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.