

MERIT SELECTION AND DIVERSITY ON THE BENCH

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I. MERIT SELECTION AND DIVERSITY DEFINED

Before we examine the relationship between merit selection and diversity on the bench, it will be useful to define those terms. When we say “merit selection,” there is a basic working definition; when a vacancy occurs on the bench, a non-partisan nominating commission evaluates applicants for the position.¹ The commission recommends a list of nominees, and an “appointing authority (usually the governor)” appoints someone from the list to fill the seat.²

Beyond that basic template, nearly every state that uses merit selection has developed its own specific form of implementation. Judicial selection is one area in which the foundational idea of the states as laboratories of governance—trying out different approaches to policy and regulation—has really taken root. For example, nearly every state has its own particular way of selecting the people who serve on nominating commissions.³ Some states require that the governor’s appointees to the bench be confirmed by one (or both) chambers of the state legislature.⁴ In some states, commission rules advise nominating commissioners to consider the diversity of the judiciary when selecting nominees. In other states, enabling legislation suggests (or requires) officials charged with appointing the nominating commissioners to consider the diversity of the commission itself when making their appointments commissioners.⁵

Indiana falls pretty squarely into this working definition for filling its

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1. *FAQ—Frequently Asked Questions*, AM. JUDICATURE SOC’Y, http://www.ajs.org/selection/jnc/jnc_faq.asp (last visited Nov. 14, 2012) [hereinafter *FAQ*]; see also *Methods of Judicial Selection*, AM. JUDICATURE SOC’Y (2012), http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm.?state.

2. *FAQ*, *supra* note 1.

3. *Methods of Judicial Selection*, *supra* note 1.

4. See Rachel Paine Caufield, *Inside Merit Selection: A National Survey of Judicial Nominating Commissions*, AM. JUDICATURE SOC’Y 17 (2012), http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_116092850316.pdf.

5. See, e.g., R.I. GEN. LAWS § 8-16.1-2(a)(3) (1994); ALASKA JUD. COUNS., art. III, § 2 (2012).

appellate court and trial court vacancies in some counties.⁶ The rest of Indiana's trial court judges are elected in partisan elections.⁷ This kind of selection system, which uses merit selection for appellate courts and elections for trial courts, is fairly common among what are regularly thought of as "merit selection states."⁸ The variety of judicial selection methods, both across and within states,⁹ makes studying the relationship between merit selection and diversity on the bench a real challenge.

The word "diversity" has a fairly common working definition as well. A "diverse" judiciary reflects the demographic characteristics of the population it serves, in terms of gender, race and ethnicity, religious faith and non-faith, sexual orientation, etc.¹⁰ However, diversity also means something a bit different depending on the state. Again, only some states have rules that encourage diversity in the selection of either nominating commissioners or judges.¹¹ The characteristics emphasized in these rules most often include gender and race or ethnicity, but there is often consideration given to other factors, like geographic and political diversity.¹²

Some states, such as Indiana, put restrictions on how many commissioners can be members of any one political party.¹³ In Iowa, state law specifically mandates that "[n]o more than a simple majority of the members appointed [by the Governor] shall be of the same gender."¹⁴ Commissioners chosen by the bar "alternate between women and men elected members."¹⁵ In Indiana, geographic diversity is ensured among commissioners on the Commission on Judicial Qualifications, which functions as the Judicial Nominating Commission for the Indiana Supreme Court, the Court of Appeals, and the Tax Court.¹⁶

6. See IND. CODE ANN. § 33-27-3 (West 2012).

7. *Judicial Selection in the States: Indiana*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=IN (last visited Nov. 14, 2012).

8. *Progression of Judicial Merit Selection in the United States*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/uploads/documents/Merit_Selection_Progression_PDF_1F7A8597AE14E.pdf (last visited Nov. 15, 2012).

9. See *Judicial Selection in the States: Appellate and General Jurisdiction Courts Initial Selection, Retention, and Term Length*, AM. JUDICATURE SOC'Y (2012), http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_1196092850316.pdf.

10. See FRANCIS E. ROURKE, BUREAUCRATIC POWER IN NATIONAL POLITICS 396 (3d ed. 1978).

11. See, e.g., R.I. GEN. LAWS ANN. § 8-16-1-2(a)(3) (West 2012) (encouraging "racial, ethnic, and gender diversity within the commission").

12. *Methods of Judicial Selection*, *supra* note 1 (listing Florida, Iowa, Rhode Island, and Tennessee as examples of states that have rules requiring diversity considerations in commission appointments).

13. See, e.g., IND. CODE ANN. § 33-33-45-28(c)(6) (West 2012) (discussing the selection of commission members in Lake County, Indiana).

14. IOWA CODE ANN. § 46.1 (West 2012).

15. *Id.* § 46.2.

16. See IND. CODE ANN. § 33-27-2-2(a) (West 2012).

Commissioners are appointed from districts that correspond with the judicial districts of the courts of appeal.¹⁷ The governor appoints one non-attorney citizen of Indiana as a commissioner from each district,¹⁸ and the attorneys who reside in each district elect a commissioner.¹⁹

The American Judicature Society (“AJS”) publishes *Model Judicial Selection Provisions*, which offers a best practices guide of the methods that work best for creating and implementing a judicial merit selection system.²⁰ The most recent edition of the *Provisions*, revised in 2008, contains the following recommended language for creating and staffing a demographically representative nominating commission:

Appointments and elections to the commission[s] shall be made with due consideration to geographic representation and to ensure that no more than a simple majority of commissioners are of the same political party. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity).²¹

II. THE BENEFITS OF A DIVERSE JUDICIARY

Why diversity is something we should aspire to attain is a question not always considered closely enough. For those of us who are inclined to agree that it is beneficial, a diverse judiciary, which reflects the experiences of the people it serves, seems like an obvious and unquestionable good. Fortunately, there is a growing body of research looking at the benefits of a diverse judiciary.²² Various studies and surveys suggest the following:

- “[A] judiciary that is representative of the population’s diversity increases public confidence in the courts.”²³
- “[A] diverse bench provides decision-making power to formerly disenfranchised populations.”²⁴
- Nontraditional judges tend to include ““traditionally excluded perspectives””

17. *Id.*

18. *Id.* § 33-27-2-1(a).

19. *Id.* §§ 33-27-2-2(a)-(c).

20. AM. JUDICATURE SOC’Y, MODEL JUDICIAL SELECTION PROVISIONS (rev. 2008), available at http://www.ajs.org/selection/docs/MJSP_web.pdf.

21. *Id.* at 2 (alteration in original) (quoting § .02, Judicial Nominating Commission).

22. *See infra* notes 23-26 and accompanying text.

23. Malia Reddick et al., *Examining Diversity on State Courts: How Does the Judicial Selection Environment Advance—and Inhibit—Judicial Diversity?*, AM. JUDICATURE SOC’Y 1 (2008) (citing GARY S. BROWN, CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES 1992-1997 (1998)), available at http://www.judicialselection.us/uploads/documents/Examining_Diversity_on_State_Courts_2CA4D9DF458DD.pdf.

24. *Id.* (citing Nicholas O. Alozie, *Black Representation on State Judiciaries*, 4 SOC. SCI. Q. 69, 979-986 (1988) [hereinafter Alozie, *Black Representation*]).

in their decision-making, “and their presence enhances the appearance of impartiality for [both] litigants . . . and for the public at large.”²⁵

- Finally, a 2008 study published by the Brennan Center for Justice “assert[s] that diversity on the bench is vital for the judiciary to provide equal justice for all.”²⁶

Public confidence, impartiality (both in appearance and practice), inclusivity, and equality are all qualities that any responsible judiciary should strive for, and the value of diversity as an enhancement of those qualities makes it a goal worthy of aspiration.

III. DIVERSITY IN STATE COURTS

Overall, state court judges are still overwhelmingly white and male. Table 1 compares the percentage of women and minorities in the national population with the percentage of state judges in those demographic categories. In 2010, data collected in the American Bench Gender Ratio Summary showed that there were 17,108 judges serving on the state courts.²⁷ Of that total, 4521, or 26.4%, were women.²⁸ U.S. Census data for that same year showed that 50.8% of the national population was female.²⁹ Also in 2010, the American Bar Association updated its data on minority judges, reporting that 54% of the “judges of color currently serving on state courts” are African American, followed by Hispanic Americans who comprise 25% of this group.³⁰ Of the 17,108 judges reported by the American Bench³¹ judges serving in state courts, 1436, or 8.4%, were people

25. *Id.* (quoting Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 49 (2008) [hereinafter Hurwitz & Lanier, *Diversity in State and Federal Appellate Courts*]).

26. *Id.* (citing CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 4 (2d ed. 2010)), available at http://brennan.3cdn.net/31e6c0fa3c2e920910_ppm6ibehe.pdf.

27. THE AMERICAN BENCH: JUDGES OF THE NATION GENDER RATIO SUMMARY: TOTALS BY COURT LEVEL JURISDICTION (20th ed. 2009) [hereinafter THE AMERICAN BENCH].

28. The American Bench reported the total number of judges, and the number of female judges, serving on the following courts: state-level final appellate jurisdiction courts, state-level intermediate appellate jurisdiction courts, state-level general jurisdiction courts, and state-level limited and special jurisdiction courts. Totals for all state courts, and percentage of female judges serving, were obtained by adding the category totals together and dividing the total number of female judges by the total number of all judges. *See id.*

29. U.S. CENSUS BUREAU, *Profile of General Population and Housing Characteristics: 2010*, AM. FACTFINDER 2 (May 24, 2011), <http://www.stats.indiana.edu/c2010/dp1/FactfinderINandUS.pdf> [hereinafter U.S. CENSUS BUREAU].

30. *See National Database on Judicial Diversity in State Courts*, A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, <http://apps.americanbar.org/abanet/jd/display/national.cfm#1> (last visited Nov. 16, 2012) [hereinafter A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE].

31. THE AMERICAN BENCH, *supra* note 27.

of color.³² By contrast, the U.S. Census Bureau reported that approximately 27.6% of the national population was non-white.³³ Clearly, there is some progress to be made if we want to create a judiciary that reflects the population it serves.³⁴

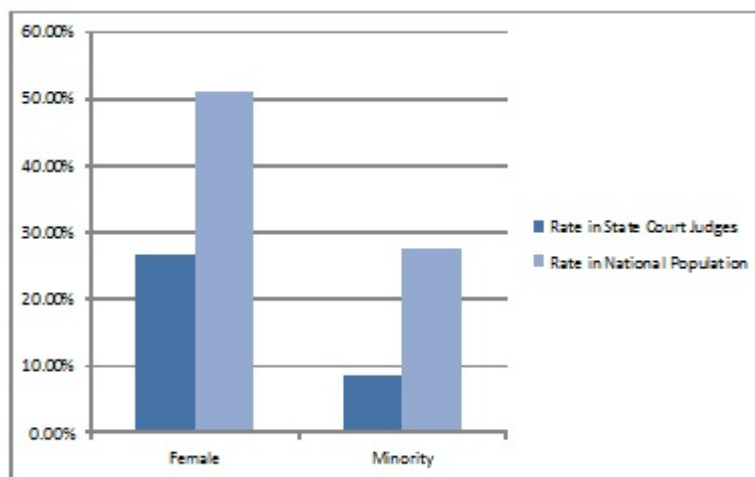


Table 1

IV. JUDICIAL SELECTION AND DIVERSITY

The relationship between methods of judicial selection and diversity in the judiciary is incredibly complex, and there are a number of variables that make it very difficult to identify a clear relationship between the two. It is also an incredibly challenging question to study. The judicial selection system is, for all intents and purposes, unique in each state.³⁵ Both across and within states, different methods are used to select (1) appellate judges and trial judges; (2) statewide and local judges; (3) candidates who are eligible for initial terms; (4) judges who are eligible for retention; (5) judges to fill seats at the end of a

32. The Standing Committee on Judicial Independence, National Database on Judicial Diversity in State Courts reports the total number of judges in five racial/ethnic categories serving on state courts nationally. The percentage was calculated by dividing this number by the total number of serving states judges reported by The American Bench. *See THE AMERICAN BENCH, supra* note 27.

33. U.S. CENSUS BUREAU, *supra* note 29, at 2 (GEO: United States) (reporting that 72.4% of the national population is white).

34. Racial demographic data is challenging to analyze and report, in part because individuals can self-identify in multiple categories. For the sake of simplicity, the racial data used herein is taken from 2010 U.S. Census information concerning individuals who identified in a single racial category.

35. *Methods of Judicial Selection, supra* note 1.

regular term; and (6) judges to fill interim vacancies on the bench.³⁶ In some states, like in Indiana, the selection method differs by county.³⁷

Even when comparing states that use the same method to select judges for a particular type of court, there are other variables to consider. Among states that use merit selection to fill seats on their courts of last resort, some states require legislative confirmation of a final nominee, but many do not.³⁸ A minority of states have written rules emphasizing diversity as an important consideration.³⁹ The priorities of the nominating commissioners, and ultimately of the appointing authority (which is usually the governor) also play a role.⁴⁰ Finally, the demographic characteristics of the state in question, and of that state's bar and existing judiciary, appear to have some influence on the diversity of nominees selected by nominating commissions.⁴¹

Trying to sort out all those different variables is difficult, to say the least. As a result, the scholarship on judicial selection has had a difficult time coming to any kind of consensus as to the influence of merit selection on the diversity of the bench.⁴²

V. MERIT SELECTION AND DIVERSITY

We know that merit selection is at least as good as judicial elections at promoting diversity on the bench. There seems to be some indication that minority judges are selected slightly more often under merit selection systems. By contrast, states that elect judges tend to select a slightly higher percentage of women.⁴³ Neither system is clearly superior to the other.

Existing studies have produced vastly different results about the effects of judicial selection systems regarding gender and racial diversity in state courts.

36. *Id.*

37. *See Methods of Judicial Selection: Indiana*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=IN (last visited Nov. 17, 2012) (discussing the role of *local* judicial nominating commissions in the selection of county court judges).

38. *Methods of Judicial Selection*, *supra* note 1 (listing, among other states, Delaware, Iowa, New York, and Utah as states requiring legislative approval of the appointment).

39. *See id.*

40. *See FAQ*, *supra* note 1 (stating that common commissioner priorities include "the fundamental goal of ensuring that applicants are assessed on their knowledge of the law, their experience, their demeanor, and their ability to be fair and impartial judges").

41. *See generally* Lynette Labinger, *A Response from the Field: One Practitioner's View*, 15 ROGER WILLIAMS U. L. REV. 755 (2010) (discussing the need for changes in state statutes in order to increase the applicant pool of judicial candidates).

42. *See* Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 73 (2007).

43. *See* Malia Reddick et al., AM. JUDICATURE SOC'Y, *Racial and Gender Diversity on State Courts*, 48 JUDGES J. 28, 28 (2009).

Some have found that appointive systems advance judicial diversity.⁴⁴ For example, a 1985 study of women and minorities on courts in all fifty states concluded that “[t]he success of women and minorities in achieving judicial office depends in large measure upon the method of selection,” and found appointive systems more effective than elective systems at creating a diverse bench.⁴⁵ A 2002 study found that appointment processes tended to favor African-American candidates of both genders.⁴⁶ Another report the same year showed that appointive systems provided greater gender diversity to formerly all-male courts, but the report noted that the effect does not seem to hold when the court being studied is already diversified.⁴⁷ A 2006 study tracked with that conclusion, showing that interim appointments frequently function to diversify all-white or all-male benches.⁴⁸

Other studies have produced the opposite result. A study of New York City judges from 1992 to 1997 found that the city’s “elective systems produced more minority and women jurists than appointive systems.”⁴⁹

Still, other studies have found no link between selection systems and diversity. A series of three studies, published between 1988 and 1996, concluded that judicial selection systems, by themselves, could not account for ethnic or racial diversity on the state bench.⁵⁰ Another series of three studies in 2001, 2003, and 2008 also concluded that the method of selection does not have a substantial effect on judicial diversity.⁵¹

AJS has contributed to recent research in this field with two significant projects. In 1999, AJS gathered demographic data from ten states that use nominating commissions in their judicial selection process.⁵² The study looked

44. See generally M.L. HENRY, *THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS* (1985).

45. *Id.* at 65.

46. Elaine Martin & Barry Pyle, *Gender and the Racial Diversification of State Supreme Courts*, 24 *WOMEN & POL.* 35, 35-52 (2002).

47. Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 *SOC. SCI. Q.* 504, 514 (2002).

48. Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 *JUST. SYS. J.* 1, 10-11 (2006).

49. Reddick et al., *supra* note 23, at 1 (citing BROWN, *supra* note 23).

50. See Nicholas O. Alozie, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*, 77 *SOC. SCI. Q.* 110, 122-24 (1996); see also Alozie, *Black Representation*, *supra* note 24, at 984-85; Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selections Methods*, 71 *SOC. SCI. Q.* 315, 321 (1990).

51. Hurwitz & Lanier, *Diversity in State and Federal Appellate Courts*, *supra* note 25, at 67; Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, *ST. POL. & POL'Y Q.* 329, 345-46 (2003); Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 *JUDICATURE* 84, 92 (2001).

52. Kevin M. Esterling & Seth S. Andersen, *DIVERSITY AND THE MERIT SELECTION PROCESS:*

at the demographic composition of the possible pool of applicants, lists of nominees recommended for appointment, and eventual appointees, as well as the demographic composition of the state bars and the nominating commissions themselves.⁵³

Based on this data, the AJS study was able to draw several conclusions. “[M]erit selection commissions [generally] tend to *affirmatively select minority applicants as nominees for judicial vacancies*.”⁵⁴ Specific governors, however, vary quite a bit in their inclination to choose minority applicants for appointment.⁵⁵ Nominating commissioners and appointing authorities tend to select female candidates in proportion to the percentage of women in the applicant pool.⁵⁶ There also seemed to be evidence that, when nominating commissions themselves are more representative, they attract more diverse applicant pools and produce more diverse lists of nominees.⁵⁷

AJS revisited the topic again in 2008 with a study that did three important things, which, to that point, had not really been done. First, rather than looking at a few jurisdictions, or focusing on a particular level of the judiciary, this study examined “courts of last resort, intermediate appellate courts,” and general jurisdiction trial courts in all fifty states.⁵⁸

Second, studies up to that point made generalizations about the selection method in each state.⁵⁹ Previous studies tended to assume that judges in a particular state, or in a particular court, were selected using the most frequent method.⁶⁰ The 2008 study was the first to look at “the actual method of selection for each judge in [the] dataset.”⁶¹

Finally, this study was the first to look at each judge on an individual level, to try to measure the influence of institutional, political, and contextual characteristics of the states in which they served, the courts on which they sat, the ideology of the actors involved in their selection, and the environment in which they were selected.⁶² The study examined each state’s factors in each state, including the geographic basis of selection, minimum qualification requirements, the political environment, and the demographics of the pool of attorneys eligible to apply to see how those factors might influence diversity in ways that went beyond simply the method of selection.⁶³

A STATISTICAL REPORT, AM. JUDICATURE SOC’Y 6 (1999), available at http://www.judicialselection.us/uploads/documents/diversity_and_the_judicial_merit_se_9C4863118945B.pdf.

53. *Id.* at 7.

54. *Id.* at 6.

55. *Id.* at 7.

56. *Id.*

57. *See id.* at 11.

58. Reddick et al., *supra* note 23, at 2.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 2-5.

The results are complex, but the takeaway message is that minority and female judges are no more or less likely to reach the bench through merit selection or judicial elections.⁶⁴ For minority judges, the most important factors seemed to be the percentage of minorities in the pool of eligible nominees and, to some extent, the political environment of the state.⁶⁵ For women judges, the important factors varied quite a bit depending on the level of court in question.⁶⁶

So again, the picture is complicated. There seems to be some indication that minority judges are selected slightly more often under merit selection systems, and women are selected slightly more in states that elect judges, but neither system is clearly better than the other.

VI. JUDICIAL NOMINATING COMMISSIONS AND DIVERSITY

From the perspective of those who believe in the value of a diverse and representative judiciary, merit selection offers one significant advantage over judicial elections: merit selection provides the opportunity to identify diversity as an institutional priority.⁶⁷ States can include the consideration of judicial diversity in statutes that govern commission appointments and the selection of nominees to the bench.⁶⁸ Commissions themselves often have significant discretion to create or modify their own rules.⁶⁹ In the absence of statutory guidance, many commissions could choose to make diversity a priority in the procedures they create and apply.⁷⁰

AJS recently published a report called *Inside Merit Selection: A National Survey of Judicial Nominating Commissioners*.⁷¹ With 487 respondents from thirty states and the District of Columbia, it is the largest survey of nominating commissioners ever conducted.⁷² AJS surveyed the commissioners anonymously, and they shared very candid answers about the ways their commissions function, their opinions about the processes involved, the relationships between lawyer, non-lawyer and judge members, and their priorities when it comes to selecting the judges that they nominate for the bench.⁷³

Many of the results were extremely encouraging. They seem to suggest that, by and large, nominating commissions are functional, responsible, and professional.⁷⁴ They are becoming more systematic; commissions are more likely

64. *Id.* at 7.

65. *Id.* at 6.

66. *Id.*

67. *See* Caufield, *supra* note 4, at 19.

68. *Id.* at 18.

69. *Id.* at 19.

70. *See id.* at 19-20.

71. *Id.* at 3.

72. *Id.* at 9.

73. *Id.* at 9-10.

74. *Id.* at 54-55.

than they were in the past to have written rules and formal procedures.⁷⁵ Almost across the board, respondents reported that they work together well, with no significant friction between lawyer and non-lawyer members.⁷⁶ Commissioners report that lawyer and lay members respect each other, and neither group holds an inappropriate sway over the process or the final selection of nominees.⁷⁷ The commissioners also report that, as a whole, they see themselves as an appropriate check on the appointive power of their governors and that they choose nominees without the intention of either helping or hurting their governors' political priorities.⁷⁸ Crucially, these answers did not vary significantly among lawyer and non-lawyer members.

As noted earlier, there is some evidence that diverse nominating commissions produce more diverse lists of nominees for judicial vacancies.⁷⁹ On that score, the results of *Inside Merit Selection* suggest that things might be improving.⁸⁰

Over time, more women have been appointed as Commissioners: 32% of all respondents were women, up from 10% in 1973 and 25% in 1989. The numbers of African American and Hispanic Commissioners are also growing, though the change appears to be happening very slowly. The percentage of White commissioners has gradually declined, from 98% in 1973 to 93% in 1989 to 88.9% in 2011, as the percent of Commissioners who identify as African American (4.2%), Asian or Pacific Islander (1.6%) and American Indian (.5%) seem to be inching upward. The percentage of Commissioners who identify as being of Hispanic, Latino, or Spanish origin appears to have leveled off at their 1989 levels.⁸¹

There seems to be significant room for improvement in the priorities of the commissioners who serve on the nominating commissions. One set of questions on the survey focused on what qualities the commissioners prioritize when considering nominees.⁸² Commissioners consistently ranked professional qualification and mental fitness of an applicant as the qualities they thought were most crucial for a nominee.⁸³ Also consistently, they ranked political affiliation and party membership among the least important qualities.⁸⁴

The results show, however, perhaps surprisingly, that commissioners do not consider diversity on the bench as a priority when choosing nominees.⁸⁵ They

75. *Id.* at 20.

76. *Id.* at 50.

77. *Id.* at 50-51.

78. *Id.* at 39-40.

79. *See* Esterling & Andersen, *supra* note 52, at 11.

80. Caufield, *supra* note 4, at 8, 18.

81. *Id.* at 18.

82. *Id.* at 28-29.

83. *Id.*

84. *Id.*

85. *Id.* at 29-30.

consistently ranked it among the lowest of their priorities when deciding who to nominate.⁸⁶ This suggests that the effect of more diverse commissions on the diversity of the bench is largely the result of individual decisions by commissioners who are simply more open to the qualifications of diverse candidates rather than the result of an affirmative commitment to diversity. Including diversity considerations in the formal process for selecting commissioners and judges might encourage those tendencies. In a follow up study on diversity in merit selection states, AJS hopes to compare states that have diversity guidelines with those that do not, to see if they actually have an effect on the diversity of the bench.

VII. DIVERSITY ON THE BENCH IN INDIANA

The diversity of the bench in Indiana also shows significant room for improvement. At the state level, staffing the nominating commissions from the three appeals court districts ensures a geographic distribution of commission members and is Indiana's only formal requirement for diversity, for either commissioners or nominees to the bench.⁸⁷ Diversity by any other measure is left up to the discretion of the commissioners when they decide whom to nominate, and this diversity ultimately is left up to the governor when he or she makes an appointment.⁸⁸

Formal rules do not require the state or county commissions to consider the diversity of the judiciary when choosing the nominees they send to the governor for appointment.⁸⁹ There may be informal conventions, but again, the results from *Inside Merit Selection* suggest that, in the absence of a formal requirement, the commissioners themselves are not likely making diversity a priority when choosing nominees.

Table 2 compares the percentage of women and minorities in Indiana's population with the percentage of Indiana judges in those demographic categories. In 2010, 20.7% of the judges on the bench in Indiana were women,⁹⁰ while the state's overall population was 50.8% female.⁹¹ Seven percent of Indiana's judges were people of color,⁹² while the non-white population of the state was 15.7%.⁹³

86. *Id.*

87. IND. CODE ANN. § 33-27-2-1 (West 2012).

88. *But see id.* §§ 33-33-45-28(b)(1)-(3), (c)(3)-(5) (requiring the makeup of two of the four attorney and two of the four non-attorney members of the Lake County Nomination Commission to be female and that one of each of the four be a minority). “‘Minority’ means an individual identified as black or Hispanic.” *Id.* § 21-13-1-6.

89. *See* IND. CODE ANN. § 33-27-3-2 (West 2012).

90. THE AMERICAN BENCH, *supra* note 27.

91. U.S. CENSUS BUREAU, *supra* note 29.

92. A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 30.

93. U.S. CENSUS BUREAU, *supra* note 29.

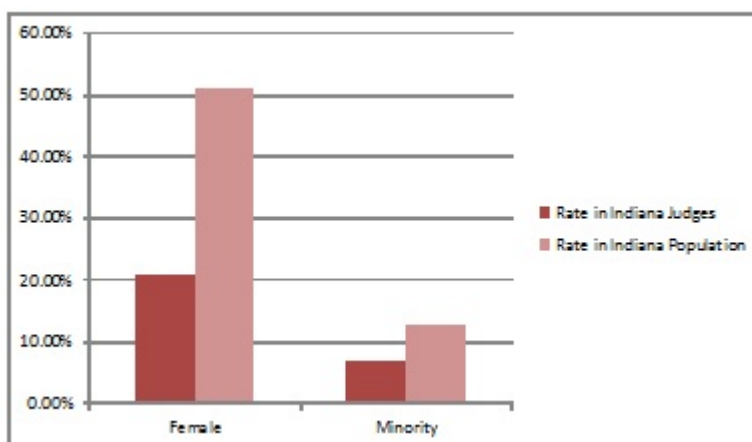


Table 2

Table 3 contrasts the rate of female and minority judges, both nationally and in Indiana, with the rates in the overall population from which those judges are drawn.⁹⁴ Nationally, the rate of female judges was 52% of their percentage in the population;⁹⁵ it was closer to 41% in Indiana.⁹⁶ Nationally, the rate of minority judges was 30% of their percentage in the general population.⁹⁷ In Indiana it was close to 44%.⁹⁸ Thus, compared to the national average, women are well-represented in Indiana's courts, but minority judges are better represented.

94. These figures were calculated by taking the percentages of women and minorities in the population of state judges (both nationally and in Indiana), calculated for Tables 1 and 2, and dividing those rates by the percentages of women and minorities in the corresponding populations (nationally and Indiana). They are intended to provide a means for a rough comparison between the representation of women and minorities on the bench nationally, and in Indiana specifically.

95. See THE AMERICAN BENCH, *supra* note 27; see also U.S. CENSUS BUREAU, *supra* note 29.

96. See THE AMERICAN BENCH, *supra* note 27; see also U.S. CENSUS BUREAU, *supra* note 29.

97. See A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 30; see also U.S. CENSUS BUREAU, *supra* note 29.

98. See A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, *supra* note 30; see also U.S. CENSUS BUREAU, *supra* note 29.

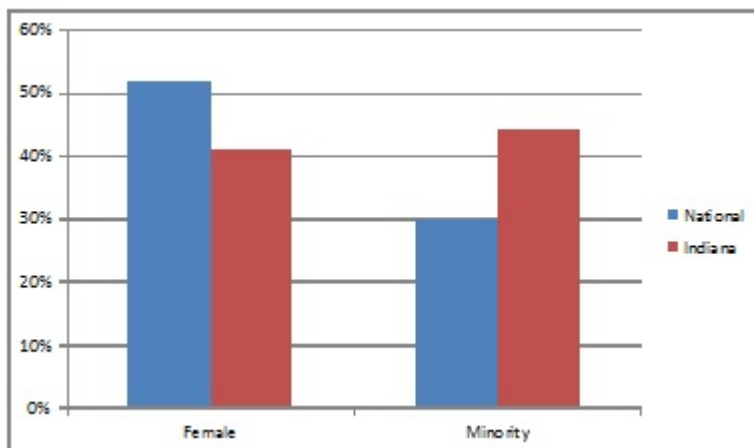


Table 3

As previously noted, Indiana's Commission on Judicial Qualifications/Judicial Nominating Commission has no statutory guidelines for including diversity as a consideration when choosing candidates to nominate to the bench.⁹⁹ In fact, the statewide commission's application form used for judicial vacancies does not ask any demographic questions, so it is exceedingly difficult to take any measure of the racial and ethnic diversity of either applicants or nominees.¹⁰⁰

More information about gender is available.¹⁰¹ Since 1985, there have been eight vacancies on the Indiana Supreme Court.¹⁰² The Commission on Judicial Qualifications/Judicial Nominating Commission sends a list of three nominees to the governor for each vacancy.¹⁰³ The commission has nominated fifteen men and eight women, including one, Judge Betty Barteau, who was nominated twice.¹⁰⁴ Of those eight women, only one, Justice Myra Selby, was appointed to

99. See IND. CODE ANN. § 33-27-3-2 (West 2012).

100. See *Application for the Indiana Supreme Court*, IND. JUDICIAL NOMINATING COMM'N, available at <http://www.in.gov/judiciary/jud-qual/files/jud-qual-sc-108-application.doc> (last visited Nov. 15, 2012).

101. Sincere thanks to Adrienne L. Meiring, Counsel to the Division of State Court Administration, for providing data on the members of the Commission on Judicial Qualifications/Judicial Nominating Commission and nominees to the Indiana Supreme Court.

102. See JUSTICES OF THE INDIANA SUPREME COURT 395-430 (Linda C. Gugin & James E. St. Clair eds., 2010).

103. IND. CODE ANN. § 33-27-3-1(c) (West 2012).

104. E-mail from Adrienne L. Meiring, Counsel, Ind. Comm'n on Judicial Qualifications/Ind. Judicial Nominating Commission, to author (Mar. 19, 2012, 2:56 PM) (on file with author).

the court.¹⁰⁵ When Justice Selby took the bench in 1994, she was the 103rd justice to serve on the court, and both the first woman and the first African-American to sit there.¹⁰⁶ She was also appointed from the only completely female slate of nominees ever submitted by the commission.¹⁰⁷ Since she retired from the court in 1999, no female justices have served on the court.¹⁰⁸ Currently, Indiana, Iowa, and Idaho¹⁰⁹ are the only states with no women as members of their courts of last resort.¹¹⁰

VIII. DIVERSITY OF NOMINATING COMMISSIONERS

Given the evidence suggesting that diversity among nominating commissioners has a positive influence on diversity of the judiciary, we should consider the diversity of the Commission on Judicial Qualifications/Judicial Nomination Commissions. Again, the use of districts to select commissioners ensures geographic diversity, but no other factors are formally considered in terms of ensuring diversity among the commissioners.¹¹¹ The Commission was created by an amendment to the Indiana Constitution in 1970 and began operation in 1972.¹¹² The first woman was appointed to the Commission in 1985.¹¹³

A total of sixty-six people have served on the Commission, in slates of seven. There are three attorney commissioners, three citizen commissioners, and the Commission is chaired by the current Chief Justice of the Indiana Supreme Court. Of the sixty-six commissioners who have served, thirteen, or 19.7%, have been women. More than two female commissioners have never served at a time. Records of the race or ethnicity of commissioners are not kept.¹¹⁴

CONCLUSION

While the relationship between judicial selection and diversity on the bench

105. JUSTICES OF THE INDIANA SUPREME COURT, *supra* note 102, at 413.

106. *Id.*

107. See E-mail, *supra* note 104.

108. See JUSTICES OF THE INDIANA SUPREME COURT, *supra* note 102, at 417-30.

109. See *Diversity of the Bench*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm (last visited Nov. 15, 2012).

110. This Article is based on a presentation that was given on April 5, 2012. On September 14, 2012, Governor Mitch Daniels appointed Tippecanoe County Judge Loretta Rush to fill the seat vacated by the retirement of Justice Frank Sullivan. Upon her swearing in, Rush will become the second woman to serve on the Indiana Supreme Court.

111. See IND. CONST. art. 7, §§ 9-10 (amended 1970); IND. CODE ANN. 33-27-3-2 (West 2012); see also *About the Commissions*, COURTS.IN.GOV, <http://www.in.gov/judiciary/jud-qual/2380.htm> (last visited Nov. 17, 2012).

112. See E-mail, *supra* note 104.

113. The first woman was nominated for a vacancy on the Indiana Supreme Court in 1986. See *id.*

114. See *id.*

is complicated, there exists an opportunity to improve merit selection systems to encourage judicial diversity. Affirmatively striving to diversify nominating commissions seems likely to assist in the creation of a more diverse and representative bench. Placing an institutional value on creating a judiciary that reflects the people it serves will hopefully encourage those commissioners to consider the value of diversity more explicitly when selecting nominees. Given the substantial institutional benefits that research suggests are conferred by diversity in the judiciary, attempting to improve merit selection systems in these ways seems both reasonable and useful.