THE IMPORTANCE OF A DIVERSE FEDERAL JUDICIARY

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

THURSDAY, MARCH 25, 2021

THE IMPORTANCE OF A DIVERSE FEDERAL JUDICIARY

Thursday, March 25, 2021

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 2:09 p.m., via Webex, Hon. Henry Johnson [Chair of the Subcommittee] presiding.

Present: Representatives Johnson of Georgia, Nadler, Deutch, Lieu, Stanton, Lofgren, Cohen, Jones, Ross, Neguse, Issa, Jordan, Chabot, Gaetz, Johnson of Louisiana, Tiffany, Massie, Bishop, Fischbach, Fitzgerald, and Bentz.

Staff Present: Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Jordan Dashow Professional Staff Member; Cierra Fontenot, Staff Assistant; John Williams, Parliamentarian; Jamie Simpson, Chief Counsel; Danielle Johnson, Counsel; Matt Robinson, Counsel; Rosalind Jackson, Professional Staff Member; Betsy Ferguson, Minority Senior Counsel; Ken David, Minority Counsel; Andrea Woodard, Minority Professional Staff Member; Darius Namazi, Minority Research Assistant; and Kiley Bidelman, Minority Clerk.

Mr. JOHNSON of Georgia. The Subcommittee will come to order.

Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

Welcome to this afternoon's hearing on "The Importance of a Diverse Federal Judiciary."

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of today's hearing. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices and we will circulate the materials to Members and staff as quickly as we can.

I would also ask all Members to mute your microphones when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself anytime you seek recognition. I now recognize myself for an opening statement.

I often underscore the judiciary's vital role in our great democracy. The courts are tasked with the sacred duty of administering justice and upholding the rule of law, and they must do so fairly and impartially. Yet these duties are only part of the equation that ensures that the judicial system runs smoothly. The public must also be confident that the system is as fair, impartial, and just as it pledges to be. Today we explore an important part of ensuring the public's confidence in the courts and creating an equitable judiciary, and that is the diversity of the Federal bench.

By many metrics, today's judiciary is notably nondiverse and fails to reflect the communities it serves. Approximately ¾ of Article III judges identify as White, while about ⅔ of Article III judges are men, leaving women and people of color largely underrepresented on the bench.

Some circuit-level examples highlight this striking disproportionality. The Eleventh Circuit, for example, which encompasses Georgia, Alabama, and Florida, States that have been historically rich with diverse population and that today include a population that is roughly half people of color, 80 percent of the Eleventh Circuit's active judges are people—80 percent of the Eighth Circuit's active judges are White. Just two circuit judges are people of color.

Today we will hear from the Honorable Bernice Donald of the Sixth Circuit which includes Tennessee, Kentucky, Ohio, and Michigan, States that also have a rich and diverse history. Somehow in 2021, Judge Donald remains the first and only Black woman to serve on that circuit.

Other circuits tell a similar story. It is staggering that in today's age there are so few opportunities for underrepresented communities to see themselves reflected on the bench. We are, of course, in a better place than we were decades ago. Courts were even more overwhelmingly White and even more overwhelmingly male, but the incremental progress we have since made is not a success story. Efforts to further diversify the bench have even regressed in recent years. As today's numbers show on their face, there is a lot more work to be done.

Diversity beyond demographic metrics also matters. Currently, judges' backgrounds tilt toward those with prosecutorial experience, with educational credentials that lean toward a limited set of law schools. We are left without the value of wide-ranging professional and educational experiences that would enhance our Nation's courtrooms.

Now, why does this matter? A diverse judiciary is vital to maintaining the public's confidence in the courts. The public perceives a judiciary that reflects a cross-section of its community as fairer with the potential to be better understand—or excuse me—with the potential to better understand their realities.

Judicial decision-making is also enhanced when the bench is diverse. A variety of narratives and perspectives must be considered and weighed, and no one set of values can dominate.

As one judge once put it, quote, "I think everybody is applying the same law but you may be able to see more angles. The more angles, the better the decision," end quote.

This is the first time at least in recent history that the Committee has focused squarely on the issue of a diverse Federal judici-

ary. Today's esteemed witnesses bring important perspectives on the vital role diversity plays, and I look forward to having a productive dialogue.

Without objection, I would like to enter into the record a statement from the Cato Institute, two reports from the Center for American Progress, and a letter from the Leadership Conference on Civil and Human Rights.

[The information follows:]

MR. JOHNSON OF GEORGIA FOR THE RECORD

March 25, 2021

The Honorable Hank Johnson
Chairman
Subcommittee on Courts, Intellectual Property, & the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Darrell Issa
Ranking Member
Subcommittee on Courts, Intellectual Property, & the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee:

My name is Clark Neily, and I am an attorney, adjunct professor at Antonin Scalia Law School, and Senior Vice President at the Cato Institute. I would like to thank the Subcommittee for convening this hearing on The Importance of a Diverse Judiciary, on March 25, 2021, and for providing the opportunity to express my views regarding this important subject.

In particular, I would like to draw the Subcommittee's attention to the lack of professional diversity on the federal bench and particularly to the disproportionate number of former prosecutors and other courtroom advocates for government as compared to former public defenders and civil rights lawyers. Among federal judges, **former courtroom *advocates for* government outnumber former courtroom *opponents of* government by a ratio of seven to one**. This does not inspire confidence on the part of litigants who find themselves adverse to the government in court, whether as criminal defendants or civil rights plaintiffs, and there can be little doubt that the extraordinary overrepresentation of former government lawyers on the bench has significantly affected the development of legal doctrine.

Much has been written about the importance of diversity in the legal profession generally and among judges in particular. As a former federal law clerk and career constitutional litigator, I strongly endorse the proposition that those who preside over our courts should reflect the diversity of the communities they serve. One form of judicial diversity that deserves far more attention than it receives is diversity of professional background—especially among judges whose formative professional experience involved representing the government in court versus those whose formative professional experience involved challenging the government in court.

As explained in the accompanying report titled "Are a Disproportionate Number of Federal Judges Former Government Advocates?", Cato scholars examined the professional backgrounds of more than 700 sitting federal judges and coded each according to whether he or she had significant experience working as a prosecutor (or other courtroom advocate for government),

a criminal defense attorney (including public defenders), or a public interest lawyer at organizations like the ACLU, the Innocence Project, or the Institute for Justice.

What we discovered is that about half of all federal judges had significant experience in one or more of those fields while half did not. Among the former, some 44.5 percent of judges had significant experience representing the government in court against individuals (but not the other way around), whereas only 6.1 percent of judges had significant experience representing individuals against the government (but not the other way around). (About 13 percent of judges had experience on both sides—as courtroom advocates for and against government.) Thus, as noted above, the ratio of former courtroom advocates for government versus former courtroom advocates against government is an extraordinary *seven to one*. Notably, of the nine sitting Supreme Court Justices, only Justice Amy Coney Barrett has never represented the government in court—a professional hallmark she shared with the Justice she replaced, Ruth Bader Ginsburg.

The notion that such an extraordinary imbalance between former government advocates versus former government opponents presents no serious concerns is not credible. To the contrary, the Biden Administration has already asked senators to recommend and prioritize potential nominees who have served as public defenders or civil rights lawyers in an effort to address the massive imbalance documented in the attached report and discussed in this Statement.[1] In my judgment this is an enlightened and long overdue change to the historic overreliance on former government lawyers, including particularly prosecutors for these vital positions.

There are several reasons why we should be concerned about a federal judiciary that is disproportionately composed of former prosecutors and other courtroom advocates for government.

First, one of the most important things federal judges do is resolve disputes between individuals and government over the government's power to restrict people's freedom in various ways, including censoring their speech, taking their property, or even locking them up in a prison cell. When people challenge the government's authority to do those things, they should be confident that they will have access to a judiciary that is free not just from actual bias but from the appearance of bias as well.[2] As documented in the attached study, however, when criminal and civil rights cases pitting individuals against government are filed in federal court, the chances are nearly 50 percent that they will be heard by a judge who served as a courtroom advocate *for* the government (but never for individuals against government), whereas there is only a 6 percent chance that the case will be heard by a judge who represented individuals in cases *against* the government (and never served as an advocate for government). Those figures certainly would not inspire confidence on the part of litigants seeking to have their disputes with government resolved in a truly neutral forum.

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[1] Harper Neidig, "Biden team asks Senate Democrats to recommend public defenders, civil rights lawyers for federal bench," *The Hill*, Dec. 30, 2020, https://bit.ly/3vXA7Fk.

[2] *See, e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice.") (cleaned up).

Second, there is abundant empirical evidence to support the commonsense notion that judges' personal experiences and prior professional backgrounds can influence the way they decide cases.[3] Thus, for example, the presence of a female judge on a three-member court of appeals panel is a strong predictor of rulings in sexual discrimination cases.[4] Similarly, when asked whether African-Americans are treated fairly in the criminal justice system, 83 percent of white judges said they were, but just 18 percent of Black judges said so.[5] Research indicates that so-called "deep-level diversity"—including a person's attitudes, personality, beliefs, values, knowledge, educational background, and life experiences—can have an even greater impact on group decision-making than so-called "surface-level diversity," with groups comprised of individuals with diverse personality types outperforming homogenous groups by a wide margin on complex decision-making tasks.[6] Thus, as Jason Iuliano and Avery Stewart have explained, "there is strong reason to believe that the judiciary also benefits from deep-level diversity."[7]

Finally, given the government's vast resources, nearly every court case pitting a lone citizen against the state represents a David-versus-Goliath fight for justice. To further stack the deck with judges who are far more likely to have earned their spurs representing Goliath than David is unfair to individual litigants and creates a bad impression for the justice system as a whole.

Americans deserve a federal judiciary that is representative of the communities it serves and that has the ability to resolve disputes between individuals and government in a way that is not only substantively fair but carries the appearance of fairness as well. A judiciary that is disproportionately comprised of former prosecutors and other courtroom advocates for government does not provide the appearance of fairness and will not inspire confidence in citizens who come before it to have their disputes with government resolved. The longer we wait to begin rebalancing the composition of the judiciary, the harder that job will be. As the Biden Administration has correctly acknowledged, the time it is time to get to work.

Sincerely,

/s/

Clark M. Neily III
Senior Vice President
Cato Institute

Enclosure

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[3] *See, e.g.*, Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 Tenn. L. Rev. 248, 256 (2016); Emily Hughes, *Investigating Gideon's Legacy in the U.S. Courts of Appeals*, 122 Yale L. J. 2376, 2388-89 (2013); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, Charting the Influences on the Judicial Mind: An Empiral Study of Judicial Reasoning, 73 NYU L. Rev. 1377, 1473 (1998) (noting that a review of district court judges found that a career background as a prosecutor was positively correlated with increased support for the constitutionality of the U.S. Sentencing Commission and sentencing guidelines); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. Crim. L. Criminology & Police Sci. 333 (1962).
[4] Juliano & Stewart, *The New Diversity Crisis*, *supra* at 258.
[5] *Id.* at 260.
[6] *Id.* at 263.
[7] *Id.* at 265.

Are a Disproportionate Number of Federal Judges Former Government Advocates?

It has been said that the surest way to become a federal judge is to first be a prosecutor. Cato's Project on Criminal Justice devised a methodology to test that perception.

SEPTEMBER 18, 2019 • STUDY

By Clark Neily

Introduction and Summary of Findings

It has been said that the surest way to become a federal judge is to first be a prosecutor. And it is generally perceived that a disproportionate number of federal judges served as government lawyers before donning a robe. Until now, however, no one had ever examined the professional background of every sitting federal judge to see whether that perception is true. So Cato's Project on Criminal Justice devised a methodology for coding judges' prior professional experiences and went through the federal judiciary judge by judge to test that perception.

What we found confirms the conventional wisdom: Former government lawyers—and more specifically, lawyers whose formative professional experiences include serving as courtroom advocates for government—are vastly overrepresented on the federal bench. Looking only at former prosecutors versus former criminal defense attorneys (including public defenders), the ratio is **four to one**. Expanding the parameters to include judges who previously served as courtroom advocates for government in civil cases as well as criminal cases, and comparing that to judges who served as advocates for individuals *against* government in civil or criminal cases, the ratio is **seven to one**. As explained below, the disproportion is both striking and concerning.

Summary of Previous Studies

People have long been interested in the makeup of the federal judiciary and concerned about the relative lack of diversity—including professional diversity—among federal judges. As discussed below, there have been numerous studies examining the racial and gender diversity, education, and professional experience of judges and judicial nominees. But it does not appear that anyone had ever studied the professional background of each sitting federal judge to determine whether there is a significant imbalance between judges whose formative professional experience involved advocating for government in court and judges whose experience involved challenging the exercise of government power over individuals and institutions. Still, despite being more limited in scope and less precisely focused on the for-government/against-government divide, the findings of prior studies are fully consistent with this one.

For example, an article titled "Why Public Defenders Are Less Likely to Become Judges—and Why That Matters" notes that as of July 2015, "just 14% of President Obama's nominees for district and appeals court judges had experience working in public defense. Meanwhile, 41% of his nominees

had experience working as prosecutors."[1] This reflects a larger trend at the federal and state levels, where "judges and justices are much more likely to be former prosecutors than former public defenders."[2] Moreover, "[t]he discrepancy in judicial experience isn't just about public defenders. Lawyers who have worked at civil rights groups like the American Civil Liberties Union or public interest law organizations like the NAACP Legal Defense Fund are also underrepresented in the judiciary."[3] These findings have been confirmed by others, including the Alliance for Justice, which commended Obama's attempt to bring demographic diversity to the bench but stressed the need for future administrations to "broaden[] the bench" in terms of professional diversity.[4]

Examining the professional backgrounds of Supreme Court justices, the Harvard law professor Andrew Crespo found that since the 1970s, the number of justices confirmed who have worked as a prosecutor has increased threefold.[5] Additionally, a 2017 Vox article, written in the wake of Justice Neil Gorsuch's nomination, points out that the Supreme Court has not had a justice with criminal defense experience in 25 years.[6] The article quotes Tejas Bhatt, an assistant public defender in New Haven, Connecticut, who suggested that federal judges tend to have "ticked all the political checkboxes on their career starting from when they were 15," and that one of those boxes includes working as a prosecutor.[7]

Harvard law professor Andrew Crespo found that since the 1970s, the number of justices confirmed who have worked as a prosecutor has **increased threefold.**

Other studies suggest the importance of diversity, including professional diversity, in the makeup of the entire federal judiciary. A 2016 article by Jason Iuliano and Avery Stewart, titled "The New Diversity Crisis in the Federal Judiciary," argues that a diversity of experiences, or deep-level diversity, provides as much or more enhancement to the judicial decision-making process than demographic diversity.[8] Specifically, as individuals collaborate over a period of time (as appellate judges do when they sit in panels and draft opinions together), the benefits of demographic diversity appear to diminish.[9] Conversely, deep-level diversity continues to enrich the decision-making process by ensuring alternative experiences and attitudes.[10]

NAACP Legal Defense Fund president Sherrilyn A. Ifill believes judicial diversity of backgrounds and experiences "promotes public confidence in the legitimacy of the courts" and "enriches judicial decision making," particularly at the appellate level.[11] She suggests that "[a]lthough there's been very little interest in exploring the importance of professional-background diversity, the value of bringing [government-challenging] experience to the bench is fairly non-controversial."[12]

Procedure and Findings

In order to ensure accurate, reproducible results, this study uses the following procedure to assess and characterize the professional backgrounds of all currently serving,[13] non-senior-status federal judges except those on the Federal Circuit, which does not have jurisdiction over criminal cases.

First, using each district and appellate court's respective websites, the names of all nonsenior, Article III judges were placed in a spreadsheet. Then each judge's professional background was assessed and crosschecked using various publicly available sources, starting with Westlaw's *Almanac of the Federal Judiciary*. Professional experiences, comprised of dates and titles, from the *Almanac of the Federal Judiciary* were then compared with the work history provided by judges during their confirmation process in response to questionnaires from the

Senate Judiciary Committee. In the instances where a questionnaire could not be found, past professional titles and relevant dates provided in the *Almanac of the Federal Judiciary* were crosschecked using other legal databases such as the Government Publishing Office, HeinOnline, and Ballotpedia. If the preceding steps did not yield sufficient information to confidently assess a given judge's prior professional experiences, then his or her name was entered in the "attorney" search field of the Westlaw legal database to identify any reported cases he or she may have litigated before being nominated to the bench.

Judges' professional experiences were then coded according to six distinct categories: prosecutor, noncriminal courtroom advocate on behalf of government, nonlitigating government lawyer (e.g., agency general counsel), civil liberties litigator (e.g., ACLU, Institute for Justice, Becket Fund, etc.), non-public-defender criminal defense attorney with significant (i.e., more than sporadic) criminal-defense experience, and public defender.[14] All other professional experiences were documented under "Other Experience" but were not assigned a numeric code.

The following tables summarize the results of this coding in three distinct ways: total number of judges in each category; judges with experience as prosecutors compared to those with experience in criminal defense; and judges with experience as courtroom advocates for government more broadly compared to those with experience as courtroom advocates for individuals more broadly.

Table 1

Number of judges with experience in each category, calculated out of 755[15]

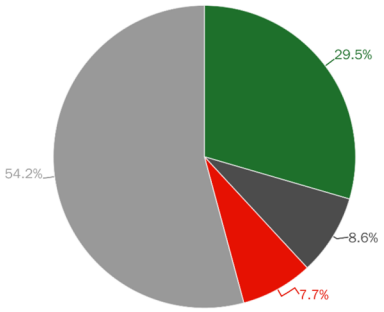
Prosecutor (1)	Noncriminal courtroom advocate for government (2)	Nonlitigating government lawyer (3)	Civil liberties litigator (4)	Criminal defense attorney (non-PD) (5)	Public defender (6)	No recognized experience in any of the six categories
288	247	171	25	72	63	275
38.1%	32.7%	22.6%	3.3%	9.5%	8.3%	36.4%

Note: The columns indicate the total number of judges with experience in each category and the proportion of judges with experience in each category, out of all judges counted in the study. The total number of judges accounted for in this first table add up to more than 755 (and total percentages add up to greater than 100 percent) because of double or triple counting in instances where a judge's past experience includes more than one category.

Table 2
Judges who fall into (1) or (5, 6), or both—346 judges, calculated out of 755

Prosecutor (1)	Prosecutor and criminal defense (1, 5, 6)	Criminal defense (5, 6)	No recognized experience (1, 5, 6)
223	65	58	409
29.5%	8.6%	7.7%	54.2%

Chart 2a
Judges who fall into (1) or (5,6), or both: 346 judges—calculated out of 755



Prosecutor: (1) Prosecutor and criminal defense: (1) and (5, 6) Criminal defense: (5, 6) No recognized experience in 1, 5, or 6

Note: The "Prosecutor" segment represents those judges with experience as a prosecutor, but *not* as a public defender or other criminal defense attorney; "Prosecutor and criminal defense" represents those with experience as both a prosecutor *and* a public defender or other criminal defense attorney; "Criminal defense" represents those with experience as a public defender or other criminal defense attorney, but *not* as a prosecutor; "No recognized experience" represents those without experience as a prosecutor, public defender, or other criminal defense attorney.

Table 3

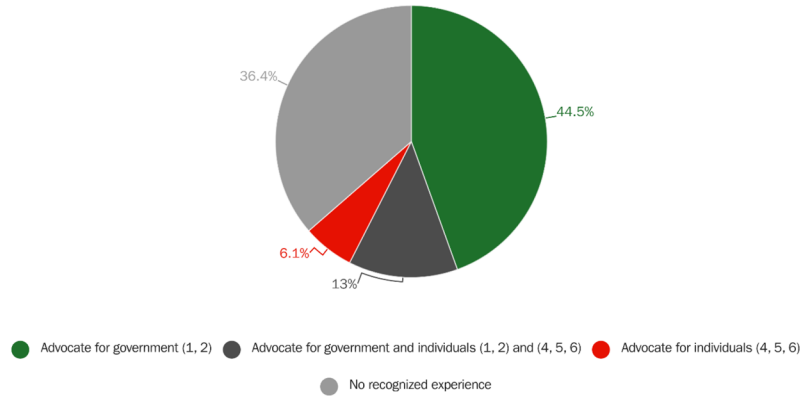
Judges who fall into (1, 2) or (4, 5, 6), or both: 480 judges—calculated out of 755[16]

Advocate for government (1, 2)	Advocate for government and individuals (1, 2) and (4, 5, 6)	Advocate for individuals (4, 5, 6)	No recognized experience in 1, 2, 3, 4, 5, 6
336	98	46	275
44.5%	13.0%	6.1%	36.4%

Note: Positions that fell under the category "nonlitigating government lawyer" were counted in the study but were not included under the broader "advocate for government" classification because they did not serve as courtroom advocates for government.

Chart 3a

Professional background of Article III judges



Note: The "Advocate for government" segment represents those judges with experience as a prosecutor or other courtroom advocate for government, but *not* as a civil liberties litigator or criminal defense attorney; "Advocate for government and individuals" represents those with experience as both a prosecutor or other courtroom advocate for government *and* as a civil liberties litigator or criminal defense attorney; "Advocate for individuals" represents those with experience as a civil liberties litigator or criminal defense attorney, but *not* as a prosecutor; "No recognized experience" represents those without experience as a prosecutor, other courtroom advocate for government, civil liberties litigator, or public defender or other criminal defense attorney.

As these numbers plainly reflect, the key takeaway is that the federal judiciary is massively tilted in favor of former prosecutors over former criminal defense attorneys, and in favor of advocates for government more generally over advocates for individuals in cases against government. Looking only at criminal cases—and excluding judges with experience on both sides—former prosecutors (223, 29.5 percent) outnumber former criminal defense attorneys (58, 7.7 percent) by roughly **four to one**. Similarly—and again, excluding those with experience on both sides—former courtroom advocates for government (336, 44.5 percent) outnumber former advocates for individuals against government (46, 6.1 percent) by roughly **seven to one**.

Why It Matters

Some people might be inclined to dismiss the federal judiciary's imbalance between former government advocates and former government opponents as irrelevant. After all, judges take an oath to be impartial and to faithfully apply the laws and the Constitution in each case, regardless of the outcome. But this blinks at deep-seated and empirically valid intuitions that most people have about the potential for bias created by an adjudicator's past experiences—especially experience that involves advocating for a particular institution or cause. Consider the following illustrations:

Imagine you wanted to sue your doctor for medical malpractice, but you were required to pursue that claim through private arbitration instead of the courts, as is increasingly common. Now imagine you can decide between two different arbitration firms. The first one hires arbitrators from all different legal backgrounds, including lawyers who used to sue doctors in medical-malpractice cases and lawyers who used to defend doctors in those cases. The firm also makes it a point to ensure that its arbitrators are not disproportionately drawn from any particular legal specialization or orientation (i.e., plaintiff-side versus defense-side). By contrast, the second arbitration firm goes out of its way to hire former medical-malpractice ***defense*** lawyers, who are therefore significantly overrepresented within that firm's ranks. Can there be any doubt as to which arbitration firm you as a medical-malpractice ***plaintiff*** would choose to hear your case? Indeed, wouldn't it be absurd to suggest to someone in your position that they simply flip a coin to choose between the two firms, given that all arbitrators take an oath to be neutral—so who cares whether the arbitrator assigned to your case used to sue doctors or defend them earlier in her career?

Or imagine you're a diehard Ohio State football fan, and every time the Buckeyes play the Wolverines, three or four of the seven referees on the field are Michigan alums, while only one is an Ohio State alum. You'd most likely prefer a more balanced officiating crew because even though referees are required to be neutral, there are many close calls in football, and it's reasonable to suppose that even the most conscientious referee might tend to shade those calls in favor of his alma mater. And of course, as any football fan knows, one call can decide a game—or even a whole season.

Here's a final illustration that cuts closer to home. Imagine you're a former criminal defense attorney who gets called for jury duty in a drug-dealing prosecution. Your chances of being seated on that jury are slim to none. Why? Because the prosecutor will most likely use one of her "peremptory" challenges to keep you off the jury on the entirely reasonable assumption that, in light of your professional background, you are likely to have certain biases and predispositions that will tend to color both your perception and your assessment of the prosecution's case.

And while a particular set of past experiences doesn't necessarily translate into a corresponding worldview, neither does it mean that concerns about the potential for bias are completely unfounded.

The fact is that our current worldview is necessarily influenced—not dictated, but influenced—by our personal and professional experiences. And while a particular set of past experiences doesn't necessarily translate into a corresponding worldview, neither does it mean that concerns about the potential for bias are completely unfounded. On the contrary, it is perfectly reasonable for an Ohio State fan to balk at the prospect of an officiating crew consisting mostly of Michigan alums, just as it is perfectly reasonable for a criminal defendant to be leery of a federal bench on which former prosecutors outnumber former criminal defense attorneys four to one.

The radical imbalance between former government advocates and former government opponents on the federal judiciary is

particularly concerning when we consider what federal judges actually do, as well as the key role of the judiciary in our system of government. While the bulk of the federal court docket involves disputes between private parties, around 20 percent of all federal cases are criminal prosecutions, with another 15 percent involving various challenges to government power, including civil rights cases and habeas corpus petitions. Some of these are literally a matter of life and death—and not just in capital cases—whereas others involve constitutional challenges to laws that restrict people's ability to work, speak, worship, travel, get married, or raise their own children. Other cases involve fundamental questions regarding the size, scope, and nature of government power, including the legitimacy of our ever-expanding, increasingly unaccountable federal bureaucracy. If a person's last job before judging the legality of that bureaucracy was representing its interests in court, who could fault the civil rights plaintiff for suspecting that the agency she's suing might enjoy a bit of a hometown advantage?

As demonstrated above, when criminal and civil rights cases pitting individuals against government are filed in federal court, the chances are nearly **50 percent** that they will be heard by a judge who served as a courtroom advocate ***for*** the government (but never for individuals against government), whereas there is only a **6 percent** chance that the case will be heard by a judge who represented individuals in cases ***against*** the government (and never served as an advocate for government). No prosecutor would relish the prospect of trying a case before a jury half-filled with former criminal defense attorneys—just as no criminal defendant relishes the idea of going before a judiciary half-filled with former government advocates. But for now at least, that's the system we have.

Acknowledgments

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15 The total number of judges accounted for in this first table add up to more than 755 (and total percentages add up to greater than 100 percent) because of double or triple counting in instances where a judge's past experience includes more than one category.

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Pipelines to Power

Encouraging Professional Diversity on the Federal Appellate Bench

By Maggie Jo Buchanan August 2020

WWW.AMERICANPROGRESS.ORG

Contents

Introduction and summary

Author's note: *The professional and demographic data presented in this report reflect federal judges appointed to Article III appellate courts as of July 1, 2020*

The U.S. federal judiciary holds incredible sway over life in America. From the U.S. District Courts and the U.S. Courts of Appeals all the way up to the U.S. Supreme Court, the individuals holding lifetime appointments to the bench determine the contours of America's laws and whose rights are protected under those laws. But professional diversity on the federal appellate courts is severely lacking, with significant implications for the type of legal expertise underlying the opinions these judges issue. Only about 1 percent of sitting circuit court judges have spent the majority of their careers as public defenders or within a legal aid setting. In contrast, the federal appellate bench is swamped with those who spent the majority of their careers in private practice or as federal prosecutors—making up more than 70 percent of all sitting appellate judges. No sitting judge spent the majority of their career with a nonprofit civil rights organization.

The legal educations and formative experiences of federal appellate judges are largely homogeneous as well, with approximately 30 percent of circuit court judges being educated at just four law schools: Columbia, Harvard, Stanford, and Yale. In addition, the prevalence of federal judicial clerkships, which can help young lawyers gain entry to powerful professional networks, is on the rise; younger members of the federal bench are much more likely than their older counterparts to have held a clerkship, with the most recently appointed appellate judges increasingly holding two or even three clerkships.

It is important to consider these statistics alongside the fact that the federal appellate bench remains overwhelmingly white and male and that these trends in career and educational backgrounds correspond with those professional pathways that white men have long been able to access without the discrimination women and people of color have faced. To underscore this point: Nearly 70 percent of all white men on the federal appellate bench spent their careers in private practice, but less than half of the only 12 women of color on the bench came from the same sector.

A shocking lack of professional diversity on the bench

Only about 1 percent of sitting circuit court judges have spent the majority of their careers as public defenders or within a legal aid setting. Individuals from predominantly private practice and federal prosecutor backgrounds make up more than 70 percent of all appellate judges.

This lack of diversity not only reflects the closed and elitist nature of the federal appellate bench but also represents a barrier to the courts' ability to develop intellectually rich jurisprudence grounded in an awareness of a broad set of individuals' experiences across the country. To improve this state of affairs, significant disruptions are needed—from law school through every stage of an attorney's prejudicial career—to broaden pathways to the federal bench and challenge long-held assumptions on the "right" type of attorney to take up a gavel.

In order to better understand the individuals who hold such positions of power, previous reports from the Center for American Progress have analyzed the demographic diversity of the federal judiciary in great depth.[1] Perhaps unsurprisingly, despite some progress, those reports found that individuals on the federal bench look significantly different from those whose rights they rule on—particularly in regard to women of color and LGTBQ individuals.[2] Those reports further found that President Donald Trump's overwhelmingly white and male nominees to the federal judiciary have regressed efforts to diversify the bench that have occurred under previous administrations, both Democrat and Republican.[3]

This report builds on CAP's earlier work by focusing on the career backgrounds of those judges sitting on the U.S. Courts of Appeals, with the goal of analyzing the educational and professional experiences that have significantly informed these judges' understanding of the law. The lack of diversity on the bench in this regard is clear.

In addition, statistics on gender as well as race and ethnicity are presented alongside professional characteristics, as doing so demonstrates significant variances in the education and career trends among judges from different demographic groups.

Gender, race, and ethnicity are not, of course, the only measures of diversity. Regrettably, data on characteristics such as religion, disability, and LGBTQ status are not included in the Federal Judicial Center's (FJC) database and, to ensure consistency of data, are not included in this report.

Other sources, however, indicate that diversity on the bench in these regards is significantly lacking. One 2017 study in the *Journal of Empirical Legal Studies* found that approximately 45 percent of the bench identified as Protestant, 28 percent as Catholic, 19 percent as Jewish, and just 5 percent as Mormon. Hindu judges comprised less than 1 percent of circuit court judges, while no Muslim, Buddhist, or atheist judges were identified.[4] In addition, there are very few openly LGBTQ appellate federal judges.[5]

Disparities are stark

Nearly 70 percent of the 181 white men on the federal appellate bench spent their careers in private practice, but less than half of the only 12 women of color on the bench came from the same sector.

Finally, indicating a significant need for more attention in this area, the author was unable to locate any public information on judges with disabilities. As previous reports from CAP have called for, the FJC should make significant efforts to improve the range of reported characteristics.

This report explores why professional diversity matters and provides an overview of the current federal appellate bench—first by exploring the educational backgrounds and clerkship experience of federal judges and then providing a deep dive into the professions represented on the bench. While the author discusses clerkships throughout this report given their growing prevalence among candidates for the bench, such discussion should not be confused with an endorsement of that credential as a prerequisite to becoming a judge. When relevant, this report also highlights notable differences in the educational and professional paths between the most senior and youngest members of the bench.

Finally, this report concludes with a discussion of reforms needed to ensure a professionally diverse bench, providing examples of how the legal profession, Congress, and future administrations could act to improve the bench. Importantly, the report notes that the lack of professional diversity is severe enough that all policymakers must take responsibility.

It is sobering to consider that a single federal judge, thanks to their lifetime appointment, can play a powerful role in defining the rights of individuals for decades. For example, one 9th Circuit Court senior judge was confirmed to his seat in 1971 after being appointed by President Richard Nixon—nearly 10 years before today's 40-year-olds were born. By identifying what trends currently exist in judicial selections, policymakers and the courts can better understand how to ensure the judiciary can strengthen itself as a whole.

Gender, race, and ethnicity on the appellate bench

Of the 297 judgeships on the U.S. Courts of Appeals as of July 1, 2020, 77 appellate judges are women, of which 65 are white; 51 appellate judges are African American, Asian American, or Hispanic (the only communities of color represented on the federal appellate bench); 39 of the appellate judges of color are men; and there are only 12 women of color on the U.S. appellate bench—five African Americans, five Hispanic Americans, and two Asian Americans.

Methodology

The professional and demographic data presented in this report reflect federal judges appointed to Article III appellate courts as defined by the U.S. Constitution as of July 1, 2020. Unless cited otherwise, the data derive entirely from the FJC website, specifically the FJC's Biographical Directory of Article III Federal Judges, 1789 to the present.[6]

The author made the decision to include all sitting judges in the scope of this report—meaning both active judges, who regularly hear cases and are employed full time by the federal judiciary, as well as senior judges, who have entered into semiretired status. The reason for this decision was twofold. First, and most importantly, the report's aims to examine the full universe of judges who are still actively hearing and ruling on cases; many senior-status judges, despite the part-time nature of their work, still regularly issue decisions on both routine and major matters.[7] In addition, by examining both active and senior judges, the author was able to identify differences in trends between those appointed to the bench in recent years compared with earlier administrations.

Gender, race, and ethnicity statistics

Previous reports from CAP have detailed a wide range of demographics on the bench—from racial and ethnic diversity to religion—within the U.S. district and circuit courts. This report does not attempt to overlay the same depth of analysis in that respect to the professional characteristics described below. It does, however, discuss disparities within professional tracks by breaking out statistics by gender and race. Particular attention is given to women of color, who are severely underrepresented on the bench, reflecting the long-standing intersectional discrimination these judges face.[8]

In order to ensure consistency, demographic categorizations are derived entirely from the FJC website. The author, however, wishes to stress an awareness that within these broad categories, a wide variety of communities who face different types of discrimination also exist.

Defining a career

Finally, it is important to explain how each judge was categorized. In contrast to other reports that, for example, chose to survey federal judges based on the position in which they served immediately before joining the bench[9] or that identified judges based on characteristics such as partnership status at a firm,[10] this report categorizes judges based on the field in which they spent the majority of their career before becoming a judge at any level, federal or state.

There are certainly advantages and disadvantages to defining the careers of judges in this manner. But while the field in which a lawyer spends the majority of their career may not demonstrate the full range of a lawyer's professional experience and networks—or certainly their personal beliefs—this methodology does make clear the dominant setting in which the judge developed their expertise and insights into the law.

For a small but not insignificant number of appellate judges, careers were evenly split between two fields. In those cases, judges are counted in both career categories. Finally, it should be noted that many appellate judges served as adjunct professors at law schools before their appointments. Such experience, particularly because it was almost always paired with other full-time, significant employment, was not counted toward a judge's overall total of years spent in legal academia.

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Why professional diversity on the federal bench matters

At the offset, it is important to address why professional diversity matters, particularly given that lawyers throughout the profession have a wide variety of personal experiences and perspectives. Unfortunately, because the bench has been dominated for so long by those from a narrow range of backgrounds, it is difficult to broadly analyze the impact judges from more diverse professional backgrounds can have on American jurisprudence. But while some conservatives may grandstand and argue that judges should operate as complete blank slates in regard to interpreting the law[11]—negating the need for diversity of any sort on the bench—the reality is that judges, being human, bring unique perspectives into their decision-making. And many of those perspectives can be significantly shaped by professional experiences.

Of course, judges who spent their careers in certain fields do not vote as blocs. In the late-2019 5th Circuit Court ruling that largely declared the Affordable Care Act (ACA) unconstitutional, for example, all three judges sitting on the panel were from private practice backgrounds, and all were white. While two voted to overturn the ACA, one dissented.[12]

But the fact that such an important case—concerning issues that would most directly affect people who are economically struggling and often face significant structural racism[13]—was heard and decided by judges with such similar career backgrounds underscores just how homogeneous the appellate bench is today. It also begs the question of what nuance and insight a judge who had actually spent their career working within such communities could have brought to the bench when evaluating the cases brought before them.

But it is perhaps the legacies of jurists who dedicated significant amounts of their careers to nonprofit service that best illustrate the importance of professional diversity.[14] Most famously, Supreme Court Justice Thurgood Marshall spent almost the entirety of his career with the NAACP and brought a completely unique perspective to the bench due to that work, significantly advancing equal protection jurisprudence. In reflection, Justice Sandra Day O'Connor wrote:

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> *Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection.*[15]

In discussing the legacy of her former colleague, Justice O'Connor rightfully does away with the notion that judges can—or should—somehow divorce their understanding of the law from their lives. A bench made up of individuals with diverse perspectives results in a stronger jurisprudence that recognizes diverse sets of people and the realities of their lives.

In another examination of professional diversity, Alliance for Justice, a progressive judicial advocacy group, explains: "When a judge decides whether a claim is 'plausible,' or whether a witness is 'credible,' or whether police officers, when they stopped and searched a pedestrian, acted 'reasonably,' her determination is necessarily influenced by the nature of her work as a lawyer up to that point."[16]

Conservatives have long decried the idea of an "activist" judge.[17] And while judges from nonprofit backgrounds and government public defender settings are often stereotyped as activists because of the populations they represent, nominees from law firm settings—not coincidentally, often white men—are largely assumed to be free of any bias.[18]

This notion lacks logic given that a corporate lawyer's training has occurred in a setting with no less of a focus than a nonprofit organization may have; lawyers at private law firms typically work to further business interests. In fact, it is a defining characteristic of the legal profession that a lawyer "zealously"[19] represent the interests of their clients. Over the course of a legal career, a lawyer learns about statutes, guidance, legal philosophy, and precedent grounded in the perspective of advocating for that client—whether that be a young family or a large corporation. Recognizing this is not a condemnation of a corporate lawyer over a public interest lawyer; rather, it is acknowledging that both sets of lawyers will bring different types of expertise and skills to the bench.

By accepting that fact, particularly in light of the professional disparities discussed below, the need for greater professional diversity on the bench becomes clear.

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The current federal appellate bench

Much has been written about the makeup of the U.S. Supreme Court. While the author touches on the characteristics of those who sit on the highest court , this report will focus on judges sitting on the 12 regional circuit courts, in addition to the Federal Circuit, that make up the U.S. Courts of Appeals.

The data paint a clear picture of the typical appellate judge: white, male, and from a private practice background. He typically has more than 20 years of professional experience between graduating law school and his first federal judicial appointment, and it is overwhelmingly likely that he attended an elite law school—even if he is not included in the full quarter of the appellate bench that attended Harvard or Yale.

Looking outside this stereotype, a more complex picture emerges on how those who do not fit this stereotype gain the prominence in the legal world needed to attract a nomination to the federal bench. Out of the 12 women of color on the appellate bench, for example, only one attended Harvard or Yale.

And for those individuals who choose a career path outside of a law firm or government setting, there appear to be near-insurmountable obstacles to the bench. Only one circuit judge spent the majority of his career in nonprofit work, such as at a civil rights, workers' rights, or legal aid organization.

The following section first looks at notable characteristics of the current Supreme Court to set the stage for understanding what the legal profession, and those tasked with selecting judges, appears to value most in the backgrounds of judges. The report then turns to a deep dive on three key areas in the journey from law student to an appellate federal judge: legal education, clerkships, and professional experience.

The U.S. Supreme Court

As would be expected, the Supreme Court is made up of individuals from elite backgrounds. All justices attended extremely prestigious law schools, and all had distinguished careers before becoming federal judges—either in private practice, government, or legal academia. Even Justice Ruth Bader Ginsburg, rightly well-known for her work at the American Civil Liberties Union (ACLU) to advance women's rights, spent the majority of her career before the bench as a law professor.

Only three law schools are currently represented on the bench: Columbia, Harvard, and Yale. Justice Ginsburg is the only active justice to attend Columbia; the rest went to either Harvard or Yale. Additionally, it is likely worth mentioning that Justice Ginsburg spent the majority of her law school years at Harvard before transferring to Columbia. When living, retired justices are included in that count, the number expands by only one school: Stanford.

Politics and the Supreme Court

While President Trump's most recent appointment to the Supreme Court, Brett Kavanaugh, is notable for spending the majority of his professional career engaged in the Whitewater investigation and later as a presidential aide, the justices as a whole generally did not shy away from political roles before joining the bench. Half of the living justices either worked in the White House, U.S. Congress, or as elected officials themselves. Those positions include Justice O'Connor's significant time as an Arizona state senator and Justices Stephen Breyer, Elena Kagan, and Clarence Thomas' time as U.S. Senate staffers. In addition, Chief Justice John Roberts and Justices Kagan and Kavanaugh all served as White House staffers for U.S. presidents.

Such experience underscores the nonsensical nature of the bias against attorneys from public interest sectors. Given such political work, any of these justices could be seen as having an agenda they seek to implement on bench, yet all were nominated despite those roles.

Notably, the more senior living justices generally did not serve as clerks to judges as young lawyers while the more junior members had multiple clerkships. The most recently appointed justice, Brett Kavanaugh, held three clerkships. A notable break from this trend is Justice Sonia Sotomayor—also the only woman of color on the bench—who is the only justice nominated in almost 30 years who did not hold a clerkship. As will be explored below, federal clerkships are highly competitive, and clerks themselves are typically from very elite schools and from nondiverse demographic backgrounds—a trend in the legal system that significantly contributes to a lack of professional diversity.

As illustrated below, the backgrounds of Supreme Court justices reflect many of the trends observed in the lower appellate courts.

The U.S. Courts of Appeals

Only a very small fraction of cases will be heard by the justices on the Supreme Court.[20] As a result, the federal appeals courts are most parties' last opportunity to make their case. These seats are considered extremely prestigious and are distributed across the country in the 12 regional circuit courts—the 1st through 11th and the D.C. circuits—as well as the Federal Circuit. The trends in legal education, clerkships, and professional experience discussed below are by and large consistent from circuit to circuit.

Law schools

Much has been written about the prevalence of elite law schools being represented on the bench in recent years, reflecting the influence a law school can have on a future attorney's career—particularly if that attorney wishes to one day join the bench.[21] As respected legal commentator Dahlia Lithwick wrote: "[E]lite schools beget elite judicial clerkships beget elite federal judgeships. Rinse, repeat."[22]

In fact, while the prevalence of elite schools on the bench generally is clear, just two law schools—Harvard and Yale—have educated approximately one-quarter of the appellate bench. Expanding the scope slightly to include the schools that all living current and former Supreme Court justices attended—meaning that judges who graduated from Columbia and Stanford are added—the number of appellate judges who graduated from the same schools as recent Supreme Court justices includes approximately 30 percent of the federal judiciary.

Certainly, these law schools provide an exceptional legal education. But just as certainly, they grant their students myriad professional connections and access to powerful fellow alumni that even the most brilliant student from a less elite school would find difficult to access.

With those professional benefits in mind, it is important to note that the proportion of appellate judges who are women, particularly women of color, who attended these schools may be much lower than the proportion for the bench as a whole. In fact, only two of women of color on the appellate bench—less than 20 percent—attended a so-called SCOTUS school.

Clerkships

As the above quote by Lithwick illustrates, one of the most coveted positions after law school is a federal clerkship. In fact, the importance—or at least, likelihood—of a potential federal judge holding such a credential seems to be increasing. Furthermore, it appears that some of the most elite clerkships are increasingly going to students with conservative political leanings. Taken together, trends in clerkships appear to be a significant barrier to fostering diversity on the bench.

Reflecting trends among the older and younger Supreme Court justices, while approximately just one-third of senior appellate judges clerked, about two-thirds of active judges completed at least one clerkship early in their careers. Among those with two judicial clerkships, nearly all are more recent appointees. The highest number of clerkships that any sitting federal judge completed is three, and every judge with that number was nominated by either President Barack Obama or President Trump.

Thanks to growing financial incentives from the private sector paired with rising tuition rates and student debt, it would appear that clerks are increasingly incentivized to join large corporate law firms after leaving their clerkship. These clerks collect large, continually increasing bonuses from their new employer: today, typically at least $50,000 and more than $100,000 at some firms for a clerk at the district or appellate level. A clerkship on the Supreme Court can typically enjoy a bonus of $400,000 from large firms,[23] and multiple federal clerkships come with additional bonuses.[24]

This trend, however, appears to be benefiting individuals already overrepresented on the bench. For example, of those seven individuals with three judicial clerkships, all are white, and only two are women.

The power of conservatives in the judicial pipeline and judgeships

The type of insider access that firms hope to purchase by attracting clerks also speaks to the fact that a clerkship can go far in helping a young lawyer develop the insider relationships and network that could significantly help lay the groundwork for a future nomination for a judgeship. In addition, students—particularly at the appellate and Supreme Court levels—tend to apply to clerk for judges who align with their own legal theology or political leaning, while judges tend to hire individuals from similar backgrounds, particularly in regard to education and politics, as their own. Closely related to professional diversity, such hiring practices can undermine intellectual diversity in regard to personal ideology as well. And currently, the pipeline appears significantly skewed toward those with conservative political views.

Looking at what is considered the most prestigious clerkship experience makes this trend clear. The majority of former Supreme Court clerks now serving as appellate judges across all demographic groups worked for justices appointed by Republican presidents—typically a sign that that justice's jurisprudence, as well as their clerks', aligns with a conservative viewpoint.

The Federalist Society's influence on the judicial pipeline

The decades-old Federalist Society has worked to develop a pipeline of conservative candidates for judgeships—often beginning with securing the loyalties of law students through networking events with prestigious law firms and federal judges. Founded in 1982, the organization's full name is the Federalist Society for Law and Public Policy Studies. The Federalist Society has hundreds of chapters of lawyers and law students across the country and dedicates itself to promoting an extreme, conservative understanding of the law while encouraging its members to involve themselves in local, state, and federal public policy.[25]

The organization holds events that cast itself as diametrically opposed[26] to progressives while fostering candidates for judges who hold far-right positions in regard to civil rights. Supported by wealthy and anonymous donors,[27] conservative organizations such as the Federalist Society have been extremely effective in their efforts to influence powerful legal figures. For example, of the five current Supreme Court justices nominated by Republican presidents—Samuel Alito, Neil Gorsuch, Brett Kavanaugh, Clarence Thomas and Chief Justice John Roberts—all have close ties to the Federalist Society.[28]

During the 2016 campaign, President Trump pledged that all his candidates would be approved by the organization. To date, at least 85 percent of his appellate federal judicial nominees are active members in the Federalist Society.[29] As is illustrated by the clerkship trends discussed in the rest of this section, the grip the organization and its funders have on the judiciary has the potential to continue for decades.

This conservative bent among those Supreme Court clerks who make their way back to the federal bench is further illustrated by the fact that, among all current and retired living justices, Justice Thomas has the highest number of former clerks serving as circuit court judges. Justices O'Connor and Anthony Kennedy are tied for second, followed in order by Alito, Ginsburg, and David Souter. Furthermore, while the most recently appointed justices—Sotomayor, Kagan, Gorsuch, and Kavanaugh—would not be expected to have former clerks who worked for them on the Supreme Court serving as a circuit court judge due to their young age, two former clerks for Kavanaugh from the D.C. Circuit and one former Gorsuch clerk from the 10th Circuit are now appellate judges.

Professions

While alma maters and clerkships may provide the foundation for a legal career, lawyers develop their expertise and understanding of the law through their professional experiences. This section breaks down the broad career paths, along with some notable subcategories, of all federal appellate judges—defined by the sector in which they spent the majority of their career before becoming a judge at any level.

FIGURE 1

Approximate breakdown of 4 most common career paths among appellate judges

Distribution of federal appellate judges by professional background

Note: A small percentage of judges are not represented in any of these four main categories.

Source: Federal Judiciary Center, "Biographical Directory of Article III Federal Judges, 1789-present," available at https://www.fjc.gov/history/judges/search/advanced-search (last accessed July 2020).

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Prior judicial service

After their work as lawyers, many appellate judges—approximately 30 percent—served as a judge on the federal district level for significant time before being elevated to the appellate courts. Roughly the same percentage served in non-Article III judgeships, such as on state courts or federal courts that do not carry a lifetime appointment, before joining the appellate bench.

The following four sectors are discussed in descending order of percentage of the entire bench: private practice, federal government, state and local government, and legal academia. The final section discusses judges from other careers—making up approximately 3 percent of the bench overall. This number includes the one judge, Judge Richard Paez, who spent the majority of his career as a legal aid attorney. Judge Paez worked at a variety of legal aid organizations, most extensively at the Legal Aid Foundation of Los Angeles. And while it would be a mistake to wholesale apply stereotypes about a given profession to every judge with that background, as several examples below make clear, these categories demonstrate the overwhelming dominance certain legal sectors have on the bench.

Finally, it is important to note the evidence suggesting that the bench is beginning to diversify somewhat: While more than 70 percent of senior-status judges come from private practice backgrounds, less than 60 percent of active-status judges come from this professional sector, explained largely by the significantly growing proportion of judges being selected from government backgrounds. At the same time, federal prosecutors dominate among those judges from government sectors, limiting the impact of that change in regard to broad increases in diversity. That trend, however, seems to be in lockstep with the slow demographic diversification occurring far too generally within the judiciary.[30] For example, more than one-third of all male judges on the bench who come from communities of color spent the majority of their careers within government, compared with less than one-quarter of white men.

Despite that shift, the lack of professional diversity remains stark.

Private practice

As noted previously, the appellate bench is stacked with individuals from private practice backgrounds—particularly men from all race and ethnicities, who are significantly more likely than women to be from this professional setting. Nearly two-thirds of circuit court judges spent the majority of their careers in private practice. The proportion of

white male judges and male judges from communities of color from this field is close to 70 percent for both groups. That proportion drops to less than 60 percent of the white women on the bench and less than half of women of color—speaking to the continuing discrimination women face when rising through the ranks of many law firms.[31]

Many circuit court judges made their careers in smaller firms, but significant numbers established careers at international corporate powerhouse firms—also known as BigLaw—such as Davis Polk & Wardwell LLP,[32] Jones Day,[33] and O'Melveny & Myers LLP.[34] These types of firms focus their work on large corporations able to afford the extremely high fees that come with retaining such firms.[35]

Furthermore, while a small number of judges from this category appear to have been engaged in private public interest law,[36] overwhelmingly, appellate lawyers who spent the majority of their careers engaged in private practice worked for business-focused firms, even if not at one of the powerhouse firms noted above. These firms, while perhaps occasionally handling personal matters for certain high-income clients, derive the vast majority of their revenues from business transactions—mergers and acquisitions, corporate governance, and equity and debt financing[37]—as well as large-scale litigation representing the interests of corporations.

Trailblazers in BigLaw

It should be noted that several former BigLaw partners who are now on the appellate bench, particularly women and people of color, gained prominence at their firms during a time when they had little to no established support networks. Those experiences, and what they may speak to regarding these judges' perspectives on power and discrimination, are essential to recognize within a discussion of professional diversity.

A strong example of such a trailblazer is senior 2nd Circuit Court Judge Amalya Lyle Kearse. Judge Kearse was the only Black woman in her law school at the University of Michigan, where she was an editor of the law review and graduated cum laude in 1962 before joining one of the most prestigious firms in the country, Hughes Hubbard & Reed LLP. She became the first female Black partner not only at her firm but at any major so-called Wall Street firm.[38]

She is also a championship bridge player and served on the board of the NAACP Legal Defense and Educational Fund earlier in her career.

While many of these attorneys also likely engaged in pro bono legal work and other activities that were valuable in informing their understanding of the law, the strong majority of those on the appellate bench have expertise that was gained through the lens of advancing the interests of businesses.

Federal government

The second-most represented sector is the federal government. The majority—more than 60 percent—of those judges spent the bulk of their careers within the federal government as prosecutors. Only one spent the majority of her career as a federal public defender.

Several of these judges held other positions throughout the U.S. Department of Justice (DOJ), and still others in this category spent the majority of their careers in the military or at other federal agencies, such as the U.S. Patent and Trademark Office.

White male judges in this category are less likely than judges from other demographics to have spent the majority of their careers in federal government. In fact, male judges from communities of color are the demographic group most likely to have worked within federal government for the bulk of their careers, with the most common career path being a prosecutor. The role of federal prosecutor was also the most common career path among all female judges who spent the majority of their careers in federal service.

State and/or local government

The third-most represented sector is made up of individuals who spent the majority of their careers in state and/or local government. Unlike their federal counterparts, however, the majority of these judges spent their government service careers in roles other than a state or local prosecutor. Most common was a variety of different roles within a state attorney general's office, with careers within a governor's office or as a city or state solicitor also being common.

Finally, the number of judges who spent the majority of their careers as public defenders at the state level, including Washington, D.C., doubles the federal number—albeit from one judge to two.

Women in general are more likely than men to have worked at the state or local level, with a full one-third of judges who are women of color having spent the majority of their careers in such roles and white women ranking second-most likely to have done so.

Law professors

Finally, significant numbers of current appellate judges came from legal academia—though slightly fewer than those who served in state and local government—often with very little experience practicing law before becoming professors. Arguably in tension with conservative claims that law schools are dominated by progressives, the majority of appellate judges on the bench who came from academia were appointed by Republican presidents.

Many judges have diverse careers that are not easily defined

D.C. Circuit Court Judge Cornelia Pillard's career is an excellent example of the varied nature of many federal judges' backgrounds, even when one sector clearly dominates their career history. While the vast bulk of Judge Pillard's career was in academia, she started her career at the ACLU and NAACP and later spent time in the DOJ.

Moreover, in contrast to the stereotype of the ivory tower academic, Judge Pillard argued or briefed dozens of cases before the Supreme Court and litigated cases in trial courts as well. As co-director of Georgetown Law's Supreme Court clinic, she helped prepare lawyers who represented diverse interests for oral arguments on a wide variety of topics.[39]

Republicans in the Senate initially blocked Pillard, an Obama nominee, from being appointed, decrying her academic writings for being "outside of the mainstream."[40] Conservative activists piled on, claiming she supported "militant feminism."

Male judges from communities of color are significantly less likely than any other demographic group to hail from legal academia. White women are somewhat overrepresented, with the proportion of white men and women of color falling below the overall proportion of the bench in respective order.

The rest of the bench

The remaining judges not included in the categories above make up approximately 3 percent of the appellate bench. In addition to Judge Paez, who spent his career in legal aid, this percentage includes judges who spent the majority of their careers engaged in general business roles outside of the law or serving as in-house lawyers within large institutions, including major universities.

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This report breaks out these lawyers for illustrative purposes to show the very small number of individuals who make their way to the bench from careers spent in any setting outside the larger categories described above. However, there is a strong argument to view these judges as a subcategory of those coming from private practice, given the practice areas are strongly aligned between the two groups as both sets are focused on business interests.

Where are the public interest lawyers?

Taken together, only about 1 percent of all circuit court judges spent their careers as public defenders or legal aid attorneys. Only three appellate judges spent the majority of their careers as lawyers as state or federal public defenders: Judges Bernice Donald on the 6th Circuit, Jane Kelly on the 8th Circuit, and Robert Wilkins on the D.C. Circuit. And, as noted above, only one spent his career in a nonprofit setting: Judge Richard Paez from the 9th Circuit Court, who spent his career as an attorney with the California Rural Legal Assistance and the Western Center on Law and Poverty, in addition to the Legal Aid Foundation of Los Angeles, before becoming a municipal court judge.

There is no sitting appellate judge who spent the majority of their career with nonprofit, civil rights organizations as Justice Thurgood Marshall did.

Looking beyond judges who spent the majority of their careers in these settings, it is clear that only a handful of appellate judges have any career experience with such organizations. Less than 10 appear to have spent any time at legal aid organizations, or as a public defender. As two final examples, Justice Ginsburg is joined by only two appellate judges with any time spent at the ACLU, and only one spent time at the NAACP. No sitting appellate judge has spent the majority of their career at a women's rights organization, a child welfare organization, an immigration rights organization, a labor union, or a disability rights organization.

Finally, the only judge not represented in any of the categories above is Judge Helene White. After graduating from law school, White worked as a clerk for the Michigan Supreme Court before successfully running for a state judgeship, remaining a state judge until her appointment to the U.S. Court of Appeals for the 6th Circuit in 2008.

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Reforms needed to improve professional diversity

As has been observed and commented on by a variety of sources, both progressive and conservative,[41] the data in this report confirm that the appellate bench is overwhelmingly dominated by individuals who spent their careers engaged in corporate business-focused practices and, to a lesser extent, as federal prosecutors. And while professional diversity in recent years has improved in strong correlation with demographic diversity on the federal bench, this report underscores the severity of the lack of attorneys from civil rights, legal aid, and public defender backgrounds across the federal judiciary.

In evaluating the information presented in this report, several important trends emerge—notwithstanding the obvious dearth of individuals from nonprofit and public defender fields—that must inform future reforms to bring greater diversity to the bench:

- Improving professional diversity cannot be done without any eye to what takes place in the early years of a lawyer's career. Law schools and clerkships set the stage for a promising attorney to ultimately gain the connections and prestige in their field needed to secure a future nomination to the federal bench.

- Relatedly, the rise in the importance of multiple, elite clerkships and the powerful monetary incentives to enter private practice after those clerkships serve to undermine efforts to improve professional judicial diversity. Any effort to address this issue must also recognize the reality that many students face significant difficulties in paying off student loans from law school.[42]

- Partisan conservatives currently have an outsized influence on the pipeline for federal judges, threatening to undermine intellectual diversity along with professional diversity.

- The link between professional and demographic diversity is complex. Women and people of color are much more likely to come from government than from an international law firm; thus, selecting more judges from the former is likely to increase both professional and demographic diversity. Moreover, for many

attorneys—particularly for women and people of color—this correlation is unlikely to come from choice but rather from continuing prejudices, both overt and subtle, within elite firms. Any reforms to encourage professional diversity on the bench should not be confused with allowing such discrimination to continue nor with discounting the important perspectives of those who become prominent partners in law firms despite such continuing biases.

The entire legal profession, including entities such as the American Bar Association (ABA) and law schools, have a role to play in the promotion of individuals from diverse career settings into judgeships. In addition, policymakers must advance reforms in order to improve the current state of affairs .

Pipeline-focused reforms: Legal education

It is clear that law schools play a significant role in the early years of a lawyer's career. To leverage that influence and help foster more professional networks for their students, law schools should be required to ensure that more students are exposed to the judiciary—and to judges—through new curriculum requirements.

The ABA sets the standards in regard to law school accreditation, including curriculum standards.[43] Similar to the current requirement for schools to mandate a class on professional responsibility and courses providing "writing experience," schools should also be required to craft a class on the judiciary that all law school students would take as a prerequisite for graduation. Such a course offering should cover both the judicial system in the school's home state and the federal judiciary. While the class would provide an overview of how the state and federal judiciary operate—from trial to appellate—it would also emphasize how judges at both levels are selected as well as how chambers are generally run. Furthermore, similar to guidance it provides on other curriculum requirements, the ABA should strongly encourage schools to recruit sitting or senior-status judges to either teach the class or otherwise meaningfully engage with students. Given that many law schools already engage judges as adjuncts or in other advisory roles, such a standard should not pose a significant burden.

The goal of such a course would be twofold. First, and for the purposes of this report, such a requirement would give students who may not secure a future clerkship networking opportunities with judges in addition to some insight into the judiciary and practicalities of a judge's chambers. Second, in keeping with the ABA's objective of ensuring schools provide a "rigorous program of legal education," such a course could strongly inform a young lawyer's understanding of the court systems in which many—if not most—will be practicing upon graduation.

Pipeline-focused reforms: Clerkships

The clerkship process must also be reformed to improve diversity on the bench in the long term. While a clerkship should not continue to be viewed as a de facto requirement to becoming an appellate judge, it is at the same time inarguable that clerking can provide a young lawyer with significant access to influential networks that can benefit them professionally in a variety of ways. Recognizing this reality, the courts and Congress could take direct action improve this aspect of the judicial pipeline in terms of professional diversity.

As one example, policymakers should explore reforms that would result in district and circuit courts hiring clerks to work for the court itself as opposed to specific judges. Creating hiring committees tasked with attracting a diverse pool of candidates, including demographic and educational diversity and with attention paid toward candidates who have spent one or two years practicing law in underrepresented fields, could go far in ensuring that a broader set of talented law students and recent graduates are able to benefit from clerkships. And by being hired and working for the court itself, clerks would be able to take assignments from different judges—meaning they would have the opportunity to work with judges of varying educational, professional, and ideological backgrounds and form relationships with more judges than they would have previously.

To be clear, such a reform would significantly change the nature of the work a clerk currently conducts for one specific judge. Given, however, that the current system of clerking is a relatively new invention by the judiciary[44] and that the system appears to have undesired consequences, such changes are worth considering.

When considering what influence Congress could have in this regard, it is important to keep in mind that appropriators control the budget of the federal judiciary. In recent years, appropriators have discussed policy issues such as whether or not to authorize new judgeships at the district and appellate levels as well as how to institute more transparency into the workings of the federal judiciary.[45] Enacted as part of the Financial Services and General Government appropriations bill, appropriations for the judiciary include mandatory funds, such as the salaries of federal judges, as well as discretionary funds for the administrative functioning of the courts.[46]

Pipeline-focused reforms: Making public interest work affordable

In addition, policymakers should make a career in public interest work more affordable for young lawyers. As a clear initial step, Congress should invest in more robust loan forgiveness programs for all students, including young lawyers.

At the same time, policymakers should consider additional reforms, such as exploring how Congress' taxing power could be used in a way that would help more young attorneys afford to dedicate their careers to public interest work. As one possibility, policymakers could explore ways to incentivizing high-revenue law firms to award public interest grants. A good example of the impact of such a policy can be found in the international law firm Skadden, Arps, Slate, Meagher & Flom LLP. Skadden has instituted a well-regarded program to support public interest work, where talented young attorneys receive a modest two-year salary to support their employment. Upon conclusion of the fellowship, 90 percent of participants stay in the nonprofit sector.[47]

Additional investments into public service work generally, encouraged by federal policymakers, could further allow talented lawyers to remain committed to public interest work.

Future nominees

Finally, it is imperative that future nominees for federal judgeships come from diverse professional backgrounds.

This does not mean that the administration should only consider individuals from certain professional backgrounds; doing so could risk disqualifying eminently qualified individuals, perhaps most troublingly from communities underrepresented in those sectors. But while pipeline reforms are important in regard to long-term gains, it is essential that future administrations commit themselves to nominating those who have dedicated their careers to civil rights and legal aid organizations as well as those who have served as public defenders.

In addition, prioritizing the selection of judges from certain career fields is not enough to truly broaden the bench. Future administrations must also nominate distinguished alumni from schools other than those already enjoying extremely strong representation on the bench. Given the loyalty of many judges to their alma maters,[48] doing so would also likely encourage the hiring of clerks from a greater number of law schools, helping to further diversify the pipeline of judges.

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A future administration could set two goals. First would be a commitment to nominating a significant number of judges from underrepresented fields. Second, an administration could set a similar goal in regard to educational diversity. For example, it could aim to ensure that a number of its nominees have attended a law school located within the region of the circuit that judge is to serve.

Regardless of any goal set for the bench as a whole, any future administration should also commit to installing diversity into the highest Supreme Court vacancies with lawyers from careers dedicated to nonprofit or public defender work as well as those who attended a school other than one already represented on the bench.

A future administration could set up an independent commission to lift up the need for more diversity on the bench and track diversity metrics to ensure effective implementation of these goals. And while the next president should ensure those within the administration charged with managing the judicial nomination process are committed to advancing diversity, it may also be helpful for such a commission to aide those officials in their work by spearheading new initiatives to help identify and vet attorneys who would not have otherwise been considered for judgeships. President Jimmy Carter, for example, set up such a body to aid him in the selection of his judges.[49] But it is important to recognize that any commission of this sort would not be binding on a president without a constitutional amendment.

Therefore, it is up to the integrity of future administrations to stay committed to the furtherance of professional diversity on the bench.

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Conclusion

Improving professional diversity in the federal judiciary is essential, particularly in regard to those with significant experience in public interest law. It is of paramount importance that future administrations take seriously the demonstrated lack of diversity on the appellate bench and work to put a strong majority of attorneys from a diverse range of professions, particularly those underrepresented fields, on the bench. In addition, Congress should explore avenues to encourage a more diverse pipeline of young attorneys who would be attractive for future judgeships.

Ensuring that the federal judiciary is best able to fairly evaluate the rights and interests of every person who enters a courtroom is of vital importance to a well-functioning democracy. Increasing professional diversity on the federal bench will go far in ensuring that goal.

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About the author

Maggie Jo Buchanan is the director of Legal Progress at the Center for American Progress.

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Building a More Inclusive Federal Judiciary

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Introduction and summary

Federal judges wield immense power. Each day, they make decisions that affect people's livelihoods, well-being, and fundamental rights. They serve as a check on the executive and legislative branches. This balanced system is designed to ensure that lawmakers and the president adhere to the United States' constitution and established laws. Federal judges serve for life and therefore can determine the nation's laws for generations. This is particularly true today as federal judges are serving longer terms.[1]

In order to function properly, however, the federal judiciary needs the public to trust that the institution and the decisions it renders are legitimate. Otherwise, judicial rulings would be virtually impossible to enforce. Instead of being the final arbitrator of the law, the judiciary would take on a mere advisory role.

Many people—including legal scholars, judicial commentators, and legal practitioners—have raised concerns about the federal judiciary's current legitimacy crisis. Members of the public increasingly perceive federal courts as unfair, particularly to underrepresented groups, and as entities that favor corporate interests over the public good. In particular, federal judges—especially Supreme Court justices—are increasingly viewed as political actors, while the courts are viewed as partisan institutions. This is due in part to hyperpartisanship in the judicial nomination process and recent appointments of overtly partisan judges. Of course, the process of appointing judges to serve for life on federal courts has always been political in nature and subject to heated debate between political parties. That said, the rancor and norm-breaking in the judicial nomination process has escalated in recent years.

Also contributing to the judiciary's legitimacy crisis is the lack of federal judges representing historically underrepresented groups, such as people of color, women, individuals who self-identify as LGBTQ, people with disabilities, and people belonging to minority religions. Today, more than 73 percent of sitting federal judges are men and 80 percent are white.[2] Only 27 percent of sitting judges are women, while Hispanic judges comprise just 6 percent of sitting judges on the courts. Judges who self-identify as LGBTQ make up fewer than 1 percent of sitting judges.[3]

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Diversity adds immense value to the judiciary. For parties to a case and the public at large, the court's legitimacy is strengthened when many of the decision-makers look like or share similar characteristics to them. As aptly described by Supreme Court Justice Elena Kagan, "People look at an institution and they see people who are like them, who share their experiences, who they imagine share their set of values, and that's a sort of natural thing and they feel more comfortable if that occurs."[4] Moreover, ethnic and gender diversity on the bench has been shown to positively affect decision-making.[5] However, while previous presidential administrations have made concerted efforts to diversify the bench, President Donald Trump has appointed the least racially and ethnically diverse group of federal judges of any president over the past three decades.[6]

For the first time in nearly 50 years, *Roe v. Wade* is under serious threat of being overturned or undermined by the U.S. Supreme Court.[7] Judges have also taken aim at important protections for LGBTQ people, religious minorities, and people of color.[8] While federal courts have at times offered underrepresented groups a tool for realizing and protecting basic and fundamental rights, this is becoming increasingly less true—particularly under President Trump.[9] According to information compiled by the Alliance for Justice, at least 40 of Trump's judicial appointees have poor records in one or more of the following issue areas: voting rights, reproductive justice, LGBTQ rights, and protecting the Affordable Care Act (ACA).[10]

Judges who self-identify as members of historically underrepresented groups draw on their divergent life experiences while hearing cases and deliberating with colleagues, which helps them to consider the interests and unique perspectives of a variety of litigants and communities. Accordingly, diversity in the judicial pool helps to ensure that rulings reflect a broader set of viewpoints, especially those that are traditionally overlooked, while acting as a check on a single dominant perspective.

In its report "Structural Reforms to the Federal Judiciary," the Center for American Progress examined a number of potential reforms to help restore fairness to federal courts, including setting term limits, adding justices to the Supreme Court, and strengthening ethics requirements.[11] This follow-up report focuses specifically on addressing the federal judiciary's lack of diversity. Part I explores this problem in terms of race and ethnicity, gender, sexual orientation, and religious affiliation, as well as how the lack of diversity has become worse under President Trump; it also examines the lack of varying professional and educational backgrounds among federal judges.

Part II describes various benefits to having judges from a variety of backgrounds, such as improving judicial decision-making and the public's perception of the judiciary as a legitimate institution. Finally, Part III offers recommendations for increasing the number of judges from historically underrepresented groups and different backgrounds on the federal courts, such as addressing judicial pipeline problems and making judicial nominations and appointments more inclusive.

The inclusion of judges from different backgrounds and walks of life results in more thoughtful and balanced decisions, thereby bolstering the legitimacy of the courts, while—at the same time—offering a wide array of benefits to litigants and the legal profession.

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Part I: The federal judiciary's diversity problem

Since the nation's founding, the federal judiciary has been overwhelming white and male. From the 18th century until the 1960s, white male judges comprised at least 99 percent of the federal judiciary.[12] A woman was not appointed to an Article III judgeship until 1934 under President Franklin D. Roosevelt, and it was not until 1949, under President Harry S. Truman, that an African American was appointed to a federal circuit court.[13] On the Supreme Court, racial and gender diversity came even later: Justice Thurgood Marshall—the first African American justice—was appointed in 1967, while the first woman on the court, Justice Sandra Day O'Connor, was not appointed until 1981.[14] Judge Deborah A. Batts—the first openly LGBTQ federal judge—was not appointed until 1994.[15]

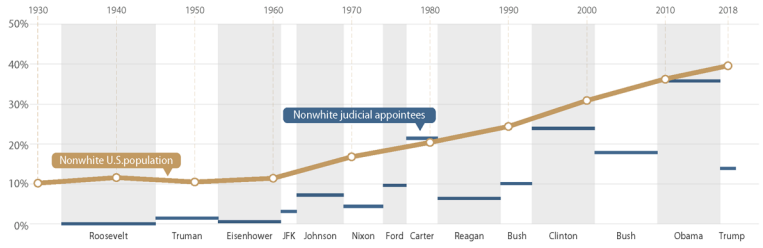
Examining diversity among sitting or active judges

Diversity in the federal judiciary can be measured by looking at "sitting" or "active" judges. The dataset for sitting judges includes those serving in senior status, which is a form of semi-retirement. Datasets for active judges, on the other hand, do not include senior status judges and only reflect judges who serve on the courts full time. Because judges in senior status can still hear cases, the authors have included them in this analysis. According to the federal courts' official website, senior status judges "typically handle about 15 percent of the federal courts' workload annually."[16] Due largely to the Obama administration's efforts to appoint more people of color, women, and LGBTQ individuals to the federal bench, diversity statistics are somewhat better among active judges—who tend to be younger and more recently appointed—than among sitting judges. That said, even among active judges, representation of underrepresented groups is quite poor. For instance, white male judges make up 59 percent of all sitting judges and nearly half of all active judges.

FIGURE 1A

Judicial appointments have not kept pace with an increasingly diverse U.S. population

Distribution of federal judicial appointees of past presidential administrations, by race and ethnicity



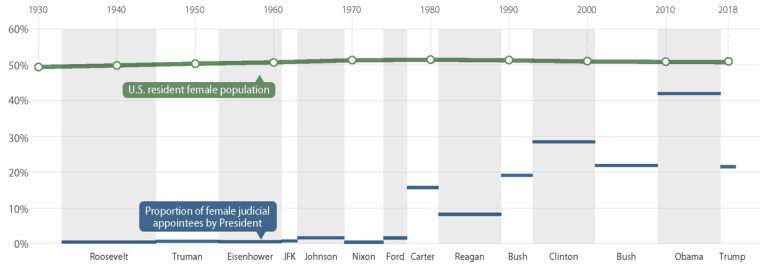
Notes: In gathering demographic data on the U.S. population, the authors used information supplied by the U.S Census Bureau. The U.S. Census Bureau did not begin collecting comprehensive data on people who identify as white, not Hispanic individuals until the 1970s, though it estimated the U.S. Hispanic population in the 1940 Census based on those who counted Spanish as their first language. Therefore, the authors relied on data for white, not of Hispanic individuals where they were available but otherwise used the data for white individuals. Note that the Census Bureau has defined "Hispanic" differently over time. Data for 1970 reflect a 15 percent sample, which the authors relied on in order to include estimates for the white, not Hispanic population at that time. Beginning with the 2000 census, individuals could report more than one race. Nonwhite individuals include those who are Black or African American, Asian, Hispanic or Latino, American Indian and Alaska Native, Native Hawaiian and other Pacific Islander, and people having two or more races. U.S. Census Bureau data reflect 2018 estimates. The data for President Trump's judicial appointees were last updated on August 20, 2019. The data reflect judges appointed to Article III courts, designated in the U.S. Constitution, as of August 2019.

Sources: U.S. Federal Judical Center, "Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria," available at https://www.fjc.gov/history/judges/search/advanced-search (last accessed August 2019); Campbell Gibson and Kay Jung, "Population Division Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States" (Washington: U.S. Census Bureau, 2002), available at https://census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf; U.S. Census Bureau American FactFinder, "Profile of General Population and Housing Characteristics: 2010," available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&src=pt (last accessed August 2019); U.S. Census Bureau American FactFinder, "Profile of General Population and Housing Characteristics: 2000," available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last accessed August 2019); U.S. Census Bureau American Fact Finder, "Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States: April 1, 2010 to July 1, 2018," available at (2018)," https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk# (last accessed August 2019).

FIGURE 1B

Judicial appointments have not reflected the gender makeup of the United States

Distribution of federal judicial appointees of past presidential administrations, by gender



Notes: The data reflect judges appointed to Article III courts, designated in the U.S. Constitution, as of August 2019.

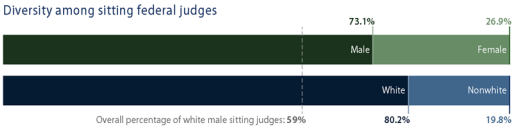
Source: U.S. Federal Judical Center, "Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria," available at https://www.fjc.gov/history/judges/search/advanced-search (last accessed August 2019); U.S. Census Bureau, "Statistical Abstract of the United States: 2000" (Washington: 2001), available at https://www2.census.gov/library/publications/2001/compendia/statab/120ed/tables/sec01.pdf?; U.S. Census Bureau American FactFinder, "Profile of General Population and Housing Characteristics: 2010," available at https://facfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last accessed October 2019); U.S. Census Bureau American FactFinder, "Profile of General Population and Housing Characteristics: 2000," available at https://facfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last accessed October 2019).

Although judicial diversity has improved in recent years—thanks, in particular, to efforts by former Presidents Jimmy Carter, Bill Clinton, and Barack Obama—federal courts remain dominated by judges who are white and male. As of August 2019, 80 percent of all the sitting judges on the federal bench were white and 73 percent were male. Together, white males comprise nearly 60 percent of all judges currently sitting on the federal bench.[17] Meanwhile, people of color—including those belonging to two or more races—and women make up only about 20 percent and 27 percent of sitting judges, respectively, while individuals self-identifying as LGBTQ comprise fewer than 1 percent of all sitting judges.[18] To put this into perspective, people of color make up nearly 40 percent, women make up 51 percent, and people identifying as LGBTQ comprise approximately 4.5 percent of people living in the United States.

FIGURE 2

White and male judges dominate the federal courts

Diversity among sitting federal judges



Note: Nonwhite individuals include those who are Black or African American, Asian, Hispanic or Latino, American Indian and Alaska Native, Native Hawaiian and other Pacific Islander, and people having two or more races. The data reflect sitting judges on Article III courts, designated in the U.S. Constitution, as of August 2019.

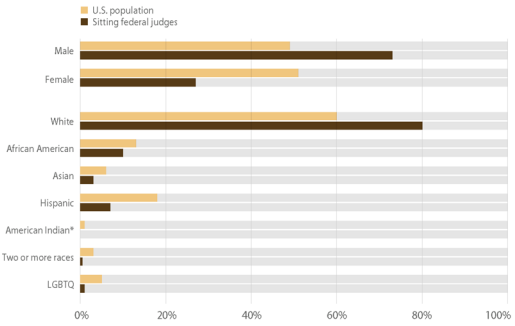
Sources: U.S. Federal Judical Center, "Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria," available at https://www.fjc.gov/history/judges/search/advanced-search (last accessed August 2019).

Of judges currently sitting on federal Article III courts, only about 10 percent are African American and 2.6 percent are Asian American. These numbers do not track with the U.S. population. For example, Blacks and African Americans comprise 12.5 percent of the U.S. population, while Asians make up 5.7 percent of the population. Hispanics are even more significantly underrepresented on the courts compared with their share of the population: Only 6.6 percent of sitting federal judges are Hispanic, despite the fact that this group comprises 18.3 percent of the U.S. population, according to the U.S. Census Bureau.[19] And there are only two American Indian judges sitting on the federal bench, making up just 0.1 percent of the federal judiciary compared with 0.7 percent of the U.S. population.[20]

FIGURE 3

Women, LGBTQ people, and nonwhite groups are underrepresented on federal courts compared with their share of the U.S. population

Diversity of sitting federal judges compared with that of the U.S. population



* According to the Federal Judicial Center, there are currently two sitting American Indian judges serving on the federal courts, comprising 0.1 percent of all sitting federal judges.

Note: As defined by the U.S. Census Bureau, "white" indicates "white, not Hispanic." U.S. population data for African American, Asian, and American Indian similary reflect non-Hispanic origin. President Trump's first LGBTQ appointee was confirmed by the Senate on July 31, 2019. The data reflect judges on Article III courts, designated in the U.S. Constitution, as of August 2019.

Sources: U.S. Federal Judical Center, "Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria," available at https://www.fjc.gov/history/judges/search/advanced-search (last accessed August 2019); Minority Corporate Counsel Association, "LGBT Article III Judges," available at https://www.mcca.com/resources/reports/federal-judiciary/lgbt-judges/ (last accessed August 2019); Chris Johnson, "Mary Rowland is the first LGBT Trump judicial nominee confirmed by the Senate," Washington Blade, August 5, 2019, available at https://www.washingtonblade.com/2019/08/05/mary-rowland-is-first-lgbt-trump-judicial-nominee-confirmed-by-senate/; Frank Newport, "In U.S., Estimate of LGBT Population rises to 4.5%" (Washington: Gallup, 2018), available at https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx; U.S. Census Bureau, "American Fact Finder, Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States: April 1, 2010 to July 1, 2018," available at (2018)," https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk# (last accessed August 2019).

If one narrows the pool to just active federal judges, which does not include judges in senior status, the numbers improve—but only marginally. Among active judges, nearly 73 percent are white and 67 percent are male. White males comprise 50 percent of all active federal judges. On the other hand, people of color comprise 27 percent and women represent 33 percent of active federal judges. Approximately 13 percent of active federal judges are African American, while 4 percent are Asian American and 9 percent are Hispanic.[21] Among judges actively serving on the federal courts, only one is American Indian. In all, people of color comprise just 27 percent of actively serving judges. Meanwhile, LGBTQ people make up approximately 1.4 percent of active judges.[22]

It can be difficult to acquire up-to-date information on the religious affiliations of federal judges, as they may not openly disclose which faith—if any—they adhere to. However, a 2017 study by scholars Sepehr Shahshahani and Lawrence J. Liu found that among federal appellate judges, 45.1 percent were Protestant, 28.2 percent were Catholic, 19 percent were Jewish, and 5.1 percent were Mormon.[23] Strikingly, Hindu judges comprised just 0.5 percent of federal appellate judges, and the study's authors were unable to identify any Buddhist, Muslim, or atheist federal appellate judges. In 2016, then-President Obama nominated Abid Riaz Qureshi to the U.S. District Court for the District of Columbia. Quareshi would have been the first Muslim American federal judge, but the Senate failed to confirm his appointment.[24]

Regrettably, the authors were unable to locate any publicly available data on the number of sitting federal judges with disabilities. The virtual absence of information on disabled federal judges is problematic and deserves more attention.

The federal judiciary also lacks diversity in terms of educational background. A 2016 study found that approximately 48 percent of all former and current federal judges graduated from one of 20 top law schools. Of those, nearly a quarter attended law school at Harvard University, Yale University, University of Michigan, University of Texas, or Columbia University.[25] When factoring in judges who attended University of Virginia, Georgetown University, University of Pennsylvania, George Washington University, and Stanford University, this number jumps to 35 percent of all federal judges, past and present. Among Supreme Court justices, in particular, more than 30 percent of those who have served on the court graduated from just one law school: Harvard. In fact, as noted by the study's authors, "Harvard has had more representation on the Supreme Court than the bottom ninety-five percent of law schools combined." Just three elite law schools—Harvard, Yale, and Columbia—have been responsible for more than half of all Supreme Court justices who have served on the bench since the nation's founding.[26]

Professional diversity is also lacking. A 2017 Congressional Research Service report found that more than 46 percent of active federal circuit court judges were either serving in private practice or as a state or local judge when they were appointed to the federal bench. In comparison, 7.5 percent were working as law professors, 3.7 percent were working for state and local government, and fewer than 1 percent were serving as a public defender.[27] Among active district court judges, nearly 66 percent were either working in private practice or serving as a state or local judge. At the same time, only 3 percent were working for state or local government, 1.4 percent were serving as a public defender,

and just 0.5 percent were working as a law professor when they were appointed. Having judges with different professional experiences overseeing cases is important because these experiences can shape how judges view the application of the law and individual parties.[28] Moreover, a 2016 study by the Alliance for Justice found that roughly 86 percent of judicial nominees under the Obama administration had either worked as corporate attorneys, prosecutors, or both.[29] At the same time, fewer than 4 percent had worked as lawyers at public interest organizations.[30]

Efforts to diversify the federal judiciary have regressed under Trump

Although other presidents who served during the early to mid-20th century made some efforts to appoint federal judges belonging to historically underrepresented groups, President Jimmy Carter was the first to make diversifying the federal courts a priority. Until Carter entered office, white judges made up at least 90 percent of all judicial appointees in every preceding administration since the nation's founding. Under Carter, however, judges from racially and ethnically diverse backgrounds comprised more than 21 percent of appointees.[31] Of Carter's judicial appointees, 37 were African American, which amounted to more than three times the number of African American judges appointed by any previous administration.[32] Moreover, whereas female judges comprised less than 2 percent of judicial appointees in past administrations, they made up nearly 16 percent of Carter's judicial appointees.[33]

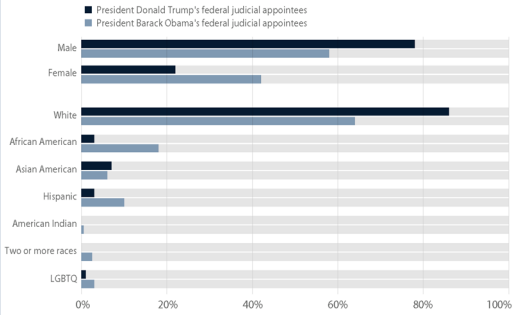
In the 1990s, President Bill Clinton took up the mantle left by Carter: Almost half of all of Clinton's federal judicial appointees were from historically underrepresented groups. Yet no president aimed to diversify the bench more than President Barrack Obama. Obama nominated and confirmed more women than any other president in history, although there is still significant room for improvement; by the time he left office in January 2017, nearly 42 percent of his judicial appointees had been women.[34] Moreover, people of color comprised nearly 36 percent of Obama's 324 judicial appointees. In all, more than 60 percent of Obama's judicial nominees were people of color, women, and sexual or gender minorities.

Unfortunately, any gains in diversity made by previous administrations came to a halt once Trump took office. President Trump is appointing federal judges at a rapid pace, yet his judicial picks are the least racially and ethnically diverse of any presidential administration over the past 30 years. As of August, Trump lagged behind the Obama administration in appointing women by 20 percentage points.[35] The current administration's stunning reshaping of the federal courts undercuts decades-worth of efforts by previous administrations—both Democrat and Republican—to diversify the judiciary.

FIGURE 4

President Trump's judicial appointees are exceptionally nondiverse

Diversity among President Trump's federal judicial appointees compared with President Obama's



Note: Three of President Obama's multiracial appointees were Asian American multiracial. In total, President Obama appointed 21 judges of Asian American descent, which accounted for approximately 6.5 percent of his judicial appointees. The data reflect judicial appointees to Article III courts, designated in the U.S. Constitution, as of August 2019.

Sources: U.S. Federal Judical Center, "Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria," available at https://www.fjc.gov/history/judges/search/advanced-search (last accessed August 2019); Minority Corporate Counsel Association, "LGBT Article III Judges," available at https://www.mcca.com/resources/reports/federal-judiciary/lgbt-judges/ (last accessed August 2019); Mark Joseph Stern, "Obama's Most Enduring Gay Rights Achievement," Slate, June 17, 2014, available at https://slate.com/human-interest/2014/06/openly-gay-federal-judges-are-obamas-most-enduring-gay-rights-achievement.html; Chris Johnson, "Mary Rowland is first LGBT Trump judicial nominee confirmed by the Senate," Washington Blade, August 5, 2019, available at https://www.washingtonblade.com/2019/08/05/mary-rowland-is-first-lgbt-trump-judicial-nominee-confirmed-by-senate/.

Since President Ronald Reagan, every president except Trump has made the judiciary more racially and ethnically diverse than the proceeding president of the same party.[36] In other words, each Republican president elected after Ronald Reagan appointed judges who were at least equally, if not more, racially and ethnically diverse than those appointed by his Republican predecessor—and the same holds true for Democrats. For example, although President George H.W. Bush did not appoint as many judges of color as Jimmy Carter, he did appoint more than Ronald Reagan. Trump broke this trend, as his appointees are 4 percentage points less racially and ethnically diverse than judges appointed by President George W. Bush.[37]

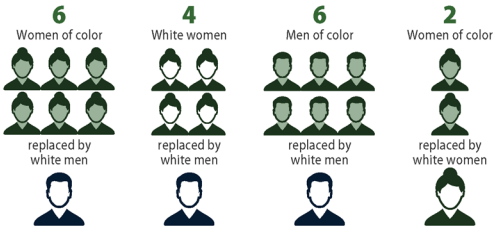
As of August 20, 2019, of Trump's judicial appointees, 78 percent were male and 86 percent were white, with white men comprising 67 percent of Trump appointees.[38] Only 21.5 percent of Trump's appointees were women, while people of color made up fewer than 14 percent of Trump's federal appointees. Only one of Trump's appointees openly identifies as LGBTQ.[39] Moreover, as of August, Trump had only appointed five African American judges and five Hispanic judges. And although 10 of Trump's appointees were Asian Americans, he has failed to appoint a single American Indian judge.[40]

Examining Trump's judicial nominees is an even better indicator of the lack of priority that the administration has assigned to broadening representation on the bench. Although Trump cannot directly control which of his nominees the Senate ultimately confirms, he has autonomy over whom he nominates. As of July 31, 2019, Trump had nominated 183 judges to the federal bench. Of those, more than 78 percent were men and 84 percent were white. Together, white men made up 67 percent of all Trump judicial nominees at that time. Only seven—3.83 percent—were African American, while just 40—21.86 percent—were women.[41] Hispanic and Asian American judges accounted for only five and twelve—2.73 percent and 6.56 percent—of Trump's nominees, respectively. Not a single American Indian judge has been nominated by Trump, and only two judges—1.09 percent—have been nominated who openly identify as LGBTQ.[42]

FIGURE 5

President Donald Trump replaced several of former President Barack Obama's diverse judicial nominees with white and/or male nominees

The number of diverse Obama nominees replaced in the current administration



Sources: Demographic information on diverse judges nominated by President Obama and replaced by President Trump came from a variety of sources, including news articles, social media sites, and Ballotopedia, and others. It includes data through July 31, 2019. The full list of sources is on file with the author.

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Moreover, when Obama left office in January 2017, more than 50 of his judicial nominees were still pending, many whom were women and/or people of color.[43] But instead of renominating Obama's nominees, once he became president, Trump replaced several of them with nominees who were either white, male, or both.[44]

Although Trump did end up renominating 13 of Obama's holdover nominees as of August 2019, seven of them were white males, four were white females, and two were Asian American women.[45] There were only a few instances where Trump nominated someone who was more representative in terms of race and ethnicity or gender. For instance, Trump replaced one of Obama's white male nominees with a white female and replaced one of Obama's white female nominees with a woman of color. In addition, two white women nominated by Obama were replaced by men of color under Trump.[46]

Still, Trump's insistence on nominating and appointing primarily white male judicial candidates, and the Senate's rush to confirm them, will have profound effects on the country's legal trajectory and people's lives.

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Part II: Diversity on the federal bench matters

In considering the courts' demographic makeup, it is obvious that the federal judiciary is not an equal opportunity employer and instead favors white male elites. This has real consequences for historically underrepresented litigants and parties who may not receive fair or even-handed rulings due to inherent biases among judges. Indeed, a consequence of having such a judiciary is that the public may begin to view the courts as another cog in an already oppressive legal system, rather than as a trustworthy and independent institution.

Also contributing to the public's distrust of the judiciary is a growing body of evidence showing that certain litigants—mainly people of color—receive disparate treatment when they come before white judges. This treatment has not gone unnoticed.[47] A 2014 Pew Research Center survey found that among respondents, 27 percent of whites, 40 percent of Hispanics, and 68 percent of Blacks felt that Black people were treated less fairly by courts, compared with white people.[48]

Increasing diversity on the federal bench will help address these concerns and foster greater public trust in the judiciary. According to one judge, having a more diverse group of judges that mirrors the makeup of the populace "enhances the ability of the populace to feel that [judges] are more *believable*."[49] Judicial diversity also offsets discriminatory biases in judicial decision-making. And research shows that the presence of judges belonging to historically underrepresented groups and with different backgrounds can result in fairer judicial outcomes and better courtroom experiences for litigants.

Better descriptive and substantive representation on the bench

The presence of a diverse group of federal judges improves both the descriptive and substantive representation of underrepresented groups on the federal bench.[50] As described in CAP's "Structural Reforms to the Federal Judiciary," descriptive representation is when an institution physically resembles the population over which it

has authority, whereas substantive representation is when an institution acts in the substantive interests of the group over which it presides.[51] The latter is, to a degree, less concerned with the physical representation of a group; rather, it is focused on whether the representation is meaningful and embodies the population's priorities and values.[52]

Descriptive and substantive representation are not interchangeable

There is a common misconception that descriptive and substantive representation are intrinsically linked. The theory goes that by improving descriptive representation, better substantive representation will automatically follow. But this is not always the case. Judges from underrepresented groups do not take homogenous approaches to how they interpret and apply the law. For instance, not all female judges are pro-choice, in the same way that not all judges of color will rule in favor of affirmative action programs.

As an example, consider Justice Clarence Thomas, the second African American judge confirmed to the Supreme Court. Although Justice Thomas has at times been critical of legal arguments and constructs he perceived as racist, he has also been a staunch opponent of affirmative action programs and has voted to eliminate important voting rights protections that were designed to protect people of color from voter suppression.[53] Justice Thomas offers a good lesson against making assumptions about the viewpoints and jurisprudential approaches of judges of color or those from other underrepresented groups. He also presents a good reminder that when it comes to improving the diversity of members of the bench, the United States needs judges who represent underrepresented groups both descriptively and substantively.

Descriptive representation is important, as it improves public trust in the judiciary since people are more likely to trust those with whom they share physical characteristics.[54] Therefore, in the interests of both equality and the perception of fairness, it is important that judges reflect the parties and populations they serve. As described by scholars Jason Iuliano and Avery Stewart, "In dispensing justice to all citizens, the legal system cannot allow one demographically homogenous group to hand down decisions while other racial and ethnic groups bear the brunt of those decisions."[55]

Yet the federal judiciary does not resemble the public at large. As explored in previous sections, notable disparities exist for women, African Americans, Hispanics, Asians Americans, American Indians, and LGBTQ individuals. All of these groups are strikingly underrepresented on the courts compared with their respective shares of the U.S. population.[56]

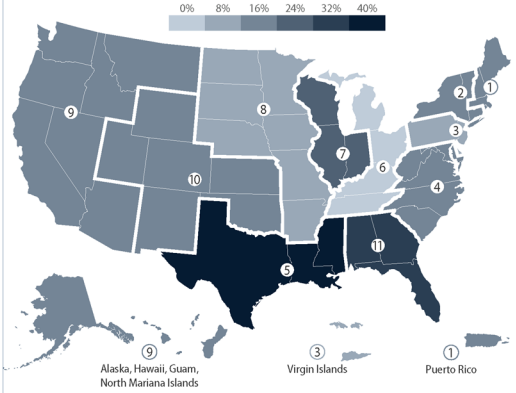
The lack of diversity is particularly stark in specific jurisdictions. For example, there are no judges of color sitting on the 7th U.S. Circuit Court of Appeals—which includes Illinois, Indiana, and Wisconsin—even though people of color make up nearly a third of the jurisdiction's population.[57] Meanwhile, of the 18 sitting judges on the 8th U.S.

Circuit Court of Appeals, only one is a woman, even though women comprise more than half of the jurisdiction's general population. Furthermore, although people of color make up more than 50 percent of the population covered by the 5th U.S. Circuit Court of Appeals, white judges make up nearly 85 percent of its sitting judges.

FIGURE 6

The racial and ethnic compositions of federal circuit courts do not reflect the populations that they serve

Gaps in the diversity of U.S. Circuit Courts compared with the general populations of the jurisdictions they preside over



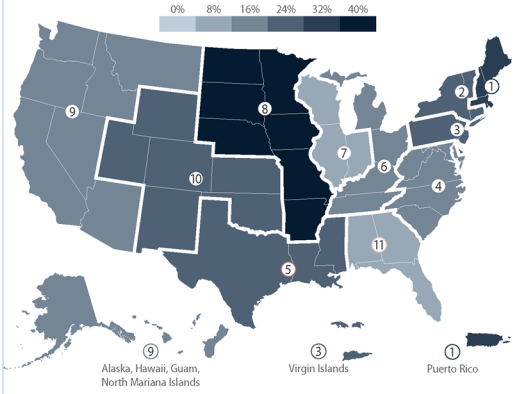
Note: Circuit population data was derived from the U.S. Census Bureau. For U.S. population, white indicates white, not hispanic. Black or African American indicates Black or African American, not Hispanic. And Asian indicates Asian, not Hispanic. The data does not include people of "two or more races," as definited by the Census. Demographic data for Puerto Rico reflect 2017 estimates. Census data were supplemented by information from the CIA World Factbook where necessary. According to the CIA World Factbook, Guam's population is comprised of the following ethnicities: "Chamorro 37.3%, Filipino 26.3%, white 7.1%, Chuukese 7%, Korean 2.2%, other Pacific Islander 2%, other Asian 2%, Chinese 1.6%, Palauan 1.6%, Japanese 1.5%, Pohnpeian 1.4%, mixed 9.4%, other 0.6%." The following ethnicities comprise the Northern Mariana Islands: "Asian 50% (includes Filipino 35.3%, Chinese 6.8%, Korean 4.2%, and other Asian 3.7%), Native Hawaiian or other Pacific Islander 34.9% (includes Chamorro 23.9%, Carolinian 4.6%, and other Native Hawaiian or Pacific Islander 6.4%), other 2.5%, two or more ethnicities or races 12.7%." The following ethnicities are represented in the U.S. Virgin Islands, according to the CIA's World Factbook: black 76%, white 15.6%, Asian 1.4%, other 4.9%, mixed 2.1%." The data reflect sitting Article III judges, designated in the U.S. Constitution, as of August 2019.

Sources: U.S. Federal Judical Center, "Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria," available at https://www.fjc.gov/history/judges/search/advanced-search (last accessed August 2019); U.S. Census Bureau American FactFinder, "Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States: April 1, 2010 to July 1, 2018," available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk# (last accessed August 2019); U.S. Census Bureau American Fact Finder, "ACS Demographic and Housing Estimates, 2013-2017 American Community Survey 5-year Estimates (Puerto Rico)," available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF (last accessed August 2019); U.S. Central Intelligence Agency, "The World Factbook," available at https://www.cia.gov/library/publications/the-world-factbook/geos/vq.html (last accessed August 2019).

FIGURE 7

The gender compositions of federal circuit courts do not reflect the populations that they serve

Gaps in the diversity of U.S. Circuit Courts compared with the general populations of the jurisdictions they preside over



Note: Circuit population data were primarily derived from the U.S. Census Bureau. Census data were supplemented by information provided by the World Bank or CIA World Factbook where necessary. The data reflect sitting Article III judges, designated in the U.S. Constitution, as of August 2019.

Sources: U.S. Federal Judical Center, "Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria," available at https://www.fjc.gov/history/judges/search/advanced-search (last accessed August 2019); U.S. Census Bureau American FactFinder, "Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States: April 1, 2010 to July 1, 2018," available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last accessed August 2019); U.S. Census Bureau American FactFinder, "ACS Demographic and Housing Estimates, 2013-2017 American Community Survey 5-year Estimates (Puerto Rico)," available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF (last accessed August 2019); World Bank Group, "Population, female (% of total population)," available at https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS (last accessed August 2019); U.S. Central Intelligence Agency, "The World Factbook," available at https://www.cia.gov/library/publications/the-world-factbook/-geos/vq.html (last accessed August 2019).

But it is not enough to simply nominate and confirm judges who physically represent a variety of races, nationalities, genders, sexual orientations, and any number of additional characteristics. The federal judiciary must be comprised of judges who can identify with the unique experiences of all kinds of litigants who come before the courts. People belonging to underrepresented groups often share a common set of experiences that shape their values and perceptions on certain issues. This allows judges belonging to such groups to effectively champion divergent values and perspectives, thus leading to better

substantive representation for those communities. Indeed, as noted by scholar Michael Nava in a 2008 study, judges belonging to historically underrepresented groups tend to be more empathetic and considerate of the concerns of litigants who—like them—have been "similarly ostracized for their differences."[58] Most Americans believe it is important for judges to "be able to empathize with ordinary people."[59]

Generally speaking, in the average case where matters disproportionately affecting historically underrepresented groups are not at issue, a judge's identity—including their race and ethnicity, gender, sexual orientation, or religious affiliation—will not have any bearing on the outcome. In other words, for most cases, a female judge will reach the same conclusion as a male judge, a Black judge will reach the same conclusion as a white judge, and so forth. Some studies have even shown that, in certain cases, female judges may issue harsher rulings than their male counterparts against similar litigants.[60] One explanation for this is that judges from underrepresented groups feel pressured to rule in such ways so as to avoid being perceived by their colleagues and others within the profession as biased or agenda-driven. As described by a female South Asian immigration judge from the United Kingdom, "The feeling of being an outsider did extend to how I behaved as a judge at first. I felt terribly self-conscious, on guard, needing to make sure I was right and also be seen to be doing it 'properly.' So I may even have been harsher than white judges."[61]

However, in cases where race, gender, and religion are at issue, a judge's identity can have a significant impact on how cases are decided. It is worth noting at the outset that studies conducted over the past several decades have reached different—and, at times, even contradictory—conclusions over the extent to which a judge's identity and background influences their decision-making. That said, a number of studies have shown promising support for the idea that a judge's background or membership in historically underrepresented groups can affect case outcomes—though more research is needed.

Indeed, judges themselves have recognized that their identities and specific backgrounds can inform their decision-making.[62] As noted by Justice Ruth Bader Ginsburg on the differing approaches male and female judges take on cases involving women's issues: "[T]here are perceptions that we have because we are women. It's a subtle influence. We can be sensitive to things that are said in draft opinions that (male justices) are not aware can be offensive."[63] Senior Judge Atsushi Wallace Tashima of the 9th U.S. Circuit Court of Appeals, too, has previously described how his life experiences influence his decision-making—particularly the incarceration of his family in a World War II U.S. internment camp for Japanese Americans and Japanese immigrants:

> *Because we are all creatures of our past, I have no doubt that my life experiences, including the evacuation and internment, have shaped the way I view my job as a federal judge and the skepticism that I sometimes bring to the representations and motives of the other branches of government.*[64]

Studies have found, for example, that female judges are more likely than their male counterparts to rule in favor of plaintiffs in sexual harassment and employment discrimination cases.[65] Women judges have also been found more likely to rule statutes unconstitutional if they violate the equal protection, due process, or freedom of association rights of people who identify as LGBTQ.[66] Using qualitative analysis, one study found that Asian American judges rule more sympathetically in certain cases, such as those involving matters of immigration or discrimination, which the author attributed in part to the plights that those racial and ethnic groups experienced themselves immigrating to and growing up in the United States.[67] Meanwhile, Black judges have been found to be more sympathetic to defendants alleging violations of Fourth Amendment rights than white judges.[68]

Moreover, plaintiffs alleging racial workplace harassment are 2.9 times more likely to succeed before African American judges than judges belonging to other races and ethnicities.[69] According to the study, as a general rule, plaintiffs in workplace harassment cases are more likely to succeed on their claims if they go before a judge of the same race as themselves. In explaining this phenomenon, professors Pat K. Chew and Robert E. Kelley explain:

> *Judges of each racial group can more readily identify with injustices that happen to their racial group. They draw upon similar life experiences; they know how they would react to being treated in certain ways; and they understand all the subtle "coded" words that carry racial offenses but that others tend to dismiss with "that's not what I was saying—you're reading into it.*[70]

Studies have uncovered other patterns in the ways that judges of specific religions decide certain cases. Professor Jeffrey J. Rachlinski and Magistrate Judge Andrew J. Wistrich of the U.S. District Court for the Central District of California explored this phenomenon in their 2017 article "Judging the Judiciary by the Numbers."[72] In reviewing past research, they describe that Jewish judges are more likely to decide cases in ways that protect minority religions, perhaps because they belong to a historically persecuted religion. Similarly, Catholic and evangelical judges rule more harshly in LGBTQ rights cases and against defendants in cases involving obscenity, which the authors note is "consistent with papal teachings." And while Jewish judges tend to adopt a more separationist approach, Catholic judges are more accommodationist.

"I find that my own life experiences inform my understanding and perceptions of the world as a judge … It is simply unrealistic to pretend that life experiences do not affect one's perceptions in the process of judging."

—Judge Edward Chen of the U.S. District Court for the Northern District of California.[71]

Unfortunately, there is scant research on how the presence of LGBTQ judges and judges with disabilities affects judicial outcomes.

Better, fairer decisions

Judges are human beings who hold biases and prejudices like everyone else. Most make concerted efforts to prevent such biases from affecting their decisions, but they are not always successful. For instance, a judge's past professional experience can contribute to bias in judicial decision-making. Although the body of research is mixed, at least one study found that judges who previously served as prosecutors are moderately more likely to rule against defendants.[73] A judiciary historically dominated by cis white men with prosecutorial backgrounds can result in legal doctrine and precedent tainted by bias—such as disproportionate criminal sentencing laws—which has repercussions for litigants and, especially, communities of color.

Adding judges with different backgrounds and experiences to the court can act as a check on bias in the courtroom. As part of their decision-making process, judges belonging to historically underrepresented groups consult their unique perspectives and life experiences—shaped by their race, gender, sexual orientation, religion, and so forth. According to one female federal judge, "I think everybody is applying the same law but you [as a minority or female] may be able to see more angles. The more angles, the better the decision."[74] This holds true for individuals from different educational backgrounds as well. For instance, law schools take varying approaches to training future lawyers and emphasize different perspectives on the application and interpretation of law.

Having a group of judges from a variety of backgrounds, including underserved or historically underrepresented communities, has a positive impact on the decision-making processes of federal judicial panels and the Supreme Court, where judges deliberate in groups. In these settings, people with varying experiences share their unique perspectives and challenge others' preconceptions with positive results. Studies have shown how groups that include people of different races and ethnicities, genders, and experiences approach problems differently, resulting in more thoughtful, innovative, and well-rounded decision-making than homogenous groups.[75] Furthermore, studies on federal appellate courts have found that having at least one female on an appellate court panel significantly increases the likelihood that male judges will find for plaintiffs in cases involving sexual harassment and discrimination, while having at least one Black judge on a panel increases the likelihood that non-Black judges will find for plaintiffs claiming violations of the Voting Rights Act and in affirmative action cases.[76]

Improving the judiciary as an institution

Judges from underrepresented groups have been champions in making the judiciary fairer and more inclusive. For instance, women judges and judges of color have spoken out about gender and racial bias on the courts and led calls for reform.[77]

The presence of judges from different communities and backgrounds can also improve the courtroom experience for litigants and lawyers from underrepresented populations—regardless of the outcome of the case. In most cases, when litigants of historically underrepresented groups come before a federal court, they encounter judges who do not look like them and with whom they do not share common experiences. This can result in litigants feeling heightened levels of stress, anxiety, or fear during court proceedings, especially if a judge uses racially or culturally insensitive language or commentary—regardless of whether it is intentional. Litigants who are people of color, women, LGBTQ people, people with disabilities, and members of other underrepresented groups may ultimately have a more positive experience and better overall impression of the legal system if their case is decided by a judge with whom they share certain attributes or backgrounds. This may hold true even if the judge ultimately rules against them.

For example, a female plaintiff bringing a sexual harassment claim against her employer may find comfort in the fact that her case is decided by a female judge who approaches the case in a thoughtful manner, with a robust or even personal understanding of the specific challenges women face in the workplace. Even if the female judge rules against her, the plaintiff may come away with the impression that the decision-making process was fairer than it otherwise would have been had the case been decided by a male judge who was less likely to comprehensively grasp the prevalence of and identify patterns in sexual harassment against female workers. For their part, federal judges of color have noted how their backgrounds and experiences provide them with a unique "understanding and appreciation of how intimidating the court system can be," which may help them to approach litigants with more sensitivity.[78]

In addition to improving courtroom experiences for litigants, the presence of judges from diverse backgrounds can also foster a more welcoming and inclusive environment for lawyers who argue cases before the courts. For example, female lawyers who come before courts presided over by male judges can be subject to harassment and disparaging remarks about their appearance and choice of dress.[79] Likewise, lawyers of color may face racist comments or disparate treatment by judges who preside over their case. Yet such mistreatment is less likely to occur in cases presided over by judges who—as discussed previously—have more empathy for individuals belonging to historically underrepresented groups.

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Finally, the presence of judges on the federal bench who represent a wealth of backgrounds and experiences signals to children, students, and other lawyers from underrepresented communities that one of the most prestigious positions within the legal system is not out of reach or reserved only for white male elites. Of course, not everyone aspires to become a federal judge. But for those who do dream of joining the profession, having judges to look to as examples can be vitally important in encouraging people to pursue their goals.

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Part III: Recommendations

By January 20, 2021, more than 200 federal judges will be eligible for senior status.[80] Of those 200 judges, more than half are white males. These potential openings provide an opportunity to improve the diversity of the federal bench. But to restore public trust and foster fair judicial outcomes, meaningful reforms must be made to the judicial pipeline and the processes by which judges are appointed.

The recommendations below focus primarily on improving the representation of women and people of color in the federal judiciary, as well as encouraging the nominations and appointments of LGBTQ judges, judges with disabilities, and judges belonging to different faiths. Yet more work is also necessary to improve the representation of judges from different educational and professional backgrounds. Indeed, the recommendations below frequently reference factors that have historically been considered necessary prerequisites for becoming a federal judge—namely, attending an elite law school, clerking for a federal judge, working at a top-tier law firm, and serving as a state judge or U.S. attorney. Preconceived notions that these are the only pathways to becoming a judge must be wholly abandoned if there is any hope of creating a fairer judiciary that is more representative of the population it serves. All judicial nominees, of course, must still have the necessary legal qualifications to adjudicate cases, such as having a healthy understanding of legal and trial procedures, as well as established legal rules and doctrine.

Address the pipeline problem

The lack of diversity within the federal judiciary cannot be remedied without addressing the judicial pipeline problem. Today, too few students of color, LGBTQ students, and students with disabilities are entering law school. And those who are accepted often are not being set up for success, as they face various obstacles in school and in obtaining the kinds of legal jobs that have traditionally led to federal judgeships. At every stage, law students and lawyers belonging to historically underrepresented groups face harassment, discrimination, and negative stereotyping. According to one Asian American female lawyer, "Being an Asian woman added another layer as men were often more interested in expressing themselves as romantic prospects as opposed to colleagues."[81]

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Attorneys belonging to historically underrepresented groups may also be subject to feelings of isolation. As described in a report by the Minority Corporate Counsel Association on sexual minority attorneys:

> *Nongay people announce their sexual orientation whenever they mention a date, a spouse, or a child. But these normal conversations can be fraught with tension for lesbians and gay men. If they decide to remain silent about their personal lives ... It's a silence that can often be interpreted by colleagues or clients as distant and cold.*[82]

To improve the diversity of the federal bench, initiatives must be put in place to ensure that individuals from historically underrepresented groups who are interested in pursuing judgeships have the resources and support they need to be admitted to and succeed in law school. Programs must also be established to help candidates obtain prestigious clerkships and law firm jobs, both of which have often been considered unofficial prerequisites for federal judgeships.[83] Becoming a state judge, state attorney general, or U.S. attorney are also common points of entry for future federal judges. As such, it is important to prioritize diversity in the pool of applicants in these sectors as well.

Get young people from underrepresented groups interested in judgeships

In order to bring individuals from all different backgrounds into the judicial pipeline, it is necessary to get young people of different races and ethnicities, genders, sexual orientations, and religions excited about pursuing a career in law.

Many people who have family members who are lawyers or judges are inspired to pursue law as a career. This is problematic as a strategy for building a more inclusive judicial pipeline, however, because people from historically underrepresented groups and backgrounds are not well accounted for within the legal profession. For instance, the profession as a whole is roughly 85 percent white and 64 percent male.[84] In 2016, the American Bar Association (ABA) reported that only 1.25 percent of its members self-identified as LGBT.[85] And a 2011 ABA survey found that fewer than 7 percent of its members responded "yes" to the question, "Do you have a disability?"[86] This puts members from underrepresented populations at a disadvantage from the very outset. Indeed, for many young people, having a career as a judge may not be on their radar or believed to be within the realm of possibility.

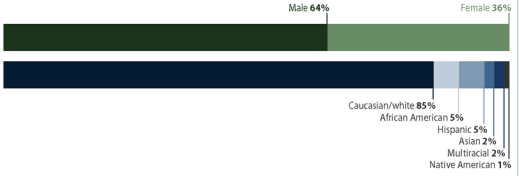
More outreach must be done at an early age to get young people with different experiences and backgrounds interested in and excited about a career as a judge. Affinity bar associations and other organizations are already leading on this front.

The Hispanic National Bar Foundation, for example, has programming—such as the Future Latino Leaders Summer Law Institute—that allows Latino high school students interested in pursuing careers in law to connect with Latino leaders in the legal profession.[87] As described by one student participant, "Hearing the success stories of people from similar backgrounds as me has inspired me, and showed me that the legal field is an amazing place for Hispanic people."[88] Meanwhile, groups such as Street Law Inc. and chapters of the Urban Debate League (UDL) work with students in cities to educate them about the law, help them build critical thinking and communication skills, and encourage them to pursue legal careers.[89] Street Law Inc. has teamed up with the National Association for Law Placement (NALP) to create a "Legal Diversity Pipeline Program" designed to help excite young people about a career in law. An evaluation of the program found that whereas 46 percent of students reported considering becoming a lawyer before entering the program, that number increased to 65 percent upon completion.[90] Moreover, the Silicon Valley UDL partners with local lawyers to provide corporate mentoring opportunities that allow students interested in law to shadow and receive advice and emotional support from practicing lawyers.[91]

FIGURE 8

Improving judicial diversity will require bringing more diverse lawyers into the fold

Diversity statistics for active attorneys in the United States



Source: American Bar Association, "ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics" (Chicago: 2019), available at https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf.

The above groups comprise but a fraction of the vast network of organizations working to foster an interest in law among individuals at an early age. Yet there is always more to be done. For instance, groups offering out-of-state programming should provide scholarships to students of all socio-economic backgrounds who are interested in participating. Such scholarships can go toward application fees, travel costs, and room and board in order to make these opportunities more financially feasible for low-income students. Affinity bar associations and justice-minded organizations can also host events at which high school students are given the opportunity to hear judges of color and women judges, as well as judges representing a variety of other characteristics and experiences, discuss their work in the courtroom and career paths. In addition to driving interest and enthusiasm for the profession among youths, events featuring these judges signal to students of all ages, races, and backgrounds that judgeships are within their grasps.

Make the law school admission process fairer and more accessible

Before becoming a federal judge, one must be admitted to and attend law school. Unfortunately, as described by law professor Sarah E. Redfield in her article on the pipeline to law school, socio-economic barriers often preclude students from underserved communities from competing with their white, affluent peers for admittance to coveted law schools.[92] As early as kindergarten, people of color, low-income people, people with disabilities, and other individuals from historically underrepresented groups are disadvantaged in the pursuit of a successful law career due to gaps in the education system.[93] For example, schools' failure to offer accessible educational facilities and equipment can result in education gaps for people with disabilities. Research has shown that the percentage of working-age disabled people who hold a bachelor's degree or higher is more than 18 percentage points lower than that of nondisabled people.[94]

In addition to overcoming educational barriers, prospective law students from underserved communities must overcome the significant financial burdens associated with applying for and attending law school. For instance, they must pay to take the LSAT exam—a prerequisite in most states for admission to law school, though a number of law schools now accept GRE scores.[95] Although the LSAT offers fee waivers for certain low-income students, they are not always well advertised, and therefore, many students in need may not be aware of their existence. Students who have the financial means can also take LSAT tutoring classes, which can give them a leg up on the exam. These prep classes, however, are expensive. They can cost upward of $1,400, which may be out of reach for low-income students.[96]

Then there is the application process itself. Each law school application can cost between $60 and $100.[97] Because experts recommend applying to between seven and 15 different law schools, the total cost of application fees alone may exceed $1,500.[98] Many law schools offer application fee waivers for low-income students, but as with the LSAT waivers, they are not always well advertised and can be difficult to obtain.[99]

Furthermore, the astronomical cost of attending law school and the prospect of being hundreds of thousands of dollars in debt upon graduation is a major deterrent for some individuals who might otherwise be interested in pursuing a career as a judge. Law school tuition can range anywhere from nearly $12,000 to almost $70,000 per year, depending on the school.[100] This is particularly daunting for those who do not have the same financial safety net as their affluent peers. Making matters worse, law students belonging to historically underrepresented groups are statistically less likely to be hired into high-paying positions upon graduation. For instance, women of color represent only about 13.5 percent of associates at U.S. law firms, while the post-graduate employment rate for law school graduates with disabilities is 7.6 percent lower than it is for other graduates.[101]

By improving education and making it more equitable across communities, a more representative pool of students—across racial, gender, sexual orientation, disability, and socio-economic lines—will enter law school, which starts them on the path to becoming federal judges. The definition of who qualifies for LSAT and law school application fee waivers should be expanded to include more applicants in need. Going further, LSAT-related fees could be waived entirely for former Pell Grant recipients. Private companies offering LSAT test prep should provide low-income applicants with more generous scholarships. For their part, affinity bar associations and justice-oriented organizations can help by establishing scholarship funds to assist low-income students in taking LSAT prep courses and paying the fees associated with the exam—including the costs of travel and lodging if the LSAT testing location is far from home—and with law school applications.

Furthermore, to increase the admission rates for students belonging to historically underrepresented groups, law school must be made more affordable. Additionally, law schools—as well as states and the federal government—must do more to alleviate the massive student debt accrued by their students. Although the federal government offers a federal loan forgiveness program for working in the public interest for 10 years after law school, the program is incredibly difficult to navigate; only 1 percent of program applicants had their loans forgiven under the program in 2018.[102]

Diversity within the legal profession and among federal judges will not improve unless steps are taken to make law school more financially viable. To address this, some attorneys and politicians have advocated for turning law school into a two-year program, rather than a three-year program.[103] An added benefit of shortening law school programs is that new graduates would be able to get practical, hands-on experience sooner than they would if they had to sit through another year of classes, better preparing them for their professional careers.[104]

For example, to help alleviate the burden of student loan debt, Yale offers a comprehensive loan forgiveness program—the Career Options Assistance Program (COAP)—that allows students making less than a certain amount to forgo payments toward their law school loans. Students making more than the set threshold are only expected to "contribute a portion toward repaying their law school loans, with COAP covering the rest."[105] Unlike many other loan forgiveness plans, COAP applies to graduates working in all sectors, including the public, private, government, and academic sectors. According to the COAP webpage, "Since its inception, more than 1,500 Yale Law School graduates have participated in COAP and received over $54 million in benefits. In 2018 alone, COAP disbursed $5.3 million in benefits to more than 400 graduates."[106]

Ensure students from underrepresented groups get into law school

Becoming a federal judge requires more than simply going to any law school. One has to go to the "right" law school. As described in Part I of this report, students' likelihood of becoming a federal judge drops considerably if they do not attend the nation's most elite law schools. Regarding the lack of educational diversity among Supreme Court justices, Justice Thomas has said, "I do think we should be concerned that virtually all of us are from two law schools … I'm sure Harvard and Yale are happy, but I think we should be concerned about that.[107]

This does not bode well for certain applicants of color and applicants from less affluent backgrounds, who, as noted previously, face unique socio-economic barriers that may prevent them from being admitted to these highly selective institutions. In 2015, approximately 58 percent of white law students graduated from the nation's top-30 law schools, compared with roughly 10 percent of Asian students, 8 percent of Hispanic students, and 5 percent of Black students.[108] Law school admission committees may fail to prioritize diversity in their applicant pool, placing too much value on applicants' LSAT scores and GPAs, which are often lower for low-income applicants and applicants of color compared with wealthy and white applicants, for reasons explained in previous sections.

Law schools—particularly top-tier schools—should give less weight to applicants' LSAT scores and GPAs. They should also better prioritize diversifying their student body. This may entail doing more outreach to colleges with high enrollments of students of color, women, LGBTQ students, students with disabilities, and students belonging to religious minorities—as well as taking affirmative steps to invite and encourage students from all backgrounds to visit and apply to their schools. Law schools, for instance, should dedicate considerable resources for the purposes of holding regularly occurring "diversity days" for prospective students, with special programming featuring law professors and distinguished alumni—especially judges—with a variety of personal and professional experiences. Such programming can help underserved students to realize that there is a place for them at law school and that the institution values and is invested in promoting diversity within its student body.

Ensure that law school environments are inclusive and welcoming

Once in law school, students may experience an unwelcoming environment that can at times be downright hostile. In particular, students from traditionally underrepresented communities have reported being harassed and discriminated against, which can negatively affect their academic performance and grades.[109] For example, in 2018 and 2019, Black and female students at Harvard Law School received a series of degrading email and text messages from fellow students, which included "racist taunts about affirmative action and intelligence" and "body-shaming." The students who received the disturbing messages explained how this mistreatment affected their studies: "It was all we could think about … all we could talk about, all we were focusing on, instead of our schoolwork."[110] Nonwhite students have also reported difficulty finding and joining study groups—particularly with their white peers—and feelings of isolation.[111] Study groups can provide critical assistance in preparing for and excelling on law school exams.

In addition, students of color may find it disheartening to be taught by white professors who, in their teaching, fail to consider or outright dismiss the important nuances and unique experiences of communities of color. This is especially problematic when 82 percent of all tenured faculty and 80 percent of all full-time faculty members at U.S. law schools are white.[112] Similarly, female students are often subjected to legal teachings that are colored by male-dominated perspectives. Women only comprise roughly 40 percent of full-time school faculty, while women of color comprise only about 9 percent of such faculty members.[113] Moreover, LGBTQ students may be discouraged or feel overlooked if they are unable to self-identify on official law school forms and paperwork and do not see themselves represented among law school faculty.[114]

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Finally, many law students of color and students from less affluent backgrounds do not enter school on a level playing ground with their white and elite counterparts due to structural barriers. And unfortunately, law schools do not always do a good job addressing the problem. Indeed, at many schools, there are few programs—outside of those organized by affinity law school clubs and bar associations—directed toward students of underrepresented groups or geared toward ensuring their success at law school and in the legal profession upon graduation.

One way to help these students feel a greater sense of belonging is for law schools to prioritize hiring faculty from a variety of backgrounds. Having a more diverse faculty can make law school feel more welcoming and inviting for students from historically underrepresented backgrounds, which can improve their overall experience. Moreover, having a diverse faculty—like a diverse group of judges—brings different perspectives to the classroom, which makes for a more comprehensive and well-rounded analysis of legal doctrine. Such robust discussions force students to recognize their own internal biases as well as the structural biases present in the legal system, helping to make them into better lawyers and judges.

Law schools should also set up special programming targeted toward female students, students of color, LGBTQ students, students with disabilities, and students from low-income backgrounds. Students from historically underrepresented groups such as these often face unique barriers navigating the law school experience, from applying and interviewing for jobs or clerkships to finding outside scholarships or funding for unpaid professional opportunities. In determining what programming is most helpful, law schools can conduct equity audits such as those described in CAP's "Equity Audits: A Tool for Campus Improvement."[115] Equity audits can assist school administrators in making smart decisions about internal changes or improvements that must be made in order to empower students from different backgrounds to succeed.

Finally, law schools should hold events headlined by female judges as well as judges of different ages, races and ethnicities, socio-economic status, and any number of additional characteristics to talk about their experiences and encourage law students from all walks of life to follow similar paths.

Ensure that law students have equal access to professional opportunities

The many challenges that underrepresented students face in law school can prevent them from obtaining prestigious judicial clerkships and positions at distinguished law firms, both of which have traditionally been considered necessary for becoming a federal judge.

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Many law students obtain highly sought-after clerkships through recommendations by the law professors who mentor them. But students belonging to historically underrepresented groups may find greater difficulty obtaining mentors among law school faculty. Although white, cis, and male law professors can be good mentors, students who do not fall into those groups may not seek out mentorships if they share little in common with their available potential mentors or suspect them of harboring prejudices. Aside from helping students obtain clerkships, mentors with shared characteristics and experiences can create safe spaces for students to go and report discrimination or harassment and seek advice in navigating a legal profession that is not friendly to lawyers from all backgrounds. With this in mind, law schools should create structured mentorship programs, whereby students interested in clerking can be paired with law professors from similar backgrounds to help them navigate the process.

An additional barrier for students wishing to obtain clerkships is that clerks are often only provided a small stipend for rent and other living expenses. Some clerks are also required to move temporarily depending on where their judge and court is located. For clerks who are financially secure or have a financial safety net to supplement their stipends, this is not a problem. But for others, such financial burdens can deter them from accepting clerkship positions. Indeed, students who lack the means to support themselves or supplement the limited stipends that clerkships offer may have no choice but to pass up such valuable opportunities, which could detrimentally affect their chances of obtaining a future judgeship.

To make clerkships more financially feasible, law schools should provide robust funding and scholarships to help students pursue unpaid or low-paying clerkship positions. Providing support for students from underrepresented communities pursuing clerkships helps both the student and the school, as getting more students placed in clerkships can improve the school's ranking in post-graduate employment and attract more students who may be interested in clerking.

Like clerkships—and as noted previously—working at prestigious law firms is often considered an important step to becoming a federal judge. Accordingly, law schools should help students from all backgrounds secure these sought-after positions. Each fall, law schools across the country host events where law firms come to interview students for hiring opportunities. However, to promote inclusive hiring practices, law schools could allow only those law firms with proven records of hiring and retaining attorneys from historically underrepresented groups and diverse backgrounds to interview students at their school. Alternatively, law schools could give those firms special priority in selecting students to interview and hire. By only allowing law firms that

foster and maintain diversity to participate—or by giving those firms priority—on hiring days, law schools can help incentivize other firms to improve diversity within their ranks. As an added bonus, law students who do get hired are more likely to be placed at a firm where they will be empowered to succeed.

At the very least, law schools should make information about law firm diversity statistics readily available to students and, on law firm interview and hiring days, provide students with rankings of firms based on their commitment to diverse hiring and retention.

Prioritize diversity in legal sectors that serve as stepping stones for judgeships

As described in previous sections of this report, working in certain sectors of the legal field—for example, serving as a judicial clerk, working at a top law firm, presiding as a state or local judge, or serving as a state attorney general or U.S. attorney—increases one's likelihood of becoming a federal judge.

Unfortunately, people of color, women, and individuals from other underrepresented groups are less likely to be employed in these positions. Judges, law firms, politicians, and even voters have a role to play in helping to diversify these legal sectors. Steps must be taken to ensure that law students and lawyers from all backgrounds have access to these kinds of positions and that they are treated fairly once they attain them.

Judicial clerkships

Clerkship positions are not often filled by candidates from historically underrepresented groups. Previous sections of this report examined the lack of demographic diversity and variance in educational backgrounds among federal judges. But many of those same patterns hold true for federal law clerks.

Indeed, according to a comprehensive 2017 study compiled by researchers associated with Yale Law School and the National Asian Pacific ABA, as of 2015, 82.5 percent of federal law clerks were white.[116] Meanwhile, Asians and Hispanics comprised approximately 6.5 percent and 4 percent of federal clerks, respectively, with Blacks making up roughly 5 percent.[117] One reason for the lack of diversity among clerks is that federal judges place too high a premium on hiring clerks from elite law schools, and as noted earlier, a number of structural barriers can prevent students from underserved communities from enrolling at such institutions. The late Justice Antoni Scalia articulated judges' preference for elite law students: "By and large, I'm going to be picking from the law schools that basically are the hardest to get into. They admit the best and the brightest, and they may not teach very well, but you can't make a sow's ear out of a silk purse."[118]

Research shows that from 1950 to 2014, Harvard students accounted for nearly a quarter of all Supreme Court law clerks, with students from Yale comprising another 19 percent. During the same span, just 10 law schools combined accounted for nearly 82 percent of all Supreme Court clerks.[119] And of law clerks who served on the lower federal courts from 2010 to 2014, more than one-third came from one of only 10 top schools—Harvard University; Yale University; Stanford University; University of Virginia; New York University; University of Michigan; University of Texas; Columbia University; University of California, Berkeley; and Duke University.[120]

Even when individuals belonging to historically underrepresented groups are selected for clerkships, they may feel isolated due to the lack of other clerks and judges with similar backgrounds. Some female clerks have even reported being sexually harassed by male judges.[121]

In hiring for clerkships, judges must look beyond law students and graduates who attended elite law schools and consider hiring clerks with different educational backgrounds and experiences. The elitist structure currently in place closes the door to many highly qualified individuals who would serve as exceptional clerks. Judge Vince Chhabria of the U.S. District Court for the Northern District of California has suggested that judges adopt a practice similar to the NFL's Rooney Rule, whereby judges would be required to interview at least one candidate from a demographically underrepresented group and at least one candidate from a law school not ranked in the top 14 for clerkship positions.[122] According to Judge Chhabria:

> *Obviously, I don't always hire law clerk candidates who meet this description. But interviewing off-the-radar candidates has sometimes led me to hire a fantastic person who might not originally have been given an interview. Other times I've not hired the person, but the interview with me has led to interviews with other judges (often on my recommendation). Overall, my hiring process has been better because of this practice, and it has resulted in stronger chambers.*

Once they are hired, clerks must also have access to resources to report discriminatory or harassing behavior. Because clerks' judges have immense influence on the trajectory of their careers, anonymous tip lines should be established for reporting abusive behavior by federal judges. Voluntary mentorship programs could also be established to pair clerks with former clerks from similar backgrounds. Such programs could help judicial clerks of all backgrounds to navigate the judicial institution.

Law firms

Like clerkships, prestigious law firms are also highly selective and favor law graduates who attended elite law schools and graduated at the top of their class. But again, as explored in previous sections, the many obstacles that students from traditionally underserved communities face in law school may cause their GPAs to suffer, especially in comparison with their elite peers, who are advantaged by the current system in many ways.

According to a report by the National Association for Law Placement, in 2018, Asians made up 11.69 percent of associates at U.S. law firms, while Hispanic and Black/African American associates comprised 4.71 percent and 4.48 percent, respectively.[123] Moreover, only 0.46 percent of associates reported having a disability and 3.80 percent identified as LGBTQ. According to the same study, women comprised slightly less than half of law firm associates that year.[124] Diversity is worse among law firm partners. The same study found that only 1.83 percent of law firm partners in 2018 were Black or African American, while 2.49 percent were Hispanic. And women of color comprised just 3.19 percent of law firm partners at U.S. law firms in 2018.[125] Fewer than 1 percent of law firm partners reported having a disability, while slightly more than 2 percent identified as LGBTQ.[126]

Candidates from underrepresented backgrounds who do get hired at law firms are not always primed for success. Women, people of color, and LGBTQ people have reported being discriminated against, harassed, or passed over for promotions and assignments at law firms. According to an ABA study, 49 percent of women of color working at law firms have reported being subject to harassment, while 62 percent reported being excluded from networking opportunities critical for career advancement. In comparison, between 2 and 4 percent of white men working at law firms reported experiencing the same issues.[127] The study also found that women of color were significantly more likely to report receiving unfair performance evaluations than their white male peers. Additionally, law firm associates who identify as LGBTQ have reported regularly hearing anti-gay comments in the workplace.[128] In regard to the distribution of clients and assignments, some advocates have noted an apparent favoritism within law firms toward "gay male lawyers who are very masculine and lesbian women who are more feminine" over other associates who identify as LGBTQ.[129]

When individuals feel unsupported or even attacked in the workplace, they are more likely to leave their prestigious positions or the law profession altogether. Studies have shown that lawyers of color are more likely to leave their firm jobs than white lawyers.[130]

A 2007–2008 report by the ABA noted that women of color, in particular, have a nearly 100 percent attrition rate from law firms after just eight years.[131] This, in turn, shrinks the pool of possible judicial candidates from certain historically underrepresented groups.

Like judges and clerkships, law firms must make hiring decisions with an eye toward bringing on more women, people of color, people who identify as LGBTQ, and people with disabilities as well as different religious affiliations. Hiring decisions can be facilitated by in-house diversity committees comprised of associates, partners, and staff from a variety of backgrounds who can monitor the firm's hiring practices to ensure that candidates are being fairly considered and that the firm's diversity goals are being met. Fortunately, many law firms have implemented the Mansfield Rule, which requires at least 30 percent of firm leadership candidates to be members of historically underrepresented groups.[132] Some law firms have even started conducting diversity seminars for firm attorneys and their clients in order to increase knowledge about diversity issues and the unique challenges faced by individuals from underrepresented groups.[133] To be effective, diversity committees within firms must have teeth. They must be empowered to make independent assessments of and take meaningful action to address problems within firms related to diverse hiring and retention practices, as well as to ensure that workplace conduct and work distribution are free of discrimination and harassment.

Clients are also prioritizing firm diversity. For instance, a number of businesses seeking outside counsel are committed to hiring law firms with lawyers from historically underrepresented groups, such as firms endorsed by the National Association of Minority & Women Owned Law Firms (NAMWOLF).[134] Client-led diversity initiatives help to empower diversity-minded law firms in a highly competitive legal field and to provide strong incentives for other firms to diversify their ranks and take concrete steps to retain attorneys from historically underrepresented groups.

It is also important to improve firm culture in order to increase retention rates among associates and partners from historically underrepresented groups. Safe workplace and bias trainings must occur regularly, and individuals who make bigoted or offensive comments must face repercussions, regardless of their place on the hierarchical totem pole. There must also be formal processes for investigating performance evaluations and work distribution patterns that may be tainted by supervisor bias. Firm attorneys belonging to historically underrepresented groups should be paired with mentors who are invested in their success. These mentors may themselves be members of underrepresented groups, but they may also be senior associates and partners that are not from such groups. In fact, some lawyers of color have acknowledged that being paired with white partners can be crucial for their success, given that they may have more connections with others in the legal field or larger client lists.[135]

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State supreme courts, attorneys general, and U.S. attorneys

Aside from clerkships and jobs at prestigious law firms, federal judges are also recruited from state supreme courts and attorneys general (AG) offices. Unfortunately, diversity is a problem in these areas as well.

A recent report by the Brennan Center for Justice found that judges of color comprise just 15 percent of state supreme court seats nationwide. Nearly half of all states have supreme courts comprised entirely of white judges.[136] Meanwhile, female judges comprise just 36 percent of state supreme court seats. The same diversity issues exist for attorneys general. In fact, there are only nine women and 12 people of color currently serving as state attorneys general, comprising only about 17.6 percent and 23.5 percent, respectively, of all state attorneys general nationwide, including Washington, D.C.[137] Moreover, of assistant U.S. attorneys in 2013 and 2014, the vast majority, nearly 81 percent, were white; only 5.2 percent were Asian, 8 percent were Black, and 5.2 percent were Hispanic.[138]

Addressing diversity problems in these sectors requires diversity-centered decision-making by governors, presidents, and the public, who appoints or elects state supreme court judges and attorneys general.

Prioritizing judicial diversity in the nomination and appointment process

Addressing the pipeline problem, as explored above, will go a long way toward ensuring that there is a larger pool of judicial candidates from which to choose for the federal bench. But ensuring that future judicial candidates are set up for success in and out of law school is only half the battle. Even if lawyers from different backgrounds play their cards right under the current system—by going to the most prestigious law school, graduating at the top of their class, clerking at the Supreme Court, and then making partner at a top law firm or presiding over a state supreme court—they still face an uphill battle in attaining a federal judgeship.

As explored in Part I of this report, despite their exceptional qualifications, judicial candidates from underrepresented groups are far outnumbered by cis white male judges on the federal courts. Solutions are therefore needed to ensure that candidates from all backgrounds are being nominated by presidential administrations and approved by Congress.

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The White House and Congress must place a premium on judicial diversity

As illustrated in previous sections of this report, for much of American history, U.S. presidents have failed to prioritize diversifying the federal bench. Except for during the administrations of former Presidents Jimmy Carter, Bill Clinton, and Barrack Obama, judicial nominations of people from underrepresented groups have been few and far between. Similarly, even when candidates of color, women, and openly LGBTQ candidates have been nominated, Congress has been slow to confirm their appointments.

Why hasn't judicial diversity been a priority for most presidents and Congress?

Some politicians may argue that when it comes to the federal judiciary, it is unnecessary to add more women, people of color, individuals self-identifying as LGBTQ, people with disabilities, and those belonging to minority religions because in applying the "black letter" law, judges render decisions objectively and free of bias.[139] But this argument is flawed, as demonstrated in earlier sections of this report. Another explanation is that in nominating and confirming federal judges, presidential administrations and Congress must make various considerations and strategic calculations. Depending on the political climate at the time, judicial diversity may unfortunately fall by the wayside even under administrations with the best intentions. Finally, one cannot discount politicians' personally held biases and prejudices toward certain historically underrepresented groups. Such biases have undoubtedly played a significant role in the disproportionately small percentage of judges from underrepresented groups who have been nominated and appointed to the federal bench since the nation's founding.

In nominating judges, presidents must make diversifying the bench a top priority for their administrations. As discussed previously, President Carter was a leader in this area. When he signed the Omnibus Judgeship Act of 1978—which, among other things, added new judgeships to the federal courts—Carter recognized his duty to address "the almost complete absence of women or members of minority groups" on the federal bench.[140] In doing so, he reportedly ignored white senators who recommended only white judges for the bench, issuing a series of executive orders aimed at improving diversity among federal judges. Professor Nancy Scherer described Carter's efforts in her article "Diversifying the Federal Bench":

> *First, Carter set out to dismantle the traditional method of selecting lower court judges—senatorial courtesy—which had perpetuated the old white boys' network. Second, Carter directed the appellate merit selection committees to make 'special efforts' to identify minorities and women for appellate vacancies. Third, Carter directed his Attorney General to make 'an affirmative effort … to identify qualified candidates, including women and members of minority groups' for federal judgeships.*[141]

President Obama, too, consciously selected judges who represented a variety of backgrounds and experiences. In a 2007 campaign speech, he maintained: "We need somebody [on the bench] who's got the heart—the empathy—to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor or African-American or gay or disabled or old—and that's the criteria by which I'll be selecting my judges."[142]

Presidents must emulate the examples set by Carter and Obama to diversify federal courts. Efforts to diversify the federal bench cannot, however, be limited to demographic characteristics. In addition to compiling a group of nominees from different racial and ethnic backgrounds, genders, LGBTQ identities, and religious affiliations, presidents should nominate judges who come from different educational and professional backgrounds. That the federal judiciary is made up largely of judges who worked in private practice and as prosecutors is problematic since it means that a very small subset of perspectives dominate the judicial system. There are many lawyers who would make excellent judges that are currently working in the public sector, including as public defenders, nonprofit litigators, and as direct legal service providers. Although such career paths have historically not been pathways to federal judgeships, they certainly should be.

It is worth recognizing that despite the Obama administration's efforts to diversify the federal judiciary, women and people of color still comprised fewer than 50 percent and 40 percent of his appointees, respectively. LGBTQ judicial appointees were similarly underrepresented compared with their share of the U.S. population. That Obama—who arguably did more to improve representation on the federal bench than any other president—did not appoint people from historically underrepresented groups at rates of even 50 percent is noteworthy. In order to make any real dent in the diversity problem that plagues the current judiciary, the proportion of women and people of color being appointed needs to be much higher, greatly exceeding any 50 percent threshold. LGBTQ judges, judges with disabilities, and judges belonging to religious minorities should also be appointed at significantly higher rates.[143] And as discussed earlier, a large proportion of judicial appointees should also come from different professional backgrounds and educational experiences.

In nominating and confirming judicial appointees, presidential administrations should engage in robust consultation with a variety of groups and communities. Affinity organizations and bar associations, disability rights and justice advocates, and interfaith coalitions and leaders specializing in judicial nominations can provide a wealth of valuable insight on and recommendations for judicial nominees from different backgrounds and experiences.

Like the executive branch, the legislative branch must also make confirming these nominees a matter of utmost importance. The Senate should demand nominees who belong to underrepresented groups and who come from different backgrounds. It should no longer be a complacent party in confirming more and more white, male, and elitist judges. The Senate has significant power over the judicial confirmation process and, as such, should be more assertive in pushing for greater diversity on the bench. Senators should similarly consult with justice-oriented groups and affinity bar associations when confirming judicial nominees. Such organizations can warn lawmakers about nominees with poor records on issues that disproportionately affect historically underrepresented groups.

Addressing inequities in the ABA's judicial rating system

Although the ABA does not exercise any formal authority over who gets nominated or appointed to the federal bench, it plays an influential role through issuing ratings on federal judicial nominees. The ABA's rating system, which was explored in CAP's "Structural Reforms to the Federal Judiciary," considers a nominee's integrity, professional competence, and judicial temperament, and has been relied upon by presidents and senators for the past several decades. Unfortunately, research suggests that the ABA rating system disproportionately disadvantages judges belonging to historically underrepresented groups. For instance, female judges and judges belonging to racial or ethnic minorities are less likely than their male and white counterparts to be highly rated by the ABA, even though there is zero evidence that white or male judges are more qualified than those belonging to underrepresented groups.[144] This is a serious cause for concern and requires immediate remedy.

Require judges and court staff to regularly undergo implicit bias training

The recommendations listed above are steps that can be taken to ensure that, going forward, judicial vacancies are filled by judges who belong to historically underrepresented groups and have a variety of experiences. There, of course, remains the question of what to do about the judges already serving on the federal bench.

As described in previous sections of this report, judges—like everyone else—have implicit biases regarding race, gender, sexual orientation, religion, and so on. Although it is impossible to eliminate judicial bias in its entirety, steps can be taken to mitigate its effect.

For example, federal judges—including Supreme Court justices—along with all senior court employees and law clerks, should be required to undergo implicit bias training on an annual basis.[145] Such training could cycle between focusing on various biases, including those having to do with gender, race, sexual orientation, socio-economic status, religion, and people with limited English proficiency or disabilities. Trainings could be carried out by implicit bias specialists and include presentations from affected litigants as well as organizations and bar associations representing various groups and communities, specifically those that are historically underrepresented. Implicit bias training could be mandated by the Federal Judicial Center or required by Congress. All federal judges are already required by law to complete annual financial disclosures in the interests of transparency and accountability.

Another way to mitigate bias is for state bars to require trainings as part of their Continuing Legal Education curriculum, as is the case in Minnesota.[146] Nonprofit groups can also get involved by monitoring court practices to identify judicial bias in the courtroom. For instance, organizations engaged in court monitoring practices will often send trained volunteers to monitor certain classes of court cases for judicial bias against parties and attorneys. These organizations can then provide feedback to judges on their performances and offer judicial bias trainings to address the problem.[147] Programs can be designed to monitor judicial bias as it pertains to different historically underrepresented groups.

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Conclusion

The federal judiciary needs judges with a wealth of different and unique experiences, who understand how their rulings can affect people from underrepresented groups and those from all backgrounds. Improving the diversity of the federal judiciary would signal both to the public and to parties that have business before the courts that it is a fair and equitable institution. This would in turn strengthen the federal judiciary's legitimacy. It would also ensure a more even-handed justice system and signal to everyone that a critical part of U.S. civil society is not closed off to them and their communities.

Fixing the federal judiciary's diversity problem will not happen overnight. Indeed, because federal judges serve for life, it will take years—if not decades—for the United States to have a federal judiciary that more closely mirrors the demographics of the country. Getting there requires a strong commitment to taking affirmative steps to improve the judicial pipeline and selection process in order to ensure that judicial candidates represent a variety of backgrounds and experiences. This commitment and responsibility must be shared by every person and entity who has a hand in the making of federal judges; this includes presidents, senators, sitting judges, law schools, law firms, justice-minded organizations, bar associations, and American voters.

By prioritizing the diversification of the federal bench and implementing reforms to make the judiciary more inclusive, America can transform today's whitewashed judiciary into one that reflects the viewpoints and experiences of the populace it serves.

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Methodology

The demographic characteristics of current and past appointed judges were retrieved from the Federal Judicial Center (FJC), which provides information on race, ethnicity, and gender. The authors supplemented the information available on the FJC site with information about federal judges' sexual orientation, professional background, and religious affiliation from a variety of secondary sources—including news sources, journal articles, and studies published by other entities. The data were then broken out to provide diversity characteristics for all sitting judges, sitting judges by circuit, judges appointed by Trump, and judges appointed by each president dating back to FDR.

In order to compare judicial diversity with population diversity in the circuits, the authors collected population demographic information from the U.S. Census Bureau for each state and U.S. territory included within each circuit. This information was then aggregated to provide a representative picture of demographics for the populations covered by each federal circuit court.

Endnotes

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The Leadership Conference

March 24, 2021

The Honorable Jerrold Nadler, Chair
The Honorable Jim Jordan, Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Hank Johnson, Chair
The Honorable Darrell Issa, Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chair Nadler, Ranking Member Jordan, Chair Johnson, and Ranking Member Issa:

On behalf of The Leadership Conference on Civil and Human Rights (The Leadership Conference), a coalition of more than 220 national advocacy organizations, we thank you for holding this hearing on "The Importance of a Diverse Federal Judiciary," and for the opportunity to submit this letter for the record. We are at a powerful moment in our nation's history when there is real possibility for our judiciary to become more reflective and representative of the incredible diversity in our country and communities and to better serve the interests of all people in America.

The civil rights community is focused on building a fair and just federal judiciary that gives real meaning to the phrase "equal justice under law." Our system of justice has failed far too many people. This system, founded predominantly by white men who enslaved Black people, was constructed to protect white supremacy and the wealthy and powerful. And our federal judiciary, which interprets the laws and the Constitution, was founded on — and far too often perpetuates — these same interests at the expense of everyone else.

For there to be equal justice, our courts must have judges who truly understand the ways in which laws impact people's lives. People have fought and organized for decades to push our laws and institutions to reflect, represent, include, and serve everyone in this country, including Black, Brown, and Asian American and Pacific Islander communities, women, people with disabilities, LGBTQ people, people of faith and no faith, immigrants, and other people our systems have marginalized. These tireless efforts helped protect and promote some of our most important civil and human rights. We need judges and justices who not only understand these rights, but also how they have been historically and systemically denied to different communities. For a court to have legitimacy in the eyes of the people it is meant to serve, it must be both reflective of and responsive to all people.

Some of our landmark civil rights achievements include *Brown v. Board of Education*,[1] which ended legal apartheid in public education thanks to the efforts of civil rights advocates like Thurgood Marshall and Constance Baker Motley at the NAACP Legal Defense and Educational Fund, Inc.; the passage of the Voting Rights Act of 1965,[2] which expanded the right to vote and access to voting for Black citizens, due to the tireless work of civil rights leaders who suffered constant private and state-sanctioned violence because of their advocacy; and the recognition of marriage equality in *Obergefell v. Hodges*,[3] thanks to the LGBTQ advocates and organizations who challenged discriminatory laws in courtrooms across the country. None of these victories were easily won. They are the result of people working to make America a more perfect union.

Thurgood Marshall and Constance Baker Motley, both civil rights advocates, became our country's first Black Supreme Court justice and first Black woman federal judge, respectively. Ruth Bader Ginsburg was the first Jewish woman to serve on the U.S. Supreme Court and only the second woman to serve on the Court, and Sonia Sotomayor was the Court's first Latina justice. Their intellectual achievements and noteworthy jurisprudence demonstrate the incredible impact of intentional selection of judges who are representative of various communities, and reflect a need for even more work to ensure that our judiciary reflects our population.

President Jimmy Carter recognized the devastating lack of representation in our federal courts and made judicial diversity a priority. In fact, President Carter still holds the record, 40 years later, for the most Black circuit court judges confirmed in one term — nine. He encouraged the creation of judicial selection commissions, which would move away from a system where senators themselves picked nominees. President Carter noted that senators selected nominees who looked like them — overwhelmingly white and male — and he advocated for commissions that reflected the community more. Many of his successors made some progress, including President Barack Obama, who made great strides to diversify the bench both demographically and professionally.

By 2016, our judiciary was more diverse, but there was still much more work needed to ensure that our courts reflect our communities. But instead of prioritizing that work to ensure a fair judiciary, President Donald Trump's astonishing lack of diversity in judicial nominations set us back even further. President Trump selected and the Senate confirmed 25 percent of all active federal judges and 30 percent of our circuit court judges.

Of those selected by President Trump and confirmed by the Senate:

- Nearly 65 percent of judges are white men, despite white men comprising only 30 percent of the U.S. population;
- Less than 16 percent of judges are people of color, making Trump's appointees the least diverse group of judges in nearly 30 years;
- Only 20.4 percent of circuit court judges are women, and a mere 3.8 percent are women of color;
- Of Trump's 54 circuit court judges, zero are Black and only one is Latino;

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- No Native Americans were selected for any federal court; and
- Out of 234 Article III judges appointed by Trump, only two are Black women.

Exacerbating the lack of diversity on our courts, Trump replaced at least 10 of Obama's nominees of color with white nominees, reflecting a concerted effort to roll back the diversity of the federal bench.[4] In addition, Trump and McConnell created an all-white circuit court. After McConnell blocked Obama's nomination of Myra Selby to the Seventh Circuit,[5] who would have been the first African American and the first woman from Indiana to serve on that court, Trump had the opportunity to nominate five different judges to this court — and all of them were white. Today, the Senate has still never confirmed a Muslim judge. There has only ever been one Senate-confirmed Native American federal judge. The Senate has confirmed only 13 openly LGBTQ federal judges.[6]

For there to be a better system of justice that serves all people, the justice system must reflect our communities. As Justice Thurgood Marshall said, we condemn the courts to "one-sided justice" when we deprive the legal process of "differing viewpoints and perspectives on a given problem."[7] And this whitewashing of the courts is indefensible at a time when the legal profession has more female attorneys, attorneys of color, and LGBTQ attorneys than ever before. Representation matters so that future lawyers can see themselves on the bench one day, but most importantly it matters to the communities who depend on our judicial system to affirm their lived experiences and recognize injustice from the perspective of many — not the isolated perspective of one.

Extensive research has also shown that including a broad range of viewpoints in the judiciary enriches deliberations, fosters better-informed decisions, and enhances public confidence in our system of justice.[8] Diversity on the bench is not a panacea. Differing perspectives do not themselves ensure that courts will recognize and protect our civil and human rights. But promoting decision-making that includes voices from our nation's diverse communities will help foster an equitable system of justice.

Our courts rely on the public's trust, and representation greatly impacts the public perception of courts. Whether someone enters a courthouse or is impacted by a court's decision, they must trust that the judges making these crucial decisions understand how laws function in people's lives — especially in the lives of the communities that have been most marginalized by our courts and laws. Judges rule on nearly every aspect of our lives, from if and when we can vote to whether we have access to health care. Judges' decisions impact the rights of working people, immigrant rights, voting rights, disability rights, health care access, educational equity, reproductive freedom, LGBTQ rights, environmental protections, and more.

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[8] Joshi, Yuvraj. "**Diversity Counts: Why States Should Measure the Diversity of Their Judges and How They Can Do It.**" *Lambda Legal and American Constitution Society*. 2017. See also Berry, Kate. "**Diverse Bench: A Guide for Judicial Nominating Commissioners.**" *Brennan Center for Justice*. 2019.

The Leadership Conference

According to the Brookings Institute, our country is becoming more diverse at a faster rate. Indeed, nearly four in 10 people in America identify with a race or ethic group other than white. The last decade will be the first in U.S. history in which the white population declined.[9] Yet, during the last four years, diversity on the courts decreased precipitously. As part of a holistic approach to fixing our justice system, it is vital that the president and the Senate prioritize the selection and confirmation of judges who are fully committed to upholding civil and human rights and who are reflective of the vast diversity that exists in the communities they serve. This diversity includes race, sex, gender identity, sexual orientation, disability status, ethnicity, national origin, socio-economic status, and experiential and professional background. A more diverse bench improves our justice system. That is why The Leadership Conference on Civil and Human Rights coalition and our Fair Courts Task Force are calling on the Biden-Harris administration and the 117th Congress to urgently prioritize making our federal judiciary more fair and just for all of us, including and especially for Black and Brown communities.[10]

There are nearly 100 vacancies on our Article III courts right now. These seats must be filled with judges who will work to protect and recognize the rights of everyday people over corporations and wealthy special interests. Our federal courts must recognize and uphold all of our rights, including workers' rights, immigrant rights, voting rights, disability rights, health care access, abortion rights, LGBTQ rights, separation of church and state, freedom from discrimination based on religion, and more. For our courts to work toward the promise of equal justice under law, there must be judges with different experiences and perspectives to make better-informed decisions and increase public confidence in our justice system.

If you have any questions, please contact Lena Zwarensteyn, senior director of the fair courts campaign, at zwarensteyn@civilrights.org.

Sincerely,

Wade Henderson
Interim President and CEO

LaShawn Warren
Executive Vice President for Government Affairs

[9] Frey, William H., "**The nation is diversifying even faster than predicted, according to new census data**." *Brookings Institute*. July 1, 2020
[10] To view all of the priorities of the Fair Courts Task Force and other task forces of The Leadership Conference coalition, please see **https://civilrights.org/the-presidential-and-congressional-transition/**.

Mr. JOHNSON of Georgia. It is now my pleasure to recognize the Ranking Member of the subcommittee, the gentleman from California, Mr. Issa for his opening statement.

Mr. Issa, you may begin.

Mr. ISSA. Thank you, Mr. Chair, and thank you for holding this hearing.

The subject of the hearing was no surprise to me and, as we seek to expand the court in the months to come, perhaps as many as 75 or 80 new Members, it is certainly my hope and I join with you in believing that the new entrants to the court will represent the best and the brightest of those who have prepared and are able to assume one of the most difficult jobs there is and that is to fairly execute the Constitution from a position, lifetime position, of great power.

I will find some differences and I believe our witnesses will show some differences not in the goal and not in the benefit but, in fact, in some preferences that I think people sometimes miss. Without a doubt, when we have community policing, we want to make sure that they represent the community they live and work in. I specifically remind us that police and fire and others who live and work in a community tend to be extremely vested and, of course, familiar both with the people and the neighborhoods.

When we seek a jury, as everyone on both sides of the dais know, the jury is often selected by an adversarial relationship of a plaintiff and defendant, that, in fact, each is trying to find a jury that most closely understands their view that they will argue for.

What is different and I believe unique and we will see today is the role that the impartial individual who sits on the dais, sometimes with a background in as a prosecutor, sometimes in defense, sometimes in civil litigation, very seldom, quite frankly, with specifics of what they will have before them, whether it is labor law, patent, or other criminal or civil prosecutions and they have to be able to look to the law but, more importantly, they need to be able to look at both sides, listen to both arguments, and compare it with the law on the Constitution.

I believe that we will show today, although the goal of more women and more broadly diversity, that we also recognize that we want to select, going forward, the best and the brightest and most qualified and that there is no history at the Federal bench of people making different decisions based on their economic position in life or their distinctions at birth, whether it is color or gender.

So, I am looking forward to us and I really believe the Chair has picked an appropriate subject for us to look at when we are preparing to expand the court but I also believe that we are going to find that, properly chosen, these justices and judges will, in fact, execute in a way that cannot be predicted based on any part of their birthrights, if you will, of citizenship, of color, or of gender.

Lastly, I would like to put one piece of levity into this. I for one would like to see at some point more diversity on the Supreme Court. It appears as though you must go to Harvard or Yale to be considered in many cases and, as someone who graduated from an Ohio State University, I certainly would hope that we reach out and find justices that have gone beyond just a handful of Ivy League colleges.

With that, I appreciate the opportunity to attend this hearing and to participate.

I yield back.

Mr. JOHNSON of Georgia. I thank the gentleman from California.

I am now pleased to recognize the Chair of the Full Committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. Well, thank you, Mr. Chair.

Mr. Chair, I will begin my remarks by quoting from the confirmation hearing of a current Supreme Court Justice.

"When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender," the Justice said, "and I do take that into account."

This statement was a frank acknowledgment that our Federal judges bring their life experiences with them to the bench and that those experiences inevitably inform their work, and it goes to the heart of why this hearing is so important.

The Justice also explained that, "I am who I am in the first place because of my parents," telling the Senate Judiciary Committee that, "My father was brought into this country as an infant, grew up in poverty, and could not find a job as a teacher because of the discriminatory hiring practices prevalent at the time."

Our Federal courts are made better by having Justices whose family experiences with poverty and immigration and discrimination are so powerful that they not only made that experience part of the record of their confirmation hearing, but they also declared that they have to take that experience into account when deciding cases.

These words were spoken by Justice Samuel Alito at his confirm hearing in 2006. I think most Americans would agree with what Justice Alito said and they would be glad to have judges who understand that their own and their colleagues' very backgrounds, perspectives, and life experiences make our judiciary stronger.

I also think most Americans, especially most young people, would take for granted the idea that our courts should reflect the incredible diversity of our country. Unfortunately, we have a lot of work to do when it comes to judicial diversity. There are ways in which the Federal judiciary of 2021 looks uncomfortably similar to the Federal judiciary of 1921, just a few years after Justice Brandeis became a target of anti-Semitic opposition to becoming the first Jewish Supreme Court Justice.

Somehow, despite all our progress, today's Federal judges remain, for instance, overwhelmingly male, White, former prosecutors or corporate lawyers who went to a handful of law schools as Mr. Issa mentioned.

There is only one female judge among the eight circuits' 15 active Members, and she is the only the second woman ever to serve on that court. There had been no Black judges in the Seventh Circuit at all which encompasses Illinois, Wisconsin, and Indiana since 2018, after the first person of color ever to serve on that circuit retired. There is just one Hispanic judge on the 10th Circuit which includes Colorado, New Mexico, Kansas, Oklahoma, Utah, and Wy-

oming. There has never been a Native American judge on any court of appeals.

We need to come to terms with why our Federal courts remain so strikingly nondiverse in so many ways. I am not just referring to characteristics like race, gender, ethnicity, religion, or disability. Why, for example, are there so few judges who are public defenders, civil rights lawyers, plaintiffs' attorneys, legal aid attorneys, or small business attorneys? Our judiciary would be enriched if we had more judges with a broader range of legal experiences and education.

We must also consider the consequences this lack of diversity has on the broader judicial system. For example, Americans are many times more likely to appear in bankruptcy court than in any other Federal court, but bankruptcy judges are the least racially and ethnically diverse judges in the entire Federal judiciary and they are not even proper Article III judges.

That is especially concerning, because bankruptcy judges are appointed by a majority vote of the Court of Appeals judges in their circuit. As I just mentioned, they are not even Article III judges.

Since this is an area in which the Federal judiciary can address its diversity problem without help from Congress or the President, I hope we will make improving diversity among bankruptcy judges a priority.

Ultimately, we need to remind ourselves of what most Americans understand, that a diverse Federal judiciary enhances public faith in the courts and improves the judicial process.

I want to thank Mr. Johnson for holding this hearing. I look forward to hearing from our witnesses about this important topic.

I yield back.

Mr. JOHNSON of Georgia. I thank the gentleman from New York.

I now recognize the distinguished Ranking Member of the Full Committee, the gentleman from Ohio, Mr. Jordan.

Mr. ISSA. Mr. Chair, the Ranking Member will pass at this time. Thank you.

Mr. JOHNSON of Georgia. All right. Thank you, Congressman Issa.

We will now begin with the introduction to Panel One, the Honorable Carlton W. Reeves is a District Judge for the Southern District of Mississippi. After law school, Judge Reeves clerked for the Honorable Reuben V. Anderson of the Mississippi Supreme Court. He subsequently worked as a staff attorney for the Supreme Court of Mississippi and in private practice.

From 1995 to 2001, Judge Reeves served as Chief of the Civil Division of the Office of the United States Attorney for the Southern District of Mississippi. In 2001, he opened his own firm, Pigott Reeves Johnson, in Jackson, Mississippi.

During this time Judge Reeves served on the board of several civic organizations including the ACLU of Mississippi, the Mississippi Center for Justice, and the Magnolia Bar Association. Judge Reeves earned his B.A. from Jackson State University and his J.D. from the University of Virginia. Welcome, Judge.

The Honorable Frank J. Bailey is a Bankruptcy Judge on the bankruptcy court for the District of Massachusetts. He was appointed in 2009 and served as chief judge from 2010 to 2015. Judge

Bailey also sits on the Bankruptcy Appellate Panel for the First Circuit. He has served as the First Circuit Governor and Chair of the Education Committee for the National Conference of Bankruptcy Judges.

Before his appointment, Judge Bailey was a partner at a law firm where he served as the Chair of the litigation department. He has taught as an Associate Professor at Boston University, Suffolk University, and the New England School of Law. He earned his undergraduate degree at Georgetown University's School of Foreign Service and his J.D. from the Suffolk University Law School. Welcome, Judge Bailey.

The Honorable James C. Ho is a Circuit Judge for the Fifth Circuit Court of Appeals. Judge Ho clerked for Judge Jerry Edwin Smith of the Fifth Circuit Court of Appeals and then entered private practice. He served in the Civil Rights Division of the Office of Legal Counsel in the Department of Justice.

From 2003 to 2005, he was Chief Counsel for the Senate Judiciary Committee under Senator John Cornyn. He then clerked for Supreme Court Justice Clarence Thomas from 2005 to 2006. From 2008 to 2010, Judge Ho was the Solicitor General of Texas. Judge Ho earned his B.A. from Stanford University and his J.D. from the University of Chicago Law School. Welcome, Judge Ho.

The Honorable Edward M. Chen is a District Judge for the Northern District of California. After law school, Judge Chen clerked for Judge Charles Byron Renfrew of the Northern District of California and for Judge James R. Browning of the Ninth Circuit. After time working in private practice, Judge Chen worked as a staff attorney for the American Civil Liberties Union. He then served as a United States Magistrate Judge in the Northern District of California. Judge Chen earned his B.A. and his J.D. from the University of California at Berkeley.

Now, before proceeding with testimony, I remind the witnesses that all of your written and oral statements made to the Subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18 U.S.C. 1001, which may result in the imposition of a fine or imprisonment of up to 5 years or both. Please note that your written statements will be entered into the record in its entirety.

Accordingly, I ask that you summarize your testimony in 5 minutes. There is a timer in the WebEx view that should be visible on your screen that should help you stay within that time limit. For this panel we will not have any questions after the witness testifies.

Judge Reeves, you may now begin.

STATEMENT OF THE HONORABLE CARLTON W. REEVES

Judge REEVES. To Chair Johnson, Ranking Member Issa, and Members of the subcommittee, I am honored to testify alongside my esteemed colleagues, Judge Chen, Judge Donald, Judge Bailey, and Judge Ho. Their brilliance is proof that diversity makes our justice system strong. Between their words and the testimony of renowned academics like Professors Stacy Hawkins and Maya Sen and attorney Peter Kirsanow, I am sure you will have all the evidence you need to know that we must diversify our Federal courts.

As I prepared my comments, I thought about the only other time that I have had the honor and privilege of appearing before this august body nearly 11 years ago at my confirmation hearing. On that day I was joined by Judge Mary Murguia, Denise Casper, Edmund Chang, and Judge Leslie Kobayashi. The room looked like America, a country populated by persons of various races, colors, sexes, genders, religions, and sexual orientations, a representation of the tapestry that has been woven to make our more perfect union.

At the hearing, Senator Durbin asked me the following question. Can you talk to us about the importance of racial diversity on the Federal bench in Mississippi, given your personal experience growing up in Mississippi and your knowledge of how far your State has come? My response, in part, was that judges serve several functions, role models to other lawyers, role models to students, role models to the people who come before the court.

People need to see that they have a chance, that they, too, can one day come to the great hall of the Senate and be nominated by a President to be a judge. My answer to that question today would be the same, as I am reminded every day how others perceived my role and purpose through their telephone calls, text message, emails, notes, conversations, and in-court reactions and statements.

All I can add to this remarkable panel is a simple plea. Go big. Aim high. Be bold. Simply be committed to diversity in the third branch of our government. It is a time for boldness because our present trajectory risks a crisis of legitimacy. More than ⅔ of Federal judges appointed over the last 4 years were White men, a group that represents less than ⅓ of all Americans. Thirty percent of Americans in the Seventh Circuit are persons of color, but the Seventh Circuit doesn't have a single Black jurist. The Fifth Circuit has an enormous Latino population. Yet, none of its judges are Latino.

I am reminded of the raw emotion that a friend and mentor, Geraldine Sumpter from Charlotte, North Carolina, experienced ten years ago when she stepped to the podium to argue in the Fourth Circuit and across from her for the first time in her nearly 30 years of practice was a panel of three African-American judges.

At this moment, having such a panel is still an illusive dream in many of our circuit courts but especially piercing the Fifth and Eleventh Circuits, the home of so many of America's African-American citizens. I am ashamed to say that my own court didn't have a single female Article III judge until 3 months ago. I appreciate our Senators for fixing that 200-year-old mistake.

These are countless and other comparisons reveal a disturbing fact. As our country becomes more diverse, our courts are becoming more homogenous. In the judicial oath of office, we promise to administer justice. An extreme imbalance in our courts is a threat to justice. If I have learned one thing in my years as a judge, it is this. The diversity matters. When our courts are diverse, they better understand the complexity of the American experience embedded in every case that comes before them. When our courts are diverse, they reinforce public trust in our system of government. America contains multitudes. So, must this court.

Righting the ship will take more than a return to past practices. While the Obama Administration appointed female judges at an unprecedented rate, nearly 60 percent of all judicial appointees under the Administration were men. While recent decades have seen periodic efforts to spring racial—to bring racial and gender diversity to the bench, appointees have increasingly shared educational and professional backgrounds. Former prosecutors, partners in national law firms, and graduates of our Nation's top law schools are overrepresented on the bench. We also need insights from other public servants, those in the academy, those in small firms, and those who have represented the hopeless and dispossessed, the public defenders, the immigration lawyers, and the rural legal aid lawyers.

If you go big, aim high, and be bold, you will shape not just the next generation of judges, you will encourage change of the entire ecosystem of the legal profession, as my friend, Melissa Murray points out. In that ecosystem, district judges influence the hiring of their own clerks, magistrate judges, special masters, receivers, MDL Steering Committees, and the clerks of our courts and all those hired into that public offices.

Circuit judges are responsible for their own clerks, bankruptcy judges, public defenders, and the clerks of their courts. Judges and the lawyers they appoint serve on commissions, councils, committees, and other bodies to make sure our judicial system fulfils its core missions. Your leadership on the courts will have a ripple effect through this powerful profession.

The very fact that I am here before you today is a testament to Brown versus Board of Education. After that decision was implemented in my Mississippi, I joined the first fully integrated class of Mississippi school children. For 12 years we were fortunate to be in the same classroom with each other, developing lifelong friendships and receiving an education that prepared us for the world.

Mr. JOHNSON of Georgia. Judge?

Judge REEVES. Yes, sir.

Mr. JOHNSON of Georgia. If you could sum up now, you are past your 5 minutes.

Judge REEVES. Okay. I am so very sorry. That decision, its bravery and its courage and its moral clarity, I hope you will be similarly courageous in shaping the next generations of this country. Diversity matters.

Thank you.

[The statement of Judge Reeves follows:]

Prepared Remarks of U.S. District Judge Carlton W. Reeves
Before the House Subcommittee on Courts, Intellectual Property, and the Internet
March 25, 2021

To Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee:

I am honored to testify alongside esteemed colleagues Judge Chen, Judge Donald, Judge Bailey, and Judge Ho. Their brilliance is proof that diversity makes our justice system stronger. Between their words and the testimony of renowned academics like Professors Stacy Hawkins and Maya Sen, and attorney Peter Kirsanow, I am sure you'll have all the evidence[1] you need to know that we must diversify our federal courts.

As I prepared my comments, I thought about the only other time that I have had the honor and privilege of appearing before this august body, nearly 11 years ago at my confirmation hearing. On that day I was joined by Judge Mary Murguia,[2] Denise Casper,[3] Edmund Chang,[4] and Judge Leslie Kobayashi.[5] The room looked like America, a country populated by persons of various races, colors, sexes, genders, religions, and sexual orientations, a representation of the tapestry that has been woven to make our more perfect Union.

At the hearing, Senator Durbin asked me the following question: "Can you talk to us about the importance of racial diversity on the Federal bench in Mississippi, given your personal experience growing up in Mississippi and your knowledge of how far your state has come?" My

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[1] Reams of scientific evidence already support the idea that diversity is essential to all kinds of courtroom decision-making. *See* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269 (2015) (collecting studies). Research on federal judges' ideological tendencies shows that their votes, on multi-member courts, tend to be ideologically dampened when "sitting with two judges of a different [expected] political party." Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304 (2004); *see also* Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 52 (2009) ("[J]udicial decisionmaking is not just about outcomes; it is also about the *process* of judicial decisionmaking"). Other research has demonstrated "that for at least two types of cases—Title VII sex discrimination and sexual harassment—a significant correlation existed between gender and individual federal appellate judges' decisions," and "that the presence of a female judge significantly increased the probability that a male judge supported the plaintiff in the cases analyzed." Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005). Studies of jurors, meanwhile, establish that "the mere presence of non-whites in the jury room made the white jurors . . . open to other possible interpretations." STEVEN JOHNSON, FARSIGHTED 54 (2018).

[2] Judge Murguia was the first Latina to serve on the district court in Arizona. She was nominated to the Ninth Circuit. *Mary Murguia, JD*, EMILY TAYLOR CTR. FOR WOMEN & GENDER EQUITY, https://emilytaylorcenter.ku.edu/womens-hall-of-fame/murgia-mary (last visited Mar. 22, 2021).

[3] Denise Casper was the first African-American woman nominated to the district court in Massachusetts. *The Honorable Denise J. Casper*, LONG ROAD TO JUST., http://www.longroadtojustice.org/topics/leadership/denise-casper.php (last visited Mar. 22, 2021).

[4] Edmund Chang was the first Asian-American Article III judge in Illinois and only the second AAPI Article III judge to be appointed outside of the East and West Coasts. *Judicial Humility and Judicial Humiliation, A View from the Trenches*, OSHER LIFELONG LEARNING INST., https://www.cmu.edu/osher/publications/weekly-essentials/2020/winter/honorable-edmond-chang html (last visited Mar. 22, 2021).

[5] Judge Kobayashi, a sitting Magistrate Judge, was nominated for a district judgeship in Hawai'i. *See Active Asian-American & Pacific Islander Article III Judges*, MINORITY CORP. COUNS. ASS'N, https://www mcca.com/resources/reports/federal-judiciary/asian-american-pacific-islander-judges/ (last visited Mar. 22, 2021).

response, in part, was that "judges serve several functions, role models to other lawyers, role models to students, role models to the people who come before the court. People need to see that they have a chance; that they, too, can one day come to the great hall of the Senate and be nominated by a President to be a judge."[6] My answer to that question today would be the same, as I am reminded every day how others perceive my role and purpose through their telephone calls, text messages, emails, notes, conversations, and in-court reactions and statements.

All I can add to this remarkable panel is a simple plea: go big. Aim high. Be bold. Simply be committed to diversity in the third branch of our government.

It is a time for boldness because our present trajectory risks a crisis of legitimacy. More than two-thirds of federal judges appointed over the last four years were white men, a group that represents less than one-third of all Americans.[7] Thirty percent of Americans in the Seventh Circuit are persons of color, but the Seventh Circuit doesn't have a single Black jurist.[8] The Fifth Circuit has an enormous Latino population, yet none of its judges are Latino.[9] I'm reminded of the raw emotion that a friend and mentor, Geraldine Sumter from Charlotte, North Carolina, experienced 10 years ago when she stepped to the podium to argue in the Fourth Circuit, and across from her for the first time, in her nearly 30 years of practice, was a panel of three African-American judges.[10] At this moment having such a panel is still an elusive dream in many of our circuit courts, but especially piercing in the Fifth and Eleventh Circuits, the home of so many of America's African-American citizens. I'm ashamed to say that my own court didn't have a single female Article III judge until three months ago. I appreciate our Senators for fixing that two-hundred-year-old mistake. These and countless other comparisons reveal a disturbing fact: as our country becomes more diverse, our courts are becoming more homogenous.

In the judicial Oath of Office, we promise to "administer justice."[11] An extreme imbalance on our courts is a threat to justice. If I have learned one thing in my years as a judge, it is this: diversity matters. When our courts are diverse, they better understand the complexity of the American experience embedded in every case that comes before them. When our courts are diverse, they reinforce public trust in our system of government. America contains multitudes. So must its courts.

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[6] *Confirmation Hearings on Federal Appointments, Before the S. Comm. on the Judiciary*, 110th Cong. 251 (2010) (statement of Richard Durbin, U.S. Senator from Illinois), https://www.congress.gov/111/chrg/shrg66720/CHRG-111shrg66720.htm.

[7] *See, e.g.*, Rorie Solberg & Eric N. Waltenburg, *Trump and McConnell's Mostly White Male Judges Buck 30-year Trend of Increasing Diversity on the Courts*, THE CONVERSATION (Oct. 8, 2020), https://theconversation.com/trump-and-mcconnells-mostly-white-male-judges-buck-30-year-trend-of-increasing-diversity-on-the-courts-146828 ("Our study on judicial diversity, which ended in July 2020, shows that Trump-appointed judges are 85% white and 76% men").

[8] *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AMERICAN PROGRESS (Feb. 13, 2020, 12:01 AM), https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/.

[9] *Id.* Judge Benavides retired in 2020.

[10] *See Hoyle v. Freightliner*, 650 F.3d 321 (4th Cir. 2011).

[11] 28 U.S.C. § 453; *see also* THE FEDERALIST NO. 80 (Alexander Hamilton) (noting that the Constitution must be structured to allow "federal judicatories to do justice"); Chief Justice John Roberts, YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (2010) ("The judiciary's central objective is, of course, to do justice according to law in every case.").

Righting the ship will take more than a return to past practices. While the Obama Administration appointed female judges at an unprecedented rate, nearly 60% of all judicial appointees under that administration were men.[12] And while recent decades have seen periodic efforts to bring racial and gender diversity to the bench, appointees have increasingly shared educational and professional backgrounds. Former prosecutors, partners in national law firms, and graduates of our nation's top law schools are overrepresented on the bench. We also need insights from other public servants, those in the academy, those in small firms, and those who have represented the hopeless and dispossessed—the public defenders, the immigration attorneys, and the rural legal aid lawyers.[13]

If you go big, aim high, and be bold, you will shape not just the next generation of judges. You will encourage change in the entire "ecosystem" of the legal profession, as my friend Melissa Murray points out. In that "ecosystem," District Judges influence the hiring of their own clerks, Magistrate Judges, Special Masters, Receivers, MDL Steering Committees, and the Clerks of our courts and all those hired into those public offices. Circuit Judges are responsible for their own clerks, Bankruptcy Judges, Public Defenders, and the Clerks of their courts. Judges and the lawyers they appoint serve on commissions, councils, committees, and other bodies to make sure our judicial system fulfills its core missions. Your leadership on the courts will have ripple effects through this powerful profession.[14]

The very fact that I am here before you today is a testament to *Brown v. Board of Education*. After that decision was implemented, I joined the first fully-integrated class of Mississippi schoolchildren. For twelve years, we were fortunate to be in the same classrooms with each other, develop lifelong friendships, and receive an education that prepared us for the world.

That decision—its bravery, its courage, its moral clarity—it changed my life, and I firmly believe it changed all of our lives. Diversity matters. I hope you will be similarly courageous in shaping the next generations of this country.

Thank you.

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[12] Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016*, 26 BERKELEY LA RAZA L.J. 92, 94 (2016).

[13] *See Chambers v. Florida*, 309 U.S. 227, 241 (1940) ("Courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

[14] Your leadership might also inspire the States to address this concern on their own courts. *See* Alicia Bannon & Janna Adelstein, *State Supreme Court Diversity — February 2020 Update*, BRENNAN CTR. FOR JUST. (Feb. 20, 2020), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update.

Mr. JOHNSON of Georgia. Thank you, Judge Reeves.
Judge Bailey, you may begin.

STATEMENT OF THE HONORABLE FRANK J. BAILEY

Judge BAILEY. Thank you to Chair Johnson, Ranking Member Issa, and to Members of the Committee for inviting me to testify this afternoon on this very important subject. I have submitted a more extensive statement, but I would like to focus on just five points.

My first point is that perceptions of equal treatment may matter just as much as the reality of equal treatment when you are talking about court appearances. My view on this was formed by a personal experience. I was in court early in my judicial career, and an unrepresented African American man came to a hearing on a motion that he had to lose. There was no chance of him winning it. The law wouldn't have allowed it.

I patiently explained that to him, because he was unrepresented, and I gave him the reasons. I explained to him that his motion was just premature, that he would later have a chance to give us his basis and preserve his rights, and at the end of the hearing he looked up at me and he said something I hope no other judge ever has to hear but I know we have. He said, "A Black man cannot get a fair hearing in this court."

Well, that statement took my breath away. I maintained my judicial composure. I calmly asked him to tell me all the reasons why he felt that was the case. I explained to him that he was wrong in that view, and he had little to say and later on, by the way, he won his motion.

I left the bench and later I thought, of course, he feels that way. He walked into a courtroom, and the judge is White. All the courtroom staff were White. All the court security that he encountered coming in and in the courtroom were also White and, if he went to our clerk's office, he would see the photographs of our judges on the wall and they were all White. So, I realized, it is perceptions that matter. Of course, he felt that way.

My second point, perceptions of equal treatment in my court, the bankruptcy court, matter enormously. First, as Chair Nadler pointed out earlier, most Americans that encounter a Federal judge will encounter a Federal bankruptcy judge. That is because of the numbers.

Second, access to a so-called fresh start through the bankruptcy system is preserved by the Constitution, Article I, Section 8. So, that right is assured to all Americans and my fear is that, unless the court, the judges on the court and our staffs, reflect the communities that we serve, it may be that people in those communities may not feel that they are welcome in our courts and so diversity on the court and the court family is enormously important.

My third point. Diversity on the bench—on the bankruptcy bench starts with diversity on the Article III bench. Again, Chair Nadler saw this coming when he said that—and I am the only Article I judge who is testifying today—Bankruptcy judges are appointed by Circuit judges. Circuit judges, where there are diverse circuit judges who are Article III, making the decision on who gets the ap-

pointment to serve as a bankruptcy judge, more diverse lawyers will feel comfortable applying.

My fourth point. Virtually, all my colleagues on the bankruptcy bench agree with me that a diverse bankruptcy bench is essential to equity and fairness and inclusion in our country. I know that because I am serving as the President of the National Conference of Bankruptcy Judges, a 100-year-old organization that almost all our judges and retired judges are Members of and because my fellow judges work tirelessly on diversity initiatives every day to increase the participation of diverse individuals in our bankruptcy system.

For example, I will give one, one of many that I could give. We have the Blackshear Fellowship Program that we started some years ago that offers a diverse—offers diverse lawyers a scholarship to attend our annual conference. That brings them into contact with 1,500 bankruptcy professionals. Has that initiative worked? Well, you could ask Judge Charles Walker from Nashville. You could ask Judge Tiiara Patton of Youngstown, Ohio. They were both Blackshear fellows. They are both now serving on our bench. It worked.

My fifth and final point is that the need to address diversity on our bench is not only critical, but it may be urgent. The bankruptcy bench is the least diverse Federal bench by far. In its last report on numbers in 2019, the AO's Fair Employment Practices office reported that our bench, the bankruptcy bench, was under 3 percent African American, 2 percent Hispanic, 2 percent Asian American, and there were no Native American or Pacific Islander judges on our bench.

In conclusion, Bankruptcy judges deliver bad news to people every day. Sometimes it is that you will have to lose your home. Other times, it is not you who is going to collect on that claim that you were counting on. So, perceptions of fairness and equity matter enormously on the bankruptcy bench.

So, thank you so much, Chair Johnson, Ranking Member Issa, and Members of the Subcommittee for taking the time to have these very important hearings. Thank you.

[The statement of Judge Bailey follows:]

Statement of Honorable Frank J. Bailey
United States Bankruptcy Judge District of Massachusetts
to the Committee on the Judiciary of the United States House of Representatives,
Subcommittee on Courts, Intellectual Property, and the Internet.

March 25, 2021

The Importance of Diversity on the Federal Bench

Chair Johnson, Ranking Member Issa and members of the subcommittee, thank you for inviting me to testify this afternoon.

I am honored to be here today with my judicial colleagues, Judges Reeves, Chen, Donald, and Ho.

I will begin with a story from early in my career on the bench that demonstrates the critical need for a diverse federal bench. The details of that experience are set forth in an article that I wrote for publication in the Judges Journal, which is linked to this report. *See* F. J. Bailey, *Does the Federal Article I Bench Reflect the Ethnicity of the Populations that They Serve? What if the Answer is No?*, The Judges Journal, ABA Judicial Division, Vol. 55, No 2, p. 21 (2016).

By far the largest number of cases filed in federal court each year are those filed in the United States Bankruptcy Court; thus, most Americans have their federal court experience before a bankruptcy judge. While bankruptcy filings have been below normal levels in recent years, during the last recession in Fiscal Year 2013, 1,107,699 cases were filed in the bankruptcy court, compared to the 401,104 cases filed in the district court. Bankruptcy Judges handle a wide variety of cases. They range from cases involving individuals who have fallen on hard times through illness, job loss, eviction or foreclosure to the country's largest corporations needing restructuring to survive. It is therefore essential that the bankruptcy bench reflect the populations that we serve.

Access to debt protection and a fresh start through bankruptcy is preserved in Art I, Section 8, clause 4 of the Constitution. That right is ensured to all Americans. My fear is that unless there are judges on the bankruptcy bench that reflect the populations in our districts, certain communities may not feel welcome in our courts. This could deny them a right ensured by the Constitution and laws of the United States – namely, a fresh start for themselves and their families.

That is what is at stake in this hearing.

I am the only Article I judge to testify today. As I will point out today, diversity on the Article I bench is critical. Of course, diversity on the Article I bench starts with diversity on the Article III bench. Bankruptcy Judges are appointed by Circuit Judges. Magistrate Judges are appointed by District Judges. When there are diverse Article III judges on the merit selection panels it changes the dynamic of that process. In my experience, diverse lawyers are more likely to apply. Lawyers from affinity bar associations, such as the Hispanic National Bar Association, are more likely familiar with the diverse Article III judges on the panels. They feel more welcome to join in the process.

Today, I will be talking about the relative lack of diversity on the bankruptcy court bench and its influence on the administration of justice. I do want to mention, however, one area in which the bench is at least *beginning* to reflect the U.S. population: about one-third of bankruptcy judges are women. Don't get me wrong, there is more work to do on gender diversity on our bench, but recent years have shown progress.

Gender diversity, like all diversity on the bench, matters. I can tell you from personal experience that in the District of Massachusetts, where 40% of the bench is comprised of women, gender diversity affects the administration of justice every day. Although we sit as single trial judges, we formulate local rules, standing orders, and local court policy as a group. More important, I also serve on the First Circuit Bankruptcy Appellate Panel (the "BAP"). In that role, I participate on appellate panels of three judges. While the panels, of course, always follow the law, discussions concerning how to get to a particular result often differs depending on the experiences of the judges on the panel, including gender. For example, when considering a person's request for relief from a student loan, and the student happens to be a single mother with a handicapped child, the observations of a female judge, using her personal life experience, is enormously useful to our discussions.

I can only imagine that the presence of an African American judge on a panel in the First Circuit BAP might also change the discussion, if something about that judge's life experience helped inform how we look at a case. Unfortunately, that is not currently possible. There are no African American bankruptcy judges serving in the First Circuit, and there has never been one.

As president of the National Conference of Bankruptcy Judges, I am here to tell you that the NCBJ believes that systemic change in our society must include racial and ethnic diversity among bankruptcy judges and lawyers. The NCBJ is committed to this goal. In order to achieve a diverse bankruptcy bench, it is critical that we identify and engage with a diverse pool of individuals interested in appointment to our bench. This means increasing the "pipeline" of individuals from diverse backgrounds that apply for appointment. Indeed, circuit judges cannot appoint individuals to our bench unless they apply. Bankruptcy judges know that they are in the best position to encourage diverse lawyers to apply.

So, what are we doing about it? The NCBJ has, for many years, focused on increasing that pipeline. In 2009, we established the Blackshear Fellowship Program, through which we provide a scholarship for diverse attorneys to attend our annual conference. In non-pandemic years we expect over 1,500 judges, lawyers, and insolvency professionals to attend. In 2018, the NCBJ established a Diversity Committee. The Diversity Committee's mission is to be a resource on the issue of diversity and to promote diversity, equity, and inclusion within the bankruptcy profession. To that end, many bankruptcy judges routinely engage in outreach to diversity organizations and communities to identify potential bankruptcy lawyers and future judges.

Let me offer a prime example. In October 2019, many of our members participated in a nation-wide program called "*Roadways to the Federal Bench: Who, me? A Bankruptcy Judge?*" that was aimed at improving diversity in the bankruptcy bench and bar and the federal bench in general. Circuit Court Judge Catharina Haynes of the Fifth Circuit worked tirelessly to organize and promote that program,

which was broadcast live to 19 judicial districts around the country. There were literally hundreds of attendees.

Since December 2020, the NCBJ has redoubled its emphasis on building a "pipeline" of diverse lawyers in the bankruptcy practice area in the hope that there soon will be an abundance of qualified practitioners to apply for judgeships. We have partnered with *Just the Beginning, A Pipeline Organization*, to offer summer internships to diverse law students. The students will get valuable exposure to our judges and a generous stipend. The students will also receive an invitation to our annual meeting in Indianapolis in October, with financial assistance to help them attend.

In 2020, we adopted a resolution supporting the inclusion of a diverse person or member of an affinity bar association on every Merit Selection Panel used to screen applicants for judgeships. Research shows that diverse people are more likely to apply if there are diverse people on the selection panel. We now coordinate with the Justice Department's Office of the US Trustee and several insolvency-related bar associations to ensure the effectiveness of our collective diversity outreach efforts.

Our Diversity Committee members regularly attend law school outreach programs. One example is a Zoom program held in the Western District of Virginia organized by Judge Rebecca Connolly in conjunction with the Black Law Students Association at Washington & Lee just two weeks ago. In the District of Massachusetts, we have developed a program for diverse, large firm "summer associates" where we present the benefits of a bankruptcy practice and encourage them to "ask for a bankruptcy assignment this summer."

I have merely scratched the surface on these efforts to build the pipeline of diverse lawyers and law students interested in becoming bankruptcy judges.

What is the reason for this focus on expanding the pipeline of diverse applicants to the bankruptcy bench? The answer is in the numbers. According to the *Judiciary Fair Employment practices Annual Report for Fiscal Year 2019*, published by the Administrative Office of the United States Courts (the "FEP Report"), active Article III judges (including circuit and district judges), over 12% were African American, nearly 10% were Hispanic, and nearly 3% were Asian American. Native Americans and Pacific Islanders were also represented on the Article III bench.. ADMIN. OFFICE OF U.S. COURTS, THE JUD. FAIR EMP. PRAC. ANN. REP., 5 (2019). These numbers show that more work needs to be done in appointing Article III judges. By comparison, however, much more work is needed with respect to Bankruptcy Judges. Those numbers are stark by comparison: according to the report only 3.4% were African American, 2.0% were Hispanic, 2.0% were Asian American, and none reported as Native American or Pacific Islander. *Id*. The FEP Report recognized this relative lack of diversity on the bankruptcy bench by stating "bankruptcy judges continued to reflect the least diversity with respect to race and ethnic composition" in the federal court system. *Id.*

While I will not burden this report with more statistics, I have developed data to compare the ethnicity and race of the general population in every judicial district in the country to the ethnicity and race of bankruptcy judges that serve in those locations. In most districts, those serving on the bench do not at

all reflect the people that work, live, and seek bankruptcy relief in those locations. I can provide data for every committee member's district.

In conclusion, I agree that while *every* litigant has a right to a fair and unbiased judge, *no* litigant has a right to a judge that shares their race, ethnicity, gender, etc. But *every* litigant has a right to appear in a court that, on balance, has judges (and staff) that reflect the diversity of the community served by that court.

Federal judges deliver bad news to people every day, and perceptions of fairness matter.

Thank you, Chairman Johnson, Ranking Member Issa, and members of the subcommittee for taking the time to hold hearings on this important subject.

Mr. JOHNSON of Georgia. Thank you, Judge Bailey.
We will now hear from Judge Ho. Judge Ho, you may begin.

STATEMENT OF THE HONORABLE JAMES C. HO

Judge HO. Thank you.

Chair Nadler, Chair Johnson, Ranking Members Jordan and Issa, thank you for inviting me to testify. I am honored to join my distinguished colleagues from the judiciary.

My remarks today are akin to what we judges sometimes call "concurring in the judgments." We agree on certain core principles, but I would like to offer my own reasoning.

Equality of opportunity is fundamental to who we are and to who we aspire to be as a Nation, and to my mind that means two things. It means that we must do everything we can to ensure that everyone truly has the opportunity to succeed, and it means we must never bend the rules to favor anyone. Dr. King had it right. "Choose people based on who they are, not what they look like."

Let me begin by explaining how I began. I came to America from Taiwan at a very young age. So, most kids grow up learning English from their parents. I grew up learning English from a bunch of puppets from a place called Sesame Street. My classmates brought a kid's lunchbox to school. I brought a bento box to school. My food seemed normal to me but it smelled funny to my classmates or so they would tell me, and I remember racial slurs and jokes on the playground and on the football field. I also learned that if you work hard and prove yourself, you can find your place in America.

Equality of opportunity is not something to be passive about. It is something we should be passionate about. We must make sure that everyone has the opportunity to learn and to succeed so that win, lose, or draw, at least you got a chance, no matter who you are. This is not just a talking point to me. It is why I was honored to serve as Co-Chair of the Judiciary Committee of the National Asian Pacific American Bar Association. It is why I love talking to young lawyers and law students of every race and idealogical stripe. It is why always say that if anyone is willing to forego other opportunities in their careers to enter public service, call me. I will take them to lunch and share what I know.

Here is the kicker. Once everyone has had full and fair opportunity to be considered, you pick on the merits. Both the Constitution and the Civil Rights Act make clear that it is wrong to hire people based on race. That is the law for a wide range of jobs. It would be especially wrong, I would submit, to select judges based on race.

It is true I am the only Asian American on my court. I am also the only immigrant on my court. I would never suggest that a wise Asian would more often than not reach a better conclusion than a White judge. That would be antithetical to our legal system and poisonous to civil society. No one should ever assume that I am more likely to favor Asians, or immigrants, or anyone else, or that my colleagues are less likely to. Everyone should lose or win based on the law. Period. That is why Lady Justice wears a blindfold. That is why judges wear Black robes.

I don't say this because I think race is no longer an issue in our country. I have received racist hate mail and racially disparaging remarks because of positions I have taken in my legal career. I have been treated differently because of the race of the person I am married to. I also remember back in high school my college admissions advisor tell on me that my grades, SAT scores, and activities were all strong enough to get me into my top choice of schools if I wasn't Asian.

Now, I am not saying anything of this here to complain. Whatever negative experiences I have had, they pale in comparison to the many blessings I have had living in this great country. I was not born an American, but I thank God every day that I will die an American.

My point is just that I don't come to my views because I think racism is behind us. Rather I come to my views precisely because racism is not behind us, because the last thing we should do is divide people by race. The last thing we should do is to suggest that the racists are right. We don't achieve equality of opportunity by denying it to anyone. We achieve it by securing it for everyone.

So, make no mistake. It would be profoundly offensive and un-American to tell the world that you are restricting a judgeship to Members of only one race. It is offensive to people of other races, and it is offensive to people of that race, because you are suggesting that the only way they will get the job is if you rig the rules in their favor.

As a judge, I have the profound honor of presiding over a naturalization ceremony every year. I do this to celebrate my own naturalization now 39 years ago. People from all around the world come together in one room for one purpose, to become an American. It reminds me that what binds our Nation is not a common race or religion or philosophical point of view. What unites us is not a common past but a common hope for the future, a shared love of freedom, and a mutual commitment to the Constitution and to the principle of equality, of opportunity.

Thank you.

[The statement of Judge Ho follows:]

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

The Importance of a Diverse Federal Judiciary

Testimony of Judge James C. Ho
U.S. Court of Appeals for the Fifth Circuit

Thursday, March 25, 2021, 2:00 p.m.

Chairman Nadler, Chairman Johnson, Ranking Members Jordan and Issa, thank you for inviting me to testify. I'm honored to join my distinguished colleagues from the judiciary.

My remarks today are akin to what judges call "concurring in the judgment." We agree on certain core principles, but I'd like to offer my own reasoning.

Equality of *opportunity* is fundamental to who we are, and to who we aspire to be, as a nation.[1] To my mind, that means two things: It means we must do everything we can to ensure that everyone truly has the opportunity to succeed. And it means we must never bend the rules to favor anyone. Dr. King had it right: Choose people based on *who* they are—not *what* they look like.

Let me begin by explaining how I began. I came to America from Taiwan at a very young age. Most kids grow up learning English from their parents. I grew up learning English from a bunch of puppets, from a place called Sesame Street. My classmates brought a kids' lunch box to school. I brought a bento box to school. My food seemed normal to me. But it smelled funny to my classmates—or so they would tell me. And I remember racial slurs and jokes on the playground and on the football field.

But I also learned that, if you work hard and prove yourself, you can find your place in America.

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[1] *See, e.g.*, *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460, 464 (5th Cir. 2021).

Equality of opportunity is not something to be passive about—it's something we should be passionate about. We must make sure that everyone has the opportunity to learn and to succeed, so that win, lose, or draw, at least you got a chance—no matter who you are.

That's not just a talking point to me. It's why I was honored to serve as co-chair of the Judiciary Committee of the National Asian Pacific American Bar Association. It's why I love talking to young lawyers and law students of every race and ideological stripe. It's why I always say that, if anyone is willing to forgo other opportunities in order to enter public service, call me. I'll take them to lunch and share what I know.

But here's the kicker: Once everyone has had full and fair opportunity to be considered, you pick on the merits. Both the Constitution and the Civil Rights Act make clear that it is wrong to hire people based on race.[2]

That's the law for a wide range of jobs. But it would be especially wrong to select *judges* based on race.

It is true that I am the only Asian American on my court. I'm also the only immigrant on my court.

But I would never suggest that a wise Asian would, more often than not, reach a better conclusion than a white judge. That would be antithetical to our legal system, and poisonous to civil society. No one should ever assume that I'm more likely to favor Asians or immigrants or anyone else—or that my colleagues are less likely to. Everyone should win or lose based on the law—period. That's why Lady Justice wears a blindfold. That's why judges wear black robes.[3]

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[2] *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–1 (1973) ("Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications. . . . [T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.").

[3] *See, e.g.*, Jay S. Bybee, *Remarks at the Investiture of S. Kyle Duncan*, 22 Green Bag 2d 9, 12 (2018) ("The enrobing – literally the vesting or dressing – is symbolic of the judicial power of the United States. . . . [T]he sameness and simplicity of our robes is a democracy of dress. It is a constant reminder that within the federal judiciary – whether we are women or men, rich or poor, Democrats or Republicans – we represent justice and mercy in a neutral, unadorned front.").

I don't say this because I think race is no longer an issue in our country. I've received racist hate mail and racially disparaging remarks because of positions I've taken in my career. I've been treated differently because of who I'm married to. And I also remember, back in high school, my college admissions adviser telling me that my grades, SAT scores, and activities were all strong enough to get me into my top choice of schools—if I wasn't Asian.

Now, I'm not saying any of this here to complain. Whatever negative experiences I've had, they pale in comparison to my many blessings living in this great country. I was not born an American. But I thank God every day that I will die an American.

My point is just that I don't come to my views because I think racism is behind us. Rather, I come to my views precisely because racism is ***not*** behind us. The last thing we should do is divide people by race. The last thing we should do is suggest that the racists are right. We don't achieve equality of opportunity by denying it to anyone—we achieve it by securing it for everyone.

So make no mistake: It would be profoundly offensive—and un-American—to tell the world that you're restricting a judgeship to members of only one race. It's offensive to people of *other* races. And it's offensive to people of *that* race—because you're suggesting that the only way they'll get the job is if you rig the rules in their favor.

As a judge, I have the honor of presiding over a naturalization ceremony every year, to celebrate my own naturalization thirty-nine years ago. People from all around the world come together in one room, for one purpose—to become an American. And it reminds me that what binds our nation is not a common race, or religion, or philosophical point of view. What unites us is not a common past, but a common hope for the future—a shared love of freedom—and a mutual commitment to the Constitution and to the principle of equality of opportunity. Thank you.

Mr. JOHNSON of Georgia. Thank you, Judge Ho.
Ms. Chen, you may begin.
Judge Chen, you may need to unmute.

STATEMENT OF THE HONORABLE EDWARD M. CHEN

Judge CHEN. I apologize for that. I hope that doesn't count against my time.
Mr. JOHNSON of Georgia. No. We will start your time now.
Judge CHEN. Okay. Thank you.
Chair Johnson, Ranking Member Issa and Members of the subcommittee, I am honored to have the opportunity to address you today on this very important topic. I would like to highlight three points from my more extensive written submission.
Diversity in the judiciary is valuable for three reasons. One, it promotes trust and confidence of the public. Two, it enhances interrelationships within the bench. Three, it improves the quality of decision-making.
Public trust. To put Chair's remarks about the importance of public trust in the courts, I would like to tell you a simple story. My colleague, Judge Edward Davila, sits in San Jose. He presides over a diverse docket. He is the first Latinx judge to sit on our court in 20 years. In a case involving a limited English-speaking Latino litigant, Judge Davila discussed some procedural matters and then asked the litigant if he had any questions. Appearing nervous, the litigant looked at Judge Davila and asked, "Will you be my judge?" Those simple words, freighted with anxiety, bespoke the sense of intimidation and alienation too often felt by Members of underserved communities. In Judge Davila, that litigant found an island of hope in a sea of isolation, hope that he would at least be heard and understood.
This seemingly small, insignificant courtroom moment underscores a larger point, that the bench that is reflective of the community it serves can be instrumental in securing the trust and confidence of the public.
A word about interpersonal relationships on the bench. A diverse bench affords a unique and personal opportunity for judges to learn from each other, thereby enriching interpersonal relationships. That point was eloquently made by Justice O'Connor in her tribute in 1992 to Justice Thurgood Marshall. She recounted Justice Marshall's fondness of sharing personal stories with other Justices in conference to emphasize legal points including stories about the Ku Klux Klan violence, jury bias, defending an innocent African American wrongly convicted of rape and sentenced to death.
Judge O'Connor spoke about the impact those stories had on her own understanding of the issues confronting the court. As she put it, no one could help but be moved by Justice Thurgood Marshall's spirit. "Occasionally in conference meetings I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear just one more story that would perhaps change the way I see the world."
As a local example, former chief judge of our district, Marilyn Hall Patel, speaks of her experience as the first and for many years the only woman on our bench. She describes how shh would hear laughter and loud chatter in the judge's lunchroom which came to

a sudden halt when the sounds of her approaching heels reached her male colleagues. One day a raucous rally was heard outside the courthouse. One of her colleagues asked what is going on. Judge Patel explained it was a rally for the International Women's Day. Her colleague then jabbed, well, maybe they should have an international men's day, to which she replied, that is the other 364 days of the year. Judge Patel stood her ground and over time moved the needle.

Finally, about decision-making, the diversity on the bench enhances the quality of the decision-making. Take for instance credibility determinations. A witness' testimony may seem more credible if it is consistent with the judge's experience and, conversely, less credible if it remains outside that judge's experience. The first African-American chief judge of our court, Thelton Henderson, recalled an instance in which a White colleague was presiding over a racial harassment trial. That judge noted that the plaintiff was generally credible. However, the judge still found it hard to believe the plaintiff's testimony about racist graffiti found on a locker and a drawing of a hangman's noose around a baboon left on his desk.

While his colleague found that testimony implausible, Judge Henderson recounted to him how Members of his own family had experienced the very same kind of harassment described by the plaintiff and that he found nothing inherently implausible about that testimony.

Diversity also ensures a fuller discussion of legal analysis. Take for instance the case of *Redding* v. *Safford Unified School District* which involved the question of whether a strip search of a middle school female student suspected of drugs violated the Fourth Amendment. The Supreme Court had to determine whether the search was excessively intrusive and less than reasonable. During oral argument, one male Justice remarked how it wasn't unusual when he was 12 to take off his clothes when he had to change for gym. In a later interview, Justice Ginsburg explained she needed to facilitate her fellow Justices' understanding of what a strip search might mean to a teenage girl. As she put it, "They had never been a 13-year-old girl. It is a very sensitive age for a girl, and I don't think my colleagues, at least some of them, quite understood." The court ultimately found the search unconstitutional.

As another example, *Virginia* v. *Black* where the court had to address the constitutionality of lawmaking in a crime to burn a cross. According to press accounts, the initial questioning by the court indicated that Members of the court seemed inclined to strike the law down as violative of the First amendment until Justice Clarence Thomas spoke. Recounting the reign of terror visited upon Black communities by the Ku Klux Klan, Justice Thomas said that a burning cross is unlike any symbol in our society and had no purpose other than to cause fear and to terrorize a population.

According to press accounts, his fellow Justices were rapt, and the tenor of the argument turned. The court went on to uphold the statute, making it illegal to burn a cross with the intent to intimidate others.

In 1943 and 1944, the Supreme Court upheld the imposition of race-based curfews and interment of 120,000 Japanese Americans in Hirabayashi and Korematsu. In justifying why Japanese Ameri-

cans could be singled out for mass treatment, whereas Americans of German and Italian descent would not, the court opined that Japanese Americans were more prone to disloyalty and presented a military risk. The court based its assumption on its observation that the Japanese have, quote, "intensified their solidarity and have in large measure prevented their assimilation as an integral part of the White population."

I ask the question: What if there had been a Japanese American Justice on the court? That Justice would likely have challenged the false assumption made by his fellow Justices, reminding them that ⅔ of those who were interned were full United States citizens, most by birthright, and that, therefore, before they were ripped from their homes by the internment order, Japanese Americans were inextricably integrated into the economy.

That Justice might have related how they had a nephew who had just been elected class President of an integrated high school and describe how Japanese-American children were active in the YMCA, in the Boy Scouts, that many excelled in all-American sports like basketball, tennis, bowling, and golf and followed baseball as closely as any other American.

Mr. JOHNSON of Georgia. Judge Chen, you are now beyond your 5 minutes. If you would sum up, we would greatly appreciate it.

Judge CHEN. Okay. I just need 30 seconds, Mr. Chair.

Mr. JOHNSON of Georgia. Yes sir.

Judge CHEN. That Justice would have told his colleagues about their son, nephew, brother who enlisted in the Army, along with thousands of other Japanese Americans, to join the famed 442nd Regimental Combat Team, the most decorated unit for its size in U.S. military history, a regiment that ironically was among the first to liberate the concentration camp at Dachau.

So, in closing, I feel there is a cost when voices are missing from the room. That cost is not theoretical. It is real. Diversity makes for a better judiciary and that, in turn, helps fulfill our promise of justice for all.

Thank you, Mr. Chair.

[The statement of Judge Chen follows:]

TESTIMONY BEFORE THE SUBCOMMITTEE OF THE COURTS,

INTELLECTUAL PROPERTY AND THE INTERNET

On

The Importance of Diversity in the Federal Judiciary (March 25, 2021)

Mr. Chairman, Ranking Member, and Members of the Subcommittee, I am honored to have the opportunity to address you today on the important topic of diversity and the judiciary. In the brief time that I have, I want to set forth four reasons why a diverse judiciary is valuable: (1) judicial diversity promotes trust and confidence of the public, (2) it enhances interrelationships within the bench, (3) it facilitates better court governance, and (4) it improves the quality of decision-making.

Public Trust

People of color constitute nearly 80% of federal criminal defendants, the vast majority of whom are charged with immigration or drug-related crimes. Yet, it is estimated that minorities constitute less than 20% of all federal judges. In fact, less than 15% of magistrate judges are minorities, which is notable because a magistrate judge is a criminal defendant's initial point of contact with the federal courts. That disparity, magnified by historically rooted feelings of alienation and isolation from the legal system, creates a gap in trust and credibility between the courts and historically underserved and underrepresented communities.

I'd like to tell a simple story that puts the issue in human terms. My colleague, Judge Edward Davila, sits in San Jose and presides over a diverse docket. He is the first Latino judge

to sit in our court in 20 years. In a case involving a limited-English speaking Latino litigant, Judge Davila discussed some procedural matters and then asked the litigant if he had any questions. Appearing nervous, he looked at Judge Davila and asked "Will you be my judge?" Those simple words freighted with anxiety bespoke the sense of intimidation and alienation too often felt by members of underserved communities. In Judge Davila, that litigant found an island of hope in a sea of isolation, hope that he would at least be heard and understood. This small and seemingly insignificant courtroom moment underscores the larger point that a bench that is reflective of the community it serves can be instrumental in securing the trust and confidence of the public.

Interpersonal Relationships

Second, a diverse bench affords a unique and personal opportunity for judges to learn from each other, thereby enriching interpersonal relationships. That point was eloquently made by Justice O'Connor in her 1992 tribute to Justice Thurgood Marshall. She re-counted Justice Marshall's fondness for sharing personal stories with the other justices in conference in order to emphasize legal points, including stories about Ku Klux Klan violence, jury bias, defending an innocent African American wrongly convicted of rape and sentenced to death, and the many indignities of racial segregation he personally had endured. Justice O'Connor spoke about the impact those stories, told by a man who had traveled a very different path than her, had on her own understanding of the issues confronting the Court.

> "No one could help but be moved by Justice Thurgood Marshall's spirit; no one could avoid being touched by his soul. . . . Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world."

As a local example, former chief judge of our district, Marilyn Hall Patel, speaks of her experience as the first (and for a number of years the only) woman on our bench. She described how she would hear laughter and loud chatting in the judges' lunchroom which came to a sudden halt when the sounds of her approaching heels reached her male colleagues. One day, a raucous rally was heard outside the courthouse. One of her colleagues asked what was going on? Judge Patel explained it was a rally for International Women's Day. Her colleague then jabbed, "Maybe they should have an International Men's Day," to which she replied, "That's the other 364 days of the year."

Court Governance

Third, diversity enhances the quality of court governance. In addition to deciding cases, courts, particularly trial courts, are tasked with a wide range of governance duties: selecting personnel for key positions such as clerk of court, chief probation officer, chief of pretrial services, magistrate judges, law clerks, and attorney representatives to bench/bar committees. The court establishes programs such as pretrial diversion, reentry programs, assistance for pro se litigants, and educational programs for bench and bar. The court promulgates local rules, general orders, and operating policies that affect access to the courts. As with any governing institution, diversity of experiences and voices broadens perspectives, deepens discussion about priorities and values, cultivates considerations of equity, enhances collective creativity, and sensitizes decisionmakers to the risk of unintended consequences. I am proud of our court's implementation of innovative programs – such as the conviction alternative diversion program, a drug re-entry program, onsite help desk for pro se litigants, and innovative procedures to ensure

a diverse jury pool – programs that were the product of the vigorous input of judges who come from a wide range of backgrounds and experiences.

Decision-Making

Finally, diversity on the bench enhances the quality of decision-making. It does so in several ways. Take for instance, credibility determinations. Sometimes those determinations turn on subtleties such as non-verbal body language. The standard wisdom of judging the veracity of a witness is by seeing whether the witness looks the questioner in the eye. But in some cultures, avoiding eye contact is a sign of respect, not a sign of dishonesty. A diverse bench can sensitize its members to the risk of cross-cultural misunderstandings.

As another example, a witness's testimony may seem more credible if it is consistent with the judge's knowledge or experience, and, conversely, less credible if it remains outside the judge's experience. The first African American chief judge of our court, Thelton Henderson, recalled an instance in which a white colleague of his presided over a racial harassment trial. The white judge noted that the plaintiff was generally credible; however, the judge still found it inherently hard to believe the plaintiff's testimony about racist graffiti found on a locker – a drawing of a hangman's noose around a baboon. While his colleague thought the plaintiff otherwise had a strong case, he found that testimony unbelievable, Judge Henderson recounted to that judge how members of his own family had experienced the very same kind of harassment described by the plaintiff. Unlike his colleague, Judge Henderson thought the harassment testimony was not inherently implausible.

Indeed, that is one reason why the Constitution requires that juries represent a cross-section of the community and prohibits the exclusion of identifiable groups. The deliberative process is enhanced, broadened and enriched by the collection of voices informed by varying experiences and perspectives. What is true for juries is true for judges as well.

Diversity also ensures a fuller discussion of legal analysis. Take, for instance, the case of *Redding v. Safford Unified School District*, which involved the question whether a strip search of a middle school female student suspected of drugs violated the Fourth Amendment. The Supreme Court had to determine whether the search was excessively intrusive and thus unreasonable: During oral argument, one male justice noted, "In my experience when I was 8 or 10 or 12 years old . . . we did take off our clothes once a day, we changed for gym." In a later interview, Justice Ginsburg explained she needed to facilitate her fellow Justices' understanding of what a strip-search might mean to a teenage girl. As she put it, "They never have been a 13 year old girl . . . . It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood." The Court ultimately found the search unconstitutional.

As another example, take the case of *Virginia v. Black*, where the Court addressed the constitutionality of a law making it a crime to burn a cross. According to press accounts, the initial questioning indicated members of the Court seemed inclined to strike the law down as violative of the First Amendment, until Justice Clarence Thomas spoke. Citing the reign of terror visited upon black communities by the Ku Klux Klan, Justice Thomas said a burning cross is "unlike any symbol in our society"; it had "no purpose other than the cause fear and to terrorize a population." According to press accounts, his fellow justices were rapt, and the tenor

of the argument turned. The Court went on to uphold the statute making it illegal to burn a cross in public with the intent to intimidate others.

In 1943 and 1944, the Supreme Court upheld the imposition of race-based curfews and internment of 120,000 Americans of Japanese descent in *United States v. Hirabayashi* and *United States v. Korematsu*. In justifying why Japanese Americans could be singled out for mass treatment, whereas Americans of German and Italian descent were not, the Court opined that Japanese Americans were more prone to be disloyal and presented a military risk. It based its assumption on its observation that Japanese "have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population." Noting that large numbers of children are sent to Japanese language schools, the court observed that "there has been relatively little social intercourse between them and the white population." I ask the question: what if there had been a Japanese American Justice on the Court? That Justice would likely have challenged the false assumption made by his other fellow justices, reminding them that 2/3rds of those interned were full U.S. citizens, most by birthright, and that before they were ripped from their homes by the internment order, Japanese Americans were inextricably integrated into the economy and local communities. That Justice might have related how they had a nephew who had just been elected class president of an integrated high school, and described how Japanese American children were active in the YMCA and Boy Scouts, excelled in All-American sports like basketball, tennis, bowling, and golf, and followed baseball as close as any other American. That Justice would have pointed out that among their friends and families were not only Buddhists, but Baptists, Methodists, Catholics, and Quakers. And that Justice could have told their colleagues about their son, nephew, or brother who enlisted in the

army, along with like thousands of other Japanese Americans, and joined the famed 442 Regimental Combat Team, the most decorated unit for its size in U.S. military history, a regiment that ironically was among the first to liberate the concentration camp at Dachau.

There is a cost when voices are missing from the room. That cost is not theoretical. It is real. Diversity makes for a better judiciary, and that in turn helps fulfill our promise of justice for all.

Mr. JOHNSON of Georgia. Thank you, Judge Chen.

That concludes the panel of today's hearing, and I would like to thank the witnesses for their participation and for their testimony. Thank you very much.

At this time, we will transition to the second panel of witnesses, and we will give that just a couple of seconds.

All right. Staff, are we ready? Okay. I have been given the okay to begin now with our second panel.

To introduce our first witness, I will turn to the gentleman from Tennessee, Mr. Cohen, for his introduction.

Mr. COHEN. Thank you, Mr. Chair.

It is my honor to introduce one of the most distinguished jurists in the United States of America, the Honorable Judge Bernice Donald.

Judge Donald was born just south of Memphis in Southaven, Mississippi. She went to Memphis State University for undergraduate school and for law school. She became an attorney and started out with Legal Services. When she was with legal services, she appeared before me in 1980 when I had a brief interim General Sessions courtship.

Fortunately, we both left those positions. She became a public defender after she was a Legal Services attorney and eventually, she was General Sessions judge herself and then she became a United States Bankruptcy judge for about 6 years or 7 years. Then through President Clinton's appointment she became a Federal District Court judge, recommended by my predecessors, Harold Ford, Sr.

She served about 16 years in Memphis as an outstanding member of our local bench in the Western District of Tennessee and then was elevated to the Sixth Circuit about 10 years ago by President Barack Obama. She has been an outstanding judge and shows how opportunities given can be shown to make justice better, to serve with distinction, and to be a very great representative and honorable representative of the city of Memphis.

Judge Bernice Donald.

Mr. JOHNSON of Georgia. Thank you, Congressman Cohen.

Welcome, Judge Donald.

Next, I will introduce Maya Sen who is a Professor of Public Policy at John F. Kennedy School of Government at Harvard University. Her research covers law, political economy, race, and ethnic politics and statistical methods.

Professor Sen currently serves as the Director of the Harvard Multidisciplinary Program in Inequality and Social Policy. She is also an affiliate for the Institute for Quantitative Social Science, the Taubman Center for State and Local Government, and the Ash Center for Democratic Governance and Innovation.

She earned her J.D. from Stanford Law School and a Ph.D. in political science from Harvard. She was also a clerk for Judge Ron Gilman of the U.S. Court of Appeals for the Sixth Circuit.

Welcome, Professor Sen.

Peter N. Kirsanow is a commissioner on the U.S. Commission on Civil Rights. He was appointed in 2001 and is currently serving his fourth term and is the longest serving member of the commission.

Mr. Kirsanow is also a partner in the Cleveland office of the law firm Benesch, Friedlander, Coplan & Aronoff and works within its labor and employment practice group. Previously, he served as a Member of the National Labor Relations Board from 2006 to 2008, and he earned his B.A. from Cornell University and his J.D. from Cleveland State University.

Welcome, Commissioner Kirsanow.

Stacy Hawkins is a professor of law at Rutgers Law School. She teaches classes on constitutional law, employment law, and diversity and the law. Her research focuses on the intersection of law and diversity. Prior to teaching, Professor Hawkins spent over a decade in private practice, advising clients in both the public and private sector on the development and implementation of legal, defensible diversity policies and programs.

Professor Hawkins earned her B.A. from the University of Virginia and her J.D. from Georgetown University Law Center. Welcome, Professor Hawkins.

Before proceeding with your testimony, I remind everyone that all your written and oral statements made to the Subcommittee in connection with this hearing are subject to 18 U.S.C. 1001. Please note that your written statements will be entered into the record in its entirety and, accordingly, I ask that you summarize your testimony in 5 minutes. There is a timer in the WebEx view that should be visible on your screen, and that should help you stay within your time limit.

So, Judge Donald, you may begin.

STATEMENT OF THE HONORABLE BERNICE B. DONALD

Judge DONALD. Thank you, Chair Johnson.

Chair Johnson, Ranking Member Issa, House Judiciary Chair Nadler, and my Congressman, Steve Cohen, I am Judge Bernice B. Donald, a member of the U.S. Court of Appeals for the Sixth Circuit. Our circuit covers Michigan, Ohio, Kentucky, and Tennessee.

Diversity in every sense of the word is critical to the proper functioning of a Federal court. A one-dimensional court cannot fully grasp the many dimension of American life. Federal courts should be as diverse as the communities that they serve. Justice Kagan put it this way. People look at an institution and they see people who are like them, who share their experiences, who they imagine, rather, share their values.

To truly deliver justice, we are tasked with administering, we must not only understand the arguments being made by the parties but also the perspectives through which those arguments are made. It is difficult to describe in 5 minutes all the benefits that a diverse Federal bench confers, but there are at least two reasons why maintaining diversity in the Federal courts is essential.

First, a diverse bench has a diversity of viewpoints and lived experiences that inform what justice look like in cases. Second, a diverse bench reinforces the legitimacy of our judicial institutions and promotes respect for the rule of law.

First, diversity of viewpoint. For every case, the law should govern always without question but there is no escaping the truth that we are all shaped by our lived experiences and those lived experiences help round out the law, the Black letter law, that we all

learn. This goes beyond the usual categories of identity, race, age, gender, sexual orientation, gender expression, religion, and national origin. It means the collection of every event fortune and misfortune that we may have embraced throughout our lives.

As my friend, U.S. District Court Judge Ed Chen, whom you heard from, recently wrote, "Although a judge's duty is to recognize those predilections and control them, it is simply unrealistic to pretend that life experiences do not affect one's perceptions in the process of judging."

A judge who grows up, for example, on a farm in America's heartland will have a different perspective on a rural agricultural program than a judge who spends his or her life in New York City. A judge who has a hearing disability would have a different perspective on the Americans with Disabilities Act than a judge who does not.

To be clear, we as judges will always follow the law but justice is often about more than simply the Black letter law. Justice is informed by our perspectives, and diversity does not mean that individual decisions are driven by our life experiences. Rather they add different angles from which to look at an issue or a question.

If our judiciary were homogenous in thought and perspectives, Justice Harlan, who penned the dissent in the Plessy case which 50 years later became the majority, would not have perhaps had that perspective.

Judge Wallace Tashima of the Ninth Circuit, reflecting on his own experience in the Japanese internment camp, once remarked, "Because we are all creatures of our past, I have no doubt that my life experiences including the evacuation and interment, have shaped the way I view my job as a Federal judge and the skepticism that I sometimes bring to the representations and motives of other branches of government."

As judges, our role is not to shed those experiences but to embrace and apply them.

Second, diversity adds confidence in our institutions of law, and you heard that from Judge Frank Bailey. A nondiverse bench may be viewed as a biased bench. A vital aspect of eliminating that perception is ensuring that the Federal bench looks like the people that it serves. When cases are decided by judges who do not respect or understand the needs of particular communities, especially communities of color or socioeconomically depressed communities, Members of those communities are less likely to trust the decisions that are rendered by those judges. That is borne out by a 60-year old study done by an organization known as the National Conference of Christians and Jews.

I know that my time is about up but let me say this. The value of diversity is not just in presence alone. Behind those closed doors, when we as circuit judges conference, perspectives and lived experiences matters. So, there is a rich benefit that comes from that. I have a story that is just the opposite of the one Judge Bailey told which I hope to have an opportunity to share with you during the question-and-answer period.

As I close, a diverse bench is increasingly critical to our concept of justice. At a certain point a Federal judiciary that looks nothing like the makeup of the rest of the country will lose the people's con-

fidence. On the other hand, a Federal bench that looks like our more perfect union will move us closer to delivering a more perfect justice. Thank you.

[The statement of Judge Donald follows:]

Testimony before the United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

The Importance of Diversity in the Federal Judiciary

March 25, 2021

Hon. Bernice Bouie Donald
U.S. Court of Appeals for the Sixth Circuit

I.
Introduction

Chairman Johnson, Ranking Member Issa, and Distinguished Members of the Subcommittee:

I am Judge Bernice Bouie Donald of the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit, which includes the States of Michigan, Ohio, Kentucky, and Tennessee, currently consists of 16 active judges and 12 senior judges. Of those 28 judges, four (4) are people of color—three (3) African-Americans and one (1) Asian-American.

I am the first and only African American woman to serve on the Sixth Circuit. I also was the first and only African American woman federal district judge on the U.S. District Court for the Western District of

Tennessee, where I served for fifteen years. Before that, I served for seven years on the U.S. Bankruptcy Court for the Western District of Tennessee, where I became the first African American woman bankruptcy judge in the United States.

For these reasons and others, it gives me great pleasure to testify before you about the importance of diversity in the federal judiciary. Since 1978, when Justice Lewis Powell articulated in *Regents of the University of California v. Bakke* the compelling interest in diversity adopted 25 years later by a majority of the Supreme Court in *Grutter v. Bollinger*, federal judges have striven to ensure "that the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity."[1] The Court in *Grutter* was addressing racial diversity in American law schools. Yet the majority's holding, authored by the first woman justice on the Court, applies equally well to the federal judiciary and embraces race, gender, sexual orientation, and all other forms of diversity.

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[1] *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

"In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry," Justice Sandra Day O'Connor explained, "[a]ll members of our heterogenous society must have confidence in the openness and integrity of the educational institutions that provide [legal] training."[2] "[L]aw schools," she went on to say, "cannot be effective in isolation from the individuals and institutions with which the law interacts. Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity[.]"[3]

If these observations were true of law schools, which train aspiring lawyers, how much more must they be true of judges, before whom trained lawyers appear? And if members of a heterogenous society must have confidence in the institutions that provide legal training, how much more critical is it that they be able to trust the single branch of government constitutionally empowered to "say what the law is"?[4]

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2 *Ibid.*
3 *Ibid.*
4 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

I am sad to report today that despite significant recent progress in diversifying the legal profession,[5] the federal judiciary is not yet "visibly open to talented and qualified individuals" from every corner of this great nation. As of exactly one year ago, in March 2020, women accounted for only one third—34%—of Article III judgeships,[6] despite amounting to more than half of the U.S. population.[7] Similarly, African Americans, Latinx Americans, and Asian Americans, combined, accounted for only 26% of federal jurists[8] while 40% of the country identifies as non-white.[9]

These disparities are rooted in the history of this country and its courts. As the Federal Judicial Center reports in its "Demography of

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[5] *See generally, e.g.,* "2020 Report on Diversity in U.S. Law Firms," National Association for Law Placement, Inc., *available at* https://www.nalp.org/reportondiversity (noting, *inter alia*, that "[o]verall, women and people of color continued to make incremental progress in representation at major U.S. law firms in 2020 as compared with 2019" but also that "diversity in U.S. law firms remains a story of geography, with law firms in some cities reporting far higher rates of diversity than others").

[6] *See* "March 2020 Snapshot: Diversity of the Federal Bench," American Constitution Society, *available at* https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench-march-2020/.

[7] *See, e.g.,* "Population Distribution by Sex," Kaiser Family Foundation, *available at* https://www.kff.org/other/state-indicator/distribution-by-sex/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[8] *See supra* note 6 and accompanying text.

[9] "The Nation is Diversifying Even Faster Than Predicted, According to New Census Data," The Brookings Institution (July 1, 2020), https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/.

Article III Judges, 1789-2020," the Article III judiciary was comprised exclusively of white and male judges for 139 years of its 231-year existence.[10] In 1928, the Honorable Genevieve Cline joined the U.S. Customs Court, becoming the first woman member of the federal judiciary.[11] She remained alone until 1934, when Florence Allen joined the court on which I presently serve, the Sixth Circuit Court of Appeals, as its first woman jurist.[12]

For another 11 years the federal judiciary remained all white. The Honorable Irvin Mollison, who, like Genevieve Cline, served on the U.S. Customs Court, became the first nonwhite Article III judge in 1945; he remained alone until the Honorable William H. Hastie joined the U.S. Court of Appeals for the Third Circuit in 1950.[13]

The Highest Court in this country was diversified by gender and race in reverse order. The Honorable Thurgood Marshall became the Court's

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10 *See* "Gender" and "Race and Ethnicity" *in Demography of Article III Judges, 1789-2020*, Federal Judicial Center, *available at* https://www.fjc.gov/history/exhibits/graphs-and-maps/race-and-ethnicity.

11 *See* "Gender," *supra* note 10.

12 *Ibid.*

13 *See* "Race and Ethnicity," *supra* note 10.

first African American justice in 1967, and Justice O'Connor became the Court's first woman justice in 1981. In 2009, Justice Sonia Sotomayor, born to Puerto-Rican parents, became the Court's first woman of color.

Certainly today's numbers at every level of the federal judiciary reflect vast improvement since 1928 and 1945. Even as we push to improve further, we should not fail to acknowledge the progress that we have made. But we also must not lose sight of the pressing need for more progress and a truly representative federal bench.

II.
Diversity Statistics for the U.S. Circuit Courts of Appeals

Because federal circuit courts of appeals are the courts of last resort for the vast majority of cases filed in the federal system, I want to focus my testimony today on them. The Supreme Court hears roughly 1-2% of the 7,000 or so cases that it is asked to review each year.[14] By contrast,

[14] "About the U.S. Courts of Appeals," United States Courts, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals (last visited March 22, 2021).

more than 60,000 cases were filed in federal circuit courts as recently as 2017.[15]

Here are a few general statistics on federal circuit court diversity reported by the Center for American Progress (CAP) as of November 18, 2019:[16]

- Overall, women comprise only about 26% of sitting circuit court judges. In fact, female judges do not comprise a majority of any U.S. Courts of Appeals and comprise half of the bench on only one court, the 11th Circuit, and only among that court's active judges. The 8th Circuit offers a particularly stark example of the lack of female judges, as it has only one woman serving on its bench.

- Among active judges, whites represent at least 80 percent of the bench on nearly half of all circuit courts. There is not a single federal circuit court whose majority comprises people of color.

- African American judges are entirely absent from two circuit courts. The 7th Circuit, which includes Chicago, Illinois, has no judges of color at all.

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[15] "Examining the Demographic Compositions of U.S. Circuit and District Courts," Center for American Progress (Feb. 13, 2020), *available at* https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/.

[16] *Ibid.*

- Asian Americans, who represent approximately 5.7 percent of the general population, make up just 4% of all sitting circuit court judges; they are entirely absent from seven of the thirteen circuit courts.

- Despite making up 18% of the U.S. population, Hispanic judges comprise only about 5.5% of sitting circuit court judges and 7 % of all active judges currently serving on U.S. Courts of Appeals. Worse still, five circuits have no actively serving Hispanic judges on the bench.

- There are no American Indian judges serving on federal circuit courts.

- Women of color comprise only about 4% of sitting circuit court judges and about 6% of active circuit court judges. Eight of the thirteen circuit courts—61.5%—have no women of color actively serving as judges. Women of color do not comprise one-fifth of any circuit court despite comprising 20% of the U.S. population. Only two circuit courts—the 9th and D.C. Circuits—have more than one sitting jurist who is a woman of color.

- Across the U.S. Courts of Appeals, there are five African American women judges, four Latina judges, and two Asian American women judges.

- Only one federal circuit court—the Federal Circuit—includes a judge who self-identifies as LGBTQ.

More detailed data for each federal circuit court of appeals follows in Exhibit A to these written comments.

III.
Conclusion

At the start of these remarks, I mentioned that Justice Powell first identified diversity as a compelling interest in *Bakke*. But *Bakke* spawned six separate opinions by the Justices. Justice Powell wrote the Judgment of the Supreme Court, but two different blocs of four justices joined separate parts of Powell's opinion.

Justice Marshall, who at that time had been on the Court a little over a decade, wrote separately to state that the Justices had not gone far enough. In his view, the Court should have recognized that the necessity of remedying the present effects of past discrimination is a compelling interest: "It is because of a legacy of unequal treatment," Justice Marshall explained, "that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the

positions of influence, affluence, and prestige in America."[17] "I cannot believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible."[18]

Justice Marshall's vision did not prevail; remedying the present effects of past discrimination never has been recognized by the Court as a compelling interest. I have to believe, however, that Justice Marshall would find heartening the fact that a subcommittee of the U.S. House of Representatives has commissioned today's hearing on diversity in the federal judiciary. I am honored to testify before this subcommittee.

My friend, District Judge Edward Chen, has written that "although a judge's duty is to recognize those predilections and control them, it is simply unrealistic to pretend that life experiences do not affect one's perceptions in the process of judging."[19] A powerful example of that reality is Senior Ninth Circuit Judge A. Wallace Tashima, who was forced into a Japanese internment camp during World War II, and who has noted

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17 *Regents of the University of California v. Bakke*, 438 U.S. 265, 401-02 (1978) (Marshall, J., concurring and dissenting in part).

18 *Ibid.*

19 Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Cal. L. Rev. 1109, 1120 (2003).

how much that unique and tragic experience has shaped his view of the law:

> Because we are all creatures of our past, I have no doubt that my life experiences, including the evacuation and internment, have shaped the way I view my job as a federal judge and the skepticism that I sometimes bring to the representations and motives of the other branches of government."[20]

Yet as the Center for American Progress has observed, "the importance of representation transcends particular cases and can improve not only the intellectual diversity and depth of judicial opinions but also the public's trust in the judiciary as a whole."[21] "Even absent clear injustices, questions over the courts' legitimacy arise when cases with outsize impacts on women, people of color, or LGBTQ individuals are decided by courts whose benches are demographically nondiverse."[22] Justice Elena Kagan, a former law clerk for Justice Marshall and the Supreme Court's fourth woman Justice, put the same sentiment this way: "People look at an institution and they see people who are like them, who

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20 A. Wallace Tashima, *Play It Again, Uncle Sam*, Law & Contemp. Probs., Spring 2005, at 7, 8.

21 *See supra* note 15 and accompanying text.

22 *Ibid.*

share their experiences, who they imagine share their set of values, and that's a sort of natural thing and they feel more comfortable if that occurs[.]"[23]

Federal judges are appointed for life. Many federal judges will spend several decades on the federal bench. Although federal judges are appointed through the political process, we do not want federal judges to be seen as political actors. It is integral to the proper functioning of the federal judiciary that federal judges be seen not only as completely independent, but also as representative of the communities that they serve.

Quite simply, federal judiciary represents the entire nation. It is vital that we have a diverse federal bench to match the ever-growing diversity of the United States.

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[23] Adam Liptak, "Sonia Sotomayor and Elena Kagan Muse Over a Cookie-Cutter Supreme Court," *The New York Times*, Sept. 5, 2016, *available at* https://www.nytimes.com/2016/09/06/us/politics/sotomayor-kagan-supremecourt.html.

EXHIBIT A[24]

U.S. Court of Appeals for the First Circuit

In looking at the combined populations of these four states and Puerto Rico, one finds that people of color and women comprise approximately 42 percent and 51.5 percent of the general population, respectively. According to the U.S. Census Bureau, African Americans and Asians each make up slightly more than 4 percent of the 1st Circuit's general population, while Hispanics represent about 32 percent. In comparison, the 1st Circuit Court comprises judges who are overwhelmingly white and male. For example, whites comprise 82 percent of sitting judges and 67 percent of active judges on that circuit court. There is only one African American judge and one Hispanic judge on the court—each comprising 9 percent of sitting judges and 17 percent of active judges. There are no Asian American or American Indian judges on the 1st Circuit Court of Appeals, nor are there any judges belonging to more than one race or ethnicity. And despite making up a majority of the

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[24] *See supra* note 15 and accompanying text.

general population, there are only two female judges on the court, comprising just 18 percent of all sitting judges and 33 percent of active judges on that court. There is only one woman of color—Judge Ojetta R. Thompson, who is African American—on the 1st Circuit.

U.S. Court of Appeals for the Second Circuit

Comparatively speaking, the 2nd Circuit Court is largely white and male. Whites comprise 77 percent of sitting judges and 69 percent of active judges on that circuit court. Among the court's sitting judges, three are African American, comprising 11.5 percent of sitting judges on that court. However, only one of the court's African American judges actively serves. There is one Hispanic judge on the court, representing 4 percent and 8 percent of sitting and active judges, respectively, and two Asian American judges on the 2nd Circuit, making up about 8 percent of sitting judges and 15 percent of active judges on that court. There are no American Indian judges on the 2nd Circuit Court of Appeals, nor are there any judges belonging to more than one race or ethnicity.

U.S. Court of Appeals for the Third Circuit

In looking at the combined populations of these three states and the Virgin Islands, one finds that people of color and women comprise approximately 33 percent and 51 percent of the general population, respectively. According to the U.S. Census Bureau, African Americans and Hispanics each make up slightly more than 12 percent of the 3rd Circuit's general population, while Asians represent about 6 percent. But this diversity is not reflected in the composition of the 3rd Circuit Court. Whites comprise 83 percent of sitting judges and 79 percent of active judges on that circuit court. There are only two African American judges on the court, comprising 8 percent of sitting judges and 14 percent of active judges. Although there are two sitting Hispanic judges on the 3rd Circuit, only one is active, comprising just 7 percent of the court's active judges. There are no Asian American or American Indian judges on the 3rd Circuit Court of Appeals, nor are there any judges belonging to more than one race or ethnicity. And despite making up a majority of the general population, there are only five sitting female judges and two active

female judges on the court, comprising just 21 percent of all sitting judges and 14 percent of active judges on that court, respectively.

U.S. Court of Appeals for the Fourth Circuit

In looking at the combined populations of these five states, one finds that people of color and women comprise approximately 38 percent and 51 percent of the general population, respectively. According to the U.S. Census Bureau, African Americans make up approximately 22 percent of the 4th Circuit's general population, with Asians and Hispanics representing 4 percent and 9 percent, respectively. Compared with this, the demographic makeup of the 4th Circuit Court is remarkedly nondiverse. For example, whites comprise 83 percent of sitting judges and 80 percent of active judges on the 4th Circuit. The court includes only two African American judges—comprising 11 percent of sitting judges and 13 percent of active judges—and just one Hispanic judge. There are no Asian American or American Indian judges on the 4th Circuit Court of Appeals, nor are there any judges belonging to more than one race or ethnicity.

U.S. Court of Appeals for the Fifth Circuit

The jurisdiction covered by the 5th Circuit is unique in that people of color comprise a majority of the jurisdiction's general population. In looking at the combined populations of these three states, one finds that people of color and women comprise approximately 55 percent and 50.5 percent of the general population, respectively.

Compared with its [] general population, the 5th Circuit Court of Appeals is the least racially and ethnically diverse circuit court in the country. For instance, despite making up just 45 percent of the general population, white judges comprise 85 percent of all sitting judges and 81 percent of all active judges on the 5th Circuit Court. Just two circuit judges are African Americans, comprising 8 percent and 12.5 percent of sitting and active judges on that court, respectively.

U.S. Court of Appeals for the Sixth Circuit

In looking at the combined populations of these four states, one finds that people of color and women comprise approximately 23 percent and 51 percent of the general population, respectively.

Overall, whites make up about 83 percent of the court's sitting judges and 69 percent of active judges. The three African American judges on the bench represent 10 percent and 19 percent of sitting and active judges, respectively.

U.S. Court of Appeals for the Seventh Circuit

In looking at the combined populations of these three states, one finds that people of color and women comprise approximately 30 percent and 51 percent of the general population, respectively. According to the U.S. Census Bureau, African Americans make up 11 percent of the 7th Circuit's general population, with Asians and Hispanics representing roughly 4 percent and 12 percent, respectively. Among all the federal circuit courts, the 7th Circuit Court of Appeals is unique in that all of its judges are white. There are no sitting or active judges of color on the 7th Circuit bench.

U.S. Court of Appeals for the Eighth Circuit

The 8th Circuit's general population is among the least diverse in the country, but whites are still strikingly overrepresented on the court compared with their share of the population. For instance, whites

comprise 94 percent of sitting judges and 91 percent of active judges on the 8th Circuit Court of Appeals. There is only one person of color on the 8th Circuit Court—Judge Lavenski R. Smith, who is an African American man. There are no Asian American, Hispanic, or American Indian judges presiding over the 8th Circuit Court, nor are there any judges belonging to more than one race or ethnicity.

U.S. Court of Appeals for the Ninth Circuit

In looking at the combined populations of these nine states and Guam and the Northern Mariana Islands, one finds that people of color and women comprise approximately 53 percent and 50.2 percent of the general population, respectively. According to the U.S. Census Bureau, African Americans make up about 5 percent of the 9th Circuit's general population, with Asians and Hispanics representing 12 percent and 31 percent, respectively.

U.S. Court of Appeals for the Tenth Circuit

In comparison, the 10th Circuit Court itself comprises judges who are overwhelmingly white: Whites comprise 91 percent of sitting judges and 83 percent of active judges on the court. People of color comprise

just 9 percent of the 10th Circuit's sitting judges and 17 percent of its active judges. The 10th Circuit Court includes only one African American judge and one Hispanic judge, each comprising about 4.5 percent of the court's sitting judges and 8 percent of its active judges. There are no Asian American or American Indian judges on the 10th Circuit Court of Appeals, nor are there any judges belonging to more than one race or ethnicity. And despite making up a majority of the general population, female judges comprise only about 23 percent of the circuit court's sitting judges and one-third of its active judges. Moreover, there are no women of color on the 10th Circuit bench, and none of the court's judges self-identify as LGBTQ.

U.S. Court of Appeals for the Eleventh Circuit

The 11th Circuit Court comprises judges who are mostly white: Whites make up 90 percent of sitting judges and 80 percent of active judges on that court. Put another way, people of color comprise just 10 percent of the circuit's sitting judges and one-fifth of its active judges. The court includes just one African American judge and one Hispanic judge. There are no Asian American or American Indian judges on the

11th Circuit Court of Appeals, nor are there any judges belonging to more than one race or ethnicity.

U.S. Court of Appeals for the D.C. Circuit

The D.C. Circuit Court is majority white and male. Whites comprise 72 percent of sitting judges or 64 percent of active judges on that court. Put another way, people of color comprise just 28 percent of the circuit's sitting judges or 36 percent of its active judges. Only two of the court's three sitting African American judges actively hear cases on a regular basis. And although there are two Asian American judges on the court, comprising 11 percent of sitting judges and 18 percent of active judges on the bench, there are no Hispanic or American Indian judges presiding over the D.C. Circuit Court of Appeals, nor are there any judges belonging to more than one race or ethnicity.

U.S. Court of Appeals for the Federal Circuit

The Federal Circuit Court has nationwide jurisdiction; it specializes in U.S. patent and trademark law and other matters specific to federal government administration. The court is overwhelmingly white and male, with 83% of sitting judges being white and 72% being male. People of

color comprise 17% of the court's sitting judges and 25% of active judges, with two Hispanic judges, one Asian American judge, and no African American or American Indian judges. The court has one woman of color judge, the Honorable Kara Farnandez Stoll, who is Latina, and one judge who identifies as LGBTQ, the Honorable Todd Michael Hughes.

Mr. JOHNSON of Georgia. Thank you, Judge Donald.

Next, we will hear from Professor Sen. Professor Sen, you may begin.

STATEMENT OF MAYA SEN

Ms. SEN. Chair Johnson, Ranking Member Issa, Members of the subcommittee, thank you so much for allowing me to speak with you today.

Judicial diversity is an important topic. Our Nation's courts are out of step with our country's demographics, and in other ways, fail to reflect the rich variety of educational and professional experiences that our legal profession has to offer. There is evidence, as many have noted, that greater diversity would strengthen the public's trust in the judiciary.

So, let me illustrate some of this. To give you one example, according to the U.S. Census, about 19 percent of all Americans identify as Hispanic, but only about 6 percent of our Court of Appeals judges and 10 percent of our District judges identify as Hispanic. 1.3 percent of Americans are Native American, but only two, not 2 percent, two of our judges out of about 800 Court of Appeals or District judges are Native American, and both actually were pretty recently appointed. Of course, half of Americans are women, and about 40 percent of lawyers are women, yet women comprise only about a third of Federal judges.

Now, I really do believe that diversity extends to a variety of life experiences, but we could also be doing better in this regard. So, for example, close to one in six Court of Appeals judges attended just one law school, and that was Harvard Law School, and one in four attended one of two law schools, Harvard or Yale Law School. Even more staggering, a whopping two out of three Court of Appeals judges attended one of the highly elite top 14 law schools, the most elite of the Nation's law schools.

Now, this is the effect of largely shutting out exceptional candidates from law schools considered less elite, and therefore, effectively penalizes those who, for whatever reason, choose to attend a less expensive school or actually who don't want to attend a law school clustered in a handful of cities.

The lack of diversity extends also to professional experiences, as others have noted. So, another large share of our Nation's judges, about one in three Court of Appeals judges, at least, have some sort of prosecutorial experience but only one in 45, so about 2 percent, list equivalent public defender experience.

Another example I like here is close to one in three Court of Appeals judges are professors of some sort. I like professors very much, some of my best friends are professors, but this is in no way reflective of the U.S. population or even reflective of graduates of elite law programs.

So, why are these discrepancies important? So, I will turn again and again to the research here. So, we have a lot of peer-reviewed studies showing that judges of different backgrounds decide cases in different ways. So, for example, a number of studies have shown that Black and White judges often differ towards criminal sentencing with White judges being harsher than Black judges against Black defendants.

Other studies have shown that White judges are less likely to vote in favor of claimants in voting rights cases or in affirmative action cases, although this is not always the case, and that some of these differences attenuate when White and Black judges sit together. It is an interesting finding.

We have some more evidence on gender. Male judges are more likely to side against plaintiffs in sexual discrimination cases, though not always, but differences also tend to attenuate when women sit alongside men, and there are actually dozens of peer-reviewed studies on these points. There is also lots of evidence, quantitative, scientific, and peer-reviewed journals, some of it from outside the courts, that diversity broadly supports healthy group decision-making, leading to the vigorous discussion of a variety of perspectives and something that is absolutely essential for something like the Court of Appeals.

So, one of the most relevant studies on this point showed that White decisionmakers engage more deeply in factual inquiries, they make fewer factual errors, and they are more amenable to the discussion of racism when they are in mixed race groups as opposed to all White groups. We would expect similar things to happen in our Federal Courts of Appeals and in our Federal District Courts.

I want to conclude by pointing out what several studies have shown which is that more diverse institutions do tend to garner stronger and more robust public support, and for the courts, which we know have no enforcement power, having strong public trust is incredibly important. Here the evidence does suggest that many people would have stronger beliefs in the institutional legitimacy of the courts with greater diversity.

So, again, thank you for your time, and I am honored to be here. Thank you.

[The statement of Ms. Sen follows:]

Written Testimony on the Importance of Judicial Diversity

Maya Sen
Professor of Public Policy
John F. Kennedy School of Government

Subcommittee on Courts, Intellectual Property, and the Internet
March 25, 2021 2pm ET

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee, thank you for allowing me to be here today to speak with you about the topic of judicial diversity on the nation's federal courts.

I am a Professor of Public Policy at the John F. Kennedy School of Government at Harvard University. I have a Ph.D. in Political Science, an A.M. in Statistics, and an A.B. in Economics, all from Harvard University, and a J.D. from Stanford Law School. I was previously a law clerk for the Hon. Ronald Lee Gilman of the U.S. Court of Appeals for the Sixth Circuit. My research is quantitative in its approach and focuses in part on diversity in the nation's courts and in the legal profession. I have written 34 published papers and two books on these and related topics.

The topic of judicial diversity is an important one, and it has only increased in public salience in the last decade. As I will discuss in this written testimony, our nation's courts are in some ways out of step with our country's demographics. They are also out of step in not reflecting the rich variety of educational and professional experiences the legal profession has to offer. The lack of diversity risks undermining the public's trust in the judiciary.

In what follows, I will describe the current status of diversity in the federal courts across three key categories: (1) demographic diversity, (2) diversity across educational institutions, and (3) diversity in professional experience. I will explain why diversity within the federal courts is important, focusing on what a more diverse judicial body brings to the table and how the courts being reflective of American society can generate more trust in the rule of law and stronger beliefs about the institutional legitimacy of the judiciary.

	White	Black	Hispanic	AAPI	Native American	Women
General Population	60.1%	13.4%	18.5%	5.9%	1.3%	50.8%
Court of Appeals	76.4%	10.4%	6.4%	6.4%	0%	34.3%
District Courts	72.9%	13%	9.6%	3.9%	0.3%	32.6%

Table 1: Basic demographics of U.S. judges compared to the general population (in percentages). Sources: U.S. Census Population Estimates (July 1, 2019), Federal Judicial Center Biographical Database (accessed March 17, 2021). Note: Some judges identify across multiple categories.

Status of Diversity on the U.S. Courts

To give some background, law schools did not admit women, religious minorities, and racial or ethnic minorities for much of American history, making the ability of people from these groups to enter into the judiciary nearly impossible. Thus, the first African American named to the federal bench, William Henry Hastie, was appointed in 1950, but it was not until 1961 that the second African American, James Parsons, was named. The first woman, Florence Ellinwood Allen, was appointed in 1934, and it was not until 1949 that the second woman, Burnita Shelton Matthews, was appointed. The first Mexican-American judge was appointed in 1961, but no Puerto Rican or Cuban-American judges were appointed until 1979 and 1992, respectively (Sen, 2017). The situation today is improved, although the judiciary remains far from reflective of the nation's population and, in some ways, has become less representative.

Demographic Diversity. On the issue of race and gender, consider Table 1, which shows the basic demographic characteristics of the 172 current active judges on the U.S. Courts of Appeals and the 613 active judges on the U.S. District Courts, as compared to the general population. (We do not know enough to say if the nation's federal judges are representative of the general population in terms of LGBTQ persons.)

Both appellate and district judges are more likely to identify as white and less likely to identify as Black, Hispanic, or Native American. (The only minority racial or ethnic group with a share larger than its general population share are Asian American appellate judges.) The largest discrepancy concerns the federal judges identified in the data as Hispanic. Here, despite the general population being around 18.5% Hispanic, only about 6.4% of appellate judges and about 9.6% of district judges identify as Hispanic. Also, the federal courts until recently had no judges of Native American descent, and the share of this group also does not reach the population share.

Gender is another area with a large discrepancy between the federal courts and the general population. As Table 1 shows, about half the general population is women, but only about 34% of appeals court judges and 33% of district judges are women. This is also unrepresentative of the gender balance among U.S. law school graduates, where women have

	Harvard	Yale	All "T14" Law Schools	UT-Austin	Univ of Florida
Court of Appeals	15.1%	11.6%	64.5%	0.6%	0%
District Courts	9.0%	5.4%	34.3%	3.8%	2.0%

Table 2: Educational backgrounds of U.S. judges (as the percentage of judges who attended). Sources: Federal Judicial Center Biography (last accessed March 21, 2021).

comprised over 40% of yearly J.D. recipients since at least 1985, or among members of the legal profession writ large, which is approximately 38% women.[1]

Educational Diversity. Another area of concern is that many of the judges who sit on our nation's courts do not represent the life experiences of many Americans. Granted, all judges should have a law degree and professional experience relevant to their work as judges. Even so, a wealth of important educational and professional experiences remain poorly reflected in the judicial branch.

For example, Table 2 shows the educational backgrounds of current active federal judges, which lean very heavily toward the elite Top 14 ("T14") law schools.[2] Indeed, about 15% of all active appellate judges attended just one law school, Harvard Law School, and nearly 27% – more than 1 in 4 – attended either Harvard or Yale. Close to 2 out of 3 appellate judges – an overwhelming majority – attended one of the highly elite T14 schools.

Of course, very smart and talented people go to school in cities such as Cambridge and New Haven, but focusing on such a narrow bandwidth of schools overlooks the wealth of experiences from graduates of other excellent universities, especially those that are state flagship law schools or those outside of the I-95 corridor. Consider, for example, the University of Florida Law School. Despite being one of the most prestigious law schools in the third-largest state, no appellate judges and only 12 district judges (2%) attended this law school. Another example is the excellent law school at the University of Texas, which counts among its graduates only one active appellate judge and 23 active district judges (3.8%).

Professional Diversity. Perhaps the most surprising area concerns the professional experience of federal judges, shown in Table 3.[3] The table shows that a significant majority of active federal judges come to the bench with private practice experience, many of them

[1] `https://www.census.gov/library/stories/2018/05/women-lawyers.html`.

[2] The T14 law schools are, in alphabetical order, Columbia, Cornell, Duke, Georgetown, Harvard, NYU, Northwestern, Stanford, Berkeley, University of Chicago, University of Michigan, University of Pennsylvania, University of Virginia, and Yale.

[3] To create the table, I looked for exact phrases used to describe the judges' professional backgrounds by the Federal Judicial Center. For example, I recorded how many active judges' biographies contain the expression "Private Practice" in the description of their professional experience. This does not capture all judges with some sort of private practice experience, nor does it perfectly calibrate among different kinds of experiences, but it does capture the prevalence of these exact mentions.

	Private Practice	U.S. Attorney	Attorney General	Professor	Military	Public Defender	Staff Attorney
Court of Appeals	89.5%	28.5%	21.5%	30.2%	7.6%	2.3%	6.4%
District Courts	87.6%	33.6%	9.1%	14.8%	10.9%	7.7%	5.2%

Table 3: Percent of judges with exact phrase mentioned at least once in their Federal Judicial Center professional profile. Sources: Federal Judicial Center Biography (last accessed March 22, 2021). Note: "Military" includes judges whose biographies contained any mention of "Army," "Navy" (or "Naval"), "Marine," "Coast Guard," or "Air Force."

having previously worked as corporate lawyers. In addition, a large number have some sort of prosecutorial experience – such as experience working as a U.S. attorney, as a assistant U.S. Attorney, in a U.S. Attorney's office, or in another kind of attorney general's office (for example, in a state attorney general's office). Close to a third of appellate judges have experience working in legal academia as full-time or adjunct professors, and, while I like professors very much, this is extremely unrepresentative of the U.S. general population or, indeed, of the legal profession.[4]

While I am in strong support of members of the federal judiciary having these kinds of experiences (including corporate practice and prosecutorial experience), the lack of representation in other areas is striking. For example, consider the proportion of judges whose biographies include the phrase "Public Defender." Only about 2.3% of federal appeals judges and about 7.7% of federal district judges list this kind of experience in their professional profile, a statistic wholly out of balance compared to the share of judges with prosecutorial experience. Another example is judges whose biographical profiles list "Staff Attorney," which is a phrase often used to describe legal positions with nonprofit organizations. Here, only 6.4% of appellate judges and 5.2% of district judges list this kind of experience, much lower than those who list private practice, U.S. attorney, or even academic experience.

Importance of Diversity

With these statistics in mind, it is important to explain the reasons why such discrepancies might matter and why a broadly diverse judiciary is a good thing. I consider three reasons, which are that (1) judges of different backgrounds may decide cases differently, (2) evidence shows that diverse groups of decisionmakers reach better-justified decisions, and (3) a diverse judiciary can help strengthen the public's trust in the courts and in the decisions they reach. I will go through these in order.

[4]The table shows correspondence between the share of judges who are military veterans and the share of veterans in the general population (around 7 percent). This is very important, as military experience brings an important perspective to a body that often rules on the scope of military powers. However, many of these veterans are older judges, meaning that this share is likely to fall over time.

Benefit #1: Judges of Different Backgrounds Bring Different Perspectives

First, diversity broadly impacts the kinds of decisions produced by our nation's courts. The scholarship on this is wide-reaching and varied and, although it points to different contexts and outcomes, the message is that judges from different backgrounds often do rule differently from one another, particularly when cases involve components of those differences. This suggests that we should be thinking of diversity as implicating the entire judiciary, not just individual judges.

Diversity in Racial/Ethnic Background. For example, a large set of papers have compared the decisions of Black judges to those of white judges within the context of criminal justice, finding differences in how these judges sentence criminal defendants. Some early studies have found that Black district judges are harsher on defendants, while later studies mostly find that white district judges are harsher on defendants.[5] A closely related research area has shown differences in voting in non-criminal issue areas where race or ethnicity is salient. For example, Cox and Miles (2008) find that white federal appeals judges are less likely to vote in favor of plaintiffs in Voting Rights Act cases than are Black judges. Kastellec (2013) finds that white federal appeals judges are less likely than Black judges to vote in support of affirmative action programs. This finding is consistent with Weinberg and Nielsen (2011), which finds that white federal district judges are more likely to dismiss civil rights employment claims than are non-white judges.

There have been fewer studies with regards to Latino/a, Asian American and Pacific Islander, and Native American judges since their numbers are so small. Morin (2014) examines black and Latino/a federal appeals judges' voting in employment discrimination cases, finding that Latino/a judges are less likely than are white judges to rule in favor of claimants. An older study, Holmes et al. (1993) find that Latino/a judges are not impacted by defendant ethnicity, while white judges sentence non-Latinos more leniently. Haire and Moyer (2015, p. 30-32) finds no statistically distinguishable differences between Latino/a and white federal appeals judges on a host of issues after controlling for ideology. To date, there are no studies exploring decision-making by Asian American or Native American judges, again likely due to the relatively low numbers.

Diversity in Gender. There are similar patterns in terms of gender diversity. (We have no information on LGBTQ persons.) For example, Farhang and Wawro (2004) find that, in employment discrimination cases, courts of appeals judges who are men are less likely

[5]The studies here are numerous and have explored different outcomes (Harris and Sen, 2019). Steffensmeier and Britt (2001) finds that Black judges were slightly more likely to sentence defendants to prison, regardless of the defendant's race. Scherer (2004) examines search and seizure cases and finds that white appellate judges are less willing than their Black counterparts to accept Black defendants' claims of police misconduct. More recently, Cohen and Yang (2019) find that white district judges issue longer criminal sentences and that Black judges issue shorter ones. Some studies have found no differences (Abrams, Bertrand and Mullainathan, 2012).

than women to favor plaintiffs, and that having at least one woman on the three-judge panel increases the probability that the panel will rule for the plaintiff. These findings are supported by Peresie (2005), which examines federal appeals judges' voting on Title VII sex discrimination and sexual harassment cases and finds, in addition to effects on the panel, that male judges are less likely than female judges to side with the plaintiff. In another influential study, Boyd, Epstein and Martin (2010), finds that male federal appeals judges are less likely than female judges to vote in favor of women in gender-related cases. Gill, Kagan and Marouf (2019) find that all-male appeals panels hearing immigration appeals are much harsher with male litigants than female litigants (but that mixed-gender panels are not).

However, these are some mixed findings. Haire and Moyer (2015)'s analyses of federal appeals judges' overall voting records concludes that judges' gender has no relationship to voting after controlling for ideology (pp. 47–49). The authors also see no difference across specific issue areas, with the exception of sex discrimination cases, which, interestingly, reveals that older female judges are more sympathetic to plaintiffs than younger female judges.

Diversity Across Other Characteristics. Scholars have examined other kinds of personal characteristics as well. Songer and Tabrizi (1999) find that evangelical state supreme court judges are more conservative across social issue than are mainline Protestant, Catholic, and Jewish judges, while Pinello (2003) analyzes voting on LGBTQ-rights issues, finding that Jewish judges are more inclined to favor these issues and Catholic judges are less so, both in comparison with Protestant judges. Shahshahani and Liu (2017) examine federal courts of appeals cases involving religious freedom claims, finding that Jewish judges are more likely to favor claimants.

In terms of professional experience, the work is more limited, probably owing to the homogeneity in professional backgrounds of federal judges. However, interest in this is growing, and one recent non-peer reviewed study, Shepherd (2021), has found that judges who were previously corporate lawyers or prosecutors are significantly more likely than other types of judges to rule against workers in employment cases.

Benefit #2: Diversity Contributes to Healthy Decisionmaking

A second benefit to greater diversity, broadly construed, is that it can lead to the discussion of more numerous and more varied viewpoints and therefore promote better group decisionmaking – a consideration particularly salient for the federal courts of appeals.

Much of this research comes from outside the study of the courts, but has strong implications for how the judiciary functions. For example, Sommers (2006) finds that white decisionmakers engage more deeply in factual inquiry, make fewer errors, and were more amenable to the discussion of racism when in mixed-race versus all-white groups. Similarly, Levine et al. (2014) finds that teams tasked to make financial decisions make better choices when their

teams are racially or ethnically diverse. Similar findings extend to gender (as opposed to racial diversity) (Díaz-García et al., 2013) and, presumably, also to different professional and educational backgrounds.

We see suggestive evidence of this on the courts, with studies showing that the impact of people of color and women on the bench can extend to their peers, most apparent for those sitting on three-judge panels in the federal courts of appeals. Studies have shown that appeals panels with no Black judges are less likely to rule in favor of affirmative action programs than are panels with at least one Black judge (Kastellec, 2013); studies have also shown that panels with no women are less likely to rule in favor of plaintiffs in sex discrimination cases than are panels with at least one woman (Boyd, Epstein and Martin, 2010).[6]

Judges have also argued in favor of these points. For example, the first Asian American appointed to the Northern District of California, Judge Edward M. Chen, noted that diversity "affects the direction and effectiveness of any organization by encouraging richer debate and more thoughtful reflection and discussions within the organization. Diversity facilitates the expansion of an organization's agenda and broadens its perspective" (Chen, 2003, p. 1115).

Benefit #3: Diversity Enhances Respect and Legitimacy

The last and perhaps most important reason for an increasingly diverse judicial bench is the possibility of increased and more widespread respect for the rule of law and of stronger beliefs in the institutional legitimacy of the courts. More diverse courts – ones that reflect the population across demographics, education, and professional and personal experience – have the possibility of engendering greater goodwill from the population they serve.

On this, there is plenty of qualitative evidence. As Judge Chen, observed, "It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority." How can the public have confidence and trust in such an institution if it is segregated–if the communities it is supposed to protect are excluded from its ranks?" (Chen, 2003, p. 1117).

There is also quantitative evidence that supports these observations. For example, Scherer and Curry (2010) find that greater representation of African Americans on the courts directly leads to greater feelings of legitimacy for the institution among African Americans. Although

[6]In related findings, other studies have considered the positive effect of diversity on judicial processes. For example, Boyd (2013) finds that civil cases assigned to women district judges are more likely to settle, and to settle more quickly, than cases assigned to men. Haire and Moyer (2015, p. 52-53) look at three-judge federal appeals panels and find that opinions authored by women are longer, suggesting a greater attempt to incorporate a variety of perspectives.

this study was focused primarily on representation in terms of race, and on African Americans specifically, I believe that these and other studies are certainly suggestive that we would see similar positive effects for other characteristics, such as gender, educational backgrounds, and professional experience.

Conclusion

It is an honor to speak with you today. I believe that we have an opportunity to make our courts more diverse across a variety of respects – including across race, gender, religion, education, and professional experience. I think that doing so will benefit decisionmaking across the entire judiciary and shore up the institutional legitimacy of courts.

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Mr. JOHNSON of Georgia. I am sorry. I was on mute. Thank you, Professor Sen.

Commissioner Kirsanow, you may now begin. Commissioner Kirsanow, if you will unmute yourself.

STATEMENT OF PETER N. KIRSANOW

Mr. KIRSANOW. Apologies. I thought I was unmuted.

Thank you, Chair Johnson, Ranking Member Issa, and Members of the committee. I am a partner in the labor employment practice of Benesch, Friedlander, and a member of the U.S. Commission on Civil Rights. I am appearing in my personal capacity.

The U.S. Commission on Civil Rights was established pursuant to the Civil Rights Act of 1957 to, among other things, investigate denials of equal protection on the basis of race and other protected characteristics. Today's hearing is about the importance of diversity in Federal judiciary.

It is a conclusory statement, though it is not one that I necessarily disagree with. As a matter of preliminary inquiry, there may have been a colorable argument that it would be salutary to increase the number of, say, Black State court judges in 1957 when the commission was created and when racial discrimination was both legal and rampant.

It is at least defensible that the presence of, say, Black judges might have assured litigants that their matters would be fairly and impartially adjudicated, but even then, any inclination towards expanding judicial diversity should always have been consistent with the overriding principle of non-discrimination. Today, some urge that we should diversify the Federal judiciary to improve the, quote, "legitimacy of the courts among the public."

Taken to its logical conclusion, however, this might actually undermine public confidence in the judiciary. It suggests, whether subtly or overtly, that unless someone appears before a judge who shares your pigmentation or ethnic background, you cannot trust that your case will be fairly adjudicated.

Perpetuating that notion itself derogates public faith in the judicial system. Indeed, just yesterday, two U.S. Senators announced that they will not vote to confirm any diverse—non-diverse nominees. As Chief Justice John Roberts stated in *Parents Involved* v. *Seattle Schools*, the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

I am aware of the studies that note that there are differences in decision-making based on race and sex. I am unaware, however, of any credible studies that show that a more diverse judiciary would yield, quote, "better decisions." It is unclear how one would even measure something like that. One could compare recent reversals, I suppose, but that won't particularly be helpful.

For example, according to the Center for American Progress, the Ninth Circuit is the most reversed appellate circuit that has neither the greatest disparity between percentages of White judges compared to the general population in the circuit nor the smallest disparity. It also seems somewhat unlikely that diversifying the Federal judiciary would lead to appreciably different outcomes even if one believes the judges' decisions may be influenced by explicit or implicit bias.

The decisions of Federal court judges in a particular tend to pertain to fairly technical issues. For example, do White judges and Black judges have different interpretations of standing requirements, section 1 of the Sherman Act, section 8(B)3 of the National Labor Relations Act. There is a possibility that White judges and Black judges could, on average, come to different decisions in some cases. That may not be because of their race, but perhaps because Black judges may be more likely to have been appointed by Democrats or to have, say, progressive political views.

Perhaps some Black judges are more disposed toward Black plaintiffs in discrimination cases, but they might be more likely to be inclined toward any plaintiffs in discrimination cases. In other words, the judges' race is simply an imperfect proxy for etiology. Race may also be an imperfect proxy for class.

Well-intended but misguided policies have contributed to the dearth of diverse judges in another way. The academic achievement gap between Black and Hispanic students on one hand and White and Asian students on the other is profound. This gap begins early in students' academic careers, and it is because of this gap that universities and law schools give significant admissions preferences to Black and Hispanic students. Those preferences actually end up harming many of the supposed beneficiaries who are then mismatched with respect to their peers.

Some struggle in law school which then makes it more difficult for them to obtain the clerkships, Law Review Memberships, other prestigious positions in law firms and government. They are often predicates to becoming a Federal judge.

Increasing the diversity of the Federal bench should not override equal treatment under the law, nor should it trump proficiency and excellence. Casting a wide net in the application process to ensure as many diverse candidates as possible are vetted is consistent with the imperative nondiscrimination while increasing the probability of selecting more diverse candidates.

Lady Justice is blindfolded. The Administration of justice should be colorblind. No race, ethnicity, or sex has a lock on judicial excellence. It is respectfully submitted that Members of the Federal judiciary should be selected on reliable indices of legal acumen, judicial temperament, and the content of their character rather than the color of their skin.

Thank you, Mr. Chair.

[The statement of Mr. Kirsanow follows:]

Testimony of Peter N. Kirsanow

Partner, Benesch, Friedlander

Before The House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet

The Importance of Diversity in the Federal Judiciary

March 25, 2021

Today's hearing is about diversity in the federal judiciary. As a preliminary matter there may have been a colorable argument that it would be salutary to increase the number of, say, black state court judges in years ago when racial discrimination had been rampant. It is at least defensible to argue that the presence of black judges might help build confidence among black litigants that their matters would be fairly and impartially adjudicated. But even then, any inclination toward expanding judicial diversity should have been consistent with the overriding principle of non-discrimination.

Today, some continue to urge that we should diversify the federal judiciary in order to increase the "legitimacy" of the courts among the public. Taken to its logical conclusion, however, this might actually undermine public confidence in the judiciary. It suggests, whether subtly or overtly, that unless one appears before a judge who shares your skin color and ethnic background, you cannot trust that your case will be fairly adjudicated. Perpetuating that notion derogates public faith in the judicial system.

Some may respond that that people need to see themselves represented among members of the bench. However, the average citizen is unaware of the identities of most, if not all, of the federal judges in the district or circuit, and even less aware of the racial composition of such courts. Most only know the race of a federal judge before whom they happen to appear. If we encourage the belief that you need to "see yourself" represented on the bench, we are only going to undermine faith in the fairness of judicial decisions overall.

I am concerned that some of those who advocate for a more racially diverse federal judiciary do so because they believe judges should issue decisions based on perceived racial or ethnic interests. For example, in 2019 the Center for American Progress issued a report entitled, "Building a More Inclusive Federal Judiciary." It cautioned:

> There is a common misconception that descriptive and substantive representation are intrinsically linked. The theory goes that by improving descriptive representation, better substantive representation will automatically follow. But this is not always the case. . . . [C]onsider Justice Clarence Thomas, the second African American judge confirmed to the Supreme Court. . . . he has been a staunch opponent of affirmative action programs and has voted to eliminate important voting rights protections that were designed to protect people of color from voter suppression. Justice Thomas offers a good lesson against making assumptions about the viewpoints and jurisprudential approaches of judges of color or those from other underrepresented groups. He also presents a good reminder that when it comes to improving the diversity of members of the bench, the United States needs judges who represent underrepresented groups both descriptively and substantively.

Apparently, the argument is that Justice Thomas does not share typical progressive views of the law and, therefore, he does not "substantively" represent African-Americans. This attitude has

contributed to the dearth of minority judges on the federal bench. For example, we might have had a Hispanic Supreme Court justice years before Justice Sotomayor's nomination, but Senate Democrats subjected Miguel Estrada to a no-holds-barred confirmation fight, fearing that if he was confirmed to the federal bench he would soon be nominated to the Supreme Court.

Well intended but misguided policies have contributed to a supposed dearth of diverse judges in another way. There is a profound academic achievement gap between black and Hispanic students on the one hand and white and Asian student on the other. This gap begins early in students' academic careers. It is because of this gap that universities and law schools give admissions preferences to black and Hispanic students. Those preferences end up harming many of the beneficiaries, who are "mismatched". They struggle in law school, which makes it more difficult for them to obtain the clerkships and other prestigious positions in law firms and government that are necessary if one wishes to become a federal judge.

I am unaware of any credible studies that show that a more "diverse" judiciary would yield "better" decisions. It is unclear how one would even try to measure that. One could compare rates of reversals, but that will not be particularly helpful. For example, according to the Center for American Progress, the Ninth Circuit is the most reversed appellate circuit, but it has neither the greatest disparity between the percentage of white judges compared to the population in its circuit, nor the smallest disparity.

It also seems unlikely to me that diversifying the federal judiciary would lead to appreciably different outcomes, even if one believes that judges' decisions are influenced by explicit or implicit bias. The decisions of federal appellate judges, in particular, tend to pertain to highly technical questions. Do white judges and black judges have different interpretations of standing requirements, Section 1 of the Sherman Act or Section 8 (a)(3) of the National Labor Relations Act

There is a possibility that white judges and black judges could, on average, come to different decisions in some cases. Is that because of their race, or because black judges may be more likely to have, say, progressive political views? Perhaps black judges are more disposed toward black plaintiffs in a discrimination case, but perhaps they would be more likely to be inclined toward *any* plaintiffs in a discrimination case

It might be argued that even if, e.g., black judges are more likely to give a lenient sentence to defendants because of the judges' progressive views and not out of concern for black defendants, blacks will still benefit. But which black people? The black gang member who is on trial? Or the black mother maimed in a drive-by shooting?

Increasing the diversity of the federal bench should not override equal treatment under the law, nor should it trump proficiency and excellence. Casting a wide net in the application process to insure as many diverse candidates as possible are vetted is consistent with the imperative of nondiscrimination while increasing the probability of selecting more diverse candidates.

Mr. JOHNSON of Georgia. I thank you, Mr. Kirsanow.
Last but not least, we will hear from Professor Hawkins.
Professor Hawkins, you may now begin.

STATEMENT OF STACY HAWKINS

Ms. HAWKINS. Thank you so much to Chair Nadler, Chair Johnson, Ranking Member Issa, and the other distinguished Members of this subcommittee. Thank you for the opportunity to testify here today.

As has been said, I am a Professor of Law at Rutgers Law School, and after more than a decade in private practice, I have spent the last decade at Rutgers writing and teaching about the intersection of law and diversity. I have authored numerous articles on the subject and several about judicial diversities, specifically. So, I would like to say that I am delighted that the House is taking up this issue, and I am honored to offer this testimony here today.

I want to begin with some data about the diversity, or lack thereof, on the Federal bench. From 1789 until 1960, there were only two White women and another two men of color appointed to the Federal bench. Perhaps not surprising to anyone here, the civil rights era seemed to mark a key turning point when we began to acknowledge, albeit tacitly, that the judiciary must begin to reflect the diversity of our citizens to be viewed as legitimate.

Then in 1977, this acknowledgment was made explicit by President Jimmy Carter who announced his commitment to diversifying the Federal bench. Carter went on to appoint more than twice the number of women and minority judges to the bench than had been appointed during the previous four Administrations combined. It was a watershed moment.

In 1981, Ronald Reagan broke another historic barrier when he appointed Sandra Day O'Connor as the first female justice to the Supreme Court. Then following Reagan, each of the next four successive Presidents across both parties built on their political predecessors' progress in diversifying the Federal bench.

However, after nearly 3 decades, that trend receded for the first-time during Donald Trump's presidency. Perhaps most notably, none of the 54 Circuit Court judges appointed by Trump were Black despite representing the largest share of sitting minority judges on the bench, and only one was Hispanic, the second largest minority group among sitting judges.

This reversal of modern presidential practice is troubling for two reasons. First, as many have said, diverse judges secure the trust necessary to enhance judicial legitimacy. Second, diverse judges ensure judicial accountability to our increasingly diverse Nation.

Opinion polls measuring public trust in our Federal Government reveal that while the judiciary remains the most well regarded of the three branches, this trust is not equally distributed. One study found that only a quarter of White respondents but more than three-quarters of Black respondents believe the justice system treats Blacks unfairly. This concern for fairness threatens the effective functioning of our judiciary which relies on people's trust in order to legitimize the rule of law.

Now, many people point to increases in politically polarized decision-making as the source of citizens' eroding trust in the judicial branch. Research, however, instead demonstrates that it is the appearance of fairness in the judicial process itself more than substantive outcomes that fosters trust in our judicial system. One way to promote this sense of fairness is to ensure that judicial decisionmakers reflect the diverse communities they serve. As one judge observed about the judicial process, quote, "you want for this thing to not only be fair, to look fair," unquote.

Research shows that when judicial decisionmakers are diverse, not only do they engender trust in the judicial process, but they also enhance accountability to minority communities, particularly on issues of high racial salience has been mentioned in cases like voting rights or discrimination. One study found that plaintiffs in racial harassment cases had higher success rates when their cases were decided by a Black judge than when their case was decided by either a White or a Hispanic judge. Contrary to what has been stated, these findings held even after controlling for the judge's political affiliation.

The last point that I want to make before concluding my remarks is that the judiciary lacking in diversity is inconsistent with our ideals of representative democracy. More importantly, perhaps, today it is increasingly out of step with broad public support for a government more representative of our diverse Nation. Diversity on the Federal bench is not just about curing a crisis of judicial legitimacy. It is also about preserving the promise of government of the people, by the people, and for the people.

Thank you, and I look forward to your questions.

[The statement of Ms. Hawkins follows:]

The Importance of a Diverse Federal Judiciary

HEARING TESTIMONY

House Committee on the Judiciary

Subcommittee on Courts, Intellectual Property, and the Internet

Thursday, March 25, 2021, 2:00 p.m.

Statement of Stacy Hawkins
Professor of Law, Rutgers Law School

I. Introduction

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee: Thank you for the opportunity to testify today regarding "The Importance of a Diverse Federal Judiciary." My name is Stacy Hawkins, and I am a Professor of Law at Rutgers Law School. In the decade prior to joining the Rutgers Law School faculty, I advised clients in both the public and private sectors on developing and implementing legally defensible diversity policies and programs. I have spent the last decade at Rutgers teaching and writing about the intersection of law and diversity. In that time I have authored numerous articles addressing the importance of diversity as a key principle underlying both our ideals of representative democracy and our constitutional guarantee of equality. Several of my most recent articles are about the importance of judicial diversity specifically, and I would like to highlight a few key points from those articles.

II. The History of Federal Judicial Diversity

A. *1789 - 1960*

I want to begin with some data about the diversity of the federal judiciary. It will likely come as no surprise that beginning with the first presidential appointment to the Supreme Court in 1789 and continuing through 1933, every judge appointed to the federal bench by every president from George Washington to Herbert Hoover was a white man.[1] It was not until 1934 that President Franklin Delano Roosevelt appointed the first woman to a federal court of general jurisdiction.[2] Roosevelt also appointed the first person of color to the federal bench in 1937.[3] Prior to the Civil Rights Movement, the number of women and minority judges appointed to the federal bench remained exceedingly low. From 1934 until 1960, of the 1337 judges appointed to the federal bench, only two were white women and another two were men of color.[4]

B. *1961-2016*

However, beginning with John F. Kennedy, the rate of racial, ethnic, and gender diverse judges appointed to the federal bench rose appreciably.[5] Although he served less than three years in office, Kennedy appointed five minority men and one white woman to the federal bench.[6] When Lyndon B. Johnson assumed the presidency after Kennedy's assassination, Johnson appointed twelve minority judges and three women judges, including the first woman of color, to the federal bench.[7] It was Johnson who appointed the first minority Justice to the United States

1. *See* Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELEY LA RAZA L.J. 92, 99 (2016).
2. Roosevelt appointed Florence Ellinwood Allen, a white woman, to the Court of Appeals for the Sixth Circuit on March 6, 1934 and she was confirmed by the senate on Marcy 15, 1934. *Id.* at 101. Calvin Coolidge had previously appointed Genevieve Rose Cline, also a white woman, to the U.S. Customs Court. *Id.*
3. *Id.* Roosevelt appointed William H. Hastie to serve on the federal district court for the U.S. Virgin Islands. Although Hastie, a black man, served on the court for only two years, in 1949 he was appointed by President Truman to serve on the Third Circuit Court of Appeals. *Id.* at 101–02.
4. *Id.* at 109.
5. *Id.* at 103.
6. *Id.*
7. *Id.* at 111. Johnson appointed Constance Baker Motley to serve on the federal district court in New York. *Id.* at 103–04.

Supreme Court when he nominated, and the senate confirmed, Justice Thurgood Marshall in 1969. Indeed, the Civil Rights Era seemed to mark a key turning point wherein we began to acknowledge, albeit tacitly, that the judiciary must, even nominally, reflect the diversity of our citizens in order to be viewed as a legitimate institution of government in our pluralist democracy.

Then in 1977, this acknowledgment was made explicit when President Jimmy Carter announced his commitment to diversifying the federal bench.[8] Carter appointed forty women judges and fifty-seven minority judges (including eight women of color) to the federal bench during his single four-year term.[9] This was more than twice the number of women and minority judges that had been appointed during the previous four administrations combined.[10] It was a watershed moment that ushered in our nation's reckoning with the relationship between diversity on the bench and legitimacy for the courts. Ronald Reagan too broke a historic barrier in 1981 by appointing Sandra Day O'Connor as the first female Justice of the Supreme Court.[11] Reagan's successor, George H.W. Bush, improved on his predecessor's diversity performance significantly, increasing the share of women judges he appointed by 138 percent over Reagan and increasing the share of minority judges he appointed by 59 percent.[12]

It was Bill Clinton who once again renewed the express mandate of diversifying the federal bench by proclaiming his commitment to make his appointments "look like America."[13] Most notably Clinton added a second female Justice to the Supreme Court with his appointment of Ruth Bader Ginsburg in 1993. While his successor, George W. Bush, did not increase the diversity of the federal judiciary as much as Clinton did, Bush's appointments were more diverse than both of his Republican predecessors. In fact, continuing the Carter and Clinton legacies of making explicit what often had been only tacitly acknowledged since the Civil Rights Era, George W. Bush reportedly insisted that his judicial nominees reflect adequate racial and gender diversity.[14]

But by far the most notable increase in the diversity of the federal judiciary came during Barack Obama's presidency. He made no formal commitments to diversity, but his actions spoke louder

8. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 594 (2011).

9. Stubbs, *supra* note 1, at 111. By contrast, Nixon, Carter's immediate predecessor, appointed nine men of color and one white woman to the bench. *Id.* at 104, 111. Ford, who assumed the presidency when Nixon resigned, appointed only a quarter of the number of judges appointed by Nixon and they included six men of color and one white woman. *Id.* at 111.

10. *Id.*

11. *Id.* at 107.

12. George H.W. Bush appointed nineteen minority judges (including five women) and thirty-six women judges (including five minorities) to the federal bench during his single term. *Id.* at 108, 111.

13. Scherer, *supra,* note 8, at 601.

14. *See* Li Zhou, *Trump Has Gotten 66 Judges Confirmed This Year. In His Second Year, Obama Had Gotten 49*, VOX (Dec. 27, 2018, 7:10 AM), https://www.vox.com/2018/12/27/18136294/trump-mitch-mconnell-republican-judges [https://perma.cc/4ZV8-23K9]; *see also* Catherine Lucey & Meghan Hoyer, *Trump Choosing White Men as Judges, Highest Rate in Decades*, CHI. TRIB. (Nov. 13, 2017, 6:22 AM), https://www.chicagotribune.com/news/nationworld/politics/ct-trump-blacks-judges-20171113-story.html (quoting Bush II's Attorney General, Alberto Gonzalez, saying that Bush II pointedly requested that the number of women and minority judicial nominees be increased).]

than any words.[15] Obama appointed more women and minority judges to the federal bench than Reagan and both Bushes *combined*.[16] He appointed 137 women judges and 118 minority judges to the bench, including more Asian American women than all forty-three of his presidential predecessors *combined*.[17] Obama was the first president to appoint two women to the Supreme Court, one of whom was also the first Hispanic Justice appointed to the nation's highest Court.[18] These appointments tripled the number of women on the Supreme Court, setting a new high water mark and making the Court more closely resemble the gender demography of the country than ever before.[19]

C. *Trump's Presidency*

When Justice Ginsburg died in September 2020, then President Donald Trump appointed Justice Amy Coney Barrett to replace her, maintaining the historic female representation on the Supreme Court and at least tacitly acknowledging the importance of gender diversity on the Court.[20] However, the overall trend of increasing judicial diversity that had occurred across successive presidential administrations since the Civil Rights Era receded during Trump's presidency. An analysis of Trump's judicial appointments from demographic data collected by the Federal Judicial Center suggests that of the 226 judges confirmed during Trump's single term in office, only thirty-two (14%) were minorities and fifty-five (24%) were women, making his appointees nearly ninety percent white and more than seventy-five percent male.[21] Perhaps most notably, none of the fifty-four Circuit Court judges appointed by Trump during his four years in office were African American, despite representing the largest share of sitting minority judges on the federal bench, and only one was Hispanic, the second largest minority group among sitting federal judges.[22]

Rorie Solberg and Eric Waltenburg, who study the extent to which judicial appointments have increased, decreased, or maintained the diversity of the federal bench across successive presidential administrations, reported that in his first two years in office Trump nominated the

15. Perhaps Obama's failure to expressly affirm his commitment to judicial diversity can be explained by the research showing that women and minorities suffer negative consequences, relative to their white male peers, from exhibiting diversity-valuing behavior. *See* David R. Hekman et al., *Does Diversity-Valuing Behavior Result in Diminished Performance Ratings for Non-White and Female Leaders?*, 60 ACAD. MGMT. J. 771 (2017).]

16. Stubbs, *supra,* note 1, at 109.

17. *Id.* at 109, 111.

18. Obama's first Supreme Court nominee was Sonia Sotomayor, whom he nominated in 2009 to replace retiring Justice David Souter. Obama's second Supreme Court nominee was Elena Kagan, whom he nominated in 2010 to replace retiring Justice John Paul Stevens. *See* Supreme Court Biographies, https://supremecourt.gov/about/biographies.aspx.

19. Reagan's appointee, Justice Sandra Day O'Connor retired from the bench in 2006 during George W. Bush's second term. Although Bush initially nominated Harriet Mier, another woman, to replace O'Connor, her nomination was eventually withdrawn. Ultimately, Bush nominated, and the senate confirmed, Samuel Alito to replace Justice O'Connor, leaving Justice Ruth Bader Ginsburg as the sole woman on the Supreme Court when Obama assumed office. *See* Ron Elving, *The Fall of Harriett Miers: A Cautionary Tale for Dr. Rony Jackson*, NPR (Mar. 30, 2018), https://www.npr.org/2018/03/30/598115811/the-fall-of-harriet-miers-a-cautionary-tale-for-dr-rony-jackson.

20. *See* Peter Baker and Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Justice Ginsburg's Seat on the Supreme Court*, NEW YORK TIMES (Oct. 15, 2020).

21. *See* FED. JUDICIAL CTR., BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, https://www.fjc.gov/history/judges/search/advanced-search (last visited Mar. 23, 2021); *see also* John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RES. CTR. (Jan. 13, 2021)

22. Trump appointed only nine African American and eight Hispanic judges to the federal district courts. *Id.*

lowest share of judges who *increased* the diversity of the bench since Ronald Reagan.[23] While Trump nominated the *highest* share of judges who *decreased* the diversity of the bench (by a margin of more than two to one) since before the Carter Administration first made judicial diversity a national priority.[24]

III. The Importance of Judicial Diversity

The current demographic profile of the federal judiciary is approximately sixty percent white males, twenty percent white women, and twenty percent racial and ethnic minorities.[25] This falls far short of reflecting the demographic diversity of the population, which is comprised of only about thirty percent white men, thirty percent white women, and forty percent racial and ethnic minorities.[26] But, as already noted, Trump's appointments notwithstanding, this judicial diversity was achieved incrementally over the course of six successive presidential administrations across both political parties. It is imperative that President Biden resume this important presidential legacy of increasing the diversity of the federal bench so that it might indeed one day "look like America."

A. *Judicial Legitimacy Depends on Public Trust*

Diverse judges are important both for signaling judicial legitimacy and for ensuring judicial accountability in an increasingly diverse nation.[27] From the earliest days of our constitutional democracy, Alexander Hamilton described the court's reliance on the people's trust to achieve its legitimacy.[28] Opinion polls measuring public trust in our federal government reveal that while the judiciary remains the most well-regarded of the three branches, there has been an erosion in

23. Rorie Solberg & Eric N. Waltenburg, *Trump's Presidency Marks the First Time in 24 Years That the Federal Bench Is Becoming Less Diverse*, THE CONVERSATION (June 11, 2018, 6:43 AM), https://theconversation.com/trumps-presidency-marks-the-first-time-in-24-years-that-the-federal-bench-is-becoming-less-diverse-97663 [https://perma.cc/V8BG-KFTU].

24. Nearly 21 percent of Trump's judicial nominees in his first two years decreased the diversity of the federal bench, compared to only 9 percent of Obama's nominees, and an even smaller percentage for every president before Obama. *Id.* By comparison, only about 21 percent of Trump's nominees in his first two years increased the diversity of the federal bench, which is only slightly higher than Reagan's 18 percent and far lower than any of his other Republican presidential predecessors, including Bush II (34 percent) and Bush I (32 percent). *Id.*

25. This is based on a snapshot of the federal judiciary as of March 23, 2021. *See* FED. JUDICIAL CTR., BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, https://www.fjc.gov/history/judges/search/advanced-search (last visited Mar. 23, 2021).

26. *See Quick Facts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045218 [https://perma.cc/ZK4U-WQ2E]. The profession has also been diversifying, but it is also less diverse than the general population. *See ABA National Lawyer Population Survey*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_Demographics_2008-2018.pdf [https://perma.cc/SU6X-2GYF] (showing female representation currently at thirty-six percent of the profession and minority representation at fifteen percent).

27. Numerous scholars have noted the relationship between diversity and judicial legitimacy. *See, e.g.*, Scherer, *supra* note 8, at 625; Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5 (2004); Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What* Grutter v. Bollinger *Has To Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101 (2004); *see also* Stacy L. Hawkins, *Batson for Judges, Police Officers & Teachers: Lessons in Democracy From the Jury Box*, 23 MICH. J. RACE & L. 1 (2017).

28. FEDERALIST PAPERS NO. 78. ("The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment.")

public trust of the judicial branch over time.[29] Moreover, there are gaps in public perceptions between various groups. Only fifty-eight percent (58%) of Democrats trust the Judiciary, while eighty-two percent (82%) of Republicans trust the Judiciary.[30] Researchers have also documented racial disparities in the level of trust between certain minority communities and a number of social institutions.[31] One of the most frequently cited is the level of distrust between black communities and the justice system. One study found that only a quarter of white respondents (25%) but more than three-quarters of Black respondents (78%) believe the justice system treats Blacks unfairly.[32] While nearly half of white respondents (45%) and more than four-fifths of Black respondents (84%) said they think the justice system favors whites over Blacks.[33] As this data shows, the concern for the fairness of our justice system is in some ways endemic, but it is especially acute among certain minority groups. This concern for fairness is particularly problematic for the effective functioning of our judiciary, which relies on people to repose their trust in the system in order to legitimize the rule of law.

B. *A Diverse Bench Fosters Public Trust in the Judiciary*

Much public discourse centers on the increase in politically polarized decision-making of the courts as the source of citizens' eroding trust in and the diminished legitimacy of the judicial branch.[34] Yet research demonstrates that it is the appearance of fairness in the judicial process, more than substantive outcomes, that fosters the trust among citizens necessary to legitimize our judicial system.[35] According to the theory of procedural justice, which describes this phenomenon, public perceptions of the legitimacy of our justice system turn less on the substance of decisions, and more on the perceived fairness of the judicial processes employed in reaching those decisions.[36] Fair process not only increases faith in the legitimacy of judicial decision-making, it also increases citizens' willingness to accept the decisions of courts, to

29. According to Gallup, which collects data on public perceptions of the three branches of the federal government, the Judicial Branch has been and remains the most highly regarded of the three branches, but the current rate of public trust in the Judiciary – sixty-seven percent (67%) – remains below its height of eighty percent (80%) in 1999, although above the low watermark of fifty-three percent (53%). *See* Lydia Saad, *Trust in Federal Government's Competence Remains Low*, GALLUP (Sept. 29, 2020).

30. *Id.*

31. Race has been identified as the most salient trait for influencing levels of trust. *See* Susan Sternberg Greene, *Race, Class, & Access to Civil Justice*, 101 IOWA L. REV. 1263, 1276 (2016).

32. *See* Nancy King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle,* 31 AM. CRIM. L. REV. 1177, 1184-1185 and 1194-1195 (1994).

33. *Id.*

34. *See e.g.*, Richard L Hansen, *Polarization and the Judiciary,* ANN. REV. POL. SCI., VOL. 22: 261-276 (May 2019).

35. *See e.g.*, *See* Tom R. Tyler and Tracey Meares, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, YALE L. J. FORUM, 525 (Mar. 24, 2014); Tom R. Tyler, *Governing Amid Diversity: The Effects of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809 (1994); *see also* Nancy Scherer and Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. 90, 90-91 (2010) ("litigants' satisfaction with the resolution of their legal dispute was largely influenced by the fairness of the process, rather than the substantive outcome of the dispute.").

36. *See* Tyler & Meares, *supra* note 36; *see also* Sherer, *supra* note 8, at 625 (citing scholars demonstrating empirically that "fair court procedures . . . lead to greater legitimacy for the justice system." Although Sherer herself distinguishes between "procedural fairness" and the kinds of "descriptive representation" reflected in calls for greater racial diversity within the judiciary (whether among judges or on juries), ensuring that jurors represent a fair cross-section of the community, including the racial diversity of the community, can itself be seen as promoting a kind of procedural justice. *Id.*; *see also* Tom R. Tyler, *Governing Amid Diversity: The Effects of Fair Decisionmaking Procedures on the Legitimacy of Government,* 28:4 L. & SOC'Y REV. 809-832 (1994).

cooperate with them, and to otherwise abide by the rule of law.[37] Because of the limits of the court's enforcement power, citizens' willingness to trust the court is key to its effective functioning. This trust can only be generated when citizens believe the process is fair. The literature on procedural justice identifies two key measures of fair process: (1) the quality of treatment of citizens by the decision-maker, and (2) the quality of the decision-making itself.[38] One way to foster the type of trust in the judiciary that promotes a sense of procedural justice is to ensure that decision-makers themselves are diverse in ways that reflect the communities they serve.[39] As one judge observed about the diversity of juries as judicial decision-makers, "[y]ou want . . . for this thing to not only be fair, but look fair. Th[e] Court depends on people believing that you get a fair shake."[40]

C. *A Diverse Bench Improves Accountability to the Public*

In addition to fostering *trust* in judges as judicial decision-makers, research shows that ensuring diversity also improves the quality of judicial decision-making.[41] Jeffery Abramson, writing about the importance of diverse juries, argues that racial diversity among judicial decision-makers[42] promotes three different democratic ideals: (1) *epistemic diversity*: a populist claim about the collective wisdom of the people; (2) *deliberative diversity*: a claim that many minds outsmart the few brightest minds; and (3) *representative diversity*: a claim that diversity of representation matters in a democracy.[43] While representative diversity helps foster the needed trust in judges as judicial decision-makers, it is the epistemic and deliberative benefits of diversity that improve the quality of judicial decision-making.

37. A 2002 study of 1656 respondents who had interactions with the justice system showed that respondents' perceptions of the fairness of the procedures employed in decision-making were more determinative of the respondents' willingness to accept the decision than was the favorability of the decision itself. Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing & Rightful Policing and Why It Matters*, 54 WM. & MARY L. REV. 1865 (2013).

38. Tyler & Meares, *supra* note 35, 537-538.

39. *See* Sherer & Curry, *supra* note 35 at 98 (discussing empirical analysis showing greater support for judicial legitimacy among blacks when there are more black judges on the bench. Notably this enhanced legitimacy was not registered for whites, but whites displayed a much higher baseline for judicial legitimacy than blacks); *see also See* JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY, 104 (1994) (discussing how racial diversity improves the quality of jury deliberation and decision-making).

40. Ashish S. Joshi and Christian T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, ABA J. (2015). Danielle Allen similarly describes this principle in relation to democratic decision-making more broadly when she explains that trust in fellow citizens as public decision-makers "inspires . . . a consent-based regime with the flexibility needed to garner from citizens of diverse backgrounds consent to decisions made in uncertainty." DANIELLE ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION*, 156 (2004).

41. *See* Thomas & Meares, *supra* n. 35 at 537.

42. Here Abramson is referring to juries as deliberative, decision-making bodies in the justice system, but Abramson's observations are equally applicable to judges as decision-makers in our justice system. Diversity among judges is more important today than in the past as judges have expanded their decision-making power to include many issues that were previously decided by the jury. *See* Abramson, *supra* n. 61 at 866, 898 (offering theoretical model for democracy legitimizing features of jury that have equal application to judges). *Id.*, 870-71.

43. Jeffery Abramson, *Four Models of Jury Democracy*, 90 CHI.-KENT L. REV. 861 at 883 (2015). In explaining the optimal functioning of the jury and the necessity of cross-sectional representation, Abramson offers a deliberative theory of the jury that relies on Aristotle's assertion that "democracy's chief virtue [i]s the way it permit[s] ordinary persons drawn from different walks of life to achieve a 'collective wisdom' that none could achieve alone." *Id.* at 104.

The theory of representative bureaucracy lends further support for the each of these benefits of judicial diversity.[44] This theory posits that racial congruence between bureaucrats and the citizens they serve influences how minority citizens benefit from public decision-making.[45] In other words, minority citizens will experience greater benefit from bureaucrats who share their racial and ethnic background, particularly on issues of high racial salience.[46] The underlying reasons involve an accrual of both the epistemic and representative benefits of diversity.[47] Representative bureaucracy argues that differences in social identity translate into different social experiences.[48] These experiences, in turn, contribute to differences in political attitudes, which are strongly correlated with political behaviors.[49] As a result, racial congruence between bureaucrats and citizens improves policy outputs on behalf of minority citizens, particularly on issues of high racial salience.[50]

Proof of representative bureaucracy's claims can be seen through studies in judicial behavioralism. Judicial behavioralism applies empirical methods to determine the relationship, if any, between the personal attributes of judges and their decisions.[51] Judicial behavioralism confirms the effects of racial congruence on judicial decision-making as theorized by

44. J. Donald Kingsley first coined the term "representative bureaucracy" in 1944 in relation to British Parliamentary government, but it emerged in the American public administration and then political science literature in the late 1960's and early 1970's as a recognition that bureaucratic agencies make more public policy decisions than do legislatures. M.E. SHARPE, REPRESENTATIVE BUREAUCRACY: CLASSIC READINGS & CONTINUING CONTROVERSIES (Julie Dolan & David H. Rosenbloom eds., 2003).

45. There are some differences among theorists in describing the benefits of representative democracy, which loosely correlate with Abramson's epistemic, deliberative, and representative theories of jury diversity. Kingsley argues that government bureaucracies must reflect the larger populace to ensure they reflect the wisdom and insight of the diverse views of the public. *Id.* at 4. Max Weber, on the other hand, doubts that individual representatives can overcome institutional bureaucratic cultures, *id*; while Frederick Mosher straddles these two views by acknowledging the importance of representative bureaucracy for enhancing public decision-making, but expresses suspicion that identity congruence between bureaucrats and citizens will necessarily translate into beneficial public policy for citizens because of their shared identity. *Id* at 5. Samuel Krislov responds to Mosher's concern by suggesting that the descriptive (or passive) representation that arises from identity congruence between bureaucrats and citizens is itself beneficial because it legitimizes government by promoting the ideal of equality. *Id.* at 6. Despite these conflicting theoretical perspectives, each of these theorists acknowledge the importance of representative bureaucracy, regardless of their disagreement over its precise consequences for citizens. Moreover, the empirical data demonstrates that representative bureaucracy can inure to the benefit of minority citizens.

46. *Id.*

47. *Id.* at 52 (describing benefits as "enhancing administrative responsiveness . . . redressing [ ] underrepresentation . . . [and] legitimizing government.").

48. *Id.* at 85; *see also* Hong-Hai Lim, *Representative Bureaucracy: Rethinking Substantive Effects & Active Representation*, PUB. ADMIN. REV. (Mar./Apr. 2006).

49. Sharpe, *supra,* note 45 at 85. This theory and each of these linkages have been confirmed by at least some empirical research relating to race, whereas some other demographic characteristics, such as gender, wealth or education are only weakly correlated with bureaucratic decision-making. *Id.*, 89-90. Given the distinct social construction of racial identity, it is unsurprising that racial identity has strong correlations with social experiences and, consequently, political attitudes. *See generally* IAN HANEY LOPEZ, WHITE BY LAW (2006) (discussing the social construction of racial identity).

50. This is particularly true where bureaucrats exercise substantial discretion. Sharpe, *supra,* note 45, 122 and 126; *see also* Nick A. Theobald and Donald P. Haider-Markel, *Race, Bureaucracy & Symbolic Representation: Interactions Between and Police*, 19 J. PUB. ADMIN. RESEARCH & THEORY 409-426 (2008) ("research suggests that the presence of African American and Hispanic elected officials increases the likelihood that African American and Hispanic interests are represented in policy processes" and suggesting the same phenomenon operates with even greater force among unelected public officials).

51. *See* Pat K. Chew & Robert E. Kelley, *Myth of the Color-blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); *see also* Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics in Minority Diversity of the Federal Bench*, 83 IND. L. J. 1423, 1471 (2008).

representative bureaucracy.[52] In one study researchers found that plaintiffs in racial harassment cases had a higher success rate when their case was decided by an African American judge (45.8%), than when their case was decided by either a White judge (20.6%) or a Hispanic judge (19%).[53] Critics often claim that it is not this descriptive representation (or racial congruence) that matters among public decision-makers, but instead it is substantive representation (or interest congruence) that matters most.[54] But this study of judicial decisions in racial harassment cases found that the statistical disparity in outcomes by race held even after controlling for judges' party of appointment.[55] African American judges who were appointed by both Democrats (47%) and Republicans (43%) ruled in favor of Black plaintiffs significantly more often than White judges appointed by either Democrats (27.1%) or Republicans (16.6%).[56]

Another study similarly found that African American judges were more than twice as likely to rule in favor of Voting Rights Act plaintiffs than their white counterparts.[57] Moreover, consistent with the deliberative benefits of diversity, this study also found that on appeal White judges were significantly more likely to find a violation of the Voting Rights Act when they sat on a panel with an African-American judge than when they sat on an all-White judicial panel.[58] These representative, epistemic, and deliberative benefits of judicial diversity can be seen in

52. These studies have found that racial congruence between judges and litigants matters in cases of high racial salience. *See* Chew & Kelley, *supra*, note 51 at 1134 (describing the significance of judges' race in cases alleging racial discrimination).

53. *Id.* The study was based on a random sampling of racial harassment cases across six federal circuits for the period 1981 – 2003. *Id.* at 1138. The success rate before a Black judge (45.8%) was twice the overall rate of success (22%). *Id.* at 1141.

54. *See e.g.* Royce Brooks, *Electing One of Our Own: The Importance of Black Representation for Black Communities in the Context of Local Government*, 3 AM. U. MODERN AM. 33, 37-38 (2007) (responding to this critique by expressing a preference for descriptive representation over substantive representation in local elections where the need for effective interest representation is most acute).

55. Chew & Kelley, *supra*, note 51 at 1149.

56. *Id.* This means that although Black Republicans were slightly less likely to rule in favor of race discrimination plaintiffs than were Black Democrats and White Republicans were also significantly less likely to do so than White Democrats, Black Republicans and Black Democrats were 2-3x more likely to rule in favor of race discrimination plaintiffs than were their white counterparts. *Id.* Providing further confirmation of the importance of identity congruence between judges and litigants, another study found that judges' gender was not significantly correlated with judicial decisions in racial discrimination cases, but judges' gender was correlated with outcomes in sex discrimination cases. *See* Pat K. Chew, *Judges, Gender & Employment Discrimination Cases: Emerging Evidence Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359, 366 (2011). Interestingly, the judges' race was correlated with different rulings in both race and sex discrimination cases, with African American judges ruling in favor of sex discrimination plaintiffs twice as often as their white counterparts and ruling in favor of race discrimination plaintiffs more than twice as often as their white counterparts. *Id.* at 370.

57. Voting Rights Act plaintiffs are more often than not African American. *See* Adam Cox and Thomas Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008). Additional studies confirm the significance of racial congruence between judges and litigants by evaluating racial disparities in criminal sentencing. *See* David S. Abrams, Marianne Bertrand, and Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012). Although all judges impose harsher sentences on Black criminal defendants than on white criminal defendants, one study found a statistically significant reduction in the magnitude of the racial disparity among African American judges, suggesting that minority defendants are treated less harshly by African American judges than by judges of other races. *Id.*

58. Cox and Miles, *supra,* note 57 at 45.

discrimination cases,[59] civil rights cases,[60] and even in contested Supreme Court cases,[61] and these diversity benefits are not simply a function of more progressive ideological commitments among minority judges.[62] Consistent with theories of procedural justice and representative bureaucracy, these empirical findings confirm the importance of racial diversity for both fostering trust in judges on behalf of minority citizens and increasing democratic accountability by judges to minority citizens, both of which in turn promote institutional legitimacy for the judiciary.[63] Not only does increased diversity among judges engender the trust necessary to secure citizens' belief in the fairness of our justice system, perhaps more important, when the bench lacks sufficient diversity, judges themselves can decide cases in ways that compromise the appearance of procedural fairness and undermine the rule of law. [64]

D. *Public Support for Diversity is Widespread*

Finally, a judiciary lacking in diversity is inconsistent with our ideals of representative democracy and is increasingly out of step with broad public support for a government more representative of "the people." The current demographic profile of the federal bench is approximately sixty percent white males, twenty percent white women, and twenty percent racial and ethnic minorities.[65] The population is only about thirty percent white men, thirty percent white women, and forty percent racial and ethnic minorities; and census projections estimate that our nation will be comprised of a majority of racial and ethnic minorities by 2042. [66] Recent data released by the Pew Research Center suggests that the generation defined as post–millennials, or Generation Z, will reach this critical majority minority threshold by 2026, when they will be between the ages of fourteen and twenty-nine.[67] A judiciary that is comprised of

59. See Chew & Kelley, *supra,* note 51 at 1134.

60. *See* Cox & Miles, *supra,* note 57 at 45; *see also* Stubbs, *supra,* note 1, at 119–24 (discussing the research on how diversity improves judicial decisionmaking).

61. *See* Lazos Vargas, *supra* note 51 (examining the impact of the Supreme Court's composition on the rule of law and suggesting greater diversity on the Court has resulted and would result in greater civil rights for minorities).

62. African American judges nominated by both Democrats (47 percent) and Republicans (43 percent) ruled in favor of black plaintiffs in discrimination cases significantly more often than white judges nominated by either Democrats (27 percent) or Republicans (17 percent). *See* Chew & Kelley, *supra,* note 51, at 1149.

63. Not surprisingly, given these findings and the widespread calls for greater racial diversity among judges, attempts to diversify the federal bench extend as far back as the Carter Administration in the 1970's. *See* Sherer, *supra,* note 8 at 601(marking the start of efforts to diversity the federal judiciary with President Carter, observing "[w]hen President Jimmy Carter took office in 1977, there were but eight women (1.4% of all federal court judges at that time), twenty African-Americans (3.5%), and five Hispanics (0.9%) on the federal bench (including both active and senior status judges). Believing that such imbalance jeopardized the integrity of the entire justice system, President Carter became the first president to implement a far-reaching appointment strategy with diversity as its cornerstone" and citing President Clinton, as the "first to make descriptive representation the cornerstone of his judicial selection strategy . . . promising to make . . . appointed positions 'look like America.' ")

64. *See* Barbara Graham, *Toward An Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 183 (2004) (detailing diversity of federal bench); Tracey E. George and Albert H. Yoon, *The Gavel Gap: Who Sits in Judgement on State Courts?*, AM. CONST. SOCIETY FOR L. & POLICY (2016) (citing statistics on the lack of gender and racial/ethnic diversity among state court judges).

65. This is based on a snapshot of the federal judiciary as of March 23, 2021. *See* FED. JUDICIAL CTR., BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, https://www.fjc.gov/history/judges/search/advanced-search (last visited Mar. 23, 2021).

66. *See Quick Facts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045218 [https://perma.cc/ZK4U-WQ2E].

67. Richard Fry & Kim Parker, *Early Benchmarks Show 'Post–Millennials' on Track to Be Most Diverse, Best-Educated Generation Yet*, PEW RES. CTR. (Nov. 15, 2018), https://www.pewsocialtrends.org/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet/ [https://perma.cc/XR38-WQG5].

predominantly white and largely male judges, not only fails to reflect the growing diversity of the population it is called upon to serve, but it also cannot be reconciled with shifting political attitudes, especially among younger generations of Americans who view increasing diversity as a social good to be encouraged, rather than a social ill to be cured.[68] The same Pew study found that even among Republicans the value for diversity is high. More than half of all post–millennial, or Generation Z, Republicans agreed that increasing racial and ethnic diversity is good for the country.[69] This means that future generations of Americans will inherit a judiciary that fails to adequately reflect either the polity or the broadly held social value for diversity.

And it is not just the millennial and post–millennial generations who embrace this value for diversity as a key feature of our representative democracy. The Reflective Democracy Campaign, a research and advocacy organization committed to analyzing demographic trends in politics, conducted a survey of 800 registered voters and solicited their thoughts on the current demographic trends in government.[70] Both Democratic and Republican respondents shared the belief that there are too many white men and too few women and minorities in elected offices.[71] Perhaps more surprising, more than three-quarters (77 percent) of respondents said they support affirmative efforts to increase the number of women in office and nearly three-quarters (71 percent) said the same about increasing the number of minorities in office.[72] So any assertion that citizens do not value judicial diversity, or that they are opposed to affirmative efforts to diversify the judiciary, is contradicted by this recent polling data. The fact is that the gap between our aspirations for greater diversity among our civic leaders and the reality that our federal judges are woefully unrepresentative of the diverse communities they serve leaves many citizens wanting for the ideal of representative democracy. This democratic failure threatens to undermine the legitimacy of our federal judiciary. It deepens mistrust in particular between racial and ethnic minority communities and a justice system that many in those communities already think lacks accountability to them.

68. A related Pew Research Center study of political and social attitudes among younger generations found that nearly two-thirds of both post–millennials and millennials believe "increased racial and ethnic diversity is a good thing for society" and a similar share of both believe the increased number of women running for political office is a "good thing." *See See* Kim Parker, Nikki Graf, & Ruth Igielnik, *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RES. CTR. (Jan. 17, 2019), https://www.pewsocialtrends.org/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/ [https://perma.cc/SE6P-Z3FK] (reporting that two-thirds of post–millennials, millennials and Gen-Xers, ranging in age from 17–54, support more women running for office, as do nearly two-thirds of baby boomers).

69. *Id.*.

70. *Reflective Democracy 2017 Voter Opinion Research*, REFLECTIVE DEMOCRACY CAMPAIGN (Oct. 2017), https://wholeads.us/resources/for-activists. [https://perma.cc/9M5G-D4UV].

71. *Id.* at 6. 52 percent of all respondents said there are too many white men in office. 51 percent and 43 percent, respectively, thought there are too few women and too few minorities in office. *Id.* Although there were wide partisan gaps in response rates, a third of Republicans agreed there are too few women in office and nearly a quarter agreed there are too few minorities in office. *Id.* at 7.

72. *Id.* at 21. Here the partisan differences were less stark. More than nine in ten (92 percent) Democrats and almost two-thirds (65 percent) of Republicans expressed support for efforts to increase the number of women in office and nearly nine in ten (88 percent) Democrats and over fifty percent (57 percent) of Republicans agreed. *Id.*

IV. Conclusion

For the first 145 years of our nation's history, the federal judiciary was comprised of all white men. Prior to the Civil Rights Era, only a handful of women and minority judges were appointed to the federal bench, but this began to change as a result of the Civil Rights Era. Then in 1977 President Carter announced a commitment to diversifying the federal judiciary, and meaningful progress to increase diversity on the federal bench began. Since that time, every president, save Donald Trump, has built upon the diversity progress of their political predecessor to gradually improve the diversity of the bench over time. As a result of these sustained efforts, a judiciary that just fifty years ago was comprised of more than 93 percent white men, is now comprised of twenty percent racial and ethnic minority judges and more than a quarter women judges. Not only does this increased diversity improve citizens' perceptions of judicial legitimacy, there is also evidence that it increases judicial functioning by making judges more accountable to minority interests.

Diverse citizens must believe in the legitimacy of the judicial process, but ultimately they must also believe that their interests will be effectively served by that process. Diversity among judges provides both the legitimacy and accountability necessary for all citizens to trust in the judicial process and submit to the rule of law. The progress in diversifying the federal judiciary achieved since President Carter has been eroded by President Trump, but it must be renewed under President Biden. Demographers predict a nation that will become majority minority within the next generation. Opinion polls reflect that citizens across the political spectrum increasingly want our nation's leaders to reflect that growing diversity and believe further that improving the diversity of our leaders is good for democracy. Diversity on the federal bench is not just about curing a crisis of judicial legitimacy, it is about preserving the promise of government "of the people, by the people, and for the people."

Thank you.

Mr. JOHNSON of Georgia. Professor Hawkins, thank you for your testimony.

We will now proceed under the 5-minute rule, and I will begin by recognizing myself for 5 minutes for questions.

Judge Donald, you have often held the title of the first; the first Black woman to serve on the Sixth Circuit, the first Black woman District judge for the Western District of Tennessee. What impact do you think your many firsts have—what impact have those firsts had on the public that your courts have served, both on the bench and off the bench?

Judge DONALD. Thank you, Chair Johnson. I have been privileged in my community to be able to serve in those important positions. For me, what has happened by the honor of being a first is I have had an opportunity to demonstrate that people who look like me in gender and race can do an effective job, can uphold the law, can apply themselves, can meet all the requisite qualifications to compete with others who sit in those positions. More than that, I think it has served to inspire others who may not have believed that they could do this to see that someone like them can achieve those positions and do that job.

I think one of the things that has been said and bears some truth, Professor Hawkins talked about the Federal courts. For the first 139 years of the court's existence, the court was completely White and male. People of color did not all of a sudden begin to be qualified in 1967 when Justice Thurgood Marshall was appointed to the Supreme Court, the same as women did not just suddenly become qualified when Judge Florence Allen or Justice Sandra Day O'Connor were appointed, nor did Latinx people suddenly become magically qualified with the appointment of Justice O'Connor.

I think those who are in authority have to see and understand that we are a country that is rich in diversity, rich in talent, and rich in skill. I want to take this opportunity to say no one on these panels, I believe, are arguing that people ought to be appointed to positions or have an opportunity to achieve just because of their gender or their appearance.

What we are saying that all people who are talented, have something to contribute, and if they have an opportunity, and they have something to contribute that they should be able to compete without barrier of race or gender or socioeconomic status. In those positions of firsts, that is what I think I have been able to demonstrate.

Mr. JOHNSON of Georgia. Thank you, Judge Donald.

Professor Hawkins, one recurring theme we have heard is that when the judicial bench is diverse, judicial decision-making is better. What does it mean for decision-making to be better in this context?

Ms. HAWKINS. Chair Johnson, I certainly did not represent that it is better, but it is different, and it is improved, and it has improved along a number of dimensions.

First, as many people have said, diverse people have different experiences, and those experiences shape our perspectives on various issues. I think that all the anecdotes that have been shared today about how people from different walks of life have contributed their

experiences and their different perspectives to their decision-making from the bench is proof of that benefit.

The second is that there is a deliberative benefit so that particularly on appellate panels, but also simply in the interactions that District Court judges have with their colleagues, will improve their ability to deliberate around issues when they are exposed to different points of view. So, it does improve decision-making both because people with different experiences bring different things to bear, and it enhances deliberation.

Mr. JOHNSON of Georgia. Thank you.

Professor Sen, your testimony describes diversity as leading to, quote, "healthy decision-making." Can you explain why research suggests that this is the case?

Ms. SEN. Yes. Well, we have a couple strands of research that really form that view. So, first, we have research from outside the court, so looking at business organizations, corporate leaderships, corporate boards, other kinds of governmental decision-making units, and all of those point to the direction that more diverse groups of people will, as was just said, discuss, uncover, leave no stone unturned in terms of, you know, the different viewpoints in forming the decision-making. So, there is the evidence that more diverse group decision-making is more robust and takes into account different positions.

Then we also have evidence from within the courts that panels like judicial panels on the Court of Appeals that have different composition in terms of race and gender actually do reach different kinds of decisions as opposed to panels that are more homogenous, for example, all White or all male panels.

So, we have evidence from within the courts that actually really engages the view that more diversity actually, strengthens the group decision-making and kind of contributes to healthy decision-making.

Mr. JOHNSON of Georgia. Thank you. My time has expired.

We will next have 5 minutes of questions from the gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chair. I am going to start off by asking a couple of questions of Mr. Kirsanow.

You have been part of a group, a commission that helped select Federal judges in Ohio. Is that correct?

Mr. KIRSANOW. That is correct.

Mr. ISSA. When you are looking at the applications, do some of those prejudices—regardless of which President and what Senate, do some of those prejudice of Ivy League schools, of party based on who is suggesting that individual and experience based on, sort of that stereotype of a prosecutor and a certain resume is more likely to get you confirmed, are all of those preloaded into the applicants?

Mr. KIRSANOW. Well, I should say that I am restricted from discussing these things because of our bylaws. All our deliberations are confidential.

Mr. ISSA. I am only talking about the broad nature of the applicants.

Mr. KIRSANOW. Generally speaking, there are a host of factors that are employed, and there are a host of factors that are pertinent to whether or not somebody is qualified or deemed to be quali-

fied to at least be presented for nomination to the Federal judiciary. Among those are academic qualifications, social work, time served on the bench, experience as possibly a clerk, maybe some type of other experience with respect to governmental positions.

One thing that we must all keep in mind is I don't think anybody who has testified thus far today, at least what I have heard it, is opposed to a diverse Federal Judiciary. I don't think that is the case. The question is how do you get there consistent with 1964 Civil Rights Act, 14th Amendment, everything, right, because we are talking about a compelling State interest.

In other words, if you are making a decision even a balancing decision based on race, you must be serving a compelling State interest. That is a high bar. It can't be something minor. It has usually been reserved to matters of national security, something of extreme importance. So, all the factors—

Mr. ISSA. Sure. I don't want to interrupt you unfairly, but the question that I wanted to get to isn't there, from your experience, a bit of a bias towards Ivy League schools, towards people who had the opportunity to do more extracurricular activity?

In other words, socioeconomic advantage does play a part in whether or not you are likely to be able to come to the Federal bench simply because the nature of being qualified is a combination of intelligence and drive and opportunity, and that third one often makes a difference on whether you can go to Harvard, or you have to go to the school that you can afford.

Mr. KIRSANOW. Yeah. I will say that there is clearly a real disparity in terms of where the educational kind of template skews, and that is it is, as other people have testified, skewed toward the Ivy League, just dramatically so. That doesn't necessarily mean that the Ivy League is better or that Harvard or Yale are better, but that happens to be the case, and I think that is true throughout the districts and throughout the circuits.

Mr. ISSA. Along that same line, and I will get off of your selection process, but the inherent question is if you have a single judge who will leave the Supreme Court and appellate judges, if you have a single judge sitting on the bench, do you believe, as some of the other witnesses said, that you can predict how they are going to be behave based on their gender or race.

Mr. KIRSANOW. I wish. I mean, I have only been doing this for 42 years. Maybe somebody has a different perspective. I have been before several judges a number of times. Even though I have been in front of a number of times, sometimes spanning decades, very often I am surprised, but the least able—and I am not disputing any of the studies, but the least reliable indices for me to predict which way a judge is going to go.

If I am telling a client when I am in a trial, I think we are going to go this way if it is a bench trial, it really has to do with perceived etiology. That is the one. It has nothing to do with race, sex, age, any of those things. If you can get a pretty good handle on what is the etiology of this particular judge, and not that etiology is controlling. I am saying that it is clearly a greater demarcation factor than the others, in my experience. Again, that is my experience.

Mr. ISSA. Let me ask you one question, and one closing question. Are we potentially conflating or confusing in some parts of our discussion today the diversity that is essential in a judge, perhaps what we are really looking at is what you do as a trial lawyer when you are selecting a jury, and you have some skill, capability of predicting a better potential outcome based on one or all 12 of the jurors?

Is there really a difference between selecting juries which obviously there is a whole profession within your profession to help you select juries that are more likely to give you a certain outcome versus judges? Would you contrast that delta, if there is one?

Mr. KIRSANOW. Yeah. There is a slight delta. Let me just say there are numerous factors that go into selecting jurors. For me, because I normally do discrimination law and labor and employment law, the one discrete factor that is most important, probably, that separates the kind of juror I want from another juror is occupation and the experiences that go along with that occupation.

The least important, and one that is prohibited, of course, is race because what we find, I have jurors of every race on that pool or in the array, and we find that they have a broad range of viewpoints, beliefs.

I have had jury foremen who are Black who, my goodness, these guys are—the stereotype would be that they are more inclined to decide in favor of a plaintiff in a race discrimination case, and just the opposite is true. I find that race is among the least important qualities when it comes to selecting a juror.

Mr. ISSA. Thank you.

Yeah, Mr. Chair, I would only ask unanimous consent that the article written by John McGinnis be placed in the record.

Mr. JOHNSON of Georgia. Without objection.

[The information follows:]

MR. ISSA FOR THE RECORD

Law & Liberty

ESSAY

MARCH 11, 2021

How Blind Should Lady Justice Be?

john o. mcginnis

It is often argued that the federal judiciary should be representative of the nation, with representativeness defined by race, ethnicity, and gender. President Donald Trump's nominees were criticized for being too male and too white. By contrast, President Joe Biden has promised more diverse nominees. And some federal judges themselves have argued for this kind of representative judiciary.

But this call raises uncomfortable questions. First, legal decision-making is not supposed to reflect a process by which case outcomes are apportioned representatively or even where the characteristics of the people before the judge should affect the outcome. The icon of justice is blind. Second, even if representativeness were desirable, a focus on race, ethnicity, and gender distorts the diversity of America: Other factors, such as religion and family background, are at least as relevant to what makes an individual representative. Third, appointing with reference to representativeness devalues considerations of quality.

Law and Representativeness

The more formal one's view of law, the less representativeness should matter to the legitimacy of the judiciary. A formalist believes that the material of written law—the text as understood in the context of rules of interpretation and sometimes supplemented by precedent also applied according to formal rules—generates decisions. Thus, judges have little, if any, policy discretion in reaching decisions. To be sure, there may be easier and harder cases, but there is still no room for personal policy views in deciding them. If legal correctness of a more formal kind is the goal of judging, the focus in judicial appointments should be on the candidates' legal acumen and legal fidelity, including a fierce determination to put aside irrelevant considerations like race, ethnicity, and gender.

If, on the other hand, judges were policymakers, and race, ethnicity, or gender were proxies for policy views, representativeness, including these factors, might be useful in making sure that the policy reflected a variety of interests. In setting policy, the judiciary is then acting more like a legislature. It follows that representativeness might have more of a role in state courts than federal courts, because state courts have common law responsibilities, such as shaping the law of contracts and torts. At least in the modern view of the common law, these judges do make policy. But federal courts have almost no common law responsibilities, being charged with interpreting constitutional and statutory text.

It also follows that Republicans have a principled reason to reject representativeness as an ideal because they have embraced the formal methods of constitutional and statutory interpretation—originalism and textualism. Democrats, however, oppose these methods. They either believe that they are not possible because written law has large gaps, or that they are not desirable because a formally oriented jurisprudence makes it too hard to change the status quo. One might conclude, therefore, that Democrats have a principled reason to embrace representativeness.

Progressivism and Diversity

But there is a limit to such principled advocacy of representativeness defined in terms of race, ethnicity, and gender. First, as discussed below, race, ethnicity, and gender are only a few of the factors that reflect a diverse polity, and progressives are generally unconcerned with any other categories. Second, many if not most progressives count as "diverse" only candidates with progressive views. Democrats opposed many of the female and minority lawyers nominated by Trump just as much as the white males that he nominated. For many progressives, the definition of representativeness is simply instrumental to advancing their political positions.

The connection between politics and representativeness explains the reason that President Biden has announced that he will first nominate a black woman to the Supreme Court. On a straightforward representativeness ideal, this decision is odd. African Americans comprise 13 percent of the country and one justice out of nine is African American—a close approximation to the proportion of the population. In contrast, Asian Americans have no representation on the Court and never have.

But Justice Clarence Thomas is not a progressive. He is a formalist and (to use political science terms) the most conservative justice on the Court. He is not infrequently denounced by the left for his apostasy from what is understood to be the view of most African Americans.

If representativeness is an idea impossible to achieve in practice and unattractive in theory, it is at least heartening that the left's obsession with it will almost certainly undermine their goal of moving the judiciary leftward.

But that complaint underscores yet another problem with representativeness as a concept. Are judges supposed to reflect the median views of their identity group? If so, they must conform to a stereotype. And the requirement of conformity implicit in this ideal of representativeness damages our society, where people of any race, gender, and ethnicity must be free to think for themselves. It also hardens existing fault lines of society by connecting race, ethnicity, and gender to political and ideological differences. Confirmation of this damage came just this week. Amazon has removed a documentary about Justice Thomas from its video collection. It was Black History Month and apparently the only African American justice on the Court was not Black enough to participate.

Who is Representative?

Thinking more broadly, if representativeness is related to policy views, then race, ethnicity, and gender are not the only key considerations. For instance, getting married and having children substantially changes people's worldviews, including their political views. That fact gave President Trump, a master of political jiu-jitsu, the opportunity to turn representativeness to his advantage when, at her installation as a justice, he touted Amy Coney Barrett as the first woman at the Court who had children at home. Elena Kagan and Sonia Sotomayor, in contrast, have never had children, unlike the great majority of women. Does that make them unrepresentative for those who, unlike me, think representativeness should shape judicial appointments?

Religion is also a great shaper of worldviews. On this point, the current Court is very unrepresentative with five practicing Catholics, one non-practicing, one Episcopalian, and two Jews. (Before Justice Ruth Bader Ginsburg's death there were three). Catholics and Jews thus are heavily overrepresented. But just

as noticeable is the absence of evangelical Protestants who constitute a quarter of the American population. Should appointments take account of judges' religion?

Social class also affects a person's views. It is true that most successful lawyers of the kind likely to be appointed to federal courts are at least middle class, but there is still a wide range of wealth and income within that group. Moreover, a person's perspective is influenced by his or her upbringing. Someone who has risen from poverty is likely to be shaped in part by that experience. If one were really concerned about representativeness, screening lawyers for their social background, regardless of race and ethnicity, would be important, particularly because it has been shown that federal courts often follow elite rather than popular views.

But the larger point is that it is impossible to construct a representative Supreme Court or even a representative circuit court on any fair definition of the representativeness that might matter to policy. The numbers are simply too small. Indeed, focusing on one dimension of representativeness may make a court less representative on a different dimension. Moreover, it is just not the case that the pool of lawyers from which judges are drawn are representative of the population. Like most jobs, the enterprise of law attracts particular groups more than it does others. Jews and people of Irish descent, for instance, continue to be overrepresented, as are the middle and upper-middle classes.

Representativeness and Quality

If representativeness is an idea impossible to achieve in practice and unattractive in theory, it is at least heartening that the left's obsession with a narrow view of representativeness will almost certainly undermine their goal of moving the judiciary leftward. Selecting on the axis of identity will make it less likely that the best and most articulate champions of progressive jurisprudence will get on the bench.

It is not, of course, that there are no such effective champions among people of all races, ethnicities, and genders. But the process of becoming a federal judge requires running a gauntlet that discourages many even from trying. Only lawyers of a certain experience are eligible. Home-state senators of the President's own party have influence on nominees for both the district and appellate courts and senators of the other party have influence on the district courts. The process has become so polarized that even writings during college can be deemed disqualifying. Adding yet another screen of representativeness makes it even harder to get the most outstanding nominees. The Trump administration's nominees to the appellate bench encompassed a very high percentage of Supreme Court clerks. If the goal is to get that level of professional distinction, a singular focus on quality is necessary.

And quality pays dividends in influence. While judges within a circuit hear an equal number of cases, that does not guarantee equal influence. Much of their shaping of the law comes through their opinions—their shifting of precedent and parsing of text. Some opinions are more persuasive than others and thus are cited more, enjoying an outsized effect on fashioning the law for the future.

We have some evidence that the influence may not currently be distributed randomly along the lines of some of the representative factors. One law review article measured the influence of federal appellate judges by a variety of considerations, such as the number of written opinions and citations per opinion by other appellate judges. The judges in the top ten on various measures were uniformly white. Some of the categories did include women in roughly their proportion on the judiciary. Others were all male. But

there is no indication that influence will necessarily map onto the factors that make for representativeness at any given time. The best predictor of influence at that time seemed to be academic prominence before taking the bench, with Richard Posner and Frank Easterbrook leading the tournament of judges by a substantial measure. Having met both of these distinguished jurists, I would claim that they are representative only of their own towering intellects.

Sadly, however, the focus on the racial, ethnic, and gender identity of judges will not go away. It may well be joined by other identities that are no more relevant to formal judging and no more predictive of a diverse policy outlook than many that are ignored. It was once a commonplace that our society was devoted to the rule of law rather than the rule of men. But a focus on the representativeness of judges will entrench a rule of identity.

Mr. ISSA. Thank you. I yield back.

Mr. JOHNSON of Georgia. Thank you.

We will now hear from the gentleman from New York, the Chair of the Full Committee, Chair Nadler, for 5 minutes.

Chair NADLER. Well, thank you, Mr. Chair.

Judge Donald, we heard Judge Reeves call on Congress to be courageous in our commitment to diversity in the Federal courts. What would courage for Congress look like to you when it comes to diversity in the courts? I think you are muted.

Judge DONALD. Okay. Thank you, Chair Nadler, for that question. Congress being courageous to me would mean looking at people, diverse people, recognizing the pluralism of our Nation, and making certain that all voices are heard and that they are at the table.

I believe that no one is advocating that we choose people based on race or gender, but what we are saying is people should not be excluded. They should not be denied the opportunity based on race and gender. Just as Congress was courageous in appointing or confirming the first woman, the first African American, the first Latinx, be courageous right now and look at the diversity that is this country and give all of those quadrants an opportunity to participate if they meet the other criteria.

Chair NADLER. Thank you.

Professor Sen, we heard Judge Chen recount story after story of how our judges' life experiences help their colleagues understand crucial elements of a case in ways they might otherwise have missed. Justice Ginsburg helped her colleagues to see how a strip search might feel to a teenage girl. Judge Henderson explained that the shockingly racist graffiti a plaintiff described was far more common than his colleague apparently thought. Justice Thomas, during the history of the Ku Klux Klan, explained the meaning of a burning cross. Does your research support Judge Chen's message that, as he put it, there is a cost when voices are missing from the room?

Ms. SEN. Not just my research, I would say, but a wide swath of research across political science and sociology and economics, I think, supports that view. So, I could just kind of go through, like, a litany of studies on this point, but we do have a number of studies. For example, let's talk about gender. We have a number of examples, kind of chilling that across employment discrimination cases or sexual harassment cases that women judges tend to vote differently from their male counterparts.

So, for example, male judges are more likely to vote against a plaintiff in a sexual discrimination case or that all male panels are most likely to vote against a plaintiff in a sexual discrimination case. The inclusion of a woman on the panel would actually bring the two groups closer together and actually eliminate some of those differences.

Now, when I talk about the studies, I am talking about quantitative analyses of thousands of votes across the Court of Appeals, to take one example. We do see reflected in the data the nuances and the nuggets of those stories that were highlighted by people like Judge Chen. We do see that in the large quantitative studies.

Now, does that apply to everyone? No. These are the kind of statistics that we are working with, so it is not going to explain the individual—it is not going to explain or predict any one individual judge, but we do see kind of these broad patterns, these voices reflected in the numbers, actually, so yes.

Chair NADLER. Thank you. Thank you.

Professor Hawkins, Judge Chen also compared the need for a diverse Federal bench to the Constitutional requirement that juries represent a fair cross-section of the community. How do the considerations that animate the fair cross-section requirement for juries support the importance of a diverse Federal judiciary?

Ms. HAWKINS. Thank you for that question, Chair Nadler, especially because I have written about this, and I have compared the considerations that we use and apply pretty uncontested in the jury context to the bench.

Juries serve as judicial decisionmakers, not unlike judges. One adjudicates facts; the other adjudicates the law. Yet, we have this very explicit commitment to having jurors represent a fair cross-section of the community. We have lots of courts that make very deliberate efforts to ensure that not only that jury pools are diverse, but that jury panels are sufficiently diverse to reflect the communities that they serve.

I think that because we understand that the appearance of fairness in the process is what engenders the trust, we need to legitimize the rule of law that those appearances matter as we have an increasingly diverse Nation. So, just as we acknowledge expressly and engage in active efforts to ensure diversity among jurors, we should do the same for judges.

Chair NADLER. Thank you.

Judge Donald, Judge Chen, Judge Bailey, and Judge Reeves all discuss how diversity on the bench affects the wider judicial system from the selection of bankruptcy and magistrate judges as well as key court personnel like clerks of the court or chief probation officers to local rules and programs. Do you agree with their assessment?

Judge DONALD. I agree with that. I also think it affects clerks. Chair Nadler, when I became a bankruptcy judge in June of 1988, I became the first African American woman to be a bankruptcy judge in the history of the United States. There were only nine nationwide. I was the only one in the south. I firmly believe that had it not been for the presence of Judges Nate Jones and Damon J. Keith on the Sixth circuit that I would have never had that opportunity.

Yes, it matters. Also, those of us who are in those positions are more likely to higher diverse clerks. I, for one, I don't want to be surrounded by everyone who looks like me or thinks like me because I think if that happens, there is no one to help me guard against my own blind spots, and all of us have those blind spots.

Chair NADLER. Thank you. My time has expired. Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

If the Ranking Member of the Full Committee, Mr. Jordan, is not here, then next up will be Mr. Bishop, the gentleman from North Carolina. You may begin, Representative Bishop.

Mr. BISHOP. Thank you, Mr. Chair.

Judge Donald, I was interested in your written comments. There is this one paragraph that sort of got me thinking about what we are talking about, and it says, you say, I am sad to report today that despite significant recent progress in diversifying the legal profession, the Federal judiciary is not yet visibly open to talented and qualified individuals from every corner of this great Nation. As of exactly 1 year ago in March 2020, women accounted for only one-third, 34 percent of Article III judgeships despite amounting to more than half of the U.S. population. Similarly, African Americans, Latinx Americans, and Asian Americans combined accounting for only 26 percent of Federal jurists, while 40 percent of the country identifies as non-White.

I guess, Judge Donald, it prompts me to ask. What is the objective? Is it to have a quota so that you are not really or not there until the numbers match the background population?

Judge DONALD. I don't think that we necessarily have to have the numbers correlating, but I do think that we ought to have the presence of all those groups.

One of the professors here today talked about, for example, the Seventh Circuit which today, we know that that circuit includes cities like Chicago, Illinois, Gary, Indiana, Indianapolis, Indiana, Milwaukee, Wisconsin, and those are cities with high populations of people of color, and there is not an African American on that court.

We are not going—it is not necessary that we have those mirror images, but I do believe we ought to have influences on those courts. We have to have that presence and those ideas and those lived experiences, Representative Bishop.

Mr. BISHOP. Comparing those—if comparisons were made to the background population, of course, we have to draw the judges from among the lawyers who are admitted to bars, so isn't that really the more relevant comparison?

Judge DONALD. I am so pleased that you acknowledge and mention that, sir, because we are working mightily right now to work on pipelines. We need to make certain that we have opportunities to enter the practice of law afforded to many more students, and there are organizations and individuals who are doing that.

In my own community, as Congressman Cohen will note, when I came on the bench, there were many students who were in impoverished communities and others who had never met a lawyer. They had never seen a lawyer. I do my job as judge, but I also feel I have a responsibility to my communities to make certain that people's dreams are enlarged. People cannot often exceed their dreams. They ought to have the ability to aspire to every position in this country. When we go out and help to infuse diversity, we have to enlarge and inspire dreams, and those dreams can one day become a reality.

Mr. BISHOP. Yes, ma'am. To that point, I am concerned about how we make the pipeline better. Asian Americans, despite having increased their numbers and outscoring other applicants, have been disproportionately denied admission to Ivy League schools, particularly Harvard, and I think that was sustained nonetheless by the First Circuit as an appropriate first—appropriate affirma-

tive action thing to do. The Administration recently dropped its support for Asian Americans discrimination contentions against Yale. Is it possible to discriminate against Asian Americans in Ivy League schools, and yet, improve the pipeline for Asian Americans getting access to judicial positions?

Judge DONALD. Okay. So, Congressman Bishop, I am going to let one of the professors respond more narrowly to that. When I talk about the pipeline, I am talking about going as deep as conditions in elementary schools and high schools, and exposing people to the law. It would be improper for me to comment on an issue that might come before my court, but I do understand the issue you are talking about. I am going to let those who are professors and those who sometimes live in the real as well as the theoretical world respond to that.

Mr. BISHOP. All right. Very well.

Professor Hawkins, I might take a quick—I have only got 30 seconds. Maybe you want to comment on that, and also, I have noticed that there—well, I will leave it and try to not make it a compound question. Do you have a quick comment on that before my time expires?

Ms. HAWKINS. Yes. Thank you. First, I want to say that the underrepresentation of Asian Pacific Americans in the Federal courts is definitely a concern. However, that concern does not stem from the underrepresentation of Asian Pacific Americans in college or in law school. They are actually overrepresented among college students, and they are one of the fastest-growing demographics among law school students as well. So, it is not a pipeline program, but I do agree that the underrepresentation on the bench is problematic.

Mr. BISHOP. Thank you. My time has expired.

Mr. JOHNSON of Georgia. I thank the gentleman.

The next up is the gentlelady from California, Congresswoman Lofgren, for 5 minutes.

Ms. LOFGREN. Well, thank you very much. I wonder if I could ask Judge Donald—She said she had a story to tell if she got a chance to tell it.

So, could you take just part of my 5 minutes and tell that story?

Judge DONALD. I will abbreviate it. Thank you, Congresswoman Lofgren. I grew up in the segregated south, so I have been in lots of situations where I was the only person who looked like me in the room. So, when I became a judge in Shelby County, the Clerk of Court, a middle-aged White male, a friend of mine—a former friend of mine, he is deceased now, and of Congressman Cohen's was Gene Goalsby. He staffed my courtroom. I was the first African-American woman to become a judge in Tennessee's history. Mr. Goalsby was my friend. He was invested in my success. He wanted me to be comfortable. So, he staffed my courtroom with all African American personnel.

So, when I opened court the first day in that September of 1982, the first person on my docket to walk through the room was a young White male. He looked around the room, Congresswoman. His eyes grew as wide as half dollar bills, as he saw no one who looked like him. Because of my own experiences of being the only person of a particular race in a space, I knew he must have been

feeling anxious. He asked me for a continuance. I granted it. He came back 30 days later with an African American defense attorney. Based upon my belief that he was concerned that he could not get justice in a place where no one looked like him, I went to Mr. Goalsby and thanked him, but I told him we need to change out some personnel and create a diverse environment, and that is what we did.

So, that story is directly opposite to Mr. Bailey's, but it means that diversity is not just to people of color, but it is also important to people in the majority race. It is just that most people in the majority have never been in a situation where they were the minority unless they were in some foreign country.

Ms. LOFGREN. That is a fascinating and a really beautiful story. I know we have a long hearing, and there are others behind me, so I will just say this has been a very enlightening panel for me. One of the things that in addition to having diversity in terms of ethnicity and gender, we just touched upon the need for diversity geographically and educationally. You just can't tell me that the only qualified people in America to be judges are White people who went to Harvard or Yale. I mean, that just can't be true, and historically it has not been true. When you take a look at Justice Earl Warren, he wasn't even a judge when he was appointed. He went to Bakersfield High School, and he went to the University of California Berkeley Law School, and yet he made a profound change in America on the court.

I worry that the court has become more like a priesthood than it used to be. We used to reach out to talented lawyers who had life experiences not only on the bench as working their way up, but also in business and in life and in politics broadly. I mean, Justice Douglas and others. We have lost that. So, I think we need a diverse bench, a talented bench, and I think we all understand that that doesn't just mean men, and it doesn't just mean White men, although I love White men. My husband and my son are White men. We need to have a bench that really reflects the full talent of America.

I really appreciate the witnesses here today, and Judge, it was a treat to hear your story, and I am glad I got a chance to ask you about it.

Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. The gentlelady yields back.

I will now recognize the gentleman from Wisconsin, Mr. Tiffany, for 5 minutes.

Mr. TIFFANY. Thank you, Mr. Chair, for the time today. Before we start, I just want to mention in regards to the technical difficulties that we had at the start of this, it is really time for us to get back to hearings in the United States Capitol. I had the same thing happen with another Committee that I sit on repeatedly. This is not any of your fault, Mr. Chair, as the Subcommittee Chair here, but it is time for us to get back to having these hearings in the United States Capitol where we will have a Congress, a Congress where people get together.

I would just like to share my comments. Dr. Martin Luther King once said, "I have a dream that my four little children will one day live in a Nation where they will not be judged by the color of their

skin, but by the content of their character." Today this committee's message is we will judge you by the color of your skin, race, gender, and politics, not by your character or qualifications.

Let's begin with the basic premise that exceptional qualifications, not race, skin, color, gender, or religion should be the most important factor when evaluating a judicial nominee. Over the last few years, we have seen well qualified and diverse nominations to the courts. However, because they were Republican nominations, the Democrats didn't think they were diverse enough. I would urge people to take a look at the list of the Trump nominees which came from all different types of ethnicities and stations in society that were put on the courts. It is a good record.

Senator Whitehouse in 2019 referred to Judge Neomi Rao, the first Asian Pacific American woman to sit on the D.C. circuit, as a cartoon of a fake judge despite her well qualified rating by the American Bar Association. She did not receive one single Democrat vote.

When Judge Janice Brown, an exceptionally qualified African American woman was nominated to the Federal bench. Senator Schumer called her the least worthy pick despite her qualification as a judge coming from the California Supreme Court. Even then, Senator Biden voted against her nomination.

The truth is simple. The only times my Democratic colleagues believe someone meets their diversity test is when they are ideologically aligned. The same is true when gender issues are involved. One may not look further than the nomination of an exceptionally qualified woman, Justice Barrett. She was openly attacked for her religion, and no one on the left said a word. The message that day, she was not diverse enough because she was nominated by former President Trump. This is less about diversity and more about furthering radical progressive agendas.

As I understand it, the composition of are Article III judges roughly represents the racial diversity of our Nation. Nomination to the bench should not be decided by identity politics but instead by qualifications. These men and women administer our laws. Lady Justice is blindfolded for a reason because justice is blind.

I would just go on to say, Mr. Chair, I thought you did a good job of acknowledging the improvements that have been done. A couple of our judges that spoke earlier spoke very eloquently consequently about their numerous success stories. We are moving in the right direction, and that is really a good thing. If you look at the list of President Trump's judges, that continuation happened over the last 4 years. If you take—we can cherry pick data, all of us, but you can take a look at the Wisconsin State Supreme Court. Six of the seven judges are women which I would say people see as progress in our State and a good thing to point out.

I do agree with you and our Ranking Member, Mr. Issa, in regards to there are some places that are overrepresented. Let's talk about the elephant in the room that we are talking about the Ivy League, and that is not just the courts, but all our Federal government. We could use more people that are from throughout our country.

So, if I can take—I don't have the timer in front of me, Mr. Chair, but I want to put one quick question out to Mr. Kirsanow.

Mr. Kirsanow, you referred to two Senators, United States Senators yesterday, Duckworth and Hirono, that came out and said that they will not vote for non-diverse candidates. Do you think that it is wise to extend that to judicial nominations?

Mr. JOHNSON of Georgia. Mr. Kirsanow, you need to unmute.

Mr. KIRSANOW. Apologies once again.

In 2 decades on the Civil Rights Commission, one of the things I have observed is the decline in public trust of institutions, and it is correlated to some extent with the perception that we are counting by impermissible qualities. The most impermissible of all is race, but that is not the defining thing that has eroded trust, but it is one of those things. Someone is going to say, very overtly, I am not voting for somebody because of their race. That is something that is so anathema to our civic ethos as to be astonishing.

I think we have been talking a lot about having a diverse judiciary which I think a lot—everybody here agrees with as somehow engendering trust in the public. One of the uncontroverted ways of eroding that trust is giving the public perception that you are counting on the basis of race, or people are getting onto the judiciary because of race.

For those who are saying that, and I am not saying anyone here is doing that, but for those broadly who say, no, we are not doing that, we saw the same dynamic pertain in Grutter and Gratz versus Bollinger where the courts said race is just one of many factors, a feather on the scale in the admissions process. When you look at the data, it is not a feather on the scale, it is an anvil. At some schools, Black and Hispanic students are up to 500 times more likely to be admitted over the White and Asian comparatives. What we must not do under any circumstances, in my estimation, is erode the trust that some people have talked about very eloquently as being engendered by a diverse judiciary by making it appear as if race is a factor in the process of selecting candidates.

Mr. TIFFANY. Mr. Chair, I really—

Mr. JOHNSON of Georgia. The gentleman's time has expired.

Mr. TIFFANY. Okay. Mr. Chair, I thought you did a really good job of laying this out today. We all seek a perfect union as it is said in the founding. We have so much work to do. We continue to move towards that more perfect union, and I really appreciate having this hearing today to talk about this important issue. Thank you.

Mr. JOHNSON of Georgia. I thank the gentleman.

Our next questioner will be the gentleman from California, Mr. Lieu, for 5 minutes.

Mr. LIEU. Thank you, Chair Johnson, for holding this important hearing. I previously served on active duty in the United States military because I believe America is an exceptional country. We are not perfect, but we are moving towards that more perfect union, and one of the areas we have to look at is the Federal judiciary.

Let me simply start by noting that the highest Federal court in the land, the United States Supreme Court, does not have a single Asian American on their court. Not only that, but not a single Asian American was even seriously considered to be on that court in both Democratic and Republican Administrations. The message sent is that lawyers and judges and law professors that look like

me are somehow not qualified to be on the U.S. Supreme Court, and that is just wrong.

When we looked at district courts, for example, Asian Americans are 3.5 percent in terms of Federal District Court judges, well below our population in the United States. Again, the message that sends is that lawyers and State court judges and law professors that look like me are somehow not qualified to be Federal District Court judges.

I want people to understand that when you have a Federal judiciary that is 73 percent White and male, far above that actual population of White males, and then you say the reason is because of merit, you are sending the message that minorities are less qualified, more stupid, less good to be judges to be on the Federal judiciary. That is what is so corrosive about not diversifying the Federal judiciary.

It is not about a specific Federal judge. I listened to Judge Ho very closely. I admire he is the only Asian American on that Circuit Court, but it is not about him. He is not there just because of merit because there are dozens, likely hundreds of other people who could be in his exact same position and be just as qualified. Because there are so few Federal judiciary positions, there are literally thousands of people that could fill these positions that are not White and male. To somehow suggest that the only reason it is White and male is because those people are the most exceptionally qualified is a lie. There is discrimination happening because if you took the most qualified people and sorted them out, it wouldn't like look this, and that is what we need to address.

Now, Commissioner Kirsanow, you also had a similar line of testimony that somehow the way it looks like this is because of merit. You also made a false fact about the Ninth Circuit Court of Appeals. It is not the most reversed circuit. PolitiFact checked this; other people have. In fact, the Sixth Circuit is the most reversed circuit.

So, setting that aside because I did mention you and your testimony, I am going to give you a chance to respond. Where I am coming from is not the individual judges or the Federal judiciary. It is the message that is being sent to America that somehow minorities are not qualified to be on the Federal judiciary because somehow, we are not exceptionally qualified.

Mr. KIRSANOW. Thank you, Congressman, for the opportunity to respond. I agree with you entirely that if there is discrimination, it is against Asian Americans. In fact, just yesterday or the day before yesterday, I filed a brief in the Students for Fair Admissions against Harvard case in the Supreme Court.

Mr. LIEU. Stop bringing in irrelevant issues. There are more Asian Americans at these Ivy Leagues. That are underrepresented. These are different issues happening. Just answer my question about Asian Americans in the Federal judiciary or minorities in the Federal judiciary because it is underrepresented.

Mr. KIRSANOW. It is underrepresented.

Mr. LIEU. These college issues are not what the hearing is about.

Mr. KIRSANOW. Underrepresented, definitely. Underrepresented based on the fact that there has been discrimination in the pipeline that we have talking about, profound discrimination against Asian

Americans. Without question, profound discrimination. It is one of the reasons why I indicated before we have an erosion in confidence in the institutions because the perception by the public is we are making determinations on the basis of race, one of the most baleful and anathema considerations we have in the United States of America because of history.

It is precisely why I said we must avoid at all costs the perception that decisions are being made on the basis of race. When you look at the correlative with how decision-making is being through the admissions process, it appears as if decisions, in large part, are being—

Mr. LIEU. We are not talking about the admissions process. We are talking about the Federal judiciary. The fact that it is 73 percent White and male means decisions were being made on the race of applicant, and that is simply a fact because it is not—statistically, it would not have come out as 73 percent White and male.

The reason that you can't talk about the Federal judiciary and you keep going to the college issue is because you have no basis on the issue of the Federal judiciary. It just needs to be more diverse. It is corrosive to America to have an entire third branch of government in which people were selected on the basis of them being White. That is the only way to explain these statistics.

I yield back.

Mr. JOHNSON of Georgia. I thank the gentleman for his impassioned argument.

We will next turn to the gentleman from Wisconsin, Mr. Fitzgerald, for 5 minutes.

Mr. FITZPATRICK. Thank you, Mr. Chair.

I appreciate Judge Donald being with us today. It is an honor. I think my frustration kind of with not just the discussion today but overall, this back and forth that has been going on. Diversity, I am not sure who would not be for that.

I was in the State Legislature for many years before I was elected to Congress. What we experienced in Wisconsin, and Judge Donald, you talked a little bit about Milwaukee earlier, but the frustration we had was that oftentimes, the legislature in Wisconsin would pass a bill, and the governor would sign it into law, and immediately it would end up in the Western District or the Eastern District. We would get into a situation where we would know where we were headed and how the judge was going to handle something. It clearly was based on – that they had developed an ideology.

If there was kind of this gambit of which judge you might be before, I think most of us could accept that. There seemed to be—I am going to call it dysfunction, and maybe that is close to being accurate, maybe it isn't, but it was about the back and forth between what was going on in the Eastern or Western District and the Seventh Circuit in Chicago where there was just a delay in action or a delay in ruling.

For me, it seems more about longevity of judges, Federal judges, and how long they are there which can be a long time. Oftentimes, people get entrenched, and they start understanding this is the profile of this judge, and they are not going to vary from that.

So, from my perspective as a Republican Congressman, we need more conservative judges. We need more judges that are going to Rule based on the merits of the case instead of taking one ideology or other. Obviously, the criticism that comes from a lot of Members of my party is just the idea that, there are too many Federal judges that are legislating from the bench versus really taking kind of a fair look at it.

So, I just want to take that a different look at it, but there still seems to be a back and forth between what is going on in the States and in the circuit, the Federal circuit courts that seems to be resolved, and I don't know how we are going to do that or how we could tackle that, and I would just be interested to hear your take on that.

Mr. FITZGERALD. I think you are muted, Judge.

Mr. JOHNSON of Georgia. That question is directed to whom, sir?

Mr. FITZGERALD. To Judge Donald.

Judge DONALD. Okay. So, Congressman Fitzgerald, I can appreciate your expressed frustration with the sometimes I guess the friction or whatever between the various branches. I think that is the genius of the Founders to have these separate branches. I know that sometimes the courts are frustrated with legislative matters and legislators are frustrated with things that happen in the court.

I believe, though, and I believe this firmly to the core, because of the oath that I took, that judges come to these issues with a view to determining the law based on the facts. I think we try to look at the laws and sometimes if there is an ambiguity and we have to try to decide what Congress meant by a particular law, I think that we use the appropriate tools of a statutory and other interpretation to do the best we can to find that and then apply that law.

I can appreciate that there are perhaps some ideological differences in the way judges come to these things and I can't speak to those individual differences in any court, but I do believe that the courts and judges generally come to this job seeking to honor and uphold the oath that they take with respect to applying the law. I also believe that we try to make certain that we give fidelity to the framework that the Founders set up with these separate and coequal branches and the respective obligations of each.

Mr. FITZGERALD. Thank you very much.

A fascinating day and a fascinating hearing. I yield back, Mr. Chair.

Mr. JOHNSON of Georgia. Thank you, Congressman Fitzgerald.

Next up is the Congressman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair. First, I would like to—

Mr. JOHNSON of Georgia. Before you start, Mr. Cohen, let me ask that all Members mute their phones. We are hearing commentary from sounds like Fox News. Whoever there needs to—okay. All right. Thank you.

Mr. Cohen, you may begin.

Mr. COHEN. Thank you, Mr. Chair.

First, I would like to agree with my colleague from Wisconsin that we should be having in-person hearings. We can't do that, as Speaker Pelosi has made clear, until enough of the Congress Mem-

bers have taken shots, vaccinations to make us be safe in our committees. I believe it is about half of the Members on the other side who have not taken their tests, and that is why we can't go back to our hearings like we would like. So, if they would just roll up their sleeves and allow a little needle to be put in their oral to protect them from this pandemic, we could all be back together again. I look forward to that.

Secondly, as far as the people that criticized Harvard and Yale, yeah, Judge Barrett went to Rhodes College, a Rhodes scholar from Memphis. We are proud of that.

Judge Donald, you have seen the fact that the Federal judiciary is never as diverse as it should be. Over the past 4 years which direction have we gone in? We have gone the wrong direction. Out of 226 judges appointed by Donald Trump, only 24 percent were women and only 16 percent were non-White and when you look at the appeals court where you sit, Judge Donald, the statistics are just astonishingly worse. Zero Black appeals court judges were appointed by Trump, zero out of about 65. He couldn't find one Black judge out of 65 who would qualify based—because he does everything, according to some of these people, based on qualifications. Not a single qualified Black person. Unbelievable. No Hispanic appeals court either. None.

This is important because, as we look at our life experiences, judges are no different and Trump basically put White people in control because it was all about changing the balance of power.

Judge Donald, you have had a seat at the district and the Circuit Court levels. You have had that. You have heard appeals court cases with panels and judges that interact with each other, deciding cases. How do judges' life experiences play into the deliberative process and how, if at all, was it different at the trial court level versus the appellate court level?

Judge DONALD. Well, obviously thank you, Congressman Cohen.

At the trial court level, I sat as the sole decision-maker. In trials, of course, with juries, I had a jury there to be the decider of fact, but it did not rely on any kind of collaborative or deliberative process between judges. I was the sole decision-maker. At the appellate court I sit with panels. I sit in panels of three or sometimes with an en banc court. All of us, whether we acknowledge it or not, we to some degree rely on lived experiences. We all study the same Black letter law.

Then in interpreting and applying that law, those lived experiences are brought to bear and for people who say, well, that is wrong, but how else could it be if all of us, if the Black letter law was all that we relied on, then we would not have minority and majority opinions on an issue because we would all see everything the same way. We would look at the law the same way. So, those lived experiences help us to round out and factor in all the considerations of the law that we are sitting and looking.

So, it is important because we have a back and forth and we put all of those views about cases and come to hopefully a richer experience and sometimes, I would say this, most of the decisions on our court are unanimous. Most of our decisions are unanimous and I think it is probably that way on most courts but there are times when we look at those issues and, based on our reading of the law

and our shared lived experiences, we come to different results as all courts do.

Mr. COHEN. Thank you, Judge. You have a rare background for a Federal judge and one that people should be envious of. You got your degrees from the University of Memphis, my alma mater as well for law school. You worked at Memphis Area Legal Services to provide legal assistance for those who couldn't otherwise afford it. As a public defender, you did the same thing. Do you find that background useful in your deliberative process? How do you think having a more diverse judiciary particularly with respect to education or professional experiences would affect judicial decision-making?

Judge DONALD. I think those experiences, Congressman Cohen, were and are enormously important.

We have not talked about one dimension of diversity and that is socioeconomic diversity. I represented people, poor people, who otherwise had no voice. I went into the criminal courts and stood as the voice and the advocate for people accused with the government against them and only an advocate representing them.

It is important that we have not only the prosecutorial perspective that the judges experience, but also the defense perspective and to be a public interest lawyer is a component that we don't often find in judges but it is an important and critical component. I think it also helps lend legitimacy, and it also helps with the perception of justice by the people that we seek to serve.

Mr. COHEN. Thank you, Judge Donald.

I yield back the balance of my time.

Mr. JOHNSON of Georgia. Thank you.

We will next hear from the gentleman from Oregon, Mr. Bentz. Mr. Bentz, if you would turn your camera on, you will be recognized.

Mr. BENTZ. Thank you so much, Mr. Chair, for this most interesting discussion.

I would like to start with Judge Donald. I was part of a commission to vet applicants to the Federal District Courts in the Northwest and the Ninth Circuit Court of Appeals. I asked that the applicants, that the doorway to apply for consideration be opened again because I felt we had too few applicants. As a result, the number doubled. I won't go into detail, other than to say I was disturbed by the lack of minority participation in that application process.

I know that when I went to law school many years ago, the number of women in my class was perhaps 20 percent. Today I understand that about 54.9 percent of law students are female. You mentioned in your discussion the focus on the pipeline, and I would like you to go back to that for just a moment and share with us what you think needs to be done so that we can advance the interests of minorities, as well as successfully as has been the case with female applicants.

Judge DONALD. Absolutely. Thank you for this opportunity.

Well, first, I want to speak specifically to the point you mentioned about the selection process there. Often when people look in an area and they don't see that there is a history of people who look like them being considered, they simply won't apply and go

through the process. It is a daunting process, and why go through all of that if there is no opportunity that you might get selected.

On the pipeline issue, it starts early on. There are many places where people don't know a lawyer. Let me give you an example of what is going on in Memphis. We have a program where law firms and corporations will support this position where they will allow high school students to go through a work training program and then have a summer internship in the law department either at the corporation or in the law firm. They are paid a modest stipend, but it gives them exposure and experience not only to lawyers but also to the area of law. We have had a number of people who have gone through that program express interest.

At the American Bar Association, we have the legal opportunity minority—legal opportunity minority scholarship for first-generation lawyers. You would not believe the number of individuals in this country who have never had a lawyer in their family. So, we provide scholarships for people to help front the costs of the expense of law school and also to provide mentors.

We judges have a judicial intern opportunity program to help students get placed as internships. Judges from across the country band together to do a program where we help law students understand the importance of clerkships and train them in that.

Those are some of the pipelines. We have got to do more at the base, at those elementary schools when students are first getting started, to help them understand and envision a future that might include the law.

Mr. BENTZ. Thank you.

Professor Hawkins, there has been much discussed about where people want to go, but not too much about how to get there. Perhaps this—and my question about the pipeline is one focus. Perhaps you could share with us what changes in law you would recommend to address the issues we have been discussing today?

Ms. HAWKINS. Do you mean the rule of law, Congressman?

Mr. BENTZ. Yes. I mean the rule of law or any—we know that much of that which has been discussed is challenging to achieve by virtue of rules we have heard, laws that apply that we have heard from many discussing the issues. They say we can't discuss race. So, what would you do to help address these issues? Would you do anything on the law side, or is this all about encouraging as opposed to passing laws?

Ms. HAWKINS. Well, I appreciate the question, because I think that one of the important things that we have to do is preserve existing law. So, currently the Supreme Court precedent is <it>Grutter<it> v. <it>Bollinger<it>, and that precedent acknowledges the compelling interest in diversity. Now that is in respect to higher education but, nevertheless, it is reasonable to assume, and certainly lower courts have found, applying that precedent—that diversity is a compelling interest across a wide range of government context including in the employment context.

So, certainly there are people who think that the rule of law in Grutter is threatened by the current Supreme Court and I think what is really important is not just to preserve the existing recognition that diversity is, in fact, a compelling interest and can be pursued in ways that are legally defensible and that are narrowly

tailored but to extend that explicitly outside of the context of higher education to employment practices and other domains.

Mr. BENTZ. Thank you for the clarity of your answer.

I yield back.

Mr. JOHNSON of Georgia. Thank you.

We will next hear from the gentleman from New York, Mr. Mondaire Jones, for 5 minutes.

Congressman Jones.

Mr. JONES. Thank you, Chair Johnson, for your leadership as always and for holding this important hearing today and thank to you all our witnesses on both of our distinguished panels.

As Judge Reeves stated in his written testimony, our judiciary may soon face, quote, "a crisis of legitimacy." As he wrote, one reason is that quote, "as our country becomes more diverse, our courts are becoming more homogeneous."

As an openly gay, Black attorney who grew up in section 8 housing and on food stamps, I know how important it is that the judges who serve the American people truly represent the American people.

When I entered law school in 2010, I hardly ever saw myself represented in the legal profession, let alone on the Federal bench. At that time there was only one openly gay Article III judge. When I graduated law school, there still was not a single openly gay Black man on the bench nor before this Congress had there been one in this body.

It is for that reason that growing up I never imagined someone like me could even run for Congress, let alone get elected. Make no mistake, descriptive representation drives substantive representation. Who serves in our Government shapes who our Government serves. When decisions about us are made without us, underrepresented communities pay the price. There is a reason for that. Whether we want to admit it or not, we are all shaped by our life experiences.

That, of course, does not by any stretch of the imagination mean that we can presume how a judge will vote simply because of their race, gender, or sexual orientation. I understand that and I agree with those individuals who have expressed concerns about that presumption, but we are dishonest with ourselves if we think that the lack of judicial diversity in this country does not impact judicial decision-making.

As Professor Sen and Professor Hawkins have shown us today, it does look no further than the Supreme Court's cases on LGBTQ rights. I think the court's slow progress with respect to LGBTQ rights is because not enough people on the court have seen the humanity in Members of the LGBTQ community. As a decade of research on what is called contact theory shows, personal relationships with LGBTQ people increase support for LGBTQ rights.

Does anyone really think that if they were openly LGBTQ Justices on the Supreme Court, LGBTQ people like me would have to spend every June anxiously awaiting to see if the Supreme Court will vote to take away our civil rights? If there were openly LGBTQ Justices on the Supreme Court, does anyone really think it would have taken them until June 2015 for the Court to recognize my constitutional right to marry who I love or until June of 2020 for

the Court to Rule that Federal law prohibits employers from firing someone for being gay or trans?

Does anyone really think that if there were even one openly LGBTQ justice, Justice Scalia would have compared LGBTQ people to child abusers in an address a few months after his dissent in Obergefell? Justice Scalia once wrote that one of his votes against LGBTQ rights was not of immense personal importance to him. Well, that might explain why he was so comfortable voting to oppose statutes criminalizing gay intimacy and prohibiting marriage equality.

We need more judges who see the humanity in all people, who understand the human stakes of their decisions. We need more judges for whom the law is personal.

With my time left, Professor Hawkins, can you highlight for us how descriptive representation improves the judicial decisions that most directly affect underrepresented communities?

Ms. HAWKINS. Absolutely. Thank you, Congressman Jones.

Your description was quite excellent, but you are right. There is research that shows across a wide range of bureaucratic context including the bench that when there is racial congruence between constituents and Representatives that there are more responsive outcomes. This is what we call accountability. This is why I said that it improves judicial accountability to minority communities when we have a diverse bench.

We know that not because, as so many people have said already, race, gender, ethnicity, LGBTQ status, or any other dimension of identity necessarily dictates outcomes. It is because they influence experience and perspectives, and they make people more able to relate to people who come before the Court and before the government to plead their case or to seek some sort of redress. So that is what makes descriptive representation translate into substantive representation and what I would call political accountability.

Mr. JONES. Thank you, Professor.

Mr. Chair, I yield back.

Mr. JOHNSON of Georgia. Thank you, Congressman Jones.

Last but not least, the gentlelady from North Carolina, Congresswoman Ross, is recognized for 5 minutes and she will be the end, unless another member appears.

Congresswoman Ross, you may proceed.

Ms. ROSS. Thank you very much, Mr. Chair, and I think this has been a fantastic hearing and coupled with the hearing that we had a couple of weeks ago about expanding the Federal judiciary, that it might be just a sweet spot in time for taking care of two issues that are crucial to the better Administration of justice in this country.

My question is for both of our professors who have done a lot of research and so I am curious about whether—I understand and it is clear that we have a disproportionate number of men and White men who are on the Federal bench.

My question is: Are they retiring or how long do they stay around? I think because these are lifetime appointments, we have fewer opportunities coming up for anybody else and I want to think about when will these opportunities come up and how age diversity is affected?

Ms. SEN. These are really important questions.

So, generally for the Court of Appeals the average age at investiture is around 50 years old and for District Court judges it has been closer to 40, but I think that has actually flipped downward over time so that we are appointing younger judges who then serve longer terms.

So, to kind of concretely answer your question, these opportunities aren't going to come around all that often, given that judges are serving longer and longer terms. There are some papers on looking at judges' age and that is another characteristic that kind of factors into here. You might think that younger judges are actually, like more well-connected to kind of social developments and more sensitive to components of diversity, for example, LGBTQ status, than older judges, as younger generations are more embracing of the LGBTQ community. So, that is something that people have looked at and have found.

Ms. ROSS. Ms. Hawkins, yeah.

Ms. HAWKINS. Thank you.

I would add to that the fact that what we really have is this artificial scarcity in terms of the seats available to be filled, and we have really an abundance of qualified candidates. I think it was Congressman Lieu who said this is not really about having an inadequate supply. This is about having the deliberate and conscious commitment to improving the diversity on the bench, because, as you said, there are so few seats that come available, given life tenure. As Professor Sen said, the age of judges at investiture is actually going down. I believe research shows that President Trump had the lowest average age at the time of appointment.

So, we know that these opportunities are few and far between. Because of that, there are usually robust candidate pools that are available, rich with not only well-qualified candidates but very diverse candidates. So, this is not really a pipeline problem. This is an appointment problem. We really just have to be deliberate and conscious about the commitment, just like Jimmy Carter did when he said, "I am going to do this." It happened.

Ms. ROSS. To follow up, this Committee had a hearing on the need to expand the Federal bench, particularly at the District Court level, because of the caseloads and because of population increases. If we did that, would that be something that would provide the opportunity for all these qualified candidates to be considered so that it wouldn't be such a small number, that we could then have much more of a balance, because we would have so many more opportunities to fill those positions?

Ms. SEN. I think the answer is yes, and I think we could make a huge impact here with a small number. So, for example, going to the number of Native American judges which is just two, we could add one more and that would actually increase the percentage of Native Americans on the Federal bench by 50 percent. Right? So, small numbers could have a huge impact here, and I think that speaks to your point. This is a great opportunity to do that.

Ms. ROSS. Okay.

Ms. HAWKINS. I echo that. Again, scarcity is really the problem. It is the scarcity of opportunities that prevents us, in addition to

the will, the political will to do this. Once we have the political will, the scarcity of opportunity is another impediment. So, expanding the Federal court system is certainly a way to expand those opportunities and reduce that artificial scarcity.

Ms. ROSS. Well, wonderful. Maybe, we will get around to doing that for the first time in 30 years.

Thank you very much, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. I thank the gentlelady.

I also thank the witnesses for their appearance, for their testimony, and for their time. I deeply thank you.

Mr. KIRSANOW. Mr. Chair.

Mr. JOHNSON of Georgia. This concludes today hearing.

Mr. KIRSANOW. Mr. Chair, a point of personal privilege.

Mr. JOHNSON of Georgia. Yes.

Mr. KIRSANOW. I think the claim was made I lied to the Committee about the reversal rates of the Sixth—of the Ninth Circuit. I want to reemphasize that the Ninth Circuit over the last 25 years is the most reversed circuit by the Supreme Court.

Mr. JOHNSON of Georgia. Well, I think that the figures speak for themselves and it is a matter of ideology that the Ninth Circuit has been so overruled over the years more than any other circuit. So, that is a matter of ideology as opposed to competence. There is no question about that.

So, without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

With that, the hearing is adjourned.

[Whereupon, at 4:38 p.m., the Subcommittee was adjourned.]

APPENDIX

ALLIANCE FOR JUSTICE

PRESIDENT
NAN ARON

CHAIR
PAULETTE MEYER

March 25, 2021

The Honorable Henry C. Johnson
Chairman
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet

Dear Chairman Johnson:

On behalf of the Alliance for Justice (AFJ), a national association representing over 120 public interest and civil rights organizations, I write to thank you for holding the hearing *The Importance of a Diverse Federal Judiciary* concerning the urgent need for more jurists of diverse professional and demographic backgrounds to serve on our federal courts. For four years, the Trump Administration confirmed hundreds of predominantly white, male, and too-often unqualified federal judges with disturbing records of undermining critical rights and legal protections — aided by his Republican allies in the Senate. As AFJ made clear in November, along with over 70 other organizations, it is more necessary than ever for President Biden and the Senate to reverse course by nominating and confirming demographically and professionally diverse jurists with a demonstrated commitment to equal justice.

Federal courts and the judges who serve on them are essential to the protection of our most important constitutional rights. Judges determine the scope and enforceability of protections for reproductive rights, health care, equal opportunity in the workplace and education, social and criminal justice, corporate accountability, and more. The judiciary is often the last defense for vulnerable Americans fighting for their civil rights and liberties.

Individuals in every industry and of all backgrounds bring their personal experiences to bear in their work. This breadth of experience is especially beneficial among judges sitting on federal courts. For everyday Americans, including from historically marginalized communities, having their disputes heard before judges of diverse racial, ethnic, and gender backgrounds inspires confidence in the fairness and equality of our judicial system. It is outrageous, as just one example, that there are no persons of color on the Seventh Circuit Court of Appeals, despite the fact that thirty percent of the circuit — which

includes Chicago, Milwaukee, and Indianapolis — are racial minorities. The Eighth Circuit Court of Appeals has only had two women in its entire 152-year history (and only has one woman sitting on the court now). More jurists from underrepresented demographic backgrounds would decrease the mistrust that vulnerable members of our society have for our judicial institutions and would also strengthen our democracy and rule of law.

Judicial decision-making is enriched when the judges on a panel hear from colleagues with different professional backgrounds and career paths. A former corporate attorney will likely consider a given piece of evidence through a different lens than a former public defender. That multiplicity of perspectives will ultimately result in a more thorough and informed ruling. In 2014, AFJ published Broadening the Bench: Professional Diversity and Judicial Nominations, a report on the need for greater professional diversity in a federal judiciary composed largely of jurists who spent most of their legal careers in private practice or as prosecutors. And, seven years later, it is even more imperative that those who have been public defenders and fought for equal justice — as advocates for workers' rights, women's rights, civil rights, LGBTQ rights, disability rights, consumers, immigrants, and environmental protections — also be represented on the federal bench.

Indeed, a more diverse bench improves the quality of decision-making. There are countless examples of the valuable contributions that minority perspectives bring to our judiciary through increased legitimacy of our institutions and more legally robust judicial opinions. Rulings and even dissents by celebrated Supreme Court Justices Thurgood Marshall and Ruth Bader Ginsburg are particularly illustrative of how underrepresented perspectives on the bench lead to greater interest in and respect for the judiciary among the public, more careful consideration of matters before the Court, and improved legal reasoning justifying answers to the most significant questions facing our society. The unique perspectives of these legal giants have been acknowledged and appreciated by their colleagues appointed by both political parties.

Justice Sandra Day O'Connor, for instance, reflected that while all justices "come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used the law to heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection." The jurisprudence that came out of the Supreme Court during Justice Marshall's tenure benefited immeasurably not only from his perspective as the first Black American to serve on the high court, but also thanks to his decades of unique experience as an NAACP Legal Defense Fund lawyer.

It is long past time that Congress prioritizes the confirmation of underrepresented jurists who will similarly enhance the quality of judicial decision-making. Thank you again for holding this hearing to increase awareness of our judiciary's desperate need for judges who reflect not only the diversity of race, sex, gender identity, sexual orientation, disability status, ethnicity, national origin, and socio-economic status, but also the broad spectrum of lawyers across the profession who advocate for clients with different legal needs from all walks of life.

AFJ applauds your commitment to ensuring our diverse nation is served by the equally diverse judiciary it deserves. We look forward to working with you in the coming years to advocate for the nomination and confirmation of highly qualified and demographically and experientially diverse nominees for the federal courts.

Sincerely,

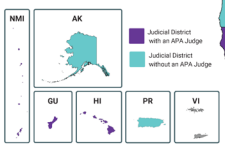
Nan Aron
President

APA Judges by Federal Judicial District

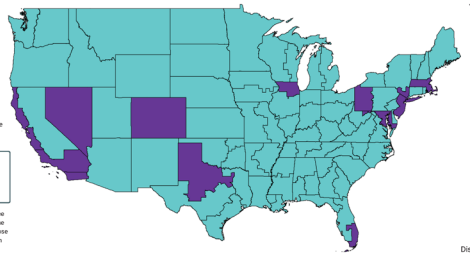
As of July 16, 2021

Out of a total of **94** federal district courts, there are only **18** district courts (16 Article III and 2 Article IV courts) with at least one APA judge.*

Out of a total of **673** Article III federal district court seats, only **27** are held by active APA judges.



*There are 91 Article III courts (including D.C. and Puerto Rico) and three Article IV courts. There are two APA judges for the District Courts for the District of Guam and the District of the Northern Mariana Islands, but those judges are Article IV judges appointed for 10-years. Similarly, the Virgin Islands contain a judicial district that has an Article IV court.



List of federal district courts with at least one APA judge

- Central District of California
- Northern District of California
- Southern District of California
- District of Colorado
- District of D.C.
- Southern District of Florida
- District of Hawaii
- Northern District of Illinois
- District of Maryland
- District of Massachusetts
- District of New Jersey
- Eastern District of New York
- Southern District of New York
- District of Nevada
- Western District of Pennsylvania
- Northern District of Texas
- District of the Northern Mariana Islands
- District of Guam

For more information about APA judges in the United States, please visit: https://www.napaba.org/page/JudicialNom

NAPABA

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April 1, 2021

The Honorable Henry C. Johnson
Chairman, Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: "The Importance of a Diverse Federal Judiciary" hearing on March 25, 2021

Dear Chairman Johnson:

On behalf of the Lawyers Committee for Civil Rights Under Law ("Lawyers Committee"), a nonprofit civil rights organization founded in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and securing equal justice under law, I thank you for holding the hearing "The Importance of a Diverse Federal Judiciary" on March 25, 2021 concerning the urgent need for more judges of diverse racial, ethnic and professional backgrounds to serve on the federal bench.

The hearing highlighted the urgent need for more judges of diverse racial, ethnic and professional backgrounds to serve on the federal bench, particularly after the regression of racial and ethnic diversity in the federal judiciary during the past four years, as 84 percent of the confirmed judges were white and 76 percent of those confirmed were male. As our country has grown increasingly racially and ethnically diverse, the need to appoint more Black judges, judges of color, women judges, and judges from other underrepresented backgrounds on the federal bench grows, both to ensure that the judiciary is reflective of the population whose cases it hears and also to increase public trust and accountability.

It is extremely important for the federal bench to better reflect the demographics of the United States. According to the United States Census Bureau, approximately 40 percent of the U.S. population identifies as people of color, yet only 26.5 percent of active Article III judges are people of color.

We recently published the attached brief, "The Federal Bench Must Reflect the Racial, Ethnic, and Gender Diversity of the United States" to highlight the importance of judicial diversity in increasing public trust, accountability, accessibility and impartiality. The brief identifies trends in presidential appointments that have contributed to the lack of racial and ethnic diversity on the federal bench.

We ask that this submission be accepted into the record for the hearing. Thank you for your leadership in advancing judicial diversity, and ensuring our federal bench is reflective of the diverse nation it serves. We look forward to working with you and your staff to continue advocating for racial and ethnic diversity on the federal bench, and welcome the opportunity to discuss the brief with your office further. If you have any questions or concerns please contact my colleague Erinn D. Martin, Policy Counsel, at emartin@lawyerscommittee.org.

Sincerely,

Damon T. Hewitt
Acting President and Executive Director/
Executive Vice President
Lawyers' Committee for Civil Rights Under Law
Washington, D.C.

Attachment: "The Federal Bench Must Reflect the Racial, Ethnic, and Gender Diversity of the United States" Brief

March 25, 2021

Chairman Hank Johnson
Subcommittee on Courts, Intellectual Property, and the Internet
House Committee on the Judiciary
United States House of Representatives

Dear Chairman Johnson:

We, the undersigned 22 organizations, applaud your hearing today on "The Importance of a Diverse Federal Judiciary." This issue is critically important, and we commend you for treating it with the urgency that it warrants. If the American public is to maintain faith in our judicial system, it is critical that our courts reflect the diversity of the people they serve–and also that we restore balance to a bench where former corporate lawyers and prosecutors are so heavily overrepresented.

As several expert witnesses will detail in their testimony today, the federal judiciary suffers from a stunning lack of demographic diversity. According to a recent analysis by the American Constitution Society, 74 percent of all sitting federal judges are white and 67 percent are male. Less than one percent of federal judges are known to have disabilities. The judiciary, in other words, wholly fails to reflect the increasingly diverse population that it serves. Though the Carter, Clinton, and Obama administrations sought to improve the diversity of the bench to better reflect the overall population, the Trump administration reversed that trend and backtracked on much of the progress that was made over the past four decades. Incredibly, 76 percent of Trump's judicial picks are male and 84 percent are white. Only two of Trump's 230+ judges identify as LGBTQ, not a single one of his nominees to the U.S. Courts of Appeals is Black, and he appointed only one Latinx circuit judge. The Biden administration will begin to remedy this shameful lack of representation on the federal bench by nominating more women, people of color, and LGBTQ lawyers to our courts. Improving demographic diversity on the bench is essential to the strength and legitimacy of the federal judiciary.

A less-noticed, but equally problematic, trend in federal judges has been a troubling lack of educational and professional diversity. For too long, the vast majority of judges nominated by presidents of both parties have been former corporate lawyers and prosecutors - and startlingly few have been lawyers with experience as public defenders, civil rights lawyers, plaintiffs' lawyers, or union-side labor lawyers. Lawyers who have spent their careers developing an in-depth understanding of the legal needs of everyday people are systematically underrepresented on the bench; for example, according to the Center for American Progress, there is *no* sitting federal appellate judge who spent their career primarily at a non-profit civil rights organization. Judges from these underrepresented legal backgrounds are better equipped to understand the experiences of each litigant before them, to recognize the disparate burdens that laws often place on people who are living with low incomes or otherwise marginalized, and to render more informed decisions, including on civil and human rights, reproductive rights, and economic justice.

The overrepresentation of former corporate lawyers and prosecutors on the bench has made a tangible impact on how justice is served in this country. New research, for example, shows that district judges nominated by President Obama who previously worked as corporate lawyers and prosecutors are substantially more likely to rule against workers in employment cases, compared to judges with other legal backgrounds. This compounds existing biases at all levels of our judiciary; since John Roberts became chief justice in 2005, the Court has sided with the Chamber of Commerce in 70 percent of the cases in which it has filed briefs, substantially more often than during the preceding thirty-five years.

President Biden understands the urgency of this problem, and in a December letter to all Democratic Senators, his White House Counsel Dana Remus committed to nominating judges who "reflect the best of America, and who look like America." She requested that Senators recommend:

> "talented individuals who would bring to these critically important roles a wide range of life and professional experiences, including those based on their race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, veteran status, and disability.... With respect to U.S. District Court positions, we are particularly focused on nominating individuals whose legal experiences have been historically underrepresented on the federal bench, including those who are public defenders, civil rights and legal aid attorneys, and those who represent Americans in every walk of life."

Fortunately, the goals of improving demographic diversity and professional diversity and go hand and hand. Research shows that under President Obama, for example, corporate lawyers and prosecutors were more likely to be white and male compared to other types of lawyers nominated to the bench. We have no doubt that there is a truly diverse pool of highly qualified candidates who have spent their careers fighting for justice and who would now seek to bring their experiences to the federal bench.

We thank you, again, for your leadership in convening today's hearing to examine this important issue, and we look forward to working with you to advance our shared objective of improving diversity in the federal judiciary.

American Association for Justice
American Atheists
Americans for Financial Reform
Bazelon Center for Mental Health Law
Bold ReThink
Demand Progress Education Fund
Demand Justice
Demos
Free Speech for People
Freedom From Religion Foundation
Indivisible
Lambda Legal
NARAL Pro-Choice America
National Council of Jewish Women
National Employment Law Project
National Employment Lawyers Association
National Equality Action Team (NEAT)
People's Parity Project
Revolving Door Project
Service Employees International Union (SEIU)
True North Research
Working Families Party

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Washington, DC

Ashley Upkins
Secretary
Nashville, TN

Nicholas Austin
Treasurer
Washington, DC

March 30, 2021

Dear Chairman Nadler, Chairman Johnson, Ranking Members Jordan and Issa,

I first wish to thank you for allowing me to place a brief statement in the record to support the nomination of diverse candidates for the Federal Judiciary.

I write to you as the 78th President of the National Bar Association (NBA) to underscore the importance of diversity in the Federal judiciary. As you may know, the NBA is the nation's oldest and largest national network of predominantly African-American attorneys and judges. Our organization represents the interests of approximately 66,000 lawyers, judges, law professors and law students. As lawyers and jurists we stand on the shoulders of Justice Thurgood Marshall, Judge Constance Baker-Motley, the incomparable Charles Hamilton Houston and our living legend Fred Gray. Imbedded in our mission is our fight for diversity in the Federal bench because of its unique power to shape the laws of our country, and to demand that these laws be applied equally. Diversity of mind, experience, perspective and intellectual acumen are critical characteristics of members of the Federal bench. Without such diversity, our country could flounder into an abyss and impede the growth of our democracy and pursuit of justice.

As an African- American woman lawyer in this country, I was keenly aware of how brutal and cruel the world can be against those who fall outside of mainstream American—or against those in the Black and Brown communities. Born in the 60s, it was not unusual to be called the "N" word or a "monkey", as our country was plagued with racial division and misunderstanding. Fifty years later, based innumerable tragic and horrific events including the failed *coup d'etat* on January 6, 2021, I sadly conclude that our country is still plagued with racial animus and misunderstanding. Interestingly, the demographics of this country have changed immensely since the 60s, although the mindset of some members of the Federal bench and others has not evolved in step. WE have a unique opportunity to be change agents to bring our country into greater harmony; our work begins in the Federal Courts, although that is not the only avenue for justice and fairness.

Thus, we would urge members of the United States Congress to be the purveyors of justice and democracy as demonstrated by their commitment to ensure a dramatically more diverse Federal judiciary, populated with African-American jurists of the highest degree.

Respectfully,

CK Hoffler

Tricia (CK) Hoffler, Esq.
President, National Bar Association

NCBJ | National Conference of Bankruptcy Judges
954 La Mirada St. | Laguna Beach, CA 92651 | 949.497.3673

March 31, 2021

The Honorable Jerrold Nadler
Chairman,
Judiciary Committee
2132 Rayburn HOB
Washington, D.C. 20515

The Honorable Jim Jordan
Ranking Member,
Judiciary Committee
2142 Rayburn HOB
Washington, D.C. 20515

The Honorable Henry C.
"Hank" Johnson
Subcommittee on the Courts,
Intellectual Property, and
the Internet
2204 Rayburn HOB
Washington, D.C. 20515

The Honorable Darrell Issa
Ranking Member,
Subcommittee on the Courts,
Intellectual Property, and
the Internet
2300 Rayburn HOB
Washington, D.C. 20515

Re: *The Importance of a Diverse Federal Judiciary*

Dear Chairman Nadler, Ranking Member Jordan, Chairman Johnson, and Ranking Member Issa:

I want to thank you again for the opportunity to testify before the House Judiciary Subcommittee on the Courts, Intellectual Property, and the Internet at its March 25, 2021 hearing on *The Importance of a Diverse Federal Judiciary*. It was an honor and a privilege to speak on a topic that is of vital importance to myself and the organization I lead as president, the National Conference of Bankruptcy Judges (the "NCBJ").

I understand the Subcommittee is eager to learn more about the NCBJ's efforts to promote diversity within the bankruptcy bench and bar. As noted during my testimony, the bankruptcy bench is, unfortunately, the least diverse bench of the federal judiciary. To address this, the NCBJ is committed to ensuring diversity and inclusion within all levels of the bankruptcy profession to better reflect the populations we serve. The bulk of our diversity efforts are now led by our Diversity Committee, which has quickly become the most active committee within our organization. Understanding that a diverse judiciary only occurs when the pool of qualified applicants is consistently filled with diverse and inclusive candidates, the Diversity Committee pursues its work under the following directive:

> *The mission of the Diversity Committee is to be a resource for the Conference on the issue of diversity and to promote diversity and inclusion within the bankruptcy profession by facilitating the entry, participation and retention of diverse judges, lawyers, bankruptcy professionals, law clerks and court employees. To achieve these goals, the Diversity Committee will promote ideas and events to further diversity and inclusion and to also assist the Conference in developing policies and practices to recruit, support, and promote a bankruptcy workforce with diverse attributes that mirror the public served by the profession.*

Invested with this mission and having the full backing of the NCBJ, the Diversity Committee implemented and oversees the following initiatives to promote bankruptcy law as a viable career path for individuals with diverse backgrounds and to enhance their opportunity for advancement within the profession:

- ***10-Point Presentation Promoting Bankruptcy Clerkships/Internships***
  The Diversity Committee created a condensed bullet point sheet for law students describing the benefits of clerkships, internships, and externships with bankruptcy judges. This resource has been widely disseminated to law school placement offices, law school organizations supporting diversity and inclusion initiatives, college and high school students, and other organizations supporting diversity and inclusion of the judiciary workforce. The continued dissemination of this ten-point resource is an on-going activity of the Diversity Committee.

- ***Diversity Resources Handbook for Bankruptcy Judges***
  This digital handbook was developed by the Diversity Committee to provide outreach suggestions and tools for bankruptcy judges to attract a diverse and inclusive law clerk pool, bankruptcy workforce, and bankruptcy professionals. The handbook is a dynamic one, updated on a regular basis to provide valuable information on a range of diversity initiatives and programs.

- ***Merit Selection Panel Resolution***
  In an effort to ensure that diverse individuals feel welcome in the application process for appointments to our bench, in January 2021, the NCBJ adopted a resolution to be delivered to all federal circuit courts, recommending adoption of the following policy for merit selection panels for the appointment of bankruptcy judges to encourage selection of diverse candidates:

  To further efforts to achieve diversity in all aspects of the bankruptcy judge selection process and to encourage diverse candidates, the National Conference of Bankruptcy Judges encourages the Circuit Courts of Appeals to

include as a member on its merit selection panel for the appointment of bankruptcy judges:

1. *at least one member of an affinity bar association committed to issues of diversity and inclusion; or*

2. *provided a local or state bar association has a committee devoted to issues of diversity and inclusion in the legal profession, the chair or other designee of that committee; or*

3. *a person that identifies as a member of a diverse group.*

- ***Partnering with Just the Beginning – A Pipeline Organization (JTP-APO)***
  At the recommendation of the Diversity Committee, NCBJ is funding $21,000 from its own resources to six law students participating in the JTB-APO Summer Judicial Internship Diversity Project. Each student will receive a stipend of $2,500 to intern during the summer with bankruptcy judges and an additional $1,000 to offset each student's costs to attend the annual NCBJ Conference. The registration fee for the conference is also waived for these students.

- ***Coordinating with Organizations on Diversity Initiatives***
  The Diversity Committee is reaching out to other organizations in the judiciary and the legal profession that also have diversity and inclusion initiatives to coordinate such efforts directed at diversifying the bankruptcy bench, bankruptcy clerk's offices, the judiciary workforce, and the legal profession. Initially, such organizations include the Administrative Office of the U.S. Courts, the Federal Judicial Center, the National Association of Bankruptcy Trustees, the American Bankruptcy Institute, NCBJ's Blackshear Fellowship and Next Gen Programs, the Duberstein Bankruptcy Moot Court Competition, Law Clerks for Diversity, and the Federal Judiciary Oscar Program (Online System for Clerkship Application and Review).

- ***NCBJ Quarterly Newsletter Articles***
  On an ongoing basis, the Diversity Committee submits articles focusing on the importance of diversity and inclusion of the bankruptcy bench and workforce for each quarterly NCBJ Newsletter. These articles draw attention to the critical topic of diversity and inclusion among the bankruptcy bench and provide concrete suggestions to create a more diverse bench.

- ***Increasing Awareness of Career Advancement in Bankruptcy***
  In October 2019, the NCBJ worked with the Committee on the Administration of the Bankruptcy System to coordinate a national program broadcast from Washington, D.C. entitled "Roadways to the Bench: What, Me a Bankruptcy Judge?" The panel presentation was broadcast live to 19 judicial districts where hundreds of young lawyers and law students attended. The attendees discussed the topic with judges and more senior lawyers in each district.

As I trust this demonstrates, the NCBJ is committed to developing bankruptcy professionals and judges that are fully reflective of the citizens who appear in our courts.

I appreciate the Subcommittee's interest in our initiatives and can assure you that we will continue to search for new and innovative ways to reach our goal of a diverse and inclusive bankruptcy judiciary. Should you have any questions or require additional information, please do not hesitate to contact me.

Respectfully yours,

Honorable Frank J. Bailey
President,
National Conference of Bankruptcy Judges

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Federal Bench Must Reflect the Racial, Ethnic, and Gender Diversity of the United States

As the United States increasingly grows more racially and ethnically diverse, diversity within the federal judiciary unfortunately lags far behind. Federal and state courts have historically failed to reflect the racial, ethnic, and gender diversity of the United States. In order to work towards a more equitable and just democracy that is representative of the American public, there is an urgent need for the next President to appoint more Black judges, judges of color, women judges, and judges from other underrepresented backgrounds to ensure the federal bench is reflective of the population and to increase public trust and accountability in the judiciary. According to the Census, around 40 percent of the U.S. population consists of people of color (Figure 1).

Background

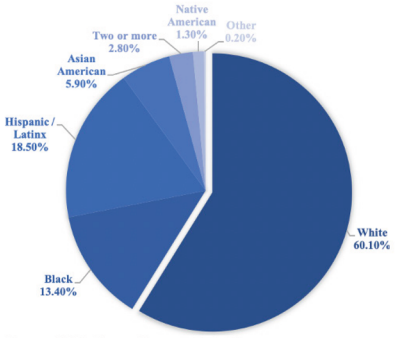
However, only around 26.5 percent of active judges in Article III courts are judges of color (Figure 2). The same disparities hold true for gender. Around half of the people in the United States are women, yet they only make up around 33 percent of active judges in Article III courts.[i]

The lack of diversity extends beyond the federal judicial courts. The same trends are present at the state level, where only 15.5 percent of judges, as of February 2020, on state supreme courts are people of color.[ii]

This, however, is not a new trend.

Historically, presidents tend to appoint disproportionately more white and male judges than reflected in the population. Although Presidents Barack Obama and Jimmy Carter nearly achieved a reversal of this trend, no president has ever appointed judges that truly reflect the racial, ethnic, and gender diversity of the United States.

Figure 1. 2019 U.S. Population by Race or Ethnicity.

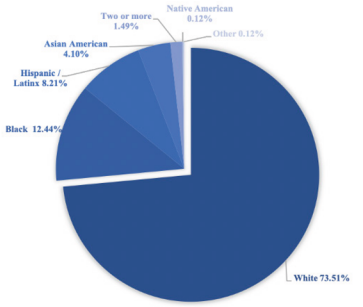


Source: U.S. Census Bureau, QuickFacts.

Twenty-two percent of President Jimmy Carter's judicial appointments were judges of color (Figure 4), surpassing the percentage of people of color in 1980, which was 16.9 percent.[iii] This was the only time in U.S. history where a president appointed more people of color than reflected in the national averages. Around this time, however, women made up roughly 51 percent of the U.S. population,[iv] but only about 16 percent of President Carter's judicial appointments.[v]

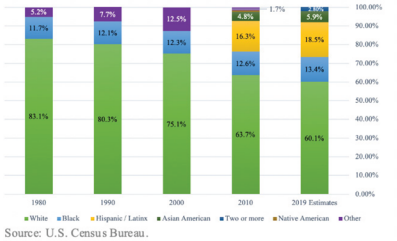
Towards the end of President Ronald Reagan's presidency, 80.3 percent of the total population identified as white, whereas 19.8 percent of the population identified as a race or ethnicity other than white. Out of the total number of judges appointed by President Reagan, 94 percent were white and only around 6 percent were people of color, 13.8 points under the national average and 16 points behind

Figure 2. Active Judges by Race or Ethnicity



Source: Federal Judicial Center, Biographical Directory of Article III Federal Judges, 1789-present.

Figure 3. U.S. Population Estimates.



Source: U.S. Census Bureau.

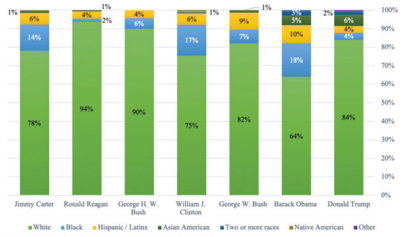
President Carter's appointments (Figures 3 and 4). That same year, 51.25 percent of the total population identified as women.[vi] Out of the total number of judges appointed by President Reagan, only a mere 8 percent were women.[vii]

President Obama made considerable advancements to judicial diversity. appointing the most diverse nominees in history. Ten percent of judges appointed under President Obama were Hispanic/ Latinx, 18 percent were Black, and 5 percent were Asian American (Figure 4). In comparison, 13.4 percent of people in the United States currently identify as Black, 18.5 percent as Hispanic/ Latinx, and 5.9 percent as Asian American.[viii] Out of all the judges appointed by Obama, 42 percent were female judges.[ix] While this falls 8.9 points under the national average, it vastly exceeds any president before him.[x] Notably, President Obama's confirmed Supreme Court Justices were both women, including the first Latina Supreme Court Justice: Associate Justice Sonia Sotomayor. This progress, however, has stalled during the presidency of Donald Trump. Eighty-four percent of judges appointed by President Trump identify as white, a staggering 23 points above the national average.[xi] Nearly 76 percent of judges appointed under President Trump are men, 26 points above the national average and 34

points above President Obama's appointees.

Racial and ethnic diversity in the U.S. is growing at a much faster rate than diversity on the federal bench. In order to achieve a true representative judiciary, it is critical that the court reflect the diversity of the jurisdictions they hear cases from. For example, the Seventh Circuit Court of Appeals, which hears cases from Illinois, Indiana and Wisconsin, appallingly doesn't have a single judge of color serving on the bench.

Figure 4. Presidential Appointments by Race or Ethnicity.



Note: percentages <1% are not shown on graph.
Source: Federal Judicial Center, Biographical Directory of Article III Federal Judges, 1789-present.

By 2044, it is estimated that a majority of people living in the United States will identify as people of color.[xii]

Appointing judges of color and women judges is not only an effort to simply increase representative diversity, it is also an effort to increase public trust, accessibility, accountability, and impartiality. The courts hear a wide range of cases impacting the lives of Americans: criminal justice, workers' rights, voting rights, LGBTQ rights, reproductive rights, and more. As each judge brings their own unique perspective to understand the cases before them, judges of color, women judges, and those with backgrounds in civil rights and representing everyday Americans tend to bring a more expansive and very much needed perspective in deciding cases because they fully understand the implications of their opinions.

Looking Forward

It is extremely important for presidents to appoint judges that reflect the demographics of the United States. Upon assuming office in January 2021, President Joe Biden must commit to doing so and prioritize nominating judges of color, women judges, and judges from professionally diverse backgrounds, such as those with civil rights and public defender experience. For the first time in several decades, our Supreme Court doesn't have an attorney in the mold of Justice Thurgood Marshall and Justice Ruth Bader Ginsburg, who spent their careers as attorneys fighting for civil rights, and it is imperative that President-elect Biden appoint attorneys who are racially diverse, fair, impartial and committed to equal justice under law.

As Justice Sonia Sotomayor said, "A different perspective can permit you to more fully understand the arguments that are before you and help you articulate your position in a way that everyone will understand.[xiii] To obtain this vision, we must commit to diversifying the judiciary.

Endnotes

[i] AM. CONST. SOCIETY, DIVERSITY OF THE FED. BENCH (2020), https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/

[ii] ALICIA BANNON & JANNA ADELSTEIN, STATE SUPREME COURT DIVERSITY - FEB. 2020 UPDATE (Brennan Ctr. 2020), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update

[iii] FRANK HOBBS & NICOLE STOOPS, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY (U.S. Census Bureau 2002), https://www.census.gov/prod/2002pubs/censr-4.pdf

[iv] U.S. CENSUS BUREAU, NAT'L INTERCENSAL TABLES: 1900-1990 (2016), https://www.census.gov/data/tables/time-series/demo/popest/pre-1980-national.html

[v] FED. JUD. CTR, BIOGRAPHICAL DIRECTORY OF ART. III FED. JUDGES (1789-Present), (https://www.fjc.gov/history/judges/search/advanced-search

[vi] CTR. FOR DISEASE CONTROL AND PREVENTION, RESIDENT POPULATION, BY AGE, SEX, RACE, AND HISPANIC ORIGIN (1950-2012), https://www.cdc.gov/nchs/data/hus/2012/001.pdf

[vii] FED. JUD. CTR. supra note 5.

[viii] U.S. CENSUS BUREAU, QUICK FACTS (2019), https://www.census.gov/quickfacts/fact/table/US/PST045219

[ix] FED. JUD. CTR. supra note 5.

[x] Id.

[xi] Id.

[xii] U.S. CENSUS BUREAU, PROTECTING MAJORITY - MINORITY: NON-HISPANIC WHITES MAY NO LONGER COMPRISE OVER 50 PERCENT OF THE U.S. POPULATION BY 2044 (2014), https://www.census.gov/content/dam/Census/newsroom/releases/2015/cb15-tps16_graphic.pdf

[xiii] Katie Reilly, Justice Sotomayor Calls for More Supreme Court Diversity, TIME (Apr. 9, 2016), https://time.com/4287655/sonia-sotomayor-supreme-court-diversity/

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