ADDRESS

THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS: POLITICAL CORRECTNESS REBUFFED

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For the last three years, the D.C. Circuit has spent a distressing amount of time and energy dealing with the Task Force on Gender, Race, and Ethnic Bias. This amorphous body, under the auspices of the Judicial Council, was composed of a number of District of Columbia lawyers and legal academics and five judges from the D.C. circuit and district court. The Task Force activities were flatly improper for a group that included federal judges and proceeded under a judicial imprimatur.[1]

I had three key procedural criticisms. In my view, the Task Force had absolutely no business investigating, as they did, the personnel practices of Washington law firms and executive-branch institutions. Second, it was an outrageous encroachment into the integrity of judicial decisionmaking to try to determine from judges, as they did, what considerations their colleagues employ in deciding cases. Finally, to evaluate judicial decisionmaking through the Task Force's use of anonymous questionnaires and focus groups, the latter evidently composed of friends of the Task Force leaders, was a profound attack on judicial independence and our normal legal process.

My main substantive criticism was directed at the Task Force's

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1. This controversy has received a great deal of press attention in the D.C. area. *See* Bruce D. Brown, *Task Force Wraps Up*, LEGAL TIMES, Jan. 29, 1996, at 6; Saundra Torry, *Federal Judge Assails Courthouse Bias Study: Jurists' Report Finds Subtle Barriers in D.C.*, WASH. POST, Mar. 27, 1995, at B3; Michael Hedges, *Court Rulings Dissected by Race, Sex: D.C. Survey Raises Specter of Quotas*, WASH. TIMES, Mar. 14, 1994, at A4. I sent an internal memorandum to all Article III judges on the circuit criticizing the Report issued by the Task Force, and someone leaked it to Saundra Torry of *The Washington Post*, who seemed to act as the functional equivalent of the Task Force spokesperson. The memo ultimately was published virtually in full in *The Legal Times*. *See Showdown Over Bias Task Force*, LEGAL TIMES, Apr. 10, 1995, at 12 [hereinafter *Showdown*].

recommendation that judges, judicial law clerks, and lawyers providing services to the courts should be chosen in accordance with "diversity" criteria.[2] The Task Force assumed that judicial decisionmaking would and should vary in accordance with the race or sex of the judges and clerks—or at least that it might be so perceived. As federal judges, according to the Task Force, we should defer to these perceptions.

This Article updates the matter and tries to put the whole affair in perspective, explaining as best as possible why the D.C. Circuit and the federal judiciary have been struggling with this matter so far removed from the normal business of judges. First, to the denouement. The Task Force ended more with a whimper than a bang. It presented an extensive list of recommendations (some actually directed at local law firms and government agencies). These recommendations, inter alia, urged greater "diversity" in the hiring of judicial clerks and in other court appointments, authorized the Federal Judicial Center to "study" the effects of race, ethnicity, and gender on the outcome of litigation, and suggested that the Center conduct educational programs—should I say "re-education programs"—to root out unconscious judicial bias and to develop sensitivity training for judges. Finally, and perhaps most troubling institutionally, the Task Force called for a continuing ad hoc advisory committee to oversee the implementation of the report.

Under the deft leadership of our new Chief Judge, Harry Edwards, many of these recommendations somehow seemed to disappear before their formal consideration by the Judicial Council.[3] These recommendations may have dropped away because of their divisive nature, but it also may be that the Task Force proponents recognized that requests for the Federal Judicial Center to play a formal role in the "re-education" of judges called all too much attention to the Center's past efforts to nourish such Task Forces. In the new political and budgetary climate, certain senators were focusing, legitimately, on whether the Federal Judicial Center, a $20 million-a-year organization sponsoring these sorts of judicial studies, was of significant value to the country or

2. *See Showdown*, *supra* note 1, at 12.

3. The Judicial Council is composed of an equal number of district judges and an alternating group of appellate judges. It is ostensibly limited to circuit administrative matters.

even to the judiciary.[4]

In any event, under Chief Judge Edward's guidance, the Judicial Council was assiduously careful not to express any views on the Task Force Report. It treated those Reports as if they were the product of only a loosely-attached advisory committee of lawyers. Fortunately, the recommendations for nonjudicial institutions were ignored. The Council actually accepted only noncontroversial recommendations: those designed to ensure that information on job and promotional opportunities for our staff is widespread, that the courthouse be made safe and accessible, and that a formal written policy on sexual harassment be adopted. It is assumed that the latter will not deviate from the well-understood legal meaning of that term. Certain other recommendations were referred to our two courts which, rather than the Judicial Council, really have authority over the matters raised. Two of these recommendations—calling for "educational programs aimed at increasing awareness of cultural diversity and its effects on relationships among court personnel and court users" and "information gathering concerning participation in the court system by men and women of differing races, ethnicities, and languages"—were voted down by our court. The last thing we need is the kind of "diversity training" certain government agencies have foisted on their employees.

The Report has been sent for publication. It will include a defense of the Report issued by the judges that participated on the Task Force, but no Council endorsement. The publication will also include the powerful criticisms of the Independent Women's Forum and the devastating attack on Task Force methodology submitted by Professor Steven Thernstrom of Harvard.[5] It also will be accompanied by a Statement of Disassociation filed by Judges Buckley, Ginsburg, and Randolph, who are all members of the Council, with an indication that Judges Williams, Sentelle, Henderson, and myself, who are not now members of the Council, concur. That, of course, is a majority of the D.C. Circuit Court of Appeals.

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4. *See* Naftali Bendavid & Eva M. Rodriguez, *Senator Targets Judicial Spending*, LEGAL TIMES, May 29, 1995, at A1.

5. *See* Stephen Thernstrom, *Critical Observations on the Draft Final Report of the Special Committee on Race and Ethnicity to the D.C. Task Force on Gender, Race, and Ethnic Bias*, 1995 PUB. INT. L. REV. 119 (1995); Stephen Thernstrom, *Rule of Law: Racial Bias in the Federal Courts?*, WALL ST. J., Mar. 22, 1995, at A17.

It would appear, then, at least for the D.C. Circuit, that our three-year long period of turmoil is over. As my wife is fond of saying, "all's well that ends." The Senate Judiciary Committee and the Senate Appropriations Committee have inquired into the diversion of judicial resources caused by those Task Forces.[6] Perhaps as consequence of this inquiry, the Fourth Circuit Judicial Council recently adopted a resolution killing a similar proposal. It would not be surprising if other circuits, which have felt pressured to employ this Task Force approach, similarly draw back.

Still, we should recognize, to use the popular phrase, that "we have dodged a bullet"—a bullet that, only a short time ago, I would have thought could not possibly have been aimed at the Federal judiciary. We should try to understand how and why this happened. What is it that could give rise in the first place to such an effort improperly to influence the federal judiciary? The Task Force mechanism, to examine the status of women and minorities, has become quite fashionable over the last decade. It has been adopted at various institutions, in academia and journalism, as well as in certain business organizations. Just last week, in a *New Republic* article that may turn out to be one of the most influential published in recent times, Ruth Shalit dissected the "diversity" wars at *The Washington Post*, which were marked by, among other things, re-education and sensitivity task forces.[7] After much contention and journalistic blood, not only is the news coverage corrupted—*The Washington Post* never was a model of objectivity—but race relations have been worsened significantly.

When the concept of such an inquiry was first brought to our attention, a number of us wondered what problem it was designed to solve. Was there any indication that women and minority lawyers or women and minority parties were in any way discriminated against or mistreated by court personnel? We never got an affirmative answer to that question, but we constantly were told that the Ninth Circuit had embarked on such a Task Force study. Our then-Chief Judge Abner Mikva initially asked then-Judge Clarence Thomas to chair a committee of the

6. *See generally Funding Cut May Scuttle Court Study*, ASSOCIATED PRESS POL. SERV., Nov. 14, 1995.

7. *See* Ruth Shalit, *Race in the Newsroom: The Washington Post in Black and White*, NEW REPUBLIC, Oct. 2, 1995, at 20.

Judicial Council to look into this matter. Judge Thomas was adamant that he would not turn this responsibility over to a group of practicing lawyers or academics who might have an ideological ax to grind. And he was quite concerned that inappropriate paths of inquiry not be pursued. But—everyone knows—he left our bench for a more rarefied atmosphere, and we were off to the races.

Thereafter, a large Task Force with two separate committees, one to study gender bias and one to study racial and ethnic bias, was commissioned. Its proponents prevailed in gaining acceptance of their key demand that the Task Force include judges so that its activities and its product would carry a judicial imprimatur. This pattern of placing senior executives on such a Task Force often is used by hierarchical organizations, but it is hard to imagine a more inappropriate approach for courts. The Task Force actually was led by academics and lawyers who clearly represented one philosophical and ideological point of view on the core issue as to whether sex and race proportional representation (sometimes referred to as diversity and sometimes referred to as affirmative action) was a moral imperative. Tellingly, no one, so far as I could determine, ever made the slightest effort to define "bias." A number of us judges thought that term should be limited to discrimination or unequal treatment, but the committees never acknowledged any such restriction.

While our Task Force was underway, the Ninth Circuit Task Force on Gender issued its wide-ranging Report based on similar techniques and with even more extensive investigations and recommendations. Our Task Force continually cited the Ninth Circuit as controlling precedent. The Ninth Circuit's product was astonishing. Certainly judges on that circuit could be expected to have the same concerns as those ultimately expressed by the majority of our court, but apparently they remained passive onlookers. One can only speculate as to the reasons, but it is worth noting that the Ninth Circuit has swollen to such a size—twenty-eight appellate judges—that it resembles more a legislature than a court. Perhaps it is to be expected, therefore, that it would be less resistant to transitory political currents. Moreover, many of the judges have resisted fiercely any splitting of the circuit, and Senator Biden, who until last November was chairman of the Judiciary Committee, was an avid supporter of these judicial Task Forces.

It often is suggested that the notion of political correctness is a figment of the paranoia of old fossils.[8] I certainly admit to being an old fossil, but this entire exercise proves the existence and force of political correctness. At least a score of federal judges have told me privately that they disapproved of the Ninth Circuit Task Force paradigm, including some on the Ninth Circuit itself, but few have been prepared to oppose the notion publicly. It is extremely unpleasant for anyone, but especially a federal judge, to endure political attacks from those—like law professors—who have made it their primary business to wage ideological struggles unceasingly. As mentioned, the active leadership of the D.C. Circuit Task Force's nonjudicial members, mostly academics, were those whose views on the diversity debate were well known. There were, to be sure, a sprinkling of other than ideological warriors, but they—like many judges around the country—did their best to stay out of the line of fire. One wonders why such people would lend their names but not their conviction to such a process.

The first indication that the D.C. Circuit Task Force similarly was lurching out of control was the Notice of a Public Hearing the Race Committee of the Task Force put out in April of 1993. That notice indicated that the Task Force was inquiring into, inter alia, "the demographics of the federal bench, bar, and courthouse" and "the role race may play in substantive outcomes, [in] interactions among judges." Some of us protested, pointing out that it would be improper for the Task Force to inquire into substantive outcomes in cases or into the race or gender of judges who, after all, are chosen by Presidents, not by other judges. We also warned that the key question to which the Task Force was gravitating—the desirability of proportional representation—was an intensely political issue, inappropriately pursued by a group under judicial auspices.[9] Thereafter, a ques-

8. *See, e.g.*, Jamin B. Raskin, *The Great PC Coverup*, CAL. LAW., Feb. 1994, at 68 (critiquing the notion of political correctness as "conservative America's choice scare term of the '90s").

9. Another political aspect of the D.C. Circuit Task Force was its insistence that our circuit, even our Court of Appeals, be thought of as a court primarily serving D.C. residents. Although that approach serves certain obvious objectives, including who might serve on our court, it is plainly foolish. The U.S. Court of Appeals for the D.C. Circuit is fundamentally a national court. The great bulk of its caseload is attributable to federal statutes that allow persons and institutions to petition for review either in their home circuit or in our Court of Appeals.

As the direction of our Task Force became apparent, the Court of Appeals voted "no

tionnaire was sent to members of the bar soliciting any indication from women lawyers of adverse treatment in federal court, including the losing of cases they thought they should have won. I received several calls from women lawyers asking me whether we had totally lost our minds. Were we authorizing an anonymous plebiscite on our own integrity? Why did we not just stand for election as judges?

Looking back now, it is clear that the fundamental problem was that those who were driving the process, both on and off the courts, were wholly unwilling to articulate any limits to the inquiry, either procedural or substantive.[10] As noted, bias never was defined because, as was increasingly apparent, a good deal more than just nondiscrimination or equal treatment was sought. We were to be influenced—perhaps bludgeoned is more correct—to accept a profound change in outlook that ultimately would be expected to affect our substantive decisions. We never were able to persuade even the judges on the Task Force to accept the proposition that substantive law and substantive outcomes, which should only be examined by judges case by case, were out of bounds. Perhaps those who were leading the effort did not wish to retreat from what had been gained in the Ninth Circuit. But it is of equal importance that the Task Force leaders, including the participating judges, did not seem comfortable in articulating limits. That is another manifestation of political correctness: once in the politically-correct stream, one must go where the stream takes one; it is difficult to construct levies or dams of principle.

I am not satisfied with the end of this story; I am only relieved. It is comforting, although hardly surprising, to hear from one of the social scientists who provided services to the Task Force that the basic data, even taking into account the flawed methodology, shows no statistically significant incidents of bias (as normally defined) in our courts. But, it is nothing less than frightening that a powerful ideological movement with hard political

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confidence" in the Task Force. Because it was being operated out of the Judicial Council, however, we were not able to end the effort, but we certainly wanted to disavow its legitimacy.

10. In the Judicial Conference, the institutional organization of the federal judiciary headed by the Chief Justice and composed of the chief judges of all circuit and district courts, the Committee on Judicial Administration proposed a resolution heartily endorsing these task force studies. Amazingly, an amendment that merely would have limited the endorsement to studies that were confined to discrimination for which judges and court personnel were appropriately thought responsible was defeated seven to six.

overtones could have come so close in its efforts to intimidate the federal judiciary. Had the majority of the D.C. Circuit not rebelled, who anywhere would have questioned the propriety of the Gender and Race Task Force notion as applied to federal courts, with its disturbing methodology and sweeping and inappropriate objectives?

We certainly were fortunate at the end to have as a chief judge a fair-minded man who, although he did not necessarily agree with us, understood our concerns. But that merely made possible a peaceful ending. This misconceived effort should never have been launched in any circuit. It should be opposed everywhere.