

**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

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**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.”<sup>1</sup> 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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<sup>1</sup> *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.”<sup>2</sup> “[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[.]”<sup>3</sup>

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”?<sup>4</sup>

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *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,<sup>5</sup> 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,<sup>6</sup> despite amounting to more than half of the U.S. population.<sup>7</sup> Similarly, African Americans, Latinx Americans, and Asian Americans, combined, accounted for only 26% of federal jurists<sup>8</sup> while 40% of the country identifies as non-white.<sup>9</sup>

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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<sup>5</sup> 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”).

<sup>6</sup> 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/>.

<sup>7</sup> 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>.

<sup>8</sup> See *supra* note 6 and accompanying text.

<sup>9</sup> “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.<sup>10</sup> In 1928, the Honorable Genevieve Cline joined the U.S. Customs Court, becoming the first woman member of the federal judiciary.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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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<sup>10</sup> 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>.

<sup>11</sup> See “Gender,” *supra* note 10.

<sup>12</sup> *Ibid.*

<sup>13</sup> 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.<sup>14</sup> By contrast,

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<sup>14</sup> "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.<sup>15</sup>

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

- 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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<sup>15</sup> “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/>.

<sup>16</sup> *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.”<sup>17</sup> “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.”<sup>18</sup>

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.”<sup>19</sup> 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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<sup>17</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265, 401-02 (1978) (Marshall, J., concurring and dissenting in part).

<sup>18</sup> *Ibid.*

<sup>19</sup> 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.”<sup>20</sup>

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.”<sup>21</sup> “Even absent clear injustices, questions over the courts’ legitimacy arise when cases with outside impacts on women, people of color, or LGBTQ individuals are decided by courts whose benches are demographically nondiverse.”<sup>22</sup> 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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<sup>20</sup> A. Wallace Tashima, *Play It Again, Uncle Sam*, Law & Contemp. Probs., Spring 2005, at 7, 8.

<sup>21</sup> See *supra* note 15 and accompanying text.

<sup>22</sup> *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[.]”<sup>23</sup>

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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<sup>23</sup> 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**<sup>24</sup>

### **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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<sup>24</sup> 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 remarkably 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.