection any better?

- Merit selection not only sifts out unqualified applicants, it searches out the most qualified.
- Judicial candidates are spared the potentially compromising process of party slating, raising money, and campaigning.
- Professional qualifications are emphasized and political credentials are de-emphasized.

- Judges chosen through merit selection don't find themselves trying cases brought by attorneys who gave them campaign contributions.
- Highly qualified applicants will be more willing to be selected and to serve under merit selection because they will not have to compromise themselves to get elected.

How will women and minorities fare under a merit selection system?

Women and minorities do as well under merit selection as they do under other selection systems. A recent study showed that women and minorities were just as likely to become appellate judges through merit selection as they were through other processes.

How are merit selection judges held accountable?

After an initial term of office, judges are evaluated on the basis of their performance on the bench by a retention commission or by the voters in an uncontested retention election. Judicial performance is similarly re-evaluated for each subsequent term. This provides an opportunity to remove from office those who do not fulfill their judicial responsibilities.

Where is merit selection operating now?

Two thirds of the states and the District of Columbia select some or all of their judges under the merit system.