

JudicialDistrictsTaskforce - Ltr. from NAACP LDF re: Advisory Task Force on the Composition of Judicial Districts

From: Leah Aden <laden@naacpldf.org>
To: "lt.gov.randy.mcnally@capitol.tn.gov" <lt.gov.randy.mcnally@capitol.tn.g...>
Date: 7/24/2019 4:16 PM
Subject: Ltr. from NAACP LDF re: Advisory Task Force on the Composition of Judicial Districts
Cc: "rep.ga.hardaway@capitol.tn.gov" <rep.ga.hardaway@capitol.tn.gov>, "ask...."
Attachments: NAACP LDF Ltr. re TN Advisory Task Force on Composition of Judicial Districts_07 24 2019_final_.pdf

Dear Chair Forgety and Speakers McNally and Casada –

With the attached letter, the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) writes once again to express our concern regarding the ongoing 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 for changes to a judicial district in southwestern Tennessee. Adopting changes like these would help begin to ensure that Black voters in Tennessee have an equal opportunity to elect judicial candidates of their choice, consistent with the Voting Rights Act and United States Constitution.

We welcome the opportunity to discuss our concerns and these recommendations further.

Sincerely,

(end)

Leah Aden

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From: Leah Aden <laden@naacpldf.org>

Sent: Tuesday, February 26, 2019 11:51 AM

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

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July 24, 2019

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Re: Advisory Task Force on the Composition of Judicial Districts

Dear Chair Forgety and Speakers McNally and Casada:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”)¹ writes to reiterate our concerns regarding the lack of diversity in the membership of Tennessee’s Advisory Task Force on the Composition of Judicial Districts (“Task Force”). Further, we also write to urge the Task Force to seriously consider whether Tennessee is meeting its obligations under the Voting Rights Act and U.S. Constitution to ensure that Black voters have an equal

¹ Since its founding in 1940 by Thurgood Marshall, 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 that 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, et al., v. Edwards, et al.*, 274 F. Supp. 3d 395, 461 (M.D. La. 2017) (LDF successfully challenging Louisiana’s at-large voting system for the 32nd Judicial District Court with jurisdiction over Terrebonne Parish, as having a discriminatory purpose and results 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); *Chisom v. Roemer*, 501 U.S. 380, 384 (1991) (LDF successfully arguing that Section 2 of the VRA applies to judicial elections).

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

opportunity to participate in judicial elections and elect their preferred judicial candidates. Accordingly, to support your development of recommended judicial redistricting plans that comply with these statutory and constitutional obligations, we **append** to this letter a proposed judicial redistricting map that would provide a more equitable opportunity for Tennessee voters of color to elect judicial candidates of their choice.

In a letter dated February 26, 2019, LDF wrote to the Task Force and noted that the 11-member body appears to be comprised entirely of white people, 82% of which are men, despite that people of color make up nearly 29% of Tennessee’s total population.² We also illuminated that the Task Force did not appear to conduct its activities in a transparent manner that invited public participation. As both Tennessee and federal courts have recognized, the absence of diverse voices within any public body is troubling.³

While the Task Force did not respond to our concerns directly, we did see that the Task Force posted information about its meetings on its website and began to solicit input from a broader range of stakeholders. Though we appreciate this improved transparency, it does not resolve the continuing and unacceptable lack of diversity on the Task Force.⁴

Moreover, to date, there is no evidence indicating that the Task Force has seriously considered how its redistricting recommendations might help Tennessee fulfill its obligation to provide Black voters with an equal opportunity to participate in judicial elections. Most starkly, the Task Force’s list of eight “focus questions” makes no reference to the need to examine Tennessee’s existing judicial districts in light of federal and state constitutional requirements, nor any concern for examining diversity within the Tennessee judiciary (*i.e.*, of judges, court personnel, etc.).⁵

² Letter from Leah Aden, et al., LDF, to Lieutenant Governor and Speaker McNally, Speaker Casada, and Chair Forgety (Feb. 26, 2019), https://www.naacpldf.org/wp-content/uploads/Letter-re-TN-Advisory-Task-Force-on-Composition-of-Judicial-Districts_2.26.19.pdf.

³ See, e.g., *Bredesen v. Tennessee Judicial Selection Comm’n*, 214 S.W.3d 419, 438 (Tenn. 2007) (“Ensuring 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.”) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 331-32 (2003)).

⁴ Indeed, we observed a video of a public hearing on June 12, 2019 where both the Task Force members and other participants were overwhelmingly white.

⁵ Cf. Tennessee State Courts, *Advisory Task Force on Composition of Judicial Districts*, [TNCOURTS.GOV](https://www.tncourts.gov), <https://www.tncourts.gov/Advisory%20Task%20Force%20on%20Composition%20of%20Judicial%20Districts> (last visited July 23, 2019) with Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C.L. Rev. 95, 105-110 (1998) (describing Black voters’ claims that dilutive electoral districts deprived them of an opportunity to elect candidates of their choosing to the bench).

There is clearly an opportunity to do so. Our analysis and the current composition of Tennessee’s judiciary suggest that the state’s existing judicial districts are not drawn in accordance with principles of fairness, inclusion, and equity, especially with regard to Black voters and other people of color. Reportedly, Tennessee ranks 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.⁶ The Task Force is uniquely empowered to begin addressing the lack of both diversity and fair electoral opportunity within the Tennessee judiciary.⁷

We, therefore, call on the Task Force to comprehensively examine existing judicial district lines in light of Tennessee’s legal obligation to provide Black voters and other voters of color with an equal opportunity to participate in the state’s political process. As you know, representation in the judiciary, particularly for historically excluded groups, is critical because of the important decisions that judges make, which impact all Tennesseans. In light of these considerations, the Task Force must take action to develop and propose judicial districts that provide equal opportunities for Black voters and other voters of color to elect judicial candidates of their choice.

The lack of equal opportunity for Black voters to elect their preferred candidates, who may themselves be Black, is particularly acute in western Tennessee. Although nearly 26% of the total population in the counties that make up 25th, 26th, and 28th Judicial Districts is Black,⁸ there does not appear to be a single elected Black judge in any of these three judicial districts.⁹ None of the three district attorneys in these judicial districts appears to be a person of color.¹⁰

⁶ See 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>.

Moreover, according to a recent report, Tennessee is one of 24 states with a Supreme Court comprised entirely of white judges. Of those 24 states, it has the 7th highest percentage people of color in its total population. See Laila Robbins & Alicia Bannon, *State Supreme Court Diversity*, BRENNAN CENTER FOR JUSTICE (July 23, 2019), https://www.brennancenter.org/sites/default/files/publications/2019_07_StateSupremeCourtDiversity.pdf.

⁷ See Tenn. Code Ann. § 16-1-119(a) (2)(A) (requiring the Task Force to “recommend and publish a proposed statewide judicial redistricting plan”).

⁸ Estimate based on analysis of U.S. Census Bureau Data for the following counties: Chester, Crockett, Fayette, Gibson, Hardeman, Haywood, Henderson, Lauderdale, Madison, McNairy, and Tipton. See U.S. Census Bureau, *Quick Facts: Tennessee* (last visited June 19, 2019), <https://www.census.gov/quickfacts/tn>.

⁹ See Tennessee State Courts, *Trial Court Judges* (last visited June 19, 2019), <http://www.tsc.state.tn.us/courts/circuit-criminal-chancery-courts/judges>.

¹⁰ See Tennessee District Attorneys General Conference, *District Directory* (last visited June 19, 2019), <https://www.tndagc.org/offices.html>.

The highly unrepresentative composition of elected judicial officers in these counties likely contributes to stark racial disparities across a range of indicators in the region.¹¹ In Tennessee, Black individuals are 2.5 times more likely to be incarcerated than white individuals.¹² In ten out of the eleven counties within judicial districts 25, 26, and 28, Black Tennesseans are incarcerated at a higher rate than their white neighbors, and in seven of those counties, the racial disparity is more pronounced than the disparity for Tennessee overall.¹³ In Madison County, where Black residents make up 38% of the population, they are 3.25 times more likely to be incarcerated than white residents.¹⁴

The importance of equal opportunity in judicial elections is heightened by the significant discretion that state court judges have in exercising their extensive legal authority.¹⁵ In addition to incarceration, elected judges can impose significant fines and fees in the civil and criminal contexts, which can hamper an individual's ability to maintain their job, their home, and even their freedom.¹⁶ Unfortunately, fines and fees likely cause outsized harm to Black and Latinx communities because these communities suffer a "double burden"¹⁷: Black and Latinx individuals are not only disproportionately subject to criminal

¹¹ See generally Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405 (2000); Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (finding that white trial judges harbor the same kinds of implicit racial biases as the general population).

¹² See Vera Institute of Justice, *Incarceration Trends* (last visited July 22, 2019), <http://trends.vera.org/incarceration-rates?fromProfile=true>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ In addition to ruling on matters such as whether to impose the death sentence, see Tenn. Code Ann. § 39-13-206(a)(1), and whether a region's schools are adequately funded, see *Tennessee Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139, 140-41 (Tenn. 1993), 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.

There is evidence strongly suggesting that these decisions are sometimes influenced by race. See, e.g., N.J. Supreme Court Task Force on Minority Concerns, *Final Report 79* (1992) (stating that 30% of judges report that bail decisions are influenced by trial judges' attitudes about race); 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).

¹⁶ See U.S. Commission on Civil Rights: Tennessee Advisory Committee, *Preliminary Advisory Memorandum on Legal Financial Obligations in Tennessee* (May 9, 2019), <https://www.usccr.gov/pubs/2019/Advisory-Memo-on-Legal-Financial-Obligations-in-Tennessee.pdf>; see also U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications* (Sept. 2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

¹⁷ "It is well established that African-Americans and Hispanics are over-represented within the criminal justice system. As a consequence, African-American and Hispanic defendants as a group carry a heavier economic burden on account of being arrested and incarcerated at higher rates than white

prosecution, but they also face greater difficulty in paying off fines and fees because of stark and long-standing racial wealth, income, and employment gaps.¹⁸ Yet these same Black and Latinx residents—who, like all Tennesseans, rely on fair, timely, and efficient judicial services—are potentially being deprived of an equal chance to elect judicial candidates of their choice.

When judicial elections are not equally open to effective participation by all people, they fail to fulfill their basic function. As the Tennessee Supreme Court and numerous others have recognized, diversity—racial and in other of its forms—is crucial to ensuring that governmental bodies make fair decisions that the public will have confidence in.¹⁹ Further, federal law is clear that all Tennesseans, including voters of color, have the right to an equally effective voice in deciding who will serve their community as judicial officials. Despite this, Tennessee’s current judicial district lines may be depriving Black voters in Tennessee of that right. Such a disparity in electoral opportunity arising from outdated or unfair judicial maps is potentially unlawful under the Voting Rights Act and the U.S. Constitution.²⁰

defendants. A further factor compounds the difficulty faced by African-American communities. Research points to the persistence of high levels of wealth disparity between African American and white communities, with African-Americans also possessing fewer opportunities to access financial services (e.g., checking accounts, credit facilities).” *Id.*

¹⁸ According to an analysis of 2015 census data by the State of Tennessee, in western Tennessee (excluding Shelby County), 32% of Black residents and 35% of Latinx residents live in poverty, compared to only 16.2% of white residents. See Xinqing Deng and Rachel L. Jones, *2017 Tennessee Behavioral Health: County and Region Services Data Book*, TENNESSEE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES (Sep. 2017), https://www.tn.gov/content/dam/tn/mentalhealth/documents/DPRF_BH_county_region_service_data_book_9-2017_FINAL.pdf.

¹⁹ See *Bredesen v. Tennessee Judicial Selection Comm’n*, 214 S.W.3d 419, 439 (Tenn. 2007); see also Ciarra Torres-Spelliscy, et al., *Improving Judicial Diversity*, BRENNAN CENTER FOR JUSTICE (2010) (“Diversity on the bench is important, both because a diversity of viewpoints will produce a more robust jurisprudence, and because it will enhance the legitimacy of our system of justice in the eyes of an increasingly diverse public.”); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICHIGAN J. OF RACE & L. 2, 23 (2004) (quoting Justice Powell of the U.S. Supreme Court for the proposition that “a member of a previously excluded group can bring insights to the Court that the rest of its members lack”); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL’Y REV. 325, 329 (2002) (“The strong presence of black judges has a powerful impact on how non-minority judges, lawyers, and litigants view minority persons, and it also serves as an inspiration for minorities who aspire to positions in the legal profession. . . . [R]acial diversity on the bench can enhance judicial decision making by broadening the variety of voices and perspectives in the deliberative process.”).

²⁰ Section 2 of the Voting Rights Act prohibits voting practices that have a discriminatory purpose or result. 52 U.S.C. § 10301. The Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV § 1. The Fifteenth Amendment provides that “The right of citizens of the United States to vote shall not

For these reasons, the Task Force should strongly consider recommending new judicial district lines that prioritize compliance with the VRA and Constitution. There are several available alternatives to Tennessee’s current judicial districts, each of which contain at least one district in which Black voters comprise a substantial share of the voting-age population. We urge the Task Force to seriously consider the appended proposed map, which is by no means the only lawful variation, as an avenue through which the Task Force can seek to provide Black voters in Tennessee of their voting rights with respect to judicial elections.

The proposed redistricting plan appended to this letter creates a new judicial district in southwestern Tennessee (district 32) by altering the composition of the current 25th, 26th, and 28th districts. The new judicial district (or something like it) would provide Black and Latinx voters with an improved opportunity to elect a judge of their choice by forming voting coalitions with other demographic groups.²¹ Creating such an opportunity may be required when electoral districts unlawfully dilute Black voters’ ability to participate in elections on equal terms.²² This redistricting option would increase the combined Black and Latinx citizen voting-age populations (“CVAP”) to nearly 40% in the new southwestern district, as compared to the existing voting-age populations (less than 30% combined Black and Latinx CVAP) in the current 25th, 26th, and 28th judicial districts.²³

We are likely to follow up in writing with additional redistricting proposals for these and/or other judicial districts in the state that, if recommended by the Task Force and

be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. Const. amend. XV § 1.

²¹ For example, in *Huot, et al., v. City of Lowell*, the District of Massachusetts recently approved a consent decree requiring the City of Lowell to change from an at-large plurality electoral system for its city council and school committee—which the court recognized as having “the potential to result in an unlawful dilution of the Asian-American and Hispanic/Latino vote in violation of Section 2 of the Voting Rights Act”—to a new system which would provide a coalition district of Asian-American and Latinx voters who, in tandem with other voters, would have the opportunity to elect candidates of their choice to the elected bodies at issue. Consent Decree, *Huot et al., v. City of Lowell*, Case No. 1:17-cv-10895-DLC (D. Mass. June 13, 2019), <http://lawyersforcivilrights.org/wp-content/uploads/2019/05/Huot-v.-Lowell-Consent-Decree.pdf>.

²² See *Campos v. City of Baytown, Tex.*, 840 F. 2d 1240, 1245 (5th Cir. 1988) (finding that Section 2 applies to coalition of Black and Hispanic voters); *Perez v. Abbott*, 250 F. Supp. 3d 123, 135 (W.D. Tex. 2017) (“The Court agrees with Plaintiffs that § 2 can require the creation of minority coalition districts.”). See also *Arbor Hill Concerned Citizens Neighborhood Ass’n. v. Cty. of Albany*, No. 03-CV-502, 2003 WL 21524820, at *5 (N.D. N.Y. July 7, 2003), *report and recommendation adopted sub nom. Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cty. of Albany*, 281 F. Supp. 2d 436 (N.D. N.Y. 2003).

²³ The proposed judicial district in southwestern Tennessee has a combined Black and Latinx citizen voting-age population of 39.8% (37.3% BCVAP + 2.5% LCVAP). CVAP calculations based on the 5-year 2013-2017 American Community Survey.

adopted by the General Assembly, would provide a more equal opportunity for Black voters in Tennessee's judicial elections.²⁴ In the interim, we ask that the Task Force consider our alternative to current judicial districts in southwestern Tennessee at your next scheduled meeting on Monday, July 29, 2019, and provide us with your response *in writing* by the following **Monday, August 5, 2019**.

In addition, to Lieutenant Governor and Speaker McNally and Speaker Casada, specifically, we express our continuing concern that the General Assembly has taken no steps to address the Task Force's lack of racial or ethnic diversity and again urge the General Assembly to take steps, including those that we recommended in our letter dated February 26, 2019, to enhance the body's diversity and inclusivity. By failing to address this critical issue, the General Assembly has suggested by its inaction that it does not take seriously the need to receive input from Black voices on a crucial public decision that will shape the everyday lives of all Tennesseans. The need for greater public participation, especially from communities who lack representation on the current Task Force, is particularly acute given Tennessee's historic lack of transparency in its redistricting processes.²⁵

Among our recommendations, we call on the General Assembly once again to expeditiously pass legislation 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.²⁶ Given that the Task Force's work is well underway, we urge the General Assembly to immediately provide a mechanism for appointing new members to the body to enable them to meaningfully participate in fulfilling the Task Force's stated responsibilities.

²⁴ In addition to revising judicial lines and creating new judicial districts, the Task Force can propose the creation of new judgeships that comply with the VRA and U.S. Constitution where a judicial district's caseload and other features warrant it. See Office of Research and Education Accountability, *Tennessee Judicial Weighted Caseload Study: FY 2017-18 Update*, TENNESSEE COMPTROLLER OF THE TREASURY (April 2019), <https://comptroller.tn.gov/content/dam/cot/orea/documents/orea-reports-2019/FY2018%20Weighted%20Caseload%20Report.pdf>.

²⁵ According to the nonpartisan research organization ThinkTennessee, Tennessee's legislative redistricting process is "one of the least open in the nation," receiving an "F" grade for transparency and ranking 40th in the country on that measure. See ThinkTennessee, *State of Our State: Redistricting* (last visited July 22, 2019), https://thinktennessee.org/wp-content/uploads/2019/06/State-of-our-State-Policy-Brief_-Redistricting_FINAL..pdf.

²⁶ See *Bredesen*, 214 S.W.3d at 439 (holding that it is "entirely appropriate . . . to include diversity as a single factor among many other important factors . . . in making judicial appointments").

In light of the General Assembly's failure to act thus far, Lieutenant Governor and Speaker McNally and Speaker Casada, we request that each of you provide us with your response *in writing* to the concerns raised herein and in our previous correspondence by **Monday, August 5, 2019**.

Sincerely,



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Appendix: Proposed Judicial Districts (with District 32 in Hardeman, Haywood, and Madison)

