

A Diverse Judiciary?

By Hon. Cynthia Diane Stephens



“Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue.”
—Francis Bacon, *Of Judicature*

Citizens, lawyers, scholars, and political officials have debated for centuries the most effective methods for selecting a superior judiciary. Thirty years ago when I wrote for this journal, I suggested the achievement of a diverse judiciary was one of the lenses through which we could achieve the selection of a superior judiciary. While much has changed in the intervening years, I continue to think that diversity of the bench offers significant social value. Diversity invites public confidence in judicial impartiality and fairness, and amplifies our understanding of the law and justice. As Professor Sherrilyn Ifill noted:

First, the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision making....Second, racial diversity on the bench also encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making.¹

National judgeships

The number of African-American and other minority judges at all levels of state court judicial service has increased over time. Based on data compiled from multiple sources enumerating minority and female general jurisdiction and appellate judges, the minority judicial

cadre was at 4 percent in 1970, 11 percent in 1995, and 12 percent at the beginning of this century.² As of 2010, 7 percent of trial judges, 8 percent of intermediate appellate judges, and 9 percent of the judges of courts of last resort were African American, for a total of 769 judges.³

In 2013, the Brennan Center for Justice reported that the total number of African-American male judges, who constitute the majority of all black judges, appeared to be decreasing. As recently as 2014, the president of the Florida Bar sounded the alarm on the gradual decline in the number of African-American judges in his state's judiciary as not only a problem for Florida, but for the entire country.

Michigan judgeships

The absolute number of African-American judges has grown substantially since 1985 with the majority of judges serving in or appointed from Wayne County, where much of the state's 14 percent African-American population resides. As of June 1985, there were eight African-American judges serving at the appellate and circuit court levels: three appellate and five circuit judges. All of these judges were from or serving in Wayne County. This number grew exponentially with the merger of the Detroit Recorder's Court into the Third Circuit in 1996. The State Court

FAST FACTS

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The debate over how best to select jurists has raged since Michigan's entry into the Union. The current process was borne from the 1964 Constitutional Convention; while often challenged, it has not been substantially altered.

Administrative Office provided the raw data in 1985. Subsequent reports are based on self-reporting and the *Directory of Minority Judges of the United States* published by the American Bar Association.

Based on 2001 self-reported data, Michigan was lauded in 2004 as being the only state in which the judicial diversity at the appellate and circuit court levels was commensurate with the African-American population.⁴ The 2008 American Judicature Society census, derived from ABA data, recorded 33 circuit court judges and three appellate court judges in the state. I reviewed the rosters included in Michigan Reports, which list only 31 African-American judges in these categories in 2008—28 circuit court judges and three appellate court judges—with 23 judges in Wayne County Circuit Court, two judges in Oakland County Circuit Court, and one judge each in the circuit courts of Genesee, Saginaw, and Kalamazoo counties. A fourth black appellate judge was appointed in December 2008 but was not included in the database.

The Standing Committee on Judicial Independence/ABA database indicates that as of 2010—the last year for which reporting was done—there were 21 African-American judges on the bench at the circuit and appellate court levels, representing a net loss of 11 judgeships within two years. I reviewed the roster of judges in the 2010 *Michigan Bar Journal* Directory and found 30 black circuit and appellate court judges: 21 judges in Wayne County Circuit Court, two judges in Oakland County Circuit Court, and one judge each in the circuit courts of Saginaw, Genesee, and Kalamazoo counties.

The decline in number of African-American judges serving on the bench, whether by one or 11, is likely to continue given the expected loss of seats in the Third Circuit, the dwindling black law student population, and the recent pattern of gubernatorial appointments. There were six African-American probate court judges and more than 45 African-American district court judges on the bench as of 2010. The African-American judicial population has always been concentrated in Wayne County. At present, the counties of Oakland, Genesee, Ingham, Saginaw, and

Washtenaw also have more than one African-American judge. Other counties with an African-American population of more than 10 percent had either one black judge (Kalamazoo, Kent, Ingham, and Berrien) or none (Muskegon, Luce, Macomb, and Calhoun).

In 1985, the overwhelming majority of black judges came to the bench through election. Again, the great majority were elected from the city of Detroit. The effect of appointment versus election on the current cadre of black judges is not clear. All but one of the black appellate court judges were appointed to office, with one prevailing in a contested race in a district that included Wayne County. Ten of the 22 current African-American circuit court judges came to office through election. Until the 2014 election, all of the black probate court judges came to the bench by way of gubernatorial appointment. An African-American male judge was elected in a contested race in 2014. By comparison, 117 of the 246 Michigan judges serving at the appellate and circuit court levels attained their office through election.

Scholarship

Social scientists and legal scholars have engaged in rigorous inquiry regarding the interplay between judicial selection methods; racial, ethnic, and gender diversification of the bench; public confidence in the judicial process; and overall quality of the judiciary. The space limitation of this article precludes a review of this work.⁵ I cite a few items from the literature:

- There is no clear consensus as to which method of selection results in greater racial or ethnic diversification. Not only are the research methods vastly different, but it is nearly impossible to compare systems between jurisdictions.⁶
- There is no evidence that any one selection method produces a higher quality of judge, whether quality is determined by published citation, publication rates, or misconduct. However, there is evidence

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that the rate and extent of misconduct sanctions against minority judges is disproportionate.⁷

- The research reflects that judicial qualification ratings disadvantage minority and female candidates, in part because of implicit bias. This was also demonstrated in polls from attorneys.⁸
- When judges are selected—whether by appointment or election from a statewide pool—minorities are disadvantaged.⁹
- Data supports a correlation between the political party of the appointing governor and the appointment of minority judges—with Democratic governors appointing at a rate of 14.7 percent and Republican governors appointing 11 percent—regardless of whether the judges themselves would be subject to partisan or nonpartisan election or retention after the appointment.¹⁰

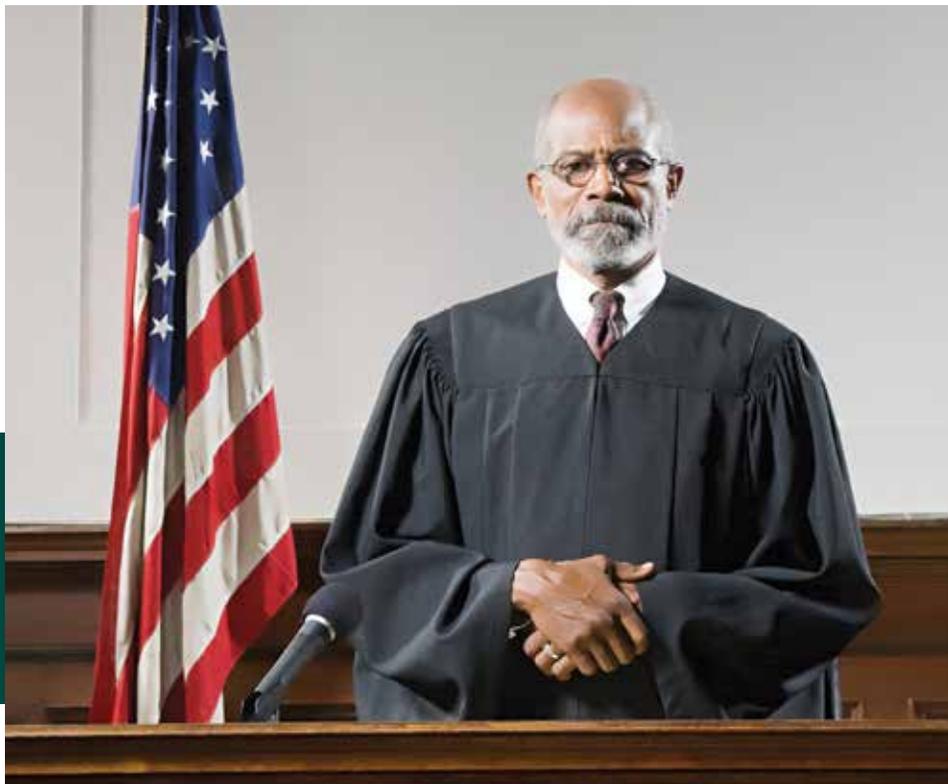
Civic and political activity

Several civic and political occurrences over the last 30 years have affected judicial selection and judicial diversity in Michigan:

- 1986—The Supreme Court Citizens' Commission to Improve Michigan Courts released a report and recommendation to, among other things, address

the fact that more than one-third of all persons surveyed and an overwhelming majority of minorities believed blacks were not treated as well as whites in the Michigan courts despite a reported confidence level of more than 70 percent.

- 1989—The reports of the Supreme Court task forces on race and gender bias in the courts released in 1986 made recommendations to address biases within the court system.
- 1997—The Recorders Court was abolished and its judgeships were transferred to the Third Circuit, expanding its electoral district to Wayne County.
- 1997—The State Bar reviewed the progress on the 1989 task force recommendations and urged additional action.
- 2000–2014—The legislature reduced and redistributed judicial positions.
- 2012—The Michigan Judicial Selection Task Force urged substantial modification of the system for judicial selection including creating an advisory nominating committee for all judicial appointments that would be diverse politically and geographically, seek diverse candidates for office, and have predominantly lay membership. The report also urged gubernatorial appointment of all Supreme Court justices.



The future?

The debate over how best to select jurists has raged since Michigan's entry into the Union. The current process was borne from the 1964 Constitutional Convention; while often challenged, it has not been substantially altered. A "years of practice" qualification has been added, campaign spending has been regulated, and the process for nomination for the Supreme Court has been tweaked. It is possible that the system may be altered by the people or a future legislature.

Regardless of whether the status quo remains or restructuring occurs, we can do better to achieve judicial diversity. I offer a few suggestions for consideration by policymakers who seek to move forward the equally important goals of diversity, integrity, and quality in Michigan's judiciary. These suggestions are derived in part from the scholarly papers and innovative efforts occurring in South Africa described in the film *Courting Justice*.¹¹

- Make every effort to render the process transparent to the public, including broader publication of vacancies and reporting the demographics of the pool of applicants and appointees.
- Create a judicial pipeline that includes programs offering pre-bench training for prospective judicial candidates not dissimilar to masters in legal letters or other post-juris doctorate certificate programs, opportunities to select a concentration in judicial practice while in law school, and aggressive efforts to recruit experienced adjudicators from among the rich ranks of administrative law officers.
- Increase the diversity of vetting, judicial qualifications, and candidate-rating committee members who evaluate applicants for judicial office by appointment or election. Consider which qualities are needed for effective evaluations.
- Increase strategic recruitment. This includes potentially establishing a time-specific pool of qualified candidates and clarifying the application and screening process.
- Develop a tool chest to assist evaluators in recognizing and managing their implicit biases.
- Make diversity an explicit part of the nominating, vetting, and evaluating processes.

- Develop job-related evaluation criteria and model the interview process toward those criteria.
- Review the compensation structure for the judiciary to attract and retain superior candidates.

Recent efforts to modify the judicial selection process are more nuanced than the historic "elect all or appoint all" debates. I dare not prognosticate on whether either the voters or the legislature will amend the Constitution. The suggestions I have offered are applicable under our current modified Missouri Plan and can be used even if all or some of the judicial seats are subject to an appointive process without any form of public vote. We need not wait for the "best" system before we make our state's judiciary better by enriching its diversity and excellence. ■



Michigan Court of Appeals Judge Cynthia Diane Stephens has also served on the 36th District and Third Circuit courts. An Emory Law School graduate, she is a faculty member of the University of Detroit Mercy School of Law. She is a board member of the National Consortium on Race and Ethnic Fairness in the Courts and was awarded the State Bar of Michigan's Roberts P. Hudson Award in 2005.

ENDNOTES

1. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash & Lee L R 405, 410-411 (2000).
2. Reddick, Nelson, & Caulfield, *Racial and Gender Diversity on State Courts: An AJS Study*, 48 Judges' J 28 (Summer 2009).
3. American Bar Association Standing Committee on Judicial Independence, *National Database on Judicial Diversity in State Courts* <<http://apps.americanbar.org/abanet/jd/display/national.cfm>> (accessed April 12, 2015).
4. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 Mich J Race & Law 153 (2004).
5. For a more comprehensive overview, see Myers, *Merit Selection and Diversity on the Bench*, 46 Ind L R 43 (2013).
6. See *id.* at 48, n 42.
7. See Mutua, *Disparity in Judicial Misconduct Cases: Color Blind Diversity*, 23 American Un J Gender Social Policy & Law 23 (2014).
8. See Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, 2 J of Law & Courts 33 (Spring 2014); Spellicy, Chase, & Greenman, *Improving Judicial Diversity* (March 3, 2010) <http://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf> (accessed April 12, 2015).
9. See generally *Racial and Gender Diversity on State Courts: An AJS Study*, 48 Judges' J 28.
10. *Id.* at 3.
11. *Courting Justice*, Ruth B. Cowan & Luna Films (2011).