

**RECOMMENDATIONS ON THE SELECTION OF  
JUDGES AND THE IMPROVEMENT OF THE  
JUDICIAL SELECTION SYSTEM  
IN NEW YORK STATE**

The Judicial Selection Task Force  
of the Association of the Bar of the City of New York

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## INTRODUCTION

The Judicial Selection Task Force (or “Task Force”) was convened by the Association of the Bar of the City of New York (the “Association”) in March 2006. Its mandate was to issue recommendations on improving the judicial selection system in New York State, particularly in light of the recent reform proposals by the “Commission to Promote Public Confidence in Judicial Elections” (the “Feerick Commission”) and Judge John Gleeson’s January 2006 decision in Lopez Torres.<sup>1</sup>

The question of how judges are generally to be selected has been the subject of debate throughout our nation’s history. See infra Section IA. In recent years this debate has been particularly prominent. In April 2003, Chief Justice Judith Kaye appointed the 29-member Feerick Commission, headed by John Feerick, former Dean of Fordham Law School (and a former President of the Association), and charged it with the mandate “to provide New York’s courts with a blueprint for preserving the dignity of judicial elections and promoting meaningful voter participation, which will serve to reaffirm public trust in our judiciary.”<sup>2</sup> Abiding by its mandate, the Feerick Commission only examined the election system—and not other judicial selection mechanisms—and issued its recommendations on improvements that could be brought to that system.<sup>3</sup>

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<sup>1</sup> Lopez Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212, 246 (E.D.N.Y. 2006), aff’d, 463 F.3d 161 (2d Cir. 2006).

<sup>2</sup> Press Release, 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://www.nycourts.gov/press/pr2003\\_08.shtml](http://www.nycourts.gov/press/pr2003_08.shtml).

<sup>3</sup> See generally New York State Commission to Promote Public Confidence in Judicial Elections, Final Report to the Chief Judge of New York State (Feb. 6, 2006).

In January 2006, the landscape significantly changed with the issuance of Judge Gleeson's decision in Lopez Torres, holding the current judicial convention process for selecting New York Supreme Court Justices unconstitutional and providing for primary elections in the absence of any action by the Legislature. The issue of judicial selection was thus transformed into a matter of immediate and significant consequence to the State. Now that Judge Gleeson's decision has been affirmed by the Second Circuit, judicial selection must be a leading issue before the Legislature.

The Association, for more than a century, has played a very active role in the judicial selection debate and has long adhered to the position that the most appropriate method for selecting New York State's judiciary is an appointive system. In October 2003, a task force appointed by the Association issued a report firmly supporting the Association's long-standing position in favor of a commission-based appointive system and recommending that independent and diverse citizen screening commissions review candidates' qualifications and forward the candidacy of only the most highly qualified applicants for appointment by an accountable elected official.<sup>4</sup>

In order to best fulfill its mandate of issuing recommendations improving New York's judicial selection system, the present Task Force created three subcommittees: (i) the Impact on Minority Candidates Subcommittee, (ii) the Lopez Torres Subcommittee and (iii) the Improvement of the Elective System Subcommittee.

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<sup>4</sup> See generally Judicial Selection Task Force of the Association of the Bar of the City of New York, Recommendations on the Selection of Judges and the Improvement of the Judicial System (2003) ("Task Force 2003 Report"), available at <http://www.abcnyc.org/pdf/Judicial%20selection%20task%20force.pdf>.

- i. The Impact on Minority Candidates Subcommittee, chaired by Judge Deborah Batts, reviewed a large variety of data, empirical studies and articles regarding minority representation on the bench. The subcommittee realized that—for a number of reasons—the data was inconclusive as to whether one of the two systems—appointive or elective—better promotes diversity. The subcommittee did, however, reach general conclusions as to improvements that *could and should* be made to both systems to promote a more diverse pool of candidates and, thus, a more diverse bench. See infra Section III.
- ii. The Lopez Torres Subcommittee, chaired by Dean David Rudenstine, followed closely the evolution of Lopez Torres from the Eastern District of New York to the Second Circuit and oversaw the drafting of the Association’s amicus brief that was submitted in May 2006 before the Second Circuit in support of affirmance of Judge Gleeson’s decision.<sup>5</sup> As noted above, the decision was affirmed.<sup>6</sup>
- iii. The Improvement of the Elective System Subcommittee, chaired by Lawrence Mandelker, studied and discussed improvements that can be brought to the current constitutionally mandated elective process until the State Constitution is amended in favor of a commission-based appointive system. The result of that work is incorporated herein. See infra Sections I and II.

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<sup>5</sup> The amicus brief was drafted by the law firm of Skadden, Arps, Slate, Meagher & Flom LLP. The Task Force is particularly grateful to Sheila L. Birnbaum and Preeta D. Bansal for their generous and skillful assistance. Judge Deborah Batts and Richard Rifkin recused themselves from any discussion or consideration of the amicus brief and of the Lopez Torres case more generally.

<sup>6</sup> Lopez Torres, 463 F.3d 161.

In this Report on Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York State (the “Report”), the Task Force firmly reiterates the Association’s long-standing position in favor of a commission-based appointive system. It sets forth a proposed amendment to Article 6 of the New York State Constitution to implement such a system. See generally Section I.

The Task Force recognizes, however, that the current system of election has been long entrenched in New York and that a change to an appointive system could entail a process which could face considerable political opposition and which, in addition, could be complex and lengthy. Mindful of such a reality, the Task Force is also recommending a statutory reform of the current judicial convention and primary systems designed to redress—among other things—the constitutional infirmities identified in Lopez Torres until the State Constitution is amended in favor of a commission-based appointive system. The Task Force is adamantly opposed to the default solution of primary elections for Supreme Court without public financing and without a convention system. See generally Section II.

Finally, regardless of whether appointive or elective systems are in use for the selection of judges, changes must be made to promote a more diverse pool of candidates, and therefore a more diverse bench. These changes include public financing for all judicial candidates; the use of diverse screening and qualification commissions; encouraging appointing authorities to commit to the importance of diversity; public education about the importance of a diverse judiciary; and, if the convention system survives after Lopez Torres, reductions in the number of convention delegates. See generally Section III.

The Task Force believes that the recent developments relating to judicial selection issues, and in particular the Second Circuit’s decision in Lopez Torres, require a change to the current election process and provide the most promising opportunity in many decades for a thorough reassessment of the current judicial selection system. In this Report, we urge the adoption of reforms designed to provide our State with a judiciary of the highest quality and independence, and to restore the confidence of all New Yorkers in the judicial system.

**I. PROPOSED CONSTITUTIONAL AMENDMENT IN FAVOR OF A COMMISSION-BASED APPOINTIVE SYSTEM**

New Yorkers are faced with a historic opportunity for reforming the State’s disingenuous process for selecting many of New York’s trial court judges. In the wake of the seminal decision by the Second Circuit Court of Appeals in Lopez Torres, the Legislature must consider what changes should be made in the manner in which candidates are nominated for the position of Supreme Court Justice. For reasons set forth in this Report, the Legislature should seize this opportunity and enact, for consideration by the voters in a statewide referendum, an amendment to Article 6 of the New York State Constitution providing for commission-based appointment for all New York State trial court judges and for the presiding justice and justices of the Appellate Divisions of the State Supreme Court.

**A. Historical Background**

In The Federalist No. 78, Alexander Hamilton argued compellingly for the appointment of federal judges with permanent tenure during good behavior. Hamilton warned that if the periodic power to select judges were given “to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult

popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.”<sup>7</sup> The practice of appointing judges who would hold office during good behavior, he noted, “is conformable to the most approved of the State constitutions”.<sup>8</sup>

As Hamilton observed, at the birth of the nation, most states provided for the appointment of judges. In New York, the 1777 State Constitution provided for the selection of judges by means of appointments made by a Council of Appointment.<sup>9</sup> And although in a few states the legislature selected the judges during this time period, it was not until 1812 that any state elected judges by a vote of the people.<sup>10</sup>

In 1828, Andrew Jackson was elected President, and with his election the era of Jacksonian democracy became ascendant. Broadly speaking, Jackson’s supporters believed in expanding public participation in government; they were openly hostile to appointive judges<sup>11</sup> and rewrote many state constitutions to reflect that value. In 1832, in

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<sup>7</sup> The Federalist No. 78 (Alexander Hamilton).

<sup>8</sup> Id.

<sup>9</sup> Under the 1777 Constitution, the Council of Appointment, comprised of the governor and four senators, had the power to make all appointments authorized by law. In The Federalist No. 69, Hamilton alluded to the Council and “the mode of appointment by the governor of New York, closeted in a secret apartment with at most four” persons. New York abolished the Council in 1821 and conferred the power to make judicial appointments on the Governor.

<sup>10</sup> Georgia was the first state to elect judges by a vote of the people, a practice that applied only to the inferior courts of that state. See Learned Hand, The Elective and Appointive Methods of Selection of Judges, in Proceedings of the Academy of Political Science in the City of New York, Vol. 3, No. 2, 82 (Jan. 1913). State legislatures elected the judges in New Jersey, Virginia and South Carolina, and in Vermont and Tennessee when they became states in 1793 and 1796. Id.

<sup>11</sup> “Delegates [to state constitutional conventions] branded the appointive system ‘a relic of monarchy’ and the ‘last vestige of aristocracy’; some delegates referred to ‘the immortal Jackson,’ and there was much talk of the need to make the judiciary ‘consonant with our theory of government.’” Caleb Nelson, A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 AM. J. LEGAL HIST. 190, 191-92 (1993). Jackson himself proposed that the Electoral College be



what Learned Hand called “a burst of democratic enthusiasm,”<sup>12</sup> Mississippi became the first state to establish an entirely elective judiciary. New York followed suit in 1846, and many states promptly followed soon thereafter. Every state that joined the Union between 1846 and 1958 adopted constitutions that provided for elective judiciaries. During the same period, Michigan (1850), Pennsylvania (1850), Virginia (1850) and Maryland (1851) all amended their constitutions to provide for the election of some or all of their judges.<sup>13</sup> By the time of the Civil War, 22 of 34 states elected their judges.<sup>14</sup>

For 160 years, justices of the State Supreme Court—New York’s trial court of general jurisdiction—have been elected by popular vote. That selection method has been dictated since 1846 by the State Constitution, which provides: “The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve.” N.Y. Const. art.VI, § 6(c). Judges of other State courts of record are also chosen by election, including judges of the County, City, District and Surrogate’s Courts; New York City’s Civil Court; and (outside of New York City) the Family Court.

It was not long, however, before a backlash set in. Two factors motivated that change. First, political parties quickly attained effective control over the election of  

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abolished and that senators and federal judges be elected directly by the people. Id. at 223.

<sup>12</sup> Learned Hand, supra note 10, at 88.

<sup>13</sup> See Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. CHI. L. REV. 689, 716-17 (1995). After reviewing the debate at New York’s Constitutional Convention of 1846, Croley concludes: “An elective judiciary was defended by its supporters not so much on the grounds that it advanced fundamental principles of constitutional democracy, as on the grounds that giving judicial selection to the people directly would avoid certain ills that alternative selection systems had brought.” Id. at 721.

<sup>14</sup> Jona Goldschmidt, Merit Selection: Current Status, Procedures, and Issues, 49 U. MIAMI L. REV. 1, 5 (1994).

judicial candidates and the retention of judges in partisan elections. One historian observed that the history of early judicial elections “worked out as a de facto system of appointment.”<sup>15</sup> Indeed, in language penned in 1928—but which might, were it not for a reference to the City of Chicago, understandably be confused for a passage in Lopez Torres—a law professor at Northwestern University wrote:

“It is one of our most absurd bits of political hypocrisy that we actually talk and act as if our judges were elected whenever the method of selection is, in form, by popular election. In a great metropolitan district like Chicago, where we have a typical long ballot and the party machines are well organized and powerful, our judges, while they go through the form of election, are not selected by the people at all. They are appointed. The appointing power is lodged with the leaders of the party machines. These men appoint the nominees.”<sup>16</sup>

Second, compelling judges to become politicians in order to ascend to the bench eroded public confidence in the judiciary. In a notable speech before the American Bar Association in 1906, Roscoe Pound stated that “[p]utting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench.”<sup>17</sup> The Association, the American Bar Association, and other bar associations were founded in a concerted effort to restore public confidence in the courts that had been lost in part because of the political nature of judicial elections.

These concerns led to limited changes in the methods used to select New York judges. In 1921, the Legislature provided for the use of conventions for the

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<sup>15</sup> James W. Hurst, The Growth of American Law: the Law Makers 133 (1950), quoted in Goldschmidt, supra note 14, at 6.

<sup>16</sup> Albert M. Kales, Methods of Selecting and Retiring Judges, 11 J. AM. JUDICATURE SOC’Y 133, 134-35 (1928), quoted in Goldschmidt, supra note 14, at 6.

<sup>17</sup> Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 AM. L. REV. 729, 748 (1906), quoted in Goldschmidt, supra note 14, at 6.

nomination of candidates for Supreme Court Justice. In 1949, New Yorkers granted authority to the governor to appoint judges to the Court of Claims. And after an “acrimonious election” in 1973 for Chief Justice of the New York Court of Appeals, in which two candidates spent over \$1.2 million,<sup>18</sup> New Yorkers approved a state constitutional amendment in 1977 that provided for commission-based appointment of the judges on the New York Court of Appeals. Additionally, as a result of an executive order first issued in 1961 by New York City Mayor Robert Wagner, and later extended and reissued by subsequent mayors, the judges of the New York City Family and Criminal Courts are chosen by the Mayor on an appointive basis through the use of a nominating committee.<sup>19</sup>

**B. The Case for Commission-Based Appointment: The Opportunity At Hand**

All judges of the New York State trial and appellate courts should meet the highest standards for intellectual rigor, integrity, independence, experience, fairness and temperament.<sup>20</sup> These qualities are critical not only for judges appointed to New York’s highest court, but for all judges who dispense justice at the trial and appellate court levels. The vast majority of all legal disputes are not resolved in the Court of Appeals or indeed at any appellate level, but rather in New York’s many trial courts. Most New Yorkers who interact with the judicial system appear before these trial judges

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<sup>18</sup> Robert Lindsey, California Leading in High-Cost Races for the Judiciary, N.Y. TIMES, Oct. 19, 1985, § 1, at 6.

<sup>19</sup> The Mayor derives this appointment power from Article 6, Section 15 of the New York State Constitution.

<sup>20</sup> Town and Village Courts are being looked at by a newly formed task force of the Association. Articles about Justice Courts have recently appeared in the press. See, e.g., Homespun Injustice, N.Y. TIMES, Oct. 1, 2006, § 4, at 9.

and no others. These litigants are entitled to be heard by jurists who meet the highest standards of character and fitness.

In order to meet these high standards, judicial candidates for New York’s courts of record should be chosen based primarily on merit, fundamentally in the same manner as are judges of New York’s highest court, the Court of Appeals, although with differently constituted screening commissions. The most qualified candidates for each position should be identified and nominated by independent and diverse judicial screening commissions on the basis of intellectual capacity, integrity, fairness, independence, experience, temperament—in short, the qualities New Yorkers expect and have a right to see in their judges. The ultimate selection of candidates for each vacancy should be made from among those most qualified candidates by an appropriate appointing authority elected by the people.<sup>21</sup>

The current convention system is not an acceptable judicial selection system. In a powerfully rendered and compelling indictment of the current system for electing Supreme Court Justices, the Second Circuit held in Lopez Torres that the current judicial nomination convention process has effectively “transformed a de jure election [of Supreme Court Justices] into a de facto appointment” by party leaders—a process the

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<sup>21</sup> In the next section of this Report, we recommend a system of judicial qualification commissions that would screen the qualifications of candidates for nomination for election to judicial office. We also recommend changes in the judicial convention system that we believe will remedy the constitutional infirmities elucidated in Lopez Torres. Although we believe these proposals would vastly improve the methods used to nominate and elect candidates for judicial office, and should render the improved methods constitutional, they would still allow unqualified or marginally qualified candidates to be nominated and elected; and they would still force incumbent judges back into the realm of elective politics and political fundraising. Accordingly, in this section of the Report we reiterate our strong preference to purge the present judicial convention system for selecting justices of its significant deficiencies, as outlined herein, once and for all.

Second Circuit found to be unconstitutional.<sup>22</sup> Pursuant to the Second Circuit’s decision, nominations for Supreme Court Justice must henceforth be made by primary election until the Legislature takes corrective action.

Shortcomings in the system for electing Supreme Court Justices are inherent in the electoral process itself. For reasons described below as well as in the Task Force 2003 Report,<sup>23</sup> elections do not ensure the selection of judicial candidates who have the highest qualifications and the greatest integrity and independence—qualities so important to a well-functioning, fair and independent judiciary. Indeed, judicial elections do not even ensure what their proponents desire: judicial selection by means of a truly democratic electoral process.

First and foremost, election campaigns for judicial vacancies are, like many campaigns for major elective office, notoriously expensive. In high court races, the expenditure of millions of dollars in judicial races has been commonplace for years.<sup>24</sup> Where judicial races attract special-interest money on one or both sides, as they often do, costs escalate substantially.<sup>25</sup> Although races for New York’s trial courts are neither as

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<sup>22</sup> Lopez Torres, 462 F.3d at 201.

<sup>23</sup> See Task Force 2003 Report at 27-29.

<sup>24</sup> In California in 1986, over \$11 million was spent on campaigns seeking to retain or unseat three incumbents; in Texas in 1988, more than \$10 million was spent by candidates in campaigns for six seats on the High Court. See Robb London, For Want of Recognition, Chief Justice is Ousted, N.Y. TIMES, Sept. 28, 1990, at B16. A campaign in 2000 for two seats on the Ohio Supreme Court cost \$9 million; in Michigan that same year, a race for three seats cost at least \$16 million. See William Glaberson, States Taking Steps to Rein In Excesses of Judicial Politicking, N.Y. TIMES, June 15, 2001, at A1. Anticipating another bruising campaign, one justice on the Ohio Supreme Court has already raised \$3 million since 2000. Adam Liptak and Janet Roberts, Campaign Cash Mirrors a High Court’s Rulings, N.Y. TIMES, Oct. 1, 2006, § 1, at 1.

<sup>25</sup> In 2000, for example, the United States Chamber of Commerce earmarked between \$1 million and \$10 million for State Supreme Court races in as many as seven

expensive nor as high profile as some of these high court contests, they are nonetheless very costly. Evidence in the Lopez Torres case revealed that Civil Court candidates routinely spend \$100,000 or more in primary elections, even in small municipal court districts. In the last primary contest for New York County surrogate, the winner spent more than \$300,000, and her leading opponent spent nearly \$500,000.

Candidates backed by the major political parties may well be unfazed by these substantial costs. Local political parties have the muscle, mechanics and money to wage successful election campaigns for judicial nomination across judicial districts. But candidates backed by those local political parties are not necessarily the most qualified for judicial office. Many judicial candidates earn their party's backing after years of labor in the vineyards of the party or from other political considerations that have little or nothing to do with judicial qualifications.

A candidate who is without party support (an "insurgent" candidate), and who has deep pockets, can overcome a deficit in party support—but deep pockets offer no assurance of merit. Insurgent candidates without deep pockets are faced with an often insuperable task of raising vast sums of money, invariably from parties and lawyers who have appeared and will again appear before them. This unseemly practice is singularly responsible for undermining public confidence in an independent judiciary. The Feerick Commission found, for example, that "[e]ighty-three percent of registered voters in the

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states where the Chamber saw "a danger that courts might block tort reform." William Glaberson, U.S. Chamber Will Promote Business Views In Court Races, N.Y. TIMES, Oct. 22, 2000, § 1, at 24. Likewise, in 1999, the Michigan Manufacturers Association notified its members about the importance of the 2000 Michigan Supreme Court election and asserted that in the last election, contributions from the manufacturers' political action committee "swayed the Supreme Court election to a conservative viewpoint, ensuring a pro-manufacturing agenda." William Glaberson, Fierce Campaigns Signal A New Era for State Courts, N.Y. TIMES, June 5, 2000, at A1.

state indicate that having to raise money for election campaigns has at least some influence on the decisions made by judges.” New York State Commission to Promote Confidence in Judicial Elections, Final Report to the Chief Judge of the State of New York, at app. E (Public Opinion and Judicial Elections: A Survey of New York State Registered Voters (December 2003), at iv). Similar examples elsewhere in the United States are legion.<sup>26</sup>

Additionally, primary election voters are often poorly informed about the qualifications of judicial candidates for office and are not well suited to evaluate the significance of those qualifications (or the lack of them).<sup>27</sup> Although the Office of Court Administration has adopted regulations designed to inform voters whether an “Independent Judicial Election Qualification Commission” (“Qualification Commissions”) in each Judicial District has found a candidate “qualified for judicial office,”<sup>28</sup> these Qualification Commissions are wholly inadequate to educate voters about

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<sup>26</sup> In Texas, for example, a 1998 report by Texas for Public Justice found that the seven Texas Supreme Court justices elected since 1994 had raised \$9.2 million, 40 percent of which came from interests with cases before the Court. As reported in *The New York Times*, a survey taken for the Court itself “found that nearly half of the judges themselves thought that campaign contributions significantly affected their decisions.” Ralph Blumenthal, DeLay Case Turns Spotlight on Texas Judicial System, N.Y. TIMES, Nov. 8, 2005, at A17. Likewise, according to a survey of 2,428 state court judges conducted in 2002 by the judicial reform organization Justice at Stake, “almost half said campaign contributions influenced decisions.” Liptak and Roberts, supra note 24. And polls of voters “typically find many voters saying that campaign contributions influence judges’ decisions”. Glaberson, States Taking Steps to Rein In Excesses of Judicial Politicking, supra note 24.

<sup>27</sup> See, e.g., London, supra note 24 (noting that the Chief Justice of Washington State, “a widely respected judge who has drawn little controversy in his six years in the post, was thrown off the bench last week by voters who chose instead a 39-year-old lawyer who has never been an elected judge and who did not campaign.”).

<sup>28</sup> Each Qualification Commission is charged with evaluating whether candidates for election to the Supreme Court, County Court, Surrogate’s Court, Family Court, New York City Civil Court, District Courts and City Courts are “qualified for judicial office,”

the “qualified” candidates. Nor may the Qualification Commissions indicate whether an applicant has been found unqualified for judicial office.<sup>29</sup> Nor is there any limitation on the number of candidates each Qualification Commission may report out as “qualified.” Voter guides offer a modest potential for improvement in this regard; but the reality remains that the vast majority of potential voters lacks the information, background and experience necessary to identify the most qualified candidates for office.

In other settings, this Association<sup>30</sup> and other organizations<sup>31</sup> have set forth the position that independent screening commissions should determine whether candidates are “qualified,” should identify any candidates found unqualified and should impose strict limits (typically three for the first vacancy) on the number of candidates reported out as “qualified.” In Section II of this Report, we flesh out the details of this proposal and reiterate its importance as an adjunct to other changes necessary to comply with the mandate in Lopez Torres. However, even if these changes were enacted, the proposal would still not ensure the election of only those candidates who are most qualified. So long as judges are chosen by election, political parties may nominate, support and work actively to elect candidates who are not rated most qualified—and who

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and with publishing an alphabetical list of the names of all candidates it has found “qualified.” N.Y. Comp. Codes R. & Regs. tit. 22, § 150.5 (2006). No candidate is required to submit credentials to the Qualification Commission, however.

<sup>29</sup> Except as to any report whether a candidate is “qualified”, “all papers filed with or generated by the commission and all proceedings of the commission shall be confidential.” N.Y. Comp. Codes R. & Regs. tit. 22, § 150.8. Thus, the public could not ascertain whether a candidate applied for evaluation or whether, upon applying, the candidate was found unqualified.

<sup>30</sup> See Task Force 2003 Report at 30-37.

<sup>31</sup> See, e.g., The Fund for Modern Courts, 2003 Policy Statement, available at [http://www.moderncourts.org/Advocacy/judicial\\_selection/policy.html](http://www.moderncourts.org/Advocacy/judicial_selection/policy.html).



indeed may be found unqualified. A political party has no reason to forebear from pursuing its electoral interests merely because an independent screening commission has not found its candidate(s) “most qualified.” A party’s substantial monetary and organizational advantages over insurgent candidates—including any who may be rated “most qualified” by screening commissions—will continue to ensure the electoral success of lesser qualified candidates. The time has come to put principle above politics and end this practice.

In 1873, the Association correctly framed the issue in a way that is still applicable today:

“Judges are not selected, like senators, assemblymen, and city officers, to represent the property, the opinions, or the interests of the people of a locality, but they are the mere selection of the fittest members of a single learned profession for the purpose of interpreting and applying the laws of the State in the same sense and the same spirit throughout its borders, irrespective of all parties, and all local interests, and all popular feelings. 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>32</sup>

The Task Force firmly believes that the only effective means of ensuring the uniform selection of highly qualified candidates for judicial office is to provide that those candidates will be selected by an appointing authority from among a limited number of candidates rated as “most qualified” by truly independent judicial screening commissions. Only by doing so can all candidates compete on a level playing field,

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<sup>32</sup> Address of the Association of the Bar of the City of New York, An Elective Judiciary 6 (Oct. 24, 1873).

regardless of wealth or political connections. Only then can selections be reliably made from the most qualified candidates. And only then can we take politics out of the selection of officials whose function in our democracy is to make decisions that are, as Alexander Hamilton put it, free of the “disposition to consult popularity” so that we may truly “justify a reliance that nothing would be consulted but the Constitution and the laws.” The Federalist No. 78 (Alexander Hamilton).

The Legislature should thus enact, for consideration by the voters in a statewide referendum, an amendment to Article 6 of the New York State Constitution providing for commission-based appointment of New York State judges.

**C. Proposed Constitutional Amendment in Favor of a Commission-Based Appointive System**

Today, the State’s Constitution requires election of most judges.<sup>33</sup> The Task Force proposes the following amendments to Article VI, § 6 of the State Constitution:<sup>34</sup>

1. Affected Courts

The judges to be appointed in the method described below are:

- The presiding Justice and Justices of the Appellate Divisions of the Supreme Court
- Justices of the Supreme Court

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<sup>33</sup> See e.g., “The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve.” N.Y. CONST. art. VI, § 6(c). Judges of other State courts of record are also chosen by election, including judges of the County (N.Y. CONST. art. VI, § 10(a)), District (N.Y. CONST. art. VI, § 16(h)), and Surrogate’s Courts (N.Y. CONST. art. VI, § 12(b)); New York City’s Civil Court (N.Y. CONST. Art. VI, § 15(a)); and (outside of New York City) the Family Court (N.Y. CONST. art. VI, § 13(a)).

<sup>34</sup> The reforms suggested by the Task Force in this Report are only stated in terms of general principles and do not constitute textual proposals.

- Judges of the Court of Claims
- Judges of the County Courts
- Judges of the Surrogate’s Courts
- Judges of the Family Courts
- Judges of the District Courts
- Judges of the Civil and Criminal Courts of New York City
- Judges of the City Courts outside of New York City

2. Establishing Judicial Qualification Commissions (“JQC”)

Independent and diverse JQCs shall be established in the manner outlined herein.

(a) Jurisdiction

- **Outside of New York City:** There shall be a JQC for each judicial district outside of NYC to evaluate candidates in that district for appointment to the Supreme Court, County Courts, Family Courts, Surrogate’s Courts and (where appropriate) District Courts.
- **Within New York City:** There shall be one city-wide JQC to evaluate candidates for the Supreme Court, Family Courts, Surrogate’s Courts, Civil Courts and Criminal Courts.
- **Statewide:** There shall be one statewide JQC to evaluate candidates for the Court of Claims and for the Appellate Divisions, and to provide the rules for the operations of all JQCs.

(b) Membership<sup>35</sup>

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<sup>35</sup> As described herein, we recommend a system by which JQC members are appointed by Non-Governmental Appointing Authorities, which in turn are appointed by Governmental Appointing Authorities (including the Chief Judge, the Governor, the presiding Justices of the Appellate Division and others). Non-Governmental Appointing Authorities would rotate periodically. We make these recommendations to ensure that the judicial screening procedure is independent and free from undue political influence. Non-governmental authorities have been used as nominating authorities in whole or in part by the New York City Mayor's Advisory Committee on the Judiciary, under the New York County Democratic Party's rules since 1977 and are also used elsewhere in the country. Cf. American Judicature Society, Judicial Merit Selection: Current Status, <http://www.ajs.org/js/JudicialMeritCharts.pdf>. Under the procedure we recommend, JQC members would owe no allegiance to any political figure by reason of or in connection

- Every member of each JQC shall have a three-year term with staggered appointments initially.
- Each JQC shall have at least 15 members, but no more than 21 members. The Chief Judge, the Governor, the presiding Justices of each Appellate Division in which the Region sits and the highest ranking members of each party in the Senate and in the Assembly (collectively, the “Governmental Appointing Authorities”) shall appoint, from each Region, 15 to 21 (depending on the number of the members of the JQC to be formed) bar associations, law schools and/or not-for-profit civic or community organizations (collectively, the “Non-Governmental Appointing Authorities”), and each one of the Non-Governmental Appointing Authorities shall then in turn appoint one member of the JQC. The Governmental Appointing Authorities shall give consideration to achieving a broad representation of the communities within each Region when appointing the Non-Governmental Appointing Authorities, including race, ethnicity, gender, religion and sexual orientation as diversity factors. The Non-Governmental Appointing Authorities shall rotate every three years. No more than \_\_\_% of the members of each JQC shall be enrolled in the same political party.<sup>36</sup> When appointments of members of the JQC are being made by the Non-Governmental Appointing Authorities, an order shall be established in which they’ll make their appointments so that it can be determined when the \_\_\_% limit has been reached. Consideration should be given to rotation mechanisms in order to achieve appropriate representation of each county on the JQCs.

(c) Operations

- **Policies:** The statewide JQC shall also be the policy body for all commissions. Its functions shall include: promulgating and enforcing

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with their appointment to the JQC. This system would increase the likelihood that JQCs evaluate candidates for judicial office solely on the basis of merit and in a way that will hopefully minimize political considerations. Moreover, since the Non-Governmental Appointing Authorities appointed by the Governmental Appointing Authorities should include a wide range of civic or community organizations and bar associations, including minority organizations and associations where available, this system is expected to achieve greater diversity. Rules for the thresholds that would be required for organizations and associations to be qualified for serving as appointing authorities of the JQC members, such as size, 501(c)(3) status etc, would be set by the Legislature.

<sup>36</sup> Although the Task Force believes that ideally no more than 50% of members of each JQC should be enrolled in the same political party, it recognizes that, because of the imbalance of political parties in various judicial districts, the Legislature may have to utilize a higher limit such as 60%. Members of the JQC that are not enrolled in a political party would not count, of course, toward that limit. It is indeed assumed that a significant number of members would not be enrolled in any political party.

rules concerning qualifications of members of the JQCs and codes of conduct for JQC members (including confidentiality of proceedings, etc); the conduct of JQC proceedings; minimum outreach requirements (advertisements, notices, etc.) by each JQC; and the collection and reporting of information on the functioning of the process (including the numbers of those selected and the diversity of those recommended and those appointed).

- **Reporting of candidates:** For every single vacancy, there shall be three names of those found most qualified reported out for that vacancy.<sup>37</sup> Where there is more than one vacancy in the same position in the same court, there shall be three names for the first vacancy and two names for each succeeding vacancy. In the case of an incumbent seeking re-election, if the JQC reported the incumbent as highly qualified, that person would be the only one recommended for the vacancy.<sup>38</sup>
- **Time limits:** Each JQC shall be required to act within 90 days of notice of a vacancy; and the appointing authority shall appoint within 60 days of receiving such recommendations. On the failure of the appointing authority to act, the Chief Judge shall make the appointments from the list.

(d) Appointing Authorities

- The Governor shall appoint from among those reported out by the statewide JQC for the Appellate Divisions and Court of Claims, as well as those reported out outside of the City of New York for the Supreme Court.
- The Mayor of the City of New York shall appoint from among those reported out by the New York City JQC for the Supreme Court, Family Courts, Surrogate's Courts, Civil Courts and Criminal Courts of New York City.<sup>39</sup>

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<sup>37</sup> By recommending a limited number of candidates, the JQCs will report out the very best judicial candidates available. Screening commissions without such limited numbers report out all who have the bare qualifications. The difference is between finding the best and merely screening out the worst.

<sup>38</sup> The Task Force is not in favor of retention elections mainly because of their potential adverse effect on judicial independence. See Task Force 2003 Report at 39.

<sup>39</sup> We believe the Governor, as the State's Chief Executive, should have the major appointment power under this system. Indeed, the Governor has long had that authority for the Court of Claims and appellate division judgeships. The Governor is the most common appointing authority in other merit appointment systems across the country. In New York City, however, we believe there is also merit to giving the Mayor of New York City appointing authority for New York City judges. The Task Force believes the Mayor of the City of New York should be an appointing authority for New York City

- All other judicial offices outside of the City of New York shall be appointed by the Governor from among those reported out by the JQC for the district.

## **II. AN INTERIM PROPOSAL TO BE IN EFFECT UNTIL THE CONSTITUTIONAL AMENDMENT IS IMPLEMENTED: A REFORM OF THE CURRENT JUDICIAL CONVENTION SYSTEM**

### **A. The Task Force’s Strong Opposition to Primary Elections**

If judges are to be elected, itself not an optimal means of selection, primaries are a constitutional, but not a wise means of selection. In Lopez Torres the Second Circuit held that New York’s judicial nomination convention process effectively “transformed a de jure election [of Supreme Court Justices] into a de facto appointment” by party leaders.<sup>40</sup> The Court affirmed, as an interim remedy, the District Court’s order that judicial nominations for justices of the Supreme Court shall proceed by primary election until the Legislature enacts corrective legislation.<sup>41</sup> However, it does not follow, nor did the Second Circuit hold, that the primary election is the only constitutionally permissible antidote to the ills that afflict the current election process. The Court noted

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judges because of the sui generis and historical position of the City. Indeed, almost half of the population of the state lives in New York City, which is also the only city in the state comprising more than one county and more than one judicial district. For these and other reasons, New York City has historically been treated differently by the Legislature in several respects. Among them is having the Mayor appoint judges of the Family Court within New York City even though they are elected on a countywide basis outside the City. Moreover, utilizing both the Governor and the Mayor as appointing authorities results in more accountability for the appointments by both elected officials. Providing the Mayor with the appointment authority for the New York City judges is likely to achieve greater diversity, since there will be more accountability to the diverse population of voters in the City. Also, if the Governor made all of the appointments, the numbers of such appointments would be substantially higher than if some of the appointments were made by the Mayor, and that higher number may not allow for the kind of attention that would be present for fewer appointments; fewer candidates also means more visibility for each appointment.

<sup>40</sup> Lopez Torres, 463 F.3d at 200.

<sup>41</sup> Id. at 204-207.

that “a convention-based system is, in the abstract, a perfectly acceptable method of nomination.”<sup>42</sup> Moreover, this Task Force concludes that primary elections by themselves (*i.e.*, without a convention system and without public financing) are far from the best constitutional solution for the shortcomings of the current convention system. To the contrary, primary elections engender a host of problems that render such elections undesirable as a means of providing to the electorate a diverse slate of the highest caliber candidates to fill the positions of Supreme Court justices.

This Association has long adhered to the position that a commission-based appointive selection procedure is preferable to either primary elections or a judicial convention system. We remain unwaveringly committed to that principle. However, in the absence of a commission-based appointive selection procedure, we conclude, as did the Feerick Commission earlier this year,<sup>43</sup> that at least without public financing of judicial elections, a reformed judicial convention system would be preferable to primary elections for nominations for Supreme Court Justice.<sup>44</sup>

A substantial concern regarding the use of primary elections to select candidates for judicial office is the necessity for candidates without party backing to raise large sums of money to mount competitive campaigns. This problem is not unique to

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<sup>42</sup> *Id.* at 189.

<sup>43</sup> New York State Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of New York State* 3, 11 (Feb. 6, 2006) (“The Commission believes that, without public financing of judicial elections, the judicial nominating convention system should be retained rather than replaced by primary elections.”).

<sup>44</sup> It should be noted, however, that our recommendations contained in this Section somewhat differ from those of the Feerick Commission in part because we are also trying to meet the constitutional requirements of the Second Circuit’s recent decision in Lopez Torres.

primaries; indeed, it plagues all elective systems including the current convention scheme. As the Second Circuit noted, the requirements of the current convention process—including recruiting large numbers of delegates and alternates, assembling delegate slates in each assembly district, recruiting petition circulators, collecting thousands of signatures, and conducting numerous localized voter education campaigns—”often shuts out candidates lacking either great wealth or the benefit of a political party’s county-wide apparatus.”<sup>45</sup> And yet the costs of mounting a successful district-wide primary election campaign are more daunting. Evidence in the Lopez Torres case revealed that Civil Court candidates routinely spend \$100,000 or more in primary elections, even in small municipal court districts.<sup>46</sup>

The need to raise large sums of money in order to compete independently and effectively for a nomination for Supreme Court Justice is profoundly disconcerting. Most candidates for Supreme Court are currently serving on the bench, many having been appointed by the Chief Administrative Judge for New York State to serve as Acting Supreme Court Justices. Compelling those sitting judges to embark on massive fund-raising campaigns during their tenure as sitting judges is deeply problematic. The primary targets of those fundraising efforts are the attorneys and law firms that appear or could appear before them. The specter of sitting judges or their representatives actively and aggressively soliciting large quantities of money from those who will or may appear

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<sup>45</sup> Id. at 174.

<sup>46</sup> In addition, the high cost of campaigning would have a disproportionate effect on minority candidates who may not have the same level of access to resources as do non-minority candidates. New York State Commission to Promote Public Confidence in Judicial Elections, June 29, 2004 Report, at 24 (2004).



before them is an acid that corrodes public confidence in the independence and integrity of the State judiciary.<sup>47</sup> Nor is the practice any more seemly when candidates who are not currently sitting judges, but who aspire to be in the near future, raise large sums of money from those who intend to practice before them. And yet the alternative of relying on the backing of the political party machinery for that same critical financial support is equally unpalatable.<sup>48</sup>

It might be argued that an independent candidate for a Supreme Court nomination would face the same daunting fundraising challenges, no matter whether she is competing in a primary election or striving to assemble a slate of delegates to run on her behalf with an eye, as the Second Circuit put it, “toward placing those delegates at the judicial nominating convention so that they can cast their votes” in her favor.<sup>49</sup> But a reformed convention system offers greater opportunities to forge effective coalitions of delegates with other candidates, and thereby potentially reduce barriers and costs faced by an insurgent candidate. In Lopez Torres, the District Court found that opportunities for coalition-building of this kind in the existing convention process did no more than

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<sup>47</sup> The Code of Judicial Conduct prohibits candidates for judicial office from personally soliciting or accepting campaign contributions, and instead requires that such fundraising be performed by campaign committees. N.Y. Comp. Codes R. & Regs. tit. 22, § 100.5(A)(1)(5). Regardless of whether this prohibition successfully insulates all judicial candidates from identifying the campaign contributors, it does not successfully ameliorate the corrosive impact of aggressive fundraising by candidate committees on public confidence in an independent and qualified judiciary.

<sup>48</sup> In other states, judicial elections (not necessarily at the trial level) have become heavily financed by “special interest money”, e.g., the plaintiffs’ trial bar and insurance companies have, in some elections, given large amounts to competing candidates. Although such practice does not seem to have become prevalent in New York, the Task Force does not want to risk New York State becoming one of those states where judicial campaigns attract large amounts of special interest money.

<sup>49</sup> Lopez Torres, 462 F.3d at 172.

offer “a potential way to work *around* the onerous petitioning requirements . . . [And i]t could not alter the fact that the burdens on ballot access are severe.”<sup>50</sup> If, however, significant reforms are made independently to dismantle those severe burdens, as we recommend in this Report, then a reformed convention process could reduce the potential costs of an insurgent candidacy when compared to those of a primary election.

In addition to potential reductions in the costs of an insurgent candidacy, a reformed convention process is potentially more amenable than are primary elections to the nomination of the most qualified candidates. This is not simply because a party organization could—as has the New York County Democratic Committee since 1977—adopt party rules requiring the county organization to support only those candidates rated most qualified by an independent screening commission.<sup>51</sup> Plainly, an enlightened party organization could adopt similar rules whether the candidates were vying for nomination at a convention or primary election. Rather, the convention system is more amenable to selecting qualified candidates because the size of the *audience* who must consider those qualifications is drastically smaller.

A candidate for nomination at a primary election who proudly bears a “most qualified” rating from an independent screening commission must still bear the cost of educating a vast number of potential voters about the significance and importance of such a rating. Even then the importance of that rating must stand out in a veritable stew of political considerations that often overwhelm the solitary voice of an independent

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<sup>50</sup> Lopez Torres, 411 F. Supp. 2d at 248 (emphasis in original).

<sup>51</sup> Both the Task Force 2003 Report and this Report strongly recommend the establishment of screening commissions in the context of a reformed convention system. See Task Force 2003 Report at 32-35; infra Section IIB.

screening commission. On the other hand, when the audience is comprised of a relatively small number of candidates for delegates, or delegates who have been elected, at a convention, a “most qualified” rating from an independent screening commission can be a much more significant, and indeed potentially decisive, factor.<sup>52</sup> For this reason, we are recommending conventions held in small districts from which delegates are elected, leading to many more conventions, with a maximum of 15 delegates at each convention. This will substantially increase the ability of qualified “outsider” candidates to have a realistic chance of nomination.

Finally, we believe that a reformed judicial convention system has the potential to promote greater diversity among candidates for Supreme Court nomination than does an open primary. As the District Court found, this is not an *inherent* advantage to the convention mechanism. We recognize that other means of promoting diversity on the Supreme Court bench are available, including the use of cumulative voting in primary elections and the creation of judicial districts involving geographically compact minority populations.<sup>53</sup> But for reasons discussed earlier, a reformed convention system—particularly one in which smaller judicial districts are used—offers certain potential advantages to promoting diversity when tightly coupled with independent and diverse screening commissions. Diverse screening commissions offer the potential to report out a field of most qualified candidates of diverse backgrounds. Those diverse candidates, in

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<sup>52</sup> The Task Force recommends that a body governing and overseeing all qualification commissions set the standards of the evaluation of judicial candidates. See infra Section IIB. For the process by which the Association evaluates candidates for elective and appointive judgeships, see Task Force 2003 Report at 16-17.

<sup>53</sup> Lopez Torres, 411 F. Supp. 2d at 252.

turn, can avail themselves of opportunities for coalition-building, and can trumpet the advantages of a “most qualified” rating more effectively in the convention setting than in an open primary. This is especially so in homogenous areas of the State where candidates representing diverse interests often have little realistic opportunity of electoral success in an open primary election.

For these reasons, and until the State Constitution is amended to adopt a commission-based appointive selection procedure, we concur with the Feerick Commission that a reformed convention system is preferable to primary elections for nominations for Supreme Court Justice.<sup>54</sup> However, even if the judicial convention system were to be reformed, absent adoption of the constitutional amendment suggested above, see supra Section IC, judges of the Surrogate’s County, Family (outside of New York City), City, District and New York City Civil Courts will continue to be nominated through primary elections.<sup>55</sup> We therefore recommend that the JQCs established in connection with our recommendation below for a reformed judicial convention system also review the qualifications of candidates for election to other elective judicial offices.<sup>56</sup>

A proposed statutory reform to the current convention and primary judicial selection systems follows. There should be a sunset provision causing the statutory solution proposed below to expire at the earlier of the effective date of the proposed

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<sup>54</sup> New York City Mayor Michael Bloomberg has also issued a proposal for a reformed convention system as a preferred alternative to primary elections.

<sup>55</sup> Judges of the Family Court in the City of New York are appointed by the Mayor. N.Y. CONST. art. VI, § 13(a).

<sup>56</sup> Justice Courts are unique—for example, town or village justices do not have to be lawyers—and present special problems. See supra note 20.

constitutional amendment (see supra Section IC) or three years from the effective date of the statutory solution below, whichever comes first.

**B. Proposed Reform of the Convention and Primary Judicial Selection Systems**

1. In order to comply with the requirements of N.Y. Const. Art. VI, §6(c), nominees for the position of justice of the Supreme Court shall run for election from a judicial district (“the justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve”). However, solely for the purpose of nominating justices of the Supreme Court, each judicial district shall be subdivided into judicial convention districts consisting of either two or three assembly districts. Each position of justice of the Supreme Court presently filled by elections held within each judicial district shall be assigned to, and nominations shall be made from, one of the various judicial convention districts within each judicial district. Notwithstanding that a person may have been nominated from a particular judicial convention district, the person shall run at-large throughout the entire judicial district in which the judicial convention district is located. All registered voters residing in the judicial district shall be eligible to vote in the general election for justice of the Supreme Court.

2. The judicial convention districts shall be grouped into eight regional districts covering roughly the following geographical areas: (1) Long Island; (2) New York City; (3) Hudson Valley; (4) Capital Region; (5) Adirondacks; (6) Finger Lakes; (7) Southern Tier, and (8) Western New York (the “Regions”). Notwithstanding the foregoing, within a variance of one, each Region shall contain an equal number of judicial convention districts. An independent and diverse judicial qualification commission (“JQC”) shall be established within each Region.

3. JQCs should be established to review the qualification of candidates for all levels of judgeships, beginning with the Supreme, District and City Courts, the Civil Court of the City of New York, the Surrogate and County Courts and the Family Court outside the City of New York (collectively, the “Covered Judgeships”).

4. There shall be 21 members of each JQC. The Chief Judge, the Governor, the presiding Justices of each Appellate Division in which the Region sits and the highest ranking members of each party in the Senate and in the Assembly (collectively, the “Governmental Appointing Authorities”) shall appoint, from each Region, 15 to 21 (depending on the number of the members of the JQC to be formed) bar associations, law schools and/or not-for-profit civic or community organizations (collectively, the “Non-Governmental Appointing Authorities”), and each one of the Non-Governmental Appointing Authorities shall then in turn appoint one member of the JQC. The Governmental Appointing Authorities shall give consideration to achieving a broad representation of the communities within each Region when appointing the Non-Governmental Appointing Authorities, including race, ethnicity, gender, religion, and

sexual orientation as diversity factors. The Non-Governmental Appointing Authorities shall rotate every three years.<sup>57</sup>

5. In making appointments to the JQC, the Non-Governmental Appointing Authorities shall similarly give consideration to achieving a broad representation of the communities within each Region, including race, ethnicity, gender, religion and sexual orientation as diversity factors. Three members of each JQC shall be non-lawyers. No more than \_\_\_% of the members of each JQC shall be enrolled in the same political party.<sup>58</sup> When appointments of members of the JQC are being made by the Non-Governmental Appointing Authorities, an order shall be established in which they'll make their appointments so that it can be determined when the \_\_\_% limit has been reached. No individual may serve on a JQC for more than three consecutive years.

6. The Election Law should be amended to make clear that no person who has not completed the process of submitting his/her qualifications to the JQC shall have access to the ballot as a candidate for elective judicial office. Each JQC shall publish a list of all candidates who have submitted their qualifications to it, along with a list of the three most qualified candidates for the first vacancy for each court in a district and the two most qualified candidates for each additional vacancy in that court.<sup>59</sup> In the case of an incumbent seeking re-election, if the JQC reported the incumbent as highly qualified, that person would be the only one recommended for the vacancy.<sup>60</sup> The JQC shall also report those whom it has found to be unqualified. The JQCs in each Region shall report to the State Board of Elections the names of all persons who have completed the process of submitting their qualifications to the JQC for an election.

7. The conventions in each judicial convention district shall be held following the September primary of each year. The delegates to the convention shall be elected from within the judicial convention district at the September primary. Candidates for justice of the Supreme Court would be required to file a declaration with the appropriate board of elections at least 60 days prior to the date of the primary election. This would give the JQCs sufficient time to review their qualifications before the primary or judicial convention. Since candidates seeking a designation or nomination to other elective judicial office, or nomination by an independent body for justice of the Supreme Court are required to file designating or nominating petitions, the JQC would receive ample notice of their candidacies.

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<sup>57</sup> See supra note 35.

<sup>58</sup> See supra note 36.

<sup>59</sup> See supra note 37.

<sup>60</sup> As mentioned earlier, the Task Force is not in favor of retention elections mainly because of their potential adverse effect on judicial independence. See Task Force 2003 Report at 39.

8. There shall be no more than 15 delegates for each judicial convention. Each party's delegates shall be elected at large at a primary election from within the judicial convention district. Candidates for the party position of delegate shall qualify for the ballot by filing a designating petition bearing the signatures of at least 5% of the enrolled voters of the party residing in the judicial convention district or 200 such signatures, whichever is less. The State Board of Elections is to promulgate regulations pursuant to which candidates for delegate can, if they choose, either run as part of a slate with other candidates for delegate or identify the candidate(s) for nomination for election to justice of the Supreme Court for whom they are pledged to vote on the first ballot, or both.

9. There shall be a governing body, overseeing all JQCs, which shall promulgate rules and regulations governing the operation and composition of the JQCs. The Chief Judge, the Governor, the presiding Justices of the Appellate Division in which the district sits and the highest ranking members of each party in the Senate and in the Assembly shall each appoint an independent bar association or a law school or a not-for-profit civic or community organization that will in turn appoint the members of the governing body, and these appointing authorities shall rotate every three years. No individual may serve on the governing body for more than three consecutive years.

10. The governing body shall adopt rules applicable to all JQCs. In addition to the rules governing proceedings before the JQCs, these rules shall include, but not be limited to: qualification for selection of an organization as a non-governmental appointing authority; conflicts of interest applicable to members and staff; disclosure and recusal standards applicable to judges before whom a JQC member might appear; disclosure and recusal standards applicable to JQC members before whom a candidate for evaluation might appear; compliance with the composition requirements for each JQC; the standards by which the JQC will determine whether a candidate is "most qualified", "highly qualified" (in the case of an incumbent) or "unqualified".

11. The governing body shall publish a judicial voters' guide for each primary, general and special election involving candidates for a Covered Judgeship. It shall contain a biographical entry for each candidate who has submitted his/her qualifications to a JQC for review and who has been designated for nomination or nominated, as the case may be. The biographical entry shall also reflect whether the candidate was reported out as "most qualified" for a vacancy, "highly qualified" (in the case of an incumbent) or "unqualified".

### **III. DIVERSITY CONSIDERATIONS REGARDING BOTH APPOINTIVE AND ELECTIVE JUDICIAL SELECTION SYSTEMS**<sup>61</sup>

The Task Force is committed to a judicial selection system that effectively promotes a diverse judiciary. A diverse judiciary is necessary to ensure that our populations are appropriately represented; to ensure that a broad array of views and experiences are brought to the bench; to regain the public’s confidence in the judiciary, and to restore the judicial system’s credibility in the public’s eyes.

After reviewing a large variety of data, empirical studies and articles generally regarding minorities serving on New York State’s judiciary, the Task Force realized that it was unable to conclude *on the statewide level* whether one of the two systems—appointive or elective—better promotes diversity. Some of the difficulties the Task Force encountered were the following:

- Although statistics on the composition of the population in the twelve judicial districts are generally available, there is a lack of reliable statistics on the diversity of the actual voting population as well as the diversity of the practicing lawyer’s—and thus potential justices’—population. In addition, sometimes the available information does not correspond to the judicial district distributions.
- Where diverse qualifications commissions are not in place statewide to screen the candidates before the appointing authority’s final selection, statistics on the minority justices selected through an appointive system do not demonstrate the efficacy of the appointive system to ensure diversity.

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<sup>61</sup> For purposes of this Report, “diversity” is defined on the basis of race, ethnicity, gender, religion and sexual preference.



- Available statistics on the percentage of minority justices on the bench (when compared to the percentage of minorities in the underlying population) reveal significantly different results among the various judicial districts, thus rendering any conclusion on the statewide level very difficult.

The Task Force believes that the following improvements must be made to both systems to promote a more diverse pool of candidates and, thus, a more diverse bench:

- Provide public financing to all candidates for judicial elections to ensure that none of the minority candidates, nor any candidates in general, are barred because of financial considerations;<sup>62</sup>
- Establish independent and diverse screening commissions; the nominating authorities of the screening commissions should—when viewed as a whole—be diverse; the requirement for diverse nominating authorities and diverse screening commissions should be codified; these nominating authorities and screening commissions must be independent of any controlling influence of the appointing authority or the political leader;
- Educate the general public on the need for a diverse judiciary and the importance of the recommendations of the independent and diverse screening commissions;

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<sup>62</sup> The Task Force did not examine the issue of public financing of judicial candidates. The Committee on Government Ethics of the Association examined the issue and released a report in May 2001. See The Committee on Government Ethics, Report on Judicial Campaign Finance Reform (2001), 56 THE RECORD 157.

- For the convention system in particular, reduce the number of delegates to the judicial district convention in order for minority candidates, and all candidates in general, to be able to succeed with fewer votes; and
- For the appointive system, encourage the appointing authority to commit to the importance of diversity.

The Task Force urges the Legislature to seize the opportunity presented and reform the current judicial selection system.

The Judicial Selection Task Force\*

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