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NEW YORK STATE BAR ASSOCIATION COMMITTEE ON STATE CONSTITUTION: SUMMARY OF 1992 ACTIVITIES

Gubernatorial Succession. The Committee concluded its study of the proposed constitutional amendment to provide procedures for determining when the governor is "unable" to carry out his or her duties; such inability empowers the lieutenant governor to serve as governor. The Constitution is now silent on how the governor's inability is to be determined. The Committee's report, which endorsed the proposal with certain modifications, was approved by the Executive Committee of the New York State Bar Association and transmitted to the Legislature. However, the bill was not reported out of committee and at year end the Committee was considering its next steps.

Under the proposed amendment the governor could make a voluntary declaration of inability which he or she could then vacate and, in involuntary situations, the New York Court of Appeals would have jurisdiction to make (and unmake) determinations of gubernatorial inability. The report of the State Bar proposes that an adjudication of inability be made only on uncontroverted allegations or on clear and convincing evidence and also, recommends that the threshold for invoking the court's jurisdiction be lowered in several respects.

The report supports the portion of the bill to delete the current provision that the lieutenant governor becomes acting governor

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when the governor is "absent from the state."[1] This is seen as an anachronism in view of modern means of communication. The report endorses the provision calling for appointment of a lieutenant governor when a vacancy occurs in that office, but recommends that the bill be clarified to require that a majority of each house vote for confirmation of this appointment.

Judicial Diversity. In *Chisom v. Roemer*,[2] decided June 20, 1991, the United States Supreme Court held that the Voting Rights Act of 1965[3] covers state judicial elections.[4] Under that Act, practices that result in the denial or abridgment of the right to vote are forbidden even though the absence of discriminatory intent protects them from constitutional challenge.[5] Following this decision, Governor Cuomo appointed a Task Force on Judicial Diversity[6] which reported in 1992 that women and minorities are seriously underrepresented in judicial positions,[7] that in its opinion the system for the election of Supreme Court Justices in New York State violates the Voting Rights Act,[8] and that the judicial selection process must be opened up in diverse ways to overcome this disability.[9] The Task Force noted that the obstacles faced by minority candidates are exacerbated in multi-county judicial districts.[10]

Several committees of the State Legislature held a joint public hearing on the Task Force Report on May 7, 1992 in New York City. At the hearing, the Chair of the State Bar Committee on State Constitution submitted a statement concurring with the view that the New York system of judicial selection is vulnerable to invalidation under *Chisom v. Roemer*. The test adopted in that

1. N.Y. CONST. art. IV, § 5.
2. 111 S. Ct. 2354 (1991).
3. Voting Rights Act of 1965, §§ 2, 2b, *codified as amended*, 42 U.S.C. §§ 1973, 1973(b) (1988).
4. *Chisom*, 111 S. Ct. at 2358, 2368.
5. 42 U.S.C. § 1973(a) (1988).
6. N.Y. COMP. CODES R. & REGS. tit. 9, § 4.149 (1991).
7. N.Y.S. Task Force on Judicial Diversity Report 2 (1992).
8. *Id.* at 19.
9. *See generally id.* at 9-13.
10. *Id.* at 19.

decision is whether, based upon the totality of the circumstances, it is shown that the political processes leading to nomination or election are not equally open to members of the protected class in that they have "'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'"[11]

The Legislature failed to act. Litigation challenging the New York system of judicial selection is pending in the courts.

Fiscal Reform. The symposium on "State and Local Fiscal Reform" prepared by the Committee for the 1992 Annual Meeting of the State Bar Association was well received.

Other business. Such other matters as reform of the reapportionment process, the provision in the Constitution limiting the executive branch to twenty departments,[12] and proposals for a constitutional convention are a continuing agenda of the Committee.

Shirley Adelson Siegel, Chair
Committee on State Constitution

11. *Chisom*, 111 S. Ct. at 2364 (citations omitted). The origin of the language of this test is found in White v. Regester, 412 U.S. 755, 766 (1973), and was incorporated into section 2(b) of the Voting Rights Act upon its amendment in 1982. *Id.* at 2364 n.22.

12. N.Y. CONST. art. V, § 2.