



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

Hearing on “The Importance of a Diverse Federal Judiciary, Part 2: The Selection and Confirmation Process”

July 12, 2021

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee, thank you for holding this critical hearing on the importance of judicial diversity. My name is Elia Diaz-Yaeger, and I serve as the President of the Hispanic National Bar Association (HNBA).

The HNBA is a nonprofit, nonpartisan, national membership organization that represents the interests of more than 67,000 Hispanic legal professionals as well as nearly 13 percent of law students enrolled in ABA-accredited law schools in the United States and its territories. We act as a collective voice for issues of common concern to our members and our community. Our organization has been working for over 50 years to support the recruitment, retention and elevation of Hispanic individuals in law schools, law firms, corporations, the judiciary, and government.

The HNBA has worked vigorously to identify, vet, and endorse qualified judicial nominees to fill the numerous vacancies in the federal court system. Since the start of the current administration, the HNBA has endorsed and provided the White House and U.S. Senators with 48 endorsed candidates for federal judicial vacancies, 47 of whom are Hispanic.

1. The Importance of Judicial Diversity

According to data from the Federal Judicial Center, only 9 percent of active federal judges identify as Hispanic despite the fact that Hispanics are the nation's largest minority group, representing almost 20 percent of the U.S. population. In addition, there are currently no Hispanic district judges in 36 of the 50 states.¹

Research supports the value of diversity on the bench.² A diverse bench provides for diversity of experiences, perspectives, and backgrounds, and creates a pipeline for future judges that reflect the community they will serve. A diverse judiciary also helps combat implicit bias in our government institutions, and instills public trust in our system of justice. Diverse backgrounds and experiences keep implicit bias in check.³ While identity does not predict viewpoint, studies point to the presence of diversity as improving outcomes, and we believe the same is true in the judiciary.⁴

2. Challenges in the Selection and Confirmation Process

¹ An HNBA analysis of Federal Judicial Center data found that the 61 active Hispanic district court judges served on district courts in only 14 states.

² See, for example, Jennifer L. Peresie, "Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts," *Yale Law Journal* 114 (7) (2005): 1761–1783, available at <https://www.yalelawjournal.org/note/female-judges-matter-gender-and-collegial-decisionmaking-in-the-federal-appellate-courts>.

See also, Dermot Feenan, "Editorial Introduction: Women and Judging," *Feminist Legal Studies* 17 (1) (2009): 1–9, available at <https://link.springer.com/content/pdf/10.1007%2Fs10691-009-9116-7.pdf>

³ Nancy Scherer, "Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?," *Northwestern University Law Review* 105 (2) (2011): 587–634, available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1169&context=nulr>

⁴ Sylvia Ann Hewlett, Melinda Marshall, and Laura Sherbin, "How Diversity Can Drive Innovation," *Harvard Business Review*, December 2003, available at <https://hbr.org/2013/12/how-diversity-can-drive-innovation>.

Steven A. Ramirez, "Foreword: Diversity in the Legal Academy After Fisher II," *UC Davis Law Review* 51 (2018): 979–995, available at https://lawreview.law.ucdavis.edu/issues/51/3/Symposium/51-3_Ramirez.pdf;

Steven A. Ramirez, "Diversity, Compliance, Ethics & In-House Counsel," *University of Toledo Law Review* 48 (3) (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2996028

Procedural processes and personal bias in the confirmation process limit opportunities for qualified Hispanics and other minorities seeking to serve on the Federal Bench. One challenge presented is the decentralization of the nominations process, which consists of 100 different U.S. Senators making their own recommendations, each with differing views on the value of diversity. If judicial diversity is not a priority of the Administration in power, the demographics of judicial nominees recommended by U.S. Senators will tend to reflect themselves and their networks.⁵ However, there are proactive measures that outside stakeholders can take to advocate for more diverse candidates. For example, national affinity bar associations, like the HNBA, and a number of other interest groups that care about the composition of the judiciary can propose and put forward recommended candidates to both the White House and Senators.

Another challenge to diversity on the bench is bias faced by traditionally underrepresented individuals. A recent study by the American Bar Association found that “widespread gender and racial bias permeates hiring, promotion, assignments and compensation in the legal industry.”⁶ Similarly, statistics show those same biases are prevalent in the selection of judicial nominees.⁷ Even in situations where there are no personal biases at play, key decision-makers in the process often turn to their own networks for judicial recommendations.

⁵John Gramlich, “How Trump compares with other recent presidents in appointing federal judges,” Pew Research Center, published on January 13, 2021, available at: <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>

⁶ “New study finds gender and racial bias endemic in legal profession,” American Bar Association, September 06, 2018, available at: <https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/new-study-finds-gender-and-racial-bias-endemic-in-legal-professi/>

⁷Danielle Root, Jake Faleschini, and Grace Oyenubi, “Examining the Demographic Compositions of U.S. Circuit and District Courts,” Center for American Progress, February 13, 2020, available at: <https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/>. See also, Dr. Sally J Kenney, “Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go,” Michigan State Law Review 2012:1499-1528, available at: <https://core.ac.uk/download/pdf/228470032.pdf>

The current judicial selection process naturally causes an unintentional bias that results in judicial nominees who are lacking in diversity.

3. The Path Forward to Increase Judicial Diversity

The current Administration's nominations to date are a positive sign of movement toward a more accurate representation of federal judges that appropriately reflects the diverse communities that come before our courts. This progress is a strong example of how decision makers can exercise the power they have to effect change.

Key decision makers in the selection of nominees need to open their selection process to include stakeholders outside their usual networks. Rather than relying on the same Ivy League law schools and exclusive institutions and networks, a more inclusive process—that incorporates a wider breadth of practice areas, experiences, and expertise—will lead to more diverse candidates being considered.

I want to thank the Subcommittee for taking the time to consider this critical issue. Public dialogue around the lack of diversity in the judicial system helps raise awareness both about the need and the challenges in promoting diversity on the bench. On behalf of the HNBA, we welcome further dialogue with the Members of this Subcommittee in working to promote diverse candidates onto the federal bench.

Thank you Chairman Johnson and Ranking Member Issa for holding this hearing today and for inviting our organization to speak today. I look forward to any questions you may have.

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