STATE OF WISCONSIN
COMMITTEE ON JUDICIAL SELECTION

TABLE OF CONTENTS

APPENDICES

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COMMITTEE ON JUDICIAL SELECTION

Executive Summary

BACKGROUND AND COMPOSITION OF THE COMMITTEE[1]

The Committee on Judicial Selection was created by the Wisconsin Legislature in 1999 Wisconsin Act 9, Section 9146(2f), the 1999-2001 state budget bill. The creating legislation charged the Committee to study and report on methods of judge selection that would increase racial and ethnic diversity on Wisconsin courts. The State of Wisconsin has seven Supreme Court justices, sixteen appellate court judges and 241 circuit court judges, ten of whom are minorities. Based on the undisputed need for diversity in our judiciary and the legislative activity on this issue, the Wisconsin Legislature determined that a committee should be appointed by Governor Tommy G. Thompson and the Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court to study and develop a plan to address this issue.

To accomplish this important mission, Governor Thompson and Chief Justice Abrahamson appointed a group of accomplished jurists, legal practitioners, legal scholars and community leaders in Wisconsin. This diverse group represented jurists from several counties, from both the appellate and circuit courts, as well as representatives of academia, the practicing bar and the community. The Governor appointed Judge Maxine Aldridge White to chair the group. Judge White, a former federal prosecutor, is one of the most seasoned judges in Milwaukee County, an effective administrator and judicial scholar experienced in providing leadership on diversity issues. As the chief judge of the First Judicial District, Judge Michael J. Skwierawski, was designated by the creating

[1] Professor Charles Clausen is the principal drafter of the Report of the Committee on Judicial Selection. He received substantial support from the Chair, Judge Maxine A. White, and Deputy Legal Counsel to the Governor, Amanda Schaumburg in drafting, reviewing, editing, and developing source materials for the Report. Professor Clausen has practiced law in Wisconsin for 25 years and has been a member of the Marquette University faculty for 22 years. In addition, he has served as a reporter on several committees and is the author of a book on campaign ethics rules for Wisconsin judges..

legislation as vice chair of the Committee. Judge Skwierawski is a very experienced jurist and legal scholar, an exceptional administrator who has provided leadership to the courts in Milwaukee County and to the entire Wisconsin judiciary.

From the circuit courts in Wisconsin, in addition to Judge White, the Governor appointed Judge M. Joseph Donald of Milwaukee County Circuit Court. Chief Justice Abrahamson appointed three circuit court judges including Judge Angela Bartell, (Dane County), Judge Dennis Flynn (Racine County) and Judge Stanley A. Miller (Milwaukee County). Each of these four jurists has shown leadership on a wide variety of issues for their respective courts, for the Wisconsin judiciary, and with diversity issues in particular. Judge Miller had been particularly proactive in the federal lawsuit in which the plaintiffs sought the creation of judicial subdistricts in Milwaukee County.[2]

The creating legislation designates the Chief Justice of the Wisconsin Supreme Court as a member of the Committee. Concerned that she might have to disqualify herself if issues related to the Committee's work would come before the Supreme Court, Chief Justice Shirley Abrahamson appointed Wisconsin Court of Appeals Judge Neal Nettesheim to serve in her stead. Judge Nettesheim serves as Deputy Chief of the Wisconsin Court of Appeals and is located in District 2 in Waukesha County handling appeals in eleven counties. Judge Nettesheim is a legal scholar and has broad experience in the administration of the courts.

Professor Frank DeGuire, a former chief executive of a major corporation, the former dean and a distinguished member of the faculty at Marquette University Law School, was selected to present an academic, legal, and administrative perspective. Professor Charles Clausen, a Marquette University law professor with substantial

[2] Milwaukee Branch, NAACP v. Thompson, 935 F.Supp. 1419 (E.D. Wis. 1996), affirmed 116 F.3rd 1194 (7th Cir. 1997). In this case, the plaintiffs, who included registered voters in Milwaukee County and organizations to which they belonged, contended that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. sec. 1973, required Wisconsin to replace county-wide elections with smaller districts, which could be drawn so that some districts would contain majorities of black voters. The district court held that Wisconsin's electoral structure did not violate the Voting Rights Act and denied relief. The Seventh Circuit Court of Appeals affirmed.

experience as a research reporter on issues relating to the judiciary was selected to provide research, analysis, and drafting assistance to the Committee.

From the legal practitioner bar, Governor Thompson selected well-respected and renowned attorney Gerald P. Boyle of Milwaukee who is an experienced trial lawyer who has practiced at all levels of numerous federal, state and municipal courts in Wisconsin and across the country. Attorney Boyle also brought to the Committee his perspective as one who has served as a local member of the Governor's Advisory Council on Judicial Selection. Attorney Gerardo Gonzalez was added as an ex-officio member, and is a highly regarded lawyer whose insight as a partner in one of the largest minority law firms in the Midwest representing broad legal interests including corporate, labor, municipal, business and administrative law was invaluable.

For their community perspectives, Dr. Marisa Rivera, Assistant to the Vice-President of Student Affairs at Marquette University, and Ms. Jerry Hamilton, president of the Milwaukee Chapter of the National Association for the Advancement of Colored People, were added as ex-officio members. Dr. Rivera provided a community perspective and contributed expertise gained from her background in administration as well as her experience from her doctoral and other research on diversity issues. Likewise, Ms. Hamilton provided a broad community perspective, and represented the NAACP, an organization that played a lead role in the legal challenge regarding judicial subdistricts in Milwaukee County which was decided by the federal district and federal appeals courts serving Wisconsin.[3]

MISSION

The Committee's mission is defined in the legislation which created the Committee. The legislation provides that:

[3] Note 2, supra.

1. The Committee shall study judicial subdistricts and other methods of judge selection that would result in increased racial and ethnic diversity of the judges in the courts.
2. No later than December 31, 2000, the committee shall submit a report on its findings and recommendations to the governor, the Supreme Court and to appropriate standing committees of the senate and assembly in the manner specified in section 13.172(3) of the statutes.

The Committee reviewed its mission statement and adopted it at its first meeting. The Committee recognized that the mission required the Committee to view its charge as it relates to the entire Wisconsin judiciary, and that the mission is not limited solely to the courts in Milwaukee County.

METHODOLOGY

Working with an aggressive schedule, the Committee immediately committed to developing an inclusive and unbiased professional approach to studying methods of judge selection with a goal of recommending methods which may increase diversity on Wisconsin courts. The Committee examined the judicial selection process for racial and ethnic diversity, including applicant pools, nominating commissions, and gubernatorial appointments. The Committee adopted an educational and investigative approach to research and analyzed various materials related to its ultimate mission. The subject areas researched and discussed included: the methods of judge selection and election utilized across the nation and in Wisconsin, the history of Wisconsin's judiciary, Wisconsin's demographics, the composition of the Wisconsin judiciary and the Wisconsin bar, and election statistics and results. The Committee combined these sources with input from judges, state and county bar associations, specialty bar associations, state legislators, and national and local experts who have experience in the field. The Committee also considered other related issues, beyond selection and election methodology, such as the racial and ethnic diversity of the pool of potential judicial applicants or candidates, law

school recruitment and retention issues, and mentoring programs for potential judicial applicants.

The Committee convened public monthly meetings between February and December 2000. A public forum was held in May, 2000, to solicit opinion testimony from judicial, legislative, bar, and academic and community representatives on judicial selection and election methodology with the goal of increasing ethnic and racial diversity on the bench. The key areas covered during the Committee's monthly meetings and public forum were:

1. The review and discussion of the advantages and disadvantages of the major methods used for judicial selection in the United States, including principally partisan election, nonpartisan election, gubernatorial appointment without nominating commission input, gubernatorial appointment with nominating commission input, legislative appointment, hybrid systems employing cumulative voting, and hybrid systems employing judicial subdistricts;
2. The review of reports of Judge White and Professor Clausen on the proceedings at the American Judicature Society's Conference, "Choosing Our Judges: A National Forum on Judicial Selection," which was hosted in part by the United States Supreme Court in Washington, D.C.;
3. The discussion of the history of judicial selection in Wisconsin and the requirements of the Wisconsin Constitution;
4. The consideration of information on the history, composition and use of a nominating commission in Wisconsin presented by Attorney William Curran, Chairman of the Governor's Judicial Selection Advisory Council, and Attorney Judith Hartig-Osanka, a member of the Governor's Council;
5. The consideration of presentations at the a widely publicized and well attended public forum which was held at Marquette University, including presentations by state senators, state representatives, the director of the American Judicature Society's Hunter Center for Judicial Selection, the assistant dean for Admissions of Marquette University Law School who

reported on behalf of Marquette and the University of Wisconsin - Madison Law School, circuit court judges, a court of appeals judge, representatives of the Wisconsin Trial Judges Association, the National Association for the Advancement of Colored People; the presidents of the State Bar of Wisconsin, the Milwaukee Bar Association, the Wisconsin Hispanic Lawyers Association, and the president-elect of the Wisconsin Association of Minority Attorneys;

6. The study and analysis of racial and ethnic as well as general population demographic data for the state of Wisconsin and those counties with substantial minority populations.
7. The review and discussion of information describing the experiences in Cook County, Illinois, and the State of Louisiana with judicial subdistricting;
8. The review of research and other materials relating to judicial diversity and the impact of selection methods on diversity on the bench, the use of and composition of nominating commissions across the nation and in Wisconsin; and the conclusions of the research on these issues;
9. The review and discussion of various proposals submitted for the Committee's consideration.

FINDINGS AND RECOMMENDATIONS

After considerable deliberation on the information gathered from national and local experts, input from legal, judicial, legislative and bar groups, and research conducted by members of the Committee and the Committee's reporter, the Committee made findings and recommendations in several categories including: (1) The need for judicial diversity; (2) Public funding of judicial campaigns; (3) Mentoring and educating potential judicial candidates and applicants; (4) The composition, structure and procedures of Nominating Commissions; (5) Judicial subdistricts; (6) Cumulative voting; (7) The need for demographic data on the racial and ethnic composition of the bench and bar; (8) The electoral process; and (9) Implementation recommendations.

Committee recommendations to the State Bar of Wisconsin, Marquette University and the University of Wisconsin Law Schools, the Wisconsin Supreme Court, the Governor, the Wisconsin Legislature, and others, include the need for recruiting efforts to increase the number of minority lawyers, the need for mentoring and recruiting efforts to increase the number of minority applicants for judicial vacancies, adequate public funding of judicial campaigns, and the need for racially diverse nominating commissions. The findings and recommendations are presented in the Executive Summary in the same chronological order and with the same Chapter designation in which they appear in the Report.

- **FINDING**: This Committee acknowledges and commends Governor Tommy G. Thompson for his exceptional job of appointing minority judicial candidates to the bench.

- **FINDING**: The overwhelming majority of the minority judges have reached the bench by an appointive process. Governor Tommy G. Thompson appointed six out of the ten minorities currently serving on the bench in Wisconsin.[4]

CHAPTER II: THE NEED FOR JUDICIAL DIVERSITY

- **FINDING**: Enhancing the racial and ethnic diversity of the Wisconsin judiciary is an important goal, most especially in those judicial circuits and districts in which the population is significantly racially and ethnically diverse.

- **FINDING**: There is clearly both room for and a need for improvement in increasing racial and ethnic diversity on Wisconsin courts.

[4] The Committee also acknowledges the significant number of women that Governor Thompson appointed to Wisconsin Courts, including the appointment of two women to the Wisconsin Supreme Court.

- **FINDING**: The Committee views it as axiomatic that, in our diverse and democratic society, no branch of our government should be the exclusive preserve of any one racial or ethnic group.

- **FINDING**: Wisconsin's current system of interim appointment/open elections has produced no minority justices on the Wisconsin Supreme Court in 152 years, no minority judges on the Wisconsin Court of Appeals in 22 years, and no minority judges on the circuit court bench in Racine County, the second most populous minority community in the state. According to the information received by the Committee, there have been no minority applicants for vacancies in Racine County in spite of the fact that a number of qualified African American attorneys currently practice law in Racine County.[5]

- **FINDING**: Even in circuits where there are substantial minority populations, the Wisconsin courts are not racially and ethnically diverse.

- **FINDING**: Judicial incumbency is an asset.

CHAPTER III: THE WISCONSIN JUDICIARY; STRUCTURAL AND ELECTORAL DATA

- **FINDING**: In contested races, campaign financing may be a major challenge or impediment to winning an election, especially in Milwaukee County where the average amount provided by judicial candidates to their own campaign costs in contested elections between 1992 and 1999 was $64,863, a prohibitive sum.

* **FINDING**: There is no known data on the racial and ethnic composition of judicial and quasi-judicial positions in Wisconsin other than in courts of record, including the

[5] Racine County is the only County, other than Milwaukee County, for which the Committee received reliable historical information of this nature.

state's municipal judges, administrative law judges, judicial court commissioners, and court commissions.

- **RECOMMENDATION**: We recommend that the legislature research public funding options for judicial elections to address the high cost incurred in contested elections in the Circuit, Appellate and Supreme Courts.

CHAPTER IV: WISCONSIN RACIAL/ETHNIC DEMOGRAPHIC DATA

- **FINDING**: The racial and ethnic composition of Wisconsin counties is significantly different from county to county.

- **RECOMMENDATION**: Such wide variations and differences among the counties in racial and ethnic composition should be taken into account in developing programs to address diversity on Wisconsin's courts.

CHAPTER V: REVIEW OF SIGNIFICANT RESEARCH ON EFFECT OF SELECTION METHOD ON JUDICIAL DIVERSITY

- **FINDING**: The published empirical research suggests that simply changing from one method of judicial selection to another, i.e., from an elective to an appointive system or vice versa, should not be expected by itself to yield a more diverse judiciary.

- **RECOMENDATION:** Any proposed change from one judicial selection method to another should be coupled with other positive efforts to recruit and appoint minority candidates to the bench**.**

CHAPTER VI: JUDICIAL SUBDISTRICTS

- **FINDING**: The Committee has concluded that Wisconsin should not attempt to replicate the Cook County experience in Milwaukee County or in other counties. Among the reasons underlying the Committee's conclusion is that it is not at all clear that subdistricting would significantly enhance the diversity of local judiciaries, and there is widespread concern that subdistricting could do significant damage to judicial independence in this state.

- **FINDING**: Creating judicial subdistricts is not desirable for Wisconsin and is not likely to lead to enhanced diversity in the judiciary.

- **FINDING**: Based on the caselaw history in Wisconsin and in other parts of the nation, it is likely that judicial subdistricts in Wisconsin would be unconstitutional.

- **FINDING**: Even if the judicial districts are drawn along twenty-five supervisory district lines in Milwaukee County, the current voting patterns suggest that this would not necessarily result in substantially greater diversity on the bench.

- **RECOMMENDATION**: The Committee does not support judicial subdistricts for any level of court in any county in Wisconsin. The Committee concluded that subdistricting in Wisconsin counties:
    1. Would require amendment of the Wisconsin Constitution;
    2. Would have the potential of increasing the politicization of judicial elections; and
    3. Might lead to across-the-board diminution in the qualifications of judicial candidates.

CHAPTER VII: CUMULATIVE VOTING

- **FINDING**: The use of cumulative voting is not desirable for Wisconsin and is not likely to lead to enhanced diversity in the judiciary.

- **RECOMMENDATION**: The Committee does not recommend the institution of cumulative voting for judicial elections in Wisconsin.

CHAPTER VIII: THE CANDIDATE POOL

- **FINDING**: No reliable data can be found on the racial and ethnic composition of the Wisconsin bar and bench.

- **FINDING**: There is no known data on the racial and ethnic composition of other judicial and quasi-judicial positions in Wisconsin including the state's municipal judges, administrative law judges, judicial court commissioners and court commissioners.

- **RECOMMENDATION**: The Supreme Court and the State Bar of Wisconsin should take steps to obtain reliable data on the numbers of licensed minority lawyers in the state.

- **RECOMMENDATION**: A web-site should be created that is connected to either the state's web-site or a web-site of the state courts, which contains information on the Governor's judicial application process and other judicial information.

- **FINDING**: One of the most important factors in increasing the ethnic and racial diversity of the bench is increasing the racial and ethic diversity of the bar.

- **RECOMMENDATION**: Judges, attorneys, and bar associations should be encouraged to provide appropriate mentoring to minority attorneys who would be potential candidates to become judges.

- **RECOMMENDATION**: The Committee recommends the creation of a program to provide information about the Governor's judicial application process.

CHAPTER IX: NOMINATING COMMISSIONS/ "MERIT APPOINTMENT" PROCESS

- **FINDING**: The use of a nominating commission is essential for any appointive process.

- **FINDING**: The membership of a nominating commission should be racially and ethnically diverse.

- **RECOMMENDATION**: The nominating commission should be expressly charged to work toward a diverse, inclusive judiciary.

- **RECOMMENDATION**: The nominating commission should be required to reflect the state's diverse population.

- **RECOMMENDATION**: The membership of a nominating commission should consist of both lawyers and non-lawyers.

- **RECOMMENDATION**: The members of a nominating commission should be appointed for fixed, staggered terms.

- **RECOMMENDATION**: The nominating commission should not be charged with the duty of actively recruiting individual judicial candidates, but should engage in broad-based information efforts designed to encourage applications by qualified applicants, including minority applicants.

- **RECOMMENDATION**: Four of the Committee members out of the eight voting members believed that the power to appoint members to the nominating commission should remain solely with the Governor. Four members believed that the power to appoint members to the commission should be dispersed among other entities or officials.

- **RECOMMENDATION**: The applicants for a judicial nomination should be kept anonymous except for the final nominees sent to the Governor by the Governor's Advisory Council on Judicial Selection, if Wisconsin's Open Records Law permits.

CHAPTER X: THE ELECTORAL PROCESS

- **FINDING**: Minority bar associations prefer open elections.

- **FINDING**: Half of the judges currently serving on Wisconsin courts were initially elected to the bench while the other judges were appointed.

- **FINDING**: There are no significant differences in success rates for minority judicial candidates in open elections verses retention elections.

- **RECOMMENDATION**: The majority of the Committee supports maintaining the current Wisconsin system of open elections and interim gubernatorial appointments.

CHAPTER XI: IMPLEMENTATION RECOMMENDATIONS

- **RECOMMENDATION**: The entire Committee recommends that the Governor amend Executive Order 2 or any superceding Executive Order with the same subject matter, to provide that the Governor's Advisory Council on Judicial Selection:
    - Shall work toward a racially and ethnically diverse judiciary;
    - Shall itself be broadly representative of the state's diverse population;
    - Shall be composed of both lawyers and non-lawyers;
    - Shall be appointed for fixed, staggered terms;
    - Shall not actively recruit individual judicial candidates, but shall engage in broad-based informational efforts designed to encourage applications by qualified applicants, including minority applicants.

- **RECOMMENDATION**: The majority of the Committee opposes any amendment to the Wisconsin Constitution for the purposes of adopting these recommendations.

I. INTRODUCTION

A. THE HISTORY OF THE COMMITTEE ON JUDICIAL SELECTION

1. The Creation of the Committee

The Committee on Judicial Selection was created by the Wisconsin legislature in 1999 Wisconsin Act 9, Section 9146(2f), the 1999 - 2001 state budget bill. The creating legislation provides:

> (2f) STUDY AND REPORT ON METHODS OF JUDGE SELECTION.
>
> **(A)** In this subsection, "minority group member" has the meaning given in section 560.036(1)(f) of the statutes.[6]
>
> **(B)** A committee composed of the chief justice of the supreme court, the chief judge of the 1st judicial administrative district, 3 judges appointed by the chief justice, one of whom shall be a minority group member, and 4 public members appointed by the governor, 2 of whom shall be minority group members, … The governor shall designate the chair of the committee. The chief judge of the 1st judicial administrative district shall be the vice-chair of the committee. The director of state courts shall provide staff services to the committee. Members of the committee shall be reimbursed for actual and necessary expenses incurred in performing their duties as members of the committee from the appropriation under section 20.680(1)(a) of the statutes.

2. The Mission of the Committee

The Committee's Mission is defined in the legislation which created the Committee. The legislation provides that:

[6] The statutory definition of minority group member includes persons who are Black, Hispanic, American Indian, Eskimo, Aleut, native Hawaiian, Asian-Indian, and persons of Asian-Pacific origin.

a. The Committee shall study judicial subdistricts and other methods of judge selection that would result in increased racial and ethnic diversity of the judges in the courts.

b. No later than December 31, 2000, the committee shall submit a report on its findings and recommendations to the governor, the supreme court and to appropriate standing committees of the senate and assembly in the manner specified in section 13.172(3) of the statutes.

The Committee reviewed its mission statement and adopted it at its first meeting. The Committee recognized that the mission required the Committee to view its charge as it relates to the entire Wisconsin Judiciary, and that the mission is not limited to the courts in Milwaukee County.

3. THE MEMBERSHIP OF THE COMMITTEE[7]

The membership of the Committee was established in part in the legislation. The number of members, the vice-chair and the Chief Justice of the Wisconsin Supreme Court's role were prescribed in the legislation. Governor Tommy Thompson appointed Milwaukee County Circuit Judge Maxine A. White as chairperson of the Committee. Milwaukee County Circuit Judge Michael J. Skwierawski, chief judge of the 1st judicial administrative district, served as vice-chair as designated by the creating legislation. Governor Thompson also appointed as members of the Committee Milwaukee County Circuit Judge M. Joseph Donald, Milwaukee Attorney Gerald Boyle and Marquette University Law School Professor and former Dean Frank C. DeGuire. Chief Justice Shirley S. Abrahamson appointed Dane County Circuit Judge Angela B. Bartell, Racine County Circuit Judge Dennis J. Flynn, and Milwaukee County Circuit Judge Stanley A. Miller. Chief Justice Abrahamson designated Wisconsin Court of Appeals Judge Neal Nettesheim as her surrogate on the Committee. Chief Justice Abrahamson determined that she would not serve on the Committee because of the risk of having to disqualify

[7] The biographies of Committee members are contained in Appendix A of this Report.

herself if issues related to the work of the Committee were to come before the Supreme Court.

The Committee obtained the consent of three citizens to serve as non-voting members. Those members are Milwaukee Attorney Gerardo H. Gonzalez; Ms. Jerry Hamilton, president of the Milwaukee chapter of the National Association for the Advancement of Colored People; and Dr. Marisa Rivera, Assistant to the Vice-President of Student Affairs at Marquette University.

Professor Charles D. Clausen of the Marquette University Law School faculty agreed to serve as Reporter to the Committee.

B. THE COMMITTEE'S PROCESS AND METHODOLOGY

Working with an aggressive schedule, the committee immediately committed to developing an inclusive and unbiased professional approach to studying methods of judge selection with a goal of recommending methods which may increase diversity on Wisconsin courts. The Committee adopted an educational and investigative approach to study various matters related to its ultimate mission. The subject areas researched and discussed included: the methods of judge selection and election utilized across the nation and in Wisconsin, the history of Wisconsin's judiciary, Wisconsin's demographics, the composition of the Wisconsin judiciary and legal practitioners, election statistics and results, combined with input from judges, state and county bar associations, specialty bar associations, state legislators, and national and local experts who have experience in the field. The Committee also considered other related issues, beyond selection and election methodology, such as the racial and ethnic diversity of the pool of potential judicial applicants or candidates, law school recruitment and retention issues, and mentoring programs for potential judicial applicants.

The Committee convened public monthly meetings between February and December, 2000. A public forum was held in May, 2000 to solicit input from a wide variety of interested persons and organizations on issues related to the Committee's mission. The Committee gained information from national experts on the various methods of judge selection and election and on the impact, if any, of a particular selection method on increasing racial and ethnic diversity on the bench. In order to accomplish this the Committee Chair, Judge White and the Committee's Reporter, Professor Clausen, attended a national meeting on judicial selection and election which was hosted by the American Judicature Society and the United States Supreme Court in March 2000. The Committee also invited the key person from the American Judicature Society who has conducted extensive research and writing on the subject, and who directs the AJS Center that is responsible for monitoring, researching, and reporting on these issues on a national level.

The key subject areas covered during the Committee's monthly meetings are summarized as follows:

- The February meeting was devoted to organizational matters, including preliminary discussions of the Committee's mission, decisions on process and methodology, and adoption of the schedule of meetings listed above.
- At the March meeting, the Committee reviewed and discussed the advantages and disadvantages of the major methods used for judicial selection in the United States, including:
    - partisan election;
    - nonpartisan election;
    - gubernatorial appointment without nominating commission input;
    - gubernatorial appointment with nominating commission input;
    - legislative appointment;
    - hybrid systems employing cumulative voting; and
    - hybrid systems employing judicial subdistricts.

- During the March meeting, the Committee received reports from the Chair and the Reporter on the proceedings at the American Judicature Society's CONFERENCE ON CHOOSING OUR JUDGES: A NATIONAL FORUM ON JUDICIAL SELECTION, conducted in Washington D.C. on March 3-4, 2000 and attended by the Chair and the Reporter. The Committee also discussed in general terms the history of judicial selection in Wisconsin and the requirements of the Wisconsin constitution.

- At the April meeting, the Committee was benefited by the appearance of Attorney William Curran of Mauston, Chairman of the Governor's Judicial Selection Advisory Council, and of Racine Attorney Judith Hartig-Osanka, a member of the Governor's Council. Chairman Curran and Attorney Hartig-Osanka provided much valuable information to the members of Committee during their two-hour appearance. The Committee gratefully acknowledges their assistance.

- On May 19, 2000, the Committee conducted a public forum at Marquette University's Alumni Memorial Union. Notice of the forum was widely disseminated, including but not limited to members of the news media, members of the legislature, members of the judiciary, the state and local bar associations including minority bar associations, and others. Members of the public were invited to appear and testify before the Committee.

- The following witnesses appeared and testified over a period of the four and one-half hour forum.[8]
  - State Senator Gary George
  - State Senator Alberta Darling
  - State Representative Pedro Colon
  - State Representative Scott Walker

[8] The Reporter's abridgement of the testimony of the witnesses is attached to this Report as Appendix B.

- Mr. Seth Andersen, Director of the American Judicature Society's Hunter Center for Judicial Selection
- Attorney Leonard Loeb, President of the State Bar of Wisconsin
- Attorney Hannah Dugan, President of Milwaukee Bar Association
- Mr. Edward Kawczynski, Assistant Dean for Admissions of Marquette University Law School
- Milwaukee County Circuit Judge Elsa Lamelas
- Wisconsin Court of Appeals Judge Richard S. Brown
- Milwaukee County Circuit Judge Mary Kuhnmuench, testifying on behalf of the Wisconsin Trial Judges Association
- Attorney Margaret Akulyo Asterlin, president of the Wisconsin Hispanic Lawyers Association
- Attorney Gregory Wesley, Wisconsin Association of Minority Attorneys
- Attorney Tracy Johnson, President-elect, Wisconsin Association of Minority Attorneys
- Attorney Richard Saks on behalf of the National Association for the Advancement of Colored People

- The June meeting of the Committee was devoted in large measure to a review and discussion of the testimony of the witnesses at the public forum. Based on input from the presenters at the public forum, the Committee incorporated additional areas for research and discussion into its agenda.

- Prior to the July meeting of the Committee, the Reporter prepared and distributed several memos containing racial and ethnic as well as general population demographic data for the state of Wisconsin and those counties with substantial minority populations.[9] The Committee was also presented with a report on the experiences in Cook County, Illinois, with judicial

subdistricting. The report on subdistricting was based in some measure on the testimony of Mr. Seth Anderson of the American Judicature Society's Hunter Center for Judicial Selection at the public forum. The Committee discussed other communications that it had received from Mr. Anderson in its follow-up with him, and considered the data presented at the American Judicature Society's national forum on judicial selection. The Committee also received information on subdistricting for its Report from personnel in the administrative offices of the Cook County circuits courts, and from journalists who provided copies of various Cook County legal and other periodicals on subdistricting and its impact on the composition and quality of the Cook County Judiciary.

- The August and September meetings of the Committee were devoted in very large measure to reviews of research and other materials relating to judicial diversity. The Committee reviewed published research relating to several subjects including: judicial diversity and the impact of selection methods on diversity of the bench; the use of nominating commissions across the nation and in Wisconsin and the conclusions of the research on nominating commissions.

- At the October meeting, the Committee reviewed a preliminary draft of its tentative findings and proposed recommendations. The Committee continued its discussion on key areas of the preliminary draft report. Various proposals were reviewed on several subjects including the composition and appointment process for members of the nominating commission, amendments to the judicial application process to allow for anonymity during the early phases of the judicial application process, and mentoring programs for potential judicial applicants.

[9] The demographic and other data studied by the Committee appears in subsequent sections of this Report.

- During the November 9, 2000 meeting, the Committee discussed a more complete preliminary draft of its proposals and established areas of findings and recommendations. The Committee reviewed the preliminary draft and made suggestions for changes in format, commented on areas where consensus had been reached, and identified areas where additional research should be included in the Report. The Committee also better defined the areas which should be covered in the report and the submissions to the Committee which should be included in the Appendix to the Report.

II. THE NEED FOR JUDICIAL DIVERSITY

A. NATIONAL INDICATORS

On May 14, 2000, the National Center for State Courts convened at Washington, D.C., a National Conference on Public Trust and Confidence in the Justice System. At the conference, the results of a national survey on public trust and confidence in America's institutions, including community courts, were presented. The survey was sponsored by the National Center for State Courts and funded by the Hearst Corporation. On the issue of fairness, the survey found that only 23 percent of African-Americans believe the court system treats them the same as it does other people, while twice as many Hispanics and whites believe the court system treats them the same as it does other people. On the issue of responsiveness, two out of three African-Americans, a slim margin of Hispanics, and four out of 10 whites believe the courts are out of touch with their communities.[10] Perceptions of equality and fairness of the courts were assessed with seven items addressing the representativeness of juries, the honesty of judges, the attention paid to individual cases, the extent to which the courts protect defendants' constitutional rights, whether rulings are understood, whether court orders are enforced, and court favoritism towards corporations. Among the specific results of the survey were the following:

- Although Whites/Non-Hispanics were almost evenly divided, a majority of African-Americans and Hispanics agreed with the statement "Most juries are not representative of the community.
- As compared to Whites/Non-Hispanics, both African-Americans and Hispanics were significantly less likely to agree with the statement "Judges are generally honest and fair in deciding cases." Indeed, one-third of African-Americans and one-fourth of the Hispanic respondents either strongly

[10] The report and survey results referred to in this section of the Committee's report are available at http://www.ncsc.dni.us/PTC/results/report/htm.

disagreed or somewhat disagreed with the statement. Almost twice as many Whites strongly agreed with the statement as African-Americans.

- Eight-five percent of all respondents agreed that "Courts protect defendants' constitutional rights," but the rate of agreement is lower among African-Americans and Hispanics.
- Whereas a clear majority of respondents in all racial and ethnic groups agreed with the statement "Court rulings are understood by the people involved in the cases," African-Americans were less likely to agree than Whites/Non-Hispanics.
- Two-thirds of the public agreed that "When a person sues a corporation, the courts generally favor the corporation over the person." Indeed, seventy percent of the African-American respondents strongly or somewhat agreed with the statements, compared to 59% of the Whites. Respondents with income less than $10,000 had the strongest agreement with the statement.
- Respondents for the most part thought that people like themselves were treated better (23%) or the same (59%) as other people. Fully eighty percent of respondents, across all racial and ethnic lines, indicated that "wealthy" people get better treatment from the courts. As compared to Whites/Non-Hispanics, African-Americans were significantly more likely to say wealthy people got "Far Better" treatment from the courts. Nearly one-half of all respondents believed that African-Americans and Hispanics were treated worse than other groups. More than two-thirds of the African-American respondents felt that "people like them" are treated worse than other people. Approximately one-third of Hispanic respondents said Hispanics, as a group, received "Somewhat Worse" or "Far Worse" treatment from the courts.
- Almost two-thirds of the African-American respondents and fifty-four percent of Hispanic respondents agreed that "Courts are 'out-of-touch' with what's going on in their communities."

The authors of the Report concluded, in part:

> The negative image of the courts covers issues about access to the courts, the treatment courts give to members of minority groups, and the independence and responsiveness of the judicial branch of government. In terms of access, courts were viewed as too costly and too slow. In terms of fair treatment, juries were regarded as not representative of communities and courts as not giving equal attention to all cases and not ensuring that their orders are enforced. Survey respondents also believed that members of minority groups were treated worse than Whites/Non-Hispanics. African-Americans were clearly estranged from the courts. In terms of independence and responsiveness, judges were perceived as negatively influenced by political considerations and by campaign fund-raising. These views held by respondents in states that appoint judges or use merit selection did not differ greatly from those of respondents in states where judges are selected through partisan elections.

In February, 1999, the American Bar Association Division for Media Relations and Public Affairs published an Executive Summary of a survey and study entitled *Perceptions of the U. S. Justice System.*[11] Among the ABA's findings were the following:

> **Equality of Treatment**
>
> A substantial number of people believe that the justice system treats different groups of people unequally. Only about half of the respondents agree that men and women are treated equally; even fewer believe that among racial or ethnic groups or between wealthy and poor people the treatment is equal. In fact, if the data are analyzed by sub-groups, those differences become even more pronounced. People who are <u>less</u> likely to

[11] This document is available on the ABA Web site at www.abanet.org/media/perception/home.html. The Executive Summary is reprinted in PUBLIC TRUST AND CONFIDENCE REPORT, THE WISCONSIN INITIATIVE, OCTOBER, 2000, pp.73-79.

agree that sub-groups are treated equally include women, non-whites, those with lower incomes and less education and those with negative court experiences. These people are the mirror images of those who are more knowledgeable and have more confidence in the justice system – more educated, higher income, white males. Men are more likely and women are less likely to agree that the system treats men and women equally; whites are more likely and non-whites are less likely to agree that the system treats different racial and ethnic groups the same; likewise for the statements about income. This suggests that perceived inequalities still exist. Given this issue's influence on people's confidence, it sorely needs to be addressed.

An important parallel to these results can be seen in the February 1999 issue of the *ABA Journal* entitled "Race and the Law." In a collaborative effort, the *ABA Journal* and the National *Bar Association Magazine* polled 477 white lawyers, 489 black lawyers and 35 lawyers of other ethnic backgrounds. The purposes of this research were to identify lawyers' perceptions of the justice system and to understand *what difference of perception may exist based on race.* The study found that perceptions of racism in the justice system among lawyers of different races are similar to the perceptions among the general population we have discussed above. In some cases, the differences are even larger. It is thus imperative that the issue of inequality be addressed in society as a whole as well as within the legal profession.[12]

[12] The quoted materials may be found at page 78 of PUBLIC TRUST AND CONFIDENCE REPORT, note 6, *supra.*

B. STATE AND LOCAL INDICATORS

Wisconsin has conducted a couple of studies dealing with the public's confidence and assessment of fairness in Wisconsin courts. The most recent study, "Public Trust and Confidence in the Justice System, The Wisconsin Initiative, Action Plan," was released in October 2000.[13] This report is the result of a project of the Office of the Chief Justice of the Wisconsin Supreme Court, the Director of State Courts, the League of Women Voters of Wisconsin, Inc., and the State Bar of Wisconsin. The report contains the result of the committee's three-phase process. The three stages were: researching and identifying issues concerning public trust and confidence; gathering input from public focus groups; and creating a public trust and confidence actions plan.

Although there was no specific survey question or discussion directly addressing the issue of diversity on the Wisconsin courts, the report contains indicators of Wisconsin citizens' perceptions and experiences with the justice system. Although many participants responded that Wisconsin's court system is a fair one, the report contains indications that there are perceptions of problems related to fairness. The greatest areas where participants differed on the issue of perceived fairness involved the issue of race and ethnicity. For example, in one section of the Report several participants remarked that the lack of diversity in Wisconsin may lead to unfair results for women and minorities. Indeed, the very first finding in the Study's Action Plan stated the following:

> Focus group participants said that judges, attorneys, and judicial system personnel who are out of touch with the community are likely to treat people in the system unfairly and unequally because they do not understand lives that differ from their own. People want to feel understood. If more judges and attorneys were active in the community,

[13] *See* PUBLIC TRUST AND CONFIDENCE REPORT, THE WISCONSIN INITIATIVE, OCTOBER 2000, pp.50-51; *see also* PP. 42-43 for overall perceptions.

people in the system would perceive the system as being more relevant and attuned to their lives.

> Participants also said that race and class matter. There is a feeling that it would be difficult, if not impossible, to escape bias in the justice system because bias permeates all levels – law enforcement, attorneys, judges, juries and corrections officials. Not only did some members of the focus groups perceive the system as being unfair, national and state statistics show that members of minority groups are more likely to be arrested than white, and are more likely to be sentenced to prison.[14]

Those same participants suggested among other things that the Committee should "be sensitive to the lack of diversity in Wisconsin and impact of this dearth on jury selection and judges' decisions."[15]

The perceptions and judgments expressed by the focus group participants in the PUBLIC TRUST study appear to be entirely consistent with views reported in both the National Center for State Courts' National Conference on Public Trust and Confidence in the Justice System and in the American Bar Association's study entitled *Perceptions of the U. S. Justice System.* They are also consistent with some of the ideas expressed at the Committee's public forum on May 19, 2000.

In Wisconsin, the overwhelming majority of the population as a whole is predominantly white.[16] However, there are population centers with substantial minority populations, such as Milwaukee County, where almost one-third of the population is minority,[17] and Racine County, where one-fifth of the population is minority.[18]

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[14] PUBLIC TRUST AND CONFIDENCE REPORT, THE WISCONSIN INITIATIVE, OCTOBER, 2000, p. 17

[15] *See* PUBLIC TRUST AND CONFIDENCE REPORT, THE WISCONSIN INITIATIVE, OCTOBER 2000, PP.50-51; *see also* PP. 42-43 for overall perceptions.

[16] *See* Section IVA, *infra* at page __.

[17] *See* Section IVB, *infra* at page ___.

[18] *Ibid.*

Milwaukee County has the most racially and ethnically diverse judiciary in the State of Wisconsin. There are five African-American circuit court judges, one Hispanic circuit court judge, and one Native American circuit court judge. Although Milwaukee County has an African-American population comprising almost 25% of the total population, Milwaukee County's 5 African-American judges comprise less than 11% of the total 47 circuit court judges in the county. Milwaukee County also comprises the entirety of District 1 of the Wisconsin Court of Appeals. None of the four judges on the District 1 bench is a minority. Racine County has no minority circuit court judge among its 10 judges even though it has an estimated 1998 African-American population that comprises 12.3% of the total population and an Hispanic population at 7.1%.

E. FINDINGS

* **FINDING**: Enhancing the racial and ethnic diversity of the Wisconsin judiciary is an important goal, most especially in those judicial circuits and districts in which the population is significantly racially and ethnically diverse.

- **FINDING**: There is clearly both room for and a need for improvement in increasing racial and ethnic diversity on Wisconsin courts.

- **FINDING**: The Committee views it as axiomatic that, in our diverse and democratic society, no branch of our government should be the exclusive preserve of any one racial or ethnic group.

- **FINDING**: Wisconsin's current system of interim appointment/open elections has produced no minority justices on the Wisconsin Supreme Court in 152 years, no minority judges on the Wisconsin Court of Appeals in 22 years, and no minority judges on the circuit court bench in Racine County, the second most populous minority community in the state. According to the information received by the Committee, there have been no minority applicants for vacancies in Racine

County in spite of the fact that a number of qualified African American attorneys currently practice law in Racine County.[19]

- **FINDING**: Even in circuits where there are substantial minority populations, the Wisconsin courts are not racially and ethnically diverse.

* **FINDING**: Judicial incumbency is an asset.

[19] Racine County is the only County, other than Milwaukee County, for which the Committee received reliable historical information of this nature.

III. THE WISCONSIN JUDICIARY: STRUCTURAL AND ELECTORAL DATA [20]

A. SUPREME COURT. The Wisconsin Supreme Court is comprised of seven justices elected to 10-year terms in statewide nonpartisan elections.[21] The justice with the longest service on the court is Chief Justice and the administrative head of the state judiciary.[22] When a vacancy occurs, the governor may make an appointment to fill the vacancy until the next election.[23]

There has never been a member of a racial minority, as that term is defined in Section 560.036(1)(f), Wis. Stats., elected or appointed to the supreme court.

Since 1990, there have been eight supreme court elections. Seven of them were contested. In six of the seven, there was a contest between an incumbent and a challenger. No incumbent lost.[24]

The annual salary of a supreme court justice is $118,824, with an additional $8,000 paid to the Chief Justice as administrative head of the court system.

The cost of supreme court campaigns has risen dramatically in recent years. The 1999 race between the 22-year incumbent, Chief Justice Shirley Abrahamson, and her opponent, Sharren Rose, cost a record high of $1,361,929. Chief Justice Abrahamson reported spending $727,547, of which $93,011 or 13% was her own money and $634,536 or 87% was contributions. Attorney Rose reported spending $634,382, of which

[20] This section of the Committee's Report is taken from an article written by the Committee's research reporter in connection with his work as Reporter and Member of the Wisconsin Supreme Court Commission on Judicial Elections and Ethics. *See* Charles D. Clausen, *The Long and Winding Road: Campaign Ethics Rules for Wisconsin Judges*, 83 Marq. L. Rev. 1, 14-19 (1999).
[21] Wis. Const. Art. 7, sec. 4(1); Wis. Stat. secs. 5.02(21), 5.58 and 5.60 (1998).
[22] Wis. Const. Art. 7, sec. 4(2) and (3).
[23] Wis. Const. Art. 7, sec. 9.

$506,501 or 80% was her own money and $127,881 or 20% was contributions.[25] In Chief Justice Abrahamson's preceding election, in 1989, she was opposed by Court of Appeals Judge Ralph Adam Fine. In that race, Abrahamson spent $209, 485, or 29% of the cost of the 1999 race. In the 1997 race between incumbent Justice Jon P. Wilcox and Milwaukee Attorney Walt Kelly, Wilcox spent $426,458 and Kelly spent $440,892, including $172,500 of his own money. Contributions and expenditures and other data respecting supreme court races during the last ten years are reflected in tables reproduded in Appendix G.[26]

Of the seven justices currently on the court, four were originally appointed by a governor. Chief Justice Abrahamson was appointed by Governor Patrick Lucey in 1976. Justice David T. Prosser, Jr. was appointed by Governor Tommy Thompson in 1998, succeeding Justice Janine P. Geske, also appointed to the court by Governor Thompson in 1993. Justice Jon P. Wilcox was originally appointed to the court by Governor Thompson in 1992. Justice Donald Steinmetz' resignation at the end of the 1998-1999 led to the appointment of Justice Diane S. Sykes by Governor Thompson.

B. COURT OF APPEALS. The Wisconsin Court of Appeals is a unitary court with 16 judges serving in four districts[27]. District I, with 4 judges, is comprised solely of Milwaukee County and sits in the city of Milwaukee.[28] District II, with 4 judges, includes 12 southeastern counties.[29] Its chambers are in Waukesha and it sits there and in

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[24] *Wisconsin's Courts*, 67 The Wisconsin Taxpayer 10 (June, 1999).

[25] Richard P. Jones, *Supreme Court Race Crushed Old Spending Mark, Report Says*, The Milwaukee Journal Sentinel, July 22, 1999 at 2B.

[26] Except for the 1999 data, the data compilations in the table were assembled by researchers for Wisconsin Citizen Action and are reported in WISCONSIN CITIZEN ACTION, COURTING THE SUPREMES: BIG MONEY IN WISCONSIN STATE SUPREME COURT ELECTIONS 1989-1999 (April,1999). The report was written by Roger Bybee with the assistance of David Julseth, a researcher for the Wisconsin Cooperative Campaign Database. The researchers restricted their data to election years running from July 1 of the year preceding the Spring election to June 30 following the election. The data were derived from reports filed with the State Elections Board. The report was published before the final reports for the Spring, 1999 election were filed. Those data, and computations base on them, have been supplied by the author. Copies of the Wisconsin Citizen Action report are on file with the author and with the Marquette University Law Review.

[27] Wis. Stat. sec. 752.03 and 752. 11 (1998).

[28] Wis. Stat. sec. 752. 13 (1998).

[29] Wis. Stat. sec. 752.11(1)(b) (1998).

Fond du Lac and Racine.[30] District III, with 3 judges, includes 35 counties in the northern half of the state.[31] Its chambers are in Wausau and the court sits also in Eau Claire, Superior, and Green Bay.[32] District IV, with 5 judges, includes 24 central and southern Wisconsin counties.[33] The District IV chambers are in Madison; it also sits in LaCrosse and Stevens Point.[34]

Court of Appeals judges are elected to six-year terms in district-wide, nonpartisan elections.[35] As with the supreme court, only one election per year may be held in each district.[36] The governor may appoint judges to fill vacancies pending the next election.[37]

As of October 8, 2000, the salary of a Court of Appeals judge is $112,100.

Between 1990 and 1998, there were 26 court of appeals elections. In 20 of them, an incumbent ran and in only 2 of the twenty was there a challenger. In the six races in which there was no incumbent on the bench, in four there was only one candidate. Thus, only 15% of the court of appeals elections were contested.

There has never been a member of a racial minority, as that term is defined in Section 560.036(1)(f), Wis. Stats., elected or appointed to the court of appeals.

C. CIRCUIT COURTS. Wisconsin has 72 counties.[38] Sixty-six of the counties represent individual judicial circuits.[39] Three circuits combine two counties into one circuit: Buffalo-Pepin[40], Florence-Forest[41], and Menominee-Shawano.[42] As of August 1,

[30] Wis. Stat. sec. 752.15 (1998).
[31] Wis. Stat. sec. 752.11(1)(c) (1998).
[32] Wis. Stat. sec. 752.17 (1998).
[33] Wis. Stat. sec. 752.11(1)(d) (1998).
[34] Wis. Stat. sec. 752.19 (1998).
[35] Wis. Stat. sec. 752.04 (1998).
[36] *Id.*
[37] Wis. Const. Art. 7, sec. 9.
[38] Wis. Stat. ch. 2 (1998).
[39] Wis. Stat. sec. 753.06 (1998).
[40] Wis. Stat. sec. 753.06(7)(a) (1998).
[41] Wis. Stat. sec. 753.06(9)(c) (1998)

2000, the 69 circuits have 241 judges.[43] Thirty circuits have one judge.[44] Thirteen circuits have two judges.[45] Nine have three judges.[46] Five have four judges.[47] Two have five.[48] One has six.[49] Three have seven.[50] Brown County has eight. Racine County has 10. Waukesha County has 12. Dane County has 17 and Milwaukee County has 47.

There are three Hispanic circuit judges in Wisconsin, one each in Milwaukee, Waukesha, and LaCrosse counties. There are six African-American circuit judges in the state, five in Milwaukee County and one in Dane County. There is one Native American circuit judge in the state, serving in Milwaukee County.

Circuit court judges are elected to six-year terms[51] in nonpartisan elections within the circuits, and with the governor able to fill vacant unexpired terms by appointment.

Between 1990 and 1998, there were 381 circuit court elections in Wisconsin.[52] In 325 of these, there was an incumbent on the ballot. In 282 of these 325 elections, the incumbent had no opponent. In 43, the incumbent's re-election was contested. In 56 elections, there was no incumbent on the ballot. In 14 of these elections, there was only one candidate; in 42, the election was contested.[53]

As of October 8, 2000, the salary of a circuit court judge is $105,755.

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[42] Wis. Stat. sec. 753.06(9)(h) (1998).
[43] Wis. Stats. sec. 753.06 (1998). *See also Wisconsin's Courts*, The Wisconsin Taxpayer, June, 1999 at 10. The same sources were used for notes 59 through 65 and accompanying text.
[44] Wis. Stat. sec.753.06 (1998)
[45] Barron, Chippewa, Door, Douglas, Dunn, Grant, Marinette, Monroe, Oconto, Oneida, Polk and Waupaca counties and the combined Menominee-Shawano circuit .
[46] Columbia, Dodge, Jefferson, Manitowoc, Ozaukee, Portage, St. Croix, Sauk and Wood counties.
[47] Fond du Lac, LaCrosse, Marathon, Walworth, and Washington counties.
[48] Eau Claire and Sheboygan counties.
[49] Winnebago County.
[50] Kenosha, Outagamie, and Rock counties.
[51] Wis. Stat. sec. 753.01 (1998).
[52] *Wisconsin's Courts*, The Wisconsin Taxpayer, June, 1999 at page 10.
[53] *Id.*

The cost of an electoral campaign for a circuit court seat is substantial. The Committee reviewed financial data related to contested circuit court elections in certain counties with substantial minority populations: Milwaukee, Racine, Kenosha, and Dane Counties. The data were collected from reports filed with the State Elections Board. Because not all of the files appeared to be complete at the time of the inspection, and because different filers used different methods of providing the information required to be filed, some desired data could not be obtained. Nonetheless, the data that was available clearly revealed that running in a contested election for a circuit court seat in an urban county can be very expensive, indeed probably prohibitively expensive for many potential candidates.

The Milwaukee County figures are especially interesting, since Milwaukee County has by far the largest number and percentages of minority citizens in Wisconsin. There were 17 contested circuit court races in Milwaukee County between 1992 and 1999, including two in which the only opposition was a write-in candidate. In 13 of the 17, the candidate who outspent the opposing candidate won the election. The combined total of funds contributed or lent by the winning candidates to their own campaigns was $1,102,673, for an average of $64,863. Omitting the top three and the bottom three self-funders to reduce distorting effects still leaves a total of $554,071, and an average of $50,370. The losing candidates (excluding the write-ins) provided a total of $521,981 to their campaigns, or an average of $34,800. Reducing the top and bottom three self-funders produces a total of $111,813 and an average of $12,424.[54]

The Supreme Court Commission on Judicial Elections and Ethics, in its Final Report to the Court dated June 4, 1999, addressed the issue of public financing of judicial elections as follows:

> The cost of statewide races has escalated dramatically over the last several elections, almost certainly exceeding $1 million for the last race and $867,000 for the preceding race. This fact places enormous strain on the

[54] A table outlining Milwaukee Circuit Court contested campaign costs is found in Appendix G.

> candidates and their committees and other supporters to raise money from all available sources: personal resources, individual contributors (many of whom will be lawyers), and interest groups. The fundraising inevitably raises questions of bias and partiality and judicial independence which tend to undermine public confidence in the integrity of judicial officers and judicial process. The potential of independent expenditures by special interest groups, some of them single issue advocacy groups, creates additional financial challenges for judicial candidates, especially at the state-wide level. Court of Appeals races are not so expensive as supreme court races, but candidates for these judgeships must contend with escalating costs of media in high population areas, the costs of campaigning in many different counties, or both. The need for public financing at the state-wide level is perceived by a majority of the commissioners to be immediate and urgent. For the reasons stated above and in the following paragraph of this report[55], the majority of the commissioners also believe that serious consideration should be given to public financing of all judicial campaigns for courts of record.[56]

The Committee also noted that the 1999 Bench-Bar Survey conducted by the State Bar of Wisconsin reported that 71% of the judges and lawyers surveyed disagreed at least to some extent with the proposition that the current system of campaign financing for judicial elections is acceptable. Indeed, only 9% of the respondents strongly agreed with the proposition. Respondents in Dane and Milwaukee counties were less supportive of the current system than respondents in the other counties.[57]

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[55] The following section of the Report, which recommended that the Code of Judicial Conduct should contain special rules regarding campaign financing for judicial elections, stated, in relevant part:

> The Commission notes, with regret, that across the nation and in Wisconsin, judicial election campaigns are becoming more expensive, more combative, and more driven by professional media and political consultants. The need to raise money to finance a contested judicial election is, for most judges at least, a curse. Soliciting money from others, most of whom will be lawyers who practice in the court to which the candidate seeks election, inevitably compromises the judicial candidates' appearance of independence. . . Candidates for legislative and executive offices are free to raise money from contributors with relative freedom from reputational harm and accusation of impropriety. Indeed, the ability to generate broad-based financial support for from the electorate may be considered a sign of widespread public approval of a partisan candidate. Judges are in a different position. They cannot realistically expect to generate broad public financial support for judicial campaigns. . . As a practical matter, the judge's campaign treasury must be nourished mainly by the judge's own funds and by funds contributed by those with a professional interest in the administration of justice, i. e., mostly lawyers.

See Appendix B to Charles D. Clausen, *The Long and Winding Road: Campaign Ethics Rules for Wisconsin Judges*, 83 Marq. L. Rev. 1, 85-86 (1999).

[56] *Id.*

[57] The 1999 Bench-Bar Survey: Final Report was prepared for the State Bar of Wisconsin in August,1999, by Gene Kroupa & Associates, Madison, Wisconsin.

Just this month, i.e., in December, 2000, chief justices and other knowledgeable participants met in Chicago to discuss the challenges of campaign financing for judicial campaigns.[58] Indiana University Professor Charles Gardner Geyh reported at the conference and opined that public financing may be more important for supreme court races than for legislative races. "Because virtually any external influence over a judge's independent decision-making is inappropriate, the need to immunize judges from the influence of - and the appearance of the influence of- campaign contributions may be all the more pressing," he said. Professor Geyh specifically studied Wisconsin's public financing system. Wisconsin is the only state to underwrite in part judicial campaigns. He noted that the system is ailing:

> [T]axpayer participation in Wisconsin's $1 income tax check-off system, which funds public campaign grants, dipped from 20% in 1979 to 9% in 1998. As a result, Supreme Court candidates in Wisconsin who abide by the $215,000 spending cap get about $13,500 in public financing, far short of the $97,000 grants authorized by the program. That reduces the incentive for candidates to accept the caps.
> . . .
> Jay Heck, executive director of Common Cause in Wisconsin, said last month's advisory referendum in 59 counties calling for campaign finance reform will give public financing a boost. "People are willing to provide public money to keep the judiciary independent," Heck said. "I hope it doesn't take a Michigan for the Legislature and the governor to bite the bullet on that.[59]

The data in the table showing campaign cost data for contested circuit court campaigns in counties with high minority populations suggest that the need for adequate public financing of judicial races is not restricted to state-wide races.

D. MUNICIPAL COURTS. Wisconsin has 217 municipal courts, with 22 courts serving from two to thirteen communities.[60] With the exception of Milwaukee and Madison, municipal court judgeships are part-time employments. Milwaukee has three

[58] *See* Dennis Chaptman, "Process of Electing Judges Debated," Milwaukee Journal Sentinel, December 10, 2000, obtained from On Wisconsin, JSOnline, News, Wisconsin.
[59] *Id.*

full-time municipal court judges and five part-time commissioners.[61] Of the 217 municipal court judges, 117 are non-lawyers.[62] Salaries, job descriptions, and terms of office are decided by the municipalities that create the municipal courts.[63] Municipal judges are elected in nonpartisan elections.

The Committee has no data on the racial/ethnic composition of the state's municipal judges.

E. FINDINGS AND RECOMMENDATION

* **FINDING**: In contested races, campaign financing may be a major challenge or impediment to winning an election, especially in Milwaukee County where the average amount provided by judicial candidates to their own campaign cost in contested elections between 1992 and 1999 was $64,863, a prohibitive sum.

* **FINDING**: There is no known data on the racial and ethnic composition of judicial and quasi-judicial positions in Wisconsin other than in courts of record, including the state's municipal judges, administrative law judges, judicial court commissioners, and court commissions.

* **RECOMMENDATION**: We recommend that the legislature research public funding options for judicial elections to address the high costs incurred in contested elections in the Circuit, Appellate, and Supreme Courts.

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[60] *Id.* at 6.
[61] *Id.*
[62] *Id.*
[63] *Id.*

IV. WISCONSIN RACIAL/ETHNIC DEMOGRAPHIC DATA

A. RACIAL COMPOSITION OF THE STATE. On a statewide basis and in all of the 72 counties, whites predominate as a census group. In the 1990 census, whites constituted 93% of the total population. Non-Hispanic whites constituted 91.3%. Those percentages are reduced slightly in the 1998 estimates to 92% and 89.7%, respectively. The largest minority group is blacks with 5% of the state's population in 1990 and 5.5% in 1998. The next largest is Hispanic (who may be of any race): 1.9% and 2.5% for 1990 and 1998, respectively.[64]

B. RACIAL COMPOSITIONS OF COUNTIES. Minorities are not uniformly located throughout the state. Milwaukee County, a 47 branch circuit, has the highest percentage of minority residents of all the counties, 27.1% and 32.8% for 1990 and 1998, respectively. Racine County, a 10 branch circuit, had a population comprised if 15.5% minorities in 1990 and an estimated 20.1% in 1998. In terms of percentage minority population, the next closest county appears to be Sawyer County, a single judge circuit, whose large Native American population accounts for a minority percentage of 15.8% in 1990 and 17% in 1998.

In the 1990 census, 80% of the state's total black population resided in Milwaukee County and comprised 20.5% of the county's total population. In the 1998 estimates, those figures are 76% and 24.2%, respectively. Milwaukee also has a large percentage population of Hispanic residents, 4.6% in 1990 and 6.33% in 1998.[65]

[64] A table detailing the racial composition of the state is found in Appendix G.
[65] A table detailing the racial composition of Milwaukee County is found in Appendix G.

Racine County has a large minority population, both in terms of absolute numbers and in terms of percentages. Of the total population in 1990, 15.5% were minorities. The figure for 1998 is 20.2%.[66]

Kenosha County, a 7 branch circuit, had a 1990 minority population of 11,873, 9.1% of the total. In 1998, the figures were 17,682 and 12.2%.[67]

Dane County, with 17 circuit court branches, had a minority population of 25,769, or 7% of the total, in 1990. The estimated numbers for 1998 are 38,811 and 9.1%.[68]

Rock County, a 7 branch circuit, had a minority population of 7% in 1990 and an estimated minority population of 9.1% in 1998.[69]

Waukesha County, a 12 branch circuit, is estimated to have experienced substantial growth in the Hispanic, black, Asian/Pacific Islander, and American Indian populations, but like most Wisconsin counties, it remains quite predominantly non-Hispanic white.[70]

Brown County, Eau Claire County, Jefferson County, La Crosse County, Marathon County, Outagamie County, Ozaukee County, Sheboygan County, Walworth County, Washington County, Winnebago County, and Wood County all fall in the mid to high 90% range with respect to non-Hispanic white populations.

[66] A table detailing the racial composition of Racine County is found in Appendix G.
[67] A table detailing the racial composition of Kenosha County is found in Appendix G.
[68] A table detailing the racial composition of Dane County is found in Appendix G.
[69] A table detailing the racial composition of Rock County is found in Appendix G.
[70] A table detailing the racial composition of Waukesha County is Found in Appendix G.

B. FINDING AND RECOMMENDATION

- **FINDING**: The racial and ethnic composition of Wisconsin counties is significantly different from county to county.

- **RECOMMENDATION**: Such wide variations and differences among the counties in racial and ethnic composition should be taken into account in developing programs to address diversity on Wisconsin's courts.

V. REVIEW OF SIGNIFICANT RESEARCH ON EFFECT OF SELECTION METHOD ON JUDICIAL DIVERSITY

A. **OVERVIEW OF FINDINGS.** The principal researchers on the effect of selection methods on judicial diversity appear to be Nicholas O. Alozie of the University of Texas at Dallas and Professor Kevin M. Esterling of the University of Chicago working in collaboration with Mr. Seth Anderson of the American Judicature Society. Professor Alozie has published three pertinent studies on the subject; Professor Esterling and Mr. Anderson have published the most recent study. These studies appear to be highly pertinent to the legislature's charge to the Committee to "study judicial subdistricts and other methods of judge selection that would result in increased racial and ethnic diversity of the judges in the courts." The Alozie studies suggest that there is no significant correlation between different judicial selection methods and degree of diversity on the bench. "Rather, the overwhelming factor is the percentage of black lawyers among all lawyers in the state."[71] The Esterling/Anderson study suggests that overall, merit selection commissions clearly tend to affirmatively select minority applicants as nominees for judicial vacancies, but that many governors tend to select against minority applicants when choosing for the lists. This is to say that changing from an elective system to a nominating commission system would not necessarily lead to increased diversity. The Esterling/Anderson study also demonstrates, however, that more diverse commissions attract more diverse applicant pools and produce more diverse nominee lists.

[71] Nicolas O. Alozie, *Black Representation on State Judiciaries*, 69 Social Science Quarterly 979, 985 (1988). As the title suggests, this study focused on black judges, not more broadly on minority judges. The Alozie conclusions are supported by Esterling and Anderson: "The general tenor of the empirical literature is that the different judicial selection systems, whether competitive elections or some form of appointment, tend to promote (or hinder) women and minority jurists at equal rates. This literature also finds that the proportions of African-American and women lawyers in a particular jurisdiction have much more bearing on success rates in attaining judicial office irrespective of the selection system in place." Kevin M. Esterling and Seth S. Andersen, *Diversity and the Judicial Merit Selection Process*, note 50, *infra*, at 6,

B. NICHOLAS ALOZIE FINDINGS

1. **OVERVIEW**. In his 1988 article, *Black Representation on State Judiciaries*,[72] Professor Alozie wrote:

> A fundamental challenge for American democracy is to guarantee that Americans who were disfranchised in the past now have access to important decision-making positions. Indeed, any public policy that inhibits the access of women, blacks, and other minorities to such positions is likely to be challenged. Such challenges are part of the current debate over the degree to which different methods of selecting judges within states account for differences in the racial composition of the bench.
>
> If we compare blacks' representation among U. S. lawyers (2.7%), the group from which most judges are selected, with blacks' representation on state judiciaries (3.8%), blacks are actually over-represented as judges, though clearly underrepresented in proportion to their 12 percent share of the U. S. population.
>
> This research examined whether methods of judicial selection accounted for the differential distribution of black judges in the states. With analytical models that explained interstate variation in the percentage of black judges among all judges, the study established that the most important factors in the differential distribution of black judges among the states are not differing methods of judicial selection as has been suggested

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citing Jenkins, *Retention Elections : Who Wins When No One Loses,* 61 Judicature 79 (1977) *et al.*

> by past studies [citations omitted]. Rather, the overwhelming factor is the percentage of black lawyers among all lawyers in the state. This conclusion has a profound implication for judicial reform in the states. Blacks will not increase their share of judgeships in the states by working to institute any particular method of judicial selection. Instead, increases in their share of judgeships will come from increasing blacks' share of state lawyer populations, the pool from which state judges are selected.[73]

In his 1990 article, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*,[74] Professor Alozie studied the effects of judicial selection methods, electoral power, and intergroup competition on the achievement of judicial office by women, blacks, and Hispanics. Starting with a citation to his earlier study focusing on black judges, he wrote:

> A recent multivariate analysis of the impact of various judicial selection procedures on black representation on state judiciaries indicates that judicial selection methods failed to contribute significantly to interstate differentials on black representation in the judiciary. . . . Indeed, the most important correlate of black representation was the proportion of black lawyers among all lawyers in a jurisdiction.
>
> Does this pattern hold for other underrepresented groups such as women and Hispanics? Because of the perceived linkage between the politics of racism and sexism, this is an important question with policy and theoretical implications. In fact, many current efforts to increase women and minority representation on state judiciaries focus on blanket policies for all three of the groups, interweaving the politics of women, blacks, and Hispanics. Based on the affirmative action literature, some have

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[72] Note 1, *supra.*
[73] Alozie, note 10 *supra,* at 679, 685.
[74] 71 Social Science Quarterly 315 (1990)

speculated that there could be zero-sum trade-offs in the achievement of judicial office among the three groups. Yet, it remains unclear whether they should be treated monolithically. Hence, this paper extends the analysis for blacks to women and Hispanics.

2. "**DISCUSSION AND CONCLUSION"** *from* **Alozie article**

Judicial selection methods alone do not explain differential representation of women, blacks, and Hispanics on state judiciaries. The analysis found weak disparity for women between legislative election and nonpartisan election, but that finding is hardly supportive of the view that judicial selection methods hold the key to women's patterns of representation on state judiciaries. [Citations omitted.]

The failure of judicial selection methods to explain the differential distribution of women, black, and Hispanic judges challenges yet another theory. Dunn (1981) found that nominating commissions in merit selection jurisdictions consist predominantly of white males. Since members of judicial selection commissions do not stand for election, and therefore are not directly accountable to the electorate, some have speculated that they would feel it unnecessary to have women and ethnic minorities in the judiciary. In support of this contention, a Missouri Bar Committee set up in 1985 to study ways of improving the Missouri Plan proposed that the governor give more consideration to the appointment of women and minorities as lay members of the nominating commission (Missouri Bar Special Committee, 1986) In short, at minimum these groups would not benefit in merit selection jurisdictions, and at maximum they would be worse off. These results do not support that contention; they are equally underrepresented across selection jurisdictions.

The results of the study are also inconsistent with the thesis that a positive relationship would exist among judicial representation, appointment systems, and electoral power. Some have made the rather appealing argument that state governors will appoint more minorities to the judiciary as a means of appeasing minorities and capturing their votes. This study found no systematic support for that contention. For Hispanics, in fact, the opposite is the case. In both the interactive and simultaneous equation models the first-order interaction of Hispanic voters and the partisan election system maintained a strong positive effect on Hispanics' share of state judgeships. This means that the higher the Hispanic share of votes the more likely Hispanics are to be better represented on the judiciary in partisan election jurisdictions.

Black voters do not show such a strength. It is conceivable that this variation in the effects of black and Hispanic voters stems from name identification. Champagne (1986) suggested that, absent all other information about specific judicial candidates, the uninformed voter in a voting booth leans toward party affiliation and the ethnicity of the candidate, which is suggested by the candidate's name. Ethnic voters, on the average, can recognize Hispanic names on election ballots (e.g., Raul Gonzalez for the Texas Supreme Court). There is no way of knowing if other candidates are black or white. For blacks wishing to vote along ethnic lines, then, prior knowledge of the ethnicity of candidates on the ballot becomes fundamental.

The implication of this variation between the effects of black and Hispanic political power on the selection process is instructive. It contradicts Crockett's (1975) suggestion that instituting a partisan election system will increase ethnic minority representation in state judiciaries. In fact, his claim was made specifically with respect to blacks. This study

shows, however, that while Crockett's claim would be a viable option for Hispanics, it will not be a proper recourse for blacks.

What this means, of course, is that blacks and Hispanics may rationally choose to pursue different policy alternatives in their attempts to increase their representation on state judiciaries, though their efforts are more likely to continue to be of a coalitional nature. If blacks and Hispanics were forced to give priority to one policy objective in order to improve their representation on the bench, however, the major goal for both groups might well be to increase their respective shares of states' lawyers. The significant, positive effects found in this study between both groups' shares of states' lawyers and their shares of state judgeships make this a rational coalitional goal. Beyond that, there is also the added attraction of the finding that the achievement of judicial office by one group does not retard the access of the other group. This means that blacks and Hispanics can engage in such a joint effort without the kinds of concerns an alternative finding would have posed.

Professor Alozie's 1996 article, *Selection Methods and the Recruitment of Women to State Courts of Last Resort*,[75] was a study of the question whether judicial selection systems influence the gender composition of state courts of last resort. The results of the study indicated no significant selection-induced disparities in women's service.

C. ESTERLING/ANDERSON FINDINGS

1. Overview. The Esterling/Anderson study, Diversity and the Judicial Merit Selection Process,[76] addresses the question whether so-called merit selection tends to promote a diverse judiciary. They wrote:

[75] 77 Social Science Quarterly 110 (1996)
[76] This is a paper prepared for presentation at the annual meetings of the Midwest Political Science Association, Chicago, Illinois, April 15-17, 1999.

On the trial court level, African-Americans indeed have made recent gains through the elective process – especially in those states and localities that have created judicial subdistricts for the purpose of increasing the diversity of the bench. A review of the existing literature on the comparative effects of selection systems on diversity shows, however, that there are no substantive or significant differences in the rate at which different selection systems promote women and minority jurists. The general tenor of the empirical literature is that the different judicial selection systems, whether competitive elections or some form of appointment, tend to promote (or hinder) women and minority jurists at equal rates . . .

There are a few studies showing positive differences between selection systems, but these results are contradictory. . .

In perhaps the most systematic research on the effect of selection systems on diversity, Alozie (1988, 1990, and 1996) finds that it is *only* the size of the eligible pool of women and minority lawyers, cross-sectionally, that has an effect on the percentage of African-American judges in a state. . .

1. "DISCUSSION AND CONCLUSION" *from* Esterling/Anderson study.

The overall pattern that emerges from our descriptive findings suggest that merit selection in practice promotes women and minority jurists, although at substantively small marginal rates. Rarely does the process overall *disfavor* women and minorities as, in the absence of data, some have feared. . . [M]erit selection nominating commissions either promote minority and women applicants as judicial nominees, or operate without regard to race, ethnicity, or gender. This suggests that having a commission in place to constrain the governor's choices ultimately tends to improve diversity on the bench relative to governors acting alone. This is a significant finding given that the vast majority of judges in even elective states are selected through gubernatorial interim appointments.

Of course, as Ashman and Alfini write, even if it were shown that merit selection does not promote women and minority jurists, this would "indict the selection of the commission members themselves more than the actual operation of the nominating commission as a mechanism." (1974:69). Or as the Walsh Commission writes, an ideal commission "will minimize the influence of partisan considerations by providing: a wide range of input sources for commission membership, a deliberate weighting of membership to prevent domination by the bar, and an affirmative insistence that the commissions be broadly representative of the people of the state. (Walsh Commission 1996:29) To this end, we examined the effect of diversifying the nominating commissions on the diversity of the applicant pools and nominee lists. We found relatively clear evidence in Alabama that diverse commissions tend to propose more diverse nominees, and in New Mexico that more diverse commissions tend to attract more diverse applicants and produce more diverse lists. This suggest that, until women and minority groups are better represented in the

state bar, increasing the diversity of nominating commissions will assist in the goal of increasing the diversity of merit-selected benches.

D. FINDING AND RECOMMENDATION

- **FINDING**: The published empirical research suggests that simply changing from one method of judicial selection to another, i.e., from an elective to an appointive system or vice versa, should not be expected by itself to yield a more diverse judiciary.

- **RECOMENDATION**: Any proposed change from one method of judicial selection to another should be coupled with other positive efforts to recruit and appoint minority candidates to the bench.

VI. JUDICIAL SUBDISTRICTS

The Committee recognizes that establishing subdistricts in Wisconsin would require an amendment to the Wisconsin Constitution.[77] There are relatively few Wisconsin counties that have sizable minority populations and multi-branch judicial circuits. Because Milwaukee County has by far the largest minority population in the state, both in terms of absolute numbers and percentages, the Committee focused much of its attention on that county. The Committee studied demographic data, election results, and other information in coming to conclusion that subdistricting would not likely result in a significant increase in minority representation on the bench. In addition to this baseline concern, the Committee was of the opinion that subdistricting one or more counties (1) would require amendment of the Wisconsin Constitution, and (2) would have the potential of increasing the politicization of judicial elections, and (3) might lead to across-the-board diminution in the qualifications of judicial candidates.

A. THE COOK COUNTY EXPERIENCE (1) HISTORY. In 1990, the Illinois legislature created 15 judicial subcircuits in Cook County, comprising the city of Chicago and many of its suburbs.[78] The law took effect with the 1992 elections. The

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[77] Article 7 of the Wisconsin Constitution provides:

> § 6. Circuit court: boundaries. The legislature shall prescribe by law the number of judicial circuits, making them as compact and convenient as practicable, and bounding them by county lines.
>
> § 7. For each circuit there shall be chosen *by the qualified electors thereof* one or more circuit judges as prescribed by law. Circuit judges shall be elected for 6 year terms and shall reside in the circuit from which elected.

Providing subdistricts for court of appeals elections also appears to require a constitutional amendment. Article 7, §5 provides:

> ____For each district of the appeals court *there shall be chosen by the qualified electors of the district* one or more appeals judges as prescribed by law, who shall sit as prescribed by law. Appeals judges shall be elected for 6-year terms and shall reside in the district from which elected. . .

[78] Ill. Stat. Ann., Ch. 705, §35/2f.

purposes of the law were to promote "geographic and ethnic diversity on the [Cook County] bench and help voters cast educated ballots for a handful of [judicial] races instead of a swarm."[79] "Geographic diversity" translates in Cook County to "political diversity" since the city of Chicago has been historically dominated by the Cook County Democratic Party, whereas the suburbs (many of them in any event) tend to vote Republican.[80]

There are 404 circuit court judgeships in Cook County.[81] Full circuit judges in Cook County are elected either countywide or through subcircuits. There are 94 judges who are elected countywide. The 1990 subcircuit legislation provided for 165 "resident judges" who were to be elected from the subcircuits and who would be and are required to live in the subcircuit during their terms of office. Each subcircuit is allotted 11 resident judges (11 resident judges X 15 subcircuits = 165). Through a complicated court conversion scheme, the number of subcircuits has been increased to 167. There are also 123 associate judges and 20 "permissive associate judges." The circuit court judges appoint the associate judges. [82]

Subcircuit boundaries are not congruent with any other political or electoral subdivisions, such as supervisory or aldermanic districts, wards, precincts, towns or cities. Rather, the subcircuits are designated in the statutes by tract numbers. The districts were established shortly after the results of the 1990 census were made available and were designed to comply with the requirements of the federal Voting Rights Act of 1965. Based on the 1990 census, there were 9 predominantly white districts, 4

[79] *Voters and Justices Bypass Subcircuit Talent,* CHICAGO LAWYER, November 1995 at 1.
[80] *Dems Capture Bulk of County's Bench Slots,* CHICAGO DAILY LAW BULLETIN, November 4, 1998 at p. 1. ("Democrats running in the 13 contested countywide races for Circuit court netted at least twice as many votes as their Republican opponents, with one candidate beating the GOP nominee by a 3-1 margin. The margin of victory also was comfortable for the Democrats who won in three of the four contested subcircuit races.")
[81] The data in this paragraph was obtained by reviewing the Illinois statutes and speaking with Ms. Connie Brown, an analyst or "number cruncher" in the Administrative Office of the Illinois Courts.
[82] The process is more like an election. A committee of the circuit court judges reviews the candidates for selection. The committee selects twice the number of candidates as there are available judgeships and submits the names of the selected candidates to all the circuit court judges. The circuit court judges vote for

predominantly African-American districts, and 2 Hispanic districts. Four of the districts are suburban districts which tend to favor Republican candidates.[83]

In 1990 when the subcircuit system was created, each of Cook County's 15 subcircuits would have contained on average 340,336 residents. As of 1998, the estimated number would be 345,979.[84]

Prior to an amendment of the relevant statute in 1997, any candidate for *election* to a subcircuit seat was required to be a resident of the district pertaining to the seat sought, although a candidate for *appointment* to the same seat was not so required. Between 1992 and 1995, the Illinois supreme court filled vacancies in 8 African-American subcircuit seats. The court appointed 8 white males who lived outside the subcircuit boundaries.[85] In 1997, the statute was amended to provide "A person appointed to fill a vacancy in the office of circuit judge shall be, at the time of appointment, a resident of the subcircuit from which the person whose vacancy is being filled was elected if the vacancy occurred in Cook County."[86]

Circuit Court judges all have countywide jurisdiction, whether elected at large or from a subcircuit. Moreover, all circuit judges must run on a countywide retention ballot after 6 years of judicial service.

From 1992 through 1996, 113 judges were elected from the subcircuits.[87] Thirty were African-Americans, seven were Hispanics, thirty-eight were women, and thirty-four were Republicans.

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as many candidates as there are positions open and those receiving the highest number of votes are appointed.

[83] A table based on estimates of the racial composition of Cook County is found in Appendix G.

[84] These numbers are inaccurate insofar as the voting age population of the subcircuits differs from the total population figures. Voting district boundaries are drawn with reference to voting age populations, i. e., those 18 and above.

[85] See note 2, *supra*.

[86] Ill. Stat. Ch 705 §40/2(d).

[87] The 165 resident judgeships have been phased in over a period of years. *See* Ill. Stat. Ch. 705 §40/2(a)(4).

In 1995, the last year for which broad statistics are readily available,[88] the Illinois supreme court filled 30 subcircuit vacancies – three with minorities, two with white women. Fifteen appointments went to sitting associate judges, two of them African-American. The other 15 went to lawyers from Chicago and the suburbs. One of the 15 was an African-American. None of the 30 vacancies was filled with a Hispanic American. Half of the appointees were residents of three subcircuits that border Lake Michigan from Chicago's "Gold Coast" to Glencoe. The order appointing the 30 judges provided that none of them could run for election from the subcircuit, i.e., as a subcircuit candidate. Each had to run in the countywide election.

(2) Diversity Effects. Seth Andersen, Director of the American Judicature Society's Hunter Center for Judicial Selection, reported to the Committee at its public forum on May 19, 2000 that before 1992, there were 44 persons of color on the Cook County bench out of a total of approximately 400. That number increased to 92 in the 1996 election, and has increased further since the 1998 elections and the 2000 primary elections. There appears to be no dispute that the subcircuit system has increased both minority representation on the circuit court bench and Republican representation.

(3) Candidate Qualification Issues. In the minority subcircuits, only 29% of 1994's election winners were recommended by a majority of the bar associations that rated them.[89] In the non-minority subcircuits, 75% of the winners were so recommended and in countywide races, 86% of the winners were so recommended.[90] Six of the 11 judges elected from the predominantly African-American subcircuits in 1994 were "not recommended" by the predominantly African-American Cook County Bar Association. In most of those cases, lower-rated minority candidates beat CCBA-recommended African-Americans.

[88] The statistics are from the Chicago Lawyer article cited in note 2.
[89] Cook County Bar Association, Chicago Bar Association, Chicago Council of Lawyers, and the Women's Bar Association of Illinois.

In the 1996 elections,

> 20 of the 30 African-Americans elected from the subcircuits were not recommended by the Chicago Bar Association. 10 were not recommended by the predominantly African-American Cook County Bar Association, and 12 were not recommended by the Chicago Council of Lawyers.
>
> Low-rated white and Hispanic judicial candidates also have been elected through the subcircuits. Of the nine subcircuit candidates in the March primary who won despite the bar groups unanimously finding them "not recommended" or "not qualified," six were white and three were African-American.[91]

In the 1994 subcircuit primary election, 13 of 49 candidates endorsed by no bar group won; four of 25 endorsed by only one bar group won; nine of 44 endorsed by two bar groups won; and 28 of 47 endorsed by three or more bar groups won. Only 61% of the subcircuit winners in 1994 primary elections were recommended by a majority of the bar groups that rated them. The bar groups were unanimous in their recommendations with respect to 119 of the 165 subcircuit candidates in 1994.

Associate Judges in Cook County are required to have at least 10 years of legal experience to be eligible for selection; circuit judges have no minimum requirement. In the 1996 election, one candidate for a subcircuit seat ran unopposed although she had been admitted to the Illinois bar only since 1994 and had been found "not qualified" by the Chicago Bar Association, the Cook County Bar Association and the Chicago Council of Lawyers. The candidate refused all interview requests during her campaign and declined to identify her practice area.[92] In the 2000 elections, a candidate who was licensed less than 5 years won the Democratic primary for a circuit court seat and was

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[90] The data are from the Chicago Lawyer article cited in note 2.
[91] *Subcircuits Boost Numbers of Black and Hispanic Judges*, CHICAGO LAWYER, May, 1996 at p. 12.
[92] *Seven Panned Candidates Unopposed in November*, CHICAGO LAWYER, October 1996 at p. 5.

unopposed in the general election although she had shunned all the bar associations that engage in ratings.[93]

(4) Politicization; Ward Heelers. Seth Andersen of the American Judicature Society testified before the Committee that the subcircuit system in Cook County tends to create a "local ward type of mentality," a Balkanized atmosphere within the county, with fewer people at the local level having a great deal of power in selecting judges. The April 1998 CHICAGO LAWYER reported:

> The March 17 judicial primary election showed once again that high bar ratings count less than support from ward bosses, a good ballot position, and Irish name or female gender. Democratic party-slated candidates swept 10 or the 13 countywide judicial primary races. . .
>
> All 13 countywide Democratic judicial primary winners had good ratings from most of the bar groups. By contrast, five of the nine winners of Democratic primaries in the subcircuits were found "not recommended" by all the major bar groups who reviewed them for this election. In the subcircuits the party went 4-0 in the races in which the committeemen united behind a candidate. That includes two candidates universally found "not recommended" by all the major bar groups . . .[94]

(5) Commensurability Issues. Cook County's estimated 1998 population of 5,189,689 is less than 1% lower than Wisconsin's 1998 estimated population of 5,233,500. Cook County has 404 circuit court judgeships compared to Wisconsin's statewide total of 240.

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[93] *In the End, It's Ballots – Not Ratings – That Win Races*, CHICAGO DAILY LAW BULLETIN, 'April 22, 2000 at p. 3. Chicago now has an Alliance of Bar Associations for Judicial Screening consisting of the Chicago Bar Association, the Cook County Bar Association, the Illinois State Bar Association, the Women's Bar Association of Illinois, Hispanic Lawyers Association, Puerto Rican Bar Association, Asian American Bar Association, the Decalogue Society of Lawyers, and the Lesbian and Gay Bar Association of Chicago. Ratings are also given by the Suburban Bar Coalition, consisting of five suburban bar groups: West, North, Northwest, South Suburban, and Southwest bar associations. The Civil Justice League also rates judicial candidates. It is a Chicago-based coalition of business, manufacturing, and other interests promoting "tort reform" legislation found unconstitutional by the Illinois supreme court.

For Cook County's "resident" or subcircuit judges, the average population[95] of the subcircuits from which they are elected was 345,979, a population larger than any Wisconsin County except Milwaukee. Indeed, Milwaukee County's population *in toto* is less than the sum of the populations of three of Cook County's 15 subcircuits. Additionally, judges in Cook County are elected in partisan elections, unlike the situation in Wisconsin. Thus, it is at best a difficult leap to generalize from the Cook County experiences to Wisconsin. Nonetheless, the Committee did note some similarities between the Cook County situation and Milwaukee County situation. The Committee also has serious concerns respecting potential increased politicization of the judiciary and potential decreased qualifications of judicial candidates.

High Percentage of Minority Citizens. Cook County's black population was 26% and almost 27% of the total population in 1990 and 1998, respectively. Milwaukee County's black population was 20.5% and 24.2% of the total population in 1990 and 1998, respectively.

Voting Power Dilution. Milwaukee's 1998 black population of 221,299 exceeds the total population of any Wisconsin county except Dane (313,971) and Waukesha (250,974). Notwithstanding a quarter of the total population being black, only 5 of the 47 Milwaukee County circuit judges are black. On the statewide total population/circuit judge ratio, Milwaukee's black population would account for 10 circuit court judges. On the Milwaukee County population/judge ratio, the result would be just under 11 judges.

Increased Politicization? Subdistricting Milwaukee County (or any other county) would significantly reduce the size of the voter base for elections to subcircuit seats. Some benefits might flow from this fact. With fewer candidates on a subcircuit ballot than would be on a countywide ballot, the voters would have a greater opportunity to know the candidates. Campaign costs would also presumably be lower than such costs for

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[94] *Election Day as Usual in Chicago,* CHICAGO LAWYER, APRIL, 1998 at p. 4. *See also Dems Capture Bulk of County's Bench Slots, supra,* note 3.
[95] The data from Illinois is all "total population" rather than "voting age population."

countywide elections. Greater geographical diversity on the bench would be virtually assured. On the other hand, subcircuit candidates may tend to campaign on local or neighborhood "issues" and would almost necessarily seek the political support of local or neighborhood leaders, including alderpersons and supervisors. In terms of judicial function, there would not appear to be any legitimate local or neighborhood issues. Judges, of course, do not represent districts or subdistricts as members of legislative bodies do. *Quaere* whether it is desirable for judges or judicial candidates to seek the support of or be beholden to local power-brokers.

Decreased Qualifications? Restricting the pool of available judicial candidates to those living in certain parts of a county may operate to significantly reduce the qualifications of certain candidates. The Cook County experience is fairly stunning in this regard. As seen in Cook County, the qualification problem is not one restricted to candidates of one race or ethnic background. White, black, and Hispanic candidates adjudged not qualified by the various Chicago-area bar associations were elected to subcircuit seats. It is not reasonably to be expected that highly qualified judicial candidates will be uniformly distributed throughout any given county. Retaining county-wide, at large judicial elections will permit candidates to be drawn from a much larger pool of potentially highly qualified candidates than would be the case with any subdistrict plan.

B. THE LOUISIANA EXPERIENCE. (1) HISTORY. In 1986, a class action was commenced by certain black voters and black lawyers who possessed the qualifications to be elected Louisiana district court, family court, and court of appeals judges. The plaintiffs claimed that the use of multimember districts to elect family court, district court, and court of appeals judges operated to dilute black voting strength in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965. The vote dilution claims were based on *Thornburg v. Gingles*, 478 U.S. 30 (1986). The case was tried on the merits and the United States District Court for the Middle District of Louisiana initially found that the state's entire at-large scheme for judicial

elections violated Section 2. Although minority vote dilution had not been proven in every district, the court enjoined elections for all family, district, and appellate courts until the state system could be revised. The Louisiana legislature proposed a package of constitutional and statutory changes to address the court's ruling, but the voters rejected them.[96]

Thereafter, the district court vacated the statewide injunction on the ground that *Gingles* requires district-by-district findings, and it issued revised findings that eleven districts violated Section 2. For those eleven districts, the court reluctantly concluded that subdistricts must be created to enhance minority judicial candidates' chances.[97] The eleven districts did not include the 23rd Judicial District Court ("JDC")

Both parties appealed, placing at issue the findings of Section 2 violations in some districts and the refusal to enter such findings in others, including the 23rd JDC. Eventually, a settlement was reached calling for revisions of fifteen judicial districts, including the eleven which had been covered by the district court's remedial order for subdistricting and the 23rd JDC. The *Clark* plaintiffs agreed to drop their challenges to the other districts. Obtaining preclearance by the U. S. Attorney General pursuant to Section 5 of the Voting Rights Act was an essential component of the settlement, as preclearance was needed before elections could be held in the judicial districts. Preclearance of the plan was granted. Louisiana Act 780 was the result of the settlement agreement.

Act 780 of the 1993 Regular Sessions of the Louisiana legislature increased from four to five the number of district judges for the 23rd JDC, which covers Ascension, Assumption, and St. James Parishes. In the process, Act 780 created two electoral subdistricts within the district. In the whole district, the population ratio is about 70% white/30% black. Subdistrict one is 75% black, contains roughly 20% of the total

[96] The facts recounted in this section are taken from *Prejean v. Foster*, ___ F. 3d ___ (5th Cir., 2000 WL 1336282, October 2, 2000) and *Clark v. Edwards*, 725 F. Supp. 285 (M. D. La. 1988).
[97] *Clark v. Roemer*, 777 F. Supp. 445, 450 (M.D. La. 1990).

population, and elects one of the five district judges for the 23rd JDC. Subdistrict two is 80% white, contains roughly 80% of the total population, and elects four of the district judges. Alvin Turner became the first African-American judge in the 23rd JDC when he was elected in subdistrict one.

The jurisdiction of the judges elected under Act 780 covers all three parishes in the 23rd JDC. Because of subdistricting, voters in the black subdistrict may only elect one of the five judges and have no right to vote on the other four. Conversely, voters in the white subdistrict may vote for four of the trial judges but not for the fifth one. Any citizen may, however, be a party in the court of a judge, or judges, he has been prohibited from voting on.

In *Prejean v. Foster*,[98] appellants contended that in creating racially identifiable subdistricts for electing trial judges in the 23rd JDC, Act 780 effected an impermissible racial gerrymander. They pointed to the shape of the subdistricts, the racial statistics submitted to the court, the *Clark* litigation history, and the state's Section 5 preclearance *submissions* as direct and circumstantial evidence that race was the "sole and singular" for Act 780. As a result, appellants claimed that Act 780 violates the Equal Protection clause of the Fourteenth Amendment,[99] the Fifteenth Amendment,[100] and Section 2(a) of the Voting Rights Act, 42 U.S.C. § 1973(a). In an opinion written by Circuit Judge Edith H. Jones, the Court of Appeals for the 5th Circuit reversed the District Court's grant of summary judgment to the State of Louisiana, and remanded the case for trial.

(2) CONSTITUTIONAL ISSUES. In *Shaw v. Reno*,[101] the United States Supreme Court held that racial gerrymandering of electoral districts, which involves the "deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes" falls "within the core

[98] Note 75, *supra*.
[99] Amendment XIV, §1: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within is jurisdiction the equal protection of the laws."
[100] Amendment XV, §1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."
[101] 509 U.S. 630, 640 (1993).

of " the Fourteenth Amendment's prohibition of States intentionally discriminating against persons on the basis of race.[102] In *Prejean*, Louisiana argued that its nondiscriminatory intent was clear from an affidavit submitted by Judge Alvin Turner, the first African American judge elected in the 23rd JDC. Judge Turner averred that he submitted his suggested boundaries of the subdistricts to the Louisiana legislature, boundaries which the legislature adopted, not without regard to 'traditional districting principles', but rather simply to accommodate his own candidacy. The 5th Circuit held that Judge Turner's affidavit was not conclusive of the legislature's intent and was insufficient, in itself and in connection with other evidence, to support summary judgment in favor of the state. Indeed, the court rejected all of the state's arguments in support of the district court's grant of summary judgment.

The court's discussion of interplay of 'traditional districting principles' and 'racial gerrymandering' is of particular interest in light of the Committee's mission.

> [T]he district court failed to draw all justifiable inferences in the appellants' favor with respect to the subordination of traditional districting principles such as compactness, contiguity and maintaining communities of interest. [citation omitted] Traditional districting principles are important "not because they are constitutionally required . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." Shaw I, 509 U.S. at 647, 113 S.Ct. at 2827. The district court minimized the appellants' evidence based on Judge Turner's affidavit and the appellants' admission that the subdistricts are "technically compact and contiguous." The court misperceived appellants' position.
>
> At first glance, the shape of the majority-black subdistrict in the 23rd JDC is not as ungainly as the districts in Shaw or Gomillion. But

[102] *Id.* at 642.

> upon closer inspection, the construction of the judicial subdistricts appears problematic. In this respect, the 23rd JDC resembles the Eleventh District at issue in *Miller*: "Although by comparison with other districts the geometric shape of the [district] may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering . . . become much clearer." 515 U.S. at 917, 115 S.Ct. at 2489.
>
> As the district court noted, Act 780 divides its three constituent parishes as well as three municipalities (Lutcher, Donaldsonville, and Gonzales). The majority-black subdistrict, situated roughly in the middle of the district, contains precincts in each of the Parishes and each of the municipalities. Several parts of the subdistrict protrude out to include predominately black populations. For example, the "Lutcher thrust"is a thin, finger-like extension that, at its tip, encompasses part of the city of Lutcher. Although the population of Lutcher is roughly 50% black, the portion of Lutcher included in the majority-black subdistrict is 99.4% black. Similarly, in Ascension Parish the majority-black subdistrict incorporates only part of the city of Donaldsonville, but that portion contains a 79% black population, compared to about 59% black citizenry of Donaldsonville. The City of Gonzales allocated to the black subdistrict is 62% black.
>
> The splitting of communities also affects the majority-white subdistrict. . .

The Fifth Circuit also rejected Louisiana's argument that, even if the District Court erred in concluding that the establishment of the subdistricts was racially motivated, the court correctly concluded that the state had met its burden of justifying

race-based districts. Part of the court's reasoning addressed the state's interest in linkage between judicial offices and the citizens over whom the judges preside.

> The appellants' . . . argument why the state had no strong basis in evidence or reasonable fear that it faced Section 2 [of the Voting Rights Act] liability is far more persuasive. They point to the state's interest in "linkage" between judicial offices and the citizens over whom the judges preside. Linkage, embodied in district-wide elections, promotes the actuality as well as perception of judicial impartiality and responsiveness to all citizens of the district. Subdistricts, on the other hand, can render judges vulnerable to insular prejudices of their constituents or to targeted attacks by powerful interest groups. Indeed, racial subdistricts tend to limit rather than extend the influence of minority voters for whom such districts are ostensibly created. *Houston Lawyers* found the state's interest in linkage relevant to the totality of the circumstances aspect of the test for Section 2 liability and suggests that the interest may possibly "preclude a remedy that involves redrawing or subdividing districts. . . " *Houston Lawyers*, 501 U.S. at 426, 111 S.Ct at 2381. . .
>
> The state also asserts that these plaintiffs should not rely on a linkage argument, because the state itself declines to do so while defending Act 780. Surely the state should not ignore the provisions of Louisiana's Constitution that strongly support the election of judges by the people and correlate with the linkage arguments.[23] Such provisions are intended to be relied upon by Louisiana's citizens.

Respecting the Fifteenth Amendment claim, the court stated:

[23] Since 1868, the Louisiana Constitution has consistently required election of judges by the qualified voters in their respective districts. See e.g., Const. of State of Louisiana 1974, Art. 5, §22(A). The trial court previously acknowledged that Louisiana's "constitutional and statutory policies demonstrate a strong

The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." . . . As this court has recognized, "[s]ubdistricting would partially disenfranchise citizens to whom all district judges in a county are now accountable. League of United Latin American Citizens v. Clements, 999 F.2d 831, 873 (5th Cir. 1993). Thus, subdistricting done for predominately racial reasons violates the Fifteenth Amendment and Section 2(a) [of the Voting Rights Act.]

The district court summarily dismissed these claims, as it held that "there was no constitutional right to vote for a certain number of judges." This general principle is undoubtedly sound, since "'judges need not be elected at all,'" Chisom, 501 U.S. at 400, 111 S.Ct. at 2366 (citation omitted), the U.S. Constitution does not guarantee the right to vote for some minimum number of judges. However, having decided in its state constitution to elect its judges, Louisiana cannot abridge the right of citizens in the 23rd JDC to vote for trial judges for predominately racial reasons. Redistricting legislation must still pass Fifteenth Amendment muster.

The state objects that allowing consideration of a Fifteenth Amendment claim in this case will affect all voting rights cases in which majority-minority remedial subdistricts have been created. Because of the nature of the elective offices at issue here, we disagree. It is difficult to hypothesize a denial or abridgement of the right to vote effected by the remedial subdistricting of a multimember legislative body. Indeed, the Supreme Court has rejected application of the Fifteenth Amendment to vote dilution causes of action. [citations omitted] When a legislative body

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preference for the election of judicial officers my majority vote." Clark, 777 F.Supp. at 466.

is apportioned into districts, every citizen retains equal rights to vote for the same number of representatives, even if not for all of them, and every citizen's ballot is equally weighed.

But judicial elections for trial judges are different. Each judge presides individually and independently over the entire 23rd JDC. When subdistricts are created, voters are denied the right to elect officers who (a) may preside over cases in which the voters become involved and (b) will inevitably affect the district's law and policies. If the subdistricting is done with racially discriminatory intent, voters in each subdistrict are just as disenfranchised with respect to the judges they are cut off from electing as were the black voters excluded from the city limits of Tuskagee, Alabama in *Gomillion.* In this case, black voters who could previously vote for all four district judges may now vote for only one of five.

C. MILWAUKEE COUNTY SUPERVISORY DISTRICTS AS SUBCIRCUITS.

Milwaukee County is divided into 25 supervisory districts. Legislation that was proposed and later withdrawn in the last budget bill provided that one resident judge would be elected from each of the 25 supervisory districts. District lines were redrawn after the 1990 census so as to produce districts with an average population[103] of 38,371 with a mean percent deviation of 0.32.[104]

Of the 25 supervisory districts, 14 had a white population of 90% or more, with a number of them approaching 98%. Another two districts had white populations of 85% or more. Additionally, District 4 was almost 80% white and District 9 slightly more than 2/3 white. Only Districts 1, 5, 7, 10, and 13 had black populations in excess of 50%. None of these districts approached the racial exclusivity reflected in the overwhelmingly

[103] It should be noted that the population figures in the tables in this memo are not voting age populations, i.e., those 18 years of age or older, but total populations.

[104] Figures were supplied by Attorney Glenn Bultman of the Milwaukee County Board of Supervisors professional staff. A table detailing the racial composition of the districts is found in Appendix G.

white districts, e.g., Districts 20 through 25. No district had a majority Hispanic population. District 12 had a 35% Hispanic population.[105]

There are six county board supervisors who are black. They represent District 1 (69.45% black), District 2 (37.31% black), District 5 (66.97% black), District 10 (65.93% black), and District 13 (64.77% black). The population figures are derived from the 1990 census, not the 1998 estimates which are not available broken down by supervisory district. It may be the case that the percentage of minority voters in one or more of these districts on the date of the last Spring election was higher than the percentage in the 1990 census.

Currently, there are five African-American judges in the Milwaukee County circuit, one Native American judge, and one Hispanic judge. Both in terms of absolute numbers and in terms of racial/ethnic categorization, the diversity within the county's judiciary compares favorably with that of the county board even though the judges are elected at-large and the supervisors on a single-member district basis.

The Committee recognizes that subdistricting along supervisory district lines is only one of many possible modes of subdistricting. There could be as many subdistricts created as there are branches of the circuit court. There could be four (corresponding in Milwaukee's case with the number of District 1 court of appeals seats) or fewer. Regardless of the number of subdistricts that could be created, however, in light of the available demographic data and the available research findings, the Committee is unconvinced that subdistricting alone will result in significantly greater numbers of minority judges on the bench. Additionally, the experiences in Cook County, Illinois suggest that unacceptable negative consequences are not unlikely to flow from judicial subdistricting.

[105] A table detailing the most recent election results in the Milwaukee County Supervisory Districts is found

D. ANALYSIS OF DATA SURROUNDING CASELAW ON THE ISSUE OF JUDICIAL SUBDISTRICTS

There are relatively few Wisconsin counties that have sizable minority populations and multi-branch judicial circuits. Because Milwaukee County has by far the largest minority population in the state, both in terms of absolute numbers and percentages, the Committee focused much of its attention on that county. The Committee studied demographic data, election results, and other information in coming to conclusion that subdistricting would not likely result in a significant increase in minority representation on the bench. In addition to this baseline concern, the Committee was of the opinion that subdistricting one or more counties (1) would require amendment of the Wisconsin Constitution, and (2) would have the potential of increasing the politicization of judicial elections, and (3) might lead to across-the-board diminution in the qualifications of judicial candidates.

Finally, the Louisiana 5th Circuit litigation over judicial subdistricting, considered together with the 7th Circuit decision in *Milwaukee Branch of the N.A.A.C.P. v. Thompson*,[106] strongly suggests that subdistricting for purely racial reasons would invite nonfrivolous litigation alleging Fourteenth and Fifteenth Amendment violations by the state, as well as violations of the Voting Rights Act of 1965. In the Milwaukee case, the 7th Circuit affirmed the judgment of the U. S. District Court for the Eastern District of Wisconsin that the at-large election system for Milwaukee County circuit judges does not violate Section 2 of the Voting Rights Act. Milwaukee County and Louisiana's 23rd JDC appear to be similarly situated in this regard. Thus, the creation of subcircuits based on race would appear to be subject to the same federal constitutional and Voting Rights Act attacks as those mounted in *Prejean* .

The Committee is aware of the state's public policy, expressed in Article 7, §§ 5 and 7 of the Wisconsin constitution, favoring linkage of the boundaries of a court's

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in Appendix G.

[106] 116 F.3rd 1194 (7th Cir. 1997)

jurisdiction to the boundaries of judges' electoral base. As the 7th Circuit noted in the Milwaukee case:

> Wisconsin believes that election of judges from subdistricts would lead to a public perception (and perhaps the actuality) that judges serve the interests of constituencies defined by race or other socioeconomic conditions, rather than the interest of the whole populace. Larger jurisdictions liberate judges, to some degree, from the pressure created by the need to stand for reelection. A judge elected from a small district might fear that acquittal of a person charged with a crime against a member of that neighborhood, or a decision that harms an employer in that neighborhood, will lead to defeat at the polls. To free the judge to follow the law dispassionately, Wisconsin prefers to elect judges from larger areas, diluting the reaction to individual decisions. Perhaps the belief that judges favor those who elect them is unwarranted – though the diversity jurisdiction of the federal courts rests in part on a belief that state judges highly value the interests of that state's citizens and thus are potentially biased against citizens of other states. . . So, too, perhaps, for smaller jurisdictions within a state. It is odd to find the United States, whose judges have secure tenure, arguing in this case that Wisconsin must treat its judiciary like ward heelers. At all events, the Voting Rights Act does not compel a state to disregard a belief that larger jurisdictions promote impartial administration of justice, if that belief is sincerely held – as the district judge concluded that it is in Wisconsin.[107]

[107] 116 F.3rd at 1201. The court acknowledged the plaintiffs' arguments against "linkage:"

> What can be said in favor of plaintiffs' position is this: (i) Judges do not "represent" the people who elect them, so a match of electoral base to geographic jurisdiction is less important for judicial than for legislative office. (ii) Much of the law judges use is established by people who live outside their jurisdiction (state and national legislatures, and the Supreme Court of Wisconsin, make rules local judges must employ), diminishing the importance of a link between electoral base and scope of jurisdiction. (iii) Many of the persons affected by judicial decisions are unconnected with the court's geographic base. Litigants may come from anywhere in the world, and none of these strangers has any legitimate interest in whether the judges were elected from the county as a whole or a smaller district. (iv) Wisconsin already has weakened the link between jurisdiction and electoral base. Four appellate judges are elected from Milwaukee County. Although they hear only appeals that originate from the local circuit court, their opinions are binding on the state's other intermediate appellate courts. If the state is content with this situation for the court of appeals, why not for the circuit court? And if the state is content to have four appellate judges elected from one county, why not one appellate judge from each of four districts within the county? Other states have severed the link between electoral base and jurisdiction [referring to Cook County] .

116 F.3rd at 1200, 1201.

E. FINDINGS AND RECOMMENDATION

- **FINDING**: The Committee has concluded that Wisconsin should not attempt to replicate the Cook County experience in Milwaukee County or in other counties. Among the reasons underlying the Committee's conclusion is that it is not al\t all clear that subdistricting would significantly enhance the diversity of local judiciaries and there is widespread concern that subdistricting could do significant damage to judicial independence in this state.

- **FINDING**: Based on the caselaw history in Wisconsin and in other parts of the nation, it is likely that judicial subdistricts in Wisconsin would be unconstitutional.

- **FINDING**: Creating judicial subdistricts is not desirable for Wisconsin and is not likely to lead to enhanced diversity in the judiciary.

- **FINDING**: Even if the judicial districts are drawn along twenty-five supervisory district lines in Milwaukee County, the voting patterns suggest that this would not necessarily result in greater diversity on the bench.

∗ **RECOMMENDATION**: The Committee does not support judicial subdistricts for any level of court in any county in Wisconsin. The Committee has concluded that subdistricting in Wisconsin counties:

1. Would require amendment of the Wisconsin Constitution;
2. Would have the potential of increasing the politicization of judicial elections; and
3. Might lead to across-the-board diminution in the qualifications of judicial candidates.

VII. CUMULATIVE VOTING

A. DEFINING CUMULATIVE VOTING

On the issue of cumulative voting, the Committee heard and considered the testimony of Attorney Richard Saks at the Committee's public forum at Marquette University on May 19, 2000. The Committee also reviewed an informative 1995 law review article by Michael E. Lewyn and excerpts from the book THE TYRANNY OF THE MAJORITY by Professor Lani Guinier. Based on its review, the Committee does not recommend the institution of a cumulative voting regime for judicial elections.

Attorney Richard Saks addressed the Committee during its public hearing in March, 2000. He appeared on behalf of the National Association for the Advancement of Colored People (NAACP). Mr. Saks testified:

> Cumulative voting is a form utilized in approximately seventy different types of jurisdictions around the country for school boards or sometimes common councils, and it essentially permits voters to accumulate or aggregate their votes behind a particular candidate.
>
> So, for example, if every election year we had approximately nine judges up, nine branches up, the candidate for those branches would not run for a numbered post, but instead would just run for a Milwaukee County bench seat. The nine top votegetters countywide would prevail. They would be the winners, and you could either have a system where people would have to vote for one, they would have to vote for one each, or even a system where voters would

> clump their votes and basically cast several votes for one candidate, the point being that there would be a way of ensuring that minority voters would have an opportunity to elect their candidates.[108]

B. ADVANTAGES, DISADVANTAGES, AND DANGERS OF CUMULATIVE VOTING

In his article, WHEN IS CUMULATIVE VOTING PREFERABLE TO SINGLE-MEMBER DISTRICTING?, 25 New Mexico Law Review 197 (1995), Michael E. Lewyn described cumulative voting, and its alleged advantages and disadvantages, as follows:

> The traditional remedy for vote dilution has been the creation of "majority minority" single member districts. Typically, courts and legislators have tried to create enough majority minority districts to give minorities proportional representation in legislatures. However, single-member distracting has not always increased minority representation, because minority voters are sometimes so geographically dispersed that no majority minority district can be created. Even where Section 2 has increased minority representation, it has also forced legislatures to create unsightly (and arguably unconstitutional) gerrymanders in order to create a large number of majority minority districts.
>
> The defects of single-member districting have caused some commentators (most notably Lani Guinier) to endorse a system known as "cumulative voting" as a remedy for Section 2 violations. Under cumulative voting, as in a traditional at-large election, voters may vote for several candidates. However, voters also have the option of "cumulating" their votes by casting several votes ("plumping") for one or more candidates. For example, suppose City X has a five-member city council. Under

[108] Transcript of May 19, 2000 Public Forum.

> traditional at-large voting, each voter could cast one vote for as many as five candidates, and the five candidates with the most votes would win. By contrast, under cumulative voting, each voter would have five votes but would have the option of casting multiple votes for one or more candidates. Thus, the voter could cast all five votes for his first choice, cast one vote for each of five candidates, or could support an intermediate number of candidates. If enough voters cast multiple votes for a candidate they intensely supported, a candidate without majority support could win. Thus, cumulative voting increases minority representation (like single-member distracting) but never requires racial gerrymandering (unlike single-member districting).
>
> Supporters of cumulative voting argue that cumulative voting (1) increases minority representation in situations where single-member districting does not, (2) reduces the number of votes "wasted" on losing candidates, (3) eliminates gerrymandering of all types, (4) encourages voters to build multiracial coalitions, and (5) may increase voter turnout.
>
> Opponents of cumulative voting have advanced a number of arguments against this voting method. These commentators contend that cumulative voting may result in the following: (1) create fragmentation by giving minority groups representation; . . .(4) reduce political competition; and (5) distort election results by making a political group's strength depend on its voting strategy, rather than on the size of the group.

The article addresses the dangers of cumulative voting as follows:

> One possible disadvantage of cumulative voting concerns the voters' ability to use their votes prudently. A faction's strength depends not only on how many supporters it has, but on how well they distribute

their votes. For instance, suppose Still County has 60 blacks and 50 whites (excluding county commission candidates), 6 county commission candidates of each race, and a six-member commission elected through cumulative voting. If all 60 blacks plump for 1 candidate and all whites cast 1 vote for each of 6 candidates, 1 black candidate will receive 360 votes, each white candidate will receive 50 votes, and the remaining black candidates will receive no votes (except for their own). Thus, the Still County Commission would have a 5-1 white majority, even though the county is two-thirds black. This would hardly be an equitable outcome. Similarly, a majority can turn itself into a minority through inadequate plumping. For example, if Still County's black voters split their votes evenly among all 6 candidates, while white voters concentrated their 6 votes among 4 candidates, 4 of the white candidates could get the equivalent of 1.5 votes from each white voter (by receiving 2 votes from half the white voters and 1 from the other half), thus giving the 4 whites 75 votes each (as compared to the blacks' 60). Thus, the white minority would have a 4-2 commission majority.

Such bizarre outcomes (although never totally impossible) are far more likely in some circumstances than in others. For example, if one faction has a stable majority (e.g., in a city 70% white or 70% black) and both majority and minority voters are aware of their status, both groups will probably act rationally; the minority will plump for a small number of candidates in order to ensure their election, while the majority will disperse its votes among a wider number of candidates in order to preserve its majority.

It therefore follows that cumulative voting should be disfavored where most voters are uncertain about whether they are in the majority faction. Such uncertainty can arise in two situations. First, voters may be

> uncertain about their status where political or racial factions are so closely balanced that there is no clear majority. Second, voters may be unaware of their status where they do not know what the balance of power is in their district. This means that cumulative voting should be especially disfavored in any situation where districting is required, because even the small number of voters who know the identity of all their legislators are not likely to be aware of the political situation in other neighborhoods in their district. Cumulative voting should also be highly disfavored in big-city elections, because even if voters may know the racial or political makeup of their own neighborhood, they may have no idea what the balance of power is in their city as a whole. In addition, big-city electorates are so large that voters could probably not be organized to vote rationally.

After a lengthy and sophisticated analysis, Professor Lewyn concludes:

> In sum, cumulative voting is appropriate in some situations, and less so in others. Litigators, legislators, and judges should support cumulative voting in small, nonpartisan, local elections, but not in most big-city or statewide elections.[109]

After due consideration, the Committee concluded that there is no warrant for adopting cumulative voting for Wisconsin judicial races, especially for judicial races in multi-branch, large urban districts where the desire for enhanced racial and ethnic diversity is greatest. There appears to be no reason to believe that the adoption of such a radical change in judicial elections would lead to appreciably greater diversity in the judiciary. Moreover, there is reason to fear that the level of mathematical and strategic complexity introduced into voting by the electorate would depress rather than increase already low voter turnout for judicial elections.

[109] Michael E. Lewyn, *When is Cumulative Voting Preferable to Single-Member Districting?*, 25 New

C. FINDING AND RECOMMENDATION

* **FINDING:** The use of cumulative voting is not desirable for Wisconsin and is not likely to lead to enhanced diversity in the judiciary.

* **RECOMMENDATION:** The Committee does not recommend the institution of cumulative voting for judicial elections in Wisconsin.

Mexico L. Rev. 197 (1995).

VIII. THE CANDIDATE POOL

A. Quantifying the Pool

1. THE NATIONAL DATA

In 1986, the American Bar Association created its Commission on Opportunities for Minorities in the Profession, since renamed Commission on Racial and Ethnic Diversity in the Profession. The mission of the Commission is to promote the "full and equal participation of minorities in the legal profession. The Commission serves as a clearinghouse for information respecting the status of minorities within the legal profession. In 1998, the Commission issued a report entitled MILES TO GO: THE PROGRESS OF MINORITIES IN THE LEGAL PROFESSION. That report was updated with data obtained as recently as May, 2000, and issued as MILES TO GO 2000 in July, 2000. The report was based on a comprehensive review of academic, government, professional, and popular data sources. The principal substantive findings of the Commission were stated in an Executive Summary which is reproduced, in material part, below.

(a) Summary of the findings in the American Bar Association's report on the status of minorities in the profession.

1. Minority representation in the legal profession is significantly lower than in most other professions.
   - Total minority representation in the profession currently is about 10 percent.
   - Combined African American and Hispanic representation among lawyers was 7 percent in 1998, compared to 14.3 percent among accountants, 9.7 percent among physicians, 9.4 percent among college and university teachers, and 7.9 percent among

engineers. The only professions with lower levels of minority representation were dentists (4.8 percent) and natural scientists (6.9 percent). The United States population is projected to be almost 60 percent "minority" by 2050.

2. Minority entry into the profession has slowed considerably since 1995.

- Nationally, minority representation among law students is holding at about 20 percent, despite the effects of voter initiatives and lawsuits banning affirmative action in law school admissions. However, the growth in minority law school enrollment, which had been steady since 1985, ended in 1995. Over the past five years minority law school enrollment has increased only 0.4 percent, the smallest five-year increase in 20 years.

- Minority enrollment has dropped significantly in top public law schools in states banning affirmative action. Last year, there were only two African Americans in the UCLA first year class; and only two African Americans and four Hispanics in the University of Washington Law School first year class.

- In 1999, the total number of minority law graduates in the United States dropped for the first time since 1985.

3. The distribution of minority lawyers still differs significantly from that of whites.

- Minorities are more likely than whites to enter government, public interest, and business, and less likely to enter private practice. In 1998, only 49.5 percent of minority law graduates entered private practice, compared to 57.1 percent of whites. African Americans, in particular, are less likely than other groups to enter private practice.

- Minority women are especially likely to take government and public interest jobs. In 1998, 23.6 percent of minority females graduate entered government or public interest, compared to 18.9 percent of minority men and 15.2 percent of whites. Only 46.5 percent of minority female graduates entered private practice, compared to 52.8 percent of minority men and 57.1 percent of whites.
- The percentage of minority law graduates entering business has increased substantially, from 6.3 percent in 1987 to 15.2 percent in 1998. As a result, the percentage of minority graduates entering the for-profit sector (private practice and business) has increased. In 1987, 60.9 percent of minority graduates entered the for-profit sector, compared to 72.6 percent of whites (a difference of 11.7 percent). In 1998, 64.7 percent of minority graduates entered the for-profit sector, compared to 70 percent of whites (a difference of 5.3 percent). At the "sector" level, therefore, minority and white career paths are converging.

4. Minority representation in upper-level jobs remains minuscule, especially in the for-profit sector.
   - Minority representation among law partners remains less than 3 percent in most cities.
   - Minority partners tend to be "partners without power," clustered at the bottom of firm management and compensation structures.
   - Minority representation among general counsel in the Fortune 500 is 2.8 percent.

5. Progress has been especially slow for minority women in the profession.

- Minority men significantly outnumber minority women in most upper-level jobs. Minority women make up less than 1 percent of capital partners in Chicago, and only 1.2 percent of income partners. There is only one minority female general counsel in the Fortune 500, only six minority female federal appellate judges, and two minority female law school deans.
- Law firm attrition rates for minority women are higher than for any other group. Fully 12.1 percent of minority women leave their firms within the first year of practice, and over 85 percent leave by the seventh year.

6. Minorities in general continue to face significant obstacles to "full and equal" participation in the profession.
   - The attack on affirmative action in law school admissions threatens to have a devastating effect on minority applications and admissions to law school. An analysis of law school admissions decisions for the 1990-91 applicant pool (n=90,335) found that under a "numbers only" admissions policy (where admissions are based solely on applicants LSAT scores and undergraduate GPAs), African American admissions would drop 80 percent, Hispanic admissions would drop 51 percent, Asian American admissions would drop 37 percent, and Native American admissions would drop 55 percent.
   - A numbers only admissions policy also would deny admission to many graduates who could perform well in law school if admitted, pass the bar, and enjoy successful legal careers. A just-published study of over 1,000 University of Michigan Law School graduates found that minority graduates were admitted to the bar at about the same rate as whites, and enjoyed equally successful careers, as measured by income, career satisfaction and public service.
   - Minorities in law firms continue to have difficulty building

business among white clients, and gaining access to mentors and training within the firm. Minority women, in particular feel isolated in white male dominated firms.

(b) Conclusions and Recommendations from the American Bar Association Report

The Report concludes with recommendations to bar associations, law schools, and legal employers for promoting the "full and equal" participation of minorities in the profession. The ABA recommendations are summarized below:

The American Bar Association Commission on Racial and Ethnic Diversity in the Profession made the following recommendations under the heading ""What Bar Associations Can Do."[110]

- SYSTEMATIC RESEARCH AGENDA

> First, bar associations should formulate a systematic agenda for national research on minority lawyers. This agenda could include, at a minimum: research on the entry and distribution of minority lawyers; research on the representation of minorities in different employment settings; and research on the representation of minorities at different levels of the hierarchy within employment settings. Ideally, bar associations should have such research conducted on a regular, periodic basis.

- INSTITUTIONAL COORDINATION

> To facilitate a system of centralized reporting, bar associations should

[110] MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION, American Bar Association Commission on Racial and Ethnic Diversity in the Profession, page 28-29 (July, 2000).

adopt a standardized framework for data collection . . . If a standardized framework were in place, the task of gathering and interpreting new information on a timely basis would be greatly simplified. Adopting a standardized framework for reporting also would help researchers and bar leaders identify where more information is needed.

- GROUP-SPECIFIC ANALYSIS

To improve the collection and dissemination of data on "minority" lawyers in the profession, the ABA and other bar associations should avoid the aggregate category "minority" for the purposes of data collection. Instead, bar associations should adopt standardized categories for referring to different minority groups. The four categories used in this [ABA Commission] Report [African American, Hispanic, Asian American, Native American] are the most frequently used by researchers, which argues for their adoption by bar associations. Adopting these categories would not prevent the aggregation of data, once collected, by other groupings (such as "minority women"). More importantly, it also would not prevent the use of more specific categories (such as "Puerto Rican" or "Pacific Islander") at the data collection stage. Racial categorization is always in flux, and is attempting to move with the times for rhetorical purposes. For research purposes, however, maintaining some consistency in categories is necessary to facilitate consistent comparisons over time.

- SUSTAINED RESEARCH AND PROGRAM REVUE

Most bar associations have instituted formal programs and projects to improve diversity in the profession. It is not enough, however, to *create* such programs. Bar associations must follow through by evaluating and

> reporting on their results and impact. Local bar associations must look critically at their own diversity efforts, and take more responsibility for monitoring conditions in their own communities. . . This active approach from all bar associations would furnish the profession with accurate information about the progress of minority lawyers as well as about what works – and what does not - to promote entry and advancement in the profession.

2. THE LACK OF WISCONSIN DATA. As described elsewhere in this Report[111], the best available research suggests that there is no significant correlation between different judicial selection methods and the degree of diversity on the bench. "Rather, the overwhelming factor is the percentage of black lawyers among all lawyers in the state."[112] Despite focused effort to find reliable data on the number of minority attorneys in the state, the Committee was unable to obtain such data. The State Bar of Wisconsin does not have such data. Indeed, the Bar's Minority Outreach Committee attempted last year to obtain data on the numbers of Wisconsin minority attorneys and was unsuccessful. No information respecting racial or ethnic identification is sought either at the time of admission to the bar or through annual licensure renewal applications.

The American Bar Association and its Commission on Racial and Ethnic Diversity has no state by state racial/demographic information on attorneys. In July of this year, the Commission published a rather comprehensive study on diversity within the legal profession, entitled MILES TO GO 2000. The author of the study is Doctor Elizabeth Chambliss, Research Director of Harvard Law School's Program on the Legal Profession. Dr. Chambliss, who holds both a J.D. and a Ph.D. from the University of Wisconsin-Madison, states that neither she, the ABA Commission, nor the Harvard Program had

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[111] *See* p. 31, supra.

[112] Nicolas A. Alozie, *Black Representation on State Judiciaries*, 69 Social Science Quarterly 979, 985 (1988). As the title suggests, Professor Alozie's study focused on black judges, rather than on the broader category of minority judges. However, there does not appear to be any reason to believe that the conclusions in the study would not apply as well to attorney members of other minority groups.

such data on a state-by-state basis. She further stated that she did not know where such data could be gathered, unless a state licensure authority collected and maintained such information. Most such authorities, she noted, do not maintain such information.

The Committee also unsuccessfully sought information from, *inter alia*, the National Bar Association headquarters in Washington and from its regional liaison for the Wisconsin region, the chief demographer at the Wisconsin Department of Administration, and from U. S. Census Bureau data available on the world wide web.

Representatives of the Wisconsin Association of Minority Attorneys (WAMA), an organization of African-American lawyers, and the Wisconsin Hispanic Lawyers Association (WHLA) spoke before the Committee at the public forum on May 19, 2000. The WAMA speakers stated that WAMA has approximately 40 dues-paying members and a mailing list of approximately 150.[113] The WHLA representative stated that her organization had approximately 45 dues-paying members.[114]

Information about minority enrollment at the state's two law schools is available but it is of marginal usefulness. Not all graduates of UW and Marquette University Law schools go into practice. Not all such graduates stay in the state or in active practice. Additionally, the data from the in-state schools with diploma privilege admission[115] to the bar would shed no light on the number of minority attorneys who gain admission to the bar through the bar examination[116] or through reciprocity.[117]

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[113] Transcript of Public Forum, May 19, 2000.

[114] *Id.*

[115] Wisconsin Supreme Court Rule 40.03 provides that, subject to specified terms and conditions, an applicant for admission to the bar who has been awarded a first professional degree in law from a law school in Wisconsin that is fully approved by the American Bar Association shall satisfy the legal competence requirement for admission by presenting to the clerk of the court certification of the Board of Bar Examiners showing satisfactory completion of legal studies in accordance with the Rule.

[116] Wisconsin Supreme Court Rule 40.04 provides for satisfying the legal competency requirement for admission to the Wisconsin bar by satisfactory performance on a bar examination administered by the Board of Bar Examiners. Applicants who are not eligible for admission on diploma privilege or through reciprocity must successfully take the bar exam.

[117] Wisconsin Supreme Court Rule 40.05 provides that applicants for admission to the Wisconsin bar who have been admitted to practice law by a court of last resort in any other state or territory or the District of Columbia, and who have been primarily been engaged in the active practice of law in the courts of the U. S.

B. SUPPORTING THE POOL.

1. **Mentorships.** A recurring theme throughout the discussions and deliberations of the Committee was the necessity of effective mentorship activities aimed at encouraging and empowering capable minority attorneys who are interested in and qualified for service in a judicial office. Such mentoring activities can occur through formal programs sponsored, for example, by bar associations, or through informal relationships between potential judicial candidates and other lawyers and judges. Judges and lawyers who have either been through the election or appointment process and/or who are familiar with the process have much to offer to those who are unfamiliar with such processes. Effective and extremely worthwhile assistance can be provided not only with respect to "nuts and bolts" issues such as filing and reporting requirements for judicial elections and how to navigate the appointment process, but also on such matters as positioning oneself appropriately, in terms of career choices, public service, etc., for a future judicial career.

Committee member Attorney Gerald Boyle has suggested that a local committee of judges be created "appointed by the Chief Judge to meet and set up a program by which to reach out to minority lawyers for the purposes of suggesting that they apply and assisting them in the process with that committee recommending candidates as qualified for appointment." His proposal is found in Appendix C to this report. He wrote:

> The committee of judges would be in a position to hear from other judges about minorities that seem to be judicial timber. Those judges would also be able to solicit comments about minority attorneys. Those judges would be able to allay fears that the applicants may have. Those judges would be able to suggest how to handle the appointment process.

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or another state or territory or the District of Columbia for 3 years within the 5 years preceding the application for admission to the Wisconsin bar, may be admitted to practice in Wisconsin without taking the

2. **Application Process. (a) Selection Criteria.** It is quite common throughout the fifty states for the appointing authority over judicial vacancies to use certain criteria to make the selection for a particular judicial appointment. The appointive process in Wisconsin requires all judicial applicants to complete and submit a standard questionnaire[118] regarding the applicant's background, experience and qualifications. This is one way that the Governor's Advisory Council on Judicial Selection collects information for its use in evaluating which of the many applicants are best qualified to be recommended for appointment to the bench. The Questionnaire requires the applicant to state with specificity his or her academic, professional, and legal background. It also requires the judicial applicant to detail any other public office he or she had served in, membership in professional organizations, civic organizations, political organizations, and vocational interests and hobbies. Additionally, the applicant is asked to describe his or her law practice including the nature of the cases and the type of advocacy. The applicant is further asked to describe advocacy in administration proceedings and litigation experience including the citation to cases, which are considered to be significant by the applicant. The Questionnaire requires the judicial applicant to present a statement on the subject, "Why you feel qualified to be a member of the judiciary."

The literature on judicial selection is full of examples and models of selection criteria for trial and appellate court judges. The assessment of what standards are most appropriate in weighing judicial qualifications has been a continuing subject of discussion with bar groups and academics. Most recently the American Bar Association proposed standards for screening judicial applicants to determine "who have demonstrated by well-defined and well-recognized qualifications their fitness for judicial office."[119] The areas listed in the ABA Report as appropriate judicial selection criteria include experience; integrity; professional competence; and judicial temperament. For appellate judgeships the applicants should be further screened on scholarship and academic talent and writing

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bar examination if certain specified other conditions are satisfied.

[118] Under the current system "The Governor's Advisory Council on Judicial Selection Questionnaire" must be filed by all applicants with the Legal Counsel to the Governor. An original and twenty copies are required by the deadline specified in the notice of judicial vacancy.

[119] *See* text accompanying notes 128 – 129.

ability.[120] The ABA suggests the use of a broad range of criteria when making an appointment. The ABA defines a "qualified judiciary" as one which is compassionate, courteous, decisive, emotionally stable, in good health, possessing good moral character, industry, integrity, freedom from bias, legal ability, legal experience, open-mindedness, patience, and socially aware.[121]

(b) Disclosure of Selection of Selection Criteria. The ABA Report advocates disclosure as a method of furthering the goal of having a qualified, inclusive, independent, and accountable judiciary. Such disclosure of judicial selection criteria will benefit the judiciary at large, the public and the potential applicants. Further, with the criteria in hand long before a prospective candidate applies for a judicial vacancy, additional preparation and planning by applicants may increase the pool of qualified candidates. The ABA Report indicates:

> Disclosure of selection criteria is essential. Although this standard prescribes a particular method for disclosure, the appointing authority should implement a disclosure format that is reasonably consistent, regularized, fair, and informative. Disclosure of selection criteria familiarizes the citizenry with the judicial selection procedure, and thus diminishes the perception of personal or political bias in the selection of judges. Additionally, disclosure of selection criteria encourages qualified candidates to seek judicial office by informing them of qualities sought in a qualified judge.[122]

The process by which applicants are screened for judicial vacancies is an important one and the diversity of the approaches used across the country do not detract from its value. Hamilton observed:

> … [T]hat there can be but few men [and women] in the society who will have sufficient skill in the laws to qualify them for the stations of judges, and making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.[123]

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[120] *Id.*
[121] *Id.*
[122] *Id.*

The ABA Report acknowledges the requisite judicial knowledge and integrity are important and significant criteria, but are not enough to "accommodate the present needs of the judiciary."[124] The ABA, therefore, agreed with Hamilton and then went on to propose expanded lists of qualifications and a process to ensure that appointing authorities would use their power to ensure a well-qualified and inclusive judiciary reflective of the citizens of the State.

C. FINDINGS AND RECOMMENDATIONS

- **FINDING**: No reliable data can be found on the racial and ethnic composition of the Wisconsin bar and bench.

- **FINDING**: There is no known data on the racial and ethnic composition of other judicial and quasi-judicial positions in Wisconsin including the state's municipal judges, administrative law judges, judicial and court commissioners and other commissioners.

- **RECOMMENDATION**: The Supreme Court and the State Bar of Wisconsin should take steps to obtain reliable data on the numbers of licensed minority lawyers in the state.

- **RECOMMENDATION**: A web-site should be created that is connected to either the state's web-site or a web-site of the state courts, which contains information on the Governor's judicial application process and other judicial information.

- **FINDING**: One of the most important factors in increasing the ethnic and racial diversity of the bench is increasing the racial and ethic diversity of the bar.

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[123] Federalist No. 78, Hamilton 14; Federalist No. 81, Hamilton.
[124] *See* text accompanying notes 128-129.

- **RECOMMENDATION**: Judges, attorneys, and bar associations should be encouraged to provide appropriate mentoring to minority attorneys who would be potential candidates to become judges.

- **RECOMMENDATION**: The Committee recommends the creation of a program to provide information about the Governor's judicial application process.

• IX. NOMINATING COMMISSIONS/APPOINTMENT PROCESS

A. NATIONAL BACKGROUND

Executive (which is to say, royal,) appointment and removal of judges was one of grievances listed in the Declaration of Independence. "He (George III) has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." After the Revolution, the new states reacted against executive appointment of judicial officers. In eight states, the power of appointment was vested in one or both houses of the legislature. In two states, the governor and his Council appointed judges. In only three states was the power of appointment vested in the governor and the power was subject to the consent of the Council.

After the 1840s, as the principles of Jacksonian Democracy took root and more territories (including Wisconsin) sought admission to the Union, popular election of all public officials, including judges, became the norm in the new states. After the Civil War, especially in large urban areas, political party machines controlled judicial elections and patronage played a larger role in ascendancy to the bench than merit. Bar associations, notably the Association of the Bar of the City of New York at the local level and the American Bar Association at the national level, were formed in large part to take the politics out of judicial selection. This was an era when states were encouraged to move from partisan to nonpartisan elections, when judicial qualification polls began to be published, when judicial elections were held separate from nonjudicial elections.

In 1906, Roscoe Pound delivered his famous address before the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice." Prominent among his targets was the use of popular elections for the selection of judges. In 1913, William Howard Taft addressed the ABA and also berated the use of popular election, even nonpartisan election, as a method of selecting judges. The

American Judicature Society was created also in 1913. Northwestern University law professor Albert Kales served as director of research for the AJS. He devised a system designed to maximize the benefits and minimize the weaknesses of the appointive and elective systems. The plan had three elements: first, a judicial nominating commission would provide the names of qualified candidates to an appointing authority (the elected chief justice, later changed to the governor); second, the appointing authority would appoint a candidate from the list; and, third, the judge would eventually go before the voters on the issue of his or her retention in a noncompetitive, nonpartisan election. No state adopted the plan, but in 1937, the American Bar Association endorsed the plan. In 1940, Missouri adopted the plan for its largest counties, but Missouri remained the only state to have adopted the plan by mid-century. Since then, however, a number of jurisdictions have adopted various forms of what has come to be known as the "merit selection system" or the "nominating commission system." Some of the principle variations in those systems are discussed below in § V. Perhaps the most basic variation is whether the system is used only for interim appointments in states having elective systems, or rather, for all judicial appointments.

B. THE WISCONSIN PROCESS

Wisconsin has relied on popular election as its constitutionally favored method of selecting judges since the first Wisconsin constitution in 1848. Justices of the supreme court, and judges of the court of appeals and circuit courts are all subject to popular election. WIS. CONST., Art. 7, §§ 4(1), 5(2), and 7. Article 7, § 9, however, provides: "When a vacancy occurs in the office of justice of the supreme court or judge of any court of record, the vacancy shall be filled by appointment by the governor, which shall continue until a successor is elected and qualified."

In 1983, by executive order, Governor Anthony Earl established a Governor's Advisory Council on Judicial Selection. Upon taking office in 1987, Governor Tommy G. Thompson recreated and restructured the council in Executive Order 2, which

provides:

WHEREAS, the quality of justice in the State of Wisconsin is best maintained through the election and appointment of qualified persons to the judiciary; and

WHEREAS, it is the duty of the Governor under the Constitution and laws of the State of Wisconsin to appoint persons to fill vacancies in the courts until a successor is elected to such office as provided by law; and

WHEREAS, it is desirable to establish a procedure through which vacant judicial offices will be filled by appointment of competent, public-minded lawyers of the highest integrity;

NOW, THEREFORE, I, TOMMY G. THOMPSON, Governor of the State of Wisconsin, pursuant to the authority vested in me by Section 14.019 of Wisconsin Statutes, do hereby:

1. Establish the Governor's Advisory Council on Judicial Selection;

2. Provide that for the purpose of making recommendations to the Governor concerning vacancies in the courts the Governor's Advisory Council on Judicial Selection shall consist of a panel of permanent members appointed by the Governor;

3. In the case of a vacancy on the Supreme Court, two additional members shall be appointed by the Governor upon consultation with

the President of the State Bar; however, these members shall only serve until the Council makes its recommendation as to that vacancy;

4. In the case of a vacancy on the Court of Appeals, two additional members shall be appointed by the Governor from the Court of Appeals District in which the vacancy occurs; however, these members shall only serve until the Council makes its recommendation as to that vacancy;

5. In the case of a vacancy of the Circuit Court, the Chairperson of the Advisory Council shall appoint two additional members who reside in such circuit after consultation with the President of the local bar association or associations, as appropriate; however, these members shall only serve until the Council makes its recommendations as to that vacancy;

6. Provide that all members shall serve at the pleasure of the Governor;

7. Provide that the Council shall use the following minimum standards to evaluate whether proposed nominees are qualified candidates:

a. that the person meet all legal requirements, including those in the Wisconsin Constitution, for becoming a member of the judiciary;

b. that the person is a member in good standing of the State Bar of Wisconsin and a resident of the State of Wisconsin;

c. that the person appointed is likely to measure up to those standards outlining the significant qualities of an ideal judge as set forth in Section 60.01 of the Wisconsin Supreme Court Rules;

d. that the person is fair, experienced, even-tempered, and free of biases against any class of citizens or any religious or racial groups; and

e. that the person possesses sound mental and physical health such that he or she can fully and completely perform the duties of the office for which the vacancy exists.

8. Provide that the Governor shall designate from the Council membership a Chairperson;

9. Provide that the Council shall adopt such rules concerning its operating procedures as it deems appropriate;

10. Instruct and encourage the Council to solicit applications for each judicial vacancy; instruct the Council to review the qualifications of all those interested in appointment, and to provide the Governor with a list of at least three but no more than five persons who the Council regards as best qualified for the vacant position no later than six weeks after notification of the vacancy;

11. Instruct the Council to keep all proceedings confidential, consistent with state law;

12. Instruct the Secretary of the Department of Administration to provide the Council with sums of money that are necessary and proper for the legitimate travel and operating expenses of the Council as provided by the Joint Committee on Finance under Section 20.505(3)(a) of the Wisconsin Statutes.

Governor Thompson has made approximately 75 to 80 appointments during his

terms in office. In all of them, he has used the Advisory Council on Judicial Selection. Approximately half of all the judges in Wisconsin have initially reached the bench by gubernatorial appointment.

Attorneys William T. Curran, current chair of the Advisory Council, and Judith M. Hartig-Osanka appeared before the Committee on April 13, 2000. Among the information learned were the following:

- Although Executive Order 2 does not require it, all members of the Advisory Council are attorneys.[125]
- There are 8 permanent members of the Council: Mr. Curran, Ms. Hartig-Osanka, Emery K. Harlan, Leah M. Lampone, Thomas F. Mallery, George K. Steil, Jr., Jonathan T. Swain, Raymond P. Taffora. [126]
- Most members of the Council are friends of the governor or have been active in Republican party circles.[127]
- There is one African-American permanent member of the Council.[128]
- There are two women who are permanent members of the Council.[129]
- The Council is geographically diverse, with members from Milwaukee, Mauston, Racine, Janesville, Madison, and Wausau. Three of the 8 permanent members are from Milwaukee County.[130]
- Although the Council solicits applications to fill judicial vacancies, it does not recruit candidates.[131]
- Although the Executive Order makes no reference to diversity values, Governor Thompson himself has advised the Council that diversity on the bench is important to him.[132]

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[125] Transcript of Meeting, April 13, 2000 (hereinafter Transcript) at 4-5, 36.
[126] *Id.*
[127] *Id.* at 10, 79.
[128] *Id.* At 11.
[129] *Id.*
[130] *Id.* at 4-5.
[131] *Id.* at 28.
[132] *Id.* at 14.

- The Council itself has striven to be sensitive to diversity both within the Council and with respect to applicants.[133]
- Applicants are required to sign a form acknowledging that the application is subject to the Open Records Act.[134]
- Electability plays a significant role in the Council's decisions.[135]

C. THE PRINCIPAL VARIATIONS AMONG STATE SYSTEMS

There are at least 34 states[136] that employ nominating commission or "merit selection" plans at some level. There are a great many variations in the nominating commission systems employed by the various states. In a *Commentary* to Standard B.2 pertaining to nominating commissions, the ABA summarized major differences as follows

> Among the states, nominating commissions vary in their structure, composition, and organization. Some states use one commission too select all judges, while other states use separate commission for different judicial levels or separate commissions in different geographical areas. Typically, nominating commissions include an even number of lawyers and persons who are not lawyers. Often the commission will also include a single judge who usually cannot participate in voting, but can be of assistance in the procedural process. The state chief executive branch official usually selects lay commissioners. Lawyer commissioners are normally selected by

[133] *Id.* at 38.
[134] *Id.* at 16.
[135] *Id*. at 39, 43-45, 60.
[136] Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

either the chief executive branch official, bar association leaders, state attorneys general, state supreme court judges, or a combination of the aforementioned. Some states require legislative approval of some or all of the commission members.

Indeed, jurisdictions vary with respect to:

- legal basis for the plans;
- level of courts covered;
- types of vacancy;
- number of commissioners;
- number of commissions;
- how the chair is selected;
- who appoints lawyer members;
- who appoints lay members;
- days allowed to submit list;
- number of names submitted;
- order of names submitted;
- whether additional information is sent to appointing authority;
- whether the governor is bound to appoint from the list;
- whether legislative confirmation is required;
- whether the names of applicants are made public;
- whether and which records are confidential;
- whether deliberations and voting are confidential;
- whether the identify of nominees is confidential;
- whether there are disqualification provisions;
- whether there are ethics provisions;
- whether an oath of office is required;
- whether there is a prohibition on political activity;
- whether there is a provision for external recruitment;

- whether there is a diversity provision for commissioners;
- whether there is a diversity provision for applicants; and
- whether there are rules against discrimination.

D. VARIOUS POSITIONS ON MERIT SELECTION

1. AMERICAN JUDICATURE MODEL.

The American Judicature Society has promulgated Model Judicial Selection Provisions, most recently in 1994. Different provisions are proposed for inclusion in a state constitution, for legislative enactment, and for promulgation by way of executive order. The Society has identified ten key elements of its Model Merit Selection Plan.[137] Eight of the ten key elements apply to commission systems broadly, i.e., those which functions only with respect to interim appointments and those that apply to all judicial appointments. Two of the ten apply only to jurisdictions employing retention elections. The ten key elements are:

1. Establishing a broadly-based, diverse nominating commission composed of both lawyers and lay people that recruits, investigates, interviews, and evaluates applicants for judgeships;

2. Submitting to the appointing authority a list of nominees that reflects the diversity of the jurisdiction it serves, so as to yield a more representative bench;

[137] A table illustrating the differences between Executive Order 2 and the AJS Model is found in Appendix G.

3. Staggering the terms of nominating commissioners and prohibiting commissioners from applying for judgeships themselves for a specified number of years after they leave the commission;

4. Prohibiting nominating commissioners from holding paid public office or any office or official position in political party;

5. Requiring that the nominating commission submit a short list of only the best-qualified nominees to the appointing authority;

6. Requiring that the final list of nominees be made public and public comment invited;

7. Requiring that the appointing authority appoint only from among the nominees recommended by the commission;

8 Setting a deadline for the appointing authority to nominate someone from the list and providing for a backup appointing authority if the deadline is not observed;

9. Providing for a retention mechanism--either through election or reappointment; and

10. Establishing a performance review process that will provide useful information to voters in retention elections.

Judge Richard S. Brown of the Wisconsin Court of Appeals has submitted a proposal for interim judicial appointments that is patterned in large measure on the AJS model, but modified for the Wisconsin judiciary. He proposes separate nominating

commissions for the supreme court, court of appeals, and circuit courts. Each commission would consist of seven members, four of whom would be attorneys who are officers of state or local bar associations, and three of whom would be non-lawyers appointed by the governor, deans of the state's two law schools for the supreme court and court of appeals and by the chair of the county board at the circuit court level. The entire text of Judge Brown's proposal appears at Appendix D.

Milwaukee County Chief Judge and Committee member Michael J. Skwierawski also submitted a proposal which appears in full at Appendix F. Judge Skwierawski's proposal combines a number of features of the AJS Model, or the so-called "merit selection" process with a proposal to have all judges appointed through the nominating commission/appointment process run in an open election two years after appointment. Those who are appointed under his system, and who thereafter prevail in the open election for their judicial seat, would thereafter run periodically in retention elections, i.e., where there would be no opposing candidate but where the voters would exercise their franchise in answering the ballot question "Should Judge _____ be retained?" The arguments in favor of this hybrid system, and the significance in terms of judicial diversity, are explained more thoroughly in Appendix F.

2. AMERICAN BAR ASSOCIATION STANDARDS ON STATE JUDICIAL SELECTION.

At its Annual Meeting in July, 2000, the House of Delegates of the American Bar Association adopted State Judicial Selection Standards. As noted earlier, the ABA has endorsed the appointive system of judicial selection since at least 1937. Nonetheless, in adopting the State Judicial Selection Standards, the Association recognized that the majority of judges in the United States are elected in either partisan or nonpartisan elections. Accordingly, the Association drafted Standards applicable both to appointive and elective selection systems.

The Standards consist of three parts. Part A sets forth detailed selection and retention criteria relating to experience, integrity, professional competence, judicial temperament, and service to the law and contribution to the effective administration of justice. The selection and retention criteria make no mention of diversity and one criterion could be viewed as slightly inimical to diversity goals, i.e., a requirement that every candidate shall have been a member of the bar of the highest court of the state for 10 years.[138]

Part B identifies the primary actors in the selection process. It has three notable provisions, relative to the Committee's charge.

First, Standard B.1 (pertaining to Judicial Eligibility Commissions), Standard B.2 (pertaining to Judicial Nominating Commissions) and B.3 (pertaining to Appointing Authorities) expressly make inclusivity a goal of the selection process.[139] An *inclusive*

[138] ABA State Judicial Selection Standards, Standard A.1: "A candidate for judicial office should be a member of the Bar of the highest court of a state for at least 10 years and have been engaged in the practice or teaching of law, public interest law, or service in the judicial system."

[139] ABA State Judicial Selection Standards, Standard B.1: "Judicial Eligibility Commission: To assist appointing authorities, endorsing authorities, and the electorate in achieving the goal of a qualified, inclusive, and independent judiciary, a credible, deliberative, bi-partisan body known as a Judicial

judiciary is defined in the Standards as "a judiciary that includes individuals who are broadly representative of the population served."

Secondly, the ABA calls for the creation of Judicial Eligibility Commissions whose function would be to review the qualifications of judicial candidates for *elective* office.[140] Standard B.1(d) provides:

> Screening and Recommendation of Candidates. A Judicial Eligibility Commission should give careful and equal consideration to each candidate for a judicial office, and should apply judicial selection criteria set forth in Part A to determine whether a candidate is qualified for judicial office. Only the names of those candidates found qualified by the commission should be published and placed on the list of qualified candidates and reported to the appointing or endorsing authority.

Thirdly, the ABA calls on Nominating Commissions to actively recruit judicial candidates: Standard B.2(d) provides:

> Recruitment of Candidates. Nominating commission should actively recruit qualified individuals for judgeships and in performing this function should operate in a manner that imparts public confidence in the judicial selection system, and encourages a broad range of applicants.

3. POSITIONS OF MINORITY BAR ASSOCIATIONS.

The Committee's Chair, Judge Maxine A. White, and Reporter, Professor Charles D. Clausen, attended the American Judicature Society's Conference on Choosing our Judges: A National Forum on Judicial Selection, conducted in Washington D.C. on

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Eligibility Commission should be created to review the qualifications of judicial candidate pursuant to recognized selection criteria."

[140] *See* note 8, *supra*.

March 3-4, 2000. At that meeting, Detroit Attorney Harold Pope, President of the National Bar Association, spoke of the opposition of that predominantly African-American bar association to an appointive system of judicial selection. The principal thrust of those remarks were echoed in "Judicial Selection: An African American Perspective," authored by Cook County Circuit Court Judge Sidney A. Jones, III, a member of the Judicial Council of the National Bar Association,[141] in the Spring 2000 edition of GOAL IX, a quarterly publication of the American Bar Association's Commission on Racial and Ethnic Diversity in the Profession. Judge Jones wrote:

> Throughout the history of our country, the right to vote has been so vigorously fought for by the Civil Rights movement that African Americans can only be expected to distrust any system that takes away that right. This is even more so when such a system so drastically reduces the input of the public and necessarily restricts that input to a vastly smaller and more cohesive social, economic, political, financial, and legal elite. In short, this means "the establishment." The black legal community well remembers that in the presidency of Jimmy Carter, a Democrat, not a single lawyer of color was forwarded for nomination to the federal bench by then-Democratic [Illinois] Senator Adlai E. Stevenson, Jr. This was on account of the "merit" system created by the Senator having found that there were no black lawyers or black state judges qualified to be a U. S. District judge. Preposterous, indeed. The black community could only have been left with the impression that the senator's selection process was more interested in elitism than quality, and this is precisely the reason for which appointive selection plans continue to draw vehement opposition in the black community and among its lawyers.
>
> . . . The very history of our country is based on the desire to be governed by consent rather than to be ruled by decree. Why on earth should society permit the executive and legislative branches of government to select judges to protect the people from the possible abuses of these executive and legislative branches? Perhaps that part of our society that has been most victimized by brutal legislative and executive

[141] "When the NBA was organized in 1925, there were fewer than 1,000 African-American lawyers in the nation, and less than 120 belonged to the Association. By 1945, there were nearly 250 members representing 25% of the African-American members of the bar. Over the past 72 years, the NBA has grown enormously in size and influence. At present, the NBA is the nation's oldest and largest national association of predominantly African-American lawyers and judges. It has eighty-seven affiliate chapters throughout the United States, Canada, United Kingdom, Africa and the Caribbean and represents a professional network of over 17,000 lawyers, judges, educators and law students." Lawyers for One America, "Action is the Difference We Make," available at www.lawyersforoneamerica.com.

> action would be the most distrustful of having the right to vote to elect and retain judges taken away. African Americans are most familiar with legally instituted gimmicks to restrict their right to vote – the poll tax, literacy testing, gerrymandering, and now, "merit" selection. We won't have it.
>
> . . . The election of a few less-than-stellar individuals to the bench is a risk, to be sure. However, it is far better to accept the risks of democracy than the tyranny of aristocracy. When the vested social, economic, political, financial, and legal elite is given the right to appoint judges, tyranny will not be far behind. Black people know this, even if appointive selection proponents do not.[142]

In the same publication, Attorney David A. Cerda, former president of the Hispanic Lawyers Association of Illinois, wrote:

> [J]udicial screening panels are not likely to increase the number of people of color appointed to the bench. For example, in Cook County, Illinois, associate judges are appointed by circuit court judges. Candidates for associate judgeships are screened by bar associations. Separately, a committee of circuit court judges screens candidates (taking into consideration bar ratings) and presents a ballot of candidates to the full circuit. Too few minorities have been appointed under this system. "Qualified" African Americans, Hispanics, and Asians have been overlooked. Who a candidate knows is the most important factor in these appointments.
>
> The elimination of judicial elections will also rob people of color of a needed avenue to the bench just as more minority populations are growing and more minorities are being elected to the bench.
>
> History has given people of color reason to distrust appointive systems and bar associations' recommendations to eliminate judicial elections. Rather than working to eliminate judicial elections, the ABA should work to improve judicial elections.[143]

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[142] Sidney A. Jones, III, *Judicial Selection: An African American Perspective,* GOAL IX, Vol. 6, No. 2, pages 1, 8 (Spring, 2000).

[143] David A. Cerda, *Judicial Selection: An Hispanic Perspective*, GOAL IX, Vol. 6, No. 2, page 4 (Spring, 2000). The Hispanic National Bar Association is a network of Hispanic lawyers and bar associations across the United States. Its goals include the following:

- promoting equal justice and opportunity for all Hispanics
- educating the Hispanic community about relevant legal issues and about its legal rights and responsibilities;

E. FINDINGS AND RECOMMENDATIONS

* **FINDING**: The use of a nominating commission is essential for any appointive process.

* **FINDING**: The membership of a nominating commission should be racially and ethnically diverse.

* **RECOMMENDATION**: The nominating commission should be expressly charged to work toward a diverse, inclusive judiciary.

* **RECOMMENDATION**: The nominating commission should be required to reflect the state's diverse population.

* **RECOMMENDATION**: The membership of a nominating commission should consist of both lawyers and nonlawyers.

* **RECOMMENDATION**: The members of a nominating commission should be appointed for fixed, staggered terms.

* **RECOMMENDATION**: The nominating commission should not be charged with the duty of actively recruiting individual judicial candidates, but should engage in broad-based information efforts designed to encourage applications by qualified applicants, including minority applicants.

- promoting the professional development of Hispanic lawyers and law students;
- encouraging Hispanics to enter the legal profession; and
- promoting the appointment of Hispanics to leadership positions in federal, stae and local governments.

Lawyers for One America, "Action is the Difference We Make," available at

* **RECOMMENDATION**: Four of the Committee members out of the eight voting members believed that the power to appoint members to the nominating commission should remain solely with the Governor. Four members believed that the power to appoint members to the commission should be dispersed among other entities or officials.

* **RECOMMENDATION**: The applicants for a judicial nomination should be kept anonymous except for the final nominees sent to the Governor by the Governor's Advisory Council on Judicial Selection, if Wisconsin Open Records Law permits.

X. THE ELECTORAL PROCESS

A. DEFINITION OF OPEN ELECTIONS. Nearly two-thirds of the states use an elective system to choose judges. Some use partisan elections;[144] some use nonpartisan elections.[145] In these states, a judicial candidate competes against one or more opponents to achieve election to a judgeship. It is not unusual for incumbent candidates to run unopposed. Indeed, as demonstrated in Section III of this Report, at the Wisconsin Court of Appeals level, there were 26 elections between 1990 and 1998. In twenty of them, an incumbent ran and in only two of the twenty was there an opponent. Even in the six races in which there was no incumbent, in four there was no opponent. At the circuit court level in Wisconsin for the same period, there were 381 circuit court elections. In 325, an incumbent ran. The incumbent had no opponent in 282 or almost 87% of the elections. In 56 of the elections, there was no incumbent on the ballot. Forty-two or 75% of these elections were contested. Notwithstanding the high degree of incumbent stability, the feature of an open election system that most accounts for its popularity is the opportunity of the electorate to participate in the selection of its judges and to oust a judge who for any reason incurs the displeasure of the voters.

B. **DEFINITION OF RETENTION ELECTIONS.** A number of states have adopted some form of what is frequently called the "Missouri Plan" or "merit selection."[146] The "Missouri Plan" has been described as follows:

> In this complex system, a commission is established to nominate

[144] Alabama, Arkansas, Illinois, Indiana, Kansas, Mississippi, Missouri, New York, North Carolina, Pennsylvania, Tennessee, Texas, and West Virginia. It should be noted that other systems of selecting some judges may also be used in these states.

[145] Arizona, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin.

[146] Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Missouri, Nebraska, New Mexico, New York, Oklahoma, South Dakota, Tennessee, Utah, Vermont, and Wyoming. The overlap between states in this grouping and states in the other groupings is due to the use of different selection systems for different levels of the states' judiciaries or different jurisdictions within the states.

> candidates for judgeships. Most commonly, the commission includes lawyers who have been selected by their colleagues and nonlawyers who have been selected by the governor; in many states, a judges also serves. When a judgeship needs to be filled, the commission produces a short list (usually three names) of nominees, and the governor makes the appointment from this list. After the judge has served for a short time, and at periodic intervals thereafter, an election will be held in which voters decide whether or not to retain the judge; there is no opposing candidate.[147]

The election referred to above is known as a "retention election". Such an election provides for citizen participation in the decision to keep an incumbent judge on the bench regardless of whether the judge draws opposition from within the bar (or from within the judiciary in the case of some elections.)

> In most states operating under the Missouri Plan, a judge needs to win a simply majority of votes in a retention election to remain in office. Most judges are in an excellent position to do so; in a retention election, all the ordinary advantages of incumbency are strengthened by the absence of an opposing candidate. Until recently, the results were highly favorable to judges: the overwhelming majority of judges won, and generally by large margins. For instance, 99 percent of the major trial court judges who faced retention elections between 1964 and 1984 were successful. (citation omitted.)
>
> In the past decade, judges have not done quite so well in retention elections. This change is symbolized by a few well-organized campaigns against retention. One came in California, which uses retention elections as the last stage in a modified system of gubernatorial appointment for appellate judges. Over several years, conservatives became increasingly unhappy with the highly liberal state supreme court, particularly Chief Justice Rose Bird. In 1986, conservative groups mounted campaigns against Bird and two of her colleagues. These groups spent an estimated $3.5 million to defeat the three justices, while their supporters spent an estimated $2 million. The public campaigns against the justices focused on their votes against the death penalty, but large shares of the financing on both sides came from supporters and opponents of the court's liberal positions on personal injury law. Ultimately, the three justices were defeated by large margins.
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> . . .

[147] BAUM, AMERICAN COURTS, 3RD ED., CH. 4, The Selection of Judges, at 116.

> More important than these visible battles is a less visible trend: the frequency of negative votes has increased since the 1960s. In Illinois, which requires 60 percent favorable votes for retention, a record ten out of ninety-seven trial judges lost in 1990. In Missouri, the average proportion of favorable votes dropped from 82 percent in 1972 to 73 percent in 1988 – and then below 60 percent in 1990. (This downward slide was halted in 1992, but that year a Missouri judge lost a retention election for the first time since 1942.)
>
> . . .
>
> The judges who do lose usually have aroused opposition from those who see their performance as substandard or who disagree strongly with their decisions. But, . . . , to a great extent the trend toward higher level of negative voting is directed at judges in general, perhaps reflecting a decline in citizens' trust of political leaders. California voters were struck by the contrast between the contentious supreme court contests of 1986 and the virtually invisiable retention votes in 1990, with five justices facing no apparent opposition. Yet all five received more than 30 percent negative votes, and one won by a 56-44 margin. As fewer voters are inclined to give judges automatic support, those judges who do have opposition face an even greater chance of defeat than two decades ago. But it remains true that the overwhelming majority of Missouri Plan judge succeed in winning retention. [148]

C. **MINORITY JUDGES IN RETENTION ELECTIONS.** In 1994, the American Judicature Society published the results of a study on the success rate of minority judges in retention elections.[149] The authors concluded:

> It takes an awful lot for a sitting judge to lose a retention election, and so far as we can see this is roughly as true of black and Hispanic judges as of white judges. Hispanic judges may be rejected at slightly higher rates than their black or white colleagues, but even they are retained 96 percent of the time. The handful of black and Hispanic judges who have lost retention elections over the past decade, moreover, seem to have do so for other reasons. There is no convincing evidence, in any of these elections, that the judge's race or ethnicity played any significant part in his or her loss.

[148] Id. at 126.
[149] Robert C. Luskin, Christopher N. Bratcher, Christopher G. Jordan, Tracy K. Renner, and Kris S. Seago, *How Minority Judges Fare in Retention Elections,* 77 Judicature 316 (1994).

. . .

> Although merit selection systems, within which retention elections have most often been found, have historically depressed minority representation vis-à-vis purely appointive systems, their bias seems to have lain in the nominating rather than the retention process, and they have actually done better than partisan elections on this score. It does seem unlikely, even with the recent emergence of minority representation as a criterion with which nominating commissions will have to reckon, that the many states now looking for an alternative to at-large partisan elections will secure greater minority representation by merit selection than by partisan elections within smaller and more racially homogeneous constituencies, but the probable shortfall, again, would occur in the nominating process.
>
> As far as retention elections themselves are concerned, the verdict seems clear: The prospect of more judicial retention elections, per se, offers minorities little to fear.[150]

E. NATIONAL OVERVIEW. The debate over the merits and drawbacks of open election judicial selection systems vs. so-called "merit selection" systems featuring retention elections has gone on at least since Roscoe Pound's 1906 address to the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice." The issues resurfaced in high profile and were placed before the voters of Florida in the November, 2000, general elections. A referendum item gave the voters of each of Florida's counties the option to choose a system in which the governor would appoint their local county and circuit judges or to retain the current open election system. The appointive system was vigorously supported by the state bar association and other individuals and organizations. The results are enlightening, as the following news story from the *St. Petersburg Times* reveals.

[150] *Id.* at 321.

WEDNESDAY, NOVEMBER 8, 2000

REFERENDUM: JUDICIAL SELECTION
FLORIDIANS KEEP RIGHT TO ELECT JUDGES

Floridians voted overwhelmingly to continue electing the state's more than 750 trial judges, soundly defeating a movement by the state's legal community to have the governor appoint them.

In judicial circuits and counties across the state, voters favored retaining their right to select the judges who run some of Florida's busiest courts and have the most contact with ordinary citizens.

The Tampa Bay area followed that trend. Voters in the counties of Pinellas, Hillsborough, Pasco, Hernando and Citrus will keep electing county and circuit judges every six years.

"People like to elect their public officials," Hillsborough Chief Judge Dennis Alvarez said Tuesday night. "It's the American way."

The choice to appoint or elect judges was before voters because of a constitutional amendment Floridians approved in 1998.

If the change had been approved, the governor would fill openings on the bench based on recommendations from local nominating commissions, and voters would have decided whether to retain sitting judges – much as they do for appellate and Supreme Court judges.

But those who wanted to hold onto the current system said they didn't want voters to lose more rights by switching to the "merit selection system," which would have given more power to a small group of politically connected people.

"The system works," said Oscar Marrero, president of the Cuban-American Bar Association. "This is a victory for the entire community and for the administration of justice."

Although the appointment process is credited with making the judiciary more diverse, several groups representing minority attorneys want to retain elections.

The National Bar Association, the Hispanic Bar Association, the Cuban-American Bar Association, and the Florida Association for Women Lawyers supported the current system- much to the dismay of the Florida Bar, which counts every lawyer as a member.

> Tuesday's election was a blow to legal heavyweights such as the American Bar Association and the Florida Bar, which spent about $70,000 lobbying for the change around the state.[151]

F. WISCONSIN'S PROCESS. Wisconsin has employed a hybrid system for selecting judges since its admission to the Union. The Wisconsin Constitution provides that the basic method is by nonpartisan popular election.[152] Significantly, however, the Constitution also provides for interim judicial vacancies to be filled by gubernatorial appointments.[153] Approximately half of all the judges in Wisconsin have initially reached the bench through the appointment process. A substantial majority of such appointees, i.e., those appointed since 1983, have gone through a merit selection process conducted by the Governor's Advisory Council on Judicial Selection.[154] As pointed out earlier in this Report,[155] the vast majority of incumbent judges, whether initially appointed or elected, are retained by the voters. This is to say that there is no substantial rejection of gubernatorial appointees by the electorate.

Many member of the Committee believe that Wisconsin's long-standing hybrid system offers Wisconsin's citizens an excellent combination of the advantages of the elective system and the advantages of the appointive system. With half of the state's judges having been selected through a screening process, the state enjoys in very large measure the benefits of a nominating commission system. With the other half of the judges having initially reached the bench through an open election process, the state ensures that qualified judicial candidates who wish to stand for popular election may do so. Candidates who for any reason fail to obtain an appointment to judicial office are free to offer their qualifications to the electorate in an open election.

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[151] The story may be accessed from Westlaw at 2000 WL 26334566. *See also Voters Shun Appointment of Judges,* Daytona Beach News-Journal, Nov. 8, 2000; *Judges Remain Elected, Voters Statewide Say,* The Miami Herald, Nov. 8, 2000.

[152] *See* Wis. Const., Art. 7, sec. 4(1) [Supreme Court]; Art. 7, sec. 5(2) [Court of Appeals]; and Art. 7, sec. 7 [Circuit Courts].

[153] *See* Wis. Const., Art. 7, sec. 9. ["When a vacancy occurs in the office of justice of the supreme court or judge of any court of record, the vacancy shall be filled by appointment by the governor, which shall continue until a successor is elected and qualified. There shall be no election for a justice or judge at the partisan general election for state or county officers, nor within 30 days either before or after such election.]

[154] *See* Section IX B of this Report, pp.76-80, *supra* and Section X A, p.92, *supra.*

The Committee notes the apparent anomaly that the majority of minority judges in this state initially reached the bench by appointment rather than by election, yet, at the national level at least, minority bar associations strongly support an open election process for judicial elections.[156] The anomaly may be more apparent than real when one considers the fact that in this state racial and ethnic minorities tend to be found in major urban areas,[157] and that the percentage of minority citizens in those areas is increasing.[158] As the minority voting age population increases, minority voting power increases. Thus, at least to some minority attorneys and voters, it may be more anomalous to move from an elective system to an appointive system as minority voting power increases in the jurisdictions where the greatest need for judicial diversity exists, i.e., the major urban centers where large minority populations are to be found.

F. FINDINGS AND RECOMMENDATION

- **FINDING:** Half of the judges currently serving on Wisconsin courts were initially elected to the bench while the other judges were appointed.

- **FINDING:** Minority bar associations prefer open elections.

- **FINDING:** There are no significant differences in success rates for minority judicial candidates in open elections versus retention elections.

- **RECOMMENDATION:** The majority of the Committee supports maintaining the current Wisconsin system of open elections and interim gubernatorial appointments.

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[155] *See* Section III of this Report, pp. 17-24, *supra.*
[156] *See* Section IX D 3, pp.87-90, *supra.*
[157] *See* Section IV B, p. 25-27, supra.
[158] *See* Section IV generally and compare the 1990 census figures with the estimated 1998 figures. Note that the 2000 census figures will be available only a few months after this Report is delivered to the Governor, the legislature, and the Supreme Court.

XI. IMPLEMENTATION RECOMMENDATIONS

- **RECOMMENDATION:** The entire Committee recommends that the Governor amend Executive Order 2, or any superceding executive order with the same subject matter, to provide that the Governor's Advisory Council on Judicial Selection:
- Shall work toward a racially and ethnically diverse judiciary;
- Shall itself be broadly representative of the state's diverse population;
- Shall be composed of both lawyers and nonlawyers;
- Shall be appointed for fixed, staggered terms;
- Shall not actively recruit individual judicial candidates, but shall engage in broad-based informational efforts designed to encourage applications by qualified applicants, including minority applicants.

* **RECOMMENDATION:** The majority of the Committee opposes any amendment to the Wisconsin Constitution for the purposes of adopting these recommendations.