DIVERSITY IN THE FEDERAL JUDICIARY:

WHAT IS ITS STATUS?

WHY DOES IT MATTER?

WHAT CAN BE DONE?

I. INTRODUCTION

A. Background

The subject of diversity generally has gained in significance in recent years. It has become an increasingly important topic of discussion in conversations among multiple groups of individuals and in organizations in a variety of contexts. The reasons aren't hard to discern. In the United States, race seems to be the recurring issue we have yet to resolve. We all take comfort, and legitimately so, in the fact that enormous strides toward equality have been made. We have had an African American President—although not a woman, at least not yet. Previously underrepresented groups have gained ground in almost every venue, from city councils to corporate board rooms.

But then we are brought up short by a video of George Floyd, lying unarmed and handcuffed on the ground, defenseless and pleading that he cannot breathe, being murdered on camera by a white police officer who knelt on his neck for over nine minutes until he died. And other officers looked on, doing nothing.

How can such a thing happen? It is hard to say. But it is not hard to understand why the federal judiciary, at the fulcrum of our country's system of justice, has come under scrutiny. As judges, we are expected to be the bulwarks that protect the individual from the tyranny of extra-judicial behavior and lawlessness.

It is both ironic and hopeful to note that on June 15, 2022, Jerry Blackwell, one of the high-profile prosecutors who helped send ex-Minneapolis cop Derek Chauvin to prison for the murder of George Floyd, was nominated to be a federal judge. Who the judge is, matters.

I will briefly relate two anecdotes to illustrate the point before turning to the discussion at hand. The first involves Judge Edward Davila, who sits in San Jose, California, and presides over a diverse docket. He is the first Latino Judge to sit in that court in over twenty years. In a case involving a limited-English speaking Latino litigant, Judge Davila discussed several procedural matters and then asked the litigant if he had any questions Appearing nervous, the litigant looked at Judge Davila and asked incredulously, "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." *Statement of Judge Edward M. Chen on the Importance of Diversity in the Federal Judiciary, March 25, 2021, Congressional Record.* Who the judge is, matters.

The final anecdote references the female judicial icon Justice Ruth Bader Ginsberg, who died in 2020. In 1993, Justice Ginsberg joined the first woman on the Supreme Court, Justice Sandra Day O'Connor, and served with her until Justice O'Connor stepped down in 2006.

One of the opinions for which Justice Ginsberg is best remembered is that of the United States v. Virginia Military Institute (VMI). She authored the 7-1 decision opening the doors of the last all-male public university to qualified women. It is a decision that came out of the Fourth Circuit, where I sat.

VMI is the alma mater of General George C. Marshall, the Army's first five-star general and a Nobel Peace Prize winner, as well as important people in almost every field of endeavor. The University built its reputation on its tradition of military discipline and academic rigor. But no women need apply.

The United States Department of Justice sued VMI, a publicly funded institution, for excluding women. The Supreme Court agreed with the government's position. Writing for the Court, Justice Ginsberg categorized as "presumptively invalid. . .a law or official policy that denies to women, simply because they are women, equal opportunity to aspire, achieve, participate in, and contribute to society based upon what they can do." Would the outcome have been the same had Justice Ginsberg not participated? Perhaps. But the moral imperative with which she spoke cannot be overstated. Who the judge is, matters. *Discussion drawn from the United States Courts website maintained by the Administrative Office of the Courts in Honor of Women's History Month.*

B. Scopes of Discussion:

1. The Federal Judiciary

The scope of the discussion of diversity in the judiciary in the United States is potentially so broad that it had to be narrowed for purposes of our discussion today. By way of background, more than 100 million cases are filed each year in state trial courts, while roughly 400,000 cases are filed in federal trial courts. There are approximately 30,000 state judges, compared to only 1,700 federal judges. *FAQS : Judges in the United States; Institute for the Advancement of the American Legal System, University of Denver. HTTPS://iaals.du.edu.*

Because state systems among themselves also differ so dramatically in the way judges are elected and retained, my first "narrowing" decision was to focus solely on the federal judiciary.

For purposes of general comparison, however, it may be useful to know that broadly speaking, state judges are chosen in one of five ways

- Gubernatorial appointment
- Legislative appointment
- Partisan elections
- Non-partisan elections and
- Commission-based selection

Even within those five general categories, however, variations exist. After the initial appointment/selection, re-elections may be by a different methodology. Selections may be district-wide or state-wide. Term lengths vary. The Brennan Center for Justice at the New York University School of Law, has done work in this area, publishing a piece on Judicial Section for the 21st Century. (The article, published in 2016, needs to be updated.) `

One consequence of the varied selection methodology is that the race barrier at the state level was breached much earlier than at the federal level. It appears that the first African American, Jonathan Jasper Wright, became a state court justice in 1870. Justice Wright moved from Pennsylvania to South Carolina and became involved in Republican Party politics. As a result, he was appointed to the South Carolina Supreme Court and served until 1877.

The first elected judge of color is believed to be James Dean, a black attorney in Florida, who was elected at the local level in 1888. He was suspended from his position less than eight months later by the governor of Florida for breaking anti-miscegenation laws for issuing a marriage license to a couple of Cuban descent, who were considered to be of two different races. In 2006, then-Florida Governor Jeb Bush reinstated his judgeship through proclamation.

By comparison, in the federal judiciary, it was not until 1937 that President Franklin Delano Roosevelt appointed the first person of color, William Hattie, to the federal district court for the U.S. Virgin Islands. President Roosevelt earlier appointed the first woman, Florence Ellinwood Allen, to the U.S. Court of Appeals to the 6th Circuit in 1934.

2. Article III Judges

Even within the general category of federal judges, further narrowing and an explanation is necessary.

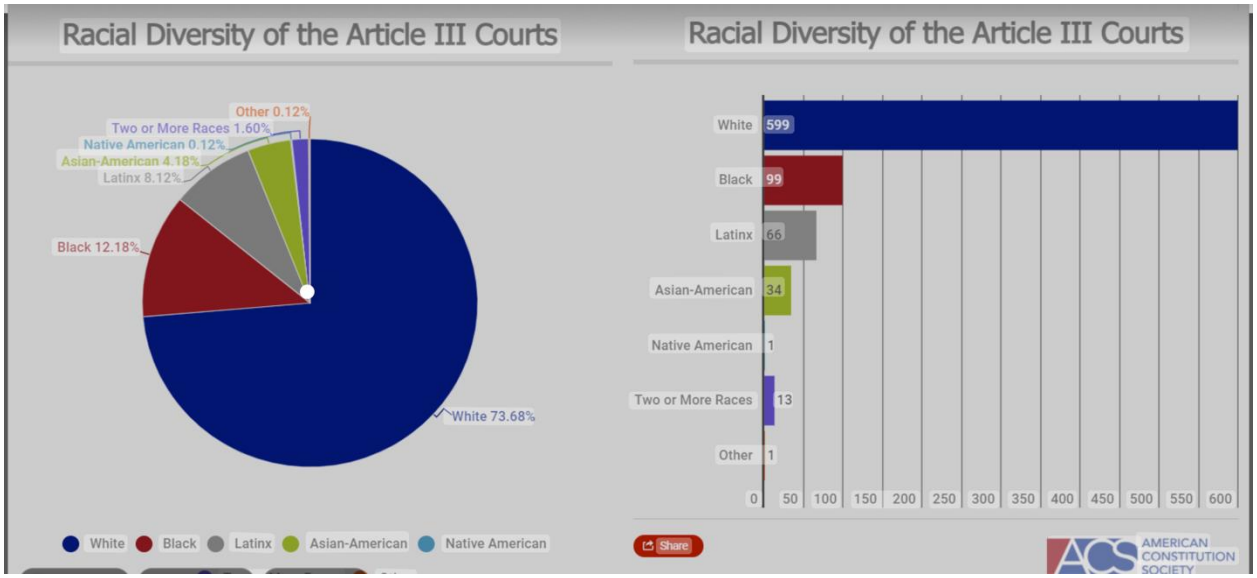
At a high level of generality, Article III Courts are those established pursuant to Article III of the United States Constitution, which governs the appointment, tenure and payment of Supreme Court justices, circuit judges, and district judges. These judges may only removed by impeachment. Article III Judges are nominated by the President and confirmed by the Senate

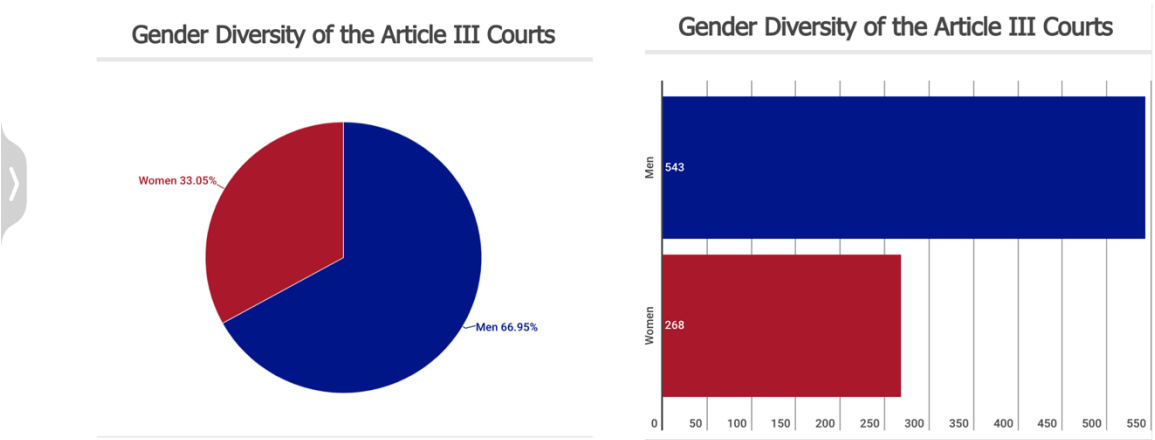
Article I judges, on the other hand, are created by the legislature and have differing levels of independence, length of terms, and selection methodology. Generally speaking, they are not subject to the same protections as Article III judges: they do not have life tenure and their salaries may be reduced by Congress. Because of the variations among the ranks of Art. I judges, I focus today on the Presidentially-appointed, Art. III judges. Because Art. III Judges are Presidential-appointees, the political forces that come into play create potentially more significant challenges for the interests of diversity.

C. Data:

What are the numbers and what do they tell us about diversity within the ranks of the Article III Judiciary?

The following charts are taken from the website of the **American Constitution Society,** drawn from statistics from the Federal Judicial Center: *acslaw.org/judicial-nominations/October-2020-snapshot-diversity-of-the-federal judiciary*





One fact that stands out is the minorities fare worse in the judiciary at every level—district, circuit and the Supreme Court. Women make up approximately one-third of the ranks at each level. And, of course, there are three women on the United States Supreme Court. African Americans, on the other hand, do not rise above 13%. In its history, there had only been two on the Supreme Court—until July 1, when Justice Ketanji Brown Jackson will joined their ranks, making her the second currently sitting African American (the third in history) and also the fourth woman.

D. Why is diversity on the bench so important?

In March of 2021, the House Judiciary Subcommittee on Courts held a series of hearings to consider this issue. Over several days, the Subcommittee heard testimony from a number of individuals among them Judges (including Judge Bernice Donald, a former active IAJ member), Academics and others on why having a diverse federal judiciary is important and how it can be achieved.

In opening the March 25, hearing, House Judiciary Committee Chairman Jerrold Nadler (D-NY) introduced the subject in this way: "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." Representative Nadler's remarks included the following quote drawn from the confirmation process of a current member of the United States Supreme Court: *"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. . .and I do take that into account. . ."* The nominee went on to add "*my father was brought into this country as an infant, grew up in poverty," and "could not find a job as a teacher due to the discriminatory hiring practices prevalent at the time."*

These words were spoken by now-Justice Samuel Alito at his confirmation hearing in 2006.

Stacey Hawkins, a Professor of Law at Rutgers University who teaches and writes about the intersection of law and diversity, has addressed this subject extensively, and was one of the Academics who testified before Congress. She posited four reasons why diversity on the federal bench is critical:

1. Judicial Legitimacy Depends on Public Trust

The first is that judicial legitimacy depends on public trust. Alexander Hamilton, one of our nation's founders and author of Number 78 of the Federalist Papers famously said that the judiciary branch of the proposed government would be the weakest of the three: because it had "no influence over either the sword or the purse, it may truly be said to have neither force nor will, but merely judgment." The Courts necessarily rely on public trust to achieve both their legitimacy, and necessarily, their effectiveness.

In the wake of decisions on such controversial topics as abortion and gun control, regard for the Judiciary has fallen as low as it has ever been. It is also true, however, that approval of the judiciary does not hold constant across all population groups. As Professor Hawkins noted, data shows that while concern for the fairness of our justice system is to some extent endemic, it is especially acute among African Americans. "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." Professor Hawkins's statement referring to Nancy King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle,* 31 Am. Crim. Rev. 1263, 1276 (2016). This marked difference

in perceptions is strengthened when the judiciary does not fairly reflect the population it purports to serve.

2. A Diverse Bench Fosters Public Trust in the Judiciary

Studies suggest that eroding confidence in the judiciary results less from judges' substantive decisions than from the appearance of unfairness in the process.[1] United States Bankruptcy Judge Frank J. Bailey of Massachusetts has spoken to this issue. Judge Bailey, an Article I Bankruptcy Judge, made the point that by far the largest number of cases filed in federal court each year are those filed in federal bankruptcy courts. In other words, most Americans have their federal court experience before a bankruptcy judge. This is particularly likely to be true in a recession. And yet there are no, nor have there ever been any, African American Bankruptcy Judges in the First Circuit which includes Massachusetts. Judge Bailey summarized his thoughts on the need for the bankruptcy bench to reflect the diversity of the community it serves as follows: "Federal judges deliver bad news to people every day, and perceptions of fairness matter." Statement of Honorable Frank J. Bailey, United States Bankruptcy Judge District of Massachusetts to the Committee on the Judiciary of the US House of Representatives, Subcommittee on Courts, Intellectual Property and the Internet, March 25, 2021.

3. A Diverse Bench Improves Accountability to the Public

On this point, Professor Hawkins described the work of Jeffery Abramson in the context of diverse juries, arguing that racial diversity among judicial decision-makers promotes three different democratic ideals: (1) epistemical diversity, which reflects the populist theory about the collective wisdom of the voting public; (2) deliberative diversity, termed, in other writings, as the wisdom

[1] A 2002 study of 1656 respondents who interacted with the justice system demonstrated that their perceptions of the fairness of the process employed in the decision-making was more determinative of the respondents' willingness to accept the decision than the substantive outcome itself.

of the crowd, and the notion that the collective engagement of many minds is superior to the opinions of a few brighter minds; and (3) representative diversity, describing the premise that diverse representation matters in a democracy. Jeffery Abramson, *Four Models of Jury Democracy, 90 Chi.-Kent L. Rev. 861, 883 (2015).*

As a nominee to the United States Supreme Court, Now-Justice Sotomayor drew considerable flak for saying that "a wise Latina Woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." I think what she was trying to say is that the addition of the voice of a wise Latina woman to a collective that did not otherwise include it would be stronger.

E. How can diversity be increased? Increase the pipeline

Because of the Presidential-appointment process in the Article III judiciary, increasing diversity is, at least to some extent, a matter of will. In 1978, then-President Jimmy Carter came to office with the stated goal of increasing minority representation within the federal judicial branch and did so.

However, other measures can help address the issue, primarily by increasing the presence of woman and minorities in the pipeline.

1. Law School Admissions

Scrutiny begins at the law school level. Although law school graduation is, of course, a prerequisite to becoming a federal judge, it is further the case that it helps to go to the "right" school. A student's likelihood of becoming a federal Judge drops considerably if he or she does not attend one of the nation's most elite law schools.

To put the matter in perspective, "Harvard has had more representation on the Supreme Court than the bottom ninety-five percent of law schools combined." Just three elite 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. Jason Iuliano and Avery Stewart, "The New Diversity Crisis in the Federal Judiciary," *Tennessee Law Review, 84 (247)(2016).*

2. Law School Loan Forgiveness

Setting aside the problem of getting into the "best" school, the cost of a law school education is also a limiting factor for individuals from lower socio-economic backgrounds. Law school tuitions can range anywhere from $12,000 to almost $70,000 per year. Ileana Kowarski, "See the Price, Payoff of Law School Before Enrolling," *US News and World Reports,* March 12, 2019.

This crushing debt load has consequences, affecting where students can go to law school on the front end, and what they can do when they graduate. On the front end, the better the school at which the student matriculates, the brighter the prospects for a judicial appointment thereafter. On the back end, the bigger the debt load, the more students who rely on loans as part of their financial aid package may have to make career choices that do not maximize their chances of become judges.

Robust student loan forgiveness packages are one potential answer to this problem.

3. Judicial Clerkships

Judicial clerkships, extremely valuable and sought-after positions on the pathway toward judgeships, but clerkships are government jobs that do not pay the kind of salary that student loan debt often requires. Also, not being able to clerk takes away a critical mentorship opportunity. Yet I have talked to groups of minority law students who say they cannot afford to apply for a clerkship because they have to make money to pay off their student loans.

Judge Ketanji Brown Jackson clerked for Justice Breyer, the Justice she will replace. Justice Kavanaugh clerked for Justice Kennedy, the Justice he replaced. A number of Supreme Court Justices have a hierarchy of such "apprenticeship" clerkships, requiring first a district court and then an appellate court clerkship. And the bias toward "elite" schools comes into play here as well. According to the article by Iuliano and Stewart cited above, it appears that between 1950 and 2014, students from Harvard accounted for almost 25% of all Supreme Court law clerks, and another almost 20% came from Yale. This creates almost circular problem: students who cannot get into Harvard have a lower chance of ultimately clerking and being appointed to the bench, and therefore a lower probability of being in a position to hire other talented under-represented individuals as clerks to address the issue of diversity on the bench.

CONCLUSION:

I would like to close with the powerful words of Judge Vanessa Ruiz, a Senior Judge for the Court of Appeals in the District of Columbia and Past President of the International Association of Women Judges in a speech to the UNODC on insuring judicial independence and integrity:

"The judiciary will not be trusted if it is viewed as a bastion of entrenched elitism, exclusivity, and privilege, oblivious to changes in society and to the needs of the most vulnerable. Indeed, citizens will find it hard to accept the judiciary as the guarantor of law and human rights if judges themselves act in a discriminatory manner. That is why the presence of [the underrepresented] is essential to the legitimacy of the judiciary."

This may never have been more true.

SOURCES

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F.J. Bailey, *Does the Federal Art. 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 (2016)

Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible,* 105 Nw. U. L. Re. 587 (2011)

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