

Judicial Districts Taskforce - NAACP LDF's Concerns & Recommendations re Lack of Diversity in Advisory Task Force on Composition of Judicial Districts

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Date: 2/26/2019 10:52 AM
Subject: NAACP LDF's Concerns & Recommendations re Lack of Diversity in Advisory Task Force on Composition of Judicial Districts
Cc: "rep.ga.hardaway@capitol.tn.gov" <rep.ga.hardaway@capitol.tn.gov>, "ask...."
Attachments: Letter re TN Advisory Task Force on Composition of Judicial Districts_2.26.19.pdf

Dear Speakers McNally and Casada and Chair Forgety:

With the attached letter, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") writes to express our concern regarding the striking lack of racial and other forms of diversity in the membership of Tennessee's Advisory Task Force on the Composition of Judicial Districts ("Task Force"). We also write to share our recommendations to improve the representation of people of color on this body as it considers judicial redistricting in the state. The Task Force has the opportunity to recommend changes to the state's judicial election system that would address a shameful absence of diversity across all tiers of Tennessee's judiciary. It is therefore troubling that the Task Force suffers from a diversity deficit of its own. As far as we are able to discern, no Black person or other person of color has been appointed to serve on this 11-member Task Force. Thus, the Task Force's membership—apparently 100 percent white—utterly fails to reflect the diversity of Tennessee's population.

In light of these concerns, and consistent with the Tennessee Supreme Court's recognition that fostering diversity in the public sphere is "a paramount government objective," we encourage you to facilitate the equitable representation of all Tennesseans in the judicial redistricting process by implementing the recommendations in our attached letter.

We would welcome the opportunity to discuss these recommendations further. If you have any questions, please contact Leah Aden at [212-965-7715](tel:212-965-7715).

(end)

Leah Aden

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Re: Advisory Task Force on the Composition of Judicial Districts

Dear Speakers McNally and Casada and Chair Forgety:

The NAACP Legal Defense and Educational Fund, Inc.¹ (“LDF”) writes to express our concern regarding the striking lack of racial and other forms of diversity in the membership of Tennessee’s Advisory Task Force on the Composition of Judicial Districts (“Task Force”), and to share our recommendations to improve the representation of people of color on this body as it

¹ Since its founding in 1940 by Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. (“LDF”) has been a pioneer in the struggle to secure and protect the voting rights of Black people and other people of color through legal, legislative, public education, and other advocacy strategies to promote the full, equal, and active participation of Black people in America’s democracy. LDF has been involved in much of the precedent-setting litigation related to securing the rights of people of color to be free from discriminatory voting schemes, including in the methods of electing state-court judges. *See, e.g., Terrebonne Parish Branch NAACP v. Jindal*, 274 F. Supp. 3d 395 (M.D. La. 2017) (LDF successfully challenging Louisiana’s at-large voting system for state-court judges for Terrebonne Parish as intentionally discriminatory under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution); *Hunt v. Arkansas*, No. PB-C-89-406, 1991 WL 12009081, at *1 (E.D. Ark. Nov. 7, 1991) (LDF successfully obtaining a court order creating majority-Black judicial subdistricts after Arkansas admitted liability under Section 2 of the VRA).

LDF has been a separate entity from the NAACP and its state and local branches since 1957.

considers judicial redistricting in the state. As far as we are able to discern, no Black person or other person of color has been appointed to serve on this 11-member Task Force.

As you know, Task Force members have been entrusted with the responsibility to “review the composition of Tennessee’s current judicial districts”² and to “recommend and publish a proposed statewide judicial redistricting plan.”³ Through these important functions, the Task Force has the opportunity to recommend changes to the state’s judicial election system that would address a shameful absence of diversity across all tiers of Tennessee’s judiciary. According to a recent analysis by professors at Vanderbilt Law School and the University of Toronto, Tennessee’s judiciary is one of the least diverse in the nation.⁴ Over 90% of Tennessee’s judges are white.⁵ Seventy-four percent (74%) are both white and male—even though white men are only 36% of the state’s population.⁶ While people of color make up more than a quarter of Tennessee’s population, they hold fewer than one tenth of its judgeships.⁷

These disparities can likely be traced in part to the electoral lines along which Tennessee’s current judicial districts are drawn. The redistricting process is an important opportunity for states to safeguard the ability of all voters to have an opportunity to elect diverse, representative candidates to political and judicial office. However, whereas fair and inclusive redistricting promotes these goals, unfair or discriminatory redistricting both defeats these important objectives and exposes states to liability under the Voting Rights Act and the Constitution. Indeed, in Tennessee, the longstanding inability of Black voters to elect or retain judicial candidates of their choice, who may be Black, raises questions about whether the state’s current districts are dilutive in violation of Section 2 of the Voting Rights Act.⁸

Moreover, it is clearly in Tennessee’s interest to foster a judiciary that is diverse—not only with respect to race, ethnicity, and gender, but also with respect to geographic origin, professional experience, political affiliation, and other factors.⁹ As the Tennessee Supreme Court has

² Tenn. Code Ann. § 16-1-119(a)(1)(A).

³ Tenn. Code Ann. § 16-1-119(a)(2)(A).

⁴ Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?* 27 (2016), <https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf>. The report ranked Tennessee 45th out of the 50 states and Washington, D.C., in the overall racial, ethnic, and gender representativeness of the state’s judges as compared to its population. *Id.*

⁵ *Id.* at 24.

⁶ *Id.* at 27.

⁷ *Id.* at 24.

⁸ See 52 U.S.C. § 10301.

⁹ See *Bredesen v. Tennessee Judicial Selection Comm’n*, 214 S.W.3d 419, 438 (Tenn. 2007) (quoting Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Cal. L. Rev. 1109, 1117 (2003) (“The case for diversity is especially compelling in the judiciary. . . . It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities

recognized, “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.”¹⁰ Judges with diverse backgrounds and perspectives can foster public trust in the judicial system, counteract entrenched biases, and improve judicial decision-making by enriching the deliberative process with a more complete spectrum of viewpoints and voices.¹¹ Electoral schemes that stand in the way of a diverse judiciary needlessly deprive states of the intelligence, experience, and unique perspectives of qualified potential candidates.

This is particularly true with respect to state courts. In Tennessee, state-court judges make important decisions in the civil and criminal contexts that impact those living in the state every day. For example, the Tennessee Supreme Court is required by law to review every death sentence imposed in the state, and thus regularly determines whether individual Tennesseans live or die.¹² Tennessee’s state courts have also issued notable rulings on the state’s voter identification law,¹³ women’s health rights,¹⁴ criminal justice fees,¹⁵ school funding,¹⁶ and many other subjects. And, on a daily basis, trial judges throughout Tennessee issue search and arrest warrants, approve criminal charges before they are sent to a grand jury, and exercise their discretion to detain criminal defendants awaiting trial or release them on bond.¹⁷

In light of these considerations, it is troubling that the Task Force—which is uniquely positioned to address the diversity deficit in Tennessee’s judiciary—suffers from a diversity deficit of its own. The statute creating the Task Force instructed the Speakers of the Tennessee Senate and House of Representatives to appoint a total of 11 members, including three trial court judges,

against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks?”).

¹⁰ *Id.* at 438 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003)).

¹¹ See generally Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405 (2000).

¹² Tenn. Code Ann. § 39-13-206(a)(1). Less than one month ago, the Court upheld the death sentence of Henry Lee Jones, a Black man from Shelby County, during a review pursuant to this statute. *State v. Jones*, No. W201502210SCDDTDD, 2019 WL 364700, at *29 (Tenn. Jan. 30, 2019).

¹³ *City of Memphis v. Hargett*, 414 S.W.3d 88, 108 (Tenn. 2013).

¹⁴ *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000).

¹⁵ *State v. Decosimo*, 555 S.W.3d 494, 515-17 (Tenn. 2018), *cert. denied*, No. 18-564, 2019 WL 113163 (U.S. Jan. 7, 2019).

¹⁶ *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 140-41 (Tenn. 1993).

¹⁷ Anecdotally, the Task Force on Minority Concerns established by the New Jersey Judiciary reported that over 30% of all surveyed judges said that bail decisions are sometimes influenced by a trial judge’s attitudes about race. N.J. Supreme Court Task Force on Minority Concerns, *Final Report* 79 (1992); see also Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C.L. Rev. 95, 101-105 (1998) (recounting similar findings in other states).

three district attorneys general, three public defenders, and two private citizens.¹⁸ Prior to the statutory deadline of September 1, 2018, the two then-Speakers responded to this call by appointing nine men and two women, all of whom we discern to be white.¹⁹ Thus, the Task Force’s membership today appears to be 100% white—and 82% both white and male.

In contrast, in Tennessee as a whole, Black people make up 17.1% of the population.²⁰ Latinx people, Asian-American people, and other people of color are, respectively, 5.5%, 1.9%, and 4.4% of the state’s population.²¹ Yet exactly zero percent of the judges, attorneys, and citizens appointed to the Task Force appear to have been selected from among these groups. Similarly, women are approximately half of Tennessee’s population. Yet fewer than one fifth of the Task Force’s members are women. We are disappointed that the Task Force so completely fails to reflect Tennessee’s racial, ethnic, and gender diversity.

During the upcoming redistricting, the Tennessee General Assembly and the Advisory Task Force on the Composition of Judicial Districts face a choice: they can either perpetuate these outdated and unacceptable problems, or they can work towards solving them. We encourage you to take the following actions to facilitate the equitable representation of all Tennesseans in the judicial redistricting process:

First, the General Assembly should expeditiously pass legislation empowering and requiring the Speakers of the Tennessee Senate and House of Representatives, the Governor of Tennessee, or another appropriate authority to make at least two additional appointments to this currently composed Task Force, one of which will be designated the Task Force’s Diversity Chair. The legislation should require the appointing authority to consider diversity in the selection process for these positions and should encourage the active recruitment and conscientious consideration of candidates of color.²² Any additional appointees must be made in sufficient time for them to meaningfully participate in fulfilling the Task Force’s stated responsibilities.

Second, the General Assembly should pass legislation commissioning a study of sentencing and conviction rates across Tennessee’s judicial districts since the last redistricting to determine if

¹⁸ Tenn. Code Ann. § 16-1-119(a)(1)(B); see Public Chapter No. 974 (May 21, 2018), available at <http://www.tncourts.gov/sites/default/files/docs/pc0974.pdf>.

¹⁹ See generally Tennessee State Courts, *Advisory Task Force on Composition of Judicial Districts: Member Biographies* (last visited Feb. 15, 2019), http://www.tncourts.gov/sites/default/files/docs/cjd_advisory_task_force_member_bios.pdf.

²⁰ U.S. Census Bureau, *Quick Facts: Tennessee* (last visited Feb. 15, 2019), <https://www.census.gov/quickfacts/tn>.

²¹ *Id.*

²² See *Bredesen v. Tennessee Judicial Selection Comm’n*, 214 S.W.3d 419, 439 (Tenn. 2007) (holding that it is “entirely appropriate . . . to include diversity as a single factor among many other important factors . . . in making judicial appointments”).

there has been a racial or ethnic disparity in outcomes for criminal defendants that may be attributable, in whole or in part, to the current composition of Tennessee's judicial districts;²³

Third, the Task Force should prioritize fair representation of Black voters and other voters of color in the drawing of new judicial districts, as it must under the Voting Rights Act and U.S. Constitution, recognizing that the homogeneity of its own membership is symptomatic of a larger diversity deficit in Tennessee's appointed and elected leadership;

Fourth, the Task Force should solicit input from, at minimum, the Tennessee Bar Association's Committee on Racial and Ethnic Diversity and the Tennessee Black Caucus of State Legislators in the preparation of its report and redistricting plan; and

Fifth, the Task Force should renew its commitment to transparency and ensure that all of its future meetings are made public both through live video feeds and archival video posted on the website of the Administrative Office of the Courts.

We would welcome the opportunity to discuss these recommendations further. If you have any questions, please contact Leah Aden at 212-965-7715.

Sincerely,



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²³ As an example, in 1996, Louisiana's Task Force on Racial and Ethnic Fairness in the Courts issued a report that found, among other things that: "the social and professional isolation of [Louisiana's state court] judges and other court personnel from persons who may not share the same culture or ethnicity is a significant underlying problem contributing to the perception, if not the reality, of bias in the court system"; and "the practice of judicial elections by sub-districts, where appropriate, [is] the only feasible means of ensuring diversity and ethnic heterogeneity in our judicial system" (report on file with LDF).

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