Panel 4: The Future of Voting Rights Litigation: Judicial and Community College Board Elections

Comments by Joaquin G. Avila†

Today I will address the standards that are involved in potential judicial challenges and the standards that are involved in challenges to community college districts. I will also outline what I believe the basic litigation strategy will be for California during the 1990s and perhaps beyond the year 2000.

The Voting Rights Act,¹ is in my opinion probably the most important civil rights statute that has ever been enacted by Congress. The Voting Rights Act provides Latino and other minority communities with a very meaningful opportunity to participate in the political process by providing a tool by which to challenge discriminatory election systems in federal court. We can also bring suits in state court, but most of the litigation is in federal court.

The standards which have been developed to date are somewhat artificial standards but nevertheless they are standards developed by the federal court to which we try to adhere. The first standards developed by the U.S. Supreme Court interpreting Section 2 of the Voting Rights Act were set forth in Thornburg v. Gingles.² You may have already been exposed to the three threshold criteria earlier, but basically the first criterion is geographical compactness; the second criterion, minority political cohesiveness; and the third criterion is Anglo bloc voting. If you are able to meet those three criteria affecting whether a given election system has a discriminatory purpose or effect, then you go on to examine other factors that have been listed by the Senate reports and the legislative history accompanying the Voting Rights Act.

There exist a panoply of factors to examine ranging from historical discrimination affecting the right to vote, racially polarized voting, structural barriers, candidate slating groups, the extent of minority political success to the socio-economic differences between the various communi-

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ties. Those are the legal standards that we, as litigators and community members, must meet in order to effectively cross the threshold to get the federal court to invalidate a given election structure. In California, it has only been recently that those principles were extended to judicial districts. In the South those kinds of cases have been with us for a much longer period of time, for several years.

The Department of Justice, in their administrative interpretation of another provision of the Voting Rights Act, has also been evaluating the impact of election systems on judicial courts, in terms of how they elect state court judges. We have a case in California that has been filed under the special provisions of Section 5 of the Voting Rights Act. Basically, Section 5 requires that any jurisdiction that is covered under the section, (there are four counties in California) must first secure approval, either by the United States Attorney General or by the United States District Court for the District of Columbia before they can change their electoral procedures. The counties have to secure approval and they have the burden of proof. They must show the absence of a discriminatory purpose or the absence of a discriminatory effect. If they do not meet either of those two criteria, the particular election change does not get approved. If the election change does not get approved a letter of objection issues, the equivalent of a federal court order.

In sharp contrast, with litigation under Section 2, the burden of proof is on the minority litigant. They have the affirmative obligation to demonstrate that a given election system has a discriminatory purpose or has a discriminatory effect. Thus, Section 5 litigation, which has only recently been utilized in California, was a very effective tool in Texas and in Arizona in eliminating discriminatory election systems and eliminating election systems that were adopted pursuant to discriminatory purposes. However, in California we are about ten years behind in voting rights litigation from that which was initiated in Texas. There are reasons for this.

One was the fact that the Mexican-American Legal Defense and Educational Fund (MALDEF), where I was in 1974, initiated an action against the City of San Fernando challenging the at-large election system. It was, in many respects, very similar to the landmark decision in the Watsonville case. There was a 50 percent Spanish origin population, and Latinos who had run for office had not been successful. We were able to demonstrate racially polarized voting, but the court never felt that we showed or came close to showing that the system was being maintained pursuant to a discriminatory purpose. We were not able to meet that burden. The court granted summary judgment, which we appealed to the Ninth Circuit. In affirming the decision, Justice Kennedy wrote a concurring opinion which set the standards for future at large
election challenges. Those standards were just so difficult to meet that it effectively foreclosed any additional at-large election challenge in the Ninth Circuit, which covers nine Western states.

During the same time period, in Texas you had the Fourteenth Amendment which was being interpreted a little bit differently by the Fifth Circuit. The Fifth Circuit was applying close to a discriminatory effect standard in challenges involving voting rights issues, whereas in the Ninth Circuit the standard was closer to discriminatory intent. Cases in the Fifth Circuit were very successful because we did not have to demonstrate the existence of a discriminatory purpose. The evidentiary burden, the hurdles, were not as high as those imposed by the Ninth Circuit, so MALDEF and other organizations such as the Southwest Voter Registration Project, and Texas Rural Legal Aid, were able to establish a string of victories in Texas based on the Fourteenth Amendment, and on Section 5 of the Voting Rights Act. Any time a covered jurisdiction sought to adopt a discriminatory election system it had to be reviewed by the Department of Justice. From the redistricting that occurred in 1980, as a result of the 1980 Census, we had a large number of letters of objection that were issued by the Department of Justice. These are some reasons there was not more voting rights litigation in California in the '70s and early '80s.

It was not until 1982, when there was an amendment to the Voting Rights Act, that the first case was initiated against the City of Watsonville. The City of Watsonville litigation was not just happenstance. It was as a result of very careful evaluation of many jurisdictions across the state and that minority members in that community also sought to challenge the at-large election structure. In the city of Watsonville the Latino community had sought election nine times. Nine times they lost. They were able to demonstrate racially polarized voting. They lost the case because the court imposed an additional standard, but they were successful in getting reversed on appeal. This is the context in which we find ourselves now in California in terms of judicial elections.

The judicial election presents a special problem because not everyone can run for judicial office. It is restricted to people who qualify for judgeship. The question is whether a judgeship is an elected office or a judicial position. One of the primary difficulties that we have had to overcome in the Voting Rights Act area is to demonstrate that these are elected positions as opposed to being just judicial positions. Therefore, if they are elected positions they are subject to the requirements of the Voting Rights Act. How can we combine the two and not introduce politics into the judicial arena? My point is that if you want to take politics out

of judicial elections, make them an appointive body. Because if they are elective bodies they are subject, just like any other elective office, to the requirements of the Voting Rights Act.

Presently in California, because many municipal court judges and Superior Court judges are elected pursuant to an at-large election system, they are very vulnerable to potential Section 2 litigation. Before initiating any potential Section 2 litigation, careful investigations should be done to make sure that the geographical compactness requirement and the racial polarization requirement have been met. I anticipate that both complications will be brought into the Los Angeles area, Los Angeles County area, and the Fresno area. We brought one in Monterey based on Section 5, not Section 2. I anticipate that is a harbinger of what is going to happen in the future. We are going to see more challenges to judicial elections across the state.

Turning to community colleges—there are a little over one hundred community college districts in the state. Close to ninety percent of them are elected pursuant to an at-large election system. The at-large election system is perhaps one of the primary obstacles preventing minorities from effective political participation in local elections. The second biggest obstacle in terms of the Latino community is the citizenship requirement. I believe that by the late 1990s there will be a need for a constitutional amendment to eliminate the citizenship requirement for voting. I think that once this major obstacle is removed and at-large election systems are removed, you are going to see very significant increases in Latino political mobilization. We saw it in Watsonville and we saw it in Salinas.

In Watsonville, as a result of the first district elections, Latino voter participation in the model areas tripled. It tripled in comparison to the participation in the at-large election system. In Salinas, after the lawsuit was settled and they adopted a districting system, Latino voter participation in the area tripled. So that provides, in my opinion, some very clear evidence that there is a reason people do not vote. It is not because they are apathetic, it is not because they are lazy, it is not because of their genetic make-up. One reason they do not vote is that you have a discriminatory election structure. In Watsonville that was very vividly illustrated by the testimony that was presented by a plaintiff. The Latino community had run both male and female candidates, business people, educators, community activists, Mexican-Americans, and Puerto Ricans. They all lost, and they lost because of racially polarized voting. Racially polarized voting is not something that just happens in a very isolated number of jurisdictions, it occurs in many of the jurisdictions throughout California.

We recently were commissioned by MALDEF to do a state-wide
selective county analysis of racially polarized voting. We counted Spanish surnames ad nauseam in Imperial County, Tulare County, Fresno County, Monterey County and parts of Santa Clara County. We examined various electoral races as well as the 1986 official language of the State of California Proposition. We found that in all of these counties, that very high levels of voter polarization was occurring. When you have racially polarized voting even if you have your numerical population or voter population levels for minorities, you are not going to get your issues or persons elected. It is just simple arithmetic, and unless you eliminate racially polarized voting you are going to have this exclusion of Latinos from the political process. This exclusion has been very well documented. Latinos are only close to six percent of all the city council numbers, close to six percent of all school board numbers, and probably even less than six percent of the judiciary state-wide, at both Municipal Court and Superior Court levels. That indicates to me there is a problem. We must start to address this problem of political exclusion that is, in essence, excluding people and further alienating people from the body politic. Society cannot afford to have that happen.

What I see in terms of the agenda for the '90s and the year 2000 here in California is continued voting rights litigation in the area of at-large election challenges in the intra-city school boards and also for judicial elections. In the area of judicial elections, we probably will seek the implementation of new remedies to address the issue of providing access to the political process. Now, typically in an at-large election challenge we take away the at-large election and we institute a system of district elections. Usually candidates have to live in that district and only the voters in that district vote for that office. In the judicial context, because it may not be possible to find people eligible to run for judicial office in every area, the residency requirement will have to be eliminated. Candidates will file for office for that district but only those people who live in that district can vote for the candidate.

Another potential remedy that we may see developed is limited cumulative voting. Basically, if you have an at-large election system, for instance, a county, and ten judges run in a given election, a voter will not be able to vote for all ten judges. Under a straight at-large election system a voter would have ten votes and could vote for ten positions. But under a limited cumulative system, a voter would have, for example, five votes to concentrate on one candidate. It is assumed that minority voters will concentrate their efforts on their own candidates. Another system of cumulative voting is the system where a voter goes into the polling place with ten votes and is able to cast all ten votes for a particular candidate, a similar kind of system that is often used during the election of corporate directors. Those two parts of election systems have been implemented.
In some cases, one in New Mexico and I believe, in Alabama they had limited cumulative voting systems.

The biggest criticism that I have against cumulative voting is that it is still an at-large election system. There are still the expenses of running and it does not provide local accountability. The argument against judicial races is that because it is not a true legislative representative, or council representative, you do not need that kind of accountability. But I think that with an election system, for whatever office, you must have accountability. If you want to remove the judiciary from the political process then that should be done and the judiciary should not be an elected position. Campaigns for judges can often become very political, as they have been in California. In terms of the potential litigation strategy in California, we are going to see more Section 2 litigation. We are also in the process of looking at other counties that are covered by Section 5 of the Voting Rights Act where there are potential challenges to existing judicial systems. The way we are able to determine that there should be a challenge in Monterey County is that there was an election change. Section 5 only applies to election changes. If there is no election change, Section 5 is not triggered.

Monterey County at one time had 22 judicial districts which were consolidated over a period of years. There were three consolidations that occurred during the triggering period from 1968 to the present which we are contending were never submitted for Section 5 clearance as election changes. That is a pretty unique factual situation. We may not find too many of those kinds of judicial consolidations in other Section 5 counties. Nevertheless, we will be focusing our efforts also on potential Section 2 violations in some of these counties, particularly in the Central Valley. This is the kind of litigation that will be very important in defining the voting rights agenda for the minority community in California.

There are two other devices that will be and have been used: the right of the local initiative and state legislation. In many places — not as many as I would like to see, but in many places — we see conversions going from at-large to district elections as a result of a city or school board initiatives. For state judicial offices and municipal court offices an amendment may be required to existing state legislation, so it is either going to be addressed by the legislative arena or by the judicial arena under the Voting Rights Act. Thus, potential Section 2 and Section 5 cases are on the horizon. We can very easily get caught up in seeing things as technical applications of the Voting Rights Act: whether we have a certain level of racially polarized voting; whether we can meet the geographical compactness; or, whether we are going to miss it by one percentage point or whether we’re going to miss a racial polarization determination by a 0.5-part square instead of a 0.6-part square. I think that
sort of misses the whole idea because the Voting Rights Act was specifically designed to politically integrate our community. The way we are going now in California is toward a major social catastrophe.

An increasing gap exists between the haves and the have-nots, and persons of color are becoming more of those persons in the have-not category. They are not educationally integrated, economically integrated or politically integrated. Unless we start to create leadership within our community to help the political process, educational process and business communities we are headed for what I consider a period of a very high level of social disorder. We are starting to see that now in Los Angeles, in Oakland and some of these other communities. Where are the leaders that we need now? Where are they going to be developed? They are going to be developed through the political process, through educational institutions and through businesses.

The Voting Rights Act is so important, because it is an attempt to politically integrate our communities. We cannot wait for someone else to do our job. We cannot wait for the government to step in and change the system. We do not have the time. The window of opportunity is maybe another ten or twenty years, thus, we need to address the issue of voting rights within our community so that we can effectively politically integrate these communities and create the kind of creative leadership that we are going to need to address these problems. That is what this is all about. It is not about challenges to at-large election systems or gerrymandered districts. It is about accountability. It is about the creation of leadership that is going to address those critical needs that need to be addressed. That is what the Voting Rights Act is all about. Thank you.
Comments by Evan A. Davis†

I would like to begin by stressing the importance of diversity on the bench. We give a tremendous amount of power to the judiciary in this country. As Speaker Willie Brown said in his keynote address last night that while new legislators take quite a while to get influence, a judge makes important decisions from the first day on the bench. Diversity on the bench is at least as important as diversity in the legislature, and in certain respects, it is more important.

However, the problems of bigotry and prejudice are no less in judicial elections than they are in the election of legislators. The fact that the Voting Rights Act uses very neutral language cannot counter the fact that prejudice is a very powerful element in our society. Unfortunately, the election of judges involves some of the most pernicious racial and other stereotypes.

I chaired a Task Force appointed by Governor Cuomo in the Fall of 1991 to examine the problem of the lack of diversity in New York State's judiciary.1 The creation of the Task Force was prompted by Chisom v. Roemer,2 a case which decided that the Voting Rights Act applies to judicial elections. From 1985 through 1990 I also served as Governor Cuomo's Counsel. One of my chief functions as his Counsel over a five-year period was to advise him on judicial appointments under New York State's fairly limiting laws that rely heavily on judicial elections. These limitations notwithstanding, Governor Cuomo has been very attentive and eager to increase diversity and his appointments reflect that.

The Governor appointed a Task Force of sixteen people. It included the Presidents of the Metropolitan Black Bar Association, the Puerto Rican Bar Association, the Asian-American Bar Association, and the Women's Bar Association. Judicial appointments has long been a priority of these organizations. Among our members who have been involved in the judicial selection process in New York State, were Judge Hugh Jones (a retired judge of our highest court from the Syracuse area who has been the Chair of the Governor's Advisory Committee on appointments for that region), and Basil Patterson (who holds a position similar to Judge Jones' but in the counties around Manhattan and the Bronx including

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1. [Eds.—The report to Governor Cuomo of the Task Force on Judicial Diversity follows these comments.]
Long Island and the Hudson Valley). Each legislative leader and the chief judge had one appointment, and the Attorney General had two appointments.

Our mandate was not limited to Voting Rights Act issues. As a matter of fact, our task was to identify the causes of the lack of diversity on the bench, steps forremedying that situation irrespective of federal law, and federal law implications regarding New York's situation.

We began by focusing on the numbers. The Governor's executive order requested that the Task Force indicate the state-wide lack of diversity by looking at state-wide aggregated totals, but we broke them down and looked at them in smaller units to see how the situation varied around the state.

In New York State we have four counties in which minorities are a majority. Those four counties comprise about 40 percent of the state population. In three of those four counties, to make up a majority, you must include the three major minority groups: Black, Hispanic and Asian. In one of those counties, the Black and Hispanic voters constitute a majority. Of those four counties where the minorities are a majority, two had less than 15 percent minority judges. The most egregious example was Kings County (better known as Brooklyn), where 60 percent of the population is minority but only 15 percent of the judges are minority. New York County (better known as Manhattan) did the best, with 33 percent minority judges. While 27 percent of Westchester County consists of minorities, only eight percent of all judges are minorities. Twenty percent of the population of Richmond County (better known as Staten Island) are minorities, but there are no minority judges. Monroe County (including Rochester) has a 17 percent minority population, but there are no minority judges. Nassau County on Long Island has a population that is 17 percent minority, but only 4.5 percent of judges are minorities there. Orange County (including the city of Newburgh in the Hudson Valley), contains a very significant minority population (15 percent), but there are no minority judges. Erie County (including Buffalo), is 15 percent minority, and has eight percent minority judges.

These numbers, produced by our electoral system, are dismal. The question arises — what is the cause of this problem and what can be done about it?

One cause we identified is something that is normally associated with an appointive system. In our state, access is very restricted. A candidate essentially needs the approval of the County Chairman of the dominant party before his name is placed on the ballot to run for a judgeship. We have judicial conventions, but these are mere formalities to endorse the choice of the party chair, a process that is called "getting the nod."
Our very political system raises questions about these political leaders' commitment to diversity. Thus, the Task Force determined that the number one cause of our state's lack of diversity is that politicians are not committed to diversity. There was no expressly articulated commitment to having a diverse judiciary. Given New York's system for choosing judges, reason number one why New York does not have a diverse judiciary is because its politicians do not want one.

The Task Force decided that it should clearly and persuasively set out the reasons why a commitment to diversity in the judiciary was in the public interest. The first part of our report is devoted to our compelling legal and constitutional reasons which also address the function of the judiciary.

There is no doubt that our rules of ethics about conflict of interest are based on appearances. It is important that in the rule of law you not only have the reality of fairness but also the appearance of fairness. When judges tell us not to worry because they can put aside their conflict of interest, we tell them that they are not allowed to do that because the appearance will not be right.

The same is true in the area of diversity: in reality having a court as far as possible above bigotry and prejudice, and also the appearance of diversity by actual diversity on the bench. This is essential to the proper functioning of the judiciary. In sum, the Task Force saw a direct connection between a quality judiciary and a diverse judiciary, based on public confidence in the judiciary and the importance that had in furthering the rule of law.

Secondly, common law, as we know from Justice Oliver Wendell Holmes, develops through reason and experience. In this case, "experience" has to be the best that we can have, it has to be the experience of the whole community, and not the experience of just a segment of the community. Because diversity adds to experience, diversity is important for proper functioning of the judiciary.

Our recommendation, was that everybody involved in the judicial selection process, whether they be party leaders or government officials appointing to a vacancy, should express in writing their commitment to a diverse judiciary. The Task Force noted that the Governor had done this in creating the task force. Recognizing that making that commitment will definitely help create judicial diversity, the Task Force called on others to follow the Governor's example.

We discovered the second cause after going to some of the minority bar associations, and the women's bar associations, talking with their members who had become judges, and asking them what obstacles and problems exist in the New York system. We heard from all segments that the closed nature of our system and the need for political connec-
tions pose very important obstacles. For attorneys who have developed their practice, there comes a time when they may want to think about judicial service. In New York, unfortunately, if you have not been in politics early on, in such non-job-related requirements as stuffing envelopes and carrying petitions, you might be precluded from judicial service. It does not mean that you will be a good judge because you have done these things, but these requirements effectively restrict the pool of talent available in the minority community.

The pool of talent from the minority community has already gone through difficulties because of prejudice. If there were no prejudice we would have more Black, Hispanic, Asian, and more women lawyers. Taking this already restricted pool of talent and restricting it further by requiring political access and political connections in order to get access to the ballot is a second and very major part of the problem.

Interestingly, the committee also had extended debates about the question of election versus appointment. Appointments, unlike elections need not comply with the Voting Rights Act. Strong philosophical views cut across all groups on the question of appointment versus election. We had people on the committee, myself included, who believed that judges are supposed to be able to do unpopular things when the law requires, and that requiring them to run for election is wrong because it compromises their ability to do unpopular things. From this point of view it would be better to have an appointive system.

But there is another group that says democracy does not stop at the courthouse steps. The public has a right to have a role in picking the judges. Because these issues are deeply philosophical, the Task Force was split on them. We decided to make recommendations for improving both the appointive and the elective system and that we would not directly deal with the question of election versus appointment. For those of us interested in making the judicial selection process less political, the Task Force’s recommendations for reducing the political connection requirement for ballot access is a very positive step.

The Task Force prepared and sent in a constitutional amendment which will be required in order to implement our recommendations. We recommended that the ballot access situation be resolved by requiring that candidates wishing to have a right to get on the ballot go through a community-based screening committee, itself reflecting diversity within the community, which would make a determination that a person meets certain qualifications. Only after passing this screening would a candidate have a right to be on the ballot.

We concluded that our current system of electing judges by judicial districts clearly violates the Voting Rights Act. For example, in Westchester County, if you want to run to be a Supreme Court judge (the
Supreme Court is our basic trial court) in that county, you have to run not only in Westchester County, but also in Orange, Rockland, Putnam, and Duchess Counties. It does not appear that this requirement was enacted in order to hamper minorities so much as it was to assure the election of Republicans outside of New York City. However, it has a very adverse effect on minorities running for office, because while you may be elected if you run in Westchester County, and your chances are better if you run in White Plains or Mount Vernon (two urban areas within Westchester County with significant minority populations), you will most likely be defeated by the vote in areas with no significant minority population. This situation is a clear violation of the Voting Rights Act.

We did not attempt to redraw district lines or propose specific district lines. Our budget did not allow us to hire the computer time needed to do that. Secondly, line drawing is really something for the legislature and the Governor to work out within the political process, at least initially.

In addition to dealing with access issues, the Task Force favored dealing with dilution of minority voting strength, handicaps to minorities where the Voting Rights Act does apply, and situations where districts need to be significantly reduced in size. The Task Force did not feel that it was necessary to go as far as demanding single member districts. There was concern that our decision could have adverse effects, but the current districts are clearly improper. This is going to be a very important issue for New York.

New York’s bad numbers reflect a national problem. They are extremely important in terms of real political participation of minorities and women. The Chisom decision will have a far-reaching impact and will help us move towards a more inclusive society that values diversity in the exercise of governmental power — which is what the Voting Rights Act is all about. In addition to achieving a more diverse judiciary and legislature, there are many other aspects of participation that have to be brought forward. Because the future of the country depends on creating a strong inclusive society, we have to think in terms of delivering results — just thinking in terms of opportunities is not sufficient.

Finally, voter registration and participation are very important factors in the context of judicial elections. We need to rectify our system in which minorities and poor people are not encouraged to vote. I was very glad to hear Willie Brown discuss same day registration in his keynote address. But even though the Voting Rights Act is by no means the full answer, one of the fruitful areas we are going to see over the next few years is development of the Act in the area of judicial elections.
Report of the New York Task Force on Judicial Diversity to Governor Mario Cuomo†

This letter constitutes the report of the Task Force on Judicial Diversity which you established by Executive Order Number 149 on September 23, 1991.

Specifically, your mandate cited five compelling reasons for establishing a task force to study issues relating to a diverse judiciary in the State of New York:

1. The June 20, 1991 ruling of United States Supreme Court that judicial elections are subject to the proscriptions of the Voting Rights Act of 1965, as amended (42 U.S.C. Section 1973). *Chisom v. Roe-mer*, (Docket Nos. 90-757 and 90-1032);

2. The majority of judges in New York State are elected, rather than appointed;

3. The current demographic composition of districts for judicial elections may dilute minority votes;

4. Minority jurists, in 1989, comprised only 8.3% of the 1,129 judges sitting in State courts, and;

5. The New York State Commission on Minorities in the Judiciary's findings regarding under-representation of racial minorities relative to their population. Our mandate concerned all aspects of diversity, including the significant under-representation of women that now exists.

In sum, your Executive Order asked the Task Force to make recommendations in two related areas. We are to consider the causes of the extreme disparity, noted in your Executive Order, between the diversity we find in our citizenry and the diversity we find on the bench and ways to reduce that disparity. We are also to consider the impact of recent decisions of the Supreme Court of the United States holding that the federal Voting Rights Act of 1965 is applicable to the election of judges and to make recommendations concerning measures, if any, required to comply with the federal Voting Rights Act. We think it helpful to keep these two topics separate, and we therefore consider each in turn.

I.

There is, we believe, clear evidence of an extreme lack of diversity in the judiciary of the State of New York. We have reviewed the data compiled by the New York State Judicial Commission on Minorities estab-

† This report of the New York Task Force on Judicial Diversity to Governor Mario Cuomo was delivered on January 29, 1992. The Editors wish to express their gratitude to Evan Davis, Chair of the Task Force on Judicial Diversity, for his agreement to publish this report.
lished by Chief Judge Sol Wachtler, by Justice Frank Torres, and by the Women's Bar Association of the State of New York

This data shows that four of the State's twelve Judicial Districts have no female JSC's [Justices of the Supreme Court], seven have less than 10 percent, and the First Judicial District scores the highest with 32.4 percent. On average about 12 percent of the JSC's are women.

With regard to racial diversity, account might be taken of variation in racial demographics around the state. In four counties, comprising 38.7 percent of the State's population, members of racial minority groups constitute the majority. Two of these counties, Queens and Kings (which are the most populous counties), have less than 15 percent minority judges. Bronx has the highest percentage of minority judges, with 33 percent, followed by New York County with 26.5 percent.

Other counties worthy of note include the following: Westchester has a minority population of 27 percent but 8 percent minority JSC's. Richmond has a minority population of 20 percent but no minority JSC's. Monroe has a minority population of 17 percent but no minority JSC's. Nassau has a minority population of 17 percent but 4.5 percent minority JSC's. Both Orange and Erie have a minority population of 15 percent but no minority JSC's.

If all state courts are considered, out of 1,129 judges in New York State as of April 1991, 1,036 (91.8%) were white, 71 (6.3%) were African-American, 19 (1.7%) were Hispanic and three (0.3%) were Asian-American. There were no Native-American Judges. Currently, less than 15 percent of all New York State court judges are women.

II.

We turn next to our assessment of the reasons for these almost uniformly poor numbers and what can be done to remedy the problem.

1. All population data reflect 1990 figures. Figures regarding numbers of minority judges are as of December 9, 1991.


2. Although Monroe and Erie counties, for example, have no minority JSC's, they do have minority administrative judges for the Supreme Court and retired minority JSC's serving upon certification. When these certificated JSC's and administrative judges are taken into account, Monroe has 10 percent minority JSC's, and Erie has 6 percent minority JSC's.

3. *Report of the New York State Judicial Commision on Minorities*, at 94 (April 1991) (Executive Summary). By contrast, of the total state population, 69.2% is white, 14.3% non-Hispanic black, 12.3% Hispanic, 3.7% Asian and 0.3% Native-American.
A.

In our view, the single most important cause of the lack of diversity that currently exists on the bench is the historic absence of an express, actually articulated commitment to increasing diversity on the part of the governmental and political party officials who play key roles in the judicial selection process. Your appointment of this Task Force does express such a commitment, and we believe that the step you have taken is unique and historic.

What is now needed, in our view, is a clear statement of the reasons why a diverse judiciary is in the public interest.

1.

This Task Force believes that diversity is vital because it is required by our constitutional and legal commitment to inclusiveness and because it greatly improves the ability of the judiciary to fulfill its function. This improvement occurs in two key areas. First, and most important, diversity improves public confidence in the fairness of the justice system and thereby strengthens the Rule of Law. Second, diversity improves the quality of judicial decisions.

One issue of great importance in any justice system is the risk that the results will be tainted by prejudice. The problem of prejudice is a pervasive component in our society, and, as you know, one function of the judicial system in this State is to enforce laws intended to mitigate its pernicious effects. You and other appointing authorities, as well as judicial screening panels, try to choose judges who are free of prejudice. We all recognize, however, that it is not enough to appoint judges who are non-bigoted. Having a judiciary that is not tainted by prejudice and is therefore inclusive is required as a matter of legal principle.

Diversity is also needed to secure both the reality and the appearance of fairness. Without diversity there is a high risk of unfairness due to prejudice. Diversity promotes sensitivity to the problem of prejudice, and awareness of the problem is the important first step to its avoidance.

Equally important as trying to avoid the actual taint of prejudice, however, is trying to build public confidence by eliminating any reasonable basis for even the appearance that the judicial system is biased and therefore unfair. Because prejudice is such a widespread problem in society, it is not reasonable to ask the public to believe that judges only rarely accede to it in their decision making. What the public can fairly be asked to believe is that diversity on the bench 1) shows the judiciary’s institutional opposition to discrimination and 2) increases the assurance that, as a matter of intention, the judicial system is fair to all people it serves.

Establishing a strong reality and appearance of fairness is, in our
judgement, vital to the justice system and the Rule of Law. This requirement forms, we think, a compelling reason for a commitment to diversity in the judiciary.

In addition to the confidence of the general public, the confidence of the minority and women’s bars in the state court system should also be noted. Minority and female attorneys in New York State can face two problems from a non-diverse judiciary. First, they may at times have reason to question the impartiality of the courts before whom they appear; at the very least these attorneys may perceive that they are not accorded the same degree of respect as their white or male counterparts. Second, client confidence in the ability of minority and female lawyers may be distorted by possible client perception that these lawyers enjoy less rapport with judges than their white or male counterparts. A commitment to diversity addresses both these problems.

Our view that improving the level of diversity on the bench promises real benefits appears to be shared by the judges and lawyers in this State. Nearly fifty-eight percent of the judges and seventy-five percent of the lawyers interviewed by the New York State Commission on Minorities gave a “great importance” rating to efforts to improve diversity on the bench.

Our principal reason for advocating the commitment to diversity is based on this nation’s fundamental constitutional commitment to inclusiveness and the reality and appearance of fairness.

We think that beyond this, however, a practical advantage of a commitment to judicial diversity is that it actually helps to improve the quality of judicial decision making. When we say that diversity improves the quality of judicial decisions, we are not forgetting the important differences between the job of a judge and the job of a political official. The judge’s job is not to make policy but to say what the law is and to apply that law to facts. In deciding what the law is and in exercising equitable powers, however, the common law judge does have a degree of discretion to be exercised, in the memorable words of Justice Oliver Wendell Holmes, in the light of reason and experience.

For the law to develop in light of the experience of the whole society, it is better if the bench is pluralistic, diverse and inclusive. The experiences of men and women, whites and racial minorities, rich and poor, advantaged and disadvantaged all differ, as do the experiences of persons of varying national origin, sexual preference or disability status. A judiciary with jurisdiction over each and every person should find wisdom in all those experiences and thereby keep the law rooted in the experience of our whole society. Although this can happen without the diversity of the bench being exactly proportional to the diversity of the population, the judicial experience factor will more accurately reflect the experience of
the whole society if the diversity is real and substantial. As the data already discussed indicates, that is not the case today.

For all these reasons, the Task Force urges that the judicial selection process be imbued with a commitment to diversity and inclusiveness.

2.

We recommend that this be accomplished in the following ways.

a. *All appointing authorities should make explicit their commitment to diversity by the issuance of an appropriate written policy statement and directive to those who assist them in the selection of judges.*

A written statement is desirable to make the commitment clear and unequivocal. Should you wish us to do so, this Task Force is prepared to follow up with the various appointing authorities to obtain such a written statement. We are also prepared to solicit the support of all the State’s bar associations for the commitment to diversity.

b. *All bodies that screen judicial candidates should reflect community diversity.*

The above-mentioned written policy statement would, of course, cover the activities of screening panels or nominating commissions that screen or review candidates for an appointing authority. The Task Force believes, however, that such screening committees must themselves be broadly diverse so that women and minority applicants will have confidence in the fairness of the process and so that all sectors of the community will have a fair participation in judicial selection activities. The data assembled by the New York State Judicial Commission on Minorities shows that such broad diversity does not now exist. Therefore, we recommend that each appointing authority review the composition of all such screening bodies and, in concert with the other related appointing authorities, promptly make or seek such changes in membership as are needed to achieve adequate diversity based on the diversity that exists in the area over which the screening committee has jurisdiction.

c. *There should be one Screening Committee per Judicial District.*

Presently, the Screening Committees you have established are responsible for screening candidates within one of four Judicial Departments, each consisting of up to four Judicial Districts. In order that Screening Committees better reflect the diversity within the communities they serve, and to make such committees more familiar with and accessible to minority and women candidates within a given geographic area, we recommend increasing the number of Screening Committees so that there would be a separate Screening Committee in each of the State’s Judicial Districts. In addition, there should continue to be one Screening

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4. For example, the 2d Department spans the 2d, 9th, 10th and 11th Judicial Districts.
Committee for each Judicial Department to screen candidates for appointment to the appellate division.

d. *Screening Committee appointments should be coordinated.*

Most screening bodies are composed of members appointed by various executive, judicial, legislative, bar association and local officials. This helps diversity in an important sense but can also make it more difficult to insure representation of minorities and women. We recommend that each person making an appointment to a screening panel consider any lack of diversity in the appointments already made by others and, if several persons are to make appointments at the same time, those persons confer with regard to adequate diversity prior to making appointments. However, nothing in this or any other recommendation we make should be construed to favor implied or expressed quotas in the number of appointments of minority and women lawyers to the bench.

e. *Data on diversity should be maintained and reported.*

To know how well we are achieving the commitment to diversity, it is important to have good data regarding the participation of minority and women applicants in the judicial selection process. The New York State Judicial Commission on Minorities found that such data has not always been maintained and reported to the public. We recommend that appointing authorities direct screening bodies that they have established to keep and regularly report data about the number of women and minority candidates who have applied, the number forwarded for consideration by the appointing authority and the number appointed and confirmed.

This data should be published in sufficiently aggregate form so that the action of a screening body with regard to any specific candidate cannot be inferred. Nevertheless, designated offices of the appointing authority should be charged with reviewing and retaining the detailed data compiled by screening bodies.

f. *Outreach and Education Programs for minority and women lawyers actively interested in becoming judges should be implemented.*

One of the problems with the current system of selecting judges is that there is no established avenue by which interested attorneys without political affiliations readily can learn about the judicial election process. Important outreach efforts do occur, such as the outreach you have made in connection with Court of Claims appointments; but the outreach process needs to become regular. Therefore, we recommend that there be

5. For example, in those districts where only one minority or woman applies for a judgeship and is found not well qualified, specifying the number of minorities or women screened would make it easy to identify the single candidate. The prospect of being so identified, with the attendant stigma if the candidate is rejected by a screening committee, may deter many minority and women lawyers from seeking judgeships in such districts.
yearly conferences open to all but targeted to special outreach to qualified minority and women lawyers both to encourage their candidacy and to educate them on the process of becoming a judge. These conferences should take place in each Judicial District with the sponsorship of the Screening Committee for that Judicial District and local bar associations.

We do not doubt that a significant number of minority and women lawyers will attend such conferences. Just last month, this opinion was confirmed by the extraordinary number of able minority lawyers who turned out for a conference on how to become a judge. The day-long conference, entitled “Pursuit of a Judicial Career,” offered a practical description of and guide to elective and appointive judgeships in New York City, including a judicial mentor program for interested minority and women lawyers. It featured panels of local judges and county political leaders who described the political and practical requirements and difficulties of being elected to the New York State judiciary. We wish to commend the following individuals and organizations for organizing this historic and important conference: The Association of the Bar of the City of New York and its president, Conrad Harper; Justice Lewis I. Douglass, in his capacity as a member of the Association of the City Bar of New York’s Special Committee to Encourage Judicial Service; Peter Eikenberry, Chair of the Special Committee to Encourage Judicial Service; The American Society of Dominican Attorneys, Inc.; The Asian American Bar Association of New York; The Metropolitan Black Bar Association; and The Puerto Rican Bar Association.

B.

We believe that another major cause of the lack of diversity in the judiciary is the closed nature of the system now used in New York State to select judges.

As we all know, our system is only nominally one of election. In practice it is the political party leaders who have the decisive power to determine who will be nominated. Most often this nomination is tantamount to election.

The Task Force believes that opening up this system is essential to improving diversity on the bench. Now a candidate needs, or is perceived as needing, political entrees or even political party service in order to be a viable candidate for political office. Many well qualified minorities and women lawyers who are interested in becoming judges lack these particular credentials. They may be political independents, or members of a party that is not dominant in the area or, if party members, may not have been active in the organization in power. Rightly or wrongly, these lawyers perceive themselves as having no chance of becoming a judge
under the current system for the "election" of judges. Our own experience is that their perception is well founded.

Obviously, this is not a problem unique to minority and women lawyers who aspire to become judges. The perception that a political entree is required restricts the pool of talent across the board. But restricting the pool of minority and women lawyers is of particular concern to us because that pool of talent is already restricted by the deprivations of prejudice and social disadvantage. There are more minority and women law school graduates than ever before, but the talent pool is not nearly as large as it would be had prejudice and discrimination been eradicated generations ago. It is fundamentally unfair, in these circumstances, to further compound the problem by imposing on the strong talent pool that does exist the totally irrelevant requirement of having a political entree.

We do not believe that the opening up of the process necessarily requires a change from an election system to an appointment system. This Task Force is not charged with determining the general merits of such a change, and we are confining ourselves to the question you put to us of how to improve diversity. We do believe, however, that from this perspective major change in the electoral process is required in order to open up the system and expand the pool of available talent.

Our recommendation for opening up the system is straightforward. We recommend that ballot access be easy and that the size of the districts in which candidates are elected be smaller. With regard to ballot access in particular, we recommend that any candidate found well qualified by a Screening Committee established in each of the twelve Judicial Districts be entitled to have his or her name automatically placed on the ballot; that the Screening Committees be composed of lawyers and non-lawyers and reflect the diversity in the community; and that there be no party designations on the ballot, the sole designation being for incumbents. If experience showed that opening the ballot to all well qualified candidates created ballot confusion due to the excessive number of names on the ballot, a limited number to be approved by the Screening Committees could be fixed by law. The presumption, however, should be for openness.

We have carefully considered the size of the district in which a candidate should be required to run for election. At present, Justices of the Supreme Court stand for election in one of the twelve Judicial Districts. From the perspective of our assignment to recommend ways to improve diversity, a smaller district has several advantages. First, it is less daunting and expensive to run in a small district, and this helps keep the process open. Second, smaller districts will mean less dilution of minority voting strength, provided that district lines are fairly drawn, and this will
help to improve diversity. Finally, smaller districts further reduce the significance of a political entree. In large districts, by contrast, support of a political organization may as a practical matter be needed to mount an effective campaign.

Small districts do have disadvantages. While we would not want to require that a candidate reside in a small district, residency would no doubt be a practical advantage. Depending on circumstances this can have some affect in restricting the talent pool. Further, it is sometimes difficult to generate public interest in small district elections, and this in turn can lead to manipulation of the voting public for purely partisan political purposes.

We believe that the advantages of small districts outweigh the disadvantages and therefore recommend that, to the extent practicable, judges be elected in smaller districts of equal population. This will give all the citizens of the State an equal opportunity to participate in the election of judges consistent with the well established principle of one person, one vote.

It is beyond the scope of our assignment to specify the precise size of these districts or to redraw district lines. We do not believe that the districts must be single member; but they must be small enough to avoid undue dilution of minority voting strength. To achieve this goal, extensive computer modelling will be required. The resources to carry out this task are available to the State, which will soon complete the redrawing of legislative and congressional districts. Drawing new districts for the election of judges should be the next order of business.

C.

We have considered whether a shortage of well qualified minority and women candidates might explain the disparity between diversity on the bench and in the community. We are of the firm opinion that it does not.

The availability of candidates is a function of the number of well qualified lawyers who are actively interested in becoming judges. Many of the members of the Task Force have direct knowledge of the availability of talent in the minority and women's bar and of the interest among those well qualified for judicial service in becoming judges. Based on our collective experience, we have not the slightest doubt that enough interested and well qualified persons exist to allow as much diversity and inclusiveness as possible.

Because we hold the view that there are many well qualified minority and women lawyers interested in becoming judges, we see no conflict between improving diversity on the bench and maintaining high standards of judicial competence. Nothing we recommend will tend to ele-
vate to the bench persons who are less than well qualified by reason of their character, temperament, professional aptitude and experience — four factors which are the standards of qualification for judicial office set forth in our State Constitution.

D.

We are not addressing the general question of whether the merit selection of judges is preferable to their election. Our recommendations do not assume the abolition of the elective system. The recommendations we have made would serve to improve both the appointive and the elective process.6

III.

This brings us to the question of whether the current system for the election of judges in New York State violates the federal Voting Rights Act and, if so, what is the appropriate remedy.

Based on the materials we have reviewed, we believe we can state with confidence that, as currently structured, the system for the election of Supreme Court Justices in New York State cannot pass muster under the Voting Rights Act. Supreme Court Justices serve and act for particular counties, yet they are elected in often multi-county Judicial Districts. Even where the county comprises the entire Judicial District, the ability of minority voters to insist on diversity by electing minority judges, and of minority candidates to seek election in communities where anti-minority prejudice is not a significant problem, is limited by the large size of the district. In other words, there is real dilution of minority voting strength.

We also believe that there is a very substantial question whether the de facto requirement of a political entree that taints the current system is not also a fatal flaw under the Voting Rights Act. The requirement imposes a non-job-related qualification on access to the bench which we believe is hindering full minority participation. In addition, the current size of the election unit has legal significance beyond the issue of voter dilution in that the cost of running for a judgeship in a large district presents a financial barrier that adversely affects women and minorities, whose access to financial support may be limited.

Because the need for change is clear, and because we believe that the recommendations we have made would cure any lack of compliance with the Voting Rights Act, we do not think we need to be definitive about

6. The issue of the comparative merits, advantages, and disadvantages of the elective and appointive systems is, of course, an important one about which Task Force members expressed strong and quite divergent views on policy. The Task Force takes no position.
whether adoption of each recommendation is necessary. We are of the view that it will not be enough simply to reduce the size of the districts and that real opening up of the process to those who do not have political connections will also be required. However, since the test under the Voting Rights Act is a totality of the circumstances, the judgement about precisely how much opening up is required cannot be made until all of the changes proposed to be actually implemented are assessed together.

Finally, the changes we recommend will require constitutional amendment to reduce the size of the districts in which judges are elected. We recommend that this constitutional amendment simply give to the legislature the power to fix the manner for selecting judges. In this way, the amendment can proceed prior to the detailed study necessary to redraw district lines.

IV.

In conclusion, we wish to thank those who have assisted the Task Force in its work: The Honorable Frank Torres; Marcia Watson of the New York State Board of Elections; James Goodale and Philip Harvey of Debevoise & Plimpton; Patricia Bucklin and Chester Mount of the Office of Court Administration; and Amy Schulman, Ray Lohier and Mary Ann Burniske of Cleary, Gottlieb, Steen & Hamilton.

Each of us thanks you and those recommending our appointment to this Task Force for this opportunity to give our views on an issue of great public importance.

Respectfully submitted,

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* Did not vote on any legal conclusions expressed in this report.
** Also has a concurring additional statement.
*** Assemblyman Vann believes that placing qualified candidates on the ballot should not be left to the sole discretion of judicial screening committees because this would tend to increase the power of those who appoint screening committee members.