

Improving Diversity on the State Courts: A Report from the Bench

**Research Conducted for the
Lawyers' Committee for Civil Rights Under Law**

**and
The Justice at Stake Campaign**

**by the
Center for Justice, Law and Society
at George Mason University**



Justice at Stake
c a m p a i g n



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Background

The Lawyers' Committee for Civil Rights Under Law, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law.

The Justice at Stake Campaign is a nonpartisan campaign that works on behalf of all Americans to keep our courts fair, impartial and independent through research, public education and advocacy.

In 2005, the Lawyers' Committee for Civil Rights Under Law published a report titled *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity*. The report described in detail the selection mechanisms used by various states and concluded that "although many minority communities favor judicial elections over the appointment process, neither of these selection models does an adequate job of promoting minorities to the bench, as the number of judges of color nationwide remains at a low level."¹ The 2005 report also included recommendations for action to help improve the selection systems and increase diversity on the state bench.

These recommendations urged action to increase the pool of minority attorneys and to publicize and broaden selection criteria with the goal of making them more inclusive.² The report called for outreach to raise awareness of the benefits of diversity,³ and it exhorted those involved in the selection process, as well as members of the public, to work for a diversified judiciary.⁴ Finally, and most relevant to present efforts, the report recommended additional studies on the topic of diversity.⁵

The Lawyers' Committee and the Justice at Stake Campaign initiated this project with the goal of expanding upon the findings of the 2005 report through an empirical evaluation of mechanisms designed to advance diversity in the state courts. Researchers from George Mason University's Center for Justice, Law and Society conducted case studies of recent instances in which individuals of color were successfully appointed or elected to the state trial bench.

As a result of this research, The Lawyers' Committee, Justice at Stake, and the Center for Justice, Law and Society at George Mason University co-authored the present report, and developed an action plan geared toward promoting a bench that is diverse in background and experience.

Executive Summary

The Lawyers' Committee and the Justice at Stake Campaign recognize that judicial diversity is essential to helping our judiciary deliver equal justice, restoring the public's faith in the legal system, and to countering perceptions of systemic bias that currently exist.

The Lawyers' Committee and the Justice at Stake Campaign initiated this project in order to provide an empirical evaluation of mechanisms that advance diversity in the state courts. Researchers from George Mason University's Center for Justice, Law and Society conducted case studies of recent instances in which individuals of color were successfully appointed or elected to the state trial bench.

This report offers a snapshot of the experiences of successful minority judges and also presents their recommendations for improving the process by which candidates of color are considered for state judgeships. These findings coalesce around several central points, most of which are felt similarly across the states regardless of the system of judicial selection employed.

Although many findings emerged, the role of personal strategy and adaptation to the politics of the selection process was central to the success of these judges, regardless of the system for selecting judges in their states. While the judges also emphasized the importance of other types of preparation for their positions, in nearly every interview the judges routinely spoke of political considerations and influences. The experiences described by the judges were remarkably similar. Across the board, they emphasized the importance of networking, mentoring, and recruitment.

To a certain extent, these findings are surprising, as they challenge some assumptions about the degree to which selection systems produce different political processes. Judges who came from elective systems were somewhat more explicit about the political nature of the process. Many of the appointed judges discussed political considerations, yet described the process using terms that were less explicitly "political" – such as "strategy," "planning," "getting to know people," "networking" or even "participating."⁶ Nevertheless, their responses suggested that they engaged in similar calculations as those judges who had been elected. For example, while elected judges discussed how they raised money and promoted their candidacies to the public, their appointed counterparts discussed strategies that they used in advertising themselves to the relevant appointment commission. In this way, elected judges detailed a formalized process of networking and campaigning, while appointed judges frequently described an informal one.

When asked to evaluate the system of selection that they had navigated, the great majority of the judges praised their state's system and expressed a lack of confidence in other types of selection mechanisms. Yet, despite this, the concerns that the judges expressed and the problems that they highlighted were remarkably similar across selection mechanisms. Even the recommendations made by the judges were quite comparable. Although circumstances were different across locations, the choice of judicial selection mechanism does not seem to operate systematically to hinder judicial diversity.

Rather, many of the critical issues hindering diversity seem to operate across both types of systems, appointive or elective. Although calling into question some of the ways in which varying selection mechanisms are assumed to produce divergent processes and outcomes, this finding would also seem to provide opportunities to leverage research and advocacy across selection systems to improve the diversity of state courts.

Based on the findings in the report, the Lawyers' Committee and Justice at Stake make several recommendations for future action:

- 1) Boost formal recruitment and mentorship programs for aspiring judges;
- 2) Educate the public about the benefits of additional diversity on the bench, and publicize the accomplishments of judges of color;
- 3) Assist aspiring judges from underrepresented communities in campaign training and fundraising;
- 4) Study the experiences of aspiring judges who were not successful in reaching the bench;
- 5) Study judicial evaluation mechanisms to determine if bias exists;
- 6) Study judicial selection systems in geographic regions where there are few judges of color.

While action has been taken over the years to improve diversity within the state courts, additional efforts are needed so that more judges of color can reach the state bench. The findings detailed here should serve as a call to those who support diversity to undertake the action necessary to implement the measures identified by the research. But, even more, the issue of judicial diversity will require sustained action *and* additional research to ensure that the lessons learned – and the advocacy that follows – are based on a full picture of the process of judicial selection.

Introduction

Democracy requires that the institutions of government reflect the citizens of the nation. In a diverse nation, those who serve in these institutions must also be diverse.⁷ Further, given the duties of the judiciary, it is of particular importance that American legal institutions be open and responsive to all.⁸

It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated -- if the communities it is supposed to protect are excluded from its ranks?⁹

In this way, it is crucial that the public sees a judiciary that reflects the diversity of its community.¹⁰ It is also a matter of fundamental fairness that all citizens have the right to participate equally in their government, including the judicial branch.¹¹

Perhaps the most important argument for diversity in the judiciary is that it benefits judicial decision-making.¹² Judges from different backgrounds and a diversity of experiences help to guard against the possibility of narrow decisions. Judges can debate with one another, offering divergent perspectives and educating their colleagues about how their decisions will affect various populations.¹³ A diverse bench also provides new role models for current and future law students and younger members of the bar, who in turn may be encouraged to seek the bench.¹⁴

In 2005, the Lawyers' Committee for Civil Rights Under Law published a report titled *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity*. This report resulted from a hearing sponsored by the Lawyers' Committee and Justice at Stake, which was held at the National Conference of the Coalition of Bar Associations of Color. The hearing provided a forum to bring together members of the legal community to discuss the role that state judicial selection mechanisms play in encouraging or impeding diversity in state judiciaries. The Lawyers' Committee combined the insights of those attending the hearing with additional research on selection mechanisms to produce the report.

The report described in detail the selection mechanisms used by various states and concluded that “although many minority communities favor judicial elections over the appointment process, neither of these selection models does an adequate job of promoting minorities to the bench, as the number of judges of color nationwide remains at a low level.”¹⁵ The 2005 report also included recommendations for action to help improve the selection systems and increase diversity on the state bench.

These recommendations urged action to increase the pool of minority attorneys and to publicize and broaden selection criteria with the goal of making them more inclusive.¹⁶ The report called for outreach to raise awareness of the benefits of diversity,¹⁷ and it exhorted those involved in the selection process, as well as members of the public, to work for a diversified judiciary.¹⁸ Finally, and most relevant to present efforts, the report recommended additional studies on the topic of diversity.¹⁹

The Lawyers’ Committee and the Justice at Stake Campaign initiated this project with the goal of expanding upon the findings of the 2005 report. The current project is designed to provide an empirical evaluation of mechanisms that advance diversity in the state courts. Working with the Lawyers’ Committee, researchers from George Mason University’s Center for Justice, Law and Society conducted case studies of recent instances in which individuals of color were successfully appointed or elected to the state trial bench.

After reviewing bar and media reports of the judges’ success, researchers conducted personal interviews with bar leaders, politicians, and interested observers and activists, as well as with the judges themselves. State-level judges were selected for these interviews, both because their numbers dwarf the federal judiciary and because they are selected under a variety of systems. Interviews were conducted in a semi-structured format to allow the judges ample flexibility to emphasize those factors they believed most crucial to their experiences and selection. In addition, judges who had attained their positions since 2004 were selected, allowing a systematic evaluation and comparison of the experiences of the most recently-selected group of state judges.

The following sections of this report describe the interviews and other components of the project in greater detail. A first part briefly examines previous studies on judicial selection mechanisms and their effect upon judicial diversity. The second section explains the methods utilized by the interviewers and the types of questions that were asked of the judges. The third part presents the insights derived from the secondary research and interviews. Finally, the report closes with conclusions and recommendations for action to increase judicial diversity.

The Impact of Selection Mechanisms on Judicial Diversity

Advocates and researchers have provided ample evidence that there is still much work to be done in the area of judicial diversity.²⁰ In 2004, it was found that:

Judges of color make up 10.3% of the state supreme court and intermediate appellate court judges, 9.8% of general jurisdiction trial court judges, and 7.1% of limited jurisdiction court judges. Of the 30,059 authorized state judgeships . . . , judges of color make up approximately 8%. Intergroup comparisons show that African Americans constitute the largest group of judges of color on the state bench. African Americans make up 4.4% of the state court bench, followed by 3.0% Latina/o representation on the state bench, 0.6% Asian/Pacific Islander representation, and a negligible American Indian presence.²¹

The Lawyers' Committee report from 2005 confirmed these statistics, reporting that "of the 11,344 authorized judgeships for the general jurisdiction, appellate, and trial courts within the United States, merely 1,144 or 10.1% are held by judges of color."²²

For some time, researchers have focused on the question of whether or not a state's choice of judicial selection mechanism impacts judicial diversity. There are five general models for how states select their judges: "executive [gubernatorial] appointment, commission or 'merit' selection, legislative selection, and nonpartisan and partisan election."²³ Nevertheless, many states use hybrids of these systems, a fact which results in numerous, unique selection systems in various states.²⁴ In addition, some states utilize multiple selection systems for various levels of their judicial systems.²⁵ The use of so many systems results in a tremendous amount of complexity in judicial selection mechanisms across and within states. This degree of complexity has also made researching the question of whether or not selection mechanisms impact judicial diversity more difficult.

In fact, much of the research in the area of judicial diversity offers contradictory conclusions or unclear recommendations for action. Early research seems to have concluded that it was more difficult for persons of color to become state judges where appointive systems were in place, arguing that "appointive systems in general, and merit systems in particular, tend to favor a prior status quo by perpetuating the dominance of traditional elites in the judiciary, thus decreasing opportunities for political minorities who may not have conventional legal backgrounds or experience."²⁶

Although persons of color have traditionally faced other barriers within elective systems of judicial selection, it was thought that these systems at least allowed for the possibility of change through competitive elections.²⁷ However, those supportive of merit systems have argued that they produce better-qualified judges and also remove much of the politics found in elective systems from the selection process.²⁸

During recent years, however, it appears as if a consensus has begun to emerge within the research.²⁹ The most recent research has disputed the idea that disparate selection mechanisms produce differing outcomes for diversity. Rather, this work claims that differing judicial selection mechanisms do not systematically affect the ability of minorities or women to become judges.³⁰ Several studies have even argued that distinctions in judicial diversity based upon the type of selection mechanism were once present, but have now disappeared with the passage of time.³¹

Yet, even while consensus has more recently emerged – that the choice of selection mechanism does not negatively impact diversity – some unanswered questions remain that may require continued study of selection mechanisms. For example, the research has provided some evidence that judges of color and female judges may lose their interim (appointed) seats once they are subjected to elections.³² To best explore this issue, further research might survey former judges who have not retained their positions in appointive systems.

On a positive note, research has also shown that diversity is “not a zero-sum game,” meaning that increases in the number of judges of color do not appear to hurt the chances for appointments of women and vice versa.³³ In addition, early research tended to suggest that women and minorities were more likely to be appointed to less prestigious courts or as limited-jurisdiction or magistrate judges.³⁴ However, more recent research provides evidence that – while the judiciary still needs to become much more diverse – the tendency to appoint women and minorities to less prestigious courts has reversed itself somewhat.³⁵

Along with selection mechanisms, researchers have also studied a variety of other factors that may influence overall diversity in a state. For example, diversity studies have nearly universally endorsed the idea that a governor supportive of diversity can greatly improve the climate in the state in favor of diversity.³⁶ In addition, many sources mention that diversity within the judiciary is limited to the number of qualified minority and female candidates who are both attorneys and possess the requisite experience to become judges. In this manner, researchers have frequently

