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PERSONAL REFLECTIONS ON CREATION OF THE THIRD CIRCUIT TASK FORCE ON EQUAL TREATMENT IN THE COURTS

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TASK forces examining gender bias are not new and are certainly not the exclusive province of the federal judiciary. More than seventy percent of the states established gender bias task forces in the late 1980s and early 1990s.¹ As of May 1996, forty-one states and the District of Columbia had established gender bias task forces that were either initiated by the state supreme courts or established by the state bar associations.² As of April 1997, thirty-seven states had either published final reports or made recommendations, and were in the postreport or implementation phase of development, while four others were still in phases of the process.³

Interest by the federal circuits came somewhat later. The Ninth Circuit took the lead when its task force was created in 1990. Shortly after I became Chief Judge of the Third Circuit on February 1, 1991, I was approached by several sources, both within and outside the circuit, with inquiries as to whether or when our circuit would begin a comparable study.

Our circuit was a prime candidate for a task force on gender bias. We have six district courts, cover three states and the Virgin Islands, encompass both rural areas and large metropolitan cities, have a diverse docket with cases invoking the full range of federal jurisdiction without being overly concentrated in any one area of the law and have an active and supportive bar.

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1. See generally NATIONAL CENTER FOR STATE COURTS, STATUS OF GENDER BIAS TASK FORCES AND COMMISSIONS IN THE STATE AND FEDERAL JUDICIAL SYSTEMS (2d ed. 1993).

2. See generally NATIONAL CENTER FOR STATE COURTS, STATUS OF STATE GENDER BIAS TASK FORCE ACTIVITY (1995 & Supp. 1996).

3. See generally NATIONAL CENTER FOR STATE COURTS, DIRECTORY OF TASK FORCES ON GENDER BIAS IN THE COURTS (1997).

(1347)

In September 1990, the Judicial Conference of the United States⁴ approved the recommendation of the Federal Courts Study Committee⁵ encouraging the federal judiciary to “expand efforts to educate judges and supporting personnel about the existence and dangers of racial, ethnic, and gender discrimination and bias.” Nonetheless, I hesitated about initiating a task force for several reasons. I recognized it would entail a great deal of time and energy and sensed it could be a divisive issue even if we could ultimately reach a consensus.

If I had come across any indication that there was in fact discrimination against women by one or more of our judges or even by any members of the staff of our various courts, I would have moved immediately, but none had come to my attention, either formally or informally. Under section 372(c) of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,⁶ the chief judge of the circuit is authorized to initiate an investigation into “conduct prejudicial to the effective and expeditious administration of the business of the courts.”⁷ I have made it quite clear that I construe section 372(c) to encompass discriminatory conduct.⁸ There are a total of 163 authorized judgeships in the Third Circuit, 14 on the court of appeals, 62 district judges, 21 bankruptcy judges and 28 full-time and 5 part-time magistrate judges in addition to our senior judges. Although I had personally reviewed and written opinions in over 100 misconduct complaints under that statute in the first three years that I had been Chief Judge, I had never received any complaint of judicial gender bias serious enough to warrant convening a special investigative committee under section 372(c)(4).

Under these circumstances, I decided that we could justifiably wait to receive and then analyze the report of the Ninth Circuit and consider whether we were sufficiently satisfied that its findings were

4. The Judicial Conference of the United States is composed of the chief judges of the thirteen courts of appeals, thirteen district court representatives and the Chief Justice of the United States, who presides. See 28 U.S.C. § 331 (1994). The Judicial Conference is, in effect, the policy-making body of the federal courts.

5. The Federal Courts Study Committee was created by Congress in November 1988 to study the courts and report back with recommendations as it deemed advisable. The Committee was composed of members of the executive, legislative and judicial branches and private individuals.

6. Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 332, 372 (1994)).

7. 28 U.S.C. § 372(c)(1).

8. See *id.* (“Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . may file . . . a written complaint containing a brief statement of the facts constituting such conduct.”).

applicable to our circuit to warrant our implementation of the recommendations of its task force without duplicating its intensive investigation. In the meantime, I began to receive invitations, in my capacity as Chief Judge, to a number of workshops and conferences relating to gender fairness. Rather than attend them myself, I sought to get a balanced perspective on the desirability of initiating a Third Circuit Task Force by asking other judges in the Third Circuit to attend one of three conferences held in the spring and summer of 1993, and thereby provide a diversity of opinions. My late colleague on the court of appeals, William Hutchinson from Pennsylvania, Judge (now Chief Judge) Anne Thompson and Judge Joseph Irenas, from the District of New Jersey, and members of the circuit's central staff attended one or more of the workshops.

In March 1993, the Judicial Conference of the United States endorsed the provision of the bill on violence against women that "encourag[ed] circuit judicial councils to conduct studies with respect to gender bias in their respective circuits."⁹ Shortly thereafter, the voluminous Ninth Circuit Task Force Report appeared. That comprehensive study, the first in the federal courts, found that attorneys, litigants and judges believed they had been subject to disparate treatment based on their gender and offered evidence to that effect.¹⁰

I then canvassed the three judges who had attended the gender bias workshops and conferences. They all were in agreement that we should proceed with our own study, which they believed would be focused on our own circumstances and which involved members of our courts and our bar. By then, Congress had finally enacted the federal statute that encouraged the circuits to conduct such studies and authorized appropriations of \$700,000 for that purpose.¹¹ Based on these factors, on June 17, 1994, I formally presented a recommendation that we establish a Third Circuit Task Force to the Judicial Council of the Third Circuit.¹²

9. The Judicial Conference endorsed the provision of Title V of the proposed Violence Against Women Act of 1993, S.11, 103d Congress (1993).

10. See generally *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 731 (1994) (reporting findings of Ninth Circuit Gender Bias Task Force).

11. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1944 (1994) (codified at 42 U.S.C. § 14001) (encouraging courts of federal judicial circuits to conduct studies of "instances, if any, of gender bias . . . and to implement recommended reforms"). The Administrative Office of the U.S. Courts was designated to act as a clearinghouse to disseminate any reports and materials issued by the task forces. See *id.* at 1945.

12. The members of the Third Circuit Judicial Council are the five most senior circuit judges in regular active service, the chief district judges from the Dis-

A number of considerations influenced my decision. First, I had secured the promise of Judge Anne Thompson, who has since become the Chief Judge of the District Court of New Jersey, that she would head the Task Force if it was established. I knew that Chief Judge Thompson, as one of the few African-American women judges, would combine a commitment to the inquiry based on her own personal experiences and the cautious approach she showed in her judicial role.

Second, it was evident that task forces focusing exclusively on gender bias, as the original Ninth Circuit Task Force did, were overlooking the actual or perceived exclusion of other large discrete groups that have frequent contact with the federal courts, but less frequent participation within the system itself, in particular, African-Americans and Hispanics.

Third, I had the overwhelming support of my colleagues on the courts of appeals, who even agreed to provide some financial backing from our administrative fund.

Fourth, my own earlier personal experiences as a woman entering a profession when it was at best indifferent to women, and at times overtly hostile, had led me to conclude that good people can sometimes be unaware that they are party to an institution or an institutional way of life that effectively, if not intentionally, excludes others.

Fifth, I had become convinced that we could not fairly examine the institution that we were a part of until we began to look at it from the perspective of the users of the court system. I thought we needed to examine topics, such as the court as a fair employer or prospective employer, the perception that female and minority attorneys have of the courtroom process and whether parties or witnesses experience any different, albeit subtle, treatment based on their race, ethnicity or gender. I believed that we, as members of the courts, could not know how the system actually operated with regard to women or minorities unless we asked. I was confident that my judicial colleagues and I strive to mete out justice fairly and without bias, but I knew that our good intentions do not ensure that parts of the system may be exclusionary or depreciative for reasons we could not imagine. I also became aware that others had found that the inquiry process entailed by a task force is itself a necessary, useful and therapeutic one.

tribut of Delaware, District of New Jersey, Eastern District of Pennsylvania, Middle District of Pennsylvania and Western District of Pennsylvania and the chief judge of the court of appeals as the eleventh and presiding member.

Sixth, I became convinced that we were capable of conducting a study that fit our needs and that we would not try to tackle issues over which we have no control, such as substantive law questions or practices of law firms or the executive branch.

Seventh, and finally, I had become confident, after three years as Chief Judge, that as long as we made an effort to design a method and scope of inquiry that did not assume the existence of bias, but instead focused on finding ways to assure that the institutions that we control are receptive to persons of any race, ethnicity or gender, the constituency of this circuit could engage in frank and free discussion, and even disagreement, that avoided the unfortunate bitterness and public debate that had been reputed to have characterized the procedures of some other task forces.

In June 1994, the Third Circuit Judicial Council unanimously voted to create a Task Force to "conduct a comprehensive examination of the treatment of all participants in the judicial process by judicial officers, their staffs, and court personnel in the Third Circuit to assure equality, regardless of gender, race, or ethnicity." Fortunately, Chief Judge Thompson kept her commitment to chair the Task Force. Our good fortune continued with the willingness of Circuit Judge Theodore A. McKee and academician and lawyer Lawrence S. Lustberg to serve as co-chairs of the Commission on Race and Ethnicity and Judge Dickinson R. Debevoise and Magistrate Judge Faith Angell to co-chair the Commission on Gender.¹³ I had striven to select a leadership group that was itself diverse, and it was, as two of the five members of the leadership group were women and two were African-American. All five of the members turned out to be exceptional, with a level of commitment, a balanced viewpoint and a fidelity to our charge that was, in a word, extraordinary. Similarly, the selection of Betty-Ann Soiefer Izenman as Project Director was propitious, as she combined organizational skills, creativity and a dedication that proved to be the cornerstone of the entire project.

My call to the judges for volunteers to work on this project was answered with a level of enthusiasm that even I had not expected. There were many more volunteers than we could include on the Task Force or its commissions. The same was true of lawyers. Ulti-

13. Judge Debevoise is a senior district judge in the District of New Jersey; Judge Angell is a magistrate judge of the Eastern District of Pennsylvania; Judge McKee is on the Court of Appeals of the Third Circuit, and Larry Lustberg had been a law clerk to a district court judge and is now a partner with the law firm of Crummy, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey, with a concentration on public interest and constitutional law.

mately, more than 100 judges, lawyers, staff, academicians and members of the public actively served on the Task Force, its two commissions, its twelve committees and as liaison judges with each court. Each commission proceeded to organize, to decide on the committees it needed, select members and lay the foundation for the work to be done.

My personal reflections would be incomplete if I failed to note that for one period during the ongoing investigation, the continued existence of the Task Force was in serious peril of losing funding for its only staff person, the Project Director, who was a cohesive and essential figure in the investigation. The judiciary had requested an appropriation of \$700,000 from the Violent Crime Reduction Trust Fund for the fiscal year 1996, but the Senate version of the bill cut \$700,000 from the portion of that fund that had been slated for the judiciary, which was precisely the amount allocated in the preceding year to support the circuit task forces. Although nothing in the bill, which passed on September 29, 1995 after lengthy debate, nor in the House or Senate Appropriations Committee Reports accompanying House Bill 2076 (the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act for the fiscal year 1996) explicitly denied funding for the task force studies, some senators engaged in a colloquy in the *Congressional Record* that sought to interpret the legislative history to signify "that no funds had been appropriated for race-gender bias studies."¹⁴ On December 7, 1995, there was a counter colloquy by supporters of the task forces, who expressed the view that the studies into gender bias in the courts were fully authorized and urged the Judiciary to continue them to fulfill the purposes of the Equal Justice for Women in the Courts Act.¹⁵ Ultimately, we were advised by the Administrative Office that funding for the ongoing gender and racial bias studies, including the Third Circuit Task Force, was approved.

In retrospect, I think it is important to try to understand the position of those senators who sought to shut down the Task Force inquiries. Some of them had gained the leadership positions in the relevant congressional committees following the 1994 election, and they believed that bias task forces by the federal judiciary were both unnecessary and undesirable, referring repeatedly to friction re-

14. 141 CONG. REC. S14689-01, S14691 (daily ed. Sept. 29, 1995) (statements of Sen. Gramm and Sen. Hatch).

15. See generally 141 CONG. REC. S18173-S18175 (daily ed. Dec. 7, 1995) (statements of Sen. Simon, Sen. Biden and Sen. Kennedy).

ported within one circuit. While I am relieved that our Task Force was permitted to continue to completion, I recognize that the differences on this issue were part of the inevitable dialectic in a democratic society between those holding differing views on issues of race, ethnicity and gender in general. I also believe that those differences must be acknowledged and reconciled before lasting progress can be made. Indeed, the Task Force inquiry itself provided a forum for examination of the differing views that may be held by participants in the judicial system.

Despite the uncertainty about funding, the members of the twelve committees, who were all volunteers, proceeded to undertake an overwhelming amount of work. In addition to the laborious process entailed by the preparation of the questionnaire forms, the members of each committee communicated frequently about additional investigations, set priorities, drew on additional volunteers when needed and, most surprisingly, met the time deadlines set by Project Director Izenman, notwithstanding the demands of their own professional responsibilities.

The committee members were creative in devising methods to get useful information without being deterred by the amount of work they were creating for themselves. They were energetic in setting up the eight public hearings throughout the Third Circuit, including two in the Virgin Islands, at which attorneys and other users of the federal courts had the opportunity to raise issues about their treatment and observations. Even judges on the commissions or Task Force who had been lukewarm to the idea of holding public hearings reported that they had become convinced of their utility after they participated in the hearings.

I was continually impressed by the depth and breadth of the ongoing inquiries. Many of those who were working on various aspects of the investigation appeared to be deriving pleasure not only from the inquiry and process itself, but from seeing it all begin to fall into place. One of the most satisfying aspects of the inquiry has been the absence of any of the rifts that might have been expected. The most delicate issues arose in the course of preparing the form of the questionnaires that were to be sent to judges, employees and attorneys. Throughout, Chief Judge Thompson was resolute in keeping to the line that put substantive law and practices outside the courts beyond the scope of our investigations, often emphasizing the specific language of the Judicial Council's resolution, which she treated as our charter. She was always supported in this limiting interpretation by the four commission co-chairs.

The report and recommendations that follow are self-explanatory, and I do not propose to summarize the findings, except to note that, as I had anticipated, they do not find systemic discrimination or bias. We have learned, however, that there is a perception by a not insignificant number of women and minorities who work in or interact with the courts of the Third Circuit that in some critical areas they are not being treated equally because of their race, ethnicity or gender.

On reflection, it would have been surprising in a society that remains highly sensitive to issues of race, ethnicity and gender if none of those divisions had influenced the perceptions of any of the many persons who have contact with the federal judiciary. That this is such a relatively small percentage of the thousands of persons who have contact with the courts and institutions of the Third Circuit is as significant as the fact that some such perceptions persist. Although the Task Force did not find objective evidence to confirm that there has been unequal treatment in fact, these perceptions of unequal treatment point us in directions that merit attention.

Thus, although I leave it to others to evaluate the work of the Task Force, its findings and its recommendations, I believe that it has accomplished what it set out to do by studying, in as neutral and comprehensive a manner as possible, the treatment of persons in terms of race, ethnicity and gender who interact with the courts of the Third Circuit. I am indebted to all those who participated.