

JUDICIAL SELECTION
IN VIRGINIA:

THE ABSENCE OF
BLACK JUDGES

A Report of the
Virginia State Advisory Committee
to the United States Commission
on Civil Rights
prepared for the information and
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ATtribution: The findings and recommendations contained in this report are those of the Virginia State Advisory Committee to the U. S. Commission on Civil Rights and, as such, are not attributable to the Commission.

This report has been prepared by the State Advisory Committee for submission to the Commission, and will be considered by the Commission in formulating its recommendations to the President and the Congress.

Prior to the publication of a report, State Advisory Committees afford any individuals or organizations that may be defamed, degraded, or incriminated by any material contained in the report an opportunity to respond in writing to such material. All responses received in timely fashion are incorporated, appended to, or otherwise reflected in the publication.

PREFACE

The United States Commission on Civil Rights

The United States Commission on Civil Rights, created by the Civil Rights Act of 1957, is an independent, bipartisan agency of the executive branch of the Federal Government. By the terms of the Act, as amended, the Commission is charged with the following duties pertaining to denials of the equal protection of the laws based on race, color, sex, religion, or national origin: investigations of individual discriminatory denials of the right to vote; study of legal developments with respect to denials of the equal protection of the law; appraisal of the laws and policies of the United States with respect to denials of equal protection of the law; maintenance of a national clearinghouse for information respecting denials of equal protection of the law; and investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

The State Advisory Committee

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 states and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 as amended. The Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters in which the Commission shall request the assistance of the State Committee; and attend, as observers, any open hearing or conference which the Commission may hold within the State.

Recommendations to the United States Commission on Civil Rights

This report has been prepared for submission to the U. S. Commission on Civil Rights by the Virginia State Advisory Committee. The conclusions and recommendations in this report are those of the Advisory Committee and are based upon the Committee's evaluation of information received as a result of research and investigations undertaken through June 1973. This report has been received by the Commission and will be considered by it in making its report and recommendations to the President and the Congress.

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INTRODUCTION

The increasing concern over the absence of black judges in Virginia has prompted the Virginia State Advisory Committee to the U. S. Commission on Civil Rights to examine the process by which Virginia's judges are selected.

Most of the information in this study was obtained from practicing lawyers and concerned citizens who have observed courtroom proceedings. Civil rights groups have alleged that many judges in Virginia are biased against blacks who appear before the court. It is also alleged by both black and white lawyers, as well as laymen, that there is frequent disparity in the sentences given to blacks and whites convicted of comparable crimes. Still another charge is that many judges are disrespectful of black persons who come before the court, including black lawyers.

There are approximately 335 district and circuit court judges in Virginia. Not one is black. Of approximately 235 substitute judges, six are black.

The population of Virginia is 4,648,494. The black population is 861,368, more than 18 percent of the total. It was estimated by lawyers interviewed by the Advisory Committee that in some localities in Virginia (e.g. Richmond) approximately 80 percent of the persons appearing before the criminal courts are black.

In the city of Richmond, the black population is 45 percent of the total. Of approximately 500 people employed in the courts two percent are black, and they hold primarily custodial positions. Since district court judges have the ultimate responsibility for hiring court personnel,

these figures further reflect the impact that the selection of judges has on a community.

Circuit judges also have considerable power in their counties. For example, they are authorized to appoint the electoral board, the game warden, and the school board. Many persons interviewed in the course of this study expressed the belief that there is a courthouse "inner circle" which is hard to penetrate, even by the most competent outsiders.

Standards of judicial behavior and methods of selecting judges have long been subjects of debate among both jurists and laymen. Generally, however, the public becomes aroused only when blatant acts of judicial malfeasance or impropriety are brought to its attention. Judges undoubtedly have a status in American society which commands more respect and awe than perhaps any other public office. They also wield tremendous power in their routine exercise of judgment. According to the Task Force Report on the Courts prepared for the President's Commission on Law Enforcement and Administration of Justice:

The quality of justice depends in large measure on the quality of judges. Good judges are essential for settling all types of legal controversies, whether the issue involves the custody of a child, the interpretation of a private business agreement or a will, or the power of the government to enforce a regulatory statute.

Many decisions of police, prosecutors and defense counsel are determined by the trial judges' rulings, by his sentencing practices, and even by the speed with which he disposes of cases. And to a great degree the public's impression of justice is shaped by the trial judge's demeanor and the dignity he imparts to the proceedings in his courtroom.

Since all judges, especially appellate judges, enunciate rules and principles which govern future cases, the report emphasized the necessity for judges to have wisdom and sensitivity to both the problems of law enforcement and of society in general.

In many jurisdictions, a trial judge's sentence, if it is within statutory limits, cannot be adjusted by an appellate court regardless of how harsh or arbitrary it may be. Although many defendants appear before the judge to enter a guilty plea (often the result of negotiations with the prosecutor), the judge's influence is still substantial since such negotiated pleas are based largely upon expectations of the result if the case were brought to trial.

Unfortunately, there is very little training available for most lawyers appointed to the bench. It is not unusual for a judge to be appointed to a court of law in which he has had no prior experience. A survey by the Institute of Judicial Administration revealed that only 12 percent of the judges in the United States had received any formal training or orientation when they assumed office.

The judiciary, in general, holds a place outside the scope of normal public supervision and oversight. Many jurists believe that this autonomy is necessary to maintain an independent judiciary, and that independence is necessary to keep the judiciary free from partisan political pressures. It is also important that judges have such qualities as patience, sensitivity, and character as well as legal expertise, and that the judiciary be sensitive to and understand the social problems of society. The Advisory Committee believes that the judiciary should be a part of the society and responsive to its changes.

It is because of the need for judges to be responsible and responsive that the Committee takes the position that it is important that there be black judges, especially in areas of substantial black population. An all-white judiciary raises serious questions about discrimination in judicial appointments.

Following is a description of Virginia's court structure and the procedure for selecting judges.

THE COURT STRUCTURE OF VIRGINIA

The Virginia Constitution provides for a Supreme Court and the establishment of other courts by the General Assembly. The General Assembly has established two kinds of courts: Circuit Courts, or courts of record, and District Courts, or courts not of record (in which transcripts of proceedings are not made). Local courts of limited jurisdiction, called police courts, have been abolished or are being phased out.

The Supreme Court, the highest State court, has seven justices, but the General Assembly has the power to increase the number up to 11. Though it acts primarily as an appellate court, it has original or trial-type jurisdiction in some cases.

There are 30 circuits and 100 circuit court judges. The circuit courts are trial courts of general jurisdiction which hear all but the most minor civil cases. They have general criminal jurisdiction with the exception of some misdemeanors and offenses against county or local laws.

District courts are more numerous and have much less legal authority than circuit courts. Previously known as county and municipal courts, the circuit courts are organized into 31 districts and include the general district courts and the juvenile and domestic relations district courts. There are approximately 235 full-time and part-time district judges.

Circuit courts handle appeals from district court decisions. Almost any case, civil or criminal, may be appealed to the local circuit court,

which then holds a new trial, this time making a complete record of the proceedings. The circuit court also has the general power to issue writs or orders to the district courts in appropriate cases.

THE PROCEDURE FOR SELECTING JUDGES

Supreme Court

The justices of the Virginia Supreme Court are chosen by majority vote of both houses of the General Assembly, and serve a term of 12 years.

Circuit Courts

Judges for the circuit courts are also chosen by majority vote of both houses of the General Assembly, but they serve a shorter, 8-year term. The statute does not describe the process for nominating circuit court judges. If a circuit court judgeship becomes vacant while the General Assembly is not in session, the Governor may appoint a person to fill the vacancy until 30 days after the General Assembly convenes. The General Assembly then elects either the Governor's appointee or another to serve the full term. Ordinarily, the General Assembly simply elects the person appointed by the Governor.

A circuit court judge must be a resident of the State and the area served by the circuit court, and a member of the Virginia bar for five years. Apart from these, there are no other qualifications required by statute. Circuit court judges are restricted from practicing law or holding any other elective office or position of public trust.

District Courts

Full-time district court judges are chosen by majority vote of the General Assembly. They serve 6-year terms. The judges of the circuit court, having jurisdiction over the district, nominate a "panel" of no more than three persons for each vacancy. No minimum number is specified. The General Assembly may elect one of these persons to fill the vacancy,

although the law establishing this procedure, which became effective in July 1973, does not require the General Assembly to elect any of those nominated. The General Assembly apparently could elect someone of its own choosing.

When the General Assembly is not in session, the judges of the circuit court in the area may appoint full-time district court judges who serve until 30 days after the General Assembly begins its session.

In addition to full-time judges, some district courts also have part-time judges and substitute judges. Part-time judges are appointed by the judges of the circuit court having jurisdiction over the district. They serve 4-year terms. A substitute judge is appointed by the chief judge of the circuit court to serve the same term as the judge for whom he substitutes.

Under the 1973 law, nearly all district court judges' terms will expire in 1980. After 1980 all district court judges will serve full terms; there will be no part-time judges.

District judges now must be members of the State bar and, with certain exceptions, must live in the district. Judges in many of the present district courts were not required to be attorneys when they became judges. They will be continued in office until their present terms expire.

The 1973 law requires that the Committee on District Courts, consisting of six members of the General Assembly and three judges, determine the necessary number of district court judges. No vacancy may be filled until the Committee first investigates and certifies that filling the vacancy is necessary.

Judicial Inquiry and Review Commission

To remove any judge, the State Constitution requires, and the General Assembly has established, a Judicial Inquiry and Review Commission made up of judges, attorneys, and members of the public. The Commission has the authority to investigate charges which could be cause for removal, censure, or retirement. Proceedings before the Commission are confidential. If the Commission finds the charges well-founded, it may file a complaint with the Supreme Court which may then hold a public hearing and take appropriate action.

According to a study by the League of Women Voters, the Commission meets monthly, or more often if complaints should warrant it. The Commission chairman informed the League that most complaints deal with dissatisfaction with verdicts rather than the competency of judges. Complaint forms may be obtained from any Commission member. The Commission interviews witnesses and gathers information, as would any investigative body.

The Judicial Inquiry and Review Commission is an important tool in light of the allegations of racism made against judges in Virginia. However, few people are aware of its existence and if it is to become an effective instrument, more publicity should be given to it.

OTHER METHODS OF JUDICIAL SELECTION

Five procedures for selecting judges in the United States include: 1) executive appointment; 2) partisan popular election; 3) non-partisan popular election; 4) election by the legislature; and 5) non-partisan citizen's commission.

1) Executive Appointment. The Governor (or another designated State executive) appoints judges as vacancies occur. The executive usually has access to both confidential and public information concerning the qualifications of candidates. However, there is a temptation to treat appointments as political rewards.

Under this method, racial balance in the courts depends on the proclivities of the executive. Citizen pressure to appoint minority judges, if effectively mobilized, may have an impact.

2) Partisan Popular Elections. Judges are nominated by a political party and appear on the ballot as candidates of that party. Party affiliation rather than judicial competence may then become the measure for selection. One of the dangers is that, after election, the judge may be tempted to use his judicial powers to repay his political party.

3) Non-Partisan Popular Elections. Under this procedure, the campaigning judge himself must convince the public. There is no political party or legislature to accept the responsibility for his qualifications or lack thereof. However, pressure groups, rather than political parties may then be the force to select or remove judges.

A judicial candidate must have funds or the backing of one or more interest groups to obtain the necessary public exposure. Candidates with the greatest financial support generally are not minority candidates.

4) Election by the Legislature. This method is also political. Votes are often cast by legislators on the basis of party affiliation or political debt. If members of the legislature are sensitive to the needs of their constituents, and the selection of judges is an important issue to the voters, this procedure can be an equitable one.

Under this method, minority candidates may be chosen if the legislature feels that it would be politically feasible. In Virginia, the General Assembly obtains names for nomination for circuit judgeships from the local bar associations in the State. Many have never submitted the name of a black lawyer for nomination.

5) Non-Partisan Citizen's Commission (the Merit Plan). A non-partisan commission makes nominations for judgeships, and the Governor must select judges from this list. The commission is composed of lay members appointed by the Governor and lawyers either elected or appointed by the bar associations.

The commission reviews the appointments after a short probationary period to determine if the judges should remain in office, and makes a further review at the end of each judge's term of office.

Despite the "non-partisan" label, a flaw in this method is that executive appointment of commission members may result in political pressure to nominate certain candidates. Ideally, if the selection panel is comprised of representative persons in the community, representative nominations will also be submitted. Certainly a judge who has demonstrated racism in the courtroom would not be re-appointed.

Several organizations in Virginia have advocated the non-partisan citizen's commission. The League of Women Voters' System of Justice Study Kit states:

The Attorney General [of Virginia] is supporting the establishment of a non-partisan nominating commission made up of both lawyers and laymen that would act as an impartial review panel with the authority to screen candidates for judicial office.

The Virginia Bar Association voted in June 1972, to recommend a non-partisan nominating commission and will probably be submitting a bill to the 1973 legislature to implement it. And nation-wide, the American Judicial Society and the American Bar Association also endorse the non-partisan nominating commission as the first part of their preferred merit selection plan.

The study also points out that one of the requirements of the merit plan -- the non-partisan election -- would be very difficult to institute in Virginia since it would require constitutional change. However, the establishment of a commission would require only a statutory change. Legislation was introduced in the Senate late in the 1972 session to establish such a commission, but died in committee.

FINDINGS AND CONCLUSIONS

Having reviewed the procedures for selecting judges in Virginia and elsewhere, based on the literature and the statutes, the Virginia State Advisory Committee questioned lawyers and legislators as to how the selection process actually works in Virginia.

Nominations for the Supreme Court are made by the Virginia Bar Association. Nominations for courts of record are submitted by local bar associations. In Richmond, for example, when a vacancy occurs in a court of record the Richmond Bar Association nominates a candidate and submits the name to the General Assembly. If the Assembly is not in session the names is submitted to the Governor. Until April 1972, the General Assembly met once every two years. It now meets annually.

Prior to nominations, election campaigns are held within the local bar association. There are no criteria for nomination, nor are there specific qualifications for becoming a member of the Richmond Bar Association. A Virginia lawyer need only complete the application and be endorsed by three members.

It was alleged that the Richmond Bar is controlled by attorneys associated with Richmond's largest and most prestigious firms and that they nominate one who "has paid his dues, can be influenced if necessary, or whom they want out of the way for competitive reasons." A judge with no experience in criminal law may be appointed to a criminal court. This procedure may also eliminate potentially good judges who have no desire to enter a "popularity contest."

The choice of the local bar association is submitted to the Governor or to the General Assembly for confirmation. To date, no name submitted has been rejected by the legislature.

A black lawyer ran for a nomination in Richmond in 1971, but was defeated. He received almost 45 percent of the vote, and several persons cited this as an example of a qualified black lawyer who could have been appointed. It was the opinion of others that he lost because he was a Democrat and the incumbent Republican Governor wanted a Republican. It was also alleged that the close defeat was staged so it would appear that he had a chance and that the Richmond Bar was not biased against blacks.

Close observers of the selection process claimed that the judicial system is inextricably a part of the larger scheme of Virginia politics. The General Assembly, with 40 Senators and 100 members of the House of Delegates, has one black Senator and one black member of the House of Delegates.

A frequent allegation is that there are no black judges because no "qualified" black lawyers are willing to leave lucrative practices to take a judgeship. Black lawyers, however, pointed out that law practice is not particularly profitable for black lawyers and there would be great prestige associated with being Virginia's first black judge. They also felt that the "qualifications" argument was inherently racist.

The views of officials of the Old Dominion Bar Association and the Richmond Bar Association were solicited by the Advisory Committee.

The Old Dominion Bar Association is the black bar association in Virginia. Its president, James Sheffield, said that in Richmond, which has about 20 black lawyers, any one of them seeking nomination would obviously need substantial support from white lawyers.

The Old Dominion Bar Association has endorsed black lawyers as judicial candidates and has publicly charged racial discrimination in the nomination and election of Virginia's judges. Former Governor Linwood Holton promised to appoint a black lawyer as judge, and it was reported on May 13, 1972, in the Richmond Afro-American that, in a meeting with black organizations and lawyers, the Governor indicated he was considering a black attorney for the State Supreme Court seat to be vacated, but no appointment was made.

Hunter Martin, Secretary of the Richmond Bar Association, said that he felt that the present selection procedure generally produced good judges, and that the recent Virginia court reforms would improve the system. He agreed that "to some extent, it's a popularity contest," but he did not feel that politics dominated, or that discrimination was a factor in the absence of black judges. He told the Advisory Committee that, "a competent colored lawyer has just as good a chance as any other", and that the more competent black lawyers were just not interested in running.

Asked his opinion of a merit selection system or citizens' review board, Mr. Martin replied that the average citizen was not qualified to select judges, and that dissatisfied persons should go to their legislators if they have complaints. All appointments are ultimately political, he concluded.

The behavior of some incumbent white judges, however, is of major concern to the Advisory Committee. It has been charged that some judges are disrespectful toward blacks in their courtrooms, that they do not use courtesy titles and may even use racial epithets. Several other groups have expressed this concern including the American Civil Liberties Union and the Virginia Council on Human Relations, both of which have instituted court-watching programs.

The League of Women Voters in Virginia in its system of justice study has reviewed the entire legal system of the Commonwealth of Virginia, including the selection of judges. Ellen Gale, Chairwoman of the study, informed the Advisory Committee that at one time 90 percent of the judges were interim appointments by the Governor, given joint approval by the General Assembly. Mrs. Gale said she felt that there has been improvement as a result of the new legislation and more frequent meetings of the General Assembly. The Court of Justice Committees of the House and Senate now have access to the files of the judicial review board before voting on the selection of an incumbent judge.

The League, according to Mrs. Gale, favors the establishment of a citizen nominating commission, similar to that of the merit plan, for the screening of applicants. Mrs. Gale observed that it was difficult to pinpoint racial discrimination from the League's research, but it was evident that there were inconsistencies in the judicial system in Virginia.

Concerned Citizens for Justice in Virginia, an organization which evolved from a 1972 citizen's conference on the courts, has about 300 members. Representatives were invited by the Court of Justice Committee of the House to appear as resource persons when it was considering the

recently enacted court reorganization bills. Concerned Citizens also supports the merit plan with non-lawyers on the selection panel.

The Virginia State Advisory Committee to the U. S. Commission on Civil Rights concludes that the absence of black judges in Virginia is a direct result of past and present discrimination, and the lack of commitment to eliminating those discriminatory barriers by bar associations, the Governor, and the General Assembly. Consequently, the Advisory Committee seriously doubts that justice in Virginia is being administered impartially and without regard to race. The absence of blacks in any capacity in Virginia's courts raises a serious question about the impartiality of the judicial system.

This question is reinforced by the frequent allegations made to the Committee of racism of presiding judges, disparity in sentencing and in setting bail between blacks and whites, the use of racial epithets and the refusal to use courtesy titles when addressing blacks in the courtroom.

RECOMMENDATIONS

The Virginia State Advisory Committee to the U. S. Commission on Civil Rights, having reviewed the judicial selection process in Virginia, does not believe it is inherently discriminatory. However, the manner in which the process is administered has resulted in an all-white judiciary and little effort has been made to rectify the situation.

The Committee therefore offers the following recommendations toward improving Virginia's judicial system:

1. That, at the present time, high priority be given by bar associations, the General Assembly, and the Governor to the nomination and appointment of black judges.
2. That Virginia establish a non-partisan citizen's commission composed of lawyers and non-lawyers to nominate qualified candidates for judgeships. The Governor or the General Assembly would then make appointments from these candidates. The Commission should be representative of the citizens of the Commonwealth.
3. That the Commonwealth of Virginia, as well as local bar associations and concerned community groups, effectively publicize the existence and function of the Judicial Inquiry and Review Commission. Citizens should be informed that if they have complaints against judges, the Constitution has provided for the creation of a body to investigate those charges and take appropriate action.

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