



# THE NEW YORK HISPANIC BAR TASK FORCE ON JUDICIAL SELECTION

A JOINT TASK FORCE OF

THE HISPANIC NATIONAL BAR ASSOCIATION

THE DOMINICAN BAR ASSOCIATION

THE LATINO LAWYERS ASSOCIATION OF QUEENS COUNTY

THE PUERTO RICAN BAR ASSOCIATION

## REPORT AND RECOMMENDATIONS

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## FOREWORD

This Report and its recommendations regarding judicial selection in New York have been submitted to and approved by the Hispanic National Bar Association, the Dominican Bar Association, the Latino Lawyers Association of Queens County, and the Puerto Rican Bar Association.

## I. EXECUTIVE SUMMARY

### A. INTRODUCTION

The New York legal community is in the midst of an historic debate over the manner in which judges should be selected. Spurred by the court decisions in the *López Torres* case, the debate involves the relative merits of, on the one hand, choosing judges by popular election, including the delicate question of how candidates for election should be nominated, versus, on the other hand, granting our elected officials responsibility for appointing judges. The debate is historic not because the issues are new — various recommendations for reforming the current system have been made over the years — but rather because the courts have decreed that the current system *must* change. Thus, the current discussion focuses on how, and not whether, the system should change.

Responsibility for effectuating reform now falls squarely upon the new Governor, the Legislature, the many New York bar associations, and the entire New York legal community. As part of our commitment to the ideals of judicial excellence and increased diversity on the bench, the four bar associations representing the Hispanic legal community in New York City — the Hispanic National Bar Association (“HNBA”), the Dominican Bar Association (“DBA”), the Latino Lawyers Association of Queens County (“LLAQC”), and the Puerto Rican Bar Association (“PRBA”) — came together in March 2006 to create the New York Hispanic Bar Task Force on Judicial Selection (the “Task Force”). The mission of the Task Force, which was created on the initiative of Nelson Castillo, then President of the HNBA, was to conduct an in-depth examination of judicial selection systems as they exist in New York and to issue a Report recommending appropriate changes. This Report is the result of our deliberations.

Enhancing the diversity of the legal profession generally, and of the bench in particular, is a core goal of the constituent organizations of the Task Force. The Task Force agrees that a diverse bench contributes to the legitimacy of our legal system. As the Honorable Rolando T.

Acosta, President of the Association of Judges of Hispanic Heritage, said in a statement to the Task Force:

[I]n the absence of diversity, the system lacks credibility and the requisite moral authority among those who have been excluded and have historically viewed such a system with suspicion and distrust.

We agree; and to that end, the Task Force has scrutinized the proposed methods of judicial selection for their effect — past, present, and future — on diversity. We must note, however, that our mission was not to make diversity the only guiding factor for our recommendations. That would not be constitutional, nor, indeed, right. Rather, the Task Force believes and recommends that diversity be one of the core factors for the selection of judges. In our view, there is no doubt, that when the diversity of our population is truly represented on the bench, that the Hispanic community, and all communities, will benefit.

This Report endeavors to provide the reasonable steps for “how” New York’s system for selecting judges should be changed, as well as to make diversity a true cornerstone rather than a mere platitude. The Task Force urges the Legislature and the New York legal community to consider our findings of fact and recommendations in responding to the current judicial selection crisis.

B. OVERVIEW OF THE TASK FORCE

**1. Organization**

The Task Force was created to represent its founding organizations, the HNBA, the DBA, the LLAQC, and the PRBA, who collectively represent the Hispanic legal community of New York City. The members of the Task Force were selected from a broad cross section of the legal community, including small firm practitioners, large firm practitioners, state practitioners, federal practitioners, government lawyers, bar association leaders, and sitting members of the state and federal benches of New York.

## **2. Procedures**

The guiding directives of the Task Force are the principles set forth in its original Mission Statement — that judges should be highly skilled lawyers, fair-minded, not beholden to special or political interests, and truly representative of a cross section of the community at large.

The Task Force focused its examination primarily on the selection of Justices of the Supreme Court of New York. This focus is based largely on the effect of *López Torres* and the fact that the Supreme Court, as the court of general jurisdiction, is the most important trial-level tribunal in New York and has the largest effect on the daily lives of New Yorkers. We note, however, that while the Task Force has examined and analyzed the factual findings made by the district court in *López Torres*, it expresses no opinion on the soundness of the legal conclusions contained in the decision or its affirmance by the Second Circuit. That analysis goes beyond the scope of our mission.

Upon formation, the Task Force created a number of subcommittees to focus its efforts. These subcommittees included:

- a subcommittee to examine the impact of the various judicial selection methods on diversity;
- a subcommittee to provide an historical overview of New York's judicial selection system and examine prior reports concerning these issues;
- two subcommittees to select and invite guest speakers to discuss elective and appointive judicial systems;
- a subcommittee to examine financing of judicial elections;
- a subcommittee to examine screening and selection panels; and
- a subcommittee to review the factual analysis of the *López Torres* decision.

The Task Force held monthly general meetings, as well as numerous interviews with esteemed representatives of the New York legal community, including the Honorable Carol Robles-Roman, Deputy Mayor of the City of New York; the Honorable Margarita López Torres, Kings County Surrogate; the Honorable Rolando Acosta, President of the Association of Judges of Hispanic Heritage; Jeremy Creelan, Counsel to Surrogate López Torres in the current litigation; Ricardo Oquendo, former Counsel to The Bronx Democratic Party and former Assemblyman Roberto Ramirez; Manuel Romero, Past President of the Brooklyn Bar Association; Carl Landicini, Counsel to the Kings County Democratic Party; Arthur Greig, Counsel to the New York County Democratic Party; Robert Begleiter, Chair of the Magistrate Judge Screening Committee for the Eastern District of New York; and Paul Shechtman, Chair of the Governor’s Screening Panel for the Court of Claims.

The Task Force would not have considered its job complete without affording an opportunity for the individual members of its constituent organizations to speak out regarding reforms of the judicial selection system. Therefore, the Task Force solicited the views of the membership via a non-scientific survey sent to every member of the HNBA, the DBA, the LLAQC, and the PRBA soliciting their opinions regarding the system as it currently exists in New York State. The views of the respondents have been considered throughout the Report.

The Task Force agreed not to use the term “merit selection” in this Report to describe any recommended method for the selection of judges in New York State. Although we obviously believe that merit should be a primary driving force behind the selection of judges, the use of the term “merit selection” to contrast certain appointive systems with other systems in existence is felt by some to denigrate those jurists who were selected either by popular election or by the convention system for Supreme Court. In place of “merit selection,” we use the term “commission-based appointment system.”

All of the Task Force Members endorse the conclusions and recommendations contained in this Report. However, our two judicial members express no views on any actual pending litigation.

C. CONCLUSIONS AND RECOMMENDATIONS

The Task Force reached each of its conclusions and recommendations by consensus and without dissent. Each is discussed in detail in individual sections later in this Report.

**1. Diversity Must Be Embraced Throughout New York State**

The unequivocal view of the Task Force is that diversity must be a *bedrock* of any judicial selection system New York State adopts. As we explain in more detail below, different observers have come to different conclusions as to which system of judicial selection is most likely to increase diversity on the bench, and our own examination of the subject has yielded no firm answers. For example, the number of minorities on the bench in New York County, Kings County, and Bronx County has increased in recent years under the current nominating convention system, which was found unconstitutional in *López Torres*. At the same time, however, that system has produced dismal results in upstate areas and the New York City suburbs, to the point where several judicial districts do not have even one minority Supreme Court Justice. Likewise, while several of the appointive systems currently in place have in recent years produced a number of minority jurists, others, particularly those for the Appellate Division and the Court of Claims, have produced unsatisfactory results.

Because there does not appear to be one right answer, it is imperative that whatever system New York ultimately employs have a commitment to diversity as a hallmark. A crucial first step towards increasing diversity on the bench is to ensure that the commitment extends not only to those ultimately selected to serve as judges, but also to the members of the screening panels or nominating commissions that will forward names to the appointing or electing authorities.

Screening panels and nominating commissions must reflect the diversity of our community to ensure a properly functioning system that is reflective of society. Our minority communities have a right to participate in the process of picking judges.

**2. Open Elections Are Not a Preferred Method For Judicial Selection**

As currently ordered by the Second Circuit, absent legislative intervention, an open primary system will go into effect this year. The Task Force spent much time discussing a system of open primaries for judges. To be sure, such a system has the immediate and obvious virtue of being truly democratic. If a candidate has the wherewithal, she can petition to get on the ballot, campaign with gusto, and try to convince her fellow citizens that she would make the best judge. But in the view of the Task Force, the positives end there. Therefore, while we recognize the historic opportunity brought about by the efforts of the plaintiffs in the *López Torres* litigation and the decisions of Judge Gleeson and the Second Circuit, we do not recommend that the Legislature allow the *López Torres* remedy to stand.

The Task Force believes, as do many other organizations, that the prospect of judicial election committees soliciting funds from lawyers and litigants who might come before the judge is unseemly at best, and tars the public's perception of our legal system. So, too, holding open primaries without costly and possibly unattainable public financing would risk limiting judicial office mainly to the wealthiest candidates. But beyond the problem of financing elections, the Task Force believes that legislatively adopting primaries would be misguided because, simply put, judges are different. The role of the judicial branch in our system of government convinces us that judges should not have to face popular election and, indeed, that popular elections are detrimental to the independence and impartiality of the judiciary, as well as incompatible with the dignity of the office. While legislators and chief executives truly represent the people, and it is therefore expected that

they will state their views on issues publicly, judges *must* decide cases based on the law and the evidence, and are severely restricted in publicly stating their positions on issues.

As a result, the Task Force believes that voters in judicial elections are less likely to consider the temperament, experience, and intelligence of the candidates as paramount. In legislative and executive elections, voters rightly ask where a candidate stands on the issues and decide at least in part on that basis. But in judicial elections, in the absence of stated positions on the issues, factors such as name recognition, campaign advertising, and political endorsements become far more important than competence. In the end, the reality is that of all elective offices, voters pay the least attention to judicial elections. We are wary of the possibility of New York's becoming one of those states where insurance companies and plaintiffs' lawyers fight it out to see who can elect their favored candidate.

### **3. Recommendation of a Commission-Based Appointment System**

The Task Force believes that, properly implemented, the ideal system of judicial selection in New York would see district-wide Judicial Nominating Commissions forward three names to the Governor for appointment to a vacant Supreme Court seat. For other courts, the appointing authority could involve other public officials, such as the Mayor of the City of New York or the County Executive of a particular county. Although we believe that this is a propitious time for a constitutional amendment that would implement such a system, we stress that simply switching to an appointment system is not enough. Rather, such a system would have to place the ideal judicial virtues of competence, independence, fairness, and diversity above political considerations.

We believe that a commission-based appointment system best minimizes the risk that political forces and political considerations unrelated to judicial skills would play a major role in the selection of judges. However, the Task Force is wary that such a system, if not carefully drawn, could simply move politics from the nominating convention system into the nomination or

appointment process. It is crucial, therefore, that any such commission be appointed by a variety of community-based and bar organizations and not just by politicians, to ensure a wide range of views and, particularly, that the views of our own community are heard loudly. Additionally, the appointing authority would have to be carefully monitored and encouraged to make the best and most diverse appointments possible.

#### **4. Recommendation of Improvements to Judicial Nominating Conventions**

The current nominating convention system, particularly in certain of the districts in New York City, has in recent years made great strides in improving the diversity of the Supreme Court bench, and we applaud these party organizations for those efforts. As currently constituted, however, the chances of selecting highly qualified and diverse jurists statewide is at best haphazard, in light of the closed nature of the nomination process. Until a constitutional amendment is passed to implement commission-based appointment, we urge the Legislature to immediately open up the existing judicial nominating convention system to allow any well-qualified, experienced lawyer an opportunity to present herself to the delegates at the nominating convention and be nominated on the basis of merit.

With certain exceptions spelled out in Part VI.D below, the Task Force agrees with the proposals of the Commission to Promote Public Confidence in Judicial Elections (the “Feerick Commission” or the “Commission”) in this regard, particularly with respect to:

- district nominating commissions;
- a reduction in the number of delegates to the convention;
- a reduction in the number of signatures needed for delegates to run;
- an enlargement of the term of each delegate;
- transparency in the process, including the publication of candidates found well qualified; and

- the right to address the convention.

These changes and others discussed below may be achieved legislatively, and we stress that this must be done immediately, not only because there is no longer any choice but to fix the system, but also because it is the right thing to do. These changes will remove the current disingenuousness in a system that is called elective but is, with rare exceptions, an opaque appointive system. They will also allow the members of our community a more realistic chance to even the odds of being selected.

\* \* \*

Thus, as discussed more fully below, we urge the Legislature not to allow the *López Torres* result to stand, and instead to take immediate steps both to: (1) implement a constitutional amendment establishing a commission-based appointment system; and (2) enact legislation that will open up the convention system and that will pass constitutional muster.

## II. OVERVIEW OF THE CURRENT SYSTEM OF JUDICIAL SELECTION

The following Section provides a detailed description of the procedures by which judges for the various New York state courts are selected. Because of the Task Force’s central focus on the court of general jurisdiction, special attention will be devoted to the selection process for New York Supreme Court Justices as it existed before the decision in *López Torres v. New York State Board of Elections*.

### A. NEW YORK UNIFIED COURT SYSTEM

The New York State Constitution establishes a “unified” court system,<sup>1</sup> split into two broad categories: the state-wide courts, which are specifically provided for in the Constitution, and localized courts established by the Legislature. The former category is made up of the Court of Appeals, the Supreme Court, including the Appellate Division, and the Appellate Term, the Court of

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<sup>1</sup> N.Y. CONST. art. VI, § 1(a).

Claims, the County Court, and the Family Court.<sup>2</sup> The latter category includes the New York City Civil and Criminal Courts, and the District, Town, City, and Village courts.<sup>3</sup>

New York is currently divided into twelve judicial districts.<sup>4</sup> Each judicial district is composed of one or more different counties within the state.<sup>5</sup> This organization, however, is not permanent, as the Legislature has the authority to alter the make-up of these judicial districts once every ten years.<sup>6</sup> The Supreme Court is organized by judicial district.<sup>7</sup>

The Task Force did not examine the Town and Village Court System in New York, but notes that it has recently been the subject of controversy.<sup>8</sup> In light of this controversy, Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman have recently outlined an action plan to overhaul this system.<sup>9</sup> Recommended changes range from substantive changes in their proceedings to modernizing their facilities, and specifically include transcription of all court proceedings, additional training of judges, and increased monitoring of these courts.<sup>10</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* art. VI, § 6(a); N.Y. JUD. LAW § 140 (McKinney 2005).

<sup>5</sup> N.Y. JUD. LAW § 140.

<sup>6</sup> N.Y. CONST. art. VI, § 6(b).

<sup>7</sup> *Id.* art. VI, § 6(a); N.Y. JUD. LAW § 140.

<sup>8</sup> William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1.

<sup>9</sup> Press Release, State of New York Unified Court System, Sweeping Reforms of New York's Local Justice Courts Unveiled (Nov. 21, 2006); *see also* State of New York Unified Court System, Action Plan for the Justice Courts (Nov. 2006), *available at* <http://www.nycourts.gov/publications/pdfs/ActionPlan-JusticeCourts.pdf>; William Glaberson, *Justice Courts in Small Towns to be Upgraded*, N.Y. TIMES, Nov. 22, 2006, at A1.

<sup>10</sup> Press Release, *supra* note 9.

Selection of the judges and justices of the above courts is truly a hodgepodge of procedures: some are elected, some are appointed, and some may be appointed on an interim basis to an otherwise elected position. New York’s elective and appointive systems are described below.

B. ELECTIVE SYSTEMS

Currently, New Yorkers elect the judges and justices of the Supreme Court, County Court, Civil Court, Surrogate’s Court, Family Court (outside New York City), City Court,<sup>11</sup> and District Courts (Nassau and Suffolk Counties).<sup>12</sup> The following is a review of these elective systems.

**1. The Supreme Court**

As New York practitioners know, the Supreme Court is not the state’s court of last resort, but is rather the trial-level court of general jurisdiction. Until the decision in *López Torres*, the Justices of the Supreme Court were elected to serve a term of fourteen years through a complicated process unique among the states.<sup>13</sup> In January 2006, this system was declared unconstitutional by the United States District Court for the Eastern District of New York, a decision that has been affirmed by the United States Court of Appeals for the Second Circuit.<sup>14</sup> This subsection reviews how the system is currently delineated in New York’s Constitution and statutes, before the current remedy of open primaries was imposed in *López Torres*.

The only technical constitutional requirement for eligibility to serve as a Supreme Court Justice is that a candidate be a member in good standing of the New York Bar for at least ten

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<sup>11</sup> City Courts are located in cities throughout the state (outside New York City). A comprehensive list is available at <http://www.nycourts.gov/courts/trial-citycourts.shtml> (last visited Jan. 11, 2007).

<sup>12</sup> N.Y. CONST. art. VI, § 16(a) (establishing the District Court of Nassau County); N.Y. UNIFORM DIST. CT. ACT § 2401 (McKinney 1989) (establishing the District Court of Suffolk County).

<sup>13</sup> N.Y. CONST. art. VI, § 6(c); *López Torres v. New York State Board of Elections*, 411 F. Supp. 2d 212, 215 (E.D.N.Y. 2006) [*López Torres I*] (“New York is unique in its use of a convention system to select nominees for election . . . .”), *aff’d*, 462 F.3d 161 (2d Cir. 2006) [*López Torres II*].

<sup>14</sup> *López Torres I*, 411 F. Supp. 2d at 255-56. The *López Torres* decision is discussed at length *infra* Part III.

years.<sup>15</sup> Any such person may stand for election under New York's unique system.<sup>16</sup> In simplest terms, a general election is held in each judicial district of the state, in which voters choose from among the candidates nominated by each party at a judicial nomination convention. The specifics of the nominating process, however, are byzantine and complex.

The most significant feature of the elective system for Supreme Court, and the one that caused the constitutional difficulties found in *López Torres*, is that a party's nomination is not obtained through a primary election, as it is with other offices. Instead, nominees are elected by delegates, who are themselves elected in party primaries unless a slate runs unopposed.<sup>17</sup> Delegates are elected from within each assembly district;<sup>18</sup> the total number of delegates is determined by party rules, as long as this total is substantially proportional to that assembly district's share of votes cast for Governor on the party's line in the preceding election.<sup>19</sup> New York law also permits each political party to provide an equal number of alternate delegates, whose purpose is to participate in the convention in place of delegates who cannot attend.<sup>20</sup>

Before an individual may appear on the primary ballot as a delegate, he or she must submit to the State Board of Elections a petition containing the signatures of at least five percent of the party's registered voters within the assembly district he or she wishes to represent.<sup>21</sup> This

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<sup>15</sup> N.Y. CONST. art. VI, § 20(a).

<sup>16</sup> See *López Torres I*, 411 F. Supp. 2d at 215.

<sup>17</sup> N.Y. ELEC. LAW § 6-124 (McKinney 1998).

<sup>18</sup> N.Y. CONST. art. VI, § 6(c); N.Y. ELEC. LAW § 6-124. New York is divided into twelve judicial districts, each one composed of a varying number of assembly districts. See N.Y. CONST. art. VI, § 6; N.Y. JUD. LAW § 62(1). The smallest of the judicial districts is composed of nine assembly districts, while the largest judicial district contains twenty-four. *López Torres II*, 462 F.3d at 172.

<sup>19</sup> N.Y. ELEC. LAW § 6-124.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 6-136(2).

process is further complicated by a restriction that does not allow a party member to sign more than one petition.<sup>22</sup> Prospective delegates are given 37 days to collect the required signatures.<sup>23</sup>

In a contested primary election, delegates not only have to actually campaign, but are also prohibited from disclosing the judicial candidate with whom they are affiliated.<sup>24</sup> Contested primaries for the office of judicial delegate, however, are few and far between.<sup>25</sup> What happens more often than not is that only one group of delegates files petitions within a particular assembly district, and because there is no opposition, those delegates are deemed elected and their names do not even appear on the primary ballot.<sup>26</sup>

Once elected, delegates attend the judicial nominating convention, the purpose of which is for all the delegates to deliberate and vote on whom to nominate as their party's candidates for Supreme Court Justice in the upcoming general election.<sup>27</sup> These conventions are held one to two weeks after the primaries, during which prospective justices can, in theory, lobby delegates.<sup>28</sup> The final step in this complicated process is the general election; the candidates selected from each convention are placed on the ballot, and the candidates with the most votes are elected.<sup>29</sup>

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<sup>22</sup> *Id.* § 6-134(3). In practice, this rule made challenging petitions very easy, and thus delegates were forced to obtain many more signatures than required, just to ensure their eligibility.

<sup>23</sup> *Id.* §§ 6-134(4), 6-136(2)(i), 6-136(3).

<sup>24</sup> *López Torres II*, 462 F.3d at 173.

<sup>25</sup> Between 1999 and 2002, four counties in New York State did not have a single contested delegate race in any assembly district. *Id.* at 175. In New York City, which has more contested elections than anywhere else in the state, only 12.7% of the judicial delegate seats were contested between 1999 and 2003. *López Torres I*, 411 F. Supp. 2d at 221.

<sup>26</sup> N.Y. ELEC. LAW § 6-160(2).

<sup>27</sup> *Id.* § 6-106; *López Torres II*, 462 F.3d at 178.

<sup>28</sup> N.Y. ELEC. LAW § 6-158(5); *López Torres II*, 462 F.3d at 176.

<sup>29</sup> N.Y. CONST. art. VI, § 6(c); N.Y. ELEC. LAW § 9-200(1).

The Judiciary Law of New York currently authorizes a statewide total of 324 Supreme Court Justices.<sup>30</sup> No legal requirement exists for review by a screening panel or nominating commission.<sup>31</sup>

## **2. County Court**

The jurisdiction of the County Courts, which sit in every county outside New York City, is more limited than that of the Supreme Court.<sup>32</sup> Best known for handling felony criminal cases outside of New York City, the County Courts also have jurisdiction over actions for the recovery of money and property not exceeding \$25,000, summary proceedings to recover real property, removal of tenants from real property, and appeals from the Town and Village Courts.<sup>33</sup> Pursuant to authority granted by the Constitution, the Legislature has expanded the jurisdiction of the County Courts to include a number of separate actions.<sup>34</sup>

Each County Court outside of New York City has at least one judge.<sup>35</sup> The Legislature may increase the number of judges that serve in any County Court if it chooses.<sup>36</sup>

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<sup>30</sup> N.Y. JUD. LAW § 140-a. The numbers by each Judicial District is as follows: First District, thirty-eight; Second District, fifty-two; Third District, fifteen; Fourth District, thirteen; Fifth District, seventeen; Sixth District, ten; Seventh District, eighteen; Eighth District, twenty-six; Ninth District, twenty-six; Tenth District, forty-seven; Eleventh District, thirty-eight; and Twelfth District, twenty-four. *Id.* This total does not include the number of Acting Supreme Court Justices who serve temporary terms to help alleviate the Supreme Court's docket.

<sup>31</sup> *See* N.Y. CONST. art. VI, § 6(c) (this provision of the Constitution only requires that Supreme Court Justices be chosen by the electors of the district in which they want to serve).

<sup>32</sup> *Id.* art. VI, § 11(a).

<sup>33</sup> *Id.* art. VI, § 11(a), (c).

<sup>34</sup> N.Y. JUD. LAW § 190.

<sup>35</sup> N.Y. CONST. art. VI, § 10(a).

<sup>36</sup> *Id.*

County Court judges are elected to a ten-year term by the voters of the county<sup>37</sup> but, unlike Supreme Court Justices, candidates are nominated by their respective parties in contested primaries.<sup>38</sup>

### **3. Surrogate's Court**

Each county in New York has at least one Surrogate's Court,<sup>39</sup> which exercises jurisdiction over matters related to the probate of wills and administration of estates for decedents.<sup>40</sup> The number of surrogates in each county may be increased by the Legislature.<sup>41</sup> Surrogates are elected by the voters of the county in which they serve.<sup>42</sup> Similar to the County Court judges, candidates for surrogate are nominated for the general election by the members of each party in contested primaries.<sup>43</sup> Depending on where they sit, surrogates serve either a ten- or fourteen-year term.<sup>44</sup>

### **4. Family Court**

Each county in New York State has a Family Court.<sup>45</sup> As the name implies, the Family Court has jurisdiction over actions related to adoption, paternity, minors, juvenile delinquency, support, and other matters generally enumerated in the Constitution and the Family Court Act.<sup>46</sup> Notably, the Family Court does not have jurisdiction over proceedings for divorce,

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<sup>37</sup> *Id.* art. VI, § 10(a), (b).

<sup>38</sup> *See* N.Y. ELEC. LAW § 6-110.

<sup>39</sup> N.Y. CONST. art. VI, § 12(d).

<sup>40</sup> *Id.* art. VI, § 12(b).

<sup>41</sup> *Id.* art. VI, § 12(a).

<sup>42</sup> *Id.* art. VI, § 12(b).

<sup>43</sup> *See* N.Y. ELEC. LAW § 6-110.

<sup>44</sup> N.Y. CONST. art. VI, § 12(c). Surrogates serving within New York City serve a term of fourteen years, while those outside of New York City have a term of ten years. *Id.*

<sup>45</sup> *Id.* art. VI, § 13(a).

<sup>46</sup> *Id.* art. VI, §13(b); N.Y. FAM. CT. ACT § 115 (2006).

separation, annulment, dissolution of marriage, or matters that would be within the court's jurisdiction but are incidental to these marital proceedings.<sup>47</sup> These proceedings are the province of the Supreme Court.<sup>48</sup>

The number of judges serving in the Family Court can be increased by the Legislature.<sup>49</sup> The methods for selection of Family Court judges differ depending on where they sit. Family Court judges serving outside of New York City are elected to serve a term of ten years by the voters of the county in which they reside and, unlike the Supreme Court, candidates for this office are nominated in open primaries.<sup>50</sup> Those serving inside New York City are appointed by the Mayor to ten-year terms, in a process described below.<sup>51</sup>

## **5. New York City Civil Court**

The New York Constitution requires that the Legislature establish a Civil Court for New York City,<sup>52</sup> which has jurisdiction over a number of basic civil matters in which the amount in controversy does not exceed \$25,000.<sup>53</sup> Thus, in civil matters, the Civil Court serves a function similar to the County Courts outside New York City.

New York City Civil Court judges are elected to serve a term of ten years by the voters of the counties within New York City.<sup>54</sup> The number of judges that serve in this court is

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<sup>47</sup> See N.Y. FAM. CT. ACT § 115.

<sup>48</sup> The Family Court Act does not include matrimonial actions among the list of actions over which it has jurisdiction, thus leaving jurisdiction over these actions with the Supreme Court by default. See *id.*

<sup>49</sup> N.Y. CONST. art. VI, § 13(a).

<sup>50</sup> *Id.*; see N.Y. ELEC. LAW § 6-110.

<sup>51</sup> N.Y. CONST. art. VI, § 13(a). See *infra* Part II.C.6.d.

<sup>52</sup> N.Y. CONST. art. VI, § 15(a).

<sup>53</sup> *Id.* art. VI, § 15(b).

<sup>54</sup> *Id.* art. VI, § 15(a).

determined by the Legislature.<sup>55</sup> Vacancies in the New York City Civil Court, other than by expiration of term, are filled by appointment until the next election can be held.<sup>56</sup>

## **6. Temporary Vacancies**

The Constitution provides a mechanism for temporary appointments to the bench should there be a vacancy, other than by an expiration of term, in any of the elective courts.<sup>57</sup> Depending on which court has a vacancy, it is filled by appointment by either the Governor, Mayor of New York City, or county officials.<sup>58</sup> When the Governor makes these appointments, his or her choice is aided by the judicial screening committee,<sup>59</sup> discussed in further detail below.<sup>60</sup> These appointments last until the vacancies can be filled by the next general election.<sup>61</sup>

### **C. APPOINTIVE SYSTEMS**

In New York, apart from temporary appointments to fill vacancies, judges are appointed to the following courts: the Court of Appeals, the Appellate Division, the Appellate Term, the Court of Claims, Acting Justices of the Supreme Court, the New York City Criminal Court, Interim Appointments to the New York City Civil Court, and the New York City Family Court. The following subsection reviews these appointive systems.

#### **1. The New York Court of Appeals**

The New York Court of Appeals is the highest court in the state of New York. Its jurisdiction, with limited exceptions including death penalty matters, is restricted to questions of

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* art. VI, § 21(c).

<sup>57</sup> *Id.* art. VI, § 21.

<sup>58</sup> *Id.*

<sup>59</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 5.10.1 (2001).

<sup>60</sup> *See infra* Part II.C.2.

<sup>61</sup> N.Y. CONST. art. VI, § 21(a).

law.<sup>62</sup> The Court consists of one Chief Judge and six associate judges, each serving a term of fourteen years.<sup>63</sup> Judges are appointed by the Governor, with the advice and consent of the Senate.<sup>64</sup> The Governor's choice is limited to those candidates that are recommended to him or her by the constitutionally mandated judicial nomination commission.<sup>65</sup>

The judicial nomination commission is perhaps the most crucial component of the selection process; it acts as a filter through which only those individuals deemed by it to be the most qualified are recommended to the Governor. The nominating commission is a bi-partisan body, mandated by law, which is used to evaluate, certify, and eventually recommend a limited number of qualified individuals to the Governor.<sup>66</sup> It has a total of twelve members, all of whom are appointed by various state officials.<sup>67</sup> Four commission members are appointed by the Governor; four by the Chief Judge; and one each by the Speaker of the Assembly, the temporary President of the Senate, the Minority Leader of the Assembly, and the Minority Leader of the Senate.<sup>68</sup>

Commission members must also conform to a stringent set of requirements in order to be appointed.<sup>69</sup> Of the four commission members appointed by the Governor and the Chief Judge, no more than two can be members of the same political party and no more than two can be

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<sup>62</sup> *Id.* art. VI, § 3(a).

<sup>63</sup> *Id.* art. VI, § 2(a).

<sup>64</sup> *Id.* art. VI, § 2(e).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* art. VI, § 2(c),(d),(e).

<sup>67</sup> *Id.* art. VI, § 2(d)(1).

<sup>68</sup> *Id.*; N.Y. JUD. LAW § 62(1).

<sup>69</sup> Aside from requiring New York State citizenship, the appointees must satisfy the numerous requirements of Section 62(1) of the New York Judiciary Law to serve.

members of the New York State Bar.<sup>70</sup> Commission members are also prohibited from holding or having held any judicial office, or any elective office for which they are compensated.<sup>71</sup> Further, members are prohibited from holding any office in any political party while serving on the commission.<sup>72</sup> Last, commission members are also precluded from appointment to any New York judicial position for at least one year.<sup>73</sup>

The judicial nomination commission has the duty of evaluating judicial candidates and, if there is a concurrence of at least eight members, to submit a report and recommendation to the Governor, which is simultaneously released to the public.<sup>74</sup> Depending on whether or not they are making a recommendation for Chief Judge or associate judge, the commission will recommend between three and seven candidates.<sup>75</sup> Each candidate's evaluation is based on his or her "character, temperament, professional aptitude, experience, qualifications and fitness for office."<sup>76</sup>

Any vacancies, other than by expiration of term, in the Court of Appeals are filled using the same procedure,<sup>77</sup> with the exception that if the Senate is not in session at the time, any appointment made by the Governor is deemed to be an "interim appointment" until the Senate can either confirm or reject the appointment.<sup>78</sup>

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<sup>70</sup> N.Y. JUD. LAW § 62(1).

<sup>71</sup> *Id.* The only exception to this rule is that the Governor and Chief Judge each may appoint one former judicial official. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> N.Y. CONST. art. VI, § 2(c), (d)(4); N.Y. JUD. LAW § 63(1), (3).

<sup>75</sup> N.Y. JUD. LAW § 63(2)(a), (b). For Chief Judge, the commission must recommend a total of seven people; for associate judge, the commission may recommend between three and seven candidates. *Id.*

<sup>76</sup> *Id.* § 63(3).

<sup>77</sup> *Id.* § 68(2).

<sup>78</sup> *Id.* § 68(3).

## **2. The Appellate Division of the Supreme Court**

Each of New York State's four judicial departments contains an Appellate Division,<sup>79</sup> which is New York's principal intermediate appellate court.<sup>80</sup> The Appellate Divisions hear and dispose of appeals from judgments and orders entered by the lower courts located within the same judicial department.<sup>81</sup> The Constitution permits the Legislature to expand the jurisdiction of the Appellate Division.<sup>82</sup>

Appellate Division Justices are appointed by the Governor from among the Supreme Court Justices that have been approved by the Governor's four screening committees (one per department), which are created by Executive Order.<sup>83</sup> A Supreme Court Justice wishing to be elevated to the Appellate Division must submit her application to the screening committee, who then reviews the applicant's background and conducts various interviews. Unlike the Judicial Nominating Commission, there is no set number of candidates that the committee reports to the Governor. Rather, its duty is to forward the name of each qualified candidate to the Governor for consideration. Once appointed, Appellate Division Justices serve a term of five years or through the end of their Supreme Court term, whichever is shorter.<sup>84</sup>

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<sup>79</sup> N.Y. CONST. art. VI, § 4; N.Y. JUD. LAW § 70.

<sup>80</sup> *See* N.Y. CONST. art. VI, § 5.

<sup>81</sup> *See id.*

<sup>82</sup> *Id.* art. VI, § 4(k).

<sup>83</sup> *Id.* art. VI, § 4(c); N.Y. JUD. LAW § 71; N.Y. COMP. CODES R. & REGS. tit. 9, § 5.10.1.

<sup>84</sup> N.Y. CONST. art. VI, § 4(c), 6(c); N.Y. JUD. LAW § 71.

In addition to designating Appellate Division Justices, the Governor also selects the Presiding Justice of each Appellate Division.<sup>85</sup> The Governor may also make temporary designations, upon the request of the Appellate Division, to help relieve the workload of the court.<sup>86</sup>

### **3. Appellate Terms for the Supreme Court of the State of New York**

Under Section 8 of Article VI of the New York State Constitution, the Appellate Division of the Supreme Court in each judicial department is authorized to establish an Appellate Term in and for the counties within such department.<sup>87</sup> Each Appellate Term must have between three and five associate justices, with no more than three associate justices sitting in any action or proceeding.<sup>88</sup> The justices are designated “from time to time” by the Chief Administrator of the Courts with the approval of the Presiding Justice of the Appellate Division.<sup>89</sup> In general, Appellate Term associate justices have been appointed for the duration of their judicial careers.

Three Appellate Terms are currently in existence. The Appellate Term for the First Judicial Department hears all appeals from the Civil Court and Criminal Court of the City of New York in the Counties of New York and Bronx.<sup>90</sup> The Appellate Term for the Second and Eleventh Judicial Districts hears appeals from the Civil Court and Criminal Court of the City of New York for the counties of Kings, Queens, and Richmond.<sup>91</sup> The Appellate Term of the Supreme Court for the Ninth and Tenth Judicial Districts (Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and

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<sup>85</sup> N.Y. CONST. art. VI, § 4(c); N.Y. JUD. LAW § 71. The Presiding Justice of the Appellate Division must reside in the department to which he or she is appointed. N.Y. CONST. art. VI, § 4(c).

<sup>86</sup> N.Y. CONST. art. VI, § 4(e); N.Y. JUD. LAW § 71.

<sup>87</sup> N.Y. CONST. art. VI, § 8(a).

<sup>88</sup> *Id.* art. VI, § 8(a), (c).

<sup>89</sup> *Id.* art. VI, § 8(a).

<sup>90</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 640.1.

<sup>91</sup> *Id.* tit. 22, § 730.1(b)(1)(2).

Ulster counties) hears appeals authorized by law to be taken to the Appellate Division from any court in any county within those districts, other than appeals from the Supreme Court, Surrogate's Court, Family Court, or criminal appeals from the County Court.<sup>92</sup>

#### **4. The Court of Claims**

The Court of Claims has jurisdiction over claims brought against the state or by the state itself.<sup>93</sup> Under the Constitution, the Court of Claims is composed of eight judges; the Legislature can and has increased the number of judges, as authorized by the Constitution.<sup>94</sup> These judges are appointed to serve nine-year terms by the Governor with the advice and consent of the Senate.<sup>95</sup> As in the case of the Appellate Division, the law does not require any form of nominating commission or screening panel before the Governor may nominate a candidate for the Court of Claims. Rather, each Governor is left to set up whatever system he or she deems best, pursuant to executive order or practice. Former Governor George Pataki, for example, established a screening committee, the members of which are appointed by various state officials, including the Governor.<sup>96</sup> Governor Eliot Spitzer re-established the committee on his first day in office.<sup>97</sup>

As described in the next section, because of an ongoing (now decades-long) judicial emergency in criminal cases in New York City, most of the Court of Claims judges sitting in New York City have been designated Acting Supreme Court Justices, empowered to hear felony cases.<sup>98</sup>

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<sup>92</sup> *Id.* tit. 22, § 730.1(d).

<sup>93</sup> N.Y. CONST. art. VI, § 9.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> N.Y. COMP. CODES R. & REGS. tit. 9, §§ 5.10.1, 5.11. This is the same process described in the preceding subsection for the Appellate Division. *Id.*

<sup>97</sup> Exec. Order of the Governor of the State of New York No. 4 (Jan. 1, 2007), *available at* [http://www.ny.gov/governor/executive\\_orders/exeorders/4.html](http://www.ny.gov/governor/executive_orders/exeorders/4.html) (last visited Jan. 11, 2007).

<sup>98</sup> *Taylor v. Sise*, 33 N.Y.2d 357, 364 (1974).

## 5. Acting Justices of the Supreme Court

Though Justices of the Supreme Court are elected, the Office of Court Administration, pursuant to the state Constitution, may designate certain lower court judges as Acting Supreme Court Justices.<sup>99</sup> Depending on the need of the court, judges from the courts of limited jurisdiction can be temporarily assigned to serve as Supreme Court Justices by the Chief Administrative Judge (or the Chief Administrator, if the incumbent is not a judge) of the Courts, in agreement with the Presiding Justice of the coinciding Appellate Division.<sup>100</sup> In making his decision, the Chief Administrative Judge must consider the recommendations made by an “evaluatory” panel, which bases its recommendations on a specific set of criteria.<sup>101</sup> Additionally, certain judges of the Court of Claims are in reality slated to be Acting Justices from the time of their appointment, to alleviate a long-standing “emergency” in the criminal caseload in New York City.<sup>102</sup> Acting Supreme Court Justices have the same powers and duties as their elected counterparts.<sup>103</sup>

The practice of designating Acting Justices was put into place to help alleviate the pressure placed on the Supreme Court docket by allowing experienced lower court judges to sit and hear cases where there would otherwise be a shortage of elected justices. It has in reality produced a two-track Supreme Court — those that are elected to the position and those that are appointed. The key differences are that only the elected justices are eligible for appointment to the Appellate

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<sup>99</sup> N.Y. CONST. art. VI, § 26. This practice is to be distinguished from vacancy appointments to the Supreme Court, which are made by the Governor with the advice and consent of the Senate until an election may be held or, if the Senate is not in session, until the end of the year in which the appointment is made. *Id.* art. VI, § 21.

<sup>100</sup> *Id.* art. VI, § 26; N.Y. COMP. CODES R. & REGS. tit. 22, §§ 33, 33.1, 121.1, 121.2.

<sup>101</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 121.2. Judges of the Court of Claims however, are exempted from these procedures. *Id.* § 121.1.

<sup>102</sup> *Taylor*, 33 N.Y.2d at 361-62.

<sup>103</sup> N.Y. CONST. art. VI, § 26(k).

Division,<sup>104</sup> and that the Acting Justices may be stripped of that title and its concomitant jurisdiction at any time by the Chief Administrator of the Courts, with the advice and consent of the Presiding Justice of the appropriate Appellate Division.<sup>105</sup>

## **6. Appointments by the Mayor of New York City**

In part because of New York's unique geography, the Mayor of New York City has been granted significant authority to appoint judges. The Mayor appoints judges of the Criminal Court and the Family Court, and makes interim appointments to the Civil Court, which judges are often assigned to sit in Criminal Court.

### **a. The Mayor's Advisory Committee**

In 2002, continuing a practice used in some form since the early 1960s, Mayor Michael Bloomberg issued an Executive Order establishing The Mayor's Advisory Committee, the purpose of which is to recruit, evaluate, and nominate qualified candidates for appointment and reappointment to the court systems that are specific to New York City.<sup>106</sup> The Mayor must first obtain a recommendation from the 19-member advisory committee before he or she can appoint or reappoint a judge.<sup>107</sup> To be eligible to serve on the committee, members must either reside in or have their principal place of business located within New York City.<sup>108</sup> Nine members of the committee are selected by the Mayor directly.<sup>109</sup> Of the remaining members, four are nominated by the Chief Judge, one each by the Presiding Justices of the Appellate Division for the First and

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<sup>104</sup> N.Y. JUD. LAW § 71.

<sup>105</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 121.4.

<sup>106</sup> Exec. Order of the Mayor of the City of New York No. 8, §§ 1-2 (Mar. 4, 2002) ["Exec. Order No. 8"]. These Courts are the New York City Family Court, Criminal Court, and interim appointments to the New York City Civil Court. *Id.*

<sup>107</sup> *Id.* §§ 2(d), 5(a).

<sup>108</sup> *Id.* § 5(a).

<sup>109</sup> *Id.*

Second Judicial Departments, and one each by the deans of two New York City law schools, who are themselves selected on a rotating basis.<sup>110</sup> Once selected, committee members serve a term of two years.<sup>111</sup>

The Mayor's choices for appointment are limited to no greater than three candidates per vacancy.<sup>112</sup> After a candidate has been selected for appointment, a public hearing is held so that the committee can further scrutinize the candidate.<sup>113</sup> The committee has the authority to reconsider a nomination based on the outcome of this public hearing.<sup>114</sup>

b. New York City Criminal Court

Under the Constitution, the New York City Criminal Court's jurisdiction is limited to crimes and violations that are not prosecuted by indictment.<sup>115</sup> The Legislature, however, is permitted to confer the New York City Criminal Court with jurisdiction over certain misdemeanors that are prosecuted by indictment and other actions that are not within the exclusive jurisdiction of the Supreme Court.<sup>116</sup> New York City Criminal Court judges are appointed by the Mayor, after approval by the Mayor's Advisory Committee, for a ten-year term.<sup>117</sup> Any vacancy, other than by expiration of a term, is also filled by an appointment by the Mayor.<sup>118</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* § 2(d).

<sup>113</sup> *Id.* § 3(a). No hearing is required for an incumbent judge. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> N.Y. CONST. art. VI, § 15(c).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* art. VI, § 15(a); Exec. Order No. 8, § 4(a).

<sup>118</sup> N.Y. CONST. art. VI, § 21(c).

c. Interim Appointments to the New York City Civil Court

When a vacancy occurs in the New York City Civil Court, other than by an expiration of term, the vacancy can be filled by an appointment by the Mayor.<sup>119</sup> This temporary appointment, however, must also be reviewed, and approved of, by the Mayor's Advisory Committee.<sup>120</sup>

d. Family Court

Although the Family Court within New York City serves the same function as those located in the other counties, the selection method for its judges is different. Family Court judges in New York City are appointed to a term of ten years by the Mayor.<sup>121</sup> Before a candidate can be appointed, however, he must first be nominated by the Mayor's Advisory Committee.<sup>122</sup>

III. THE LÓPEZ TORRES CASE

An important focal point for the Task Force's findings and recommendations, contained below,<sup>123</sup> is the decision and findings of fact made by Judge John Gleeson in *López Torres* and affirmed by the Second Circuit. As mentioned above, the Task Force expresses no views as to the soundness of Judge Gleeson's or the Second Circuit's legal or federal constitutional analysis.

A. OVERVIEW OF THE FACTS

In March 2004, the Honorable Margarita López Torres, then a sitting Civil Court Judge in Kings County, along with other named plaintiffs, filed an action in the Eastern District of

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<sup>119</sup> *Id.*

<sup>120</sup> Exec. Order No. 8, §§ 1, 4(a). Judges for the housing division of the Civil Court are appointed by the administrative judge, but also must be approved by an advisory committee. N.Y. CITY CIV. CT. ACT. § 110(f) (2006).

<sup>121</sup> N.Y. CONST. art. VI, § 13(a).

<sup>122</sup> Exec. Order No. 8, §§ 1, 4(a).

<sup>123</sup> *See infra* Parts V & VI.

New York against the New York State Board of Elections.<sup>124</sup> The New York County Democratic Committee and the New York Republican State Committee, as well as the Association of Justices of the Supreme Court of the State of New York and the Association of Justices of the Supreme Court of the City of New York, intervened as defendants in the case.<sup>125</sup> Plaintiffs asserted that the current system for selection of Supreme Court Justices is unconstitutional because it violates both the First and Fourteenth Amendments, arguing that “the system both deprives voters of the right to choose their parties’ judicial candidates and imposes insurmountable burdens on challenger candidates who seek major party nominations without the support of local Democratic or Republican Party leaders.”<sup>126</sup>

Plaintiffs sought a preliminary injunction against the enforcement of Section 6-106 of the New York Election Law, which calls for judicial nominating conventions for the election of Supreme Court Justices, and an injunction against the use of the procedures for such conventions as described in Section 6-124 of the Election Law.<sup>127</sup> Plaintiffs also sought an order directing that primary elections be held for Supreme Court Justices, as well as an order instructing the Legislature to address the matter expeditiously, presumably by enacting new legislation in conformance with the State and Federal Constitutions.<sup>128</sup>

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<sup>124</sup> *López Torres v. New York State Board of Elections*, Compl. (Mar. 18, 2004), available at [http://www.brennancenter.org/dynamic/subpages/nys\\_judicial%20elections\\_complaint.pdf](http://www.brennancenter.org/dynamic/subpages/nys_judicial%20elections_complaint.pdf) (last visited Jan. 11, 2007).

<sup>125</sup> *López Torres I*, 411 F. Supp. 2d at 212. The Attorney General of the State of New York also intervened in the case as a statutory intervenor. *Id.*

<sup>126</sup> *Id.* at 214; see also *López Torres*, Compl. at 1-3.

<sup>127</sup> *López Torres*, Compl. at 35. Section 6-106 states that “[p]arty nominations for the office of the supreme court shall be made by the judicial district convention” and Section § 6-124 outlines the specific procedures for nominating conventions. N.Y. ELEC. LAW §§ 6-106, 6-124.

<sup>128</sup> *López Torres*, Compl. at 35.

The lawsuit arose out of Judge López Torres’s unsuccessful attempts to get on the ballot as a Democratic candidate for the Supreme Court in the Ninth Judicial District (Kings and Richmond counties).<sup>129</sup> In 1992, Judge López Torres was elected to the Civil Court with the endorsement of the Kings County Democratic Party.<sup>130</sup> Following her successful election, she received a letter from Democratic Party leaders in Brooklyn suggesting a candidate for her to interview and hire as her court attorney, the official title for a law clerk.<sup>131</sup> Judge López Torres interviewed the candidate, but did not believe the candidate was qualified for the job, and therefore refused to hire him, instead hiring someone else.<sup>132</sup> In response, Judge López Torres was notified that she had upset party leaders, and was directed to fire the candidate she had hired in favor of the one supported by the party.<sup>133</sup> Judge López Torres refused.<sup>134</sup>

Three years later, Judge López Torres received another referral for a court attorney.<sup>135</sup> In this case, a Democratic Party leader asked Judge López Torres to hire a relative, and promised that Judge López Torres would receive the party’s support in a bid for the Supreme Court.<sup>136</sup> Once again, Judge López Torres refused.<sup>137</sup> After these incidents, she attempted on

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<sup>129</sup> *López Torres I*, 411 F. Supp. 2d at 235; Interview by the New York Hispanic Bar Task Force on Judicial Selection with Hon. Margarita López Torres & Jeremy Creelan, in New York, N.Y. (July 6, 2006) [“López Torres Interview”].

<sup>130</sup> *López Torres I*, 411 F. Supp. 2d at 234; López Torres Interview, *supra* note 129.

<sup>131</sup> *López Torres I*, 411 F. Supp. 2d at 234; López Torres Interview, *supra* note 129.

<sup>132</sup> *López Torres I*, 411 F. Supp. 2d at 234; López Torres Interview, *supra* note 129.

<sup>133</sup> *López Torres I*, 411 F. Supp. 2d at 234; López Torres Interview, *supra* note 129.

<sup>134</sup> *López Torres I*, 411 F. Supp. 2d at 234; López Torres Interview, *supra* note 129.

<sup>135</sup> *López Torres I*, 411 F. Supp. 2d at 234-35; López Torres Interview, *supra* note 129.

<sup>136</sup> *López Torres I*, 411 F. Supp. 2d at 234-35; López Torres Interview, *supra* note 129.

<sup>137</sup> *López Torres I*, 411 F. Supp. 2d at 235; López Torres Interview, *supra* note 129.

numerous occasions to gain the party's support for her candidacy for the Supreme Court.<sup>138</sup> Each time — in 1997, 2002, and 2003 — she alleged that she was unable to gain access to the process because of her previous disloyalty to the party.<sup>139</sup> Judge Gleeson's factual findings supported Judge López Torres's allegations.<sup>140</sup>

B. THE DISTRICT COURT'S DECISION

The district court ruled in favor of the plaintiffs on all issues, although it declined to request that the Legislature expedite enacting legislation to remedy the unconstitutionality of the judicial nominating convention.<sup>141</sup> Specifically, the court granted plaintiff's application for a preliminary injunction prohibiting the enforcement and use of Sections 6-106 and 6-124 of the Election Law.<sup>142</sup> It determined that the judicial nominating convention system as it existed was a *de facto* appointive system, in which party leaders were the appointing authority.<sup>143</sup> The court therefore held that the convention system was depriving the citizens of New York of their First Amendment right to vote and effectively participate as candidates in Supreme Court elections, a right granted them by the New York Constitution.<sup>144</sup> As Judge Gleeson wrote, "the state may not pass off the will of party leaders as the will of the people."<sup>145</sup> Absent legislative action to cure the defect, the district

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<sup>138</sup> *López Torres I*, 411 F. Supp. 2d at 235-36; López Torres Interview, *supra* note 129.

<sup>139</sup> *López Torres I*, 411 F. Supp. 2d at 235-36.

<sup>140</sup> *Id.* at 236-37.

<sup>141</sup> *Id.* at 255-56.

<sup>142</sup> *Id.* at 256.

<sup>143</sup> *Id.* at 255.

<sup>144</sup> *Id.* at 254.

<sup>145</sup> *Id.*

court ordered direct primaries as the least restrictive remedy available to ensure true election of Supreme Court Justices.<sup>146</sup>

C. SECOND CIRCUIT'S DECISION

On August 30, 2006, a panel of the Second Circuit, in a unanimous decision, affirmed the district court's decision.<sup>147</sup> The Court held that the judicial nominating system as practiced in New York and prescribed by Sections 6-106 and 6-124 of the Election Law is unconstitutional.<sup>148</sup> The Court further held that Judge Gleeson properly exercised his discretion in issuing the preliminary injunction and in ordering direct primaries for the election of Supreme Court Justices.<sup>149</sup>

D. TIMETABLE FOR THE LEGISLATURE TO ACT

The Second Circuit reiterated that it is the responsibility of the State Legislature to “enact a new nominating scheme.”<sup>150</sup> The Court also noted the fact that the order of the district court would not go into effect until after the 2006 election cycle, thus giving the Legislature more than a year before a primary election might occur, in which time it could provide an alternative system.<sup>151</sup>

E. POSSIBLE OPTIONS FOR THE LEGISLATURE

In the absence of a grant of *certiorari* by the United States Supreme Court and a further stay, the Legislature may proceed in a variety of ways. First, it may decide not to do anything, in which case direct primaries would become the method of nominating Supreme Court

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<sup>146</sup> *Id.* at 255-56. *See infra* Part VI.B for a detailed discussion of the Judge Gleeson's remedy.

<sup>147</sup> *López Torres II*, 462 F.3d at 208.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 207-08

<sup>151</sup> *Id.* at 205.

Justices, as called for in default provision of Section 6-110 of the Election Law. Second, the Legislature could rewrite sections of the Election Law in such a way as to remove the many barriers to election and voter participation cited by the district court and the Second Circuit, although there is some question as to whether a “fix” of the convention system is possible.<sup>152</sup> Third, the Legislature could authorize a constitutional amendment of Article VI, Section 6(c) of the New York State Constitution to provide for the appointment of Supreme Court Justices.

Even if the Legislature were to choose this last option, it would not go into effect for three to four years, because of the necessity of an amendment being passed by two successive Legislatures before it is submitted to the voters.<sup>153</sup> As noted in further detail below, the Task Force also notes the strong resistance to such an amendment among various political constituencies in New York, making this option most difficult.<sup>154</sup>

#### IV. HISTORICAL OVERVIEW OF DIVERSITY STUDIES AND OTHER JUDICIAL SELECTION TASK FORCES

This Task Force is certainly not the first to examine judicial selection in New York. Indeed, there have been numerous proposals for judicial selection reform over the decades, most notably (but by no means exclusively) by the Association of the Bar of the City of New York and the Fund for Modern Courts.<sup>155</sup> Indeed, one of these efforts, the 1975 task force appointed by Governor Hugh Carey and headed by Cyrus R. Vance, Sr., led to the passing of a constitutional

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<sup>152</sup> Fredrick A.O. Schwarz, Jr., Testimony Before the Standing Committee on the Judiciary of the Assembly of the State of New York 2-3 (Nov. 15, 2006), *available at* [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_38930.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_38930.pdf).

<sup>153</sup> N.Y. CONST. art. XIX, § 1.

<sup>154</sup> *See infra* Part VI.C.3 for a detailed discussion of the constitutional amendment option.

<sup>155</sup> *See* Judicial Selection Task Force of the Ass’n of the Bar of the City of New York, Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York 22-27 (2003) [“ABCNY Report”].

amendment providing for commission-based appointment of Judges of the New York Court of Appeals.<sup>156</sup>

In the past fifteen years, other groups have examined judicial selection in lower courts and, for the first time, have examined the crucial issue of diversity in our state courts. The following subsections review selected reports of these groups.

A. GOVERNOR MARIO CUOMO'S TASK FORCE ON JUDICIAL DIVERSITY

In 1992, Governor Mario Cuomo convened the Task Force on Judicial Diversity and charged them with the task of addressing the apparent lack of diversity in the state's judiciary.<sup>157</sup> The task force issued a 21-page letter to the Governor finding that although the New York State population was diverse, such diversity was not reflected in the judiciary.<sup>158</sup> The disparity between an ethnically diverse population and an ethnically homogenous judiciary led the task force to conclude that the New York State judicial selection system violated the Voting Rights Act of 1964.<sup>159</sup> The task force proposed several comprehensive changes that called for, among other things, requiring appointing authorities to issue written policy statements explicitly setting forth a commitment to diversity, coordinating diverse judicial screening committees, limiting screening committees to one per judicial district, maintaining publicly available data on diversity, and conducting public outreach to encourage qualified minority and women attorneys to apply for judgeships.<sup>160</sup> Among its more dramatic recommendations were its proposal to eliminate judicial candidates' party designations on

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<sup>156</sup> *Id.* at 25.

<sup>157</sup> Exec. Order of the Governor of New York No. 149 (Sept. 23, 1991).

<sup>158</sup> Task Force Report on Judicial Diversity 2-3 (1992) ["Cuomo Report"].

<sup>159</sup> *Id.* at 19.

<sup>160</sup> *Id.* at 9-18.

the ballot and a proposal to change the New York State Election Law to limit the number of candidates on the ballot approved by each of the judicial screening committees.<sup>161</sup>

B. THE NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS

The New York State Judicial Committee on Women in the Courts (the “Committee”) was established in 1986 to implement the recommendations of the New York Task Force on Women in the Courts, appointed by the then-Chief Judge of the Court of Appeals.<sup>162</sup> In 1996, the Committee issued a report entitled “Appraising Change and Progress a Decade After the Report of the New York State Task Force on Women in the Courts.”<sup>163</sup> The report documented the pervasive bias against women litigants, attorneys, court personnel, and judges.<sup>164</sup> However, it failed to make substantive recommendations for increasing the number of women in the judiciary.<sup>165</sup> Another report, issued in 2002 by the same Committee, made similar findings.<sup>166</sup> Other than recommending the creation of a program entitled “How to Become a Judge,” directed at women and others who historically have not been well represented in the judiciary, the report urged no other substantive recommendations on judicial selection.<sup>167</sup>

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<sup>161</sup> *Id.* at 14-16.

<sup>162</sup> New York State Judicial Committee on Women in the Courts, Equal Justice, Equal Treatment, Equal Opportunity: Appraising Change and Progress a Decade After the Report of the New York Task Force on Women in the Courts 3-5 (May 1996) [“Women in the Courts Report”] (on file with the New York State Judicial Committee on Women in the Courts)

<sup>163</sup> *See generally id.*

<sup>164</sup> *Id.* at 13-34.

<sup>165</sup> *Id.* at 35-45.

<sup>166</sup> New York State Judicial Committee on Women in the Courts, Women in the Courts: A Work in Progress, 15 Years After the Report of the New York Task Force on Women in the Courts (Apr. 2002), *available at* [http://www.nycourts.gov/ip/womeninthecourts/womeninthecourts\\_report.pdf](http://www.nycourts.gov/ip/womeninthecourts/womeninthecourts_report.pdf) (last visited Jan. 11, 2007).

<sup>167</sup> *Id.* at 6.

C. THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND

In 2002, the Puerto Rican Legal Defense and Education Fund (“PRLDEF”) issued a groundbreaking report, “Opening the Courthouse Doors: The Need for More Hispanic Judges.”<sup>168</sup> The report, not limited to New York, was written to document the lack of progress that Hispanics have made in the United States in attaining judgeships on the federal and state levels.<sup>169</sup> It noted that although census data show that 12.5 percent of the country’s population is Hispanic, as of 2000, only 3.7 percent of federal judges were Hispanic.<sup>170</sup> At the time of the report’s publication, New York had 56 state judges of Hispanic origin.<sup>171</sup> PRLDEF noted that New York ranked “24th among the states in terms of Hispanic parity in state judgeships. Among the top ten states with the largest Hispanic concentrations, New York still has one of the worst track records of appointing Hispanics to state judgeships.”<sup>172</sup> In the report, PRLDEF recommended appointing Latinos to federal and state cabinet and policy-making positions and nominating Latinos with a demonstrated commitment to the Latino community for judgeships, including one to the United States Supreme Court.<sup>173</sup>

Although the PRLDEF report provides a thorough statistical analysis, it was not specifically concerned with the method of selection of judges in New York, as long as any particular selection method resulted in greater diversity. It made the following notable recommendations for increasing diversity on the bench:

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<sup>168</sup> Puerto Rican Legal Defense and Education Fund, *Opening the Courthouse Doors: The Need for More Hispanic Judges* (2002) [“PRLDEF Report”].

<sup>169</sup> *Id.* at 1.

<sup>170</sup> *Id.* at 3.

<sup>171</sup> *See id.* at app., tbl. 1.

<sup>172</sup> *Id.* at 19.

<sup>173</sup> *Id.* at 23.

- Make the nominations and appointments of Hispanic Americans to state and federal court judgeships a high priority from the leaders filtering down throughout their administrations, particularly in those states with significant Hispanic populations.
- Appoint knowledgeable and experienced Hispanics as key advisors in cabinet-level and policymaking positions and to judicial evaluation committees.
- Nominate qualified Hispanic candidates who have also had a demonstrated interest and a meaningful involvement in the work and activities of the Hispanic community. We will not rubber-stamp nominees who are merely identified as Hispanic. The life experiences of such candidates must clearly demonstrate that they have had a meaningful interest in the needs and concerns of the Hispanic community.<sup>174</sup>

The Task Force agrees with these recommendations, which provide a useful starting point for the question of increasing diversity in New York.

#### D. THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The arrests of Justice Victor Barron in 2002 and Justice Gerald P. Garson in 2003 on bribery charges in two separate cases, and the indictment of Clarence Norman, Jr., the Brooklyn Democratic Party Chair, harshly criticized for his control of judicial elections, prompted the Association of the Bar of the City of New York (the “Association”) to convene a Judicial Selection Task Force and issue its report, “Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York” in 2003.<sup>175</sup> In 2006, the Association convened a successor to its 2003 task force, and its report was recently published.<sup>176</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> ABCNY Report, *supra* note 155, at 1-5.

<sup>176</sup> *See* Judicial Selection Task Force of the Ass’n of the Bar of the City of New York, Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York State (2006), available at <http://www.nycbar.org/TaskForceReport.htm> (last visited Jan. 11, 2007). We note that the Chair of this Task Force was a member of the Association’s 2003 Task Force, but played no role in the work of its 2006 successor.

From its founding in 1870, the Association has held the view that the appointive method is the preferred method of selecting judges, and the 2003 report is no exception.<sup>177</sup> Despite the Association’s strong preference for replacing the judicial elective system with a purely appointive process, the 2003 report concedes the difficulty of obtaining the necessary constitutional amendment to effectuate such a change.<sup>178</sup> With this limitation in mind, the 2003 report made the following principal recommendations:

- With respect to judicial elections, the report recommended the use of screening committees to evaluate candidates prior to judicial nominating conventions. The ideal screening committee would be comprised of individuals from a broad range of groups, accept applications from anyone wishing to become a judge, and investigate applicant backgrounds. For each vacancy, ideally no more than three most qualified candidates would be considered by the district nominating convention. Delegates to the convention would pledge to be bound to select from among those candidates advanced by the screening committee.<sup>179</sup>
- The use of voter guides in judicial elections.<sup>180</sup>
- With respect to judicial appointments, the report recommended the use of screening committees whose members would be appointed by a “politically accountable appointing authority,” including members of bar associations and community groups.<sup>181</sup>
- Periodic increases in judicial compensation “to attract and retain well qualified judges.”<sup>182</sup>
- The systematic evaluation of both appointed and elected judges to ensure judicial competence.<sup>183</sup>

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<sup>177</sup> ABCNY Report, *supra* note 155, at 22-27, 47.

<sup>178</sup> *Id.* at 30.

<sup>179</sup> *Id.* at 32-33.

<sup>180</sup> *Id.* at 34.

<sup>181</sup> *Id.* at 36.

<sup>182</sup> *Id.* at 43.

<sup>183</sup> *Id.* at 44-47.

E. THE FEERICK COMMISSION

In an effort to reverse diminishing public confidence in the state's judiciary, Chief Judge Judith S. Kaye in 2003 empaneled the Feerick Commission, formally known as the Commission to Promote Public Confidence in Judicial Elections, a 29-member group chaired by John Feerick, the former Dean of the Fordham University School of Law and Chair of the New York State Commission on Government Integrity.<sup>184</sup> The goal of this Commission was not to develop and recommend a wholly new system for selecting judges nor to recommend the best possible system, but rather to examine the then-current system and propose changes that would serve to increase the public's confidence in the elected judiciary.<sup>185</sup> The result of the Commission's three-year study was the publication of three reports, the final one issued in February 2006. Each report recommended a set of reforms to the current judicial election system.

The reports represent the most comprehensive study on the subject thus far. The 29-member panel was drawn from across the state and included elected judges, private and government practitioners, academics, and administrators.<sup>186</sup> Numerous private organizations and foundations each provided grants to fund the Commission's work. The Commission held three public hearings in 2003 in New York City, Buffalo, and Albany, commissioned a 2003 Marist Institute opinion poll on judicial elections and a 2004 Marist Institute mail survey of New York State judges, conducted nine statewide focus groups on voter participation in judicial elections, and reviewed reports, court decisions, academic articles, and news accounts on the current judicial elective system.

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<sup>184</sup> Press Release, Chief Administrative Judge, New York State Unified Court System, Commission to Foster Public Confidence in State's Elected Judges and the Electoral Process (Apr. 16, 2003), *available at* <http://law.fordham.edu/commission/judicialections/images/jud-oca.pdf> (last visited Jan. 11, 2007).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

Among the Commission's many recommendations were proposals on judicial campaign activity, special screening commissions, significant changes to the judicial nominating convention system, increased voter education, and the adoption of retention elections. The most salient of these are discussed here.

### **1. Judicial Campaign Activity**

The Commission recommended adopting commentary on the rules presently governing judicial campaign activity, the Rules of the Chief Administrator of the Courts Governing Judicial Conduct,<sup>187</sup> especially in light of recent First Amendment cases prohibiting restrictions on speech related to fundraising.<sup>188</sup> The Commission's proposal favors instructing judicial candidates to avoid "pledges or promises that are inconsistent with the impartial performance" of duties.<sup>189</sup> The Commission urged mandatory disqualification where a judge has made a public commitment with respect to any issue or controversy in a current proceeding.<sup>190</sup>

The Commission also encouraged the addition of mandatory recusal and disqualification provisions based on campaign contributions.<sup>191</sup> Parties appearing before a judge to whom any contribution has been made would be required to disclose the contribution.<sup>192</sup>

In addition to adopting commentary to the rules governing judicial conduct and amending the attorney disciplinary rules to provide for the disclosure of campaign contributions, the Commission also recommended the creation of a New York Judicial Campaign Ethics and Conduct

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<sup>187</sup> N.Y. COMP. CODES R. & REGS. tit. 22, §§ 100.0 *et seq.*

<sup>188</sup> Commission to Promote Public Confidence in Judicial Elections, Interim Report 17 (Dec. 2003) ["Feerick I"], available at <http://law.fordham.edu/commission/judiciaelections/> (last visited Jan. 12, 2007); see *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002).

<sup>189</sup> Feerick I, *supra* note 188, at 19-20.

<sup>190</sup> *Id.* at 26.

<sup>191</sup> *Id.* at 24-26.

<sup>192</sup> *Id.*

Center that would be a “one-stop shopping” center for judicial candidates who want to be assured that their conduct is within ethical bounds.<sup>193</sup> The Judicial Campaign and Conduct Center would be created under the auspices of the New York State Advisory Committee on Judicial Ethics and would issue fast, reliable rulings on campaign conduct.<sup>194</sup> The Center would also create a database of ethics opinions, create and administer a mandatory campaign ethics course for all judicial candidates, publish an ethics newsletter, make candidates aware of bar association judicial campaign oversight committees, and maintain a toll-free ethics hotline.<sup>195</sup> The Center’s publications would be available to the public and press.<sup>196</sup>

Each Appellate Division would also be required to establish a Judicial Campaign Practice Committee.<sup>197</sup> These committees would address written complaints of inappropriate judicial campaign conduct.<sup>198</sup>

With respect to campaign financial disclosure and expenditures, the Commission recommended electronic, timely, and publicly available financial disclosure filings.<sup>199</sup> The New York Election Law already requires financial disclosure from judicial campaign committees, and candidates for Supreme Court are required to file their reporting obligations electronically with the New York State Board of Elections.<sup>200</sup>

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<sup>193</sup> *Id.* at 29-34.

<sup>194</sup> *Id.* at 30.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 31-32.

<sup>197</sup> Commission to Promote Public Confidence in Judicial Elections at 44-45 (June 2004) [“Feerick II”], *available at* <http://law.fordham.edu/commission/judicialelections/> (last visited Jan. 12, 2007).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 46.

<sup>200</sup> N.Y. ELEC. LAW. § 14-102.

## **2. Judicial Election Qualifications Commissions**

The Commission recommended establishing New York State-sponsored Independent Judicial Election Qualifications Commissions (“IJEQC”) to evaluate the qualifications of each candidate for election throughout the state.<sup>201</sup> It proposed one fifteen-member IJEQC for each judicial district and urged that each IJEQC reflect the state’s ethnic diversity.<sup>202</sup> IJEQCs would actively recruit judicial candidates, conduct judicial candidate interviews and background investigations, screen out unqualified candidates, and publish a list of those candidates found well qualified.<sup>203</sup> IJEQCs would operate according to consistent and public criteria which would ideally focus on issues that are indicative of each candidate’s professional responsibility, character, decisiveness, temperament, and mental ability.<sup>204</sup>

## **3. Judicial Nominating Conventions**

The Commission concluded that open primaries, without public financing, are not preferable to judicial nominating conventions.<sup>205</sup> Instead of advocating for the elimination of judicial nominating conventions, the Commission proposed sweeping modifications, which now seem quite prescient in light of *López Torres*.<sup>206</sup>

The Commission proposed modifying the nominating convention system in several ways. First, the Commission recommended limiting the number of delegates that attend a judicial

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<sup>201</sup> Feerick II, *supra* note 197, at 18-22.

<sup>202</sup> *Id.* at 19-20.

<sup>203</sup> *Id.* at 20-21.

<sup>204</sup> *Id.* at 20.

<sup>205</sup> Final Report of the Commission to Promote Public Confidence in Judicial Elections at 3 (Feb. 2006) [“Feerick III”], available at <http://law.fordham.edu/commission/judicialelections/> (last visited Jan. 12, 2007).

<sup>206</sup> *Id.* at 30-35.

district convention to a minimum of twenty-five and a maximum of fifty.<sup>207</sup> Thus, there would be at least two delegates per assembly district attending a nominating convention; the end result being smaller, more manageable conventions. Second, the commission recommended that delegate votes be weighted to retain the principle of Section 6-14 of the Election Law, which requires the number of delegates to reflect the number of votes cast by the assembly district's voters for their party's nominee for Governor in the preceding election.<sup>208</sup>

Further, the Commission recommended that the number of signatures required to be a delegate be reduced to 250.<sup>209</sup> The Commission also recommended increasing the term limit for delegates to three years.<sup>210</sup> Delegate elections should also take place at the primary election in the year preceding the judicial nominating convention.<sup>211</sup>

The Commission also favored making the New York State Board of Elections responsible for providing delegates with information about judicial elections and with a list of announced judicial candidates at least ten days before the judicial nominating convention.<sup>212</sup> Lastly, the Commission recommended granting candidates seeking nomination for Justice of the Supreme Court the right to address delegates at their convention.<sup>213</sup>

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<sup>207</sup> *Id.* at 31.

<sup>208</sup> *Id.* at 32.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 33.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 34-35.

<sup>213</sup> *Id.* at 35.

#### **4. Voter Education**

The Commission recommended that New York produce and distribute voter guides on judicial candidates by mail to every registered voter.<sup>214</sup> These guides would be available in print and electronic form and should inform the electorate about the judiciary generally and judicial candidates specifically.<sup>215</sup> The guides would also include the findings of the IJEQC for each candidate.<sup>216</sup>

#### **5. Retention Elections**

The Commission recommended that New York adopt a system of non-competitive, non-partisan retention elections for qualified incumbent judges running for re-election.<sup>217</sup> Only incumbent judges who have initially won election to a full term would be eligible.<sup>218</sup> Incumbent judges would be required to apply to appear on the ballot for retention one year before his or her term expires and must participate in the IJEQC procedures.<sup>219</sup> If not elected at retention election, the incumbent judge would be free to run for the office.<sup>220</sup>

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Many of the Feerick Commission's recommendations have been adopted. As the Commission noted in its final report, "The Office of Court Administration has created the Judicial Campaign Ethics Center (<http://www.nycourts.gov/ip/jcec>), published a judicial directory

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<sup>214</sup> Feerick II, *supra* note 197, at 39.

<sup>215</sup> *Id.* at 39-40.

<sup>216</sup> *Id.* at 40.

<sup>217</sup> *Id.* at 35-37.

<sup>218</sup> *Id.* at 36.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

(<http://www.courts.state.ny.us/judges/directory.shtml>) and produced an online statewide voter guide for Supreme Court elections (<http://www.courts.state.ny.us/vote>).”<sup>221</sup>

In 2005, the Legislature enacted a law requiring that judicial candidate campaign disclosures be filed electronically.<sup>222</sup> In 2005, the State Assembly passed a bill for the public financing of judicial elections, which has not been enacted to date.<sup>223</sup>

Additionally, the Rules of the Chief Administrative Judge have been modified to clarify restrictions on judicial candidate speech; creating a mandatory judicial campaign ethics course for judicial candidates; limiting the amount judicial candidates may pay to attend political functions; and requiring that purchases of judicial campaign-related goods and services be at market value.<sup>224</sup>

Of the Commission’s many recommendations, it considered the establishment of Independent Judicial Election Qualifications Commissions the “linchpin” of its blueprint for reform.<sup>225</sup> In February and June of 2006, the Court of Appeals revised the Rules of the Chief Administrative Judge by adopting Part 150, which creates Independent Judicial Election Qualifications Commissions.<sup>226</sup> As of the date of the publication of this Report, the IJEQCs have not yet been named.<sup>227</sup>

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<sup>221</sup> Feerick III, *supra* note 205, at 12.

<sup>222</sup> N.Y. ELEC. LAW § 14-102(4).

<sup>223</sup> JUDICIAL CAMPAIGN FINANCE REFORM ACT OF 2006, Bill. No. A8-A, 2005-2006 Reg. Session. § 5 (to be codified at N.Y. STATE FIN. LAW § 92-t).

<sup>224</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5.

<sup>225</sup> Feerick Commission III, *supra* note 205, at 13.

<sup>226</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 150.1.

<sup>227</sup> *See* John Caher, *Lawmakers and Candidates Polled on Judicial Selection*, 236 N.Y.L.J., Nov. 3, 2006, at 1.

## V. THE TASK FORCE'S FACT FINDING

As noted, the Task Force spent several months studying judicial selection in order to gain an understanding of the reality of the system as it is practiced in New York State today. To accomplish this, the Task Force conducted numerous interviews, reviewed prior reports on judicial selection, reviewed certain academic literature on the topic, and drew upon the considerable combined experience of its members. Overall, what we learned paints a picture of a clouded selection system — be it elective or appointive — in desperate need of reform to make it more open, more effective, and more diverse. This is not to say these systems do not have many positive aspects; they do. But as is so often the case, these aspects require improvement in both design and execution if we are to fulfill the ideals of a competent, independent, fair, and diverse state judiciary.

### A. BACKGROUND

#### **1. Pre-Selection Screening**

The Task Force observed a developing consensus in the legal community toward the use of some form of panel, commission, or committee to screen candidates for judicial office before a final selection is made by the appointing authority or the voters. This subsection provides a brief overview of the three basic types of panels we saw, referred to here as nominating commissions, screening panels, and selection panels. Though similar, there are important differences in the structure and goals of each that control their effectiveness. The goal of such a body, in whatever form, is to attempt, within realistic human constraints, to minimize the influence of irrelevant considerations in judicial selection and to focus instead on the core characteristics described throughout this Report — competence, independence, fairness, and diversity.

We do wish to stress that the work product of such panels benefits from a high level of transparency in the process. Thus, the membership, screening criteria, and list of candidates

under consideration should all be made public, and public comment should be invited. This is discussed further in the Task Force's recommendations in Part VI.C.1, below.

a. Nominating Commissions

A nominating commission is a non-partisan or bi-partisan body, mandated by law, which is used to evaluate, certify, and eventually recommend a limited number of qualified individuals to the appointing authority.<sup>228</sup> New York currently has only one true nominating commission system in place, for the selection of judges of the New York Court of Appeals.<sup>229</sup> Other states use such commissions to select lower court judges.<sup>230</sup>

The distinguishing feature of a nominating commission is that its choices are binding on the appointing authority. Typically, the commission reports out a specified number of candidates for each available judicial seat, and the appointing authority *must* select from those candidates recommended by the commission. For example, in the case of the Court of Appeals, the Governor must choose from the three to seven recommendations submitted by the state Judicial Nominating Commission.<sup>231</sup> Thus, with a nominating commission, the initial steps of the process are delegated to an independent, bi-partisan, or non-partisan body. The intention behind this delegation of authority is that the checks and balances of such a group will place them in a better position to evaluate and recommend the best individuals for the seat in question, based on a review of all qualified applicants.

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<sup>228</sup> See N.Y. CONST. art. VI, § 2(c),(d),(e).

<sup>229</sup> *Id.*

<sup>230</sup> Missouri, for example, was among the first states to use a nominating commission to fill its judiciary. MO. CONST. art. V, § 25 (a), (b) (subsection (b) allows for the voters of some counties to retain an elective system or move to the commission based appointive system).

<sup>231</sup> See *supra* Part II.C.1.

Ideally, the membership of a nominating commission is diverse in terms of political ideology, background, and race or ethnicity, so as to prevent any one group from exerting too much influence over the process. Achieving this diversity of membership, however, is a key difficulty for nominating commissions, screening panels, and selection panels.<sup>232</sup> Another key difficulty is allowing the panels true independence. Recent criticism of New York's current Commission on Judicial Nomination for the Court of Appeals suggests that its members may not be truly independent of those who appointed them.<sup>233</sup>

b. Selection Panels

Selection panels are similar to nominating commissions in that they are a proactive process by which qualified candidates are sought out, evaluated, and then forwarded to the appointing authority for consideration. The key difference, from the Task Force's point of view, is that selection panels are typically voluntary in nature, created by the appointing authority itself either in a genuine quest for judicial excellence or as a means to insulate itself from criticism that politics plays too great a role in judicial selection. A good example of a selection panel is the Mayor's Advisory Committee on the Judiciary, created by Executive Order and used to fill vacancies in the New York City Criminal and Family Courts, as well as interim vacancies in the Civil Court.<sup>234</sup> The Mayor's Committee and similar panels are given the responsibility of actively seeking out, evaluating, and recommending the candidates they believe to be the most qualified for the particular position.<sup>235</sup>

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<sup>232</sup> See Caher, *supra* note 227, at 6 (quoting Assemblyman Ivan C. Lafayette who wrote that "I don't believe there was such a thing as an independent or non-partisan commission"; also quoting former Schenectady County Judge Michael C. Eidens who said "I think it is naive to think we could establish a non-partisan judicial qualifying commission, given the present political background.").

<sup>233</sup> See Jesse Sunenblick, *Pataki's Puppets?*, JUDICIALREPORTS.COM, Dec. 8, 2006, available at [http://www.judicialreports.com/archives/2006/12/patakis\\_puppets.php](http://www.judicialreports.com/archives/2006/12/patakis_puppets.php) (last visited Jan. 11, 2006).

<sup>234</sup> See *supra* Part II.C.6.a.

<sup>235</sup> See *supra* Part II.C.6.a.

Similar to nominating commissions, the candidates reported out by selection panels are generally binding.

C. Screening Panels

In contrast to nominating commissions and selection panels, screening panels, similar to the one used for selecting judges of the New York Appellate Division, are more limited.<sup>236</sup> The purpose of screening panels is to pass on the names of all qualified candidates to the appointing authority, giving the panel's imprimatur to all such approved candidates. Although the terminology varies, some panels will term particular candidates either "qualified" or "not qualified," while others will only pass on those deemed to be "well qualified" so as not to denigrate the rest.

Screening panels are used by groups as varied as county Democratic committees in New York City and the American Bar Association, though in the latter case (and that of most bar associations) only candidates likely to be appointed or nominated are considered.<sup>237</sup> The decisions of screening panels are typically not binding on the appointing or nominating authorities, though some groups employ a presumption that the decision of the panel will be followed.<sup>238</sup>

Screening panels, by their very nature, leave much of the power to the next step in the election or appointment process. By not limiting the number of candidates to be considered for nomination or appointment, they allow for the very real possibility of making themselves essentially irrelevant by approving large numbers of candidates for any particular opening.

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<sup>236</sup> See *supra* Part II.C.2.

<sup>237</sup> Am. Bar Ass'n, The ABA Standing Committee on Federal Judiciary: What It Is and How it Works 1 n.1 (2005), available at [http://www.abanet.org/scfedjud/federal\\_judiciary.pdf](http://www.abanet.org/scfedjud/federal_judiciary.pdf) (last visited Jan. 11, 2007).

<sup>238</sup> Kings County Democratic County Committee, Report of the Ad Hoc Committee on Judicial Selection Procedures § 4 (2004) ["Kings County Report"], available at <http://www.brooklyndems.com/pdfs/Report.%20judicial%20committee.pdf> (last visited Jan. 11, 2007).

## **2. Financing of Judicial Elections**

As a threshold matter, no system exists for public financing of judicial elections in New York State. This is unfortunate, as running for judicial office is extraordinarily expensive and therefore necessitates massive fundraising efforts for judicial candidates.<sup>239</sup> In light of this difficulty, the Task Force thought it useful to examine New York's complicated set of restrictions on campaign financing for judicial candidates.

The rules governing the financing of all elections, including judicial elections, are promulgated under Article 14 of the New York Election Law. As a general matter, the Election Law sets forth a number of very specific rules, all designed to make the process of financing a political campaign as fair and transparent as possible. The following is a brief overview of the provisions of the New York Election Law that relate to judicial candidates and the financing of their campaigns.

First, candidates for judicial office, regardless of whether or not they are currently judges, are prohibited from personally soliciting or accepting any campaign contributions.<sup>240</sup> Instead, judicial candidates may establish committees for the purpose of raising and spending money on behalf of their campaigns.<sup>241</sup> Each political committee is required to have a treasurer responsible for keeping detailed records of all the transactions made in connection with the campaign.<sup>242</sup>

These committees are required to file sworn statements with the State Board of Elections, detailing all money paid by them and to them, in connection with an election.<sup>243</sup> Statements regarding expenditures for political advertisements and literature must be accompanied

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<sup>239</sup> James Sample, *The Campaign Trial: The True Cost of Expensive Court Seats*, SLATE.COM, Mar. 6, 2006, available at [http://www.brennancenter.org/stack\\_detail.asp?key=96&subkey=36208](http://www.brennancenter.org/stack_detail.asp?key=96&subkey=36208) (last visited Jan. 11, 2007).

<sup>240</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(5).

<sup>241</sup> *Id.*

<sup>242</sup> N.Y. ELEC. LAW § 14-118(1). These records must be kept by the treasurer for at least five years. *Id.*

<sup>243</sup> *Id.* § 14-102(1).

by either a copy of all printed material or a schedule and transcript of broadcast media advertisements.<sup>244</sup> The Election Law also requires that these copies be maintained for at least one year from the date such copies were filed with the Election Board.<sup>245</sup> These statements must be filed numerous times with the Board of Elections before the election is actually held.<sup>246</sup> The possible penalties for violations of Article 14 range from a civil fine of up to five hundred dollars to being charged with a class E felony for attempting to illegally circumvent the contribution limitations.<sup>247</sup>

In addition to the filing requirements, Article 14 also regulates the amounts and sources of contributions to election campaigns. A candidate is prohibited from accepting, from a single source, a contribution that in the aggregate is greater than “the product of the total number of registered voters in the district, excluding voters in inactive status, multiplied by \$.05 . . . .”<sup>248</sup> Contributions from a candidate’s immediate family (*i.e.*, child, parent, grandparent, sibling and spouse), however, are excepted from this general rule; these contributions must not exceed the equivalent of “the number of registered voters in the district, excluding voters in inactive status, multiplied by \$.25; or twelve hundred fifty dollars, whichever is greater . . . but in no event shall any maximum exceed one hundred thousand dollars.”<sup>249</sup> In-kind contributions are valued at their fair market value, determined by the state board of elections.<sup>250</sup>

Even loans made to candidates are heavily regulated. A loan made to a candidate by any entity, to the extent it is not repaid by the time of election, is deemed a contribution by such

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<sup>244</sup> *Id.* § 14-106.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* § 14-108.

<sup>247</sup> *Id.* § 14-126.

<sup>248</sup> *Id.* § 14-114(1)(b)(ii).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* § 14-114(2).

entity.<sup>251</sup> Further, in a single calendar year, no one person may contribute, loan, or guarantee any amount greater than one hundred fifty thousand dollars within the state in connection with the election of any candidate for public office.<sup>252</sup> Corporations are also prohibited from making contributions that in the aggregate exceed five thousand dollars.<sup>253</sup>

The Election Law also prohibits candidates from accepting, and individual contributors from making, contributions in any name other than their own.<sup>254</sup> Partnerships are excepted from this rule, and are allowed to make contributions in the name of the partnership without attributing the contribution to any individual member, “provided that any such contribution . . . shall not exceed, twenty-five hundred dollars.”<sup>255</sup> Anonymous contributions are to be turned over to the New York State to be deposited into the general treasury of the state.<sup>256</sup> Candidates are permitted to use contributions for any lawful purpose, so long as they are used in a way related to a political campaign or the holding of a public office.<sup>257</sup>

It is no understatement to call the above requirements byzantine, and the Task Force believes that they strongly favor candidates who are either of independent means, have wealthy families, or have the strong support of their local party organization. As discussed more fully below,

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<sup>251</sup> *Id.* §§ 14-114(6)(a) & (b).

<sup>252</sup> *Id.* § 14-114(8).

<sup>253</sup> *Id.* § 14-116.

<sup>254</sup> *Id.* § 14-120(1).

<sup>255</sup> *Id.* § 14-120(2). If the contribution exceeds \$2,500.00, however, the aggregate amount is attributed to each partner whose share exceeds ninety-nine dollars.

<sup>256</sup> *Id.* § 14-128.

<sup>257</sup> *Id.* § 14-130.

the heavy financial burden of running for office is a significant reason, although not the only reason, that the Task Force does not favor open primaries for judicial nomination.<sup>258</sup>

B. DIVERSITY

The Task Force's fact finding confirmed what was nearly self-evident from the experience of its members: minorities are severely underrepresented among the judges currently sitting on the New York bench. Delving into the actual statistics convincingly demonstrates that none of the judicial selection systems operating in New York have made New York's bench reflect the diversity of its population. In this regard, we have considered the statistics gathered by the Feerick Commission on the question of diversity on the bench, which date from 2003, the date of its initial report.<sup>259</sup> At that time:

- 18% of New York's population described itself as African American, compared with only 9% of judges who were African American;
- 16% of New York's population described itself as Hispanic, but only 4% of judges were Hispanic;
- Of New York's 59 Appellate Division judges, only four were African American, two were Hispanic, and one was Asian;
  - In the First Department, 20% of judges (three of 15) were minorities, compared with 42% minority population;
  - In the Second Department, where minorities constituted 31% of the population, 9.5% of judges (two of 21) were minorities;
  - In the Third Department, with 8% minority population, there was not a single African American, Hispanic, or Asian judge; and
  - In the Fourth Department, with 12% minority population, 9 of 10 judges described themselves as white;
- In upstate New York (the Third and Fourth Departments), which had a minority population of 11%, 90% of judges were non-minority;

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<sup>258</sup> See *infra* Part VI.B.2.

<sup>259</sup> Feerick II, *supra* note 197, at 15-16.

- In New York City, with a minority population of 44%,
  - 84% of Criminal Court Judges were non-minority;
  - 82% of Family Courts Judges were non-minority; and
  - Only one of the eight Surrogate Court Judges (Judge Margarita López Torres) was a member of a minority group.<sup>260</sup>

With respect to the Supreme Court, a primary focus of this Report, the representation of minorities on the bench statewide is, again, abysmal. Outside of New York City, in the Third through the Ninth Judicial Districts, only 3% of Supreme Court Justices are members of minority groups.<sup>261</sup> In the Third, Fourth, Sixth, Seventh, and Ninth Districts — **five** of the twelve judicial districts — not a single minority justice sits on the Supreme Court (out of a total of 81 potential seats).<sup>262</sup> Even in New York City, in which minorities represent approximately half of the eligible voting population and in which some progress has been made in recent years, only 27% of the sitting justices are members of minority groups.<sup>263</sup> Examining each judicial district of New York City:

- First Judicial District (Manhattan) — 44.7% minority justices compared to 50% minority representation in the voting age population;
- Second Judicial District (Brooklyn/Staten Island) — 34.6% minority justices compared to 56.8% minority representation in the voting age population;
- Eleventh Judicial District (Queens) — 31.6% minority justices compared to 64% minority representation in the voting age population;

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<sup>260</sup> *Id.*; Hon. Rolando T. Acosta, Remarks to the New York Hispanic Bar Task Force on Judicial Selection 4-6 (June 20, 2006) [“Acosta Remarks”] (using data collected by Feerick Commission) (Acosta Remarks on file with the Task Force). Population statistics extrapolated from New York State Census Data from 2004, *available at* [http://www.nylovesbiz.com/nysdc/StateCountyPopests/RaceHO\\_2004.pdf](http://www.nylovesbiz.com/nysdc/StateCountyPopests/RaceHO_2004.pdf) (last visited Jan. 12, 2007).

<sup>261</sup> Brennan Center for Justice, Diversity and the New York State Supreme Court 1 (2006), *available at* [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_36167.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_36167.pdf)

<sup>262</sup> *Id.* at 2.

<sup>263</sup> *Id.* at 1.

- Twelfth Judicial District (Bronx) — 41.7% minority justices compared to 82.3% minority representation in the voting age population.<sup>264</sup>

The statewide statistics and the numerous variations of them compiled in other studies lead to the indisputable conclusion that the judiciary in New York State reflects neither its population at large nor the makeup of the bar itself. With these statistics in mind, the Task Force considered whether any particular system is more likely than others to have a positive impact on diversity.

### **1. How and Why To Evaluate Impact on Judicial Diversity**

The question to be answered in evaluating how various methods of judicial selection impact judicial diversity is simple to frame, and the importance of answering it is difficult to overstate. The question is, simply: What method of judicial selection — elective or appointive, and if appointive, whether subject to pre-screening by a nominating commission, selection panel, or screening panel — leads to the greatest diversity on the bench?

This question goes to one of the fundamental reasons for the work of the Task Force and that of the numerous other commissions and committees referred to in the present Report. As many of them have noted, diversity on the bench is not merely a question of serving the needs of a particular racial or ethnic electoral constituency. Rather, having judges who reflect the diversity of the communities they serve is a key element in securing public confidence in the judiciary. Diversity builds confidence in communities that justice will be dispensed fairly, and thereby promotes participation and confidence in the justice system. Diversity also implies a broadening of perspectives from the bench, bringing with it the obvious benefits for the quality of judicial decision-making resulting from a multiplicity of viewpoints.<sup>265</sup> Given these sociopolitical underpinnings to the importance of diversity, the Task Force analyzed the consequences of various

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<sup>264</sup> *Id.* at 2.

<sup>265</sup> Feerick I, *supra* note 188, at 15-16; *see also* Cuomo Report, *supra* note 158, at 7-8.

systems of judicial selection on diversity overall, and not the presence of Hispanics on the bench in particular.

## **2. Approaches to Evaluating Impacts on Diversity of Selection Methods**

In conducting this exercise, the Task Force considered how to evaluate the extent to which different judicial selection processes are more and which are less conducive to promoting diversity on the bench. We recognized the value of a statistical analysis of the question, which would require identifying and analyzing data sets on judicial populations and comparing them to larger population patterns over time. We set out to identify any such analyses that might have been conducted by others, either for New York or for any other jurisdiction, and found, perhaps not surprisingly, not a single serious statistical analysis of the correlation between any system of judicial selection and diversity among the judges selected by that system. Not only are there few statistical analyses of representation of minority groups on the bench to begin with, but even fewer studies have been conducted to examine the impact of various methods of judicial selection on minority representation on the bench, all of which have yielded inconclusive findings.<sup>266</sup>

Although we thought it possible and even desirable to conduct an original analysis, we realized that such an exercise would be unrealistic in light of the time-sensitivity of the Task Force's work. For example, we recognized that conducting such an analysis would, for certain judicial categories, entail a case-by-case examination of the method of selection, since certain categories of judges might, even within a single jurisdiction, be either elected or appointed. We determined after consideration that the scope of such an exercise would be beyond the scope of the

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<sup>266</sup> See, e.g., PRLDEF Report, *supra* note 168; see also Cuomo Report, *supra* note 158; Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 178-79 (2004) ("Despite the often intensely heated debate on whether elections or appointive-type systems are more likely to increase the percentage of judges of color on state courts, this literature has not produced definitive conclusions on any single factor or host of factors to explain the lack of diversity on our nation's courts.") (internal citations omitted); Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 740-41 (2002) (noting that studies evaluating the relationship between method of selection and minority representation on the bench are inconclusive).

Task Force's mandate and determined to examine this question based on the interviews conducted by the Task Force as supplemented by review of primary and secondary materials, as well as the experiences of its members. We recognize that this approach will not afford the intellectual satisfaction of a more systematic and objective statistical analysis. However, we also believe that the formal (by screening panel) and informal (by political insiders) screening of various types for both the elective and appointive systems of judicial selection in the City and State of New York insinuates subjective factors into the process that may in any case frustrate any attempt at formal statistical analysis.

### **3. Promoting Diversity and Judicial Quality**

In the end, the Task Force concluded that there is no "right answer" for how to promote diversity on the bench consistent with the ideals of competence, independence, and fairness.

We did, however, reach the conclusion that the system of judicial selection with the greatest *tendency* to promote diversity on the bench that is reflective of the diversity of the community would be an open, purely elective system. We reached this conclusion through observation of the impact, over time, of the growth of minority populations in the City of New York and the corresponding increase in the number of minority judges selected by direct election and through reasoning by analogy to the observed levels of diversity in elections to nonjudicial office. However, we also found that we needed to qualify this conclusion significantly, in at least three ways.

First and most importantly, the elective systems of judicial appointment in operation in the State of New York today are not "pure" elective systems as are elective systems for some (but not all) other offices. By that, we mean that the system does not always contemplate the selection of judges through open, competitive primary and general elections. Rather, as described in detail in the

factual background to the *López Torres* decision, judicial elections in New York take the form of competition in an informal, closed setting for the support of party leaders with control over access to the ballot. Elective systems produce parity between judicial diversity and community diversity only to the extent that the electoral process is not frustrated by the intervention of such actors — exactly the issue in the *López Torres* case. To the extent that party officials have the ability to control which candidates have access to party nominations, combined with the financial and infrastructural resources necessary to win elections, this tendency of electoral systems to promote diversity is muted. Parties and their officials have historically and systematically used this control to ensure that access to nomination and election promotes the vested interests of the party and its operatives. A system with these features thus tends to promote diversity in parity with the power and influence of minorities in the *party* rather than in the community. There is some correlation of the latter two variables, since the viability of a political party depends on community recognition of its legitimacy, which in turn depends to a large degree on the perception that the party is representative of the community. However, it goes without saying that the power of racial and ethnic minority communities in political parties lags behind their representation in the population.

Second, the Task Force believes that although a thoughtfully designed, purely elective system might produce the most diverse bench, it is not likely to produce the results that our communities want or need. This conclusion follows from the amply documented fact that elections tend to be won by the best-financed candidates.<sup>267</sup> Thus, a purely elective judicial system would tend to result in the selection as judges of those candidates who are the most successful fundraisers, who are endorsed by the most popular politicians, or who happen to have name recognition for a reason unrelated to judicial qualifications, all irrespective of how they might fare on the other critical criteria

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<sup>267</sup> Am. Bar Ass'n, Standing Comm. on Judicial Independence, Report of the Comm'n on Public Financing of Judicial Campaigns 25-26 (2002), available at <http://www.abanet.org/judind/pdf/commissionreport4-03.pdf> (last visited Jan. 11, 2007).

for judicial excellence — legal competence, independence, and fairness. Therefore, although one of the most fundamental charges of the Task Force is to seek diversity on the bench, and although we acknowledge that a purely electoral system of judicial selection could best serve that end (assuming that electoral districts are sufficiently small that reasonably large communities could elect their own local judges), we decided after considerable deliberation not to recommend such a system. We discuss this choice further below.<sup>268</sup>

Finally, it is worth noting that although an elective system presents the optimal *systemic* solution to the problem of establishing parity between the bench and the communities it serves, there is no reason that an appointive system, given the appropriate mandates and criteria, could not reach results that at least approach those of an elective system. We note in this regard that where judges are selected by appointment, diversity is much more prevalent where the political imperatives (especially size of minority constituency) are sufficiently compelling to the authorities responsible for judicial appointment. To support this conclusion, we can look to the numbers and percentages of minority judges among judges selected by appointment in New York City, which are much greater than they are elsewhere in the state, although we do not go so far as to say these numbers today are sufficient.<sup>269</sup>

Before we can throw our unyielding support behind an appointive system for the sake of increasing diversity, however, we must be careful and remember that an appointive process will only result in as much diversity as the appointing authority believes is necessary. A review of the judicial appointments made by former Governor Pataki is illustrative of this point. During 12 years of service as Governor, Governor Pataki made a total of 58 appointments to the Appellate Division. Minority representation among these appointees is as follows: two African Americans, two

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<sup>268</sup> See *infra* Part VI.B.

<sup>269</sup> See *supra* Part V.B.

Hispanics, no Asian Americans, and seven women (including one of the two African Americans).<sup>270</sup>

Though few question the ability of these appointees as jurists, some have nonetheless questioned the former Governor's choice in limiting the Appellate Division to so few minorities in a state that prides itself on diversity.<sup>271</sup> Therefore, while we hold firm to our belief that an appointive process is a preferable method for selecting a judiciary that is both qualified and diverse, we do so cognizant of this recent unsatisfactory record, and mindful of its potential limitations.

We have concluded that, if appointive systems can produce diversity in response to political imperatives, they can also be designed and their institutions chartered in such a way as to promote diversity on the bench irrespective of the presence of political imperatives. This can be done by explicitly including diversity (or, put another way, judicial representativeness of communities served, including on the basis of race, ethnicity, gender, sexual orientation, etc.) as a criterion to be considered by the appointing authority alongside competence, independence, and fairness in judicial nomination and selection. Because it is far more difficult for voters to assess judicial qualifications in an electoral selection system than it is for screening panels to do so in an appointive one, we think that an appointive system that explicitly considers diversity as a criterion of judicial appointment will result in the selection of the best judges, who enjoy the greatest perceptions of legitimacy in the community, and the highest quality in the administration of justice in our state.

### C. THE CURRENT ELECTIVE SYSTEM FOR SUPREME COURT

The following subsection reviews the Task Force's findings regarding how the elective process is actually practiced for Supreme Court elections. Special attention is devoted to

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<sup>270</sup> John Caher et al., *Few Qualms About Judges' Skills, But Low Marks for Diversity*, 237 N.Y.L.J., Jan. 3, 2007, at 1, col. 4.

<sup>271</sup> *Id.*

elections conducted in New York City, and we note that other task forces have come to similar conclusions and made recommendations that are analogous to those made by this Task Force.<sup>272</sup>

## **1. Importance of Lower Courts**

The Task Force learned of and recognizes the critical role played by the lower courts of New York in ultimately deciding who becomes a Supreme Court Justice. Courts such as the New York City Civil and Criminal Courts and the Court of Claims, as well as the County Courts and other lower courts outside of New York City, are training grounds for future Supreme Court Justices.<sup>273</sup> In fact, over the course of its interviews and fact finding, this Task Force learned that some local political leaders prefer to nominate and “select” those candidates who have judicial experience from the lower courts. We take no position over whether this is the best practice, but simply note it as an important backdrop to the reality of elective systems as practiced in New York today and that it is by no means a universal practice. Many, if not most federal district judges, for example, never served as magistrate judges.

## **2. System as Practiced in New York City**

Until the decision in *López Torres*,<sup>274</sup> New York Supreme Court Justices were selected by the judicial nominating convention.<sup>275</sup> The Task Force examined how the system was actually practiced in the four judicial districts that make up New York City.<sup>276</sup> Because the Democratic Party is the dominant party in New York City, this subsection focuses on the procedures implemented by

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<sup>272</sup> See, e.g., N.Y. Cty. Lawyers' Ass'n, *Judicial Selection in New York State: A Roadmap to Reform* (2006), available at [http://www.nycla.org/siteFiles/Publications/Publications248\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications248_0.pdf) (last visited Jan. 11, 2007).

<sup>273</sup> Herman D. Farrell, Jr., *Address on Judicial Selection in New York State at the Public Policy Forum 8* (Mar. 13, 2006) [“Farrell Address”], available at <http://www.rockinst.org/weinberg/pdf/FarrellTranscript.pdf> (last visited Jan. 11, 2007).

<sup>274</sup> 411 F. Supp. 2d at 255-56.

<sup>275</sup> See *supra* Part II.B.1.

<sup>276</sup> New York City received the most attention in *López Torres* because it is where Surrogate López Torres and the other plaintiffs resided. *López Torres I*, 411 F. Supp. 2d at 234.

that party, though we note that we learned in the course of our fact finding that there are numerous similarities in upstate districts dominated by the Republican Party.

Even though the districts, to varying degrees, employed certain methods to ensure fairness and accountability, the district court in *López Torres* nevertheless determined that nomination was nevertheless subject to the control of the local party leadership.<sup>277</sup> The Task Force believes, however, that certain districts in New York City have made worthy efforts to ensure a level of accountability and merit review, in the form of their respective screening panels. For example, before being invalidated, Supreme Court Justices in the First Judicial District were nominated through a process that combined the state mandated judicial nominating convention with a voluntary selection panel.<sup>278</sup> The idea was to create an independent panel to review and make three recommendations for Supreme Court nominations, which would then be forwarded to the delegates of the nominating conventions, who would pledge not to nominate anyone not found “well qualified” by the screening panel.<sup>279</sup>

The First District’s system is “double-blind,” in the sense that the party creates screening committees for each vacancy, whose members are not selected directly by the county leadership but by local community groups, bar associations, and law schools.<sup>280</sup> The county leadership would give the panel very specific guidelines for selection, focused not on politics but rather on the various qualities that make an excellent judge. The panel would then begin its review process, including a review of the candidates’ applications and an investigation of their professional

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 231.

<sup>279</sup> *Id.* at 239; ABCNY Report, *supra* note 155, at 21.

<sup>280</sup> Farrell Address, *supra* note 273, at 6-7.

work.<sup>281</sup> Next, the panel would confer and pick those candidates it believed to be the most highly qualified for each vacancy.<sup>282</sup> These candidates would then have approximately three weeks to petition the convention delegates for their vote.<sup>283</sup> Although this system has much to commend it, two issues make it less than ideal.

First, the representative of the New York County Democratic Committee with whom the Task Force spoke was commendably candid in acknowledging that after a candidate is approved by the screening panel, the process of gaining support in order to attain nomination is primarily political.<sup>284</sup> In other words, without the support of a political figure or figures to assist in gaining the support of district leaders and the county leader, the prospect of nomination is virtually nonexistent. Second, the time frame between the screening committee's decision and the convention makes it, for all practical purposes, impossible for one who has not been actively seeking political support well before the committee process to be nominated. Indeed, even in reform-minded New York County, it is unlikely that a candidate could be nominated (and therefore elected) without the support of the county leader. The general consensus of those who have experience in the system acknowledged that the party leadership is the most important factor in the process; although it is not necessarily one person making the decision, those selected as nominees are in effect political appointees, predetermined to serve as a Justice by the county leadership.<sup>285</sup>

Other local judicial districts have also implemented various types of screening panels, though none as robust as the one in use in New York County, and at least one, the Eleventh Judicial

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> Interview by the New York Hispanic Bar Task Force on Judicial Selection with Arthur Greig, Counsel, New York County Democratic Committee, in New York, N.Y. (June 20, 2006).

<sup>285</sup> *López Torres I*, 411 F. Supp. 2d at 232 (“no Democrat has ever been nominated for Supreme Court Justice in the First District over [the county leader’s] objection.”).

District, until very recently, had no screening panel.<sup>286</sup> Notably, the Democratic Party in the Second Judicial District — Kings and Richmond Counties — has employed a committee as well, though its standing screening panel sends all candidates it finds “qualified” to the County Executive Committee.<sup>287</sup> This has led to situations where the screening panel has at times approved as many as 26 candidates for as few as four openings, giving the political leadership far more authority than the screening panel.<sup>288</sup> There is even currently a mechanism for the county leader’s overruling of the panel’s determination that a candidate was found unqualified.<sup>289</sup> Indeed, the screening panel has been known to be influenced by the local party leadership, and its independence has been seriously questioned.<sup>290</sup> We do note that the representatives from the Kings County Democratic Committee with whom the Task Force spoke are clearly committed to changing the system and are in the process of doing so, and we commend them for it. But we are skeptical that they would be able to or motivated to change the fundamental fact that in the period between the 1960s until the evidentiary hearing of *López Torres*, no one recommended by the Kings County Democratic Party failed to obtain a nomination.<sup>291</sup>

The interviews conducted by the Task Force merely confirmed what is common knowledge: in order to succeed in the process, one needed the support of the local leadership;

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<sup>286</sup> ABCNY Report, *supra* note 155, at 21. We noted that after being elected, Congressman Joseph Crowley, the new Democratic Party leader in Queens, made a public commitment to establish an independent screening panel for judicial selection. *Queens Democratic Leader Calls for Screening Panel*, 236 N.Y.L.J., Sept. 18, 2006, at 1, col. 1.

<sup>287</sup> Rules of the Judicial Screening Committee for the Democratic Party in and for Kings County and the Second Judicial District § 12 [“Screening Committee Rules”], *available at* <http://www.brooklyndems.com/> (last visited Jan. 12, 2007); Kings County Report, *supra* note 238, § 1.

<sup>288</sup> *López Torres I*, 411 F. Supp. 2d at 233.

<sup>289</sup> Kings County Report, *supra* note 238, §§ 4, 6; Interview by the New York Hispanic Bar Task Force on Judicial Selection with Carl Landicini, Counsel to Brooklyn Democratic Committee, and Manny Romero, Immediate Past President of the Brooklyn Bar Association, in New York, N.Y. (June 20, 2006).

<sup>290</sup> Robert L. Begleiter & Jane M. Barrett, *Pick Judges Based on Merit*, 234 N.Y.L.J., Nov. 15, 2005, at 2, col. 3.

<sup>291</sup> *López Torres I*, 411 F. Supp. 2d at 233.

without it, the candidate was destined to fail. For example, when Judge López Torres contacted the Second District Screening Panel in an attempt to obtain a nomination for Supreme Court Justice, she was told that the panel would only consider those candidates that were referred by the party leader; thus, as a result of her perceived disloyalty to the party, López Torres was precluded from being placed on the ballot for the Supreme Court.<sup>292</sup>

With respect to the Bronx, the Democratic Party in the Twelfth Judicial District has employed a twelve-member screening panel, members of which were appointed directly by the party leader.<sup>293</sup> Although the Bronx in particular has made great strides in recent years in increasing diversity on the bench, like the other systems that were in place in New York City, the party leadership has been the actual authority when it came to selecting a judge for nomination.<sup>294</sup>

The Task Force's examination thus supported the district court's finding that "county leaders in general . . . actually wield enormous and dispositive power in the process by which Justices of the Supreme Court are selected."<sup>295</sup> In the end, the convention system as it existed before *López Torres* was an appointive system dressed up to look like an elective one.

We make two observations at this juncture. First, although it is clear that the systems discussed above are heavily influenced by local politics, it is likely that virtually any system chosen would have some element of political control, even our ideal of a commission-based appointment system. For example, one of the representatives of a county Democratic committee pointed out that a recent appointee to the New York Court of Appeals was a major Republican

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<sup>292</sup> *Id.* at 235.

<sup>293</sup> ABCNY Report, *supra* note 155, at 20.

<sup>294</sup> *López Torres II*, 462 F.3d 161, 176; ABCNY Report, *supra* note 155, at 20-21; Interview by the New York Hispanic Bar Task Force on Judicial Selection with Ricardo Oquendo, Non-Voting Chairman of Judicial Screening Panel for Democratic Party of Bronx County, in New York, N.Y. (June 20, 2006).

<sup>295</sup> *López Torres I*, 411 F. Supp. 2d at 233.

donor to Governor Pataki.<sup>296</sup> This raises our second observation: the mere influence of politics in a selection system does not mean that the judges selected are unqualified. Put differently, politics sometimes, possibly often, gets it right. Many if not most of the men and women serving on the Supreme Court in New York City are by all accounts dedicated and highly competent, as is Judge Robert Smith, the Court of Appeals Judge who had been a Republican donor.

#### D. APPOINTIVE SYSTEMS

The Task Force found that the various appointive systems in New York are for the most part inadequate in terms of transparency, the makeup of their screening and selection panels, and their stated commitment to diversity. Additionally, some among the bench and bar see appointive systems as elitist, tending to favor individuals who come from certain academic, social, or ethnic backgrounds. In New York City, at least, the proportion of minority judges occupying the appointive benches is somewhat lower than those occupying the elective benches.<sup>297</sup>

Seven courts in New York currently select judges through an appointive system — the Court of Appeals, the Court of Claims, the Appellate Division, the Appellate Term, the New York City Criminal Court, the New York City Family Court, and interim or acting appointments to certain courts. While there is considerable variation within each system, all appointments are made by the Governor, the Mayor, or the Chief Administrative Judge, and all are made with the assistance of an advisory committee. Of all of the committees, only one — for the New York Court of Appeals — is created by statute rather than by Executive Order. What was striking about the non-statutory committees is the shaky ground on which they stand. Different Governors or Mayors

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<sup>296</sup> John Caher, *Lawmakers Gear Up to Grill Nominee For Court of Appeals*, 231 N.Y.L.J., Jan. 7, 2004, at 1, col. 3.

<sup>297</sup> Of the State's 55 Appellate Division Judges there are only two African Americans, two Hispanics, and only nine women. *Sen. Breslin Co-Chairs Public Hearing on Judicial Diversity*, U.S. STATE NEWS, Dec. 12, 2006, available at 2006 WLNR 22295652.

would have absolute authority to change the rules by which these committees are governed, or even exist.

For example, we were struck by the State Judicial Screening Committee, which evaluates candidates for the Court of Claims, and the Departmental Screening Committees, which evaluate candidates for the Appellate Divisions.<sup>298</sup> The appointment of the members of the former is largely if not exclusively in the control of the Governor, while the members of the latter are also appointed by several other political figures and one bar association leader.<sup>299</sup> In neither case, however, is the topic of diversity even mentioned officially, much less made a priority. And, notably, both types of committees decide only whether particular candidates are highly qualified, rather than passing on a set number of applicants to the Governor, who must choose appointees from that list. The Task Force strongly believes that the structural makeup of these panels, together with a lack of a strong commitment by the appointing authority in recent years, have been largely responsible for the substandard level of diversity in the Appellate Divisions.

On the other hand, we commend the Executive Order creating the current Mayor's Committee on the Judiciary, which specifically states that its members "shall be selected with due consideration for broad community and borough representation," and that the membership "shall include . . . members of minority and other groups."<sup>300</sup> Although we believe that an ideal nominating commission would be created by statute rather than by executive order, the Mayor's Committee's structure makes the appointment system in New York City one of the better systems in the state.

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<sup>298</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 5.10.1.

<sup>299</sup> *Id.* § 5.10(3), (4).

<sup>300</sup> Exec. Order No. 8, § 5(b).

Despite the disappointing record of diversity in state judicial appointments in recent years, we noted favorably the statements made to the Task Force by the outgoing Chair of the State Judicial Screening Committee, to the effect that he had seen a number of stellar attorneys go through his committee over the years, who are now on the bench but would never have had the political support to go through the current elective system.<sup>301</sup> Indeed, that subject was a recurring theme in the Task Force’s examination: how to increase the number of *excellent* judges on the bench who would not have sufficient *political* support to make it through the political process, while ensuring that appointive systems minimize the role of politics in their own processes.

In examining this problem, we were favorably impressed by the model currently used for appointing United States Magistrate Judges and considered, but ultimately rejected, trying to apply this system to New York. Pursuant to 28 U.S.C. § 631(a), federal magistrate judges are appointed by the Article III judges of the relevant federal district court. Each appointee must qualify according to the standards set forth by the Judicial Conference of the United States.<sup>302</sup> Notably, each district court must also establish a selection panel, which is responsible for assisting the “courts in identifying and recommending persons who are best qualified to fill such positions.”<sup>303</sup> Appointments are made by a concurrence of a majority of all the judges in the district court from among no more than five candidates nominated by the panel; if there is no such concurrence, the decision is left to the Chief Judge.<sup>304</sup>

The Task Force was drawn to this system because its structure makes it the likeliest system to reward skill and qualifications while minimizing the effect of mere political considerations

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<sup>301</sup> Interview by the New York Hispanic Bar Task Force on Judicial Selection with Paul Shechtman, Chair, New York State Judicial Screening Committee, in New York, N.Y. (June 20, 2006).

<sup>302</sup> 28 U.S.C. § 631(b)(5) (2000).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* § 631(a).

in the selection process. Uniquely, the district judges who select magistrate judges have every incentive to seek out the most skilled and hard-working lawyers, because much of the daily work of magistrate judges involves assisting, to a certain degree, the work of the Article III judges on specific cases. In other words, unlike the typical appointing authority in appointive systems, this appointing authority actually has to live with its choice on a daily basis. The incentive for factors unrelated to competence, such as patronage, to influence the selection of particular candidates is greatly lessened.

In the end, we rejected applying such a recommendation to New York because in the case of Supreme Court Justices, the closest analogue would be to have the Justices of the Appellate Division act as the appointing authority. Unfortunately, the analogy is imperfect, as the judges of an appellate court have less of a direct connection to the judges of a trial court than do judges of a trial court, of different ranks, who work on the same cases. Moreover, the Task Force was hesitant to recommend an appointing authority that was not itself subject to direct political accountability.

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Ultimately, the Task Force concluded that in order for an appointive system truly to succeed in attaining a competent and diverse bench it must have a broad-based non-partisan or bi-partisan nominating commission, established by statute, and having as part of its mandate selecting a diverse judiciary. Our specific recommendation for a commission-based appointment system is discussed in Part VI.C below.

## VI. OPTIONS AND RECOMMENDATIONS

### A. RETAINING THE PRE-*LÓPEZ TORRES* CONVENTION SYSTEM

Though *López Torres* invalidated the system of judicial nominating conventions, because there is a possibility of review by the Supreme Court of the United States, the Task Force has considered the merits of retaining the convention system. We do not favor doing so, essentially because, as stated above, and with few exceptions, the current convention system is essentially an

appointive system dressed up to look like an elective system. Although the identity of the appointing authority might vary from district to district, and in some cases the appointment might be by committee or by consensus, it is nevertheless for all practical purposes an appointive system. Although there is obviously nothing inherently wrong with an appointive system, one that is called elective while those doing the appointing remain generally unknown to the public does a disservice both to appointive and elective systems.<sup>305</sup>

We caution that we make no comment on the good faith or intentions of the political leaders who have served as appointing authorities, nor on the resulting Justices that have been selected to sit on the Supreme Court using this method. We simply reject the method as a means to select Supreme Court Justices on a going-forward basis. As noted in Part VI.D below, we do believe that the current convention system may be modified in order to allow for meaningful access to nomination by potential candidates, and to a meaningful voice by the voters.

B. A SYSTEM OF OPEN PRIMARIES

As examined above, absent legislative intervention, New York's political parties will nominate Justices of the Supreme Court by direct primary elections.<sup>306</sup> In affirming, the Second Circuit stressed that the Legislature's is free to "enact a new nominating scheme," and without legislative action direct primaries will remain law.<sup>307</sup> The Task Force examined this question extremely closely, and concluded that this remedy should not stand.

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<sup>305</sup> Both the district court and the Second Circuit in *López Torres* labeled the convention system as superficial and perfunctory, in which the delegates did nothing more than formally endorse a predetermined candidate. *See López Torres I*, 411 F. Supp. 2d at 229; *López Torres II*, 462 F.3d at 178. Beyond that, the representatives of the political systems whom the Task Force interviewed were candid that the process is political, that it is highly unlikely that anyone would get nominated without the support of the county leader, and that the district and county leaders making decisions based those decisions at least in part on purely political considerations such as service to the party or support of certain politicians. While we recognize that grass-roots political activity is a positive force in a democracy, its connection to the selection of high-quality judges is difficult to establish.

<sup>306</sup> *López Torres I*, 411 F. Supp. 2d at 256.

<sup>307</sup> *López Torres II*, 462 F.3d at 207-08.

## **1. Advantages of an Open Primary System**

The Task Force recognizes that a direct primary system may have significant benefits for both potential candidates and for voters. First, such a system can allow *any* potential candidate for the Supreme Court to collect a requisite number of signatures in order to run in a primary election, and therefore significantly increases access to the ballot as compared to the convention system. Second, the possibility of direct access to the ballot weakens the power of party leaders to hand-pick candidates to run in (often-uncontested) general elections, and increases the power of voters. Finally, a direct primary election, unlike the current system, does not *require* potential candidates to engage in traditional forms of grass-roots political activity, such as club membership, fund-raising, or collecting signatures; rather, candidates may take their case directly to the voters.

## **2. Disadvantages of an Open Primary System**

Notwithstanding the important advantages of a system of open primaries, these advantages must be weighed against the significant disadvantages of such a system:

*First*, there is presently no system for public financing of judicial elections in New York,<sup>308</sup> though the costs of a judicial campaign have skyrocketed in recent years, requiring many candidates in other states to spend millions of dollars to get elected.<sup>309</sup> These staggering increases in the cost of judicial campaigns have two negative accompanying effects. First, it discourages those who cannot finance their campaigns through either independent means (*i.e.*, the wealthy) or by taking out loans from running for the bench.<sup>310</sup> Second, it creates the strong public perception that

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<sup>308</sup> The New York Assembly has passed a bill establishing public financing for judicial elections; however, this bill has not been enacted to date. *See supra* note 223 and accompanying text.

<sup>309</sup> Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 274-75, 278-79 (2002); Sample, *supra* note 239. *See also* Deborah Goldberg et al., *The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached A "Tipping Point" — and How to Keep Our Courts Fair and Impartial* 13-16 (2004), *available at* [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_10569.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_10569.pdf) (last visited Jan. 12, 2007).

<sup>310</sup> Behrens & Silverman, *supra* note 309, at 286.

campaign contributions influence judicial decisions.<sup>311</sup> Indeed, many of the largest contributors to judicial campaigns are the attorneys who will practice before the very judges to whom they contributed.<sup>312</sup> This correlation creates the strong public perception that these contributions are being made with the expectation of having the favor returned in the form of either preferential treatment or a favorable decision in the courtroom.<sup>313</sup> These effects, whether or not they are well founded in particular courtrooms, undoubtedly pose a serious threat to the judiciary's role as an independent and impartial decision maker.

*Second*, the role and purpose of the judicial branch is fundamentally different from that of the executive and legislative branches. The executive and the legislative branches are *representative* — they necessarily represent the will of the people. The judiciary, however, was intended to be *independent* — removed from the influences of constituencies so that it may impartially decide individual cases and controversies before it based solely on the facts and the law.<sup>314</sup> Requiring judges to campaign to get on the bench (and continue campaigning to stay on the bench) brings with it a requirement for the judicial candidate to appeal to, win over, and please a voting constituency.<sup>315</sup> Voters, in turn, will be inclined to vote for those candidates that they believe,

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<sup>311</sup> *Id.* at 279 (“The amounts of money spent on judicial elections strongly suggest that campaign contributors are hoping to influence a judicial philosophy through their giving.”); Sample, *supra* note 239 (“According to a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, nearly half the judges surveyed *themselves* believe that campaign contributions influence judicial decisions.”) (emphasis in original). *See also* Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 841-42 (1994).

<sup>312</sup> Behrens & Silverman, *supra* note 309, at 279 (“A large portion of donations to judicial campaigns is contributed by parties and lawyers with cases before the court.”) (citing Am. Bar Ass’n, Standing Comm. on Judicial Independence, Comm’n on Public Financing of Judicial Campaigns 11 (July 2001)).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 288.

<sup>315</sup> *Id.* at 287.

either rightly or wrongly, will decide cases in ways that reflect their personal ideologies and beliefs.<sup>316</sup>

The end result is a system that places the judiciary at the same level as the legislature and the executive, subject to the ever-changing tide of public opinion.<sup>317</sup> As set forth in an 1873 address given at the Association of the Bar of the City of New York, this result does not further the goal of an independent judiciary:

The fact that we vote for representatives is no reason why we should vote for judges, but quite the contrary. It is essential that a judge should be selected by a method which does not arouse personal prejudice or popular passion, which places him under no commitment to any locality, interest or political party, which shall give all the people who may be suitors or prisoners before him, the same power and participation in placing him upon the bench, and the same grounds of confidence in his impartiality.<sup>318</sup>

*Third*, the reality of a democracy is that of all offices, the public's motivation to participate in judicial elections and the information available for voters to make informed decisions are at their lowest. As a general matter, there tends to be a low voter turnout for judicial elections.<sup>319</sup> Even when voters do make it to the ballot box, their decisions may well be based purely on either party affiliation or other non-substantive characteristics like name or ethnicity.<sup>320</sup> Part of this problem stems from the fact that as a general matter, judges, especially those at the trial level, rarely make decisions that affect the public at large.<sup>321</sup> The lack of interest in judicial elections is further

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<sup>316</sup> *Id.*; see also Schoshinski, *supra* note 311, at 843-44.

<sup>317</sup> Behrens & Silverman, *supra* note 309, at 287-88 (quoting Professor Steven Croley: "Where the judiciary as well as the legislature and executive is elected, no branch remains to safeguard constitutionalism against majoritarian excesses.").

<sup>318</sup> ABCNY Report, *supra* note 155, at 28 n.127 (quoting Address of the Association of the Bar of the City of New York, An Elective Judiciary 6 (Oct. 24, 1873)).

<sup>319</sup> Behrens & Silverman, *supra* note 309, at 290.

<sup>320</sup> *Id.* at 291, 294.

<sup>321</sup> *Id.* at 294.

compounded by the fact that rules of ethics and conduct usually place strict restrictions on what judicial candidates can disclose to the public during a campaign.<sup>322</sup>

*Fourth*, otherwise qualified candidates may be either discouraged from or incapable of participating in a competitive political campaign. As outlined above, the costs of judicial campaigns are exceedingly high.<sup>323</sup> Many candidates who would otherwise make excellent judges may shy away from campaigning for a judgeship, knowing that they either do not have the means or willpower to finance a campaign using their own funds, or do not have the ability or desire to raise the funds necessary to run.<sup>324</sup> As the costs of judicial campaigns rise, many individuals who would otherwise be interested will be less inclined to leave the security of their jobs and take the serious financial risk that is associated with a political campaign.<sup>325</sup> Moreover, the traits that define a good judge are not necessarily the same traits that define a successful politician, capable of eliciting campaign contributions and garnering popular support for an election.<sup>326</sup>

### **3. The Task Force Does Not Favor a System of Open Primaries**

After carefully weighing the advantages and critiques set forth above, the Task Force rejects the employment of a direct primary election for Supreme Court Justices. To be sure, direct primaries do have the virtue of being democratic, but on balance we feel that if any one of the critiques were realized in practice it would defeat any good faith attempt to reform the current judicial nominating convention system. We believe the advantages of the direct primary, specifically

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<sup>322</sup> *Id.* at 291-92.

<sup>323</sup> *See supra* text accompanying notes 308-313.

<sup>324</sup> Behrens & Silverman, *supra* note 309, at 285-86. *See also* Am. Bar Ass'n, Standing Comm. on Judicial Independence, Comm'n on Public Financing of Judicial Campaigns 23-25 (2002), *available at* <http://www.abanet.org/judind/pdf/commissionreport4-03.pdf> (last visited Jan. 12, 2007).

<sup>325</sup> Behrens & Silverman, *supra* note 309, at 285-86.

<sup>326</sup> *Id.* at 286-87 (“Experienced judges may be defeated not because of a lack of judicial competence, but due to poor campaigning skills or a simple shift in the political wind.”).

the issue of access, can be achieved through other means and are not unique to a direct primary format. Access to the ballot, for both potential candidates and voters, can be greatly enhanced if the New York Legislature reforms the nominating convention system as proposed in Part VI.D below.

C. A COMMISSION-BASED APPOINTIVE SYSTEM

As stated, the Task Force recommends as an ideal a commission-based appointive system, carefully calibrated to increase diversity, ensure a highly qualified bench, and increase transparency in the process. The two keys to establishing this are a broad-based, non-partisan or bi-partisan nominating commission, coupled with an appointing authority — the Governor, the Mayor, or a county executive — committed to the ideals we have set forth.

As discussed further in Part VI.C.3 below, in light of the constitutional and other hurdles involved in ultimately establishing commission-based appointment, the Task Force recommends that the nominating convention system be modified with an eye towards eliminating the flaws that were found to be constitutionally objectionable in *López Torres*. One of these recommendations is that nominating conventions strive to nominate only those candidates that are approved by district-wide nominating commissions. We pause here to note only that whether the Legislature ultimately modifies the current nominating commission system or approves a constitutional amendment to enact a commission-based appointment system, the commission that we recommend, discussed below, would be composed and selected in the same manner.

**1. Non-Partisan/Bi-partisan Nominating Commission**

The Task Force recommends establishing a nominating commission in each judicial district, which would be responsible for reviewing potential candidates before their names are submitted for consideration by the appointing authority. Similar to the procedures already in place for the Court of Appeals,<sup>327</sup> potential candidates would apply to the nominating commission, which

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<sup>327</sup> See *supra* Part II.C.1-2.

would report no more than three to five names to the appointing authority, who would be required to choose from among those names. The ideal system would be designed so that the commission would be selected in such a way as to minimize the influence on the final choice of any one group.

With that in mind, the Task Force recommends:

- The members of the commission would be selected in a “double blind” mechanism, where politically accountable or otherwise visible leaders from the Executive, Judicial, and Legislative branches would designate broad-based bar, law school, and community groups who would in turn select the members of the commission, for three-year staggered terms. Such groups could include, for example, Citizen’s Union, the New York State Bar Association, the NAACP, the associations that make up this Task Force, other minority bar associations, and PRLDEF. Additionally, because each commission would be within its own judicial district, bar, and civic associations in each locality would participate as well. Each commission should be large enough that diverse viewpoints are considered, but not so large that it loses continuity in decision-making. We suggest no fewer than 15 and no more than 21 members, no more than 60% of whom are enrolled in the same political party.
- Members would serve on the commission in their own capacity, and not as representatives of the organizations that appointed them. Any enabling legislation or regulations would include as a stated goal the selection of nominating commissions and judges that reflect the communities in which they serve.
- The commission would also have the responsibility to engage in outreach by seeking out and encouraging candidates that represent both high quality and diversity. All applications submitted to the commission would be reviewed and evaluated by the commission.
- The commission would report no fewer than three and no more than five names to the appointing authority, deeming each “well qualified.”
- Applicants would be deemed well qualified only by satisfying the commission’s strict review process, which would be published by regulation. For instance, in addition to conducting a thorough background check, the commission would interview those attorneys and judges who are familiar with the applicant’s body and quality of work and professional reputation. In this way the commission could reach an opinion as to the capabilities of each candidate.
- The commission would have 90 days to act upon a vacancy; after the commission’s submission of candidates, the appointing authority would have 30 days in which to make its appointment, selecting only from the list provided by the commission.

- The final list of candidates would be made public, and public comment would be invited at a public hearing. The proceedings of the commission would otherwise be confidential.

## **2. The Appointing Authority**

Although, as stated above, the Task Force does not believe that judges should be chosen directly by the electorate, we nevertheless feel strongly that there must be political accountability in the appointment process. Thus, it is crucial that the final decision as to whom to appoint be made by a high-level executive official who is accountable to the voters. As discussed above, although some members of the Task Force were initially attracted to the judiciary-based appointment system used for federal magistrate and judges, ultimately the traditions of this state and the absence of a true analogue to the federal Article III judges who make such appointments made us disfavor such choices.

For the position of Supreme Court Justice, the Task Force believes that the appointment should be made by the Governor. For all other courts, we believe the selection should be made by an elected executive which, depending on the particular court, should be the Mayor of the City of New York or the local county executive.

## **3. Need for Constitutional Amendment**

Because the New York State Constitution provides that “[t]he justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve,”<sup>328</sup> a commission-based appointment system may only be implemented by constitutional amendment. Amending the Constitution, however, is a cumbersome task that would face many practical hurdles.<sup>329</sup> Although the Task Force believes that the time is now to seek such an amendment,

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<sup>328</sup> N.Y. CONST. art. VI, § 6(c).

<sup>329</sup> Article XIX of the New York Constitution specifies the procedures for amendment. First, a proposal to amend the constitution is made in either the state Senate or Assembly. *Id.* art. XIX, § 1. The proposed amendment is then referred to the New York attorney general, who has the duty to render an opinion, within twenty days, regarding the effect the proposed amendment will have on the remaining sections of the

absent such an amendment, the method for selecting Supreme Court Justices would remain an elective process. And, even if such an amendment were to pass, more than three years would be required for that to happen in light of the necessary steps. As we have stated above our opposition to an elective process based on open primaries, we turn next to our suggestions for maintaining the nominating convention system, with important modifications.

D. A MODIFIED JUDICIAL NOMINATING CONVENTION SYSTEM

**1. Feerick Commission Recommendations**

Because of the hurdles inherent in implementing a commission-based appointment system, the Task Force urges, at least on a short-term basis, that the Legislature take immediate steps to open up the current judicial nominating convention system and allow broader access to the convention and the delegates by candidates, more meaningful selection of delegates by voters, and greater authority and independence for delegates. We base our recommendations in this regard on the recent studies and reports undertaken by the Feerick Commission.

In its Final Report of February 6, 2006, the Commission, after several years of studies, surveys, and meetings, made final and detailed recommendations that the state take affirmative steps to open up the current convention system for Supreme Court. It noted three purposes in making these recommendations:

First, they are meant to attract as delegates people who are dedicated, experienced and willing to consider in depth the qualifications of judicial candidates with a view toward ensuring that their party nominates well qualified candidates for the Supreme Court who reflect the communities in which they will serve. Second, they are

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constitution. *Id.* Failure of the attorney general to do so, however, will not affect the validity of the amendment, so long as it is passed following the appropriate procedures. *Id.* After receipt of the attorney general's opinion, or after the allotted twenty days have elapsed, the proposed amendment will then be voted on by both houses of the Legislature. *Id.* If the amendment is agreed upon by a majority of the members of each house, the amendment will be referred to the legislative session that convenes after the next general election of members of the Assembly. *Id.* If the proposed amendment is then agreed upon again by a majority of the members of each house of the Legislature, it is then placed on the ballot so that the citizens of New York may vote on it. *Id.* If a majority of the "electors voting thereon" vote in favor of the amendment, the amendment will take effect at the beginning of the next calendar year. *Id.*

designed to afford conditions conducive to performing the delegates' duties in a professional manner. This includes providing adequate time and information to act independently and thoughtfully. Third, they are meant to lift barriers to qualified candidacies. Each of the recommendations offered below reflects these goals.<sup>330</sup>

We reiterate here the Feerick Commission's key recommendations:<sup>331</sup>

- The judicial district nominating convention system should be made more open and effective.
- The Election Law should be amended to reduce the number of delegates to the judicial district convention.
- Each assembly district should send at least two delegates or alternates to the convention.
- Delegates should cast weighted votes.
- The number of signatures required for a candidate to run as delegate or alternate delegate should be reduced to 250.
- The Election Law should be amended to promote the effectiveness and independence of delegates and alternates.
- Delegates and alternates should serve three-year terms.
- Delegate elections should take place in the year preceding the judicial district nominating convention at which the delegate will serve.
- The New York State Board of Elections should provide delegates with information about judicial elections.
- The Board of Elections should provide delegates and the general public with a list of announced judicial candidates at least ten business days prior to the date fixed for the convention.
- Candidates seeking nomination for the office of Justice of the Supreme Court should have the right to address the delegates.

The Task Force recommends that the current judicial district nominating convention system for the nomination by political parties of candidates for the position of Supreme Court

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<sup>330</sup> Feerick III, *supra* note 205, at 30.

<sup>331</sup> *Id.* at 30-35.

Justice be modified by amending the Election Law and Judiciary Law to include a reduction in the number of delegates to each convention; an expansion of the delegates' terms to two years; an expansion of the lobbying period so that the candidates can get to know the delegates; a drastic reduction in the number of signatures required to get on the ballot; and the creation by statute of advisory nominating district-level commissions that all judicial candidates must initially come through and that would report five names from which the delegates must choose a candidate.

## **2. Smaller Judicial Districts**

Additionally, we recommend that the current system of twelve judicial districts be modified so that each county in the state would constitute its own separate district. Without this important reform, minority candidates in certain counties, mostly upstate, would be at a distinct disadvantage when competing in nominating conventions comprised of delegates from multiple counties. Particularly in counties with large urban centers, such as Onondaga, Monroe, Erie, and Albany, diverse candidates would stand a much better chance of being nominated than they currently do or than they would if the district structure remains the same. Moreover, in line with the spirit of the Feerick recommendations, smaller districts would allow candidates to campaign more easily among the delegates, and delegates among the voters. We believe that this is a crucial reform aimed at diversity in every sense of the word — ethnic, racial, gender, and geographic.

## **3. Nominating Commissions**

As noted above, the Task Force recommends that whether New York adopts a commission-based appointment system or a more open convention system, it should create a system of nominating commissions in each of the state's judicial districts, which would screen candidates for the Supreme Court and report out a small number of names for each vacancy in a particular district.<sup>332</sup> Although the delegates could not be constitutionally required to choose only from the

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<sup>332</sup> See *supra* Part VI.C.1.

candidates who have been screened and reported out by the district nominating commission, such a commission would constitute a strong advisory component urged on political parties by current elected officials and political leaders.

A similar proposal was recently codified in the Rules of the Chief Administrative Judge, Part 150, Independent Judicial Election Qualifications Commissions. After careful review, the Task Force endorses this rule but with a strong caveat. The Task Force does not agree with the composition of the membership of the commissions established by this rule. We believe that allowing the Chief Judge and the Presiding Justice of the Appellate Division together to appoint ten out of fifteen members of each commission, and further permitting the Presiding Justice to designate four local bar associations that would in turn select four other members, places too much control in the hands of the judiciary over the process of judicial selection.<sup>333</sup> While the state judiciary should clearly have a say as to who sits on these commissions, we strongly feel that the other branches of government and more importantly, recognized broad-based community organizations mentioned in Part VI.C.1 above, should be represented on these vitally important commissions.

The Task Force strongly feels that a statewide system of district level Judicial Nominating Commissions would greatly enhance the quality of our judiciary and public confidence in the courts. The political parties should have the right to choose their nominees through their conventions but their choices should be checked by a rigorous, albeit advisory, qualification process that pre-screens and reports out the best-qualified attorneys for these vital positions.

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<sup>333</sup> N.Y. R. CHIEF ADMIN. §§ 150.2(a)(1), (2), (4) (McKinney 2006). The remaining one member is selected by the President of the New York State Bar Association. *Id.* § 150.2(a)(3).

#### **4. Adjustment to Feerick Recommendations**

The Task Force endorses all of the specific recommendations of the Feerick Commission with respect to judicial nominating conventions,<sup>334</sup> but believes that the particulars of two of the recommendations should be adjusted.

*First*, while reducing the total number of delegates to the convention is an excellent proposal in that it would promote a more democratic and collegial process, the Task Force believes the Commission's proposal capping the number of delegates at a maximum of 50 is too drastic. Such a reduction could more easily lead to the empowerment of a minority bloc of delegates at the potential expense of the majority.

By way of example, at its 2004 meeting, the Second Judicial District convention under the formula mandated by Election Law § 6-124 had 98 delegates sitting.<sup>335</sup> A potential reduction from 98 to 50 would be counter productive in that it could lead to easy manipulation of the convention by a strong and cohesive minority bloc of delegates who could successfully muster enough support for a bare plurality, and thus defeat the purpose of making the convention more accessible to candidates who lack the support of party insiders.

The likelihood of creating the unintended consequence of overly empowering a minority bloc at the convention is increased by another Feerick recommendation — with which we do agree — that delegates cast weighted votes. If the maximum number of delegates at a convention is fifty and the delegates' votes are weighted, one can imagine a small coalition of delegates with weighted votes exercising unwarranted influence over the convention. Instead, creating a statutory maximum of 75 delegates instead of 50 as recommended by the Feerick Commission would serve both to enhance the possibility of a more open and democratic judicial

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<sup>334</sup> The Task Force does not endorse the Commission's recommendation for retention elections. *See supra* discussion at Part IV.E.5.

<sup>335</sup> Feerick III, *supra* note 205, at 25.

convention and to protect against manipulation by a strong and coordinated minority bloc of delegates.

*Second*, the Task Force also recommends that delegates' terms be extended only to two years instead of the three years suggested by the Feerick Commission. Although we agree that the delegates' independence is enhanced by a two-year term instead of the current term of one to two years, we are wary of creating a system where delegates themselves become entrenched power brokers. A two-year term strikes the proper balance, allowing delegates a good opportunity to meet and consider fields of candidates while avoiding their becoming too entrenched.

## **5. Final Recommendations**

In sum, the Task Force recommends that the following be done immediately:

- Enactment of all Feerick Commission recommendations, except that the delegates' terms should be extended to two years rather than three, and the convention size should be reduced to a maximum of 75 delegates.
- Statutory creation of judicial district nominating commissions to screen and report out well qualified candidates, from which the delegates would be encouraged to choose. As in the case of a commission-based appointment system, these commissions should have broad-based representation of community groups and all branches of government and should include diversity as a strongly recommended goal for their decision making.
- Elimination of the current system of twelve judicial districts for Supreme Court in favor of one district per county.

## **VII. CONCLUSION**

Throughout this Report, the Task Force has endeavored to present an honest assessment of the current judicial selection system, with an eye towards recommending improvements. In doing so, we have been mindful of our extremely diverse constituencies, which are not always of one mind on this topic. By careful deliberation, the Task Force has tried to present the consensus view of those constituencies, arrived at after much discussion. We hope that

the New York legal community finds our suggestions helpful, and we look forward to the rapidly unfolding developments in this area and the opportunity to be a continuing part of the dialogue.

New York, New York  
January 18, 2007

**HNBA**  
HISPANIC NATIONAL BAR ASSOCIATION

