Hearings before the Coalition of Bar Associations of Color:
State Judicial Selection Methods and Their Impact on Diversity on the Bench

Co-sponsored by
Lawyers' Committee for Civil Rights Under Law *and* Justice at Stake

Testimony of
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May 16, 2003

Thank you very much for inviting me to testify before you today. My name is Deborah Goldberg, and I am the Acting Director of the Democracy Program of the Brennan Center for Justice at NYU School of Law. The Center's Fair Courts Project has been actively involved in research, advocacy, and litigation to promote the impartiality, integrity, and independence of the judiciary, especially at the state level. In particular, we have been involved in studying the rising influence of monied interests in elections for judges of the states' highest courts. In our view, that trend raises – both directly and indirectly – concerns about the prospects for improving diversity on the bench and may even threaten the very modest and hard-won gains that have been achieved over the years.

The increasing sums of money that are being raised and spent in judicial elections may have a direct impact on diversity of the bench for the same reason that the demand for access to wealth – whether one's own or others' – impairs the ability of people of color to win other offices. Because communities of color disproportionately lack access to the resources increasingly required to finance winning campaigns, candidates supported by those communities are at a distinct competitive disadvantage as compared to white candidates. Although other factors may be responsible for the recent unseating of African American appellate court judges in

Alabama and North Carolina, the loss of those seats during a period of rising campaign spending raises concerns about the impact of money.

The increased fundraising by candidates for the bench, combined with high-profile advertizing by special interests in judicial campaigns, may have an indirect impact on diversity as well. Concern about the real and perceived influence of money on judicial decisionmaking is providing new momentum for efforts to eliminate judicial elections and to replace them with some form of appointive system. Whether judicial diversity will be helped or harmed by a movement to non-elective systems is at best unclear. In my view, those who truly care about diversity as a core component of fair and impartial courts need to know more about that impact, and it is on that need for further study that I want to focus my remarks today.

More study is necessary because there are numerous judges of color who persuasively maintain that they could not have obtained their seats but for elections. If these anecdotes accurately reflect opportunities more gennerally afforded to minority judicial apsirants by competing selection systems – and I believe that we do not have the necessary evidence to know whether or not we can generalize from the reports – then eliminating elections may be a *backward* step in promoting impartiality on the bench, notwithstanding the pressure of money on judicial candidates.

More study is necessary also because even proponents of non-elective systems recognize that elections have promoted diversity in jurisdictions that have altered the elective process in response to Voting Rights Act litigation. Because trial court races tend to be less expensive than campaigns for appellate judgeships, especially statewide races for seat on a supreme court, the campaign finance threats at that level are likely not to be serious enough to outweigh the benefits to diversity afforded by elections in those jurisdictions. Opposition to elections appears even in

the absence of financial pressures, however, on the grounds that the smaller districts carved as remedies for voting rights violations leave judges inappropriately vulnerable to political influence. Unfortunately, I know of no case studies or other in-depth follow-up studies of the courts in jurisdictions subject to remedies under the Voting Rights Act that would enable us to evaluate the impact of judicial sub-districting on diversity and independence.

There are, however, some empirical studies of the impact on diversity of various selection systems. But as the authors of the most recent such study admit, the literature on this subject is contradictory. There are studies suggesting that appointive systems that use nominating commissions have a negative impact on diversity, because the commission members tend to be largely white, male, mainstream lawyers. 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 accurate, equally poorly – under both systems.

The conflicting results are not too surprising. Conducting such studies in a methodologically defensible way is notoriously difficult. Judicial selection systems vary enormously, not only from state to state but also sometimes within a single state. Moreover, even in states that hold elections for the bench, many judges are appointed when there are mid-term openings. Indeed, in some nominally elective states, interim appointments are the rule rather than the exception. Calculating the impact of selection systems on diversity may therefore require investigation of how each individual judge ascended to the bench – a daunting undertaking to say the least. And there are other confounding problems with the data analysis that I will turn to shortly.

What I'd like to do now, however, is focus on one of the most recent studies of so-called "merit selection" systems. Under those systems, a commission reviews applicants for judgeships, refers a few names to the appointing executive (such as a governor or mayor), who is typically required to select the judge from among the nominations. The study concludes that "merit selection in practice promotes minority jurists to the bench, although at substantively small marginal rates."

I'd like to focus my remarks on this study precisely because, although it is probably one of the better analyses available – as far as it goes – I am concerned that it may be misused in judicial reform efforts. I am not social scientist, so those with more methodological sophistication may prove me wrong, but I do not believe that it can be cited generally for the proposition I just quoted. In my view, the limitations of the study mean that we really still do not know whether merit selection will adversely impact racial, ethnic, or gender diversity on the bench.

First, the study focuses on only a few select jurisdictions for which data were available. Although the authors evidently sought information about the diversity of the applicant pool, nominees, appointees, and nominating commissions from the commissions in every state that uses "merit selection" to select some or all of its judges, data were collected from only a minority of those states. It is not clear from the study whether the states from which data were not collected simply failed to respond to the request or did not have data to provide. In either case, the limited response raises questions about bias in the study: we do not know whether states that failed to respond or to collect data did so because they were unconcerned about diversity or knew that data collection would demonstrate an embarrassing lack of diversity. It is possible that

inclusion of data about the composition of these various bodies in *all* merit selection states would reveal a different picture altogether.

Second, there were very few findings of statistical significance. In examining the racial and ethnic changes from the applicant pool, to nominees, to appointees, results of statistical significance were found in only one state. There is therefore little basis for generalizing to states not examined.

Third, it is not easy to separate differences in political culture and selection systems when examining the extent of judicial diversity. The very same factors that account for adoption of merit selection systems in the first place may also explain why they help to promote diversity (when they do). States with different political cultures could produce different results if a new selection system were suddenly imposed.

Finally, the study shows that the appointing official is well placed to undo the efforts of a nominating commission that is honestly striving to promote diversity on the bench – unless the commission simply refuses to refer white, male candidates for consideration, and the appointees must be selected from the nominees. I know of no state in which commissions have played that role. There would therefore seem to be a 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.

None of this shows that elections are better for diversity on the bench than merit selection systems. What it shows, it seems, is that we really don't know very much at all about what the impact will be of changes in selection systems in states that currently have judicial elections. Which brings me back to the mantra with which I started: more research is needed to provide a basis for evaluation of selection processes.

My comments today suggest that several types of studies are needed:

- Analyses of the impact of money on diversity of judicial candidates and elected judges;
- Case studies of the impact of sub-districting and other Voting Rights Act remedies for under-representation of people of color on the elective bench;
- Empirical analyses of merit selection systems using more complete data; and
- Political analyses to identify the factors that may contribute to the success of merit selection systems.

I would be eager to discuss with the hearing officers other ideas for empirical studies that should be commissioned. I would also welcome suggestions of scholars who might be encouraged to undertake such research and to present it at an academic conference that the Brennan Center is planning for the winter of 2004.