

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.

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

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.