



**Testimony of**  
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at

**Public Forum: A Lasting Blueprint for Judicial Diversity**

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I want to begin by thanking Sen. Malcolm Smith for the invitation to appear before you to discuss this very important subject. It will take some time to recover from the shameful record of the past administration, which systematically eliminated diversity from the appellate bench. The trial courts, too, are not nearly as diverse as they should be. I am pleased to see that New York is now devoting attention to this issue. I hope these hearings produce meaningful change.

**The Importance of Judicial Diversity**

The speakers who have testified today and at the two previous forums have generally assumed that that judicial diversity is important, but the reasons for diversifying the bench are sometimes understated. All too often, in my view, the justification for diversity is presented in terms of the need for role models or for promoting public confidence in the administration of justice. Although these interests deserve recognition, they are largely symbolic, and they are not the principal reason that the Center so deeply cares about diversity on the bench. In our view, there is enormous substantive value in diversity; it improves the quality of judging and the legitimacy of judgments. Diversity is necessary if courts are to deliver fair and impartial justice.

To understand this point, it may be helpful to focus a minute on juries, rather than judges. We all recognize the need for jurors who are representative of the full diversity of their jurisdiction. Without such representation, we expect bias from the jury, or at least we lose confidence that the jury will be fair. I'd like to suggest that the reasons we believe that diversity promotes fairness on juries also apply to diversity on the bench.

Thinking about juries helps to illuminate why a judiciary that is representative of the full diversity of this state is not only consistent with, but absolutely essential to, unbiased decision-making. We protect the equal right to jury service because we know that jurors of different races and genders bring different perspectives to deliberations. No one familiar with *To Kill a Mockingbird* thinks the outcome of the deliberations would have been the same if the community forced to watch the trial from the balcony had instead been permitted in the jury box. Including jurors of every race—instead of systematically favoring only one—makes it more likely that the full range of relevant considerations will be identified and debated before the jury reaches a conclusion. Forcing members of the jury to confront diverse perspectives, to have unthinking

assumptions questioned, to assert reasons rather than prejudices, and to build consensus from difference increases the likelihood, we believe, that the outcome of deliberations will be fair.

The same is true of judicial decision-making. We believe deliberations and their outcomes improve when more voices are included. We create dialogue between trial courts and appellate courts, and within panels of judges; we publish decisions, establish precedents, and expect judges deciding new cases to engage seriously with the reasoning and conclusions accepted by others—all to increase the likelihood of well-reasoned and persuasive decisions. Likewise, we need judges that bring to the adjudicative process the various perspectives of the communities from which they come to enhance the quality of decision-making and the quality of jurisprudence that emerges from individual decisions. If what we want are fair and impartial courts, we must to the extent possible eliminate opportunities for unchallenged prejudice or untested assumptions.

Of course, the symbolic value and the substantive value of judicial diversity are closely intertwined. The reason that communities of color have lost confidence in the courts is because the absence of diversity produces biased outcomes—just as lily white juries produce biased outcomes. When decision-making is actually impartial, when judicial thinking is not dominated by a single, privileged perspective, faith in the courts can be expected to grow.

What this means for those selecting judges is that judicial diversity should be regarded as a touchstone. We cannot secure a truly top-notch judiciary without also securing meaningful diversity on the bench. Characteristics such as intelligence, legal experience, and temperament are important only because they help to ensure the delivery of equal justice. But those qualities are not enough, and exclusive attention to them will produce a second-rate judiciary. If we care about the preservation of constitutional rights, our judges must represent the diverse perspectives of our pluralist society, and we must choose them to ensure they can perform that function.

### **Achieving a Diverse Judiciary**

As a matter of principle, judicial diversity is important at all levels. As a matter of practice, judicial diversity at the appellate levels will be difficult to achieve in New York without diverse trial courts. After all, Appellate Division justices are drawn from a pool of Supreme Court justices, and the Appellate Division is a pipeline for Court of Appeals nominees. If the lower courts are not diverse, diversity at higher levels will be possible only by appointing nominees without judicial experience. New Yorkers should not have to make the trade-off.

Here in New York, all of the selection systems used for courts of all levels fail to achieve adequate diversity. At the Supreme Court level, we have elections in name, and appointments in practice. When county party leaders care about diversity, they ensure judicial diversity in their county, although current levels even in New York City still do not reflect the diversity of the population. When diversity is not a priority for the county leader, people of color cannot reach the Supreme Court bench. The story is similar at the appellate level: Under current appointive systems—*de facto* or *de jure*—levels of diversity are only as high as the appointer allows.

What can be done to address these structural barriers to diversity? We do not fully know the answer to that question, but with our current base of information, we can say the following.

At the Supreme Court level, the current system of selection by party leaders should be replaced immediately with procedures that are both constitutional and calculated to promote diversity. The designating conventions used for nomination to statewide office provide one model; direct primaries are another. But in either case, if we are serious about promoting diversity, we should be reducing judicial district size, to reduce the dilution of voting power in communities of color and to reduce the cost of running for office. Where there is a history of expensive contested elections, public funding also is essential to guarantee candidates with low-income supporters an opportunity to compete.

I understand that the Governor plans to promote a constitutional amendment authorizing commission-based appointment of Supreme Court justices. Legislators and voters asked to approve such an amendment should demand probative evidence that such a change will not harm and is likely to improve diversity on the bench. Given the record of the last administration, people concerned about securing a diverse judiciary will be entitled to regard the move with skepticism, unless safeguards that do not now exist for the appellate appointment process are established for both trial and appellate court appointments in the authorizing legislation.

Those safeguards could be introduced immediately at the appellate levels, where much more can be done to promote diversity. The current executive order governing the selection of judges states that members of Judicial Screening Committees “shall not give any consideration to the age, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or political party affiliation of the candidate.” This is the wrong approach. The members should be directed not to discriminate against individuals on any of these bases, but affirmative consideration of these characteristics in the interest of ensuring a diverse bench is not merely appropriate but desirable. To be blunt, the Committee members—especially the “‘establishment’ attorneys,” who tend to dominate such Committees—must be encouraged to think more broadly about the characteristics that constitute so-called “merit.” Criteria that build in a preference for lawyers with Ivy League training and experience in prestigious law firms—or other qualifications that favor conservative, white males—will create a judiciary incapable of fulfilling the judicial role.

To make this point concrete, let me retell the story of one African-American judge’s experience interviewing with a nominating commission in another state. The commission members repeatedly asked him questions about his background in securities litigation, which was at that time (and to a large extent still is) an area of the law almost devoid of practitioners of color. Experience with securities litigation is hardly the *sine qua non* of competence for the bench, even in federal court, as the admirable performance of former civil rights lawyers such as Thurgood Marshall, Robert Carter, and Constance Baker Motley demonstrates. The questions may not have been intended to preserve judicial appointments for white “establishment” attorneys, but that is how the queries were interpreted, and their discriminatory impact would have been completely predictable. The judge was not recommended for appointment; he ultimately obtained his seat via election.

Stories like this show that Screening Committees need to subject their selection criteria to critical review to guard against unconscious biases that can undermine efforts to secure a diverse bench.

If ostensibly neutral standards consistently produce nominees overwhelmingly of a single race, class, gender, and sexual orientation, alarms should go off. Moreover, the ability of gays and lesbians, people of color, and women to bring perspectives to legal decision-making that straight, white men are not typically capable of supplying should count among the criteria for selection to ensure diversity in the nominee pool.

In addition, the Committees should be held responsible for active outreach to attorneys with varied legal experience. It cannot be enough for mainstream attorneys to solicit applications from the few women and people of color who have broken the glass ceiling at their law firms and corporations. To provide meaningful diversity, talented candidates can and must be identified among legal services providers, public defenders, public interest lawyers, and other attorneys who serve poor communities and communities of color.

To enforce these requirements, there must be far more transparency than is currently provided in the process of selecting both Committee members and nominees for appointment. There should be a public report on the methods used to secure a diverse membership on each Committee, because empirical studies show that diversity on screening panels significantly improves the likelihood of diversity among judicial nominees. A substantial number of non-lawyers should be included on each Committee. There also should be a public report on the outreach conducted by the Committee to obtain a diverse pool of prospective judges. Moreover, the public should receive a full demographic analysis of the applications and selections of both Committee members and judicial nominees (to the extent possible without invading the privacy of the individuals involved). Finally, there should be an opportunity for public comment on the lists of both proposed Committee members and proposed judicial nominees, before the final members or nominees are chosen, and there should be an opportunity for comment on the final selections as well.

In sum, the creation and operation of Judicial Screening Committees need more serious attention if they are to promote diversity on the bench. The selection of Committee members must be transparent and open to public comment. The Committee members should abide by formal and public judicial candidate recruitment policies, use explicit and fully disclosed evaluative criteria that recognize the importance of diverse perspectives on the bench, establish mechanisms for review of bias complaints, keep records of efforts to diversify both the applicant and the nominee pools, and periodically assess the success of their procedures in a public report after public comment periods.

### **Beyond Judicial Diversity**

Finally, promoting diversity means more than elevating people of color, women, and gays and lesbians to the bench. Achieving meaningful diversification requires elimination of discriminatory attitudes and practices that impair the delivery of justice and deny equal access to the benefits of our judicial system. Our concern for diversity should extend to the justice system in its entirety, including the litigants, jurors, court personnel, lawyers, court appointees, and members of the public who serve and are served by the courts.