

# **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."<sup>1</sup> 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.<sup>2</sup> The report called for outreach to raise awareness of the benefits of diversity,<sup>3</sup> and it exhorted those involved in the selection process, as well as members of the public, to work for a diversified judiciary.<sup>4</sup> Finally, and most relevant to present efforts, the report recommended additional studies on the topic of diversity.<sup>5</sup>

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 adaption 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."<sup>6</sup> 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.<sup>7</sup> Further, given the duties of the judiciary, it is of particular importance that American legal institutions be open and responsive to all.<sup>8</sup>

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?<sup>9</sup>

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

Perhaps the most important argument for diversity in the judiciary is that it benefits judicial decision-making.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.”<sup>15</sup> 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.<sup>16</sup> The report called for outreach to raise awareness of the benefits of diversity,<sup>17</sup> and it exhorted those involved in the selection process, as well as members of the public, to work for a diversified judiciary.<sup>18</sup> Finally, and most relevant to present efforts, the report recommended additional studies on the topic of diversity.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup>

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."<sup>22</sup>

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."<sup>23</sup> Nevertheless, many states use hybrids of these systems, a fact which results in numerous, unique selection systems in various states.<sup>24</sup> In addition, some states utilize multiple selection systems for various levels of their judicial systems.<sup>25</sup> 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."<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup>

During recent years, however, it appears as if a consensus has begun to emerge within the research.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup> 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

suggested that the size of the pool of eligible attorneys greatly affects diversity.<sup>37</sup> Of course, the true impact of this consideration would vary from state to state with differences in demographics. While increasing the pool of candidates always aids in recruitment, many have also argued that “[t]he pat answer that there are just too few minority and women attorneys to fill judicial openings does not appear to match the facts in most states.”<sup>38</sup>

Certainly, solutions are still needed in order to increase judicial diversity. While some agreement has been reached in the research – that judicial selection mechanisms do not seem to systematically impact diversity today – a significant number of unanswered questions still remain as described above. Although the research has seemingly resolved some questions, actual levels of diversity in the judiciary remain low. Additional research focused upon emerging questions and combining meticulous primary data collection with rigorous methods is needed. In the next section, the methods used in the current project will be examined in greater detail.

## The Current Project

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.

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.

It was a lengthy process to identify the appropriate pool of judges, for there was no single source that compiled such information nationwide at the time this project began. As a report from the Brennan Center for Justice recently noted, more detailed record keeping – both regarding successful and unsuccessful candidates for the judiciary – would be quite helpful in furthering judicial diversity research.<sup>39</sup> In this case, the collection of information was complicated further by the fact that there is relatively little media or other coverage devoted to the judicial selection process in most areas. The implications of this for research and public education are discussed in greater depth later in this report.

Initial data on the judges was assembled from secondary sources, including news stories, bar reports, law reviews, and other publications. In the end, the research focused on 23 judges across 12 states. Regretfully, judges of color still constitute a small minority of state court judges nationwide, so the 23 judges interviewed for this project represent a significant percentage of the total. Of those interviewed, 56 percent were male, while 44 percent were female. Further, 56 percent were African-Americans, 31 percent were Latino(a)s, and 13 percent were Asian/Pacific Islanders. The judges came from all regions of the United States and from states with varying demographics. In addition to the judges, researchers also spoke with lawyers, journalists, bar leaders, community activists, and fellow judges to get a full picture of the process of appointment.

Having selected the judges for study, researchers again turned to secondary sources to gain background information on the judges and to understand the legal and political climates of their communities. After the interviews were completed, researchers integrated this secondary information with the interview reports to build a comprehensive case study for each judge.

During the interviews, each judge was asked detailed questions on a variety of topics.<sup>40</sup> The judges responded to questions related to their background (experience, involvement in community and bar activities, law school), as well as their decision to seek a judgeship. In addition, the judges were asked to evaluate what they believed their likelihood of success might be at the time they originally made the decision to try to become a judge.

Then, the judges were asked to describe in depth the process by which they had achieved their position, including their supporters, possible opponents, the amount of media coverage surrounding their campaign or selection and whether or not the process was controversial for any reason. In addition, the judges were asked to evaluate the functioning of the judicial selection system that they had negotiated. The judges were also asked to describe any problems with the performance of the selection mechanism and to assess the impact of the selection system on diversity. Further, the judges were requested to recommend any changes that should be made to their state's current selection mechanism, particularly those that could improve diversity on the bench. Finally, judges were asked to respond to several questions about the impact of their race, ethnicity and gender on the selection process, and they were asked a list of targeted questions related to fundraising for elections, interim appointments and recruitment efforts.

Although these questions were asked of each judge, efforts were made to focus on the topics that the individual judge deemed important and to explore these topics in more depth, rather than confining each interview to a strict question-and-answer format. The interviews ranged from 30 to 90 minutes in length.

At the conclusion of each interview, the judges were asked to specify additional individuals who should also be interviewed in order to understand either the functioning of the judicial selection process in that state or particular aspects of the individual judge's experience. As a result of these suggestions and also of further secondary research, supplementary interviews were conducted with a variety of additional individuals. Many of these individuals are also judges. During these supplementary interviews, each interviewee was asked both to respond to specific questions about the experience of the judge who provided the referral, as well as to provide any general insights that he or she might possess on the topics detailed above.

During the course of this research, interviewees universally advocated for additional diversity research and strongly supported increased diversity on the bench. That said, participation in the research required a time commitment that some potential interviewees were unable to make. This was likely the result of a combination of the large number of commitments of those who were interviewed, as well as the potential sensitivity of the topics of diversity and the selection process.

Yet, despite these initial difficulties, the judges who agreed to participate were both extremely supportive of the project and, many times, were exceedingly candid in their responses. For this reason, each judge was offered several options with respect to confidentiality. First, a judge could choose whether or not to allow the use of his or her interview data in this project's final published report or to keep the answers confidential. For those who agreed to allow the use of their answers in this report, these judges were also given the choice of whether or not to be identified by name as a participant or even quoted.

Although many judges agreed to allow their interviews to be "on the record," this report will not identify the participants by name. This is done primarily because the population from which these participants were selected is very small. If those judges who agreed to be interviewed were identified in this report, appropriate confidentiality could not be ensured with respect to the remainder of the judges. Where possible, however, relevant demographic and other details will be provided in the discussion that follows.

As a percentage of minority judges on state benches, the number of judges interviewed for this project is significant. It is unfortunate that few judges of color have been appointed or elected to state courts of general jurisdiction during the last five years, but the research accounted for many of them. Even more compelling, however, is the fact that many of the judges gave similar accounts in the interviews. Despite being located in states with different selections systems and highly disparate demographics, their reports of the selection processes were remarkably similar. The issues raised by the judges in this sample and the recommendations provided were also highly comparable. The fact that the similarities were so striking allows additional confidence in the results of this research.

# Discussion of Findings from the Judicial Interviews

## *The Selection Process and Politics*

The courts are designed to be less susceptible to politics than the other branches, but judges interviewed for this project routinely stressed the role of various kinds of politics in judicial selection. By politics, they meant a variety of influences, from partisan political activities to the strategies necessary to navigate processes fraught with interpersonal politics. Interestingly, the judges were both explicit in their answers – such as in response to questions about the political aspects of the process – and also expressed these influences implicitly by the factors that they chose to emphasize in answering broader questions about their views. In fact, political and strategic considerations were seemingly discussed at greater length than any other theme within these interviews. In addition, discussions of politics were also surprisingly candid.

This is not to suggest that the judges failed to highlight other factors and types of preparation for their positions. Across the board, judges viewed these additional factors – such as the development of a judicial temperament and substantive preparation – as important. However, when asked specifically about the factors in their background or experience that they thought most influenced their ability to attain their positions, nearly all of the judges mentioned factors that indicated an essentially political process.

This trend was particularly marked with judges who had successfully navigated partisan elective systems. In fact, these judges were often unabashedly political. They were candid about the fact that selection is a political process and frequently described the political factors that aided their candidacy in great detail. One judge from a partisan elective system openly admitted that he was not the “most experienced” at the time of his initial interim appointment and that he “leapfrogged ahead of someone with more experience” due to his political experience and relationships.<sup>41</sup>

These judges discussed at length how they framed their appeal to the voters during their interviews. In addition, prior party registration, working on campaigns, hosting fundraisers and political networking all constituted important activities in elective states. One judge stated that he “was so active in the state and across the country, that he knew the ins and outs of a campaign.”<sup>42</sup> He had “been involved in a number of local campaigns, and so [a campaign] was not a new adventure for [him] and [he] was well aware of the sacrifices.”<sup>43</sup> Money was also described as crucially important in elective states. Many of the judges emphasized that candidates of color are frequently disadvantaged by their inability to raise large amounts of

campaign funds. Some spoke of being limited to a smaller network of supporters and said it was difficult at times to broaden their appeal for fundraising.

Judges in non-elective states also mentioned political factors; however, some judges discussed them more explicitly than others. For example, one appointed judge stated that “it is important to get yourself out there in order to be a judge, because after all this is a political appointment. People who want to be judges need to work politics locally through whatever connections that they have.”<sup>44</sup> This quotation came from an appointed judge who would ultimately be required to stand for non-partisan retention election, but who had, at the time of the interview, not participated in an election. He also candidly revealed that since “[a judgeship] is a political appointment, no one is really here strictly on their merits. A political process is not always about picking who is the most qualified. Politics are a big piece of it. And, being a good judge is not always the same thing as being a good attorney.”<sup>45</sup>

However, this judge also stated that he believes that the process “tries very hard to look at the person’s qualifications, though.”<sup>46</sup> When asked about his view of the functioning of his state’s selection system, he answered that he was supportive of it and felt that it functioned effectively, but he said that judicial terms needed to be longer in between retention elections in order to preserve a greater degree of judicial independence from politics. Another judge from a non-partisan election state claimed that politics had not played a large role in his selection process when asked about this directly. At the same time, he acknowledged that “indirectly, all of [his] supporters were political. They pulled the levers for [him].”<sup>47</sup>

Although judges from appointive systems were sometimes explicitly political in this manner, a larger percentage of these interviewees would be more accurately described as implicitly political. They did not speak of voter rolls or campaign fundraising – and, in a few cases, they even maintained that they were not politically involved or savvy – but many of their comments reflected the same concern with “strategy,” “planning,” “getting to know people,” “networking” or even “participating” that the most seasoned political operative would recommend.<sup>48</sup>

Judges from appointive systems seemed particularly eager to downplay the explicit, political aspects of their experience and of the process. Perhaps this tendency results from the culture present within an appointive system and the understandable desire to prioritize other factors over politics when discussing a topic as important as diversity in the judiciary. It can be said that the appointive process seemed to remove overt politics from the interview discussion to a substantial degree, as these judges did not discuss political parties or political climate as frequently as did



judges from elective systems. They also did not discuss the views of the public and the relationship between judging and the larger community in the way that the judges from elective systems did. Presumably, this resulted from the fact that the motivation to ponder how to “sell” their qualifications to the public is removed when there is not an election to win.

However, despite all of these observations, the appointed judges described an essentially political and strategic process of networking and informal campaigning. Their responses suggest that they engaged in similar types of calculations as did the elective judges. With little or no prompting, judges in elective systems described how they promoted their candidacy and background to the voters in much the same manner as a typical candidate for any (non-judicial) elective office would. Appointed judges, by comparison, used similar language to describe how they made their case to the nominating commission or to influential members of the community. When asked for his advice to prospective candidates, one judge stated simply, “Learn what the appointing authority cares about.”<sup>49</sup> Judges in appointive systems underscored the fact that they still must think carefully about how they portray themselves and their candidacies.

Thus, prior political activity was universally regarded as being very helpful. It was emphasized more overtly and made more central in the discussion of the judges from elective states, perhaps. However, it was acknowledged to be helpful under all systems. The benefits mentioned ranged from help with raising money (in elective states) to raising the judge's profile (in all states). The judges viewed prior political activity as a prerequisite to demonstrating leadership skills. Political activity was also crucial in recruiting individuals to write letters of support to nominating commissions and also to endorse the judges’ candidacies during elections.

In this way, many of the observations about political campaigns from other research seem to apply. For example, many of the judges who participated in elections produced commercials, websites and/or online advertisements to aid their campaigns. A few of the judges mentioned that they hired someone to conduct opposition research in a partisan election or used other types of consultants. Regardless of the selection system in their states, judges reported that they carefully thought about and managed their public persona. They highlighted aspects of their experience – such as involvement with charities or being a longstanding member of the community – with the explicit goal of portraying themselves as attractive to the public, elites, commission members and elected officials. In addition, as a judge in an appointive system underscored, a judgeship “is still a political office, so you will always have examples where politics trumps [legal] experience.”<sup>50</sup> In fact, the judicial interviews yielded several examples of similar statements, which came from judges in both elective and non-elective states.<sup>51</sup>

Like political candidates everywhere, many of the elected judges stressed the importance of fundraising for electoral success. In particular, the judges felt it was difficult for minority candidates to raise money compared with their white counterparts who had greater business and other networks, and that this disparity disadvantaged judges of color. In fact, one judge who had first been appointed stated that he “could not have afforded to run.”<sup>52</sup> However, he had routinely volunteered in community, church and bar activities in order “to get his face and name known,” a fact which ultimately led to his appointment.<sup>53</sup>

Another judge emphasized this point more starkly. As she explained, “the system needs to change. There is too much power in the political process with the parties and political brokers. Money controls in my state. This process disadvantages minority judges.”<sup>54</sup> Another judge said that it helped to have practiced law as a member of a large firm because he could tap into those connections in order to increase his fundraising potential.<sup>55</sup> Other judges attributed their ability to raise money to their success at networking and finding mentors. Yet, this success was clearly the exception. In fact, elected judges frequently cited campaign money, or, rather, the difficulty of raising it, as a leading issue that discourages minority candidates for judgeships.

### *The Importance of Elected Officials in Supporting Diversity*

That many of the judges described the selection process in political terms is unusual, since so much of the public is largely unaware of those who serve on the state courts. To the extent, then, that these processes are political, they depend on the involvement and support of political “elites” – elected officials, bar leaders, and in some cases sitting judges. Indeed, time and again, the judges reiterated in the interviews that a diverse judiciary depends on the active support of political leaders. Interviewees most often cited the role of governors in pushing an agenda of diversification, both in states where the governor possesses the power to make judicial appointments and/or interim appointments and also in other areas.<sup>56</sup> Many of the judges also specifically mentioned the power to make interim appointments as crucial. One judge described an interim appointment as “a back door that allows candidates to show their merits without a politically charged election.”<sup>57</sup>

Some judges also said that the active support of a chief justice, group of legislators, or local party leaders can make a difference in diversifying state government, and especially its courts. Bar associations and members of the public may also increase pressure on elected officials and make the issue of diversity a priority. Since members of the public rarely know a great deal about

those who serve on the state judiciary, the judges felt that increased efforts at voter and public education should be made a priority in order to reinforce the efforts of elected officials supportive of diversity.

In places where a supportive governor is in office, many of the judges expressed a positive outlook about the future of diversity and the general climate within the state. Several of the judges even credited particular governors with inspiring changes in beliefs about the importance of diversity. One judge reported that the efforts of the governor and others had lead to a “real cultural shift” in that there is now “strong support within [her] state for increasing the diversity of the bench. There is a growing belief that it is important and an increased appreciation for the fact that the bench should reflect the diversity of the public.”<sup>58</sup> Frequently, judges in states with supportive elected officials felt as if their race, ethnicity or gender had been an asset in helping them to secure their positions. One judge stated that he had been in the “right place at the right time for the governor’s desire to promote diversity on the bench.”<sup>59</sup> These judges expressed pride in their states and, on the whole, were quite hopeful about the future of diversity.

### *The Judges’ Assessment of the Functioning of Selection Mechanisms*

Overwhelmingly, the judges interviewed for this project extolled the selection system that each had successfully navigated. Judges who had been elected expressed support for elective systems. These judges liked the ability to “make their case” to the voters and expressed concern that appointive systems would translate into decreased diversity on the bench. They feared that commissions would wield too much power and that prejudices would block the selection of diverse candidates. In addition, these judges expressed concern that the appointment would be more strongly related to “who you know” than the qualifications that particular individuals possess.

Those judges selected within an appointive system consistently held the opposite view. They praised the appointive model as merit-based and fairer. In their view, elective systems raise problems for candidates of color, since they can allow voter stereotypes and racism to play a role in selections. Appointed judges worried that elections would tilt the playing field against minority candidates because other candidates could raise funds more easily. In addition, they feared that elected judges would be too tied to politics and that connections would trump qualifications. A very small number of judges suggested minor changes to their current systems, such as longer terms for appointed judges or the abolition of primaries in elective states.

In addition to general questions about the selection processes in their states, judges were asked detailed questions about how the selection process operated in their particular cases. For example, each judge was encouraged to speak about his or her supporters, opposition, and the extent of media coverage that occurred. During this part of the interview, the judges seemed uncharacteristically hesitant to discuss their opposition. For example, when the judges did answer questions about their opposition, they tended to name specific opponents and did not discuss any organized forces that opposed them. Frequently, the judges even asserted that no one (other than their named opponent) had actively objected to their selection.

When asked about supporters, the judges named specific individuals, but, again, they seemed reluctant to identify groups of supporters. Considering that the judges were so forthcoming on other topics – and that they had little trouble admitting that the selection process was political in many ways – it was curious that they would not identify groups that had supported or opposed their selection.

In addition, the judges reported minimal media coverage of their appointments, a finding also confirmed by the secondary research. In fact, many of the judges from the non-elective states said they experienced no media coverage at all. Judges in partisan elective states received the highest amount of coverage, with endorsements from newspapers, etc. However, even in these instances, the media coverage was generally quite low. The notable exceptions to this seem to occur in media coverage in a highly contested race or one in which a scandal erupts. Rather, the few stories that were written about the judges largely detailed their qualifications in a cursory manner. Media coverage also sometimes highlighted the judges' minority status, particularly if a judge was the first member of a particular racial or ethnic group to attain the position, despite the fact that the judges frequently pointed out that they did not run on their minority status alone.

Many of the interviewed judges expressed gratitude that comparatively little media coverage was devoted to their selection. Some of the judges spoke of fighting the perception that they would not be tough on crime or would make excessive allowances for members of their own minority group. One judge acknowledged that there is a certain amount of pressure attendant to being the first of a minority group to be selected. As a result, he preferred to “fly below the radar.”<sup>60</sup> By this he meant that he just wished to do his job to the best of his ability without the fanfare of media coverage and to demonstrate the benefits of appointing a diverse judiciary through her actions.

The notable exceptions to this were judges in partisan elective states, some of whom hoped to garner additional media coverage in order to aid their election bids. Indeed, several of these candidates had actively supplemented the coverage devoted to their campaigns by producing web commercials and campaign websites.

### *The Importance of Planning, Networking, and Strategy*

During the interviews, judges were asked to describe in detail the actions that they had taken to prepare for the selection process. Almost universally, the judges described a prolonged process and highlighted the great amount of preparation necessary to successfully achieve their positions. Many of these judges were not successful on their first try. The preparation detailed by the judges took a variety of different forms, including actively learning about the true daily requirements of the job and also formulating a specific strategy for accomplishing their goals.

The majority of the judges mentioned that they sought out sitting judges as mentors to provide information about the working life and responsibilities of a judge. One judge said that she also visited the various courts in her area and observed their operations to familiarize herself with the handling of cases with which she was unfamiliar. During her observations, she engaged in self-reflection and thought about whether or not she could see herself actually doing the job. She said that her observations “fueled her conviction” to become a judge and helped her to know that she could do the job well. She felt that these experiences related strongly to her successful interview with the commission in her state. As a result, this judge would advise judicial candidates to “know how you will sell yourself and to know why you will make a positive contribution to the bench. You must combat the perception that you want this position just because of the prestige.”<sup>61</sup>

The judges frequently felt that their selection hinged on this type of advanced planning. One judge reported that he had focused on becoming a judge for 17 years. He said that he “kept the judgeship in mind during his entire professional career as a prosecutor.”<sup>62</sup> According to the judges, if a candidate possesses clearly defined goals or convictions about the way in which she will ultimately handle the job, she can make a strong case to a nominating commission or to the public. In this way, substantive preparation and conviction seems to relate both to good judging and to a strategy for the selection process. Indeed, the judges frequently described in detail their thought processes regarding how they framed or “sold” their candidacy. Clearly, the judges felt that these strategies contributed significantly to their success.

In addition to personal planning, a majority of judges pursued an active strategy of networking, endorsements/references and “retail politicking.” Even in states without elections, these interviewees said that judges must engage in networking in order to be successful. Many of the judges became involved in and utilized social, professional, religious and service-oriented networks to do so and to let others know that they wished to become a judge. This process is discussed in greater detail in the section of this report devoted to experience and service. One judge even mentioned that she planned her campaign by speaking with a lot of local attorneys “about which district to run in” and, in this way, “[she identified] an incumbent judge who many of those lawyers wanted ousted.”<sup>63</sup>

Yet, regardless of the particular strategy employed, it is important to note that the overwhelming majority of the judges either explicitly or implicitly detailed an active plan for networking to bring them closer to their goal of a judicial position. In fact, the majority of judges reported that they aspired to become a judge from the time that they were very young or, at least, from the time that they attended law school. It seems reasonable, then, to draw the inference that their dedication to this goal aided their ability to navigate the process by actively planning and searching out ways to overcome obstacles in their paths.

At first glance, this finding may seem somewhat contradictory to a later section of this report, in which the judges recommended a system of active recruitment. In fact, it may seem odd that these judges were both actively recruited and actively planned for a judicial appointment through networking and other activities. It is possible that the judges over-reported the degree to which they were actually recruited in an effort to downplay the strategy and politics involved in their selection. However, a good number of the judges openly referred researchers to those individuals who recruited or mentored them, so that follow-up interviews might be conducted.

It seems more likely, instead, that successful judges had to do both – actively plan and network to amass the proper qualifications so that they could be recruited when the time came. Many of the judges highlighted the need to become involved in activities and engage in networking “before becoming interested in a judgeship” because a successful candidate “should seem like the logical choice when an opening comes up.”<sup>64</sup> Recall that all of the individuals selected for interviews in this project successfully became judges. A study of judicial candidates who did not reapply or run again following an unsuccessful bid might provide some additional insights related to this point.

In states with partisan elections, the planning process appears to be of even greater importance. Candidates must network and develop a public persona, often through community service and bar activities. However, in an elective system, each judge must also plan her campaign, and several, in fact, served as their own de facto campaign managers. One judge mentioned that she initially gathered five “well-connected” female friends who were also attorneys to help organize her campaign. In fact, this judge reported that she got a big boost once another politically well-connected and locally well-known woman agreed to serve as a campaign official for her.<sup>65</sup> For fundraising, this judge drew on people she knew from past service on local boards and commissions and those – such as women’s groups – that supported the election of a female judge.

Another judge said that he benefited from prior fundraising that he had performed for other candidates. When this judge was ready to run himself, he was able to call on those candidates and their supporters to help raise money for his campaign. It is clear from the comments of the judges that they utilized their existing social, professional and service-oriented connections to provide support for their campaigns. Even more important, judges needed to have these connections in place well before they considered a judgeship. One judge described this process as “creating networks” in advance of a planned candidacy.<sup>66</sup>

Indeed, as a follow-up to this line of questioning, the judges were asked how confident they were of becoming a judge when they initially sought a judgeship. Most of the judges answered that they were fairly certain of success. In many cases, the judges said that they had possessed this confidence both early in their careers and also during the process. Even though many anticipated that the process would be a long one or even found it necessary to navigate the process more than once, they felt confident that they would eventually be able to attain the goal.

However, one set of judges responded quite differently to this question. Judges from partisan elective states – those who also were the first of their race and/or gender to make it to the bench in their local area – fundamentally questioned their ability to win election. Indeed, these judges recalled their doubts even while expressing confidence in their preparation, qualifications and abilities. Frequently, judges described these geographical areas as “traditional,” “conservative,” or lacking in population diversity, and called them inhospitable to minority candidates.

In stark contrast, judges from appointive systems – even if they were the first of their race or gender to be selected for their position – did not highlight the demographics of their region in this manner and expressed early confidence in their ability to attain their positions. This finding

seems to contradict the longstanding argument that appointive systems protect the status quo and maintain elite control over judicial selection. As discussed above, early research seemed to confirm this idea and provided evidence that the number of judges of color in appointive systems differed from those in elective systems. More recent research has suggested that this difference seems to have disappeared over time as commissions and other charged with making appointments have become more supportive of diversity.<sup>67</sup>

The judges interviewed for this project confirmed that change. Indeed, many of the judges from appointive systems said that diversity had become a priority in their states and that, as a result, they faced a more hospitable climate for consideration and selection. The key difference found among judges in this study is *not* between judges from elective states and those from appointive systems. Rather, it is between partisan elective systems *where few or no judges of color have been elected previously* and areas with other kinds of systems (appointive systems, elective systems and even appointive systems where few judges of color have been selected). Where judges were among the first minority candidates to run for election, judges said that they had doubts about their ability to win. By contrast, virtually all other judges interviewed were confident of their eventual appointment or election. Considering that this research was directed to successful judicial candidates, the problem may be even more profound for those judicial candidates of color who are among the first to run from their communities.

### *The Importance of Experience and Service*

It is not surprising that previous professional experience was universally regarded as important by the judges interviewed for this report. This point was highlighted in the secondary research as well. In their interviews, the judges underscored previous professional experience, both in describing their substantive preparedness for the job and also as proof that they had developed the qualities necessary to be a good judge prior to attaining their position.

Former prosecutors emphasized prosecutorial experience as useful, especially among judges who serve in elective states. Just as other elected officials often campaign on “tough on crime” platforms, prosecutorial experience may be seen as a plus to voters.

Often, the judges with other types of experience said that they had to work harder to prove that they were qualified. Several of these judges even felt the need to defend their qualifications during the interview. They said that public defenders do not usually become judges, and that family law or juvenile court experience is not considered as prestigious. One judge discussed in



detail his experience as a prosecutor in family court and spent a good deal of the interview making a case for why he was qualified to be a judge in adult court. He also said that he had to make this case to the nominating commission, despite the fact that he had prosecutorial experience.

On the whole, those judges with other types of experience discussed at length the benefits of their individual backgrounds, whereas those judges who had been prosecutors seemed to assert their prosecutorial background as sufficient professional experience in itself. This is not to say, of course, that other types of professional experience are unhelpful to candidates when they apply to become a judge or campaign for a judicial post. In fact, many of the judges asserted that other types of preparation were crucial in their personal preparation. Several of these judges felt that these alternative professional experiences had, in the end, made their applications stronger than they otherwise would have been, as the judges could “sell” their candidacy as bringing unique perspectives or qualifications that were lacking on the existing bench (in addition to the requisite courtroom and trial experience, of course). However, the judges who had not been prosecutors stressed that their other experiences would be helpful, and that candidates with these experiences would be successful, only if they possessed a clear vision for the benefits that their selection would bring to the bench and a clear strategy for positioning themselves.

The judges also mentioned prior judicial service as useful – for example, when candidates had previously served as a magistrate or in a court of limited jurisdiction. Not surprisingly, interviewees said that this experience helped to position them for a more prestigious judicial post. Interestingly, their comments appear consistent with some prior research showing that women and minorities are first diverted to municipal judgeships over courts of general jurisdiction.<sup>68</sup> 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.<sup>69</sup>

In most cases, law schools were not mentioned nor emphasized as particularly helpful to selection. However, the exception to this seems to be in some cases where there is a particularly well-known, dominant local law school in an area. In this case, some judges felt that attendance at this school would make people presume that the individual was more competent. One of these judges felt that law school connections had helped him, mentioning that some law school alumni had “vouched for him.”<sup>70</sup> On the whole, though, rather than a major factor contributing to their success, the judges spoke of law school prestige as more of a bar that must be cleared or a kind of minimum qualification in certain geographic areas.

Not surprisingly, many of the judges also highlighted involvement in bar activities as invaluable in demonstrating their commitment to service and capacity for leadership. Participation in bar activities was spoken of almost as a partial litmus test for suitability for judicial service. Bar participation allowed judicial candidates to network with other attorneys, which often resulted in recruitment and mentorship. One judge felt that his bar association was particularly helpful because it “exposed him to a wide spectrum of the legal community.”<sup>71</sup> In commission states, it also can be important to have bar members write letters on behalf of the candidate. In fact, one judge revealed that the better letters come from influential members of the community who appear to be writing unprompted, so the judge “told lots of people in her office that she wanted to be a judge,” mentioned it to “older, skilled judges before whom she appeared” and also discussed her goal with “other lawyers in the community, including a group of women lawyers.”<sup>72</sup>

Most of the judges similarly praised the usefulness of specialty bar associations, especially women’s bar associations and those related to particular racial or ethnic communities. These bar associations provided the same type of networking and leadership benefits as the wider bar associations, but they were additionally viewed as necessary constituencies for candidates with a shared race, gender or ethnicity. In fact, one judge attributed his election to his “ability to bring together his constituencies,” beginning with those in the African-American bar association.<sup>73</sup> The most frequent complaint related to these bar associations was that their recruitment and networking mechanisms were underdeveloped or the associations themselves needed additional members. Some of the judges mentioned as cautionary tales unsuccessful judicial candidacies and the problems inherent in failing to mobilize these bar associations and/or the members of the relevant communities.

During the course of the interviews, several judges also mentioned that it is helpful for a judicial candidate to become involved in and to appeal to other ethnic and racial communities in addition to their own. Indeed, several of the judges who were interviewed had joined bar associations related to additional ethnic or racial communities (in addition to those representative of their own race or ethnicity). Their implicit message was that candidates of color had to reach out to other minorities to generate additional support.

Further, activity within the racial and ethnic community and bar associations can become exceedingly important in “majority-minority” areas.<sup>74</sup> In some cases, judicial slots have come to be viewed as “belonging” to members of a particular group, according to those judges who had

experienced this. One judge reported that he was discouraged from running for a particular position because his country-specific background was not the same as the background of those for which the position was informally reserved. This was the case even though both ethnicities belonged to the same larger racial group.

Participation in community service activities was also greatly emphasized by the judges. Indeed, the judges often explicitly equated community service with the demonstration of necessary leadership skills, although many also mentioned the opportunities for networking and building a coalition of community support. One judge recommended that “everyone should give of himself to the community” because then when a judgeship comes along, the individual is not then viewed as “a carpet bagger, but an established member of the community who is wanted and encouraged for the position.”<sup>75</sup> A judge who achieved his position by gubernatorial appointment mentioned that the governor had even “polled community groups about him before the appointment.”<sup>76</sup>

Judges in elective systems described community service as crucial to their success. Some judges highlighted their affiliation with religious organizations; others did not. One judge mentioned that religious involvement had aided him because he “was known at a number of churches” where he had previously spoken, and “had acted as their attorney and represented them as well.”<sup>77</sup> The judges who highlighted religious activities were located in elective states, not commission states. These judges felt that religious communities had been critically important in mobilizing support for their election campaigns.

### *The Need for Mentors*

The judges made clear that they did not secure their positions on their own, and many pointed to mentors and contacts who performed a great variety of functions and helped the judicial candidates in several ways. These contacts demystified the process by letting the candidates know how the selection process works, what to expect, and how much patience and dedication would be required to become a judge. Frequently, these contacts were other judges, political leaders, or well-connected members of the racial or ethnic community from which the judge hailed or from the larger community.

Mentors are, of course, important for all judicial candidates, but in the case of minority candidates, especially those who were the first from their communities to seek a judgeship, advisors were instrumental in explaining the workings of the selection process and helping potential candidates to network, assess the timing for their candidacies, and develop a successful

strategy for selection. The judges reported that these connections were equally important in both appointive and elective systems.

Additionally, in commission states, mentors frequently aided judicial applicants by writing letters of support to the commission members. Since commissions are comprised primarily of members of the bar, whose members in turn rate their peers for the bench, it is not surprising that developing a visible, professional relationship with an experienced lawyer or judge would benefit applicants for the bench. In elective states, the judges said that these contacts aid with fundraising (particularly political contacts and contacts with big law firms). In addition, these contacts can help to provide endorsements in elective states or informal endorsements and support in other states.

Some of the judges reported that they actively sought out these mentors long before taking their first action to apply for or run to become a judge. When asked about advice to future candidates, the judges repeatedly advised prospective candidates to find mentors, because it was important to “let people know that you want to be a judge.”<sup>78</sup> Coupled with the early research that each candidate compiled before considering a judgeship, their efforts to associate themselves with mentors suggest that there may be a pool of ambitious, prepared minority candidates who should be identified for recruitment.

### *The Need for Active, Formal Recruitment*

Nearly all of the judges who were interviewed highlighted the need for concentrated, active recruitment efforts to ensure that the most qualified candidates become knowledgeable about the judicial selection process. Regardless of the type of selection system that each judge had successfully navigated, nearly all of the judges mentioned (often without prompting) that political leaders, more senior judges, or other influential individuals had actively recruited them. However, these recruitment efforts were frequently not conducted through any formalized recruiting process.

Judges who had engaged in previous government service emphasized the fact that they were sought out by those they had met during their past positions. These judges felt that their reputations led to their recruitment. They mentioned “being known” as leaders, reformers, and consensus builders even prior to their service as a judge. One such judge with a previous background in elective office stated that he was approached frequently and repeatedly before he decided to try to become a judge. He mentioned that, “people who wanted to make changes

suggested that [he] should get on the bench, rather than just trying to effect change on the bench [as he had during his previous political service].”<sup>79</sup>

In the states utilizing a partisan elective system, this type of recruitment frequently resulted from active participation in a political party. Yet, not all of these judges had previously held or campaigned for elective offices in partisan elections. Several of the judges attributed their active recruitment to the fact that they had previously hosted fundraisers for candidates or otherwise worked on campaigns. Regardless of the specific political activity, these judges willingly emphasized that they were involved party members and that they had previously proven themselves to their party.

Even in states where the judges faced non-partisan retention elections, they frequently felt that their party affiliation was influential in their success. In fact, as reported in some previous studies of the topic, several of these judges felt that the non-partisan elections did little to quell the political aspects of the process. For example, one judge stated that “everyone knew what party I was and so I had the Democratic support.”<sup>80</sup> He expressed frustration at the fact that he couldn’t campaign openly as a party member, since he felt that it would have made fundraising easier.<sup>81</sup> Another judge mentioned that – although judicial elections in his state are non-partisan – influential partisans contribute to candidates and endorse judicial candidates, thereby making the election partisan.<sup>82</sup>

In non-elective states, the judges also stressed personal recruitment as a key factor to their success in navigating the judicial selection process. Rather than political leaders, however, these judges underscored the influence of particular mentors who encouraged them to apply for a judicial post. Most frequently, these mentors were sitting judges, though sometimes the mentors were also other prominent individuals, such as other lawyers or bar association leaders. In some cases, the mentors were politically connected individuals similar to those involved in recruiting in elective states.

In addition to active recruitment, however, the majority of judges that were interviewed also proactively sought out mentors in advance in order to prepare themselves for the judicial selection process in the future and also to gain a better understanding of the judicial position for which they would be applying. In this way, success in gaining mentorship and also in the selection process itself was described by the judges as highly reliant upon individual networking and initiative.

For this reason, a number of the judges recommended formalized and active recruitment programs to supplement the personal efforts mentioned above. As they said, many potential judicial candidates need a source of information to aid them in understanding the “true” workings of the selection system and also the realities of the job. Although these successful candidates were able to seek out individual mentors, this could be made more efficient through formalized recruitment.

Formal recruitment mechanisms might also lead individuals of color to think more seriously about the possibility of becoming a judge.<sup>83</sup> Further, these mechanisms would likely help qualified candidates of color to know that a judicial career is a realistic possibility and that those in the system are serious about recruiting a diverse candidate pool.<sup>84</sup> Those who might otherwise pursue another legal career path could be supported and information could be provided to help make the selection process clearer. This recommendation strengthens findings from other projects, which have also suggested that intensified recruitment efforts would be beneficial to diversity.<sup>85</sup> Ultimately, these efforts may increase the pool of seriously interested candidates.

As an example of these recruitment mechanisms, several judges recommended recruiting sessions with panels of current judges. In addition to providing information about how best to proceed in the selection process, these panels would also introduce current members of the bench to aspiring, well-qualified candidates. The panels might be sponsored in conjunction with local bar associations, so that bar leaders could take a role in identifying and recruiting diverse judicial candidates. One judge described a similar event, saying, “those on the panel are always looking out for people who might be good judges. These efforts are good at raising the issue of diversity, so that people can be actively recruited. In addition, it helps to give people tools, information and mentoring.”<sup>86</sup>

To many of the judges interviewed, the lack of judicial diversity is a problem of recruitment, not a deficit of qualified candidates of color. Although judges agreed that additional qualified minority candidates would advance judicial diversity, a significant number thought that there were already sufficient qualified candidates of color in their local areas who could be recruited with more intensive efforts. This finding also seems to confirm arguments made in previous research.<sup>87</sup> However, where there were concerns about the size of the pool of available candidates of color, a few judges pinpointed the problem as a lack of courtroom experience. One judge said, “there are more attorneys [of color] than there once were. However, not many have the amount of experience necessary – they are not very far into their careers and a lot are corporate attorneys [without trial experience], so there are not a lot of candidates.”<sup>88</sup>

Even in areas where the judges felt the pool of available candidates to be sufficient, a frequently cited problem was that of low judicial salaries. Candidates who are well-qualified must take a significant pay cut in order to work as a judge (and give up other more lucrative opportunities in the private sector). One judge in a partisan elective state mentioned that campaign costs would be nearly equal to his judicial salary for the entire first year, so an individual must either raise money from outside sources or lose money in order to become a judge.

One judge – located in an area of his state that has not elected many judges of color – mentioned that several of his peers had moved to other areas of the same state in search of a more favorable political climate. Indeed, “two states” can sometimes effectively exist within the formal boundaries of a state, one comprised of areas where the political climate is supportive of judicial diversity and judges of color are selected and another where the opposite is the case. Another judge asserted that well-qualified candidates have sometimes become frustrated with this and moved within the same state in order to try to become a judge.<sup>89</sup>

However, even in these areas, the judges said that the selection of one judge of color can have a profound effect in revitalizing minority bar organizations and increasing minority recruitment for the bench. The majority of judges also suggested that support for diversity is on the rise and that minority candidates are gaining momentum in successfully achieving election or appointment to the judiciary. Indeed, almost all comments regarding the future of diversity efforts were positive, as detailed in the next section; surprisingly, this was the case even in areas where very few judges of color have been selected.

### *The Judges’ Assessment of Support for Diversity*

At the close of each interview, the judges were asked to assess the support for judicial diversity in their states and communities. They were queried about stereotypes, racism and the degree of controversy attached to their selection. On the whole, only a few judges reported their selection as controversial, with the controversies unrelated to the judges’ race, ethnicity or gender. For example, one judge said that his appointment had been controversial, but then explained that the controversy was generated by media coverage of a possible attempt by another candidate to influence the election with money. Nonetheless, media coverage rose on the election as a whole. It is important to note that all of the judges who said that the process was controversial were located in partisan elective states.

Though all judges agreed that there is much work that still needs to be done in the area of diversity, many of the judges also reported that they feel the climate is generally an encouraging one in their states. This finding corresponds with the positive overall assessment provided in a recent report from the Brennan Center for Justice, which concluded that “the numbers of women and minority jurists should increase dramatically in the next two decades.”<sup>90</sup> However, the Brennan Center report also detailed numerous “structural and attitudinal changes” that would help advance judicial diversity.<sup>91</sup>

The majority of the judges that were interviewed felt that their race, ethnicity or gender had been an asset in helping them to secure their positions. The two interviews which provided exceptions to this theme were, again, those judges who represented the first of their ethnicity, race or gender to be selected for that position *and* who were also located in partisan elective states. This was not the case for pioneering judges in other types of systems. Similarly, when asked if they felt that they were held to an unfair standard or subjected to discrimination during the process, judges from non-elective systems said that they did not. The same was true for judges from elective systems within major metropolitan areas. However, elected judges from less urban locales were much more likely to report that discrimination had been present during their selection experience. All of the elected judges from less urban locales were also the first of their race, ethnicity or gender to be elected as a judge.

Despite the fact that most judges reported a climate supportive of diversity, challenges remain. Some of the judges expressed concerns about ratings systems used to evaluate judges on the bench. Rather than representing true effectiveness, several judges thought that these measures reflected a jurist’s personal popularity or his ability to network within the bar. One judge asserted that the ratings were “drawn from such a small percentage of the bar, that it was basically a farce. It was eye opening because it was a popularity contest.”<sup>92</sup> As such, some judges were concerned that these systems provide avenues for lawyers to express implicit bias against female judges and judges of color. Judges who are rated unfairly may lose their seats in the next round of elections or in a retention election. Additional studies are needed to assess the scope of the perceived problem and to make recommendations.



## Recommendations for Action

### *1. Boost Formal Recruitment and Mentorship Programs for Aspiring Judges of Color*

Through recruitment panels or other mechanisms, prospective candidates must be provided with information about how to approach the selection process most effectively. The process needs to be demystified, perhaps through the development of materials or an action plan based upon the advice given by current judges who successfully navigated the selection process.

The judges often recommended the use of additional, formal recruitment mechanisms. They praised the recruitment panels that some states have developed and urged their wide and routine adoption. At these panels, current and former judges and other bar leaders meet with lawyers to describe the work of judging, provide a realistic understanding of the local selection process, and reach out to prospective candidates and applicants.

In addition to recruitment panels, the interviewees recommended individual outreach to prospective judges. Many of the judges interviewed for this project reported that they had sought out mentors on their own because they knew from an early age that they wanted to be judges and they were determined to achieve this goal. But they said that the process would have been easier – and more minority candidates might consider a judicial career – if leaders in the judiciary or the bar more frequently reached out to minority lawyers with informal and individual offers of mentoring.

Given the high salaries and other prestigious positions available to capable lawyers, the judges recommended that potential candidates be identified early in their careers before they “defaulted” to other opportunities. These recruitment and mentorship efforts should therefore be formalized and begun early. Establishing mentoring and recruitment programs in law schools may prove to be an effective tool for increasing diversity on the bench.

### *2. Educate the Public About the Benefits of Judicial Diversity, and Publicize the Accomplishments of Judges of Color*

In general, very little publicity surrounds most judges’ selection. Although there is some media coverage of partisan judicial elections, the average citizen knows little about the state bench or the judges who serve there. Since many members of the public largely are not aware of those who serve on their state courts, calling attention to disparities may also help voters to prioritize

diversity.

Publicizing or profiling the accomplishments of current judges of color and female judges to the wider community will highlight the positive benefits of diversity. The judicial interviewees demonstrated tremendous dedication and perseverance in attaining their positions and sought to embody ideal and effective judicial officers. Added public knowledge about these individuals may call attention to the lack of diversity on the bench, help to increase support for both the judicial branch and diversity, and also counteract articles questioning the qualifications of female and minority judges. In addition, these efforts may aid existing judges who must eventually stand for retention elections or defend their seats in contested elections to do so more effectively. These difficulties also have been noted as a problem in previous studies.<sup>93</sup>

### *3. Assist Judges from Underrepresented Communities in Campaign Training and Fundraising*

Many of the judges described a selection process that was essentially political or strategic. Although some differences are detailed in the body of the report, this observation applies across selection systems. Successful judicial candidates prepare themselves well for the political aspects of the process. As part of that preparation, prospective candidates need information and advice about the political realities of the process so that they can navigate it more efficiently and effectively.

The judges commented again and again that the support of political leaders is crucial in achieving a diverse judiciary. At the top of their lists were governors, who the judges said could take direct action to appoint diverse candidates in some states and work behind the scenes to build support for a diverse judiciary elsewhere.<sup>94</sup> Some judges also reported that a Chief Justice, group of legislators, or party officials had been influential in improving the climate for diversity in their states. Bar associations and members of the public may also increase pressure on elected officials and make the issue of diversity a priority.

In places where a supportive governor was in office, many of the judges expressed positive feelings about the future of diversity and the general climate within the state. Yet, these opportunities require sustained political action to maintain progress and keep diversity on the political agenda.

The judges repeatedly cited fundraising and low salaries as twin obstacles to a diverse judiciary.<sup>95</sup> Candidates of color in elective states are hampered by relative difficulty in raising

sufficient funds to run an effective campaign. This may result from a lack of access to networks of donors. In addition, a candidate may have to raise a significant sum to run for a judicial post with a comparatively low salary. Other, more highly paid opportunities in the legal field may drain qualified candidates away from the pool of prospective judicial candidates.

#### ***4. Study the Experiences of Aspiring Judges of Color Who Were Not Successful in Reaching the Bench***

The present study involves judges who successfully navigated this process. A separate study of judicial candidates who did not reapply or run again following an unsuccessful bid may provide some additional insights into the extent to which the political realities of the process may hinder diversity.

#### ***5. Study Judicial Evaluation Mechanism to Determine if Bias Exists***

Some judges expressed concern about the rating systems utilized to evaluate judges, saying that the evaluations may more accurately reflect personal popularity and successful networking rather than true effectiveness on the bench. In addition, some of the judges expressed concerns that these systems may create opportunities for the expression of bias against female judges and judges of color. Judges who are rated unfairly may lose their seats in the next round of elections or in a retention election. Further study is needed to determine whether these anecdotal observations are replicated routinely. Additionally, to the extent that existing judicial evaluation systems have the potential for bias, further study is needed on the development of evaluation mechanisms that provides a check against bias, while still serving the worthwhile goal of judicial accountability.

#### ***6. Study Judicial Selection Systems in Regions Where There are Few Judges of Color***

When asked if they felt that they were held to an unfair standard or subjected to discrimination during the selection process, judges from appointive systems largely answered that they did not. Judges from elective systems within major metropolitan areas responded in much the same way. However, elected judges from different regions – especially those with few judges of color – were much more likely to feel that discrimination had been present during their selection experience. In this way, research can help to identify patterns within specific locales that merit additional attention, thereby allowing resources to be focused where they are most needed.

## Conclusion

To reinforce democratic values and strengthen the public's confidence in the justice system, it is crucial that the judiciary reflect the diversity of the citizenry and that judges have the background to appreciate the circumstances of those who appear before them. Action has been taken over the years to diversify the state courts, but additional efforts are needed so that more judges of color can reach the state bench.

This report supplements prior research conducted by the Lawyers' Committee<sup>96</sup> and the Brennan Center<sup>97</sup> on diversifying state courts. The present research offers a snapshot of the experiences of successful minority judges and also reports their recommendations for improving the process by which candidates of color are considered for state judgeships. These findings coalesce around several central points, including the political and strategic nature of the selection process, the importance of well-placed allies for diversity, and the need for recruitment, mentoring, and promotion of potential minority judges. Most of these issues are felt similarly across the states regardless of the system of judicial selection employed, although, of course, the facts of each appointment are unique.

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.

# Appendix

## Interview Protocol Used

The following questions relate to anticipated topics of discussion. The particular questions to be asked in each interview will change depending upon the answers given by each interviewee and the length of time we are permitted to speak with the judge. Each question may be used, as needed, to gain additional information or to suggest new topics.

### Judge's Background and Decision to Seek a Judgeship

- When did you first decide that you aspired to become a member of the bench? How many years did it then take you to achieve this goal?
- Prior to becoming a judge, what was your assessment of the likelihood that you could achieve this goal?
- What factors in your background or experience do you think influenced your ability to become a judge?

Possible follow-up questions, as needed:

- How influential was your law school education in aiding you?
- How influential was the amount of your previous legal experience?
- How influential was the type of your previous legal experience? Private practice? Prosecutorial experience?
- How influential was your prior affiliation with a local bar association or other professional group? Other professional activities?
- How influential were particular individuals that you had met, contacts that you had made or other mentors?
- How influential was your prior affiliation with a political party or prior involvement in political activities?
- How influential was your prior affiliation with community or service groups? How influential was your prior affiliation with religious organizations or other organizations or activities?

### The Process of Appointment/Election

- Once you decided to seek a judgeship, how did the process play out?

Possible follow-up questions, as needed:

- Who were your primary supporters?
- Who opposed you?
- Was the process controversial? If so, how and why?
- Did the media cover the process? What kind of coverage did you receive?
- To what factors do you ascribe your appointment/election?
- How did being an African-American/Asian/Latino(a) affect the selection process for you?

### Overall Assessment of the Appointment/Election System in the State

- What advice would you give someone who is African-American/Asian/Latino(a) and is thinking about negotiating the judicial selection process in your state?
- Overall, how would you evaluate the system of judicial selection in your state? In your experience, which parts of the system work well? Which parts of the system should be changed?
- Do you think that another selection system would either work better in your state or allow for a more diverse judiciary to be selected?
- Are there particular aspects of the state, such as its institutions or culture, which have led to the current system or would prevent it from changing?
- Are there other characteristics of the state that prevent a diverse judiciary from being selected?
- Are there specific aspects of the selection process that make it more difficult to select a diverse state judiciary?
- Do you think that it is easier for members of minority groups to get selected as interim appointments?

Possible follow-up questions, as needed:

- Are the recruitment efforts for minority candidates lacking?
- Is there a lack of willingness to appoint or elect a diverse judiciary?
- Do negative preconceptions or stereotypes prevent qualified minority candidates from being selected?
- Are there a lack of minority candidates who are viewed as qualified in your state? Do expectations about qualifications need to be adjusted in some manner in order to account for diversity of experiences? Do you think that the requirements for selection were the same for you as for other judicial candidates or do you think that you or other members of minority groups are held to an unfair standard?
- Is the lack of diversity in the judiciary partially a result of the lack of diversity amongst those empowered to make decisions about judicial selection? (commission members, legislators, etc.)
- Do minority judicial candidates lack campaign financing or other resources?
- Do you think that the lack of diversity results from an insufficient recognition of the importance of diversity?

### Additional Information

- In order to increase our understanding of the judicial appointment process in your state, who should we make sure to speak to?
- Who should we speak to in order to understand better the factors which aided you in being selected as a judge?
- If we have additional questions, may we contact you again?

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<sup>1</sup> Lawyers' Committee, *supra* note 5, at 4.

<sup>2</sup> See *id.* at 29-30.

<sup>3</sup> See *id.* at 29.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* at 29-30.

<sup>6</sup> Interviews with anonymous judges (Sept. 15, 2009, Sept. 22, 2009, Jan. 2, 2009 and Oct. 31, 2008).

<sup>7</sup> See Chris W. Bonneau, *The Composition of State Supreme Courts*, 85 JUDICATURE 26, 27 (2001).

<sup>8</sup> See Chen, *supra* note 2, at 1117.

<sup>9</sup> *Id.*

<sup>10</sup> See Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, STATE POLITICS AND POLICY QUARTERLY, Winter 2003, at 329, 331.

<sup>11</sup> See Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, SOCIAL SCIENCE QUARTERLY, June 2002, at 504, 505.

<sup>12</sup> See Ifill, *supra* note 3, at 409-10.

<sup>13</sup> See *id.*

<sup>14</sup> See Brennan Center, *supra* note 10, at 10.

<sup>15</sup> Lawyers' Committee, *supra* note 5, at 4.

<sup>16</sup> See *id.* at 29-30.

<sup>17</sup> See *id.* at 29.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 29-30.

<sup>20</sup> See Lawyers' Committee, *supra* note 5, at 8; Bonneau, *supra* note 13, at 28.

<sup>21</sup> Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 172 (2004).

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<sup>22</sup> Lawyers' Committee, *supra* note 5, at 8.

<sup>23</sup> *Id.* at 507.

<sup>24</sup> For example, some additional and hybrid systems that have been identified are: gubernatorial appointment from a commission, commission system with retention elections, gubernatorial appointment from a commission with some form of legislative approval, state supreme court appointment, and circuit court appointment. See Graham, *supra* note 27, at 192 n.135.

<sup>25</sup> See Lawyers' Committee, *supra* note 5, at 8.

<sup>26</sup> Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity*, 29 (1) JUST. SYS. J. 47, 50 (2008); see also Lawyers' Committee, *supra* note 5, at 14.

<sup>27</sup> See Lawyers' Committee, *supra* note 5, at 14.

<sup>28</sup> See *id.* at 10.

<sup>29</sup> See Bratton & Spill, *supra* note 17, at 507-08.

<sup>30</sup> See Hurwitz & Lanier, *supra* note 32, 66; Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, SOCIAL SCIENCE QUARTERLY, March 1996, 110-126; Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches 1985 and 1999*, JUDICATURE, September-October 2001, at 91.

<sup>31</sup> See Hurwitz & Lanier, *supra* note 36, at 91 (2001).

<sup>32</sup> See Brennan Center, *supra* note 10, at 30.

<sup>33</sup> See Alozie, *supra* note 36, at 122.

<sup>34</sup> See Barbara Luck Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, JUDICATURE, June-July 1990, at 30.

<sup>35</sup> See Graham, *supra* note 27, at 172.

<sup>36</sup> See Brennan Center, *supra* note 10, at 30.

<sup>37</sup> See Chen, *supra* note 2, at 1113.



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<sup>38</sup> Brennan Center, *supra* note 10, at 8.

<sup>39</sup> See Brennan Center, *supra* note 10, at 3.

<sup>40</sup> See the Appendix for a full listing of the questions used in the judicial interviews.

<sup>41</sup> Interview with an anonymous judge (Jan. 2, 2009).

<sup>42</sup> Interview with an anonymous judge (Jan. 12, 2009).

<sup>43</sup> *Id.*

<sup>44</sup> Interview with an anonymous judge (Sept. 15, 2009).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Interview with an anonymous judge (Nov. 17, 2008).

<sup>48</sup> Interviews with anonymous judges (Sept. 15, 2009, Sept. 22, 2009, Jan. 2, 2009 and Oct. 31, 2008).

<sup>49</sup> Interview with an anonymous judge (Oct. 31, 2008).

<sup>50</sup> Interview with an anonymous judge (Sept. 15, 2009).

<sup>51</sup> Interviews with anonymous judges (Sept. 15, 2009, Sept. 22, 2009, Jan. 2, 2009 and Oct. 31, 2008).

<sup>52</sup> Interview with an anonymous judge (Nov. 17, 2008).

<sup>53</sup> *Id.*

<sup>54</sup> Interview with an anonymous judge (Dec. 1, 2008).

<sup>55</sup> Interview with an anonymous judge (Nov. 21, 2008).

<sup>56</sup> See also Brennan Center, *supra* note 10, at 30.

<sup>57</sup> Interview with an anonymous judge (Oct. 31, 2008).

<sup>58</sup> Interview with an anonymous judge (Sept. 15, 2009).

<sup>59</sup> Interview with an anonymous judge (Nov. 17, 2008).

<sup>60</sup> Interview with an anonymous judge (Sept. 22, 2009).

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<sup>61</sup> Interview with an anonymous judge (Sept. 15, 2008).

<sup>62</sup> Interview with an anonymous judge (Nov. 11, 2008).

<sup>63</sup> Interview with an anonymous judge (Jan. 2, 2009).

<sup>64</sup> Interview with an anonymous judge (Jan. 12, 2009).

<sup>65</sup> Interview with an anonymous judge (Jan. 2, 2009).

<sup>66</sup> *Id.*

<sup>67</sup> See Hurwitz & Lanier, *supra* note 32, 66; Alozie, *supra* note 36, 110-126; Hurwitz & Lanier, *supra* note 36, at 91 (2001).

<sup>68</sup> See Graham, *supra* note 40, at 30.

<sup>69</sup> See Graham, *supra* note 27, at 172.

<sup>70</sup> Interview with an anonymous judge (Oct. 31, 2008).

<sup>71</sup> Interview with an anonymous judge (Nov. 17, 2008).

<sup>72</sup> Interview with an anonymous judge (Jan. 2, 2009).

<sup>73</sup> Interview with an anonymous judge (Jan. 12, 2009).

<sup>74</sup> That is, communities in which racial or ethnic minorities form a majority of the population.

<sup>75</sup> *Id.*

<sup>76</sup> Interview with an anonymous judge (Oct. 31, 2008).

<sup>77</sup> Interview with an anonymous judge (Jan. 12, 2009).

<sup>78</sup> Interview with an anonymous judge (Sept. 15, 2009).

<sup>79</sup> Interview with an anonymous judge (Nov. 21, 2008).

<sup>80</sup> Interview with an anonymous judge (Oct. 31, 2008).

<sup>81</sup> *Id.*

<sup>82</sup> Interview with an anonymous judge (Nov. 17, 2008).

<sup>83</sup> See Brennan Center for Justice, *supra* note 10, at 29.

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<sup>84</sup> *See id.*

<sup>85</sup> *See Lawyers' Committee, supra* note 5, at 29.

<sup>86</sup> Interview with an anonymous judge (Sept. 15, 2008).

<sup>87</sup> *See* Brennan Center, *supra* note 10, at 8.

<sup>88</sup> Interview with an anonymous judge (Sept. 15, 2008).

<sup>89</sup> Interview with an anonymous judge (Oct. 31, 2008).

<sup>90</sup> Brennan Center, *supra* note 16, at 42.

<sup>91</sup> *Id.*

<sup>92</sup> Interview with an anonymous judge (Oct. 31, 2008).

<sup>93</sup> *See id.* at 29-30.

<sup>94</sup> *See also* Brennan Center for Justice, *Improving Judicial Diversity*, (2009) at 30.

<sup>95</sup> *See also* Brennan Center, *supra* note 10, at 32, 42.

<sup>96</sup> *See* Lawyers' Committee, *supra* note 5.

<sup>97</sup> *See* Brennan Center, *supra* note 10.