

# Answering the Call For a More Diverse Judiciary:

A Review of State Judicial Selection  
Models and Their Impact on Diversity

*A Report of the Judicial Independence  
and Access to the Courts Project – June 2005*

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A Review of State Judicial Selection  
Models and Their Impact on Diversity



*The Lawyers' Committee is a nonpartisan, nonprofit civil rights legal organization, formed in 1963 at the request of President John F. Kennedy to provide legal services to address racial discrimination.*

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\* No longer with the Lawyers' Committee.

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# Introduction

“...a judge’s predisposition is inextricably bound to the judge’s racial, gender, and ethnic experience. Likewise, a judge’s representative capacity is contingent on the ability to hear, understand, and articulate diverse views.”<sup>1</sup>

**T**he Lawyers’ Committee for Civil Rights Under Law (“Lawyers’ Committee”) believes that increased judicial diversity is essential to restoring faith in the judiciary and to countering the perceptions of bias and illegitimacy that currently exist. The corollary benefits of a more representative judiciary serve to promote public confidence and trust in a fair and objective justice system; provide legitimacy to the judicial decision making process; validate multi-cultural perspectives and voices; and provide role models for minority youth.

**“The most important justification for judicial diversity [is that] diversity on the bench can enrich judicial decision-making by including a variety of voices and perspectives in the deliberative process.”**

University of Maryland Law Professor Sherrilyn Ifill has written extensively on the issue of judicial diversity and notes that, “The most important justification for judicial diversity [is that] diversity on the bench can enrich judicial decision-making by including a variety of voices and perspectives in the deliberative process.”<sup>2</sup> In the alternative, Ifill suggests that a lack of diversity “[p]revents the court from being informed by the variety of diverse experiences and perspectives that judges of different races may have—and it is the interplay and exchange of divergent viewpoints that prevents bias and parochialism from controlling legal decision making.”<sup>3</sup>

The increasing presence of people of color in the United States has prompted a national dialogue on whether this population shift will translate into increased political power for minorities. Census 2000 numbers show a dramatic rise in the number of Hispanics and Asian Americans in the United States, with Hispanics now outnumbering Blacks as the nation’s largest minority group. Over the last decade, people of color have capitalized on this demographic change by securing prominent positions within federal, state, and local governments. The recent mayoral race in Los Angeles, where Antonio Villaraigosa became the city’s first Latino mayor in modern times, is a prime example of this trend. However, in too many instances across the country, governmental bodies still fail to reflect the racial diversity of the communities they

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<sup>1</sup> James Wynn, *Judicial Diversity: Where Independence and Accountability Meet*, 67 Alb. L. Rev. 775 (2004).

<sup>2</sup> Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash & Lee L. Rev. 405 (2000).

<sup>3</sup> Lawyers’ Committee, *Joint Hearing on Judicial Selection in the States and Their Impact on Diversity*, (2003) at 62 (transcript on file with Lawyers’ Committee) [hereafter Hearing].

serve. This lack of diversity raises serious concerns for all Americans, especially minorities who frequently question the legitimacy of a system that does not include people of color and is overwhelmingly dominated by white males.

For decades, people of color have possessed feelings of distrust and apprehension about the judicial branch of government. Judicial set-backs in the struggle for equality in cases such as *Plessy v. Ferguson*, *Korematsu v. United States*, and the Rodney King verdict, provide a partial explanation for these shared feelings of resentment. In recent years, this tension has resurfaced as a growing number of people of color have begun to frequently interact with the nation's legal system. Unfortunately, many of these legal encounters have reinforced the negative opinions held by minorities about our system of justice.

In an effort to explore the different means available to promote diversity on the bench, the Lawyers' Committee and the Justice at Stake Campaign ("Justice at Stake") sponsored a one-day "congressional-style" hearing titled, *Judicial Selection in the States and Their Impact on Diversity* ("the Hearing"). This May 2003 forum was held in conjunction with the National Conference of the Coalition of Bar Associations of Color ("CBAC").<sup>4</sup> The CBAC conference provided a unique and historic opportunity for the Lawyers' Committee and Justice at Stake to bring together civil rights organizations, minority bar associations, and judicial independence groups to exchange diverse perspectives on state judicial selection processes and the obstacles faced by minority lawyers who aspire to elevate to the bench. The goal of the Hearing was to initiate a dialogue on the impact judicial selection methods have on diversity and to provide recommendations on how each model can be improved. The scope of the Hearing focused exclusively on diversity in state judiciaries since our nation's state courts handle more than 98% of all lawsuits in America and racial minorities are more likely to encounter the legal system at the state level as opposed to the federal level.

The Hearing included testimony from sitting judges, academicians, advocates, and bar association members on the different judicial selection models and their impact on diversity. Barbara R. Arnwine, Executive Director of the Lawyers' Committee, served as the chair of the Hearing. The Hearing officers included: Ruthe C. Ashley, President of the National Asian Pacific American Bar Association; Lawrence Baca, a representative of the Native American Bar Association; Clyde Bailey, President-Elect of the National Bar Association; Duard D. Bradshaw, of the Hispanic National Bar Association; Marisa Demeo, of the Mexican American Legal Defense and Educational Fund; Wade Henderson, Executive Director of the Leadership Conference on Civil Rights; Karen Narasaki, Executive Director of the National Asian Pacific American Legal Consortium; and Geri Palast, Executive Director of the Justice at Stake Campaign.

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<sup>4</sup> CBAC is a coalition that consists of the four major national minority bar associations – National Bar Association; Hispanic Bar Association; National Asian Pacific American Bar Association; and Native American Bar Association.

This report is the final product of the May 2003 Hearing. The report's methodology extends beyond the scope of the panelists' testimony and includes supplemental research, data and analysis on state judicial selection methods and their implications on diversity. The report provides background information on the appointment and elections models used by the states to select judges. Under the appointment model, a nominating commission is responsible for selecting candidates for state judgeships. In contrast, judicial elections require candidates to campaign and raise money in order to become elected. Some states utilize a hybrid system which includes both appointive and elective methods. While other states, such as South Carolina, use a unique variation of the appointive model that requires the approval of the state legislature for most judicial appointments.

The report finds 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. In order to address these low numbers, the report concludes that the pipeline of minority students entering law school must be expanded through increased recruitment, mentoring, and counseling on judicial career opportunities. The report's recommendations include the following:

- **Establish judicial diversity as a priority for all entities involved in the selection process;**
- **Increase public awareness of the benefits of diversity;**
- **Continue diversity studies by state supreme courts;**
- **Increase the pipeline of minority attorneys;**
- **Utilize broad judicial selection criteria and procedures;**
- **Include minority bar associations in the selection process; and**
- **Support further research and study on the topic of judicial diversity.**

The report also confirms the notion that the success of each model in creating racial diversity depends heavily on the political clout and influence held by the different minority groups within their local communities. For example, in states with a large Hispanic or African American voting age population, judicial elections have produced a greater number of judges of color than would be possible in states with a small minority community. Alternatively, minority judicial candidates in states that utilize an appointment process have only been successful in rising to the bench when the appointing authority was committed to diversity and minority advocates were able to lobby and persuade those involved in the selection process.

Despite some modest advances in state judicial diversity, the report raises the concern that minority candidates who pursue judicial positions are often faced with unique barriers to office such as racially polarized voting and the inability to raise sufficient campaign funds. The failure to overcome these obstacles has created a “glass ceiling” for minority judges who are typically unable to experience success in statewide judicial elections for seats on the highest courts of the state.

The report concludes that people of color must seize upon their growing numbers and fulfill their political future by becoming actively involved in the behind-the-scenes decisions surrounding judicial selections. Minorities must be engaged during each step of the process—from the vetting of potential candidates to promoting increased voter education campaign efforts. The report acknowledges that there is no easy solution to advancing judicial diversity, as more in-depth research is needed to determine the true racial implications of each selection method in the various states. Nevertheless, the report concludes that the creation of a more representative judiciary is critical to any effort to restore public trust and confidence in our system of government.



# Minority Perceptions of the Courts and the Current State of Judicial Diversity

The effectiveness of our nation's judicial branch of government relies heavily upon the public's respect and deference to the opinions and rulings of the courts. This deference to the "wisdom of the court" is sustained by the public's confidence in the credibility and legitimacy of the judges making the decisions. Unfortunately, based on historical and contemporary experiences, minority communities, when compared to whites, have a lower level of confidence in the judicial system. During the Hearing, Duard Bradshaw, President of the Hispanic National Bar Association, referred to a 1999 survey by the National Center for State Courts, which revealed that only 29% of Hispanics and 18% of African Americans strongly believed that judges are generally honest and fair in deciding cases.<sup>5</sup> In addition, Bradshaw noted that 40% of Hispanics believed that Blacks are treated worse than whites or Hispanics in court.<sup>6</sup> In response to these findings Bradshaw stated:

The statistics are very alarming for our nation.... [O]ne of the main causes for this perception is that in fact the courts lack diversity.... If we legal professionals do not address the perception that exists in our communities, then the legitimacy of the judicial system is in fact in doubt.<sup>7</sup>

Several of the Hearing participants echoed Bradshaw's sentiment that unless state courts represent the rich diversity of our nation, their credibility and legitimacy will be questioned and challenged because perceptions of bias will persist. Lawrence Baca, a representative from the Native American Bar Association recounted his first trial experience as a young attorney in South Dakota:

I stepped into the courtroom.... the judge was white, the state attorney general who was there to defend the right of the state to disallow Indians to run for office was also white. The county attorney defending the right to disallow this young man the right to run for office was also white....The courtroom clerk, the courtroom reporter, all white males.... I felt alone. I had a serious question as to whether there could be justice in that courtroom.<sup>8</sup>

Studies have confirmed the deterioration of public confidence in the judicial system. In particular, skepticism and distrust of the courts continues to rise among minorities,

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<sup>5</sup> Hearing at 26.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 23-24.

who are more likely than whites, to agree that racial bias is prevalent in the courts. The 1999 study by the National Center for State Courts concluded that whites believe unequal treatment in the courts is uncommon, while African Americans and Hispanics argue that it occurs frequently.<sup>9</sup> People of color within the legal profession are equally skeptical of the courts, with only 18% of Black judges believing that African American litigants are treated fairly by the criminal justice system, compared to 83% of whites. Further, more than 90% of Black lawyers believe that racism in the justice system is either the same as, or greater than, other segments of society, compared to 45% of white lawyers.<sup>10</sup>

Geri Palast, Executive Director of Justice at Stake, cited a poll commissioned by her organization which found that 85% of African Americans believed that there are two systems of justice in America, one for the rich and powerful and one for everyone else. Palast also referenced the National Center for State Courts study which, concluded that 53% of Hispanics believe that the “[c]ourts are out of touch with their communities.”<sup>11</sup>

Increasing racial disparities in minority conviction and incarceration rates as well as the longer length of criminal sentences given to minority defendants provide some explanation for minority’s high suspicion and distrust of the judicial system. Currently, this nation is faced with a serious and worsening problem where minorities of all groups are gravely underrepresented in the state judiciary and simultaneously overrepresented as criminal defendants. A 2005 report by the Sentencing Project titled, *Racial Disparities in Sentencing*, concluded that young Black and Latino males are subjected to particularly harsh sentencing compared to other offender populations.<sup>12</sup> Additionally, studies have found that in spite of mandatory sentencing, Black defendants convicted of harming white victims continue to receive harsher punishments than Blacks who commit crimes against other Blacks or white defendants who harm whites.

Hilary Shelton, Director of the NAACP Washington Bureau, provided the following compelling statistics on this tragic situation:

[D]espite the fact that African Americans make up only 13% of America’s population, African Americans make up roughly 44% of the defendants in state criminal cases; and although similar figures are not kept for Hispanic Americans, it’s estimated that 15% of the defendants in state criminal cases are Hispanic Americans. This means that three out of every five defendants who go before state court judges are racial and ethnic minorities.

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<sup>9</sup> Frank Bennack, *How the Public Views the State Courts: A 1999 National Survey* (National Center for State Courts 1999) available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf) (last visited May 16, 2005) [hereafter National Center for State Courts 1999 Survey].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Tushar Kansal, *Racial Disparity in Sentencing: A Review of the Literature* (The Sentencing Project 2005).

While racial and ethnic minority Americans have always been disproportionately represented in our nation’s criminal justice system, the war on drugs that began in the 1980’s has had a devastating impact on the African American and Hispanic community.<sup>13</sup>

Similar to African Americans, a recent study on Latinos in the U.S. prison system found that in 2000, Hispanics represented only 11% of the total adult population in this country, but were 16.1% of the total prison population.<sup>14</sup>

The overabundance of white male judges coupled with the overrepresentation of racial and ethnic minorities as criminal defendants creates a palpable friction between the judges and the judged by furthering public perception that the courts are fraught with bias and are, as some scholars have argued, “instruments of oppression.”<sup>15</sup> Shelton addressed this dynamic by noting that, “While the defendants in criminal cases are disproportionately racial and ethnic minorities, the judges who bare and decide in these cases are decidedly not.”<sup>16</sup>

In spite of steady gains over the years in the number of minority judges, the racial composition of state judiciaries across the country remains overwhelmingly dominated by white males. As Table 1 displays, there are only 1,144 state judges of color in the U.S. out of a total 11,344 judgeships.<sup>17</sup> Concerns about the relatively low number of minority judges must be considered in light of the small pool of minority candidates who are eligible for positions on the judiciary. According to the American Bar Association, minorities made up merely 9.7% of all lawyers in 2000. Therefore, any success in creating a more representative judiciary hinges largely on significant increases in the number of minority lawyers in the U.S. Anti-affirmative action education initiatives have created some decreases in minority law school enrollment figures and must be countered by aggressive efforts to increase the recruitment and enrollment of students of color.

**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.**

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<sup>13</sup> Hearing at 77.

<sup>14</sup> See Angelo Falcon, *Opening the Courthouse Doors: The Need for More Hispanic-American Judges*, Puerto Rican Legal Defense and Education Fund (2002) at 2 [hereafter PRLDEF: *Opening the Courthouse Doors*].

<sup>15</sup> Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 *Geo. Wash. L. Rev.* 173, 176 (1996).

<sup>16</sup> Hearing at 78.

<sup>17</sup> This total number includes the following courts: general jurisdiction trial courts, intermediate appellate courts, and state supreme courts.

Table 1

<b>Number and Percentage of State Judges and Lawyers By Race<sup>18</sup></b>					
<b>Race/Ethnicity</b>	<b>Number and Percentage of Judges</b>		<b>Number and Percentage of Lawyers</b>		<b>Total Representation of U.S. Population<sup>19</sup></b>
White	10,200	89.9%	786,730	90.3%	75.1%
African American	665	5.9%	33,865	3.9%	12.3%
Asian American/ Pacific Islander	122	1.1%	20,160	2.3%	3.6%
Hispanic	320	2.8%	28,630	3.3%	13%
Native American	13	0.1%	1,730	0.2%	0.9%
Other	24	0.2%	—	—	5.5%
Minority Total	1,144	10.1%	84,385	9.7%	35.3%

## Judicial Selection Models

Unlike the federal judicial system, where nominees are selected by the President with the advice and consent of the United States Senate, each state in the nation has a different procedure for determining which individuals will serve on the state judiciary. In fact, very few states model their judicial selection process on the federal system. Instead, states use either an appointment process or judicial elections—and in some instances a combination of both.

Many states use multiple methods for selecting judges, depending on the level of court. States may use elections for the lower tiered courts and utilize an appointive system for the higher courts in the state. The justification for this dual system is based on the belief that appointive systems result in the selection of the most qualified legal minds, which is essential for the highest courts in the state. As a consequence, elections are rarely used for selecting justices at the appellate level. However, states that use appointment systems are likely to require retention elections for judges that are appointed mid-term. A discussion on retention elections appears in the judicial elections section of this report.

<sup>18</sup> Source American Bar Association, National Database on Judicial Diversity in State Courts, available at <http://www.abanet.org/judind/diversity/national.html#1> (last visited May 16, 2005) [hereafter ABA Judicial Diversity Database] and American Bar Association, Miles to Go 2000: Progress of Minorities in the Legal Profession (ABA Commission on Racial and Ethnic Diversity in the Profession 2000).

<sup>19</sup> Source U.S. Census Bureau, Census 2000, available at <http://www.census.gov/population/www/cen2000/tablist.html> (last visited June 17, 2005) [hereafter Census 2000].

## Judicial Appointments

Under the appointment model, a nominating commission is responsible for selecting candidates for state judgeships. The commission's duties include recruiting, investigating, and interviewing potential nominees and their colleagues, as well as evaluating applications and candidates to determine their eligibility for a particular state judgeship.<sup>20</sup> The nominating commission is responsible for submitting names, often more than one, to the appointive body, which makes the final decision on which candidate to appoint. In most states, the governor serves as the appointive body. However, in some states such as Virginia and South Carolina, it is the state legislature's role to confirm judicial nominations.

Nominating commissions operate pursuant to specific guidelines, which establish the necessary qualifications for potential candidates. Nominating commission members typically include lawyers in private or government practice, prominent members of bar associations, designees from the governor or attorney general's offices, members of the state legislature, current judges, members of community groups or public interest organizations, and academics.

Supporters of the appointment model contend that it is the more effective system primarily because it minimizes the role of politics and helps produce a higher caliber of judges. Critics argue that appointment systems are not immune from politics or external pressures from special interest groups since most nominating commissions include elected officials and members of the plaintiff's or defense bar, who are inclined to nominate individuals who are supportive of their interests. Opponents also object to this model because of the considerable power that is vested in a small group of individuals to make final determinations on who will serve as judges.

Historically, judicial nominating commissions have suffered from a lack of diversity, as people of color and women are less likely to be selected to serve on these bodies.<sup>21</sup> The relatively small number of minority lawyers in this country (9.7%) provides a partial explanation for this dynamic. Another possible explanation is that minority lawyers are less likely to enter into private practice or hold upper level positions with law firms – both of which serve as a rich source for selecting individuals for nominating commissions.<sup>22</sup> Minimal political connections and influence are also contributing factors to this under-representation. As a consequence, critics of the appointment method contend that nominal diversity on nominating commissions creates an inaccessible system where few women and minorities are selected by nominating bodies.

Recent events in South Carolina are a prime example of the barriers faced by minority judicial candidates under the nominations process. According to a 2004 South Carolina

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<sup>20</sup> American Judicature Society, *Merit Selection: The Best Way to Choose the Best Judge*, available at [http://ajs.org/js/ms\\_descrip.pdf](http://ajs.org/js/ms_descrip.pdf) (last visited May 16, 2005).

<sup>21</sup> See Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 Dick. L. Rev. 729, 735 (2002).

<sup>22</sup> *Id.*

*State* newspaper article, under the state’s appointment system, two-thirds of the African American candidates who applied for contested judgeships were not nominated by the state’s Judicial Merit Selection Commission—a rate which is estimated to be nearly 20% higher than that of white candidates.<sup>23</sup> A legislative cap that enables the South Carolina legislature to consider only three candidates for each position has facilitated the rejection of more than 50% of the Black candidates seeking judgeships in that state. This unfortunate reality reveals the vast power held by nominating bodies and the negative implications that result when an appointive authority is not sensitive to creating a representative judiciary. Palast noted during the Hearing that several states have responded to this dilemma by creating “specific provisions for diversity on nominating commissions and in the nominations process.”<sup>24</sup>

### *The Effectiveness of Judicial Appointments in Creating Diversity*

There is little evidence that the appointment selection model actually creates greater diversity when compared to other judicial selection models. Research by CUNY Law School Professor, Steven Zeidman finds that many minority communities oppose appointment selection methods because they yield power to a small group of elitist white male lawyers to appoint other elitist white male lawyers to the bench. Critics point to the predominance of white males on the federal bench as an example of what is wrong with appointive judicial systems.<sup>25</sup>

Marisa Demeo, Regional Counsel of the Mexican American Legal Defense and Educational Fund, expressed concern during the Hearing that under the appointment system, “[t]here is generally perceived to be caps on how many minorities you can actually appoint, while there doesn’t necessarily have to be a cap on how many white males that you’re going to appoint.”<sup>26</sup> For example, Demeo noted that the current composition of the 13th Court of Appeals in Texas, where all six elected justices including the chief are Latinos, would not occur under an appointment system. “I can tell you that if there was an appointed system there would have been a cap put on the appointment of Latinos way before you got to be able to fill all seats with Latinos,” added Demeo.<sup>27</sup>

However, Chris Hegarty, Executive Director of the North Carolina Center for Voter Education, testified that many African Americans have reached the bench in North Carolina through the appointment system.

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<sup>23</sup> Rick Bundrett, *Nomination Process Thwarts Black Judicial Candidates*. *The State* (Columbia), May 24, 2004.

<sup>24</sup> Hearing at 17.

<sup>25</sup> Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1997-2002*, U. Mich. J.L. Rev. 791 (2004).

<sup>26</sup> Hearing at 114.

<sup>27</sup> *Id.*

Since 1990, there were five seats on the North Carolina Supreme Court that came up for appointment ...and were [filled] by the governor. Of those five vacancies, two were filled with African Americans.

During that same time period in the North Carolina Court of Appeals, there were 18 seats that came up as vacant. Seven of those 18 seats were filled by African Americans.<sup>28</sup>

Despite the apparent relevant success of the appointment process in North Carolina, Hegarty cautioned that with each of these appointments, a governor committed to diversity was able to make his selections without the input of a nominating committee. In these instances, “an active and organized community was able to come up, have equal time with the governor, and successfully lobby for representation,” added Hegarty.<sup>29</sup> Moreover, Hegarty suggested that the racial composition of the North Carolina courts would have been vastly different under a governor who was not inclined to create a more representative judiciary. Deborah Goldberg, Acting Director of the Democracy Program of the Brennan Center for Justice, concurred with Hegarty by stating, “There would therefore seem to be a very high risk that adoption of merit selection systems in states with governors, who are not interested in promoting diversity would have an adverse impact on minority access to the bench.”<sup>30</sup>

Ruthe C. Ashley, of the National Asian Pacific American Bar Association, referred to California as a “poster child” for the notion that diversity starts at the top. She noted that for the first time in history, California’s appointment secretary is a Japanese American who has, over the past six years, strived to create a judiciary that is representative of the state’s population.<sup>31</sup>

## Judicial Elections

There are three types of judicial elections: partisan, non-partisan, and retention elections.<sup>32</sup> The selection model is harshly criticized because it requires candidates to campaign and raise money in order to become elected. Critics of this model argue that elections compromise a judge’s impartiality and independence. In response to this criticism, some states have enacted public financing laws for judicial elections in order to limit the influence of money.

Most Americans are familiar with the partisan election model, where candidates represent or are identified with a political party on the ballot. Partisan judicial

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<sup>28</sup> Hearing at 138.

<sup>29</sup> *Id.* at 140.

<sup>30</sup> *Id.* at 73.

<sup>31</sup> *Id.* 128-9.

<sup>32</sup> See Justice at Stake Campaign, States with Elections, available at <http://faircourts.org/files/StateswithElections.pdf> (last visited May 16, 2005).

elections are no different. Candidates are associated with a political party, accept campaign contributions, and spend money in hopes of becoming elected under the banner of the political party they represent.

Some states hold non-partisan judicial elections in which a candidate does not have to be affiliated with a political party. Non-partisan elections were envisioned as a means to make judges more accountable and representative, while allowing the candidates to steer clear of party politics. This selection method was designed to ensure that qualified lawyers are able to seek judicial positions without having to be politically connected or rely on political credentials. However, the goal of non-partisanship is often illusory, as political parties openly associate themselves with certain candidates for judicial office.

The majority of appointment selection systems use retention elections as a means to ensure that state judges remain accountable to the public. Retention elections are uncontested races where voters are presented with the question, “Should Judge X be retained in office, Yes or No?”<sup>33</sup> In many states, judicial retention elections are low profile affairs, with judges facing little, if any, opposition.<sup>34</sup> Most often, in states where judges are appointed to fill an interim vacancy, they must later run in retention elections in order to stay in office. These elections typically occur a year or two after the appointment, or in some instances up to 12 years later, as in California’s Supreme Court and Court of Appeals.<sup>35</sup> According to Zeidman, “Retention elections were designed as a way to make judges more accountable to the citizenry by allowing a popular vote on the performance of a judge selected via a merit system.”<sup>36</sup> Retention elections exist in 19 states, and most judges are retained in these elections, although in recent years the number has declined.<sup>37</sup> The margin of approval for state judges in retention elections has shifted from 76.8% in the 1980s to 60.1% in 1994.<sup>38</sup> Only 12 states and the District of Columbia do not require appointed judges to run in retention elections.<sup>39</sup>

Critics of judicial elections argue that the system fosters an atmosphere where political machines can select, manipulate, and control judges. Lofty campaign contributions from special interest groups fuel the perception that judges are in fact partial to the interests of their financial supporters.

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<sup>33</sup> Michael Dann & Randall M Hansen, *Judicial Retention Elections*, 34 *Loyola of Los Angeles Law Review* 1429 (June 2001).

<sup>34</sup> American Judicature Society, *Judicial Selection in the States: California*, available at <http://www.ajs.org/js/CA.htm> (last visited May 16, 2005).

<sup>35</sup> *Id.*

<sup>36</sup> Zeidman, *supra* note 25.

<sup>37</sup> Reddick, *supra* note 21.

<sup>38</sup> *Id.*

<sup>39</sup> *See* American Judicature Society, *Judicial Selection Methods in the States*, available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf> (last visited May 16, 2005).



## *The Effectiveness of Judicial Elections in Creating Diversity*

Despite a lack of data on the effectiveness of elections in creating diversity, minority communities traditionally prefer the election model over an appointment system.

According to Palast, “There has been an historic pro-election view among many in communities of color, because of a suspicion of the

**“There has been an historic pro-election view among many in communities of color, because of a suspicion of the appointment and merit selection process. The concern is that insiders will be less likely to select diverse candidates.”**

appointment and merit selection process. The concern is that insiders will be less likely to select diverse candidates.”<sup>40</sup> Clyde Bailey, President-Elect of the National Bar Association (“NBA”), a network of 25,000 predominantly black lawyers, confirmed that based on the experiences of his organization, the NBA favors the election method.<sup>41</sup> During the Hearing, Demeo cited a Puerto Rican Legal Defense and Education Fund study, which found that elective systems result in greater

Hispanic representation. However, Demeo cautioned that the success rate of elections varies depending on the jurisdiction.<sup>42</sup> The discussion below on campaign finance and polarized voting provide insight into the unique barriers faced by minority candidates under the elections model.

## *Campaign Finance*

The issue of campaign finance as an obstacle for minority judicial candidates emerged as a major point of concern during the Hearing. Several panelists noted that the high costs of successfully running for office prevents many minority candidates, with limited financial and political resources, from entering or competing in judicial elections. Palast noted that, “The high cost of campaigns poses a threat to minority candidates who may not be able to raise as sufficient a war chest to be competitive in these elections.”<sup>43</sup>

Professor Spencer Overton, of the George Washington University School of Law, testified on the disturbing trends in campaign finance:

Money comes from a narrow segment of the population and as a result campaign finance impacts the diversity of the bench and the justice afforded to lawyers and citizens who appear before courts and the confidence that citizens have in the judiciary.<sup>44</sup>

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<sup>40</sup> Hearing at 16.

<sup>41</sup> *Id.* at 31.

<sup>42</sup> PRLDEF: Opening the Courthouse Doors, *supra* note 14.

<sup>43</sup> Hearing

<sup>44</sup> *Id.* at 40.

Overton noted that the average state Supreme Court candidate raised over \$430,000 in 2000 – a 61% increase since 1998, with half of that money coming from lawyers and business interests.<sup>45</sup> In 2004, that number increased to \$434,289.<sup>46</sup>

A successful campaign's heavy reliance on private individual contributions is an additional barrier faced by many minority candidates. To illustrate this point, Overton cited a study that found that although people of color are almost 30% of the nation's population, they make up less than 1% of the contributors to federal campaigns.<sup>47</sup> According to Overton, this low contribution level is not because people of color are politically apathetic, but instead stems from this nation's racial disparities in the distribution of wealth. With the median net worth of the average white household at \$61,000—a figure eight times greater than the median African American household and twelve times greater than Latino households— minority communities are less able to financially support their candidates when compared to whites.<sup>48</sup>

Overton stated that past discrimination has an indirect but significant impact on the ability of certain segments of the population to financially support judicial candidates.<sup>49</sup>

The disparities in wealth do not solely arise because of differences in merit or talent or hard work. These racial disparities and the ability to give judicial candidates money arise in part due to past, state-mandated discrimination, added Overton.<sup>50</sup>

Therefore, according to Overton, the wealth gap in this country plays a significant role on a minority candidate's ability to seek public office.

Several of the Hearing panelists raised public financing as a means to mitigate the effects of campaign abuse and bolster the opportunities for minority candidates to compete financially in elections. Overton expressed support for public financing of elections as a way to “level the playing field.” In addition, John Vittone, from the American Bar Association (“ABA”), referenced a 2002 recommendation by the ABA's House of Delegates, which supported public financing as a means “to create more opportunities for attorneys of all racial and ethnic backgrounds who do not have... the personal or political connectedness to raise large sums of money for elections.”<sup>51</sup>

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<sup>45</sup> *Id.* at 41.

<sup>46</sup> Deborah Goldberg and Sarah Samis, *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached A “Tipping Point” and How to Keep Our Courts Fair and Impartial* (Justice at Stake Campaign 2004).

<sup>47</sup> *Hearing* at 42.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 43.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 136.

Overton stated that public financing may be accomplished by providing a tax credit that would allow a variety of entities to give money to candidates.<sup>52</sup> However, other panelists countered that public financing merely places a band-aid on the election system because of cases like *Buckley v. Velejo* that protect a third party's right to spend independently on candidates.<sup>53</sup>

### *Voter Participation and Racially Polarized Voting*

Even when candidates of color are able to raise sufficient campaign funds, the issue of low public participation in judicial elections remains as an obstacle. Public participation rates in judicial elections are rarely high.<sup>54</sup> In fact, minority participation rates lag far behind whites, with 62% of whites voting in judicial elections compared to only 48% of African Americans.<sup>55</sup> As a result, minority candidates suffer, especially in low turnout elections where white conservative voters are more likely to cast a ballot than other populations that historically support minority judicial candidates. The Hearing panelists agreed that there is a substantial need for increased public education and voter participation in judicial elections.

Oftentimes, women and minority candidates struggle to overcome negative preconceptions and stereotypes when running for office. For example, candidates of color

**Candidates of color are often subjected to litmus tests in order to assess whether they will be too liberal or soft on crime in their judicial rulings. In addition, minority candidates must frequently overcome the false assumption that they are unable to make fair decisions in matters that involve the interests of their particular minority group.**

are often subjected to litmus tests in order to assess whether they will be too liberal or soft on crime in their judicial rulings. In addition, minority candidates must frequently overcome the false assumption that they are unable to make fair decisions in matters that involve the interests of their particular minority group.

Nationwide, the outcome of contested elections have traditionally gone against the interests of minority communities in electing candidates of their choice. Contested elections are especially difficult for candidates of color when racially polarized voting exist in the jurisdiction.

Litigation in Louisiana, North Carolina, and elsewhere under Section 2 of the Voting Rights Act has resulted in the creation of majority-minority judicial districts that have subsequently created some electoral success for candidates of color. However, in many instances where judges are elected at-large, minority voters are unable to elect the candidates of their choice. Professor Sherrilyn Ifill provided extensive testimony on the phenomenon of racially polarized

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<sup>52</sup> *Id.* at 48.

<sup>53</sup> *Id.* at 50.

<sup>54</sup> *Id.* at 18.

<sup>55</sup> Justice at Stake Campaign, *National Survey of American Voters*, available at <http://www.justiceatstake.org> (last visited May 16, 2005).

voting and expressed the opinion that, “The refusal of white voters to give their electoral support to black candidates lies at the center of the judicial diversity discussion.”<sup>56</sup>

Ifill shared one of her experiences with racially polarized voting that occurred in Harris County, Texas nearly 15 years ago when she served as an attorney with the NAACP Legal Defense Fund. In an investigation, Ifill found that despite Harris County’s significant minority population, which is 22% African American and 22% Mexican American, all of the county’s 59 district court judges were white. In some instances, Blacks were appointed to the bench by the governor to fill the unexpired term of a retiring white judge. However, once that term of office expired, these African American judges were unable to retain their seats in countywide elections. According to Ifill, “In countless elections in which a Black judicial candidate faced a white challenger, white voters voted for the white candidate and Black voters voted for the Black candidate.”<sup>57</sup> Thus, creating a situation where “white voter resistance to Black candidates meant that minority judicial candidates were virtually locked out of the courthouse.”<sup>58</sup>

Ifill provided another example of an incumbent African American circuit court judge in Maryland who had 10 years of judicial experience and was appointed to the bench twice by a Democratic governor. Nevertheless, in a 2002 countywide election, in which 20% of the electorate was Black, the African American judge lost to a white candidate with no judicial experience.<sup>59</sup>

Judge Sandra Otaka from Illinois noted the particular obstacles faced by the Asian American community in electing candidates for statewide positions.

[I]f African Americans cannot [elect their candidates] at 22% how in the Sam Heck are we going to do it at 4% when you have the name Fujimoto or Svrapu Punja [on the ballot] in Illinois?

I was told to put an apostrophe after my O because if I did that, I would have a greater chance of winning county-wide. The bottom line is in Cook County and I imagine other places...if it isn’t O’Brien or O’Malley or it isn’t Smith or it isn’t a name that they have a level of comfort with, then it’s going to be a lot more difficult for them to get elected. Let me tell you, having an Asian name does not facilitate access to election through the political process.<sup>60</sup>

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<sup>56</sup> Hearing at 58.

<sup>57</sup> *Id.* 57.

<sup>58</sup> *Id.* at 58.

<sup>59</sup> *Id.* at 63.

<sup>60</sup> *Id.* at 100-101.

Ifill's testimony on racial bias supported Otaka's conclusion. Ifill cited recent polls, which found that 30% of Americans believed that Chinese Americans are more loyal to China than they are to the United States; and 25% of those polled said they were not sure. In response to these poll numbers Ifill stated, "I ask you whether the electorate voting for a candidate who is Chinese American running for judicial office is likely to vote for that candidate if they hold those kind of suspicions?"<sup>61</sup>

Judge G.K. Butterfield recounted his own experience in North Carolina, where in 1974, there were no judges of color and at the time of the Hearing there were 51.<sup>62</sup> While that increase does represent progress, Butterfield noted that the state continues to have unresolved problems. Butterfield noted that in 1987, the NAACP successfully challenged at-large elections for the trial bench, which resulted in the creation of single-member election districts throughout North Carolina. That change directly led to Butterfield's election to the bench in 1988, where he remained in a predominantly minority district for 12 years. In 2000, Butterfield accepted an appointment to fill a vacancy on the state Supreme Court. Regrettably, two years later he lost his seat to a white Republican candidate who possessed no judicial experience and lacked any endorsements from local newspapers, previous justices, or members of the bar. Butterfield stated that despite his years of experience, his opponent "won the election with a 54% majority, riding the coattails of Senator Elizabeth Dole."<sup>63</sup>

Hegarty expanded on Butterfield's experience by providing specific details on the difficulties experienced by African Americans in North Carolina's statewide elections:

Since 1990, North Carolina has had 15 seats on the Supreme Court come up for election. Of those 15 seats, there were three contests between an African American candidate against a white candidate. In those three contests, the African American prevailed not once.

In the Court of Appeals, there were 23 seats up for election during that time period. Seven races featured an African American candidate against a white candidate, and in those cases, the African American candidate prevailed only twice.<sup>64</sup>

Despite North Carolina's unimpressive record in electing minority judges in statewide contests, Judge Butterfield concluded his testimony with a powerful endorsement of the elective system.

There are no easy answers on how to eliminate racially polarized voting since its root cause can be traced to the persistence of racism in our society. Nevertheless, Ifill

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<sup>61</sup> Hearing at 58.

<sup>62</sup> *Id.* at 90.

<sup>63</sup> *Id.* at 92.

<sup>64</sup> *Id.* at 138.

argued that, “We must address the issue of racism in the electorate. Should we choose to tip toe around that reality, we will never be able to fix the lack of diversity on the state bench.”<sup>65</sup>

### **The Need for More Research on the Selection Models**

There was a general consensus among the Hearing participants that while one selection method may appeal to certain minority groups based on the belief that it produces more favorable outcomes, the lack of sufficient data and analysis on this topic prevent any definitive conclusions from being reached. Deborah Goldberg referred to several conflicting studies on this topic:

[T]he literature on the subject is highly contradictory, there are studies suggesting that appointive systems that use nominating commissions have a negative impact on diversity because they tend to be largely white, male, mainstream lawyers. And there are studies suggesting that appointment in fact promotes diversity better than elective systems. And there are studies that suggest that women and people of color fare equally well, or more accurately, equally poorly under both systems.<sup>66</sup>

Goldberg explained that the conflicting results are not surprising, since the use of multiple selection systems combined with incomplete recordkeeping by the states, make it notoriously difficult for researchers to develop a sound methodology as a basis for their research. According to Goldberg, “Calculating the impact of selection systems on diversity may therefore require an investigation of how each individual ascends to the bench – a daunting undertaking, to say the least.”<sup>67</sup> Goldberg further noted that there is a current void in research that examines the manner in which minorities are promoted to the bench. For example, the implications on racial diversity are unclear in instances where a judge, located in a state that uses the elections model, receives an interim appointment and is later required to run in a contested election.

Palast also noted the uncertain impact of each method on diversity:

In large urban areas with high minority populations, elections may put a higher percentage of minorities on the bench. Moreover, in statewide elections or areas with minimal minority voting power, merit selections or appointments may, and I say “may” provide greater diversity, depending on the appointing authority.<sup>68</sup>

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<sup>65</sup> Hearing at 58.

<sup>66</sup> *Id.* at 70.

<sup>67</sup> *Id.* at 70.

<sup>68</sup> *Id.* at 17.

In addition to the need for more research on the different selection methods, more research should be conducted on the level of the court and the jurisdictional authority of the judgeships held by people of color. Ifill noted during the Hearing that, “In the studies that I did in the late ‘80’s and early ‘90’s, most of the time African American judges were serving on courts of limited jurisdiction. Shouldn’t it matter the kind of judges they are? Are they justices of the peace? Or are they trial court judges who are able to hear any case in the county?”<sup>69</sup>

Table 2 contains data on the number and corresponding percentage of minority judges who sit on state Supreme Courts, appellate courts, and trial courts.<sup>70</sup> The table

**Minority judges represent 9.8% of the total number of state Supreme Court justices in this country.**

**In intermediate appellate courts, judges of color are 10.7% of the bench.**

**Within the larger general jurisdiction trial courts, minorities represent 9.1% of the bench.**

reveals that in 2005, 33 minority justices serve on state Supreme Courts out of a total of 340. At the intermediate appellate level, there are 102 judges of color out of 958 such positions. And at the trial level, minority judges hold 1,009 seats out of a total 10,046. A comparison of Tables 1 and 2 of this report show that at 10.1%, minority representation on the bench is relatively aligned with the percentage of minority attorneys in the U.S., which is 9.7%. However, since Table 2 does not include data on courts of limited jurisdiction, more study is needed in order to fully explore the assertions made by Hearing

Table 2

National Percentage of Judges of Color by Type of Court <sup>71</sup>												
Type of Court	African American		Asian American/Pacific Islander		Hispanic		Native American		Other		Total	
State Supreme Court 340	5.9%	20	1.5%	5	2.4%	8	0		0		9.8%	33
Intermediate Appellate Court 958	6.3%	60	1.4%	13	2.6%	25	0.2%	2	0.2%	2	10.7%	102
General Jurisdiction Trial Court 10,046	5.3%	585	0.9%	104	2.6%	287	0.1%	11	0.2%	22	9.1%	1,009
Total 11,344	5.9%	665	1.1%	122	2.8%	320	0.1%	13	0.2%	24	10.1%	1,144

<sup>69</sup> Hearing at 85.

<sup>70</sup> This table does not include data on limited jurisdiction courts.

<sup>71</sup> ABA Judicial Diversity Database, *supra* note 18.

panelists that minority judges are primarily relegated to the lower levels of the judiciary. More study is also needed to determine the selection model in which each of these minority judges utilized to ascend to the bench.

### **The Importance of Political Influence in Both Judicial Selection Models**

Hearing participants agreed that regardless of the selection method used by the states, a community's political clout and influence were essential to creating a more representative judicial system. For instance, Otaka stated that in Illinois, Asian Americans have little political power; therefore, "under the merit selection

system... or the electoral system, if you do not have access to political power, it is very difficult to win."<sup>72</sup>

Judge James A. Wynn, of North Carolina agreed that no one system provides the solution to increasing diversity,

"[I]t depends on the jurisdiction. There is no system that you can point to as a panacea for any particular place."<sup>73</sup>

For instance, Wynn noted that in North Carolina, statewide elections on a partisan ticket worked well for Blacks for a number of years, as long as they maintained an influential role within the political party in control. However, this dynamic subsequently changed as the demographics and political leanings of the state shifted. According to Wynn, African American candidates currently face challenges for every seat by white male Republicans.<sup>74</sup>

**"[I]t depends on the jurisdiction. There is no system that you can point to as a panacea for any particular place."**

This overarching conclusion by the panelists underscores the need for diversity advocates to develop a strategy aimed at substantially increasing their political influence within their communities. Civic participation efforts that encourage minority communities to make financial contributions to judicial candidates and vote in judicial elections are a step in the right direction. Furthermore, advocates should aggressively inject their views and remain actively involved at each stage of the judicial nominations process.

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<sup>72</sup> Hearing at 97.

<sup>73</sup> *Id.* at 104.

<sup>74</sup> *Id.* at 104-5



## Case Studies

The case studies below offer some insight on the level of judicial diversity in New York, California, Texas, and Mississippi. This review provides disturbing evidence that neither selection method adequately promotes diversity, as the racial composition of state judiciaries consistently fail to reflect the diversity of each state's population. The data also reveal the dire need for more minority lawyers throughout the country in order to increase the pool of eligible candidates for judicial positions.

### The State of New York

Since 1977, New York, which possesses one of the most complex judicial systems in the nation, has used an appointment system and partisan elections to select judges for its state courts. Appointments account for only 25% of New York's judges, with the remaining 75% selected through partisan elections.<sup>75</sup> Unlike most merit selection systems, there are no retention elections in New York. Appointed judges who desire to stay in office must re-enter the commission nominating process along with other applicants.

A comparison of the 2001 and 2004 ABA numbers for the New York judiciary shows that there have been measurable improvements for judges of color (see Table 3). Minority judges increased from 11.6% in 2001 to 14.5% in 2004. Most notably, the number of both Hispanic and Asian American judges has nearly doubled. However, these improvements are still not in tandem with the racial composition of the state. According to the U.S. Census Bureau, people of color make up 37.4% of New York State's population.<sup>76</sup> Yet, minorities only account for 14.5% of the state judiciary. The rate of progress for Hispanic judges raises particular concerns when you consider that New York possesses the lowest percentage of Hispanic judges among states with the ten highest Hispanic populations.<sup>77</sup>

### *New York City Courts*

In New York City, the impact of the elections method versus appointments on judicial diversity can be assessed because of the City's use of elections to select judges for its family and criminal courts and the use of appointments to select judges for its civil courts. In 1997, the Fund for Modern Courts ("Modern Courts") conducted a study

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<sup>75</sup> The State of New York holds judicial elections for the Supreme Court, excluding the appellate division, as well as the county courts and New York City Civil Courts. *See* American Judicature Society, *Judicial Selection in the States: New York* (AJS 2003) available at <http://www.ajs.org/js/NY.htm> (last visited May 16, 2005) [hereafter *Judicial Selection in the States: New York*].

<sup>76</sup> *Source* Census 2000, *supra* note 19.

<sup>77</sup> PRLDEF: *Opening the Courthouse Doors*, *supra* note 14 at 19.

Table 3

New York State						
	Minority State Judges				% of Minority Lawyers <sup>82</sup>	% of Total Population
	2001 <sup>79</sup>		2004 <sup>80</sup>			
	#	%	#	%	%	%
African American	50	8.7%	54	9.4%	4.2%	16%
Hispanic	14	2.4%	24	4.1%	3.3%	15%
Asian American	3	0.5%	6	1%	3.4%	6%
Native American	0	0%	0	0%	0.1%	0.4%
Total <sup>81</sup>	67	11.6%	84	14.5%	11%	37.4%

that evaluated whether elections or merit selection in New York City produced a more diverse bench. The report concluded that women and minorities reached the bench in somewhat greater numbers via the elective system in comparison to the appointment method.<sup>78</sup>

Since the Modern Courts report in 1997, several studies have reinforced the view that the elective model is more effective in producing diversity on the bench and have relied on New York City as a predictor for the future of diversity in New York state. However, predictions of a more diverse New York state judiciary should not be predicated solely on minority advancement in New York City. Zeidman has argued that while initially, elections may appear to be the better choice in promoting diversity, outside of New York City, elections do not produce equal results across the state. Instead, they foster a disproportionately white judiciary. Zeidman contends that:

While both elections and appointments in New York have produced more women and judges of color in the last decade than in previous years, it is clearly the case that minorities fared much better in the elective system. Yet, a deeper analysis reveals that that result is limited to New York City. An examination of the statewide elected judiciary reveals an astonishing lack of judges of color.<sup>84</sup>

<sup>78</sup> Gary S. Brown, *New York City Bench Becoming Increasingly Diverse* (The Fund for Modern Courts 1998).

<sup>79</sup> *Judicial Selection in the States: New York* *supra* note 75.

<sup>80</sup> ABA Judicial Diversity Database, *supra* note 18.

<sup>81</sup> Figures are based on the total number of authorized judgeships (574) in the state for the general jurisdiction appellate and trial court bench.

<sup>82</sup> *Source* U.S. Census Bureau, Census 2000 EEO Data Tool, available at <http://www.census.gov/eo2000> (last visited June 17, 2005) [hereafter Census 2000 EEO Data Tool].

<sup>83</sup> *Source* Census 2000, *supra* note 19.

<sup>84</sup> Zeidman, *supra* note 25.

The conflicting views on the effectiveness of each selection method in New York reinforces the conclusions made by several Hearing participants - that the success of each selection model in creating diversity depends heavily on the racial composition of the jurisdiction, the minority communities' level of political influence, and the appointing body's commitment to diversity.

## California

The California judiciary is comprised of the Supreme Court, the courts of appeal, and the superior courts. Judges on the Supreme Court and the courts of appeal are selected through gubernatorial appointments and are confirmed by a nominating commission composed of the Chief Justice, the Attorney General, and a presiding judge of the courts of appeal.

Superior court judges participate in non-partisan elections for six-year terms. Because the superior courts represent an overwhelming majority of the total state judgeships (1,499 of 1,611 total judgeships), the elective system actually selects 93% of California's state judiciary. Appointments to the Supreme Court and the courts of appeal account for the remaining 7%.<sup>85</sup>

Table 4

California						
	Minority State Judges				% of Minority Lawyers <sup>89</sup>	% of Total Population <sup>90</sup>
	2001 <sup>86</sup>		2004 <sup>87</sup>			
	#	%	#	%	%	%
African American	79	5%	72	4.5%	3.3%	7%
Hispanic	89	5.5%	87	5.4%	5.6%	32%
Asian American	52	3.2%	56	3.5%	5.9%	11%
Native American	2	0.1%	2	0.1%	0.1%	1%
Total <sup>88</sup>	222	13.8%	217	13.5%	14.9%	51%

<sup>85</sup> American Judicature Society, *Judicial Selection in the States: California*, *supra* note 34.

<sup>86</sup> *Id.*

<sup>87</sup> ABA Judicial Diversity Database, *supra* note 18.

<sup>88</sup> Figures are based on the total number of authorized judgeships (1,611) in the state for the general jurisdiction appellate and trial court bench.

<sup>89</sup> *Source* Census 2000 EEO Data Tool, *supra* note 81.

<sup>90</sup> *Source* Census 2000, *supra* note 19.

From 2001 to 2004, the paltry number of minority judges on the California bench has remained relatively constant with only minor variations (see Table 4). African American judges dropped from 5% in 2001 to 4.5% of the judiciary in 2004, while Asian American judges advanced from 3.2% to 3.5%. What remains troubling, are the low number of minority attorneys in California and the continued racial disparity between the state’s judiciary and the general population. In 2004, minorities represented 51% of California’s total population while judges of color were only 13.5% of the state’s judicial system.

Even more alarming is the lack of Hispanic and Asian American judges on the California bench. Hispanics are 32% of California’s population, yet only 87 Hispanic judges sat on the general jurisdiction appellate and trial court bench in 2004—a mere 5.4 % of the California state judiciary. This racial gap is particularly troubling since California has the largest Hispanic population in the nation. The status of Asian Americans is equally discouraging. California ranks number one among states with the highest Asian population (11% of total population) and yet only 56 (3.5 %) of the state’s general jurisdiction appellate and trial court judges in 2004 were Asian American.

**Hispanics are 32% of California’s population, yet only 87 Hispanic judges sat on the general jurisdiction appellate and trial court bench in 2004—a mere 5.4 % of the California state judiciary.**

## Texas

The Texas judiciary consists of the Supreme Court, the court of criminal appeals, the court of appeals, and the district court. Since 1876, all levels of the Texas judiciary have used the partisan elections model. In recent years, the Texas judiciary has been harshly criticized on the prevalence of expensive campaigns and the aggressive business interests that have tainted public trust and confidence in the state’s judicial system. Texas holds the record as the first state where the costs of a judicial race exceeded \$1 million.<sup>91</sup> A recent review of Texas’ elections found that, “More than in any other state, the perception developed in Texas that there was a direct connection between campaign contributions to judicial candidates and the decisions that those candidates later make as judges.”<sup>92</sup> Because of increasing calls for reform, the Texas legislature passed the Judicial Campaign Fairness Act in 1995 in order to establish limits on campaign finance contributions.

Prior to the 1995 Fairness Act, a 1986 reform plan was proposed that promoted the merit selection method as a means to combat the perception of corruption. However, the push to switch from elections to the appointment method was met with intense opposition and ultimately proved unsuccessful as, “minorities and women complained that the plan seemed designed to limit their rise to judgeships at a time when their growing numbers [in the state population] made their election more likely than it had in the past.”<sup>93</sup>

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<sup>91</sup> Daniel Becker & Malia Reddick, *Judicial Selection Reform: Examples from Six States*, (American Judicature Society 2003) at 3.

<sup>92</sup> *Id.* at 2.

<sup>93</sup> *Id.* at 4.

**Although Hispanics are the largest and fastest growing minority group in the state at 32%, they were only 11.5% of the state judiciary from 2001-2004**

The racial diversity of the Texas judiciary and the state bar do not adequately reflect the presence of minorities in the state. Although Hispanics are the largest and fastest growing minority group in the state at 32%, they were only 11.5% of the state judiciary from 2001-2004(see Table 5). Similarly, Texas courts fail to reflect the state’s African American population, which at 12%, is the second largest minority group in the state. As the Table below displays, the number of African American judges has remained relatively stagnant at 3.5 % in 2001 and 3.3% in 2004. Overall, of the 512 total number of judgeships for the general jurisdiction and trial court bench, 15.8% of those positions belong to judges of color.

Table 5

Texas						
	Minority State Judges				% of Minority Lawyers <sup>96</sup>	% of Total Population <sup>97</sup>
	2001 <sup>94</sup>		2004 <sup>95</sup>			
	#	%	#	%	%	%
African American	18	3.5%	17	3.3%	3.9%	12%
Hispanic	59	11.5%	59	11.5%	8.1%	32%
Asian American	3	0.6%	2	0.4%	1.5%	3%
Native American	0	0%	3	0.6%	0.2%	1%
Total	80	15.6%	81	15.8%	13.7%	48%

<sup>94</sup> American Judicature Society, *Judicial Selection in the States: Texas* (AJS 2003), available at <http://www.ajs.org/js/TX.htm> (last visited May 16, 2005).

<sup>95</sup> ABA Judicial Diversity Database, *supra* note 18.

<sup>96</sup> *Source* Census 2000 EEO Data Tool, *supra* note 81.

<sup>97</sup> *Source* Census 2000, *supra* note 19.

## Mississippi

The Mississippi judiciary consists of the Supreme Court, the courts of appeals, and the trial courts of general jurisdiction. In 1994, the Mississippi legislature enacted a major reform measure called the Nonpartisan Judicial Elections Act. This legislation altered the state's selection model from partisan to nonpartisan elections. Currently, nonpartisan elections are utilized in Mississippi, except for the justice and municipal courts, which are selected through partisan elections and appointments.

From 2001 to 2004, the number of African American judges in Mississippi fell by 50% - going from 20 judges in 2001 to only 10 in 2004 (see Table 6). This significant drop has occurred despite the fact that Mississippi has the largest African American population in the country at 37%. The Table also reveals the alarming statistic that besides African Americans no other judges of color serve on the Mississippi judiciary.

**The table also reveals the alarming statistic that besides African Americans no other judges of color serve on the Mississippi judiciary in the general jurisdiction and appellate and trial court positions.**

Table 6

Mississippi						
	Minority State Judges				% of Minority Lawyers <sup>101</sup>	% of Total Population <sup>102</sup>
	2001 <sup>98</sup>		2004 <sup>99</sup>			
	#	%	#	%	%	%
African American	20	17.8%	10	8.9%	8.3%	37%
Hispanic	0	0%	0	0%	0%	1.4%
Asian American	0	0%	0	0%	0.1%	0.7%
Native American	0	0%	0	0%	0.5%	0.4%
Total <sup>100</sup>	20	17.8%	10	8.9%	8.9%	38.5%

<sup>98</sup> American Judicature Society, *Judicial Selection in the States: Mississippi* (AJS 2003), available at <http://www.ajs.org/js/MS.htm> (last visited May 16, 2005).

<sup>99</sup> ABA Judicial Diversity Database, *supra* note 18.

<sup>100</sup> Figures are based on the total number of authorized judgeships (112) in the state for the general jurisdiction appellate and trial court bench.

<sup>101</sup> Source Census 2000 EEO Data Tool, *supra* note 81.

<sup>102</sup> Source Census 2000, *supra* note 19.

## Conclusion

**T**he CBAC Hearing and this report represent an important initial step in determining, through first hand accounts and independent analysis, the reforms that are needed in each judicial selection model in order to provide real opportunities for minority lawyers to become and remain members of state judiciaries throughout the country.

This report scratches the surface of the myriad of issues that exist as obstacles to achieving a more diverse judiciary such as: systemic racism, campaign finance, homogenous judicial selection committees, and insufficient diversity within law schools. This report highlights the need for more in-depth study to uncover the true racial implications of each selection system. Although there are some empirical studies on the impact of various selection methods on diversity, the literature on the subject remains contradictory and often inconclusive.

The Lawyers' Committee produced this report in recognition of the judiciary's increasing influence and presence in the lives of people of color. We are concerned about recent public resistance to the growing influx of racial and ethnic minorities in this country that has resulted in unwarranted legal initiatives that attempt to limit the rights of minorities. With this landscape in mind, a truly representative legal system is more important now than ever before, especially as it relates to areas such as education, housing, criminal justice, voting, civil liberties, and employment. It is our hope that the recommendations contained in this report will be used to educate advocates, members of the bar, and judges about the ways in which each judicial selection model can be improved to enhance public confidence and respect for the courts.

# Recommendations

**A**lthough much work and study remains to be done on the issue of judicial diversity, the following recommendations provide some guidance on the initial steps that should be taken by various organizations, government bodies, and law schools to create and promote increased judicial diversity.

- 1. Establish judicial diversity as a priority** - The principle of judicial diversity should be embraced as a top priority for all entities involved in the selection process; such as state and local bar associations, judicial nominating commissions, election campaign committees, and state appointing authorities. A meaningful commitment to the use of procedures and processes which advance the creation of a truly representative judiciary should be a key objective of each of these bodies.
- 2. Increase public awareness of the benefits of diversity** - The entire legal profession must assume the responsibility to educate the legislatures and the general public on the vital necessity of increasing diversity in the judiciary. Emphasis should be placed on some of the benefits of diversity such as – the promotion of public confidence and trust in a fair and objective justice system; increased perception of legitimacy to the judicial decision making process; the validation of multi-cultural perspectives and voices; and the establishment of role models for minority youth.
- 3. Continue diversity studies** - The state supreme courts in their administrative supervisory capacity over the state judiciary should conduct diversity studies patterned after the precedent setting 1986 American Bar Association Report on Minorities in the Legal Profession at least every five years to track the number of minority judges in order to detect and redress any barriers in the judicial selection process to increasing judges of color.

These studies should examine and promote ways to overcome the obstacles faced by minorities such as bias, lack of political connectedness, racially polarized voting, and limited campaign resources.

- 4. Increase the pipeline of minority lawyers** - The ABA, the American Association of Law Schools, the Law Schools Admission Council, and the minority bar associations should promote efforts to increase the enrollment of law students of color. These organizations should disseminate more information on judicial career opportunities to expand the pool of qualified minority candidates. In order to demystify the necessary requirements to pursue a career on the judiciary, law schools should offer guidance on the processes involved in becoming a judge.



Law schools, bar associations, and state governmental bodies should invest resources in scholarships, mentoring programs, and academic support activities that encourage positions in the judiciary as a possible career path.

Increased diversity within law firms and in leadership positions in state bar associations should be used as a means to increase the number of eligible potential candidates.

- 5. Utilize broad judicial selection criteria and procedures -** The judicial selection process, whether by appointment or elections, must utilize criteria for selection of judicial nominees from the broadest scope of the legal profession that will effectively produce more judges of color. The selection criteria and procedures should be well publicized and made much more transparent in order to attract diverse candidates. Increased outreach efforts should be made to include more solo practitioners and public interests attorneys in the selection process.
- 6. Include minority bar associations in the selection process –** Leaders of the minority bar associations should be consulted and involved in all aspects of the selection process. The minority bar should be encouraged to groom and promote candidates from within their membership to positions on the judiciary. The selection process should be a collaborative effort between the majority bar association and their minority counterparts.
- 7. Support further study –** As noted in the report, there is a significant void in the data and research available on the topic of judicial diversity. More study is needed on the impact each selection model has on promoting diversity.



1401 New York Avenue, NW, Suite 400  
Washington, DC 20005-2124  
Tel: 202/662-8600  
Fax: 202/783-0875  
[www.lawyerscommittee.org](http://www.lawyerscommittee.org)